

รายการอ้างอิง

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17-03-2006

Investment text proposed by US to Thailand (2006)

Draft investment chapter of US-Thailand FTA as proposed by US

Chapter _____ Investment

Section A: Investment

Article 1: Scope and Coverage

1. This Chapter 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 and 10, 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. This Chapter shall not apply to subsidies or grants provided by a Party or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to domestic investors and investments.

4. This Chapter shall not apply to laws, regulations or policies governing the procurement by governmental agencies of goods and services purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods or the supply of services for commercial sale.

5. Articles 3 and 3 *bis* shall not apply to measures adopted or maintained by a Party affecting:

- (a) trade in services as defined under Chapter (trade in services);
- (b) supply of a service in its territory by an investor of the other Party; and
- (c) investments of investors of the other Party made in services sectors.

6. Articles 4 through 9 apply to measures adopted or maintained by a Party affecting the conduct, operation and sale or other disposition of investments and relating to:

- (a) direct investments of investors of the other Party, which, if so required, have been specifically approved in writing by the competent authorities concerned of the other Party as being entitled to the benefits of an agreement relating to investments; and
- (b) investors of the other Party of direct investments referred to in sub-paragraph (a).]

Article 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 the other 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 _____ (Financial Services).

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. [1] , [2]

- (a) any customs union or free trade area or a monetary union or similar international agreements leading to such unions or other forms of regional cooperation to which either of the Party is or may become a party;
- (b) any international agreement or arrangement or any domestic legislation relating wholly or mainly to taxation.

Article 5: Minimum Standard of Treatment [3]

1. Each Party shall accord to [US: covered] investments treatment in accordance with customary international law, including fair and equitable treatment and [US: full] protection and security.

[US: 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.]

[US: 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.]

4. [US: Notwithstanding Article 12.5(b),] each Party shall accord to investors of the other Party, and to [US: 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.

[US: 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
- (a) 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 6.2 through 6.4, *mutatis mutandis*.]

[US: 6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 but for Article 12.5(b).]

Article 6: Expropriation and Compensation [4]

1. Neither Party may expropriate or nationalize a [US: 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
- (d) in accordance with due process of law [US: and Article 5.1 through 5.3].

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, [US: or creation] of intellectual property rights, to the extent that such issuance, revocation, limitation, [US: or creation] is consistent with Chapter _____ (Intellectual Property Rights).

Article 7: Transfers

1. Each Party shall permit all transfers relating to a [US: 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 5.4 and 5.5 and Article 6; [US: and]
- (f) payments arising out of a dispute

2. Each Party shall permit transfers relating to a [US: covered] investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

[US: 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[US:, futures, options, or derivatives];
- (c) criminal or penal offenses;
- [US: (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.

[US: 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: [5]

- (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. 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
- (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 ____ [Intellectual Property Rights Chapter; Patents Article; Paragraph on use of the subject matter of a patent without the authorization of the right holder], 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. [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.
- (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 government 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.]

[US: 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.]

[US: Article 10: 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 11: Denial of Benefits

[US: 1. A Party may deny the benefits of this Chapter 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 Chapter were accorded to the enterprise or to its investments.]

2. A Party may deny the benefits of this Chapter to an investor of the other Party that is [US: an enterprise] of such other Party and to investments of that investor if [US: 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 [US: enterprise]

[US: Article 12: Non-Conforming Measures

1. Articles 3, 4, 8, and 9 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 3, 4, 8, or 9.

2. Articles 3, 4, 8, and 9 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 Agreement and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 3 and 4 do not apply to any measure that is an exception to, or derogation from, the obligations under Article ____ [Intellectual Property Rights Chapter; General Provisions Article; Paragraph on national treatment] as specifically provided in that Article.

5. Articles 3, 4, and 9 do not apply to:

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

Article 13: Special Formalities and Information Requirements

[US: 1. Nothing in Article 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 the other Party and covered investments pursuant to this Chapter.

2. Notwithstanding Articles 3 and 4, a Party may require an investor of the other 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.]

[US: Section B: Investor-State Dispute Settlement]



Article 14: 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 15: 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

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 upon 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 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 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 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or
- (d) referred to under any other 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 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 that arbitrator.

Article 16: 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; and
 - (b) Article II of the New York Convention for an "agreement in writing."

Article 17: 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 15.1 and knowledge that the claimant (for claims brought under Article 15.1(a)) or the enterprise (for claims brought under Article 15.1(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 15.1(a), by the claimant's written waiver, and

- o (ii) for claims submitted to arbitration under Article 15.1(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 15.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 15.1(a)) and the claimant or the enterprise (for claims brought under Article 15.1(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 18: 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 15.1(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 15.1(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 19: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 15.3. 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 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 25.

- (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 15. 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 or Annex D.

10. If a separate multilateral agreement enters into force 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 25 in arbitrations commenced after the multilateral agreement enters into force between the Parties.

Article 20: 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 19.2 and 19.3 and Article 24;
- (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 ____ [Exceptions Chapter; Essential Security Article] or Article ____ [Exceptions Chapter; 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;
- (b) 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
- (b) 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 21: Governing Law

1. Subject to paragraph 3, when a claim is submitted under Article 15.1(a)(i)(A) or Article 15.1(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 15.1(a)(i)(B) or (C), or Article 15.1(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; [7] and
 - (ii) such rules of international law as may be applicable.

3. A decision of the [Joint Committee/Commission] declaring its interpretation of a provision of this Agreement under Article ____ [Dispute Settlement Chapter; Joint Committee/Commission Article] shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that decision.

Article 22: 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 or Annex II, the tribunal shall, on request of the respondent, request the interpretation of the [Joint Committee/Commission] on the issue. The [Joint Committee/Commission] shall submit in writing any decision declaring its interpretation under Article ____ [Dispute Settlement Chapter; Joint Committee/Commission Article] to the tribunal within 60 days of delivery of the request.

2. A decision issued by the [Joint Committee/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 [Joint Committee/Commission] fails to issue such a decision within 60 days, the tribunal shall decide the issue.

Article 23: 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 24: Consolidation

1. Where two or more claims have been submitted separately to arbitration under Article 15.1 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 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 15.1 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 18 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 15.1 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 18 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 18 be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 25: 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 Section and the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 15.1(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 15.3(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 panel shall be established under Article ____ [Dispute Settlement Chapter; Request for an Arbitral Panel Article]. 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 ____ [Dispute Settlement Chapter; Initial Report Article], 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 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.

Article 26: 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.]

[US: Section C: Definitions]

Article 27: Definitions

For purposes of this Chapter:

Centre means the International Centre for Settlement of Investment Disputes ("ICSID") established by the ICSID Convention;

[US: claimant] means an investor of a Party that is a party to an investment dispute with the other Party;]

[US: disputing parties] means the claimant and the respondent;]

[US: disputing party] means either the claimant or the respondent;]

[US: enterprise] means an enterprise as defined in Article ____

[General Definitions Chapter; Definitions of General Application Article], and a branch of an enterprise;]

[US: 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*;

[US: 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;

investment means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment **[US: , 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:

[US: (a) an enterprise;]

- (b) shares, stock, and other forms of equity participation in **[US: an enterprise]** ;

- (c) bonds, debentures, other debt instruments, and loans; [8]

- **[US: (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; **[US: [9] [10]]** and

- (h) other **[US: tangible or intangible,]** movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges;

[US: investment agreement] means a written agreement [11] between a national authority [12] of a Party and a covered investment or an investor of the other Party, upon 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;]

[US: investment authorization [13] 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 **[US: a Party or state enterprise thereof, or]** a national or **[US: an enterprise]** of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; **[US: 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 ____ [General Definitions Chapter; Country-Specific Definitions Annex];

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;

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; and

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law.

Section D: Exceptions

Article 28. Measures for Financial and Economic Stability

Nothing in this Agreement shall prevent a party from taking measures of general application in pursuit of fiscal, monetary, credit, exchange rate and other related policies to ensure the integrity and stability of domestic currency, financial markets or the economy. Where such measures do not conform with the provisions of this Agreement, they shall not be used as a means of avoiding the Party's commitments or obligations under this Agreement.

Article 29. Restrictions to Safeguard the Balance of Payments

1. In the event of serious balance of payments and external financial difficulties or threat thereof, a Party may adopt or maintain restrictions on payments and transfers of funds of any investor of the other Party related to any investment covered by Chapter (Investment) and international payments and transfers for current transactions related to its specific commitments under Chapter (Trade in Services). It is recognised that particular pressures on the balance of payments of a Party 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 stable economic development.

2. The restrictions referred to in Paragraph 1 shall:

- (a) be consistent with the Articles of Agreement of the International Monetary Fund;
- (b) avoid unnecessary damage to the commercial, economic and financial interests of the other Party;
- (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; and
- (e) ensure that the other Party is treated no less favourably than any non-Party.

3. In determining the incidence of such restrictions, the Parties may give priority to economic sectors which are more essential to their economic development. However, such restrictions shall not be

adopted or maintained for the purpose of protecting a particular sector.

4. Any restrictions adopted or maintained under Paragraph 1, or any changes therein, shall be promptly notified to the other Party.

