# International Investment Instruments: A Compendium

## INTERNATIONAL AGREEMENT ON INVESTMENTâ

## (CONSUMER UNITY & TRUST SOCIETY)

# Part 1. GENERAL PROVISIONS

The Contracting Parties to this Agreement,

Recognizing the growing importance of international investment in the world economy and its contribution to development in their countries;

Wishing to establish a well-defined multilateral framework of principles and rules for international investment with a view to the expansion of such investment flows under conditions of transparency, predictability and progressive liberalization and as a means of promoting the economic growth of all Contracting Parties and the development of developing countries;

Desiring the early achievement of progressively higher levels of liberalization of investment flows through successive rounds of multilateral negotiations aimed at promoting the interests of all parties and beneficiaries on a mutually advantageous basis and at securing an overall balance of rights and obligations between and among investors and host countries, while giving due respect to national policy objectives;

Recognizing the right of Contracting Parties to regulate, and to introduce new regulations, on a non- discriminatory basis, on the manner and flow of investments within their territories in order to meet national policy objectives and, given asymmetries existing with respect to the degree of development and market regulation in different countries, the particular need of developing countries to exercise this right;

Recognizing that investment, as an engine of economic growth, has a vital role in ensuring sustainable economic growth and development, when accompanied by appropriate policies at the domestic and international levels governing the interests of environment, consumers, labour, citizens and culture;

Renewing their commitment to the international covenants and principles enunciated at several international events, such as the Agenda 21 adopted at the Earth Summit, the Copenhagen Declaration of World Summit on Social Development, Bejing Declaration at the Womens' Summit etc. and to observance of the UN Charter on Human Rights and Covenants on Social, Economic and Political Rights, the Tripartite Declaration of Principles concerning Multilateral Enterprises and Social Policy, the UN Guidelines on Consumer Protection etc.;

Reiterating their support for the United Nations Guidelines for Transnational Investment, as fundamental principles of behaviour of firms and contracting parties between and among each other;

Affirming their decision to create a free-standing independent agreement operating under an independent secretariat of the International Agreement on Investment;

Hereby agree as follows:

# Part II. SCOPE AND APPLICATION

DEFINITIONS

1. "Investor" means:

(i) a natural person who has the nationality of, or who is permanently residing in, the territory of a Contracting Party in accordance with its applicable law; or

(ii) a legal person or any other entity constituted or organised under the applicable law of a Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership1 , joint venture, association or organisation as recognised under the law of the Contracting Party in whose territory the investment is made.2

2. "Investment" means:

(a) Every kind of asset owned or controlled, directly or indirectly, by an investor, including:

(i) an enterprise (being a legal person or any other entity constituted or organised under the applicable law of the Contracting Party, whether or not for profit, and whether private or government owned or controlled, and includes a corporation, trust, partnership, branch, joint venture, association or organisation);

(ii) shares, stocks or other forms of equity participation in an enterprise, and rights derived therefrom;

(iii) bonds, debentures, loans to and other form of debt of an enterprise and rights derived therefrom;

(iv) rights under contracts, including turnkey, construction, management, production or revenue-sharing contracts;

(v) claims to money and claims to performance; intellectual property rights;

(vi) rights conferred pursuant to law or contract, including rights conferred by licenses, authorisations, and permits.

(vii) any other tangible and intangible, movable and immovable property, and any related property rights, such as leases, mortgages, liens and pledges, unless such assets lack the characteristics of an investment.

"Investment" does not include:

(i) public debt, debt securities of and loans to a state enterprise or Contracting Party;

(ii) financial assets, unless the respective claims are assets of an enterprise mentioned in paragraph(a) (i);

(iii) derivatives where the underlying asset is not regarded as an investment;

(iv) real estate or other property, tangible or intangible (including rights associated therewith)3, not acquired in the expectation or used for the purpose of economic benefit or other business purposes;

(v) movable or immovable property, and any related rights, acquired for personal use.

EXPLANATORY NOTE: "Investor"

(a) The definition of "Investor" covers natural persons as well as legal persons or any other entity constituted or organised under the applicable law of a Contracting Party. It also clarifies that the legal entity may be one organised for profit for it may be one which is not organised for profit such as, charitable institutions or societies. Again, the legal entity may be private or it may be owned or controlled by the Government. It includes inter alia:

(i) a Corporation,

(ii) a Trust,

(iii) a Partnership,

(iv) Sole proprietorship,

(v) Joint Venture,

(vi) Association,

vii) Organisation.

It may be mentioned that in law, a concern which belongs to a single living person is not an artificial entity. It is that very living person itself. It is not distinct from that person.

(b) It should also be pointed out that a joint venture does not automatically become an artificial legal person, separate from its Constituent members. For example, if company 'A' and company 'B' agree to form a joint venture, then they may or may not form a new company 'C' to operate the joint venture. If they form a new company 'Câ, then there is born another legal entity. But if they do not form a new company 'C', then no new legal entity will emerge, and company 'A' and company 'B'

will be regarded as having formed a partnership. Of course, this is subject to any statutory prohibition that may be operative in this regard, in the country concerned, in its law relating to companies or law relating to partnerships. The words "as recognised under the law of the Contracting Party in whose territory the investment is made", have been used for this reason.

"Every kind of asset, controlled directly or indirectly by an investor". The inclusive part of the definition, seeks to cover several specific types of assets-tangible and intangible.

3. "Territory" means:

(a) the land territory, internal waters, and the territorial sea of a Contracting Party, and, in the case of a Contracting Party which is an archipelagic state, its archipelagic waters; and

(b) the maritime areas beyond the territorial sea with respect to which a Contracting Party exercises sovereign rights or jurisdiction in accordance with international law, as reflected particularly in the 1982 United Nations Convention on the Law of the Sea.

EXPLANATORY NOTE: "TERRITORY"

The definition is self-explanatory.

APPLICATION

APPLICATION TO OVERSEAS TERRITORIES

A Contracting Party may, at any time, declare in writing to the Depositary that this Agreement shall apply to all or to one or more of the territories for the international relations of which it is responsible. Such declaration, made prior to or upon ratification, accession or acceptance, shall take effect upon entry into force of this Agreement for that State. A subsequent declaration shall take effect with respect to the territory or territories concerned on the ninetieth day following receipt of the declaration by the Depositary.

A Party may at any time declare in writing to the Depositary, that this Agreement shall cease to apply to all or to one more of the territories for the international relations of which it is responsible. Such declaration shall take effect upon the expiry of one year from the date of receipt of the declaration by the Depositary, with the same effect regarding existing investment as withdrawal of a Party.

# Part III. TREATMENT OF INVESTORS AND INVESTMENTS NATIONAL TREATMENT AND MOST FAVOURED NATION TREATMENT

1.1. Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment which it accords, in like circumstances, to its own investor and their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment and sale or other disposition of investment.

1.2 Each Contracting Party shall accord to investors of another Contracting Party and to their investments, treatment no less favourable than the treatment which it accords, in like circumstances to investors of any other Contracting Party or of a non-Contracting Party, and to the investments of investors of any other Contracting Party or of a non-Contracting Party, with respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposition of investment.

1.3. Each Contracting Party shall accord to investors of another Contracting Party and to their investments the better of the treatment required by Article 1.1 and 1.2, whichever is the more favourable to those investors or investments.

1.4 Nothing in paragraphs 1. 1 to 1.3 shall apply to measures adopted by a Contracting Party for compelling reasons comnected with its national interest.

NATIONAL TREATMENT AND MOST FAVOURED NATION TREATMENT

Article 1.1 Of the Draft Requires Each Contracting Party to Accord, to Investors of Another Contracting Party and to Their Investments, Non-discriminatory Treatment, That Is to Say, Treatment No Less Favourable Than the Treatment Accorded by the Contracting Party to Its Own Investors In the Like Circumstances. the Guarantee Extends to All the Stages Ex Post

Investment Including the Sale or Its Disposition.

Article 1.2 In the Draft Provides for Most Favoured Nation Treatment and Article 1.3 Requires That the Better of the Treatments Envisaged by Article 1.1 and Article 1.2 Shall Be Accorded to the Investors.

However, the total prohibition of discrimination between investors, would not be acceptable to certain Contracting Parties, particularly, developing countries. Such countries may, for economic reasons or on socio-cultural considerations, find it necessary to make a discrimination between national and foreign investors, intended to take care of this aspect.

1.5 THE PROVISIONS OF THIS ARTICLE SHALL BE SUBJECT TO THOSE OF ARTICLES 1.A TO 1K

## Article 1A. A ENTRY AND ESTABLISHMENT

A Contracting Party shall have the right to impose, on the entry of, and establishment and conduct of business by, investors, restrictions where such restrictions are:

(i) non-discriminatory in nature;

(ii) based on vital social, economic or cultural considerations; and

(iii) mandatory by national legislation or policy of the Contracting Party.

EXPLANATORY NOTE:

The legislature or the executive of a Contracting Party should be able to exclude an investor or type of investor, if such investment is not acceptable, for certain specific reasons. For example, a foreign investor should not acquire the right to produce large quantities of alcoholic liquor, in a country where there is a large segment of the population opposed to drinking alcoholic liquor on religious grounds and national regulations severely limit its production.

(iv) Entry and establishment have to remain subject to the industrial policy and other policy instruments as per the Contracting Party's preference.

