



# REGIONAL COURSES IN INTERNATIONAL LAW

Addis Ababa, Ethiopia  
1 - 26 April 2013



## STUDY MATERIALS PART XII

Codification Division of the United Nations Office of Legal Affairs

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- Howard Mann et al., *IISD Model International Agreement on Investment for Sustainable Development: Negotiator's Handbook*, International Institute for Sustainable Development, 2d. ed., 2006
- Nathalie Bernasconi-Osterwalder et al. (eds.), *International Investment Law and Sustainable Development: Key Cases from 2000-2010*, International Institute for Sustainable Development, 2011, p. 178
- Nathalie Bernasconi-Osterwalder et al. (eds.), *Investment Treaties and Why They Matter to Sustainable Development*, International Institute for Sustainable Development, 2012, p. 54

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REGIONAL COURSES  
IN INTERNATIONAL LAW

24 - 25 April 2013

INTERNATIONAL INVESTMENT LAW  
JUDGE JOAN DONOGHUE

Codification Division of the United Nations Office of Legal Affairs

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**JUDGE JOAN E. DONOGHUE**  
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Joan E. Donoghue (United States) has been a Member of the International Court of Justice since 2010.

Before being elected to the Court, Judge Donoghue served for three years as Principal Deputy Legal Adviser of the United States Department of State (the senior career legal position in the U.S. foreign ministry), serving as Acting Legal Adviser of the Department of State for the first six months of the Administration of President Obama. She has also served as Deputy General Counsel of the U.S. Department of the Treasury and has headed a variety of offices within the Office of the Legal Adviser of the United States Department of State, including the offices of Economic and Business Affairs and African Affairs.

In addition, Judge Donoghue has taught international law courses at the University of California, Berkeley (Boalt Hall), Georgetown University and George Washington University. She lectures frequently on international law topics.

In the field of international investment, Judge Donoghue has participated in the negotiation and interpretation of bilateral and multilateral treaties and in the application of national laws related to investment. She has participated in the settlement of disputes between states and investors, serving both as a representative of a government and as an arbitrator.

Judge Donoghue is a member of the Executive Council of the American Society of International Law and is Counselor for the American Law Institute's Fourth Restatement of the Foreign Relations Law of the United States.

**INTERNATIONAL INVESTMENT LAW**  
**JUDGE JOAN DONOGHUE**

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**Legal writings (only available in electronic format)**

A. *UNCTAD Series on Issues in International Investment Agreements (“Pink Series”)*:

7. *International Investment Agreements: Key Issues, vol. I*, 2004, UNCTAD Series on issues in international investment agreements (United Nations publication, Sales No. E.05.II.D.6)
8. *International Investment Agreements: Key Issues, vol. II*, 2004, UNCTAD Series on issues in international investment agreements (United Nations publication, Sales No. E.05.II.D.6)
9. *International Investment Agreements: Key Issues, vol. III*, 2005, UNCTAD Series on issues in international investment agreements (United Nations publication, Sales No. E.05.II.D.6)
10. *Key Terms and Concepts in IIAs: A Glossary*, UNCTAD Series on issues in international investment agreements (United Nations publication, Sales No. E.04.II.D.31)
11. *State Contracts*, UNCTAD Series on issues in international investment agreements (United Nations publication, Sales No. E.04.II.D.5)
12. *Dispute Settlement: Investor-State*, UNCTAD Series on issues in international investment agreements (United Nations publication, Sales No. E.03.II.D.5)
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18. *Taking of Property*, UNCTAD Series on issues in international investment agreements, (United Nations publication, Sales No. E.00.II.D.4)
19. *Admission and Establishment*, UNCTAD Series on issues in international investment agreements (United Nations publication, Sales No. E.99.II.D.10)
20. *Trends in International Investment Agreements: an Overview*, UNCTAD Series on issues in international investment agreements (United Nations publication, Sales No. E.99.II.D.23)
21. *Lessons from the MAI*, UNCTAD Series on issues in international investment agreements (United Nations publication, Sales No. E. 99.II.D.26)
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25. *Expropriation*, UNCTAD Series on issues in international investment agreements II, (United Nations publication, Sales No. E.12.II.D.7)
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27. *Most-Favoured-National Treatment (A Sequel)*, UNCTAD Series on issues in international investment agreements II (United Nations publication, Sales No. 10.II.D.19)
28. *Fair and Equitable Treatment (A Sequel)*, UNCTAD Series on issues in international investment agreements II (United Nations publication, Sales No. E.11.II.D.15)