5. The Party applying any restrictions under Paragraph 1 may, upon request, commence consultations with the other Party in order to review the restrictions applied by it.

Section E: Modification of Commitments

Article 30. Modification of Commitments

A Party wishing to modify its commitments under this Chapter shall request consultations with the other Party with a view to reaching a mutually satisfactory solution. If consultations do not lead to an agreement within three months after the request, the Parties shall enter into negotiations with a view to reaching agreement on any necessary adjustment required to maintain a general level of mutually advantageous commitments not less favourable to trade than that provided for in schedules of specific commitments prior to such negotiations. If agreement is not reached, the matter may be referred to arbitration in accordance with Chapter [Dispute Settlement].

Article 31. Scope

1. This Section shall apply to measures affecting the movement of investors of a Party into the territory of the other Party.

2. Nothing in this Chapter shall prevent a Party from applying measures to regulate the entry of investors of the other Party into, or their temporary stay in, its territory, including those measures necessary to protect the integrity of, and to ensure the orderly movement of natural persons across its borders provided that such measures are not applied in such a manner as to nullify or impair the benefits accruing to the other Party under the terms of a specific commitment. The sole fact of requiring a visa for investors of certain countries and not for those of others shall not be regarded as nullifying or impairing benefits under a specific commitment.

Article 31. Grant of Temporary Entry and Stay

1. Each Party shall in accordance with commitments in Annex [...] grant temporary entry, stay and, where applicable, work permit to investors of the other Party as listed in Annex [...], unless an application for an extension of an immigration formality has been refused on such grounds of national security or public order by the granting Party as it deems fit. These Annexes shall form an integral part of this Agreement.

2. Each Party shall within the framework of its national legislation facilitate and expedite applications for the entry into, stay, work or training in its territory, of investors of the other Party. It shall adopt all necessary measures to such effect.

Article 32. Provision of Information

A Party shall publish or otherwise make available to the other Party such information as will enable the other Party to become acquainted with its measures relating to this Section.]

Annex A Customary International Law

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 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 B Expropriation

The Parties confirm their shared understanding that:

1. Article 6.1 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 6.1 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 6.1 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 under Section B

Thailand

Notices and other documents in disputes under Section B shall be served on Thailand by delivery to:

- []

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]

Annex D Possibility of a Bilateral Appellate Mechanism

Within three years after the date of entry into force of this Agreement, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 25 in arbitrations commenced after they establish the appellate body or similar mechanism.

[1] [US: - *Note: The Parties agree that the following footnote will be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Treatment Article and the Maffezini case. This footnote will be deleted in the final text of the Agreement.*

The Parties note the recent decision of the arbitral tribunal in *Maffezini (Arg.) v.*

Kingdom of Spain, which found an unusually broad most-favored-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures.

See Decision on Jurisdiction ¶¶ 38-64 (Jan. 25, 2000), reprinted in 16

ICSID Rev. - F.I.L.J. 212 (2002). By contrast, 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 disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section B of this Chapter, and therefore could not reasonably lead to a

conclusion similar to that of the *Maffezini* case.]

[2] [US: - *Note: The Parties agree that the following footnote will be included in the negotiating history as a reflection of the Parties' shared understanding regarding the interpretation of the National Treatment and Most-Favored-Nation Articles. This footnote will be deleted in the final text of the Agreement:*

The Parties agree that each Party shall accord to investors of the other Party and to covered investments the better of most-favored-nation or national treatment. However, the Parties believe that a specific provision stating this principle is unnecessary. Each Party must comply with both Article 3 and Article 4 independently, and one Article should not be interpreted to limit the other. A specific provision stating that each Party shall

accord to investors of the other Party and to covered investments the better of most-favored-nation or national treatment would be duplicative.]

[3] [us: - Article 5 shall be interpreted in accordance with Annex A.]

[4] Article 6 shall be interpreted in accordance with Annexes A and B.

[5] [us: - 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.]

[6] [us: - The Parties recognize that a patent does not necessarily confer market power.]

[7] The "law of the respondent" means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

[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, 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.

[9] [us: 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.]

[10] [us: The term "investment" does not include an order or judgment entered in a judicial or administrative action.]

[11] [us: - "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 21(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.]

[12] [us: - For purposes of this definition, "national authority" means (a) for the United States, an authority at the central level of government; and (b) for Thailand, [].]

[13] [us: - For greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.]

CHAPTER ____ ADMINISTRATION AND DISPUTE SETTLEMENT

ARTICLE 1 : JOINT COMMITTEE

1. The Parties hereby establish a Joint Committee to supervise the implementation of this Agreement and to review the trade relationship between the Parties.

(a) The Joint Committee shall be composed of government officials of each Party and shall be chaired by (i) the United States Trade Representative and (ii) Thailand's Minister for []

(b) The Joint Committee may establish and delegate responsibilities to ad hoc and standing committees or working groups, and seek the advice of non-governmental persons or groups.

2. The Joint Committee shall:

(a) review the general functioning of this Agreement;

(b) review and consider specific matters related to the operation and implementation of this Agreement in the light of its objectives, such as those related to customs administration, technical barriers to trade, electronic commerce, the environment, labor, the Medical Products Working Group, and distilled spirits;

(c) facilitate the avoidance and settlement of disputes arising under this Agreement, including through consultations pursuant to Articles 3 and 4;

(d) consider and adopt any amendment to this Agreement or other modification to the commitments therein, subject to completion of necessary domestic legal procedures by each Party;

(f) as appropriate, issue interpretations of this Agreement, including as provided in Articles 15.21 (Governing Law) and 15.22 (Interpretation of Annexes);

(g) consider ways to further enhance trade relations between the Parties and to further the objectives of this Agreement; and

(h) take such other action as the Parties may agree.

3. At its first meeting, the Joint Committee shall consider the review performed by each Party of the environmental effects of this Agreement and shall provide the public an opportunity to provide views on those effects.
4. The Joint Committee shall establish its own rules of procedure.
5. Unless the Parties otherwise agree, the Joint Committee shall convene:
 - (a) in regular session every year in order to review the general functioning of the Agreement, with such sessions to be held alternately in the territory of each Party; and
 - (b) in special session within 30 days of the request of a Party, with such sessions to be held in the territory of the other Party or at such location as may be agreed by the Parties. A requirement under Article 4 that the Joint Committee take any action with regard to a dispute shall not be interpreted to require the convening of a special session of the Joint Committee.
6. Recognizing the importance of transparency and openness, the Parties reaffirm their respective practices of considering the views of members of the public in order to draw upon a broad range of perspectives in the implementation of this Agreement.
7. Each Party shall treat any confidential information exchanged in relation to a meeting of the Joint Committee on the same basis as the Party providing the information.

ARTICLE 2 : ADMINISTRATION OF DISPUTE SETTLEMENT PROCEEDINGS

1. Each Party shall:
 - (a) designate an office that shall be responsible for providing administrative assistance to panels established under Article 4;
 - (b) be responsible for the operation and costs of its designated office; and
 - (c) notify the other Party of the location of its office.
2. The Joint Committee shall establish the amounts of remuneration and expenses to be paid to panelists.
3. The remuneration of panelists and their assistants, their travel and lodging expenses, and all general expenses relating to proceedings of a panel established under Article 4 shall be borne equally by the Parties.

4. Each panelist shall keep a record and render a final account of the panelist's time and expenses, and the panel shall keep a record and render a final account of all general expenses.

ARTICLE 3 : CONSULTATIONS

1. Except as otherwise provided in this Agreement, either Party may request consultations with the other Party with respect to any matter that it considers might affect the operation of this Agreement by delivering written notification to the other Party's office designated under Article 2.1(a). If a Party requests consultations with regard to a matter, the other Party shall afford adequate opportunity for consultations and shall reply promptly to the request for consultations and enter into consultations in good faith.

2. In consultations under this Article, a Party may request the other Party to make available personnel of its government agencies or other regulatory bodies who have expertise in the matter subject to consultations.

3. In the consultations, each Party shall:

(a) provide sufficient information to enable a full examination of how the matter subject to consultations might affect the operation of this Agreement; and

(b) treat any confidential information exchanged in the course of consultations on the same basis as the Party providing the information.

ARTICLE 4 : ADDITIONAL DISPUTE SETTLEMENT PROCEDURES

1. Except as otherwise provided in this Agreement or as the Parties otherwise agree, the provisions of this Article shall apply wherever a Party considers that:

(a) a measure of the other Party is inconsistent with the obligations of this Agreement;

(b) the other Party has otherwise failed to carry out its obligations under this Agreement;

or

(c) a benefit the Party could reasonably have expected to accrue to it under Chapters 2 (National Treatment and Market Access for Goods), 3 (Rules of Origin), Chapter 8 (Cross Border Trade in Services), or Chapter 16 (Intellectual Property Rights) is being nullified or impaired as a result of a measure that is not inconsistent with this Agreement.

2. (a) The Parties shall first seek to resolve a dispute described in paragraph 1 through consultations under Article 3. If the consultations fail to resolve the dispute within 60 days of the delivery of a Party's request for consultations under Article 3.1, either Party may, by delivering written notification to the other Party's office designated under Article 2.1(a), refer the matter to the Joint Committee, which shall endeavor to resolve the dispute.