## Article 1B. NATIONAL TREATMENT WITHOUT DISCRIMINATION

A Contracting Party shall have freedom to discriminate between an investor of the Contracting Party and an investor of another Contracting Party, where such discrimination is considered absolutely necessary for:

(i) promoting or maintaining any public utility project in the Contracting Party's territory;

(ii) for maintaining national security or public order;

(iii) for preserving public health;

(iv) for preserving the culture of the Contracting Party;

(v) protection of consumers against fraud or unfair practices; or

(vi) for protecting other vital national considerations.

Absolute freedom to foreign investors may sometimes damage national cultural values or impair the protection of other national considerations.

Examples can be drawn from the harm that may be caused by unrestricted exhibition of films or unrestricted performance or display of other audio visual or visual entertainment material.

A Contracting State should therefore be allowed to discriminate, for justifiable cause, based on its vital interests of security, public order, consumer protection, of infant industry, considerations of unutilised capacity, other economic objectives and preservation of national culture and deep-rooted values.

It may be pointed out that the Treaty of Rome permits (in substance) discrimination against foreign industries, for reasons based on cultural considerations. Again, under the TRIPs Agreement, "public order" is a reasonable ground, justifying compulsory licensing or total denial of patent rights.

Besides the above, a country should be allowed to support or subsidise domestic projects in the nature of public works or public utilities. It is vital that investors who invest, should remain permanently in the host country and should not pack off

when, for any reason, the going gets tough.

## Article 1C. INVESTMENT REGULATIONS: STAND-STILL AND ROLL BACK

A Contracting Party shall be free to adopt or continue (with or without modifications) such restrictive measures in regard to investment as are considered necessary in the national interest. However, a Contracting Party shall use its best endeavours to limit such measures to the absolute minimum.

EXPLANATORY NOTE:

(i) Under a draft, which totally prohibits regulations discriminations that are discriminatory will have to be cancelled ("rolled back"), and there will be a bar against any further amendments of a discriminatory nature ("stand-still").

(ii) This would imply, inter alia, that the existing national restrictions will have to be deleted.

(iii) In particular, a total prohibition would invalidate national legislation (if discriminatory) relating to-

(a) agriculture;

(b) bank frauds (by foreign banks);

(c) environment; and

(d) health.

(iv) In view of this, a better alternative would be to frame the relevant provisions in the "best endeavour clause" form. It may be mentioned that the APEC treaty (investment clause), leaves the decisions, in most cases, to "best endeavour clause".

## Article 1D. TRANSFER OF FUNDS (BALANCE OF PAYMENTS ASPECT)

A Contracting Party shall be free to adopt or continue (with or without modifications) such measures in regard to investments as are considered necessary in the interest of the economy of the Contracting Party, including the rectification or avoidance of an unfavourable position regarding

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balance of payments. The Contracting Party shall, however, use its best endeavour to limit such measures to the absolute minimum.

EXPLANATORY NOTE:

(i) Under an unrestricted draft, foreign investors will have the right to all money accruing to them from the investment. These would include-

(a) profits;

(b) sale proceeds;

(c) proceeds of liquidation;

(d) amounts received for technical and managerial services; and (e) royalties from intellectual property (the list is illustrative only).

As a consequence, there will be ruled out (for example) restrictions based on the position of a State regarding balance of payments.

(ii) An unfettered right of the foreign investor to transfer all money would seriously impair the economy of a country whose financial position, for the time being, is critical.

(iii) Besides this, an unfettered right for the foreign investor would at times itself operate, in practice in a discrimination manner against domestic enterprises and local communities. It may be mentioned that even the WTO accords accept Balance of Payments position, as a basis for special provision (for developing countries).

(iv) Hence, a "best endeavour clause" would be a proper solution in regard to freedom of transfer of funds.

## Article 1E. HUMAN RIGHTS AND CULTURE

A Contracting Party shall be free to adopt or continue (with or without modification), such measures as ate required for securing conformity with international treaties, conventions and agreements relating to-

(a) human rights; and

(b) cultural protection.

EXPLANATORY NOTE:

International obligations (undertaken by various countries) regarding human rights and cultural protection should be expressly saved.

These are important obligations, which business must observe. A specific provision on the point is needed.

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If all countries are signatories to the UN Convention on human rights and cultural protection, then the same must form part of the Investments agreements also, so as to avoid a situation where under human rights etc. may be diluted to suit investors.

## Article 1F. CONSUMER PROTECTION

A Contracting Party shall have freedom to adopt or continue (with or without modifications) such measures as are required to ensure compliance with UN Guidelines for consumer protection as amended or revised from time to time, including, in particular, UN Guidelines dealing with the following matters-

(a) physical safety (including product re-call and product liability); (b) economic interests, including competition principles;

(c) standards;

(d) essential goods and services;

(e) health and basic needs;

(f) redressal of grievances; and

(g) education and information for the consumer.

EXPLANATORY NOTE:

(i) There are in existence UN Guidelines for Consumer Protection, 1985 (currently under revision). If investors seek the highest standard agreement on investment, they must be prepared to provide the highest standards of consumer protection. The guidelines developed and accepted by the international community should be followed in maintaining the highest standards of consumer protection. The areas covered include the matters enumerated in the above draft.

## Article 1G. RESTRICTIVE BUSINESS PRACTICES

A Contracting Party shall have freedom to adopt or continue (with or without modifications) measures that are required to check anti-competitive business practices, to the extent to which such measures are in substantial conformity with the UNCTAD Code, known as the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices 1980, as revised from time to time.

EXPLANATORY NOTE:

(i) There is in existence an UNCTAD set/code on Restrictive Business Practices, known as the UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices 1980.

(ii) It is desirable that investors should comply with the provisions of the UNCTAD Codes, so as to adhere to the highest standards of competition principles. It may be mentioned that these principles provide protection both to rivals and to consumers.

(iii) These provisions include the curbing of anti-competitive practices, such as:

(a) tied selling;

(b) resale price maintenance;

(c) exclusive dealing;

(d) reciprocal exclusivity;

(e) refusal to deal;

(f) differential pricing;

(g) predatory pricing;

(h)cartelisation; and

(i) mergers, amalgamations and takeovers.

## Article 1H. WORKER PROTECTION (ILO TRIPARTITE DECLARATION)

A Contracting Party shall be entitled to adopt or continue (with or without modifications) such measures as are required to secure conformity with the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy 1971, as revised or amended from time to time.

EXPLANATORY NOTE:

(i) Investment regimes should be consistent with international conventions relating to Workers' Protection. A good model is the Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 1971, adopted by the ILO. This Declaration incorporates adequate guidelines on the basis of the relevant ILO Conventions.

(ii) Guidelines given in the Tripartite Declaration cover-

(a) employment;

(b) training;

(c) conditions of work and life; and

(d) industrial relations.

There may also be need to give workers the right to negotiate work contracts. It should also be ensured that workers in the host country get full protection and decent wages which are not less favourable than those prevailing in the home countries of the investors.

1.1 NOTIFICATION OF OPERATIONAL GUIDELINES AND MANDATORY STANDARDS

(i) Each investor shall keep-

(a) the Contracting Party in whose territory the investment is made; and

(b) the MAI Secretariat, informed about the operational guidelines and mandatory standards formulated by the investor from time to time for being followed in its branches and units.

(ii) The MAI Secretariat shall communicate to Contracting States the information received by it under paragraph 1.I (i)(b) above, by issuing periodical circulars as and when needed.

EXPLANATORY NOTE:

(i) It appears desirable to require investors to notify the MAI Central Secretariat and the host Governments, of all mandatory standards and operational guidelines issued within the investor organisation so as to apply to all its branches and units.

(ii) Such a requirement would achieve a variety of objectives--

(a) It would ensure transparency and allay suspicions on the part of citizens in the host country;

(b) It would make available to all concerned the benefit of expertise developed by the investor organisation.

(iii) Notification by the investor to the MAI Central Secretariat as proposed above, would enable the latter to index the information received from various investors. Notification by the investor to the host country would enable the latter to make

the standards etc. available to business persons of the host country.

## Article 1J. TRANSFER PRICING AND ACCOUNTING STANDARDS

The Investor shall scrupulously comply with such obligations as may arise under internationally agreed guidelines or standards relating to-

(i) transfer pricing;

(ii) uniform transparent accounting, including guidelines and standards on the above matters as evolved from time to time by the UNCTAD or the OECD.

EXPLANATORY NOTE:

(i) An obligation should be imposed on Investors-

(a) not to resort to unfair transfer pricing; and

(b) to maintain uniform transfer accountancy standards.

(ii) It may be mentioned that-

(a) the OECD is itself working on transfer price; and

(b) the UNCTAD is working on international accounting standards and reporting methods.

(iii) Provisions to check unfair transfer pricing should prove useful to check unfair methods adopted to transfer profits or overload costs on inter-unit transfer of-

(a) technology;

(b) raw materials;

(c) intermediates; or

(d) finished goods.

(iv) Uniformity in accounting methods would help to check tax evasion and unfair payment of dividends to share holders.

Each Investor shall comply with the guidelines as to Environment Protection, as set out in the Appendix to these Articles.

1.1 Notwithstanding any other provisions of the Agreement, a Contracting Party shall not be prevented from taking prudential measures with respect to financial services, including measures for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by an enterprise providing financial services, or to ensure the integrity and stability of its financial system.

1.2 Where such measures do not conform with the provisions of the Agreement, they shall not be used as a means of avoiding the Contracting Party's commitments or obligations under the Agreement.