*C. UNCTAD Series on International Investment Policies for Development*

29. *Investor-State Disputes: Prevention and Alternatives to Arbitration II: Proceedings of Symposium held on 29 March 2010*, UNCTAD Series on International Investment Policies for Development (United Nations publication)
30. *Investor-State Disputes: Prevention and Alternatives to Arbitration*, UNCTAD Series on International Investment Policies for Development (United Nations publication, Sales No. E.10.II.D.11)
31. *The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries*, UNCTAD Series International Investment Policies for Development (United Nations publication, Sales No. E.09.II.D.20)
32. *The protection of national security in IIAs*, UNCTAD Series on International Investment Policies for Development (United Nations publication, Sales No. E.09.II.D.12)
33. *International Investment rule-making: stocktaking, challenges and the way forward*, UNCTAD Series on International Investment Policies for Development (United Nations publication, Sales No. E.08.II.D.1)

34. *Identifying core elements in investment agreements in the APEC region*, UNCTAD Series on International Investment Policies for Development (United Nations publication, Sales No. E.08.II.D.27)
35. *Investment Promotion Provisions in International Investment Agreements*, UNCTAD Series on International Investment Policies for Development (United Nations publication, Sales No. E.08.II.D.5)
36. *Investor-State Dispute Settlement and Impact on Investment Rulemaking*, UNCTAD Series on International Investment Policies for Development (United Nations publication, Sales No. E.07.II.D.10)
37. *Preserving Flexibility in IIAs: the Use of Reservations*, UNCTAD Series on International Investment Policies for Development (United Nations publication, Sales No. E.06.II.D.14)
38. *International Investment Arrangements: Trends and Emerging Issues*, UNCTAD Series on International Investment Policies for Development (United Nations publication, Sales No. E.06.II.D.3)
39. *Investor-State Disputes Arising from Investment Treaties: A Review*, UNCTAD Series on International Investment Policies for Development (United Nations publication, Sales No. E.06.II.D.1)
40. *South-South Cooperation in International Investment Arrangements*, UNCTAD Series on International Investment Policies for Development (United Nations publication, Sales No. E.5.II.D.26)
41. *International Investment Agreements in Services*, UNCTAD Series on International Investment Policies for Development (United Nations publication, Sales No. E.05.II.D.15)
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*D. International Institute for Sustainable Development*

43. Howard Mann *et al.*, *IISD Model International Agreement on Investment for Sustainable Development: Negotiator's Handbook*, International Institute for Sustainable Development, 2d. ed., 2006
44. Nathalie Bernasconi-Osterwalder *et al.* (eds.), *International Investment Law and Sustainable Development: Key Cases from 2000-2010*, International Institute for Sustainable Development, 2011, p. 178
45. Nathalie Bernasconi-Osterwalder *et al.* (eds.), *Investment Treaties and Why They Matter to Sustainable Development*, International Institute for Sustainable Development, 2012, p. 54





## **Research Guide for International Investment Law**

# RESEARCH GUIDE FOR INTERNATIONAL INVESTMENT LAW

(All URLs last checked on 6 December 2012)

This document offers an overview of freely available online services and resources in the field of international investment law generally and investor-state dispute settlement, in particular.

## I. Finding investment treaties

### 1. United Nations Conference on Trade and Development (UNCTAD) Investment Instruments Online

Under its Investment Instruments Online program, UNCTAD offers several ways for locating the texts of international investment agreements (IIAs). The regularly updated database is based on electronic versions of bilateral investment agreements (BITs) made available by a number of countries on their official websites, as well as the printed versions available from official national and international collections and publications. The collection may include texts of BITs that are no longer in force or agreements that have not yet entered into force. Although this is the most comprehensive freely available collection of investment treaty texts, it does not provide an exhaustive or authoritative listing of all IIAs. The UNCTAD database offers the following specific resources:

#### A. *IIA Compendium*

<http://www.unctadxi.org/templates/DocSearch.aspx?id=780>

The IIA Compendium is a collection of bilateral, regional and multilateral instruments relating to cross-border investment. The Compendium is searchable by keywords (e.g. “expropriation”), countries, the type of instrument, and the year of conclusion.

#### B. *BITs Search Engine*

[http://www.unctadxi.org/templates/DocSearch\\_779.aspx](http://www.unctadxi.org/templates/DocSearch_779.aspx)

The BITs search engine provides a user-friendly way to retrieve the text of: (i) all BITs signed by one country; or, (ii) a specific BIT between two countries.