(b) Subject to Article 3.3(b), promptly after requesting or receiving a request for consultations related to a matter identified in paragraph 1, each Party shall solicit and consider the views of members of the public in order to draw upon a broad range of perspectives.

3. (a) Where a dispute regarding any matter referred to in paragraph 1 arises under this Agreement and under the WTO Agreement, or any other agreement to which both Parties are party, the complaining Party may select the forum in which to settle the dispute.

(b) The complaining Party shall notify the other Party in writing of its intention to bring a dispute to a particular forum before doing so.

(c) Once the complaining Party has selected a particular forum, the forum selected shall be used to the exclusion of other possible fora.

(d) For the purposes of this paragraph, a Party shall be deemed to have selected a forum when it has requested the establishment of, or referred a matter to, a dispute settlement panel.

4. (a) If the Joint Committee has not resolved a dispute within 60 days after delivery of the notification described in paragraph 2(a) or within such other period as the Parties may agree, the complaining Party may refer the matter to a dispute settlement panel by delivering written notification to the other Party's office designated under Article 2.1(a).²⁰⁻¹ Unless the Parties otherwise agree:

(i) The panel shall have three members.

(ii) Each Party shall appoint one panelist, in consultation with the other Party, within 30 days after the matter has been referred to a panel. If a Party fails to appoint a panelist within such period, a panelist shall be selected by lot from the contingent list established under subparagraph (b) to serve as the panelist appointed by that Party.

(iii) The Parties shall endeavor to agree on a third panelist who shall serve as chair.

(iv) If the Parties are unable to agree on the chair of the Panel within 30 days after the date on which the second panelist has been appointed, the chair shall be selected by lot from the contingent list established under subparagraph (b).

(v) The date of establishment of the panel shall be the date on which the chair is appointed.

(b) (i) By the date of entry into force of this Agreement, the Parties shall establish a contingent list of five individuals who are willing and able to serve as a panelist or chair.

(ii) Each such individual shall have expertise or experience in law, international trade, or the resolution of disputes arising under international trade agreements; shall be independent of, and not be affiliated with or 20-1 This paragraph is subject to the letter referred to in Article 15.26(c) (Status of Letter Exchanges). take instructions from, any Party; and shall comply with the code of conduct to be established by the Joint Committee.

(iii) Individuals on the contingent list shall be appointed by agreement of the Parties for terms of three years, and may be reappointed.

(c) Panelists other than those chosen by lot from the contingent list shall meet the criteria set out in subparagraph (b)(ii) and have expertise or experience relevant to the subject matter that is under dispute.

(d) The Parties shall establish by the date of entry into force of this Agreement model rules of procedure, which shall ensure:

(i) a right to at least one hearing before the panel, which, subject to clause (vi), shall be open to the public;

(ii) an opportunity for each Party to provide initial and rebuttal submissions;

(iii) that each Party's written submissions, written versions of its oral statement, and written responses to a request or questions from the panel will be made public within ten days after they are submitted, subject to clause (vi);

(iv) that the panel shall consider requests from nongovernmental entities in the Parties' territories to provide written views regarding the dispute that may assist the panel in evaluating the submissions and arguments of the Parties;

(v) a reasonable opportunity for each Party to submit comments on the initial report presented pursuant to paragraph 5(a); and

(vi) the protection of confidential information. Unless the Parties agree otherwise, the panel shall follow the model rules of procedure and may, after consulting the Parties, adopt additional rules of procedure not inconsistent with the model rules.

5. (a) Unless the Parties agree otherwise, the panel shall, within 180 days after the chair is appointed, present to the Parties an initial report containing findings of fact and its determination as to whether:

(i) the measure at issue is inconsistent with the obligations of this Agreement;

(ii) a Party has otherwise failed to carry out its obligations under this Agreement; or

(iii) the measure at issue causes a nullification or impairment described in subparagraph 1(c); as well as any other determination requested by both Parties with regard to the dispute.

(b) The panel shall base its report on the submissions and arguments of the Parties. The panel may, at the request of the Parties, make recommendations for the resolution of the dispute.

(c) After considering any written comments by the Parties on the initial report, the panel may modify its report and make any further examination it considers appropriate.

(d) The panel shall present a final report to the Parties within 45 days of presentation of the initial report, unless the Parties agree otherwise. The Parties shall release the final report to the public within 15 days thereafter, subject to the protection of confidential information.

ARTICLE 5 : IMPLEMENTATION OF THE FINAL REPORT

1. On receipt of the final report of a panel, the Parties shall agree on the resolution of the dispute, which normally shall conform with the determinations and recommendations, if any, of the panel.

2. If, in its final report, the panel determines that a Party has not conformed with its obligations under this Agreement or that a Party's measure is causing nullification or impairment in the sense of Article 4.1(c), the resolution, whenever possible, shall be to eliminate the nonconformity or the nullification or impairment.

ARTICLE 6 : NON-IMPLEMENTATION

1. If a panel has made a determination of the type described in Article 5.2, and the Parties are unable to reach agreement on a resolution pursuant to Article 5.1 within 45 days of receiving the final report, or such other period as the Parties agree, the Party complained against shall enter into negotiations with the other Party with a view to developing mutually acceptable compensation.

2. If the Parties:

(a) are unable to agree on compensation within 30 days after the period for developing such compensation has begun; or

(b) have agreed on compensation or on a resolution pursuant to Article 5.1 and the complaining Party considers that the other Party has failed to observe the terms of such agreement, the complaining Party may at any time thereafter provide written notice to the office designated by the other Party pursuant to Article 2.1(a) that it intends to suspend the application to the other Party of benefits of equivalent effect. The notice shall specify the level of benefits that the Party proposes to suspend. Subject to paragraph 5, the complaining Party may begin suspending benefits 30 days after the later of the date on which it provides notice to the other Party's designated office under this paragraph or the panel issues its determination under paragraph 3, as the case may be.

3. If the Party complained against considers that:

(a) the level of benefits that the other Party has proposed to be suspended is manifestly excessive; or

(b) it has eliminated the non-conformity or the nullification or impairment that the panel has found, it may, within 30 days after the complaining Party provides notice under paragraph 2, request that the panel be reconvened to consider the matter. The Party complained against shall deliver its request in writing to the office designated by the other Party pursuant to Article 2.1(a). The panel shall reconvene as soon as possible after delivery of the request to the designated office and shall present its determination to the Parties within 90 days after it reconvenes to review a request under subparagraph (a) or (b), or within 120 days for a request under subparagraphs (a) and (b). If the panel

determines that the level of benefits proposed to be suspended is manifestly excessive, it shall determine the level of benefits it considers to be of equivalent effect.

4. The complaining Party may suspend benefits up to the level the panel has determined under paragraph 3 or, if the panel has not determined the level, the level the Party has proposed to suspend under paragraph 2, unless the panel has determined that the Party complained against has eliminated the non-conformity or the nullification or impairment.

5. The complaining Party may not suspend benefits if, within 30 days after it provides written notice of intent to suspend benefits or, if the panel is reconvened under paragraph 3, within 20 days after the panel provides its determination, the Party complained against provides written notice to the other Party's office designated pursuant to Article 2.1(a) that it will pay an annual monetary assessment. The Parties shall consult, beginning no later than ten days after the Party complained against provides notice, with a view to reaching agreement on the amount of the assessment. If the Parties are unable to reach an agreement within 30 days after consultations begin, the amount of the assessment shall be set at a level, in U.S. dollars, equal to 50 percent of the level of the benefits the panel has determined under paragraph 3 to be of equivalent effect or, if the panel has not determined the level, 50 percent of the level that the complaining Party has proposed to suspend under paragraph 2.

6. Unless the Joint Committee otherwise decides, a monetary assessment shall be paid to the complaining Party in U.S. currency, or in an equivalent amount of Thai currency, in equal, quarterly installments beginning 60 days after the Party complained against gives notice that it intends to pay an assessment. Where the circumstances warrant, the Joint Committee may decide that an assessment shall be paid into a fund established by the Joint Committee and expended at the direction of the Joint Committee for appropriate initiatives to facilitate trade between the Parties, including by further reducing unreasonable trade barriers or by assisting a Party in carrying out its obligations under the Agreement.

7. If the Party complained against fails to pay a monetary assessment, the complaining Party may suspend the application to the Party complained against of benefits in accordance with paragraph 4.

8. This Article shall not apply with respect to a matter described in Article 7.1.

ARTICLE 7 : NON-IMPLEMENTATION IN CERTAIN DISPUTES

1. If, in its final report, a panel determines that a Party has not conformed with its obligations under Article 17.2.1(a) (Application and Enforcement of Labor Laws) or Article 18.2.1(a) (Application and Enforcement of Environmental Laws), and the Parties:

(a) are unable to reach agreement on a resolution pursuant to Article 5.1 within 45 days of receiving the final report; or

(b) have agreed on a resolution pursuant to Article 5.1 and the complaining Party considers that the other Party has failed to observe the terms of the agreement, the complaining Party may at any time thereafter request that the panel be reconvened to impose an annual monetary assessment on the other Party. The complaining Party shall deliver its request in writing to the office designated by the other Party pursuant to Article 2.1(a). The panel shall reconvene as soon as possible after delivery of the request to the designated office.