TRANSPARENCY

2.1 Each Contracting Party shall promptly publish, or otherwise make publicly available, its laws, regulations, procedures and administrative rulings and judicial decisions of general application as well as international agreements which may affect the operation of the Agreement. Where a Contracting Party establishes policies which are not expressed in laws or regulations or by other means listed in this paragraph but which may affect the operation of the Agreement, that Contracting Party shall promptly publish them or otherwise make them publicly available.

2.2 Each Contracting party shall promptly respond to specific questions and provide, upon request, information to other Contracting Parties on matters referred to in Article 2.1.

2.3 Nothing in this Agreement shall prevent a Contracting Party from requiring an investor of another Contracting Party, or its investment, to provide routine information concerning that investment solely for information or statistical purposes. No Contracting Party shall be required to furnish or allow access to information concerning particular investors or investments, the disclosure of which would impede law enforcement or would be contrary to its laws, policies, or practices, protecting

confidentiality.

SPECIAL TOPICS

KEY PERSONNEL

A TEMPORARY ENTRY AND STAY

A Contracting Party, shall, subject to its laws applicable from time to time relating to the entry and sojourn of non citizens, permit natural persons of other Contracting party and personnel employed by legal entities (or other investors who are not natural persons) of other Contracting Parties to enter and remain in the territory for the purpose of engaging in activities, connected with investments.

EXPLANATORY NOTE:

TEMPORARY ENTRY

A particular country be compelled to impose restrictions on entry etc. not only for reasons of public health etc. but also for other reasons.

Examples are:

- Excessive under-employment;

- Over population;

- Regional economic imbalance, etc.

Hence, the draft suggested above.5

EMPLOYMENT REQUIREMENTS

A Contracting Party shall permit investors of another Contracting Party and their investments to employ any natural person of the investor's or the investment's choice regardless of nationality and citizenship, provided that such person is holding a valid permit of sejour and work delivered by the competent authorities of the former Contracting Party and that the employment concerned conforms to the terms, conditions and time limits of the permission granted to such person. (Based on ECT, Article 11 (2)).

# Part IV. PERFORMANCE REQUIREMENTS

PARAGRAPH 1

Subject to the provisions of paragraphs 2 to 7, no Contracting party may impose, force or maintain any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, operation, or conduct of an investment of an investor of a Contracting Party or of a non-Contracting party in its territory:

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;

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

(e) to restrict sales of goods or services in its territory that such investment produces or provides, by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;6

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

(g) to locate its headquarters for a specific region or the world market in that Contracting Party;

(h) to supply one or more of the goods that it produces or the services that it provides to a specific region or world market exclusively from the territory of that Contracting party;

(i) to achieve a given level or value of production, investment, manufacturing, sales, employment, research and development in its territory;

(j) to hire a given level or type of local personnel;

(k) to establish a joint venture; or

(l) a to achieve a minimum level of local equity participation.

PARAGRAPH 2

A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1 (f).

PARAGRAPH 3

Paragraph 1 (F) (g) (b) (i) G) (ix) (1) do not apply if the requirements described in one or more of these provisions are conditions for the receipt or continued receipt of an advantage in connection with the establishment, acquisition, expansion, management or operation, or conduct of an investment of an investor (of a Contracting Party or a non-Contracting Party, in its territory), and in particular, if the requirements and the advantage are subject to a contractual obligation between the investor or investment on the one side and the host state or its sub-federal entities on the other.

PARAGRAPH 4

Nothing in paragraph 3 shall be construed to prevent a Contracting Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Contracting Party or of a non-Contracting Party, on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

PARAGRAPH 5

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

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

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

(c) necessary for the conservation of living or non-living exhaustible natural resources. PARAGRAPH 6

The provisions of:

(a) Paragraphs 1 (b), (c), (f) and (i), and 3(b) and (c) do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programmes.

(b) Paragraphs (1)(b), (c), (f) and (i), and 3(b) and (c) do not apply to procurement by a Contracting Party or a state enterprise; and

(c) Paragraphs (3)(b) and (c) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential quotas.

(d) Paragraph (1) does not apply to requirements imposed by a Contracting Party as a part of privatisation operations.

PARAGRAPH 7

Notwithstanding anything contained in paragraph 1, a Contracting Party shall be free to adopt a measure otherwise prohibited by that paragraph for compelling social or economic reasons.7

EXPLANATORY NOTE:

PERFORMANCE REQUIREMENTS

In the draft, under the head "Performance Requirements", certain obligations have been sought to be imposed on the Contracting States. Broadly speaking, paragraphs 1 and 3 impose the substantive obligations, while paragraphs 2,4,5 and 6 permit certain relaxations thereof.

Paragraph 1 contains 12 clauses-(a) to (1), these clauses prohibit a Contracting Party from imposing, enforcing or maintaining requirements (or even enforcing any commitment or undertaking) in connection with an investor in its territory failing under any of the 12 clauses. It is not possible here to reproduce, or even to summarise, their content. But, it is sufficient to state that they prohibit the Contracting States from imposing requirements relating to export, production local purchase, volume of imports, sales, transfer of technology, location of headquarters, supply of goods, achieving a given level of production, etc. hiring local personnel, establishing joint venture or achieving a minimum level of local equity participation.

Several points need elaboration.

(i) harsh set_of obligations would become difficult to accept for many countries. Hence some relaxation has to be provided for.

(ii) + Benefiting the national economy through the processes and products of an industry promoted through foreign investment is one of the objects of inviting such investors. This object will be almost totally defeated by a sweeping provision.

(iii) In particular, a prohibition, in toto, of any stipulations intended to encourage export would mean putting an end to the legitimate desire of learning foreign exchange- desire which is understandable, with an adverse balance of payments position.

(iv) Again, a prohibition against requiring a foreign investor to transfer its specialised technology to local citizens would, in effect, mean that the level of technology in the host country would remain stagnant for all times to come. If the host country extends certain benefits, it should, in its turn, be allowed to derive benefits also.

# Part V. PRIVATISATION

PARAGRAPH 1 NATIONAL TREATMENT AND MOST FAVOURED NATION TREATMENT

Each Contracting Party shall accord treatment as defined in Paragraph XX (National Treatment, MEN Treatment) in case of a privatisation-

(a) both as regards the initial privatisation; and

(b) as regards subsequent transactions involving a privatised assets between investors or investments.

PARAGRAPH 2

Nothing in this agreement shall be construed as requiring any Contracting Party to privatise.

PARAGRAPH 3 TRANSPARANCY

For the purpose of this Article each Contracting Party shall promptly publish the essential features and procedures for privatisation.

PARAGRAPH 4 PRIVATISATION DEFINED

Privatisation means a partial or complete sale or other mode of transfer of the function of the Government or the ownership or control of assets of Government-owned enterprises or Government controlled enterprises-

(a) from a Government in a Contracting State or from a corporation, authority or entity owned or controlled by the Government in a Contracting State;

(b) to an investor or investment not owned or controlled by a Contracting Party or by Government or by a corporation, authority or entity owned or controlled by Government in the Contracting Party.

# Part VI. MONOPOLIES/STATE ENTERPRISES

A. MONOPOLIES

1. Nothing in this Agreement shall be construed to prevent a Contracting Party from maintaining, designating or eliminating a monopoly.

2. Each Contracting Party shall endeavour to accord non-discriminatory treatment when designating a monopoly.

3. Each Contracting Party shall ensure that any monopoly that its national or sub-national governments maintains or designates or any privately-owned monopoly that it designates and any government monopoly that it maintains or designates:

(a) acts in a manner that is not inconsistent with the Contracting Party's obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative or other governmental authority that the Contracting Party has delegated to it in connection with the purchase or sale of the monopoly good or service or any other matter.8

(b) provides non-discriminatory treatment to investors of another Contracting Party and their investments in its sale of the monopoly good or service in the relevant market;

(c) provides non-discriminatory treatment to investors of another Contracting Party and their investments in its purchase of the monopoly good or service in the relevant market. This paragraph does not apply to procurement by governmental agencies of goods or services for government purposes and not with a view to commercial resale or with a view to use in the production of goods or services for commercial sale;

(d) does not use its monopoly position, in a non-monopolised market in its territory, to engage, either directly or indirectly, including through its dealing with its parent company, its subsidiary or other enterprise with common ownership, in anti-competitive practices that might adversely affect an investment by an investor of another Contracting Party, including through the discriminatory provision of the monopoly good or service, cross-subsidisation or predatory conduct.

(e) except to comply with any terms of its designation that are not inconsistent with subparagraph (b), (c) or (d), acts solely in accordance with commercial considerations in its purchase or sale of the monopoly good or service in the relevant market, including with regard to price, quality, availability, marketability, transportation and other terms and conditions of purchase or sale.

Nothing in Article A shall be construed to prevent a monopoly from charging different prices in different geographic markets, where such differences are based on normal commercial considerations, such as taking account of supply and demand conditions in those markets.

4. In case of a demonopolisation which has the effect of extending the obligations under the Agreement to a new area, the principle of standstill does not intend to prevent any Contracting Party from lodging any reservation to the Agreement for this new area.

5. Each Contracting Party shall notify to the Parties group any existing monopoly within (60) days after the entry into force of the Agreement and any newly created monopoly within (6) days after its creation.

6. Neither investors of another Contracting Party nor their investments may have recourse to investor-state arbitration for any matter arising out of paragraph 3(b), (c), (d) or (ce) of this Article.

B. STATE ENTERPRISES

1. Each Contracting Party shall ensure that any state enterprise that it maintains or establishes acts in a manner that is not inconsistent with the Contracting Party's obligations under this Agreement wherever such enterprise exercises any regulatory, administrative or other governmental authority that the Contracting Party has delegated to it.