#### C. *Country-Specific Lists of BITs*

[http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Country-specific-Lists-of-BITs.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Country-specific-Lists-of-BITs.aspx)

This regularly updated resource provides a country-wise list of BITs, as well as their dates of signature and entry into force, for 180 countries (last updated on 1 June 2012). It does not provide the full text of the treaties, but only an exhaustive list of treaties signed or in force.

## 2. Websites of National Governments and Ministries

Since the UNCTAD database is not exhaustive, it is often useful to consult the websites of the relevant national governments. In some cases, the official websites of national governments (e.g., the websites of the ministries of foreign affairs, economic affairs, commerce, or foreign trade), provide a list and texts of all BITs concluded by a country. Sometimes government websites also include the text of a “model” BIT. Further, since investment agreements are not always concluded in the form of self-contained BITs and are often included in trade agreements as investment “chapters”, it may be useful to look at the texts of these trade agreements, also usually available on the websites of the national ministries of commerce or foreign trade.

## 3. Investment Treaty Arbitration (ITA) <http://italaw.com/investment-treaties>

In addition to BITs and trade agreements with investment chapters, ITA provides the texts of several model BITs and links to the relevant websites of several national governments and ministries.

## **II. Finding arbitral awards and decisions**

### 1. Investment Treaty Arbitration (ITA) <http://italaw.com>

Italaw, managed by Professor Andrew Newcombe of the University of Victoria, provides access to all publicly available investment treaty arbitration awards and decisions. The database covers proceedings under several arbitration rules and fora (e.g., International Centre for Settlement of Investment Disputes (ICSID), Permanent Court of Arbitration (PCA), United Nations Commission on International Trade Law (UNCITRAL) Rules, etc.), as well as enforcement proceedings in different jurisdictions. The database is searchable by several criteria, such as the claimant, respondent state, governing treaty, and the date of the award. The site also provides a free subscription for regular email updates of latest awards and decisions.

### 2. Digest of International Investment Law Jurisprudence <http://www.investment-law-digest.com/>

This resource by the University of Cologne provides a user-friendly way of locating statements and observations made by different arbitral tribunals on specific legal issues and treaty provisions.

3. International Investment Arbitration + Public Policy (IIAPP)  
<http://www.iiapp.org/cases-regulatory-impacts/>

IIAPP, run by Professor Gus Van Harten of Osgoode Hall Law School, provides a free, searchable database of all publicly known investment treaty arbitration cases up to May 2010. In addition to the usual search criteria of claimants, respondent states and treaties, the database can be searched by arbitrators, and the different areas of the host State's national regulatory policy at issue (e.g., agriculture, public health, water, indigenous rights, land use, etc.).

### III. News and Commentary

1. Investment Treaty News (ITN)  
<http://www.iisd.org/itn/>

ITN is a free quarterly newsletter published by the International Institute for Sustainable Development providing news, analysis and opinion on arbitration proceedings and developments relating to investment treaties, arbitration rules and negotiations. The newsletter offers a free subscription service.

2. UNCTAD Investment Policy Hub (IPH)  
<http://investmentpolicyhub.unctad.org/>

The UNCTAD IPH provides a useful collection of resources and publications on international investment law and investment policy:

- A. *Investment Policy Framework for Sustainable Development*  
<http://investmentpolicyhub.unctad.org/Views/Public/IndexIPFSD.aspx>

Building upon UNCTAD's accumulated expertise on national and international investment policymaking, the IPFSD provides guidelines for designing national investment policies and options for the design and use of international investment agreements.

- B. *UNCTAD Investment Policy Review (IPR)*  
<http://unctad.org/en/Pages/DIAE/Investment%20Policy%20Reviews/Investment-Policy-Reviews.aspx>

The IPR provides an objective evaluation of countries' legal, regulatory and institutional framework to attract foreign direct investment (FDI), including a review of FDI entry and establishment requirements, treatment and protection of investment, taxation, and other sectoral regulations.