2. The panel shall determine the amount of the monetary assessment in U.S. dollars within 90 days after it reconvenes under paragraph 1. In determining the amount of the assessment, the panel shall take into account:

(a) the bilateral trade effects of the Party's failure to effectively enforce the relevant law;

(b) the pervasiveness and duration of the Party's failure to effectively enforce the relevant law;

(c) the reasons for the Party's failure to effectively enforce the relevant law;

(d) the level of enforcement that could reasonably be expected of the Party given its resource constraints;

(e) the efforts made by the Party to begin remedying the non-enforcement after the final report of the panel; and

(f) any other relevant factors.

The amount of the assessment shall not exceed 15 million U.S. dollars annually, adjusted for inflation as specified in Annex 20A.

3. On the date on which the panel determines the amount of the monetary assessment under paragraph 2, or at any other time thereafter, the complaining Party may provide

notice in writing to the office designated by the other Party pursuant to Article 2.1(a) demanding payment of the monetary assessment. The monetary assessment shall be payable in U.S. currency, or in an equivalent amount of Thai currency, in equal, quarterly installments beginning on the later of:

(a) 60 days after the date on which the panel determines the amount; or

(b) 60 days after the complaining Party provides the notice described in this paragraph.

4. Assessments shall be paid into a fund established by the Joint Committee and shall be expended at the direction of the Joint Committee for appropriate labor or environmental initiatives, including efforts to improve or enhance labor or environmental law enforcement, as the case may be, in the territory of the Party complained against, consistent with its law. In deciding how to expend monies paid into the fund, the Joint Committee shall consider the views of interested persons in the Parties' territories.

5. If the Party complained against fails to pay a monetary assessment, and if the Party has created and funded an escrow account to ensure payment of any assessments against it, the other Party shall, before having recourse to any other measure, seek to obtain the funds from the account.

6. If the complaining Party cannot obtain the funds from the other Party's escrow account within 30 days of the date on which payment is due, or if the other Party has not created an escrow account, the complaining Party may take other appropriate steps to collect the assessment or otherwise secure compliance. These steps may include suspending tariff benefits under the Agreement as necessary to collect the assessment, while bearing in mind the Agreement's objective of eliminating barriers to bilateral trade and while seeking to avoid unduly affecting parties or interests not party to the dispute.

ARTICLE 8 : COMPLIANCE REVIEW

1. Without prejudice to the procedures set out in Article 6.3, if the Party complained against considers that it has eliminated the non-conformity or the nullification or impairment that the panel has found, it may refer the matter to the panel by providing written notice to the office designated by the other Party pursuant to Article 2.1(a). The panel shall issue its report on the matter within 90 days after the complaining Party provides notice.

2. If the panel decides that the Party complained against has eliminated the non-conformity or the nullification or impairment, the complaining Party shall promptly reinstate any benefits it has suspended under Article 6 or 7 and the Party complained against shall no longer be required to pay any monetary assessment it has agreed to pay under Article 6.5 or that has been imposed on it under Article 7.

ARTICLE 9 : FIVE-YEAR REVIEW

The Joint Committee shall review the operation and effectiveness of Articles 6 and 7 not later than five years after the date of entry into force of this Agreement, or within six months after benefits have been suspended or monetary assessments have been imposed in five proceedings initiated under this Chapter, whichever occurs first.

ARTICLE 10 : PRIVATE RIGHTS

Neither Party may provide for a right of action under its domestic law against the other Party on the ground that a measure of the other Party is inconsistent with this Agreement.

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**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**

**CONVENTION ON THE SETTLEMENT OF
INVESTMENT DISPUTES BETWEEN 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 Com-

mission 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.

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.

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.

(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-

ICSID ADDITIONAL FACILITY RULES

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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). As of December 15, 2002, 136 countries have ratified the Convention to become Contracting States. Under the ICSID Convention, the Centre provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The jurisdiction of ICSID, or in other terms, the scope of the Convention, is elaborated upon in Article 25(1) of the Convention. According to Article 25(1), “[t]he 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.”

The Administrative Council of the Centre has adopted Additional Facility Rules authorizing the Secretariat of ICSID to administer certain categories of proceedings between States and nationals of other States that fall outside the scope of the ICSID Convention. These are (i) fact-finding proceedings; (ii) conciliation or arbitration proceedings for the settlement of investment disputes between parties one of which is not a Contracting State or a national of a Contracting State; and (iii) conciliation and arbitration proceedings between parties at least one of which is a Contracting State or a national of a Contracting State for the settlement of disputes that do not arise directly out of an investment, provided that the underlying transaction is not an ordinary commercial transaction.

The Additional Facility Rules comprise a principal set of Rules Governing the Additional Facility and their three schedules: Fact-Finding Rules (Schedule A), Conciliation Rules (Schedule B) and Arbitration Rules (Schedule C). On September 29, 2002, the Administrative Council approved amendments of the Additional Facility Rules. These amendments came into effect on January 1, 2003.

Reprinted in this booklet are the Additional Facility Rules as amended effective January 1, 2003.

**ADDITIONAL
FACILITY
RULES**

Additional Facility Rules

**RULES GOVERNING THE
ADDITIONAL FACILITY FOR THE
ADMINISTRATION OF PROCEEDINGS
BY THE SECRETARIAT OF
THE INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES
(ADDITIONAL FACILITY RULES)**

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Additional Facility Rules

Additional Facility Rules

Proceedings under the Additional Facility are not governed by the ICSID Convention. In accordance with Article 5 of the Additional Facility Rules, however, certain provisions of the Administrative and Financial Regulations of ICSID apply mutatis mutandis in respect of proceedings under the Additional Facility. The Administrative and Financial Regulations are reprinted in ICSID Convention, Regulations and Rules, Document ICSID/15/Rev. 1 (January 2003).

**Rules Governing the Additional Facility
for the Administration of Proceedings
by the Secretariat of the
International Centre for Settlement
of Investment Disputes
(Additional Facility Rules)**

**Article 1
Definitions**

(1) "Convention" means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, submitted to Governments by the Executive Directors of the International Bank for Reconstruction and Development on March 18, 1965, which entered into force on October 14, 1966.

(2) "Centre" means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention.

(3) "Secretariat" means the Secretariat of the Centre.

(4) "Contracting State" means a State for which the Convention has entered into force.

(5) "Secretary-General" means the Secretary-General of the Centre or his deputy.

(6) "National of another State" means a person who is not, or whom the parties to the proceeding in question have agreed not to treat as, a national of the State party to that proceeding.

**Article 2
Additional Facility**

The Secretariat of the Centre is hereby authorized to administer, subject to and in accordance with these Rules, proceedings between a

State (or a constituent subdivision or agency of a State) and a national of another State, falling within the following categories:

- (a) conciliation and arbitration proceedings for the settlement of legal disputes arising directly out of an investment which are not within the jurisdiction of the Centre because either the State party to the dispute or the State whose national is a party to the dispute is not a Contracting State;
- (b) conciliation and arbitration proceedings for the settlement of legal disputes which are not within the jurisdiction of the Centre because they do not arise directly out of an investment, provided that either the State party to the dispute or the State whose national is a party to the dispute is a Contracting State; and
- (c) fact-finding proceedings.

The administration of proceedings authorized by these Rules is hereinafter referred to as the Additional Facility.

Article 3 Convention Not Applicable

Since the proceedings envisaged by Article 2 are outside the jurisdiction of the Centre, none of the provisions of the Convention shall be applicable to them or to recommendations, awards, or reports which may be rendered therein.

Article 4 Access to the Additional Facility in Respect of Conciliation and Arbitration Proceedings Subject to Secretary-General's Approval

(1) Any agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General. The parties may apply for such approval at any time prior to the institution of proceedings by submitting to the Secretariat a copy of the agreement concluded or proposed to be concluded between them together with other relevant documentation and such additional information as the Secretariat may reasonably request.

(2) In the case of an application based on Article 2(a), the Secretary-General shall give his approval only if (a) he is satisfied that the requirements of that provision are fulfilled at the time, and (b) both parties give their consent to the jurisdiction of the Centre under Article 25 of the Convention (in lieu of the Additional Facility) in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted.

Additional Facility Rules

Additional Facility Rules

(3) In the case of an application based on Article 2(b), the Secretary-General shall give his approval only if he is satisfied (a) that the requirements of that provision are fulfilled, and (b) that the underlying transaction has features which distinguish it from an ordinary commercial transaction.

(4) If in the case of an application based on Article 2(b) the jurisdictional requirements *ratione personae* of Article 25 of the Convention shall have been met and the Secretary-General is of the opinion that it is likely that a Conciliation Commission or Arbitral Tribunal, as the case may be, will hold that the dispute arises directly out of an investment, he may make his approval of the application conditional upon consent by both parties to submit any dispute in the first instance to the jurisdiction of the Centre.

(5) The Secretary-General shall as soon as possible notify the parties whether he approves or disapproves the agreement of the parties. He may hold discussions with the parties or invite the parties to a meeting with the officials of the Secretariat either at the parties' request or at his own initiative. The Secretary-General shall, upon the request of the parties or any of them, keep confidential any or all information furnished to him by such parties or party in connection with the provisions of this Article.