2. Each Contracting party shall ensure that any state enterprise that it maintains or establishes accords non-discriminatory treatment in the sale, in the Contracting Party's territory, of its goods or services to investors of another Contracting Party and their investment.

Neither investors of another Contracting Party nor their investments may have recourse to investor-state arbitration for any matter arising out of paragraph 2 of this Article.

C. DEFINITIONS RELATED TO MONOPOLIES AND STATE ENTERPRISES

1. "Delegation" means a legislative grant, and a government order directive or other act transferring to the monopoly or state enterprise, or authorising the exercise by the monopoly or state enterprise of, governmental authority.

2. "Designate" means to establish, designate or authorise, or to expand the scope of a monopoly to cover an additional good or service, after the date of entry into force of this agreement.

3. "Monopoly" means an entity, including a consortium or government agency, that in any relevant market in the territory of a Contracting Party is designated as the sole provider or purchaser of a good or service, but does not include an entity that has been granted an exclusive intellectual property right solely by reason of such grant or "Monopoly" means any person, public and private, designated by a national or local government authority as the sole supplier or buyer of a good or service in a given market in the territory of a Contracting Party.

4. "Relevant market" means the geographical and commercial market for a good or service.

5. "Non-discriminatory treatment" means the better of national treatment and most favoured nation treatment, as set out in the relevant provisions of this Agreement.

6. "State enterprises" means, an enterprise owned, or controlled through ownership interest, by a Contracting Party.

EXCEPTIONS FOR CERTAIN STATES

The provisions contained under "A." Monopolies" and "B. State Enterprises" above, shall not bind Contracting Parties, where their statutory provisions conflict with aforesaid provisions.

EXPLANATORY NOTE:

In countries, where, there is extensive statutory regulation of business, it may be necessary to examine the implications of the obligations so undertaken, regarding investment so that there is no conflict between the statutory framework and the obligations under the multinational agreements on investments.

Hence, the need for the matter under "EXCEPTIONS FOR CERTAIN STATES", suggested in this draft.

ARTICLE

1. The Contracting Parties confirm that Article XX (on National Treatment and MFN) applies to the granting of investment incentives.

2. The Contracting Parties acknowledge that, in certain circumstances, even if applied on a non-discriminatory basis, investment incentives may have distorting effects on the flow of capital and investment decisions. Any Contracting Party which considers that its investors or their investments are adversely affected by an investment incentive adopted by another Contracting Party and having a distorting effect, may request consultations with that Contracting Party. The former Contracting Party may also bring the incentive before the Parties Group for its consideration.

3. In order to further avoid and minimise such distorting effects and to avoid undue competition between Contracting Parties in order to attract or retain investments, the Contracting Parties shall enter into negotiations with a view to finalising further arrangements [within three years] after the signature of this Agreement. These negotiations shall recognise the role of investment incentives with regard to the aims of policies, such as regional, structural, social, environmental or R&D policies of the Contracting Parties, and other work of a similar nature undertaken in other fora. These negotiations shall in particular, address the issues of positive discrimination, transparency, standstill and rollback.

4. For the purpose of this Article, an "investment incentive" means:

The grant of a specific nature arising from public expenditure, being any expenditure in connection with the establishment, acquisition, expansion, management, operation or conduct of a investment of a Contracting Party or a non-Contracting Party in its territory.

# Part VII. CORPORATE ENTERPRISES: SENIOR MANAGERS

No Contracting Party may require that an enterprise in the territory of that Party, which is an investment of an investor of another Contracting Party, shall appoint, to senior managerial positions in that enterprise, individuals of any particular nationality. An exception to this obligation shall, however, be permissible where such a requirement, is considered necessary, having regard to the following considerations:

(a) the technical or financial or other participation in the enterprise, contributed by the Contracting Party, or by any Corporation, authority or agency owned or controlled by the Government in the Contracting State; or

(b) some compelling, economic or political interest of the Contracting Party.

EXPLANATORY NOTE:

The draft is self-explanatory.

# Part VIII. APPLICABLE LAW

1. Except as otherwise provided in this Agreement, all investments shall be governed by the laws in force in the territory of the Contracting Party in which such investments are made.

2. Notwithstanding paragraph 1 of this Article, nothing in this Agreement precludes the host Contracting Party from taking action for the protection of its essential security interests or in circumstances of extreme emergency in accordance with its laws normally and reasonably applied on a non-discriminatory basis.

EXPLANATORY NOTE:

The above provision, could become useful in certain situations. (compare Article 12, Government of India model text).

# Part IX. INVESTMENT PROTECTION: GENERAL TREATMENT

1.1. (a) Each Contracting Party shall accord, to investments (in its territory) of investors of another Contracting State, fair and equitable treatment and full and constant protection and security, including such treatment, protection and security in respect of the operation, management, maintenance, use, enjoyment or disposal of such investment.

(b) In no such case shall a Contracting Party accord, to such investments, treatment or protection that is less favourable than that required by customary international law.

EXPLANATORY NOTE:

The draft is self-explanatory.

International Investment Instruments: A Compendium

EXPROPRIATION AND COMPENSATION

2.1 A Contracting Party shall not expropriate or nationalise directly or indirectly an investment in its territory of an investor of another Contracting Party or take any measure or measures having equivalent effect (hereinafter referred to as "expropriation"") except :

(a) for a purpose which is in the public interest;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law; and

(d) accompanied by payment of prompt, adequate and effective compensation in accordance with Articles 2.2 to 2.5 below.

2.2 Compensation shall be paid without delay.

2.3 Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriation occurred. The fair market value shall not reflect any change in value occurring because the expropriation had become publicly known earlier.

2.4 Compensation shall be fully realisable and freely transferable.

2.5 Compensation shall include interest at a commercial rate established on a market basis for the currency of payment from the date of expropriation until the date of actual payment.

2.6 Due process of law includes, in particular, the right of an investor of a Contracting Party which claims to be affected by expropriation by another Contracting Party to prompt review of its case, including the valuation of its investment and the payment of compensation in accordance with the provisions of this article, by a judicial authority or another competent and independent authority of the latter Contracting Party.

2.7 For the purpose of deciding whether expropriation by a Contracting Party is for a purpose which is in the public interest within the meaning of clause (a) of Article 2, it shall be permissible to use the following as persuasive (though not binding)

material, namely:

(a) statutory precedents in the Contracting Party (in whose territory the investment is situated), providing for expropriation of any property, undertaking or assets;

(b) judicial decisions relevant to the concept of public purpose or analogical concepts in the context of expropriation of any property, undertaking or assets."

EXPLANATORY NOTE:

2. EXPROPRIATION AND COMPENSATION

Paragraph 2.1 to 2.6 deal with expropriation and compensation. The main emphasis is on compensation or expropriation or nationalisation of investments. The most important article is Article 2.1, which provides that expropriation must be:

(a) for a purpose which is in the public interest;

(b) on a non-discriminatory basis;

(c) in accordance with due process of law; and

(d) accompanied by prompt, adequate and effective compensation. The meaning of "due process of law" (required under Article 2.1) is spelt out in paragraph 2.6.

The concept of "public purpose", is generally regarded as an essential ingredient of the validity of acquisition of property by the Government. In India, this is, for example, an essential requirement for acquiring land under the Land Acquisition Act, 1894. In fact, (leaving aside enactments of the land), from the wider perspective of constitutional law also, it is implicit that acquisition of the property of a citizen by the State can be ordered only for a public purpose. In India also, though Article 31 of the Constitution was deleted by a later amendment, the requirement of public purpose for acquisition of property still continues according to general thinking on the subject.

Further, it needs to be mentioned that in India, case law as to "public purpose" (in the context of acquisition of land etc.) is highly rich in its content and fairly prolific in its volume and variety. A number of nice points which could not be conveniently incorporated in the statutory language have been settled by the case law. It seems desirable to provide, in the draft agreement under consideration, that such law shall have persuasive value for interpreting an agreement like the MAT Agreement. It may also be mentioned that in practice, law officers who have to advise the Government or a Government corporation in connection with an acquisition, or who have to draft or scrutinise proposed legislation involving acquisition of property, usually study and follow the Indian case law on the subject.

It is proper that the benefit of the extensive case law on the subject should not be lost and that such case law should be regarded as relevant, for the purpose of interpreting the MAI Agreement also.

Accordingly, it is suggested that, Article 2.7 should be incorporated as proposed in this draft.

3. PROTECTION FROM STRIFE

3.1 An investor of a Contracting Party which has suffered losses relating to its investment in the territory of an another Contracting Party due to war or other armed conflict, state of emergency, revolution, insurrection, civil disturbance, or any other similar event in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party, as regards restitution, indemnification, compensation or any other settlement, treatment no less favourable than that which it accords to its own investors or to investors of any third State, whichever is most favourable to the investor.

3.2 Notwithstanding Article 3.1, an investor of a Contracting Party which, in any of the situations referred to in that paragraph, suffers a loss in the territory of another Contracting Party resulting from:

(a) requisitioning of its investment or part thereof by the latter's forces or authorities, or

(b) destruction of its investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation, shall be accorded by the latter Contracting



Party restitution or compensation which in either case shall be prompt, adequate and effective and, with respect to compensation, shall be in accordance with Articles 2.1 to 2.5.