- C. *UNCTAD Best Practices on Investment for Development*  
<http://unctad.org/en/Pages/DIAE/Investment%20Policy%20Reviews/Best-practices-on-Investment-for-Development.aspx>  
 This series provides advice on best practices in investment policies which can maximize the contribution of FDI inflow to national development strategies.
- D. *UNCTAD Investment Policy Monitor (IPM)*  
<http://unctad.org/en/Pages/DIAE/Research%20on%20FDI%20and%20TNCs/Investment-Policy-Monitor.aspx>  
 The IPM is a periodic newsletter published by UNCTAD reporting on the latest developments in national and international investment law and policy.
- E. *UNCTAD Series on International Investment Agreements (IIA): The “Pink Series” (1999-2005) and IIA II (2011- )*  
*IIA I (1999-2005):*  
[http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/UNCTAD-Series-on-issues-on-international-investment-agreements.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/UNCTAD-Series-on-issues-on-international-investment-agreements.aspx)  
*IIA II (2011- ):*  
[http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20\(IIA\)/Issues-in-International-Investment-Agreements-II.aspx](http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/Issues-in-International-Investment-Agreements-II.aspx)  
 This series of booklets explores key legal concepts and issues related to international investment agreements. Each booklet focuses on a particular issue (e.g., MFN, expropriation, etc.), and includes an analysis of state practice and investment arbitration awards, in addition to offering policy options and advice.
- F. *UNCTAD International Investment Agreements: Issue Notes*  
<http://unctad.org/en/pages/publications/Intl-Investment-Agreements---Issues-Note.aspx>  
 These occasional Issue Notes provide a brief analysis and commentary on select developments relating to international investment agreements and investor-state dispute settlement.
3. Organization for Economic Co-operation and Development (OECD) Working Papers on International Investment  
<http://www.oecd.org/daf/internationalinvestment/internationalinvestmentagreements/oecdworkingpapersoninternationalinvestment.htm>

The OECD Working Paper series publishes selected studies by the OECD Investment Committee, OECD Investment Division staff, or by outside consultants working on

OECD Investment Committee projects. The series covers a variety of issues under international investment agreements and investment arbitration, apart from national investment policies.

4. Columbia FDI Perspectives  
<http://www.vcc.columbia.edu/content/columbia-fdi-perspectives-0>

The FDI Perspectives is an occasional series by the Vale Center at Columbia University providing topical analysis and commentary on issues relating to FDI.

5. Kluwer Arbitration Blog  
<http://kluwerarbitrationblog.com/>

This blog provides commentary by lawyers and academics on current developments in international investment law and arbitration proceedings, in particular.

6. A Canon for Arbitration and Investment Law  
<http://arbitrationandinvestmentlaw.wordpress.com/>

This blog provides a collection (a “canon”) of significant scholarship in the field of international investment law and arbitration, along with a review of these works.

#### **IV. Mailing Lists**

Mailing lists (also known as “list-servs”) are a useful way of interacting with international lawyers, academics and other professionals working in the field of international investment law across the world. As a member one can participate in discussions and share information through email exchanges. Membership requires an application, and must be approved. There are two free mailing lists that focus on international investment law:

1. Young-OGEMID  
<http://www.transnational-dispute-management.com/young-ogemid/>

Young-OGEMID is a mailing list for younger professionals practicing in the field of international investment law and international arbitration. Although covering a variety of issues, it maintains a strong focus on the practice of dispute settlement.

2. Forum on Investment, Contract, Treaties and Arbitration (FICTA)  
<https://sites.google.com/site/fictaweb/?pli=1>

FICTA is an open, public-service initiative that brings together academics, NGO researchers, policy makers, and practitioners to discuss international investment law issues and developments from a public policy and regulatory perspective.

## V. Multimedia

1. UN Audiovisual Library of International Law (AVL)  
<http://www.un.org/law/avl/>

The UN AVL is a multimedia collection of lectures delivered by leading international law scholars and practitioners covering a range of international law fields and issues. Some lectures are accompanied by a suggested list for further reading and research. The section on “Foreign Investment” under “International Economic Law” contains lectures directly relevant to international investment law (<http://untreaty.un.org/cod/avl/lectureseries.html#intelecon>). Other categories also contain lectures on related issues such as the protection of individuals, international arbitration, state responsibility and dispute settlement, etc. The AVL is updated regularly to include new lectures.

## VI. Further Research and Reading

1. Vale Columbia Center on Sustainable International Investment  
<http://www.vcc.columbia.edu/>

The Vale Columbia Center offers a variety of guides, reports and publications on cross-border investment flows. In addition, as part of the International Investment Law Syllabus Project, the Center provides model syllabi for academic courses on international investment law (<http://www.vcc.columbia.edu/content/international-investment-syllabus-project>).