(6) The Secretary-General shall record his approval of an agreement pursuant to this Article together with the names and addresses of the parties in a register to be maintained at the Secretariat for that purpose.

Article 5 Administrative and Financial Provisions

The responsibilities of the Secretariat in operating the Additional Facility and the financial provisions regarding its operation shall be as those established by the Administrative and Financial Regulations of the Centre for conciliation and arbitration proceedings under the Convention. Accordingly, Regulations 14 through 16, 22 through 30 and 34(1) of the Administrative and Financial Regulations of the Centre shall apply, *mutatis mutandis*, in respect of fact-finding, conciliation and arbitration proceedings under the Additional Facility.

Article 6 Schedules

Fact-finding, conciliation and arbitration proceedings under the Additional Facility shall be conducted in accordance with the respective Fact-finding (Additional Facility), Conciliation (Additional Facility) and Arbitration (Additional Facility) Rules set forth in Schedules A, B and C.

SCHEDULE A

**FACT-FINDING
(ADDITIONAL FACILITY)
RULES**

Schedule A
Fact-Finding (Additional Facility) Rules

SCHEDULE A
FACT-FINDING (ADDITIONAL FACILITY) RULES

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Fact-Finding (Additional Facility) Rules

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Schedule A
Fact-Finding
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Chapter I
Institution of Proceedings

Article 1
The Request

(1) Any State or national of a State wishing to institute an inquiry under the Additional Facility to examine and report on facts (hereinafter called a "fact-finding proceeding") shall send a request to that effect in writing to the Secretariat at the seat of the Centre. 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 fact-finding proceeding.

Article 2
Contents of the Request

- (1) The request shall:
- (a) designate precisely each party to the fact-finding proceeding and state the address of each;
 - (b) set forth the agreement between the parties providing for recourse to the fact-finding proceeding; and
 - (c) state the circumstances to be examined and reported on.

(2) The request shall in addition set forth any provisions agreed by the parties regarding the number of commissioners, their qualifications, appointment, replacement, resignation and disqualification, the extent of the powers of the Committee, the appointment of its President, and the place of its sessions, as well as the procedure to be followed in the fact-finding proceeding (hereinafter called the "Procedural Arrangement").

(3) The request shall be accompanied by five additional signed copies and by the fee prescribed pursuant to Regulation 16 of the Administrative and Financial Regulations of the Centre.

Article 3 Registration of the Request

(1) As soon as the Secretary-General has satisfied himself that the request conforms in form and substance to the provisions of Article 2 of these Rules he shall register the request in the Fact-finding (Additional Facility) Register, notify the requesting party and the other party of the registration and transmit to the other party a copy of the request and of the accompanying documentation, if any.

(2) 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 in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Secretariat; and
- (c) request the other party to inform the Secretary-General in writing within 30 days after receipt of the notice whether it agrees with the request or it objects thereto.

(3) In agreeing with the request, the other party may state additional circumstances which it wishes to be examined and reported on within the scope of the agreement between the parties for recourse to fact-finding proceedings. In that event, the Secretary-General shall request the requesting party to inform him promptly in writing whether it agrees to the inclusion of the additional facts or whether it objects thereto.

Article 4 Objections to the Request

(1) Any objection by the other party pursuant to Article 3(2)(c) of these Rules shall be filed by it in writing with the Secretary-General and shall indicate on which of the following grounds it is based and the reasons therefor:

- (a) the other party is under no obligation to have recourse to fact-finding;
- (b) the circumstances indicated in the request as the circumstances to be examined and reported on are wholly or partly outside the scope of the agreement between the parties for recourse to fact-finding.

(2) The provisions of paragraph (1) of this Article shall apply *mutatis mutandis* to an objection by the requesting party pursuant to Article 3(3) of these Rules.

Schedule A
Fact-Finding (Additional Facility) Rules

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Fact-Finding (Additional Facility) Rules

Article 5 Settlement of Objections to the Request; Appointment of Special Commissioner

(1) Promptly upon receipt of the notice of objections, the Secretary-General shall send a copy thereof to the requesting party or the other party, as the case may be, and shall invite the parties to meet with him in order to seek to resolve the objections by agreement.

(2) Failing such agreement, he shall invite the parties to designate within 30 days a third party (hereinafter called the "Special Commissioner") to rule on the objections.

(3) If the parties shall not have designated the Special Commissioner within the period specified in paragraph (2) of this Article, or such other period as the parties may agree, and if they or either one of them shall not be willing to request the Chairman of the Administrative Council (hereinafter called the "Chairman") or any other authority to designate the Special Commissioner, the Secretary-General shall inform the parties that the fact-finding proceeding cannot be held, recording the failure of the parties or one of them to cooperate.

(4) The Special Commissioner shall rule on the objections only after hearing both parties and in his ruling shall decide whether or not the fact-finding proceeding is to continue, stating the reasons for his decision. If he decides that the proceeding is to continue, he shall determine the scope thereof.

Article 6 Absence of Procedural Arrangement

(1) If, or to the extent that, the request does not set forth an agreement between the parties regarding the matters referred to in Article 2(2) of these Rules, the Secretary-General shall invite the parties to conclude in writing and furnish to the Secretariat within 30 days a Procedural Arrangement. The Procedural Arrangement may include any other matter or matters the parties may agree.

(2) If the Procedural Arrangement cannot be concluded within the period referred to in paragraph (1) of this Article, or such other period as the parties may agree, the Procedural Arrangement shall be drawn up by the Chairman after consulting with the parties and shall be binding upon the parties.

(3) Unless the parties agree otherwise, the Procedural Arrangement drawn up by the Chairman shall provide for the appointment of three commissioners. Other provisions made by the Chairman relating to: (a) qualifications, appointment, replacement, resignation, and disqualification of the commissioners, filling up of the vacancies and consequential resumption of proceeding; and (b) incapacity of the

President of the Committee and procedural matters, including procedural languages, shall, to the extent practicable, be similar to those applicable to conciliators and conciliation proceedings under the Conciliation (Additional Facility) Rules.

(4) Notwithstanding the provisions of paragraph (3) of this Article, the Chairman may, whenever he is satisfied that the circumstances so warrant, include within the Procedural Arrangement provisions similar to written and oral procedures set forth in Chapter VII of the Arbitration (Additional Facility) Rules.

Chapter II The Committee and Its Working

Article 7 Number of Commissioners

(1) Except as the parties may otherwise agree, the Committee shall consist of a sole commissioner or any uneven number of commissioners.

(2) If the Committee is to consist of three or more commissioners, one person shall be appointed the President of the Committee. References in these Rules to a Committee or a President of a Committee shall include a sole commissioner.

Article 8 Constitution of the Committee

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

(2) Before or at the first session of the Committee, each commissioner 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 Fact-finding Committee constituted to examine certain facts under the Additional Facility pursuant to an agreement 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 Committee.

"I shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Administrative and Financial Regulations of the Centre.

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Fact-Finding (Additional Facility) Rules

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"A statement of my past and present professional, business and other relevant relationships (if any) with the parties is attached hereto."

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

Article 9 Sessions of the Committee

(1) The Committee shall meet for its first session within 60 days after its constitution or such other period as the parties may agree. The dates of the first and subsequent sessions shall be fixed by the President of the Committee after consultation with its members and the Secretary-General, and with the parties as far as possible. If, upon its constitution, the Committee has no President, such dates shall be fixed by the Secretary-General after consultation with the members of the Committee, and with the parties as far as possible.

(2) The President of the Committee shall: (a) convene its subsequent sessions within time limits determined by the Committee; (b) conduct its hearings and preside at its deliberations; and (c) fix the date and hour of its sittings.

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

(4) The sessions of the Committee shall not be public.

Article 10 Conduct of Investigations and Examinations

Each investigation, and each examination of a locality, must be made in the presence of agents and counsel of the parties or after they have been duly notified.

Article 11 Decisions of the Committee

(1) Except as the parties shall otherwise agree, all decisions of the Committee shall be taken by a majority of the votes of all its members.

(2) Abstention by any member of the Committee shall count as a negative vote.

Article 12
Notices to Be Served by the Committee

The Secretary-General shall, to the extent possible, make necessary arrangements for the serving of notices by the Committee.

Article 13
Determinations of Questions of Procedure

Subject to the provisions of this Chapter, the constitution of the Committee and its procedure shall be governed by the Procedural Arrangement. Any matters not provided for in these Rules or in the Procedural Arrangement shall be determined by agreement of the parties or, failing such agreement, by the Committee.

Chapter III
Termination of the Proceedings

Article 14
Closure of the Proceeding

(1) After the parties have presented all the explanations and evidence, and the witnesses (if any) have all been heard, the President of the Committee shall declare the fact-finding proceeding closed, and the Committee shall adjourn to deliberate and draw up its report (hereinafter called the "Report").

(2) If one party fails to appear or participate in the proceeding or cooperate with the Committee at any stage, and the Committee determines that as a result thereof it is unable to carry out its task, it shall, after notice to the parties, close the proceeding and draw up its Report, noting the reference to fact-finding under the Additional Facility and recording the failure of that party to appear, participate or cooperate.