4, TRANSFERS

4.1 Each Contracting Party shall ensure that all payments relating to an investment, in its territory, of an investor of another Contracting Party may be freely transferred into and out of its territory without delay. Such transfer shall include, in particular, though not exclusively:

(a) the initial capital and additional amounts to maintain or increase an investment; (b) returns;

(c) payments made under a contract, including a loan agreement; (d) proceeds from the sale or liquidation of all or any part of an investment;

(e) payments of compensation under Articles 2 and 3;

( payments arising out of the settlement of a dispute;

(g) earnings and other remuneration of personnel engaged from abroad in connection with an investment.

4.2 Each Contracting Party shall further ensure that such transfers may be made in a freely convertible currency. [Freely convertible currency which is widely traded in international foreign exchange markets and widely used in international transactions.] or [Freely convertible currency means a currency which is, in fact, widely used to make payments for international transactions and is widely traded in the principal exchange markets].

4.3 Each Contracting Party shall also further ensure that such transfers may be made at the market rate of exchange prevailing on the date of transfer.

4.4 In the absence of a market for foreign exchange, the rate to be used shall be the most recent exchange rate for conversion of currencies into Special Drawing Rights.

4.5 Notwithstanding Article 4.1 (b) above, a Contracting Party may restrict the transfer of a return in kind in circumstances where the Contracting Party is permitted under the GATT 1994 to restrict or prohibit the exportation or the sale for export of the product constituting the return in kind. Nevertheless, a Contracting Party shall ensure that transfers of returns in kind may be effected as authorised or specified in an investment agreement, investment authorisation, or other written agreement between the Contracting Party and an investor or investment of another Contracting Party.

4.6 Notwithstanding Articles 4.1 to 4.5, a Contracting Party may require reports of transfers of currency or other monetary instruments and ensure the satisfaction of judgements in civil, administrative and criminal proceedings through the equitable, non-discriminatory, and good faith application of its laws and regulations. Such requirements shall not unreasonably impair or derogate from the free and undelayed transfer ensured by this Agreement.

5. SUBROGATION

5.1 Ifa Contracting Party or its designated agency makes a payment under a indemnity, guarantee or contract of insurance given in respect of an investment of an investor in the territory of another Contracting Party, the latter Contracting Party shall recognise the assignment of any right or claim of such investor to the former Contracting Party or its designated agency and the right of the former Contracting Party or its designated agency to exercise, by virtue of subrogation, any such right and claim to the same extent as its predecessor in title.

5.2 A Contracting Party shall not assert as a defence, counterclaim, right of set-off or for any other reason, that indemnification or other compensation for all part of the alleged damages has been received or will be received pursuant to an indemnity, guarantee or insurance contract.

6. PROTECTING EXISTING INVESTMENTS

This Agreement shall apply to investments made prior to its entry into force for the Contracting Parties concerned and would be consistent with the legislation of the Contracting Party in whose territory it was made as well as investments made thereafter. This Agreement shall not apply to claim arising out of events which occurred, or to claims which had been settled, prior to its entry into force. Or this Agreement shall apply to investments existing at the time of entry into force as well as to those established or acquired thereafter.

7. PROTECTING INVESTOR RIGHTS FROM OTHER AGREEMENTS Substantive Approach-Inclusive Respect Clause

Each Contracting Party shall observe any obligation it has entered into with regard to a specific investment of a national of another Contracting Party.

Procedural Approach-Limited Scope Dispute Settlement Clause

An investor of another Contracting Party may submit to arbitration in accordance any investment dispute arising under the

provisions of this Agreement or concerning any obligation which the Contracting Party has entered into with regard to a specific investment of the investor through:

(a) an investment authorisation granted by its competent authorities specifically to the investor or investment, or

(b) a written investment agreement or contract granting rights with respect to natural resources or other assets or economic activities controlled by the national authorities, and on which the investor has relied in establishing, acquiring, or significantly expanding an investment.

# Part X. DISPUTE SETTLEMENT: STATE-STATE PROCEDURES
# A. GENERAL PROVISIONS

1. The rules and procedures set out in Articles A-C shall apply to the avoidance of conflicts and the resolution of disputes between Contracting Parties regarding the interpretation or application of the Agreement, unless the disputing parties agree to apply other rules or procedures. However, the disputing Parties may not depart from any obligation regarding notification of the Parties Group and the right of Parties to present views, under Article B, paragraphs [1.a and 3.c], and Article C, paragraphs 1.a, 1c, and 4.e.

Contracting Parties and other participants in proceedings shall protect any confidential or proprietary information which may be revealed in course of proceedings under Articles B and C and which is designated as such by the Party providing the information. Contracting Parties and other participants in the proceedings may not reveal such information without written authorisation from the Party which provided it.

B. CONSULTATION, CONCILIATION AND MEDIATION

1, CONSULTATION

(a) One or more Contracting Parties may request any other Contracting Party to enter into consultations regarding any dispute about the interpretation or application of the Agreement.9

The request shall be submitted in writing and shall provide sufficient information to understand the basis for the request, including identification of the measures at issue. The requesting Party shall promptly enter into consultations. The requesting Contracting Party [may ][shall]notify the Parties Group of the request for consultation.

(b) A Contracting Party may not initiate arbitration against another Contracting Party under Article C of this Agreement, unless the former Contracting Party has requested consultation and has afforded that other Contracting Party a consultation period of no less than 60 days after the date of the receipt of the request.

2. MULTILATERAL CONSULTATIONS

(a) In the event that consultations under paragraph 1 of this Article, have failed to resolve the dispute within 50 days after the date of receipt of the request for those consultations, [either Contracting Party in dispute] [the Contracting Parties in dispute, by Agreement] may request the Parties Group to consider the matter.

(b) Such request shall be submitted in writing and shall give the reason for it, including identification of the measures at issue, and shall indicate the legal basis for the complaint.

(c) The Parties Group may only adopt clarifications on issues of law and on the provisions of the agreement that have been raised by [one on the Parties in dispute, in accordance with Article [Article which will allow the Parties Group to adopt clarifications in accordance with a procedure to be defined]. The Parties Group shall conclude its deliberations within [60] days after the date of receipt of the request.

(d) In the event that a dispute is submitted to the Parties Group, none of the Contracting Parties shall submit the case to the arbitral tribunal before the expiration of the period delay mentioned in the paragraph C.

3. MEDIATION OR CONCILIATION

If the Parties are unable to reach a mutually satisfactory resolution of a matter through consultations, they may have recourse to good offices, including those of the Parties Group, or to mediation or conciliation under such rules and procedures as they may agree.

4. CONFIDENTIALITY OF PROCEEDINGS, NOTIFICATION OF RESULTS

(a) Proceedings involving consultations, mediation or conciliation shall be confidential.

(b) No Contracting Party may, in any binding legal proceedings, invoke or rely upon any statement made or position taken by another Contracting Party in consultations, conciliation or mediation proceedings initiated under this Agreement.

(c) The Parties to consultations, mediation, or conciliation under this Agreement shall inform the Parties Group of any mutually agreed solution.

ARBITRATION

1. SCOPE AND INITIATION OF PROCEEDINGS

(a) Any dispute between Contracting Parties concerning [the interpretation or application of] this Agreement shall, at the request of any Contracting Party that is a Party to the dispute and has complied with the consultations requirements of Article B, be submitted to an arbitral tribunal for binding decision. A request, identifying the matters in dispute, shall be delivered to the other Party through diplomatic channels, [unless a Contracting Party has designated another channel for notification and so notified the Depositary10 and a copy of the request shall be delivered to the Parties Group.

(b) A Contracting Party may not initiate proceedings under this Article for a dispute which its investor has submitted, or consented to submit, to arbitration under Article D, unless the other Contracting Party has failed to abide by and comply with the award rendered in that dispute.

2, FORMATION OF THE TRIBUNAL

(a) Within 30 days after receipt of a request for arbitration, each Party or, in the event there is more than one requesting Party, each side to the dispute shall appoint one member of that tribunal. Within 30 days after their appointment, the two members shall, in consultation with the Parties in dispute, select a national of a third State who will be Chairman of the tribunal. At the option of any Party or side, two additional members may be appointed, one by each Party or side.

(b) If the necessary appointments have not been made within the periods specified in subparagraph (a) above, either Party or side to the dispute may, in the absence of any other agreement, invite the Secretary General of the Centre of the Settlement of Investment Disputes to make the necessary appointments. The Secretary General shall do so, as far as possible, in consultations with the Parties and within thirty days after receipt of the request.

(c) Parties and the [Secretary General] [Parties Group Secretariat] should consider appointment, to the tribunal, of members of a roster of highly qualified individuals, willing and able to serve on arbitral tribunals under this Agreement, nominated by the Contracting Parties. If arbitration of a dispute requires special expertise on the tribunal, rather than solely through expert advice under the rules governing the arbitration, the appointments of individuals possessing expertise not found on the roster should be considered. Each Contracting Party should nominate up to (four) members of the tribunal roster. Nominations are valid for the renewable terms of five years.

(d) Any vacancies which may arise in a tribunal shall be filled by the procedure by which the original appointment has been made.

(e) Members of a particular arbitral tribunal shall be independent and impartial.

3. JOINDER/CONSOLIDATION

(a) Contracting Parties in dispute with the same Contracting Party over the same matter should act together, as far as practicable, for purposes of dispute settlement under this Article. Where more than one Contracting Party requests the submission to an arbitral tribunal of a dispute with the same Contracting Party relating to the same measure, the disputes shall, if feasible, be considered by a single arbitral tribunal.

(b) To the extent feasible, if more than one arbitral tribunal is formed, the same persons shall be appointed as members of both and the time tables of the proceedings shall be harmonised.