2. UN AVL Research Library  
<http://untreaty.un.org/cod/avl/researchlibrary.html>

The Research Library of the AVL provides links to other web-based international law-related resources. Specifically, it covers: resources relating to treaties and treaty status information; materials concerning the jurisprudence of international courts and tribunals;

access to selected United Nations publications and to repositories of official documentation; and selected scholarly writings in international law, including publications and journal articles. A collection of significant scholarly works is provided by HeinOnline and can be accessed through the AVL Research Library for free (<http://heinonlinebackup.com/HOLtest/UNLAV>).

### 3. Electronic Research Guides

Several institutions offer comprehensive research guides on international investment law and investment arbitration, covering free and paid, online and print resources:

- A. *The American Society of International Law Guide to Electronic Resources for International Economic Law*  
<http://www.asil.org/iell.cfm>
- B. *The Peace Palace Library Research Guide for FDI*  
<http://www.peacepalacelibrary.nl/research-guides/economic-and-financial-law/foreign-direct-investment/>
- C. *The Georgetown Law Library International Investment Law Research Guide*  
<http://www.law.georgetown.edu/library/research/guides/InternationalInvestmentLaw.cfm>
- D. *The Washington University Law Library International Investment Law Guide*  
[http://law.wustl.edu/library/pages.aspx?id=1373#\\_1\\_4](http://law.wustl.edu/library/pages.aspx?id=1373#_1_4)

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Judge Joan Donoghue  
Shashank Kumar  
December 2012



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

# **ICSID CONVENTION, REGULATIONS AND RULES**

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

**ICSID/15  
April 2006**

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## Introduction

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

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

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

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

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

Convention

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

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Convention

Convention

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

**Preamble**

**The Contracting States**

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

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

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

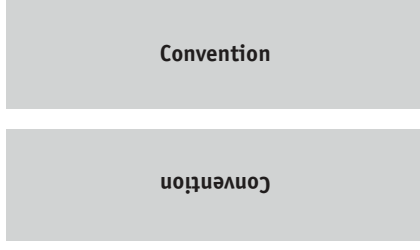
**Attaching particular importance** to the availability of facilities for international conciliation or arbitration to which Contracting States and nationals of other Contracting States may submit such disputes if they so desire;

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

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

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

**Have agreed** as follows:



**Chapter I  
International Centre for  
Settlement of Investment Disputes**

**Section 1  
Establishment and Organization**

**Article 1**

- (1) There is hereby established the International Centre for Settlement of Investment Disputes (hereinafter called the Centre).
- (2) The purpose of the Centre shall be to provide facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States in accordance with the provisions of this Convention.

**Article 2**

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

**Article 3**

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

**Section 2**

**The Administrative Council**

**Article 4**

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

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

**Article 5**

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

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

#### **Article 6**

- (1) Without prejudice to the powers and functions vested in it by other provisions of this Convention, the Administrative Council shall:
  - (a) adopt the administrative and financial regulations of the Centre;
  - (b) adopt the rules of procedure for the institution of conciliation and arbitration proceedings;
  - (c) adopt the rules of procedure for conciliation and arbitration proceedings (hereinafter called the Conciliation Rules and the Arbitration Rules);
  - (d) approve arrangements with the Bank for the use of the Bank's administrative facilities and services;
  - (e) determine the conditions of service of the Secretary-General and of any Deputy Secretary-General;
  - (f) adopt the annual budget of revenues and expenditures of the Centre;
  - (g) approve the annual report on the operation of the Centre.

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

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

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

#### **Article 7**

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

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

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

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

#### **Article 8**

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

### **Section 3 The Secretariat**

#### **Article 9**

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

#### **Article 10**

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

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

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

#### **Article 11**

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

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

#### **Section 4 The Panels**

##### **Article 12**

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

##### **Article 13**

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

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

##### **Article 14**

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

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

##### **Article 15**

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

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

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

##### **Article 16**

(1) A person may serve on both Panels.

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

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

#### **Section 5 Financing the Centre**

##### **Article 17**

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

#### **Section 6 Status, Immunities and Privileges**

##### **Article 18**

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

- (a) to contract;
- (b) to acquire and dispose of movable and immovable property;
- (c) to institute legal proceedings.

##### **Article 19**

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

##### **Article 20**

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



### Article 21

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

- (a) shall enjoy immunity from legal process with respect to acts performed by them in the exercise of their functions, except when the Centre waives this immunity;
- (b) not being local nationals, shall enjoy the same immunities from immigration restrictions, alien registration requirements and national service obligations, the same facilities as regards exchange restrictions and the same treatment in respect of travelling facilities as are accorded by Contracting States to the representatives, officials and employees of comparable rank of other Contracting States.