Article 15
The Report

(1) The Report of the Committee shall be adopted by a majority of all the commissioners.

(2) The Report shall be signed by all the commissioners. The refusal by a commissioner to sign the Report shall not invalidate the Report. The fact of such refusal shall be recorded.

Schedule A
Fact-Finding (Additional Facility) Rules

Schedule A
Fact-Finding (Additional Facility) Rules

(3) If a commissioner dissents from the Report that fact will be noted in the Report. The commissioner may in addition attach a statement to the Report explaining the reasons for his dissent.

(4) The Report shall be limited to findings of fact. The Report shall not contain any recommendations to the parties nor shall it have the character of an award.

Article 16
Effect to Be Given to the Report

The parties shall be entirely free as to the effect to be given to the Report.

Chapter IV
Miscellaneous

Article 17
Cooperation with the Committee

The parties undertake to facilitate the work of the Committee and to supply it with all means and facilities necessary to enable it to become fully acquainted with, and to accurately understand, the facts in question. Without prejudice to the generality of the foregoing, the parties in particular undertake to supply the Committee to the greatest possible extent with all relevant documents and information, as well as to use the means at their disposal to allow the Committee to visit the localities in question and to summon and hear witnesses or experts.

Article 18
Cost of the Proceeding

The fees and expenses of the members of the Committee and of any Special Commissioner, 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 proceeding.

Article 19
Final Provision

The text of these Rules in each official language of the Centre shall be equally authentic.

SCHEDULE B

CONCILIATION
(ADDITIONAL FACILITY)
RULES

Schedule B
Conciliation (Additional Facility) Rules

SCHEDULE B
CONCILIATION (ADDITIONAL FACILITY) RULES

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Schedule B

Conciliation (Additional Facility) Rules

Chapter I Introduction

Article 1 Scope of Application

Where the parties to a dispute have agreed that it shall be referred to conciliation under the Conciliation (Additional Facility) Rules, the dispute shall be settled in accordance with these Rules.

Chapter II Institution of Proceedings

Article 2 The Request

(1) Any State or any national of a State wishing to institute conciliation proceedings under the Additional Facility shall send a request to that effect in writing to the Secretariat at the seat of the Centre. 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.

Article 3 Contents of the Request

- (1) The request shall:
- designate precisely each party to the dispute and state the address of each;
 - set forth the relevant provisions embodying the agreement of the parties to refer the dispute to conciliation;
 - contain information concerning the issues in dispute;
 - indicate the date of approval by the Secretary-General pursuant to Article 4 of the Additional Facility Rules of the

agreement of the parties providing for access to the Additional Facility; and

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

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

(3) The request shall be accompanied by five additional signed copies, and by the fee prescribed pursuant to Regulation 16 of the Administrative and Financial Regulations of the Centre.

Article 4 Registration of the Request

As soon as the Secretary-General shall have satisfied himself that the request conforms in form and substance to the provisions of Article 3 of these Rules, he shall register the request in the Conciliation (Additional Facility) Register and on the same day dispatch to the parties a notice of registration. He shall also transmit a copy of the request and of the accompanying documentation (if any) to the other party to the dispute.

Article 5 Notice of Registration

The notice of registration of a request shall:

- record that the request is registered and indicate the date of the registration and of the dispatch of the notice;
- notify each party that all communications in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Secretariat;
- 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;
- remind the parties that the registration of the request is without prejudice to the powers and functions of the Conciliation Commission in regard to competence and the merits; and
- invite the parties to proceed, as soon as possible, to constitute a Conciliation Commission in accordance with Chapter III of these Rules.

Chapter III The Commission

Article 6 General Provisions

(1) Upon the dispatch of the notice of registration of the request for conciliation, the parties shall promptly proceed to constitute a Conciliation Commission.

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

(3) In the absence of agreement between the parties regarding 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.

(4) If the Commission shall not have been constituted within 90 days after the notice of registration of the request for conciliation has been dispatched by the Secretary-General, or such other period as the parties may agree, the Chairman of the Administrative Council (hereinafter called the "Chairman") shall, at the request in writing of either party transmitted through the Secretary-General, appoint the conciliator or conciliators not yet appointed and, unless the President shall already have been designated or is to be designated later, designate a conciliator to be President of the Commission.

Article 7 Qualifications of Conciliators

Conciliators 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.

Article 8 Method of Constituting the Commission in the Absence of Previous Agreement between the Parties

(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 procedures:

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

(2) The communications provided for in paragraph (1) of this Article 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 6(3) of these Rules. The Secretary-General shall thereupon promptly inform the parties that the Commission is to be constituted in accordance with that provision.

Article 9 Appointment of Conciliators to Commission Constituted in Accordance with Article 6(3) of These Rules

(1) If the Commission is to be constituted in accordance with Article 6(3) of these Rules:

- (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 the President; and

- (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 Article 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.

Article 10 **Appointment of Conciliators and** **Designation of President of** **the Commission by the Chairman**

(1) Promptly upon receipt of a request by a party to the Chairman to make an appointment or designation pursuant to Article 6(4) of these Rules, the Secretary-General shall send a copy thereof to the other party.

(2) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make appointments or a designation, he shall consult both parties as far as possible.

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

Article 11 **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 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.

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Article 12 **Replacement of Conciliators prior to** **Constitution of the Commission**

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.

Article 13 **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 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 Administrative and Financial Regulations of the Centre."

"A statement of my past and present professional, business and other relevant 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 Tribunal shall be deemed to have resigned.

Article 14 **Replacement of Conciliators after** **Constitution of the Commission**

(1) After a Commission has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if a conciliator should die, become incapacitated, resign or be disqualified, the resulting vacancy shall be filled as provided in this Article and Article 17 of these Rules.

(2) 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 Article 15 shall apply.

(3) 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.

Article 15 Disqualification of Conciliators

(1) A party may propose to a Commission the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by Article 7 of these Rules.

(2) A party proposing the disqualification of a conciliator shall promptly, and in any event before the proceeding is declared closed, file its proposal with the Secretary-General, stating its reasons therefor.

(3) 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; and

(b) notify the other party of the proposal.

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

(5) The decision on any proposal to disqualify a conciliator shall be taken by the other members of the Commission except that where those members are equally divided, or in the case of a proposal to disqualify a sole conciliator, or a majority of the conciliators, the Chairman shall take that decision.

(6) 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.

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

Article 16 Procedure during a Vacancy on the Commission

(1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman 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.

Article 17 Filling Vacancies on the Commission

(1) Except as provided in paragraph (2) of this Article, 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 has been made.

(2) In addition to filling vacancies relating to conciliators appointed by him, the Chairman shall:

(a) 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, 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) In filling a vacancy the party or the Chairman, as the case may be, shall observe the provisions of these Rules with respect to the appointment of conciliators. Article 13(2) of these Rules shall apply *mutatis mutandis* to the newly appointed conciliator.

Article 18 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 the oral procedure be recommenced, if this had already been started.

Chapter IV Place of Proceedings

Article 19 Determination of Place of Conciliation Proceeding

Unless the parties have agreed upon the place where the conciliation proceeding is to be held, such place shall be determined by the

Secretary-General in consultation with the President of the Commission, or if there is no President, with the single conciliator, having regard to the circumstances of the proceeding and the convenience of the parties.

Chapter V Working of the Commission

Article 20 Sessions of the Commission

(1) The Commission shall meet for 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 Secretariat, and with the parties as far as possible. If, upon its constitution, the Commission has no President, such dates shall be fixed by the Secretary-General after consultation with the members of the Commission, and with the parties as far as possible.

(2) Subsequent sessions shall be convened by the President within time limits determined by the Commission. The dates of such sessions shall be fixed by the President of the Commission after consultation with its members and the Secretariat, and with the parties as far as possible.

(3) 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.

Article 21 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.

Article 22 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.

Article 23 Decisions of the Commission

(1) The decisions of the Commission shall be taken by a majority of the votes of all its members. Abstention by any member of the Commission 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.

Article 24 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 Secretariat had received the notice of their acceptance of their appointment to the Commission.

Article 25 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 Secretariat, which 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 VI General Procedural Provisions

Article 26 Procedural Orders

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

Article 27
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, which is not inconsistent with any provisions of the Additional Facility Rules and the Administrative and Financial Regulations of the Centre.

Article 28
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. Notwithstanding the foregoing, one of the official languages of the Centre shall be used for all communications to and from the Secretariat.

(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.

Article 29
Supporting Documentation

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

Chapter VII
Conciliation Procedures

Article 30
Functions of the Commission

(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.

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

(3) In order to bring about agreement between the parties, the Commission may, from time to time at any stage of the proceeding, make recommendations to the parties, together with arguments in favor thereof, including recommendations to the effect 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 may fix time limits within which each party shall inform the Commission of its decision concerning the recommendations made. The parties shall give their most serious consideration to such recommendations.

(4) 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.

**Article 31
Cooperation of 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. Without prejudice to the generality of the foregoing, the parties shall: (a) at the request of the Commission, 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; (b) facilitate visits to and inquiries at any place connected with the dispute that the Commission desires to undertake; and (c) comply with any time limits agreed with or fixed by the Commission.