4. THIRD PARTIES

Any Contracting Party wishing to do so shall be given an opportunity to present its views to the arbitral tribunal on the issues in dispute. The tribunal shall establish the deadlines for such submissions in light of the schedule of the proceedings and shall notify such deadlines, at least thirty days in advance thereof, to the Parties Group.

5. PROCEEDINGS AND AWARDS

(a) The arbitral tribunal shall decide disputes in accordance with this Agreement, or interpreted and applied in accordance

with the applicable rules of international law.

(b) The tribunal may, at the request of a Party, recommend provisional measures which either Party should take to avoid serious prejudice to the other pending its final award.

(c) The tribunal shall render an award, setting out its findings of law and fact and its decision on the question whether the relevant measures are inconsistent with the agreement together with its reasons therefor, and may, at the request of a Party, award the following forms of relief :

(i) a declaration that a measure of a Party is incompatible or a Party has failed to comply with its obligations under this Agreement;

(ii) | a recommendation that a Party should bring its measures into conformity with the Agreement:

(ii) pecuniary compensation; and

(iv) any other form of relief to which the Party against whom the award is made consents, including restitution in kind.

(d) The tribunal shall draft its award consistently with the requirement of confidentiality set out in Article A, paragraph 2 and the requirements of subparagraph (e), below. It shall issue its award in provisional form to the Parties to the dispute, as a general rule within [180] days after the date of formation of the tribunal. The Parties to the dispute may, within [15] [30] days thereafter, submit written comment upon any portion of it. The tribunal shall consider such submissions, may solicit additional written comments of the Parties, and shall issue its final award within [15] days after closure of the comment period.

(e) The tribunal shall promptly transmit a copy of its final award to the Parties Group, as a publicly available document.

(f) Tribunal awards shall be final and binding between the Parties to the dispute unless the Parties Group, otherwise decides within thirty days after receipt of a copy of the award].

(g) Each Party shall pay the cost of its representation in the proceedings. The costs of the tribunal shall be paid for, equally by the Parties unless the tribunal directs that they be shared differently. Fees and expenses payable to tribunal members will be subject to schedules established by the Parties Group and in force at the time of the constitution of the tribunal.

6. DEFAULT RULES

The [UNCITRAL arbitration rules] shall apply to supplement provisions of these Articles. 12

7. ENFORCEMENT OF AWARDS

(a) In the event of non-compliance with an award of an arbitral tribunal, the Contracting Party in whose favour it was issued may raise the matter in the Parties Group. The Parties Group shall endeavour to bring about compliance. It may, by consensus minus the defaulting Party, suspend the non-complying Party's right to participate in decisions of the Parties Group.

(b) Possible exhaustive list of permitted countermeasures-no draft provided.

(c) Possible procedural safeguards on resort to countermeasures-no draft provided.

# Part XI. DISPUTE SETTLEMENT INVESTOR-STATE AND STATE-INVESTOR PROCEDURES DISPUTES BETWEEN AN INVESTOR AND a CONTRACTING PARTY

1. SCOPE AND STANDING

(a) This article applies to disputes between a Contracting Party and an investor of another Contracting Party, concerning an alleged breach of an obligation of the former under this Agreement which causes, or is likely to cause loss or damage to the investor or- his investment.

(b) It also applies to disputes between a Contracting Party and an investor of an another Contracting Party, concerning an alleged breach of any obligations of such investor under this Agreement or under legislation enacted by the first mentioned Contracting Party, on a subject matter covered by this Agreement, which causes or is likely to cause loss or damage to the interests of the first mentioned Contracting Party. 13 14

2. MEANS OF SETTLEMENT

Such a dispute should, if possible, be settled by negotiation or consultation. If it is not so settled, the Claimant may choose to submit it for resolution:

(a) to the Competent Courts or administrative tribunals of a Contracting Party to the dispute [or of the investor, as the case may be;

(b) in accordance with any applicable previously agreed dispute settlement procedure; or

(c) by arbitration in accordance with this Article, under:

(i) the Convention on the Settlement of Investment Disputes between States and Nationals of other States (the "ICSID Convention"), if the ICSID Convention is applicable;

(ii) the Additional Facility Rules of the Centre of Settlement of Investment Disputes ("ICSID Additional Facility"), if the ICSID Additional Facility is applicable;

(iii) the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL), [if neither the ICSID Convention nor the ICSID Additional Facility is applicable]15 [Provided that the venue of arbitration under paragraph 2 (c) shall be in the Contracting State in every case]. 16

By submitting a dispute to arbitration in accordance with this Article under paragraph 2 (c), the investor consents to the application of all provisions of this Article, 17

3. CONTRACTING PARTY CONSENT

(a) Subject only to paragraph 3 (b), each Contracting Party hereby gives its unconditional consent to the submission of a dispute to international arbitration in accordance with the provisions of this Article.

(b) A Contracting Party may, by notifying the Depository upon deposit of its instrument of ratification or accession, provide that its consent given under paragraph 3 (a) applies only on the condition that the investor and the investment waive the right to initiate any other dispute settlement procedure with respect to the same dispute and withdraw from any such procedure in progress before its conclusion. A Contracting Party may, at any time, reduce the scope of that limitation by notifying the Depositary.

4. TIME PERIODS AND NOTIFICATION

A claimant may submit a dispute for resolution, pursuant to paragraph 2(c) of this Article, after (ninety) days following the date on which notice of intent to do so was received by the opposite party, but no later than (six) years from 18 the date the claimant first acquired (or should have acquired) knowledge of the events which give rise to the dispute. Notice of intent, a copy of which shall be delivered to the Parties Group, shall specify:

(a) the name and address of the claimant;

(b) the name and address, if any, of the investment;

(c) the provisions of this Agreement alleged to have been breached and any other relevant provisions;

(d) the issues and the factual basis for the claim; and

(e) the relief sought, including the approximate amount of any damages claimed.

5. WRITTEN AGREEMENT OF THE PARTIES

The consent given by the Contracting Party in subparagraph 3 (a), together with either the written submission of the dispute to resolution by the investor pursuant to subparagraph 2 (c) or the investor's advance written consent to such submission, shall constitute the written consent and the written agreement, of the Parties to the dispute, to its submission for settlement for the purposes of Chapter II of the ICSID Convention, the ICSID Additional Facility Rules, Article 1 of the UNCITRAL Arbitration Rules and Article II of the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention").

6. APPOINTMENTS TO ARBITRAL TRIBUNALS

(a) Unless the Parties to the dispute otherwise agree, the arbitral tribunal shall comprise three arbitrators, one appointed by each of the disputing Parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing

Parties.

(b) If a tribunal has not been constituted within 90 days after the date that a claim is submitted to arbitration, the arbitrator or arbitrators not yet appointed shall, on the request of either disputing party, be appointed by the appointing authority. For arbitration under paragraph 2, subparagraphs C(i), C(ii), and C(iii), and paragraph 8, the appointing authority shall be the Secretary General of ICSID.

(c) The parties to a dispute submitted to arbitration under this article and the appointing authority should consider the appointment of:

(i) members of the roster maintained by the Contracting parties pursuant to Article C, paragraph 2 (c), and

(ii) individuals possessing expertise not found on the roster, if arbitration of a dispute requires special expertise on the Tribunal, rather than solely through expert advice under the rules governing the arbitration.

(d) The appointing authority shall, as far as possible, carry out its function in consultation with the Parties to the dispute.

(e) In order to facilitate the appointment of arbitrators of the Parties' nationality on three member ICSID Tribunals under Article 39 of the ICSID Convention and Article 7 of Schedule C of the ICSID Additional Facility Rules, and without prejudice to each party's right independently to select an individual for appointment as arbitrator or to object to an arbitrator on ground other than nationality:

(i) the disputing Contracting Party agrees to the appointment of each individual member of a tribunal under paragraph 2 (c) (i) or (ii) of this Article; and

(ii) a disputing investor may initiate or continue a proceeding under paragraph 2 (c)(i) or (ii) only on condition that the investor agrees in writing to the appointment of each individual member of the tribunal. 19

7. STANDING OF THE INVESTMENT

An enterprise which is constituted or organised under the law of a Contracting party but which, from the time of the events giving rise to the dispute until its submission for resolution under paragraph 2 (c), was an investment of an investor of another Contracting Party, shall not, for the purposes of disputes concerning that investment, be considered "an investor of another Contracting Party" under this Article or "a national of another Contracting Party State" for purposes of Article 25 (2) (b) of the ICSID Convention.20

8. INDEMNIFICATION

A disputing party shall not:

(a) as a defence, counter claim or right of setoff, or

(b) in any other manner assert that indemnification or other compensation for all or part of the alleged damages has been received or will be received by the claimant, pursuant to a contract of indemnity, guarantee or insurance.

9. THIRD PARTY RIGHTS

The arbitral tribunal (on the request of a Contracting Party, which is not a party to the dispute) give to that party (after hearing the parties on such request) an opportunity to present its views on the legal issues in dispute.

10. APPLICABLE LAW

An arbitral tribunal established under this Article shall decide the issue in dispute in accordance with this Agreement, interpreted and applied in accordance with:

(i) the law agreed upon by the parties; or

(ii) absent such agreement, the law of the Contracting Party (including its rules on the conflict of laws) and such rules of law as may be applicable.21

11. INTERIM MEASURES OF RELIEF

(a) An arbitral tribunal established under this Article may (order or)22 recommend an interim measure of protection to preserve the rights of disputing party or to ensure that the Tribunal's Jurisdiction is made fully effective, including an order to preserve evidence in the possession of control of a disputing Party. A Tribunal may recommend the non-application of the measure alleged to constitute the breach of obligation subject to the dispute.