### Article 22

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

### Article 23

- (1) The archives of the Centre shall be inviolable, wherever they may be.
- (2) With regard to its official communications, the Centre shall be accorded by each Contracting State treatment not less favourable than that accorded to other international organizations.

### Article 24

- (1) The Centre, its assets, property and income, and its operations and transactions authorized by this Convention shall be exempt from all taxation and customs duties. The Centre shall also be exempt from liability for the collection or payment of any taxes or customs duties.
- (2) Except in the case of local nationals, no tax shall be levied on or in respect of expense allowances paid by the Centre to the Chairman or members of the Administrative Council, or on or in respect of salaries, expense allowances or other emoluments paid by the Centre to officials or employees of the Secretariat.
- (3) No tax shall be levied on or in respect of fees or expense allowances received by persons acting as conciliators, or arbitrators, or

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

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## Chapter II Jurisdiction of the Centre

### Article 25

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

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

- (a) any natural person who had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration as well as on the date on which the request was registered pursuant to paragraph (3) of Article 28 or paragraph (3) of Article 36, but does not include any person who on either date also had the nationality of the Contracting State party to the dispute; and
- (b) any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention.
- (3) Consent by a constituent subdivision or agency of a Contracting State shall require the approval of that State unless that State notifies the Centre that no such approval is required.
- (4) Any Contracting State may, at the time of ratification, acceptance or approval of this Convention or at any time thereafter, notify the Centre of the class or classes of disputes which it would or would not consider submitting to the jurisdiction of the Centre. The Secretary-General shall forthwith transmit such notification to all Contracting

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

**Article 26**

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

**Article 27**

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

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

**Chapter III  
Conciliation**

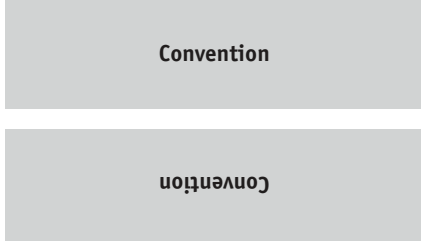
**Section 1  
Request for Conciliation**

**Article 28**

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

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

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



**Section 2  
Constitution of the Conciliation Commission**

**Article 29**

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

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

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

**Article 30**

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

**Article 31**

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

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

**Section 3  
Conciliation Proceedings**

**Article 32**

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

(2) Any objection by a party to the dispute that that dispute is not within the jurisdiction of the Centre, or for other reasons is not within the competence of the Commission, shall be considered by the Com-

mission which shall determine whether to deal with it as a preliminary question or to join it to the merits of the dispute.

#### **Article 33**

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

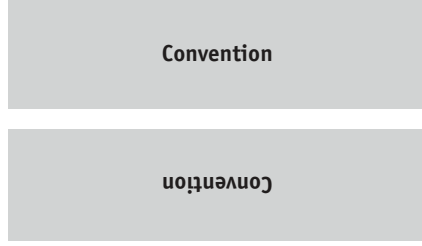
#### **Article 34**

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

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

#### **Article 35**

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



## **Chapter IV Arbitration**

### **Section 1 Request for Arbitration**

#### **Article 36**

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

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

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

### **Section 2 Constitution of the Tribunal**

#### **Article 37**

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

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

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

#### **Article 38**

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

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

**Article 39**

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

**Article 40**

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

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

**Section 3  
Powers and Functions of the Tribunal**

**Article 41**

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

**Article 42**

(1) The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.  
(2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.  
(3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

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**Article 43**

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

- (a) call upon the parties to produce documents or other evidence, and
- (b) visit the scene connected with the dispute, and conduct such inquiries there as it may deem appropriate.

**Article 44**

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

**Article 45**

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

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

**Article 46**

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

**Article 47**

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

## Section 4 The Award

### Article 48

- (1) The Tribunal shall decide questions by a majority of the votes of all its members.
- (2) The award of the Tribunal shall be in writing and shall be signed by the members of the Tribunal who voted for it.
- (3) The award shall deal with every question submitted to the Tribunal, and shall state the reasons upon which it is based.
- (4) Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.
- (5) The Centre shall not publish the award without the consent of the parties.