**Article 32
Transmission of the Request**

As soon as the Commission is constituted, the Secretary-General shall transmit to each member of the Commission a copy each of:

- (a) the request by which the proceeding was commenced;
- (b) the supporting documentation;
- (c) the notice of registration of the request; and
- (d) any communication received from either party in response thereto.

**Article 33
Written Statements**

(1) Upon the constitution of the Commission, its President shall invite each party to file, within 30 days or such longer time as the President 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.

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**Article 34
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 advocates, witnesses and experts during their testimony, and officers of the Commission may attend the hearings.

**Article 35
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 VIII
Termination of the Proceeding**

**Article 36
Objections to Competence**

(1) The Commission shall have the power to rule on its competence.

(2) Any objection that the dispute is not within the competence of the Commission, shall be filed by a party with the Secretary-General as soon as possible after the constitution of the Commission and in any event 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.

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

(4) Upon the formal raising of an objection, the proceeding on the merits shall be suspended. The Commission may deal with the objec-

tion 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, the proceedings on the merits shall be resumed. If the Commission decides that the dispute is not within its competence, it shall close the proceeding and draw up a report to that effect, in which it shall state its reasons.

Article 37 **Closure of the Proceeding**

(1) 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 reference of the dispute to conciliation and recording the failure of that party to appear or participate.

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

(3) 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.

(4) Except as the parties otherwise agree, neither party to a conciliation proceeding may in any other proceeding before arbitrators, courts or otherwise invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceeding, or the report or any recommendations made by the Commission.

Article 38 **The Report**

(1) The report of the Commission shall be drawn up and signed as soon as possible after the closure of the proceeding. It shall contain, in addition to the material specified in Article 37 of these Rules, as appropriate:

- (a) a precise designation of each party;
- (b) a description of the method of constitution of the Commission;
- (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

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- (f) a summary of the proceeding.
- (2) The report shall also record any agreement of the parties, referred to in Article 37(4) of these Rules.
- (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.

Article 39 **Communication of the Report**

- (1) Upon signature of 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 Secretariat; and
 - (b) dispatch a certified copy of the report 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.

Chapter IX **Costs**

Article 40 **Cost of Proceeding**

The fees and expenses of the members of the Commission, as well as the charge for the use of facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs with the proceeding. The Secretariat shall provide the Commission and the parties all information in its possession to facilitate the division of the costs.

Chapter X **General Provisions**

Article 41 **Final Provision**

The text of these Rules in each official language of the Centre shall be equally authentic.

SCHEDULE C

ARBITRATION
(ADDITIONAL FACILITY)
RULES

Schedule C
Arbitration (Additional Facility) Rules

SCHEDULE C
ARBITRATION (ADDITIONAL FACILITY) RULES

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Chapter I Introduction

Article 1 Scope of Application

Where the parties to a dispute have agreed that it shall be referred to arbitration under the Arbitration (Additional Facility) Rules, the dispute shall be settled in accordance with these Rules, save that if any of these Rules is in conflict with a provision of the law applicable to the arbitration from which the parties cannot derogate, that provision shall prevail.

Chapter II Institution of Proceedings

Article 2 The Request

(1) Any State or any national of a State wishing to institute arbitration proceedings shall send a request to that effect in writing to the Secretariat at the seat of the Centre. 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.

Article 3 Contents of the Request

- (1) The request shall:
- (a) designate precisely each party to the dispute and state the address of each;
 - (b) set forth the relevant provisions embodying the agreement of the parties to refer the dispute to arbitration;
 - (c) indicate the date of approval by the Secretary-General pursuant to Article 4 of the Additional Facility Rules of the

agreement of the parties providing for access to the Additional Facility;

- (d) contain information concerning the issues in dispute and an indication of the amount involved, if any; and
- (e) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.

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

(3) The request shall be accompanied by five additional signed copies and by the fee prescribed pursuant to Regulation 16 of the Administrative and Financial Regulation of the Centre.

Article 4 Registration of the Request

As soon as the Secretary-General shall have satisfied himself that the request conforms in form and substance to the provisions of Article 3 of these Rules, he shall register the request in the Arbitration (Additional Facility) Register and on the same day dispatch to the parties a notice of registration. He shall also transmit a copy of the request and of the accompanying documentation (if any) to the other party to the dispute.

Article 5 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 the notice;
- (b) notify each party that all communications in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Secretariat;
- (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 arbitrators;
- (d) remind the parties that the registration of the request is without prejudice to the powers and functions of the Arbitral Tribunal in regard to competence and the merits; and
- (e) invite the parties to proceed, as soon as possible, to constitute an Arbitral Tribunal in accordance with Chapter III of these Rules.

Chapter III The Tribunal

Article 6 General Provisions

(1) In the absence of agreement between the parties regarding 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, all in accordance with Article 9 of these Rules.

(2) Upon the dispatch of the notice of registration of the request for arbitration, the parties shall promptly proceed to constitute a Tribunal.

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

(4) If the Tribunal shall not have been constituted within 90 days after the notice of registration of the request for arbitration has been dispatched by the Secretary-General, or such other period as the parties may agree, the Chairman of the Administrative Council (hereinafter called the "Chairman") shall, at the request in writing of either party transmitted through the Secretary-General, appoint the arbitrator or arbitrators not yet appointed and, unless the President shall already have been designated or is to be designated later, designate an arbitrator to be President of the Tribunal.

(5) Except as the parties shall otherwise agree, no person who had previously acted as a conciliator or arbitrator in any proceeding for the settlement of the dispute or as a member of any fact-finding committee relating thereto may be appointed as a member of the Tribunal.

Article 7 Nationality of Arbitrators

(1) 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.

(2) Arbitrators appointed by the Chairman shall not be nationals of the State party to the dispute or of the State whose national is a party to the dispute.

Article 8 Qualifications of Arbitrators

Arbitrators 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.

Article 9 Method of Constituting the Tribunal in the Absence of Agreement Between the Parties

(1) If the parties have not agreed upon the number of arbitrators and the method of their appointment within 60 days after the registration of the request, the Secretary-General shall, upon the request of either party promptly inform the parties that the Tribunal is to be constituted in accordance with the following procedure:

- (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; and
- (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 paragraph (1) of this Article shall be made or promptly confirmed in writing and shall either

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be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

Article 10 Appointment of Arbitrators and Designation of President of Tribunal by the Chairman of the Administrative Council

(1) Promptly upon receipt of a request by a party to the Chairman to make an appointment or designation pursuant to Article 6(4) of these Rules, the Secretary-General shall send a copy thereof to the other party.

(2) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make appointments or a designation, he shall consult both parties as far as possible.

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

Article 11 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 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.

Article 12 Replacement of Arbitrators prior to Constitution of the Tribunal

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.

Article 13 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 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 and shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Administrative and Financial Regulations of the Centre.

"A statement of my past and present professional, business and other relevant relationships (if any) with the parties is attached hereto."

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

Article 14 **Replacement of Arbitrators after** **Constitution of the Tribunal**

(1) After a Tribunal has been constituted and proceedings have begun, its composition shall remain unchanged; provided, however, that if an arbitrator should die, become incapacitated, resign or be disqualified, the resulting vacancy shall be filled as provided in this Article and Article 17 of these Rules.

(2) 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 Article 15 shall apply.

(3) 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.

Article 15 **Disqualification of Arbitrators**

(1) A party may propose to a Tribunal the disqualification of any of its members on account of any fact indicating a manifest lack of the qualities required by Article 8 of these Rules, or on the ground that he was ineligible for appointment to the Tribunal under Article 7 of these Rules.

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

(3) 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; and

(b) notify the other party of the proposal.

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

(5) The decision on any proposal to disqualify an arbitrator shall be taken by the other members of the Tribunal except that where those members are equally divided, or in the case of a proposal to disqualify a sole arbitrator, or a majority of the arbitrators, the Chairman shall take that decision.

(6) 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.

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

Article 16 **Procedure during a Vacancy on the Tribunal**

(1) The Secretary-General shall forthwith notify the parties and, if necessary, the Chairman 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.

Article 17 **Filling Vacancies on the Tribunal**

(1) Except as provided in paragraph (2) of this Article, 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 shall:

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- (a) 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, 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) In filling a vacancy the party or the Chairman, as the case may be, shall observe the provisions of these Rules with respect to the appointment of arbitrators. Article 13(2) of these Rules shall apply *mutatis mutandis* to the newly appointed arbitrator.

Article 18
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 IV
Place of Arbitration

Article 19
Limitation on Choice of Forum

Arbitration proceedings shall be held only in States that are parties to the 1958 UN Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Article 20
Determination of Place of Arbitration

- (1) Subject to Article 19 of these Rules the place of arbitration shall be determined by the Arbitral Tribunal after consultation with the parties and the Secretariat.
- (2) The Arbitral Tribunal may meet at any place it deems appropriate for the inspection of goods, other property or documents. It may also visit any place connected with the dispute or conduct inquiries there. The parties shall be given sufficient notice to enable them to be present at such inspection or visit.
- (3) The award shall be made at the place of arbitration.