(b) The seeking, by a party to a dispute submitted to arbitration under this Article, of interim relief not involving the payment of damages, from judicial or administrative tribunals, for the preservation of its rights and interest pending resolution of the dispute, is not deemed a submission of the dispute for resolution for the purposes of a Contracting Party's limitation of consent under paragraph 3 (b) and is permissible in arbitration under any of the provisions of paragraph 2 (c).

12, FINAL AWARDS AND RELIEF TO BE GRANTED BY THE AWARD

(a) An arbitration award may provide the following forms of relief:

(i) a declaration of the legal rights and obligations of the parties;

(ii) compensatory monetary damages, which shall include interest from the time-(of the award) (the loss or damage was incurred) until time of payment;

(iii) restitution in kind in appropriate cases, provided that the party against whom it is awarded may pay monetary damages in lieu thereof where restitution is not practicable; and

(iv) with the agreement of the parties to the dispute, any other form of relief.

(b) An arbitration award shall be final and binding between the parties to the dispute and shall be carried out without delay by the Party against whom it is issued, subject to its post-award rights. 24

(c) The award shall be drafted consistently with the requirements of paragraph 14 and shall be a publicly available document. A copy of the award shall be delivered to the Parties Group by the Secretary General of ICSID, for an award under the ICSID Convention or the Rules of the ICSID Additional Facility; and by the tribunal for an award under the UNCITRAL Rules.

13.A. MODIFICATION OF RULES

Parties to the dispute have the freedom to agree on modifications of the rules of procedure contained in this Article, paragraphs 9, 10, and 12. 25

13.B PRELIMINARY OBJECTIONS

(i) Any objection by a disputing Party to the jurisdiction of the Tribunal or to the admissibility of the application, or other objection the decision upon which is requested before any further proceedings on the merits, shall be made in writing within 15 days after the appointment of the Tribunal.

(ii) Upon receipt by the Tribunal of a preliminary objection, the proceedings on the merits shall be suspended.

(iii) After hearing the Parties, the Tribunal shall give its decision, by which it shall either uphold the objection or reject it. The decision should ordinarily be given within 60 days after the date on which the objection was made.26

14. CONFIDENTIAL AND PROPRIETARY INFORMATION

Parties and other participants in proceedings shall protect any confidential or proprietary information which may be revealed in the course of the proceedings and which is designated as such by the party providing the information. They shall not reveal such information without written authorisation from the Party which provided it (except where such revelation is compelled by the applicable law)

15. PLACE OF ARBITRATION AND ENFORCEABILITY OF AWARDS

(a) Any arbitration under this Article shall be held in a State that is party to the New York Convention;

(b) Claims submitted to arbitration under this Article shall be considered to arise out of a commercial relationship or transaction for the purposes of Article 1 of the New York Convention;

(c) Each Contracting Party shall recognise an award rendered pursuant to this Agreement as binding and shall enforce the pecuniary obligations imposed by that award, as if it were a final judgement of its courts.27

(d) Paragraph 15(a) shall be subject to the right conferred on the Contracting State by paragraph 2, proviso. 28

16. TRIBUNAL MEMBER FEES

Fees and expenses payable to a member of an arbitral tribunal established under these Articles will be subject to schedules established by the Parties Group and in force at the time of the constitution of the tribunal.

17, COLLECTION OF STATES

For the purposes of paragraph 1 (b) of this Article, the expression "Contracting State" shall include more than one Contracting State so as to entitle any Contracting State to claim damages in accordance with that paragraph.29

18. CO-OPERATION

It shall be the duty of every Contracting Party, even if it is not a party to the dispute, to render all possible assistance, so as to make implementation of the provisions of this Article effective to the maximum extent possible.30

19. CLASS ACTIONS Nothing in this Article shall be construed as excluding, restricting or modifying the right of any group of persons in a Contracting State to bring appropriate proceedings (including a class action) for any conduct for which such proceedings are available under the applicable law.

EXPLANATORY NOTE:

In view of recent trends in certain countries regarding class actions, it is considered desirable to have specific provisions on the subject.

20. EFFECT OF NON-COMPLIANCE

Without prejudice to the provisions of paragraph 13 above, non-compliance by a party with an award shall be deemed to constitute an independent breach of this agreement.

EXPLANATORY NOTE:

The provision is self-explanatory. VI. EXCEPTIONS

GENERAL EXCEPTIONS

1. This Article shall not apply to Articles-(on expropriation and compensation and protection from strife).

2. Nothing in this Agreement shall be construed:

(a) to prevent any Contracting Party from taking any action [which it considers] necessary for the protection of its essential security interests [including those]:

(i) taken in time of war, [or] armed conflict, [or other emergency in international relations];

(ii) relating to the implementation of national policies or international agreements respecting the non-proliferation [inter alia] of nuclear weapons or other nuclear explosive devices;

(iii) relating to the production of arms and ammunition.

(b) to require any Contracting Party to furnish or allow access to any information the disclosure of which [it considers] [would be] contrary to its essential security interests or to the maintenance of public order.31

(c) to prevent any Contracting Party from taking any action in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

3. Nothing in this Agreement shall be construed to prevent any Contracting Party from taking any action necessary for the maintenance of public order.

4. Paragraphs 2 and 3 may not be invoked by a Contracting Party as a means to evade its obligations under this Agreement.

5. Actions taken pursuant to this Article shall be notified to the Parties Group in accordance with Article of this Agreement.

EXPLANATORY NOTE:

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GENERAL EXCEPTIONS

It is thought that besides security, "public order" should also be mentioned here because there is need to allow a special provision where the information demanded is such that its disclosure may impair public order without impairing security of the nation as a whole.

6. If a Contracting Party (the "requesting Party") has reason to believe that actions taken by another Contracting Party (the

"other Party" are not in conformity with [Article] [paragraphs -], it may request consultations with that other Party. That other arty shall promptly enter into consultations with the requesting Party and shall provide information to the requesting Party regarding the actions taken and the reasons therefor.

# Part XII. RELATIONSHIP TO OTHER AGREEMENTS: NON-DEROGATION

f the provisions of the Constitution or_laws of a Contracting Party or the obligations of a Contracting Party under an international agreement or customary international law, entitle the investors of other Contracting Parties or their investments to a treatment more favourable than that provided for by the present agreement, then nothing in this agreement shall be construed to derogate from such entitlement to the extent that it is more favourable than the present agreement.

# Part XIII. IMPLEMENTATION AND OPERATION

THE PREPARATORY GROUP 32

1. There shall be a Preparatory Group comprised of the Signatories to Agreement.

2. The Preparatory Group shall:

(a) prepare for entry into force of the Agreement and the establishment of the Parties Group;

(b) conduct discussions with non-signatory to the final Act;

(c) conduct negotiations with interested non-signatories to the Final Act and make decisions on their eligibility to become a Contracting Party; and

(d) .....

3. The Preparatory Group shall elect a Chairperson, who shall serve in a personal capacity. Meetings shall be held at intervals to be determined by the Preparatory Group. The Preparatory Group shall establish its rules and procedures.

4. Subject to paragraph 5, the Preparatory Group shall make decisions by consensus. Such decisions may include to adopt a different voting rule for a particular question or category of questions. A signatory may abstain and express a differing view without barring consensus.

5. However, where a decision cannot be reached by consensus, the decision shall be made by a majority comprising two-thirds of the Signatories.

THE PARTIES GROUP

1. There shall be Parties Group comprised of the Contracting Parties. 2. The Parties Group shall facilitate the operation of this Agreement. To this end, it shall:

(a) carry out the functions assigned to it under this Agreement;34

(b) at the request of a Contracting Party, clarify the interpretation or application of this Agreement;

(c) consider any matter that may affect the operation of this Agreement; and

(d) take such other actions as it deems necessary to fulfil its mandate.

3. In carrying out the functions specified in paragraph 2, the Parties Group may consult government and non-governmental organisations or persons.

4. The Parties Group shall elect a Chair, who shall serve in a personal capacity. Meetings shall be held at intervals to be determined by the Parties Group. The Parties Group shall establish its rules and procedures.

5. Subject to paragraph 6, the Parties Group shall make decisions by consensus. Such decisions may include a decision to adopt a different voting rule for a particular question or category of questions. A Contracting Party may abstain and express a differing view without barring consensus.

6. However, where a decision cannot be reached by consensus:

(a) decisions on budgetary matters shall be made by a two-thirds majority of Contracting Parties whose assessed contributions represent, in combination, at least two-thirds of the total assessed contributions specified therein; and

(b) decisions on accession and other matters shall be made by a [two-thirds] majority of the Contracting Parties.35

7. The Parties Group shall be assisted by a Secretariat.

8. Parties Group and Secretariat costs shall be borne by the Contracting Parties as approved and apportioned by the Parties Group.36

## APPENDIX I: ENVIRONMENTAL PROTECTION

1. Environmental Impact Analysis

The foreign investor shall provide an Environmental Impact Analysis of the proposed project, including:

(a) a list of all raw materials, intermediates, products, and wastes (with flow diagram);

(b) a list of all occupational health and safety standards and environmental standards (wastewater effluent releases, atmospheric emission rates for all air pollutants, detailed description and rate of generation of solid wastes or other wastes to be disposed of on land or by incineration);

(c) a plan for control of all occupational health and safety hazards in plant operation, storage and transport of potentially hazardous raw materials, products and wastes;

(d) a copy of corporation guidelines of the foreign investor for conducting environmental and occupational health and safety impact analysis for new projects ;

(e) the manufacturer's safety data sheets on all substances involved.