### Article 49

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

## Section 5 Interpretation, Revision and Annulment of the Award

### Article 50

- (1) If any dispute shall arise between the parties as to the meaning or scope of an award, either party may request interpretation of the award by an application in writing addressed to the Secretary-General.
- (2) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter. The

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

### Article 51

- (1) Either party may request revision of the award by an application in writing addressed to the Secretary-General on the ground of discovery of some fact of such a nature as decisively to affect the award, provided that when the award was rendered that fact was unknown to the Tribunal and to the applicant and that the applicant's ignorance of that fact was not due to negligence.
- (2) The application shall be made within 90 days after the discovery of such fact and in any event within three years after the date on which the award was rendered.
- (3) The request shall, if possible, be submitted to the Tribunal which rendered the award. If this shall not be possible, a new Tribunal shall be constituted in accordance with Section 2 of this Chapter.
- (4) The Tribunal may, if it considers that the circumstances so require, stay enforcement of the award pending its decision. If the applicant requests a stay of enforcement of the award in his application, enforcement shall be stayed provisionally until the Tribunal rules on such request.

### Article 52

- (1) Either party may request annulment of the award by an application in writing addressed to the Secretary-General on one or more of the following grounds:
  - (a) that the Tribunal was not properly constituted;
  - (b) that the Tribunal has manifestly exceeded its powers;
  - (c) that there was corruption on the part of a member of the Tribunal;
  - (d) that there has been a serious departure from a fundamental rule of procedure; or
  - (e) that the award has failed to state the reasons on which it is based.
- (2) The application shall be made within 120 days after the date on which the award was rendered except that when annulment is requested on the ground of corruption such application shall be made within 120 days after discovery of the corruption and in any event within three years after the date on which the award was rendered.
- (3) On receipt of the request the Chairman shall forthwith appoint from the Panel of Arbitrators an *ad hoc* Committee of three persons. None of the members of the Committee shall have been a member of

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

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

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

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

## Section 6 Recognition and Enforcement of the Award

### Article 53

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

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

### Article 54

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

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

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

### Article 55

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

## Chapter V Replacement and Disqualification of Conciliators and Arbitrators

### Article 56

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

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

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

### Article 57

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

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

**Article 58**

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

**Chapter VI  
Cost of Proceedings**

**Article 59**

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

**Article 60**

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

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

**Article 61**

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

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

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

**Chapter VII  
Place of Proceedings**

**Article 62**

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

**Article 63**

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

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

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

**Chapter VIII  
Disputes Between Contracting States**

**Article 64**

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

**Chapter IX  
Amendment**

**Article 65**

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

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

**Article 66**

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

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

**Chapter X  
Final Provisions**

**Article 67**

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

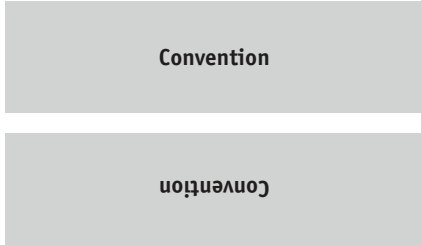
**Article 68**

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

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

**Article 69**

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



**Article 70**

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

**Article 71**

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

**Article 72**

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

**Article 73**

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

**Article 74**

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

**Article 75**

The depositary shall notify all signatory States of the following:

- (a) signatures in accordance with Article 67;
- (b) deposits of instruments of ratification, acceptance and approval in accordance with Article 73;
- (c) the date on which this Convention enters into force in accordance with Article 68;
- (d) exclusions from territorial application pursuant to Article 70;



- (e) the date on which any amendment of this Convention enters into force in accordance with Article 66; and
- (f) denunciations in accordance with Article 71.

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

Convention

**REPORT OF THE EXECUTIVE DIRECTORS  
ON THE CONVENTION**

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Report of the Executive Directors  
on the Convention

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

Report of the Executive Directors  
on the Convention

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

## I

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

“RESOLVED:

- (a) The report of the Executive Directors on “Settlement of Investment Disputes,” dated August 6, 1964, is hereby approved.
- (b) The Executive Directors are requested to formulate a convention establishing facilities and procedures which would be available on a voluntary basis for the settlement of investment disputes between contracting States and Nationals of other contracting States through conciliation and arbitration.
- (c) In formulating such a convention, the Executive Directors shall take into account the views of member governments and shall keep in mind the desirability of arriving at a text which could be accepted by the largest possible number of governments.
- (d) The Executive Directors shall submit the text of such a convention to member governments with such recommendations as they shall deem appropriate.”