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Chapter V
Working of the Tribunal

Article 21
Sessions of the Tribunal

- (1) The Tribunal shall meet for 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 Secretariat, and with the parties as far as possible. If, upon its constitution, the Tribunal has no President, such dates shall be fixed by the Secretary-General after consultation with the members of the Tribunal, and with the parties as far as possible.
- (2) Subsequent sessions shall be convened by the President within time limits determined by the Tribunal. The dates of such sessions shall be fixed by the President of the Tribunal after consultation with its members and the Secretariat, and with the parties as far as possible.
- (3) 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.

Article 22
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.

Article 23
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.

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Article 24
Decisions of the Tribunal

(1) Any award or other decision of the Tribunal shall be made by a majority of the votes of all its members. Abstention by any member of the Tribunal shall count as a negative vote.

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

Article 25
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 Secretariat had received the notice of their acceptance of their appointment to the Tribunal.

Article 26
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 Secretariat, which 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 VI
General Procedural Provisions

Article 27
Procedural Orders

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

Article 28
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 regard-

ing 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 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, which is not inconsistent with any provisions of the Additional Facility Rules and the Administrative and Financial Regulations of the Centre.

Article 29
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.

Article 30
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. Notwithstanding the foregoing, one of the official

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languages of the Centre shall be used for all communications to and from the Secretariat.

(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 hearing 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.

Article 31 **Copies of Instruments**

Except as otherwise provided by the Tribunal after consultation with the parties and the Secretariat, every request, pleading, application, written observation 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; and
- (b) after the number of members of the Tribunal has been determined: two more than the number of its members.

Article 32 **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.

Article 33 **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.

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Article 34 **Waiver**

A party which knows or ought to have known that a provision 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 to have waived the right to object.

Article 35 **Filling of Gaps**

If any question of procedure arises which is not covered by these Rules or any rules agreed by the parties, the Tribunal shall decide the question.

Chapter VII **Written and Oral Procedures**

Article 36 **Normal Procedures**

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

Article 37 **Transmission of the Request**

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

Article 38 **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:

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- (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. However, the parties may instead agree that one of them shall, for the purposes of paragraph (1) of this Article, 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.

Article 39 **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) The Tribunal shall decide, with the consent of the parties, which other persons besides the parties, their agents, counsel and advocates, witnesses and experts during their testimony, and officers of the Tribunal may attend the hearings.

(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.

Article 40 **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.

Article 41 **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, call upon the parties to produce documents, witnesses and experts.

Article 42 **Examination of Witnesses and Experts**

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.

Article 43 **Witnesses and Experts: Special Rules**

The Tribunal may:

- (a) admit evidence given by a witness or expert in a written deposition;
- (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 procedure to be followed. The parties may participate in the examination; and
- (c) appoint one or more experts, define their terms of reference, examine their reports and hear from them in person.

Article 44 **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 VIII **Particular Procedures**

Article 45 **Objections to Competence**

(1) The Tribunal shall have the power to rule on its competence. For the purposes of this Article, an agreement providing for arbitration

under the Additional Facility shall be separable from the other terms of the contract in which it may have been included.

(2) Any objection that the dispute is not within the competence of the Tribunal shall be filed with the Secretary-General as soon as possible after the constitution of the Tribunal and in any event 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) The Tribunal may on its own initiative consider, at any stage of the proceeding, whether the dispute before it is within its competence.

(4) Upon the formal raising of an objection relating to the dispute, the proceeding on the merits shall be suspended. 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.

(5) The Tribunal shall decide whether or not the further procedures relating to the objection 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.

(6) If the Tribunal decides that the dispute is not within its competence, it shall issue an award to that effect.

Article 46 Provisional Measures of Protection

(1) Unless the arbitration agreement otherwise provides, either party may at any time during the proceeding request that provisional measures for the preservation of its rights be ordered by the Tribunal. The Tribunal shall give priority to the consideration of such a request.

(2) 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.

(3) The Tribunal shall order or recommend provisional measures, or any modification or revocation thereof, only after giving each party an opportunity of presenting its observations.

(4) The parties may apply to any competent judicial authority for interim or conservatory measures. By doing so they shall not be held to infringe the agreement to arbitrate or to affect the powers of the Tribunal.

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Article 47 Ancillary Claims

(1) Except as the parties otherwise agree, a party may present an incidental or additional claim or counter-claim, provided that such ancillary claim is within the scope of the arbitration agreement of the parties.

(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.

Article 48 Default

(1) If a party fails to appear or to present its case at any stage of the proceeding, the other party may request the Tribunal to deal with the questions submitted to it and to render an award.

(2) Whenever such a request is made by a party the Tribunal shall promptly notify the defaulting party thereof. Unless the Tribunal 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) of this Article, no such period is granted, the Tribunal shall examine whether the dispute is within its jurisdiction and, if it is satisfied as to its jurisdiction, 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.

Article 49 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 Tri-

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bunal, or the Secretary-General if the Tribunal has not yet been constituted, or has not yet met, shall, at their written request, in an order take note of the discontinuance of the proceeding.

(2) If requested by both parties and accepted by the Tribunal, the Tribunal shall record the settlement in the form of an award. The Tribunal shall not be obliged to give reasons for such an award. The parties will accompany their request with the full and signed text of their settlement.

Article 50 **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 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.

Article 51 **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 IX **The Award**

Article 52 **The Award**

- (1) The award shall be made in writing and shall contain:
 - (a) a precise designation of each party;
 - (b) a statement that the Tribunal was established under these Rules, and a description of the method of its constitution;
 - (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. 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.

(3) If the arbitration law of the country where the award is made requires that it be filed or registered by the Tribunal, the Tribunal shall comply with this requirement within the period of time required by law.

(4) The award shall be final and binding on the parties. The parties waive any time limits for the rendering of the award which may be provided for by the law of the country where the award is made.

Article 53 **Authentication of the Award; Certified Copies; Date**

(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 Secretariat, 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;

provided, however, that if the original text of the award must be filed or registered as contemplated by Article 52(3) of these Rules the Secretary-General shall do so on behalf of the Tribunal or return the award to the Tribunal for this purpose.

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

(3) Except to the extent required for any registration or filing of the award by the Secretary-General under paragraph (1) of this Article, the Secretariat shall not publish the award without the consent of the parties. The Secretariat may, however, include in the publications of the Centre excerpts of the legal rules applied by the Tribunal.

Article 54 Applicable Law

(1) The Tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the Tribunal shall apply (a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable.

(2) The Tribunal may decide *ex aequo et bono* if the parties have expressly authorized it to do so and if the law applicable to the arbitration so permits.

Article 55 Interpretation of the Award

(1) Within 45 days after the date of the award either party, with notice to the other party, may request that the Secretary-General obtain from the Tribunal an interpretation of the award.

(2) The Tribunal shall determine the procedure to be followed.

(3) The interpretation shall form part of the award, and the provisions of Articles 52 and 53 of these Rules shall apply.

Article 56 Correction of the Award

(1) Within 45 days after the date of the award either party, with notice to the other party, may request the Secretary-General to obtain from the Tribunal a correction in the award of any clerical, arithmetical or similar errors. The Tribunal may within the same period make such corrections on its own initiative.

(2) The provisions of Articles 52 and 53 of these Rules shall apply to such corrections.

Article 57 Supplementary Decisions

(1) Within 45 days after the date of the award either party, with notice to the other party may request the Tribunal, through the Secre-

tary-General, to decide any question which it had omitted to decide in the award.

(2) The Tribunal shall determine the procedure to be followed.

(3) The decision of the Tribunal shall become part of the award and the provisions of Articles 52 and 53 of these Rules shall apply thereto.

Chapter X Costs

Article 58 Cost of Proceeding

(1) Unless the parties otherwise agree, the Tribunal shall decide how and by whom the fees and expenses of the members of the Tribunal, the expenses and charges of the Secretariat and the expenses incurred by the parties in connection with the proceeding shall be borne. The Tribunal may, to that end, call on the Secretariat and the parties to provide it with the information it needs in order to formulate the division of the cost of the proceeding between the parties.

(2) The decision of the Tribunal pursuant to paragraph (1) of this Article shall form part of the award.

Chapter XI General Provisions

Article 59 Final Provision

The text of these Rules in each official language of the Centre shall be equally authentic.

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ประวัติผู้เขียนวิทยานิพนธ์

นายเอก ยิ้มฉาย เกิดเมื่อวันที่ 14 สิงหาคม พ.ศ. 2524 จังหวัดกรุงเทพมหานคร สำเร็จการศึกษาชั้นประถมและมัธยมศึกษาจากโรงเรียนสาธิตแห่งมหาวิทยาลัยเกษตรศาสตร์ รุ่น 24 ปี พ.ศ. 2541 จบการศึกษาระดับปริญญาตรีนิติศาสตร์บัณฑิต จากมหาวิทยาลัยธรรมศาสตร์ ปี พ.ศ. 2545 และเข้าศึกษาหลักสูตรนิติศาสตร์มหาบัณฑิต คณะนิติศาสตร์ จุฬาลงกรณ์มหาวิทยาลัย เมื่อปีการศึกษา 2547 โดยได้เป็นผู้ช่วยวิจัยของศาสตราจารย์ ดร. ชุมพร ปัจจุสานนท์ ตั้งแต่ พ.ศ. 2547 เรื่อยมาจนถึงปัจจุบัน