2. Plant Performance

The foreign investor shall provide complete information on locations, ages and performance of existing plants and plants closed within the past 5 years in which the foreign investor has partial or full ownership, where similar processes and products are used, including:

(a) a list of all applicable occupational health and safety standards and environmental standards, including both legal requirements (standards, laws, regulations) and corporate voluntary standards and practices for the control of occupational and environmental hazards of all kinds;

(b) description of all cases of permanent and/or total disability sustained or allegedly sustained by workers, including worker's compensation claims;

(c) explanation of all fines, penalties, citations, violations, regulatory agreements and civil damage claims involving environmental and occupational health and safety matters as well as hazards from or harm attributed to the marketing and transport of the products of such enterprise;

(d) description of the foreign investor's percentage of ownership and technology involvement in each plant location and similar information for other equity partners and providers of technology.

(e) names and addresses of governmental authorities who regulate or oversee environmental and occupational health and safety for each plant location;

(f) explanation of cases where any plant's environmental impact has been the subject of controversy within the local community or with regulatory authorities, including description of practices criticised and how criticism was resolved in such cases;

(g) copies, with summary, of all corporate occupational health and safety and environmental audits and inspection reports for each location, including such audits and reports by consultants;

(h) copies of safety reports, reports of hazards assessment, and risk analysis reports carried out with similar technology by the foreign investor and its consultants;

(i) copies of toxic release forms that have been submitted to government bodies (e.g. within the past 5 tears, for all plant

locations);

(j) any information considered relevant by the foreign investor.

3. Corporate policy

The foreign investor shall submit a statement of corporate policy on health, safety and environmental performance of world wide operations. This must include the corporate policy on laws, regulations, standards, guidelines and practices for new industrial projects and production facilities. The foreign investor shall explain how it is implemented by describing the staff responsible for carrying out this policy, its authority and responsibilities, and its position in the foreign investor corporate structure. Such description will also include the name, address and telephone number of senior corporate management officials in charge of this staff function. The foreign investor shall state whether it follows the same standards world wide for worker and environmental protection in all new projects, and if not, explain why not.

4. Access to facility

The foreign investor shall agree to provide the host country with immediate access to the proposed industrial facility at any time during its operation to conduct inspections, monitor exposure of workers to hazards, and sample for pollution releases.

5. Training

The foreign investor shall agree to fully train all employees exposed to potential occupational hazards, including potential health effects of all exposures and the most effective control measure.

6. Equipment

(a) The foreign investor shall agree to provide the host country with equipment for analysing work place exposure and generation of pollution, for the life time of the proposed project.

(b) The equipment shall include (but shall not be necessarily limited to) maintenance of all limits specified in paragraph 1 b) of this Appendix.

(c) The foreign investor shall agree that the proposed project will pay to the Government of the host country the cost for all medical and exposure monitoring during the lifetime of the proposed project.

7. Compensation

The foreign investor shall agree that the proposed project will fully compensate any person whose health, earning capacity or property is harmed as a result of the occupational hazard and environments of the project, as determined by the Government of the developing country.

8. Marketing safeguards

The foreign investor shall follow marketing safeguards that are as restrictive as the safeguards which it applies anywhere in the world, so as to ensure that workers and members of the public are not harmed as a result of the use of its product.

9. Supervising risk to health or environment

If, at any time after the application for approval of the proposed project is submitted to the host country, the foreign investor becomes aware of a substantial risk of injury to health or to the environment which is likely to arise from a substance which the foreign investor manufactures or sells in the host country, being a risk not known and disclosed at the time of the aforesaid application, then the foreign investor shall agree to immediately notify the environmental protection agency of the Government of the host country, of such risk.

10. Officials

The foreign investor shall provide to the Government of the host country full information regarding:

(a) the names;

(b) designations;

(c) addresses; and

(d) phone and fax numbers,

of its senior corporate officials who are charged for the time being with the implementation of policies relating to the environment, occupational health, occupational safety, including (but not necessarily limited to), the following:

(i) plant design and operations;

(ii) corporate inspections and reviews of plant performance; and

(iii) product stewardship.

EXPLANATORY NOTE:

(i) It is desirable to ensure that a developing country should be able to require foreign investors to submit certain information in connection with the investorâ application to build industrial projects or to conduct mining operations. Principal objects of such requirement will be to protect the environment, safety and health and to ensure high standards of performance.

(ii) Connected with this aspect is the need to ensure that the host country Government will be provided with the equipment needed to protect against workerâ exposure to hazards of health and safety beyond the permissible limits and further to ensure that the release of toxic substances does not exceed permissible limits.

(iii) This would also involve, (where relevant), information about past experience of the foreign investor and other connected matters.

(iv) Finally, leading global corporations have issued their own policy statements on health, safety and environment during recent years and announced that they will meet these requirements world wide. It is convenient to incorporate appropriate obligations on all these matters in the Investment Agreement. The Companies now say that they meet the same high standards world wide that they are required to observe in their own home country. It is considered desirable to have a detailed provision on the subject.

Endnotes:

1. See explanatory note below.

2. See explanatory note below.

3. In paragraph (iv) of the definition of "investment", the words referring to rights associated with land have been included to make the provision comprehensive.

4. See Appendix I-Environmental Protection.

5. Government of India, Model Text, Article 11.

6. In paragraph (under Performance Requirements) the opening words âsubject to the provisions of paragraphs 2 to 7" have been used to bring out the fact that the mandate in paragraph 1 is, in some respects, modified by later paragraphs.

7. See explanatory note below.

8. In paragraph 3 (a) the words âor on any other matter" have been used in order to cover other ctions.

9. The scope of consultations should be no broader than the arbitration and this paragraph should utilise whatever language is ultimately adopted in Article C, paragraph 1. A.

10. Diplomatic channels are the normal channel for notice of State-State disputes. See e.g. Article 2, paragraph 1 of the PCA Optional Rules for Arbitration Disputes between Two States.

11. This proposal is based on the WTO approach. An alternative is found in the investor-state consolidation provision in Article D, paragraph 8, which is NAFTA based.

12. Another option is that of rules of ICSID.

13. Paragraph is considered necessary to enable the Contracting State to claim damages against an investor.

14. As to Collection of States, see paragraph 17, infra.

15. Since only ICSID and ICSID Additional Facility are designed for arbitration between a State and a private party, the UNICTRAL option should be available only if the former are not. The ICC option is not considered convenient for developing countries.

16. The proviso regarding venue is considered necessary in view of financial considerations involved in conducting or defending litigation or arbitration outside the country.

17. This provision, though not strictly necessary could be useful to avoid controversies Provision for multiple claims consolidation is not considered desirable.

18. The period of 6 years appears reasonable.

19. This paragraph, based on NAFTA Article 1125, is intended to assure that a three member panel may include a national of the parties to the dispute, without requiring that each member of the panel be, in fact, chosen by agreement.

20. It is not considered proper to bring the host country to international arbitration at the instance of an organisation constituted under legislation of host country.

21. Compare Article 42, ICSID,

22. ICSID Arbitral Rules contemplate "recommended' interim measures only. UNICTRAL Rules provide for interim measures without characterising them as recommendations. ICC Rules do not provide expressly for interim measure. Proposed provision would theoretically give all arbitral tribunals the same right to order certain interim relief.

23. This final elastic sub-paragraph may provide a means for the parties to work out an award of relief, tailored to the circumstances of the case, which will have legally binding force. It will cover injunction, primitive damages or withdrawal of offending measure.

24. The post-award rights include Section 5 of the ICSID Convention on Interpretation, Revision and Annulment, and the rights of a Party regarding enforcement of awards in national courts.

25. Freedom to the Parties to modify the rules appears to be desirable (paragraph 13. A). Only certain rules mentioned in paragraph 13. A as proposed here will be subject.

26. Paragraph 13, B is intended to incorporate a procedure for preliminary objections.

27. The last sentence would serve to counter potential loopholes under the New York Convention, e.g. it would preclude a Contracting Party from denying enforcement based on limitations in its acceptance of the New York Convention, or on a claim that the subject matter was incapable of settlement by arbitration or that enforcement of the award would be contrary to its public policy.

28. The overriding effect given by proposed paragraph 15 (d) to the choice conferred by paragraph 2, proviso-is necessary for obvious reasons. Paragraph 2, proviso (as proposed) deals with venue.

29. Paragraph 17 appears to be needed, for certain cases.

30. As per suggested paragraph 18, an obligation of co-operation may be needed in some cases.

31. See explanatory note below.

32. The Preparatory Group would be contained in the Final Act.

33. This and any subsequent sub-paragraphs would be necessary, only if there is business that remains unfinished at the conclusion of the negotiations that the negotiators consider should be completed by the Preparatory Group; the further sub-paragraphs would itemise the clean-up tasks to be undertaken by the Preparatory Group.

34. The sub-paragraph 2 (a) refers to any operational functions and any future work as may be specified elsewhere.

35. Further work needs to be done on paragraph 6. This work would include consideration of whether we should draw a line between substantive and procedural questions. If all decisions were required to be made by consensus, paragraph 6 would be deleted.

36. Further work is required on paragraphs 7 and 8, if it is decided that the agreement itself should contain provisions on the initial budgetary principles and formula and on the structure and functions of a Secretariat.

37. See explanatory note below.