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

3. The action by the Executive Directors was preceded by extensive preparatory work, details of which are given in paragraphs 6-8 below. The Executive Directors are satisfied that the Convention in the form attached hereto represents a broad consensus of the views of those governments which accept the principle of establishing by inter-gov-

ernmental agreement facilities and procedures for the settlement of investment disputes which States and foreign investors wish to submit to conciliation or arbitration. They are also satisfied that the Convention constitutes a suitable framework for such facilities and procedures. Accordingly, the text of the Convention is submitted to member governments for consideration with a view to signature and ratification, acceptance or approval.

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

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

## II

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

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

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

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

### III

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

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

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

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

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

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

### IV

#### The International Centre for Settlement of Investment Disputes

##### General

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

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

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

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

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

#### Functions of the Administrative Council

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

#### Functions of the Secretary-General

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

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

#### The Panels

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

### V

#### Jurisdiction of the Centre

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

#### Consent

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

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

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

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

### Nature of the Dispute

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

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

### Parties to the Dispute

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

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

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

### Notifications by Contracting States

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

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

### Arbitration as Exclusive Remedy

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

### Claims by the Investor’s State

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

## VI

### Proceedings under the Convention

#### Institution of Proceedings

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

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

#### Constitution of Conciliation Commissions and Arbitral Tribunals

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

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

#### Conciliation Proceedings; Powers and Functions of Arbitral Tribunals

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

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

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

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

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

#### Recognition and Enforcement of Arbitral Awards

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

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

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

<sup>1</sup> Article 38(1) of the Statute of the International Court of Justice reads as follows: "1. The Court, whose function it is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law."

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

## VII

### Place of Proceedings

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

## VIII

### Disputes Between Contracting States

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

## IX

### Entry into Force

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

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



# ADMINISTRATIVE AND FINANCIAL REGULATIONS

Administrative and  
Financial Regulations

# ADMINISTRATIVE AND FINANCIAL REGULATIONS

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

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

## **Administrative and Financial Regulations**

### **Chapter I Procedures of the Administrative Council**

#### **Regulation 1**

##### **Date and Place of the Annual Meeting**

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

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

#### **Regulation 2**

##### **Notice of Meetings**

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

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

#### **Regulation 3**

##### **Agenda for Meetings**

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

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

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

#### **Regulation 4**

##### **Presiding Officer**

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

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

#### **Regulation 5**

##### **Secretary of the Council**

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

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

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

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

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

## **Regulation 6 Attendance at Meetings**

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

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

## **Regulation 7 Voting**

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

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

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

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

## **Chapter II The Secretariat**

### **Regulation 8 Election of the Secretary-General and His Deputies**

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

- (a) the length of the term of service;
- (b) approval for any of the candidates to hold, if elected, any other employment or to engage in any other occupation;
- (c) the conditions of service, taking into account any proposals made pursuant to paragraph (b).

### **Regulation 9 Acting Secretary-General**

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

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

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## Regulation 10 Appointment of Staff Members

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

## Regulation 11 Conditions of Employment

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

## Regulation 12 Authority of the Secretary-General

- (1) Deputy Secretaries-General and the members of the staff, whether on direct appointment or on secondment, shall act solely under the direction of the Secretary-General.
- (2) The Secretary-General shall have authority to dismiss members of the Secretariat and to impose disciplinary measures. In the case of Deputy Secretaries-General dismissal may only be imposed with the concurrence of the Administrative Council.

## Regulation 13 Incompatibility of Functions

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

## Chapter III Financial Provisions

### Regulation 14 Direct Costs of Individual Proceedings

- (1) Unless otherwise agreed pursuant to Article 60(2) of the Convention, and in addition to receiving reimbursement for any direct expenses reasonably incurred, each member of a Commission, a Tribunal or an *ad hoc* Committee appointed from the Panel of Arbitrators pursuant to Article 52(3) of the Convention (hereinafter referred to as “Committee”) shall receive:
  - (a) a fee for each day on which he participates in meetings of the body of which he is a member;
  - (b) a fee for the equivalent of each eight-hour day of other work performed in connection with the proceedings;
  - (c) in lieu of reimbursement of subsistence expenses when away from his normal place of residence, a *per diem* allowance based on the allowance established from time to time for the Executive Directors of the Bank;
  - (d) travel expenses in connection with meetings of the body of which he is a member based on the norms established from time to time for the Executive Directors of the Bank.

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

- (2) All payments, including reimbursement of expenses, to the following shall in all cases be made by the Centre and not by or through either party to the proceeding:
  - (a) members of Commissions, Tribunals and Committees;
  - (b) witnesses and experts summoned at the initiative of a Commission, Tribunal or Committee, and not of one of the parties;
  - (c) members of the Secretariat of the Centre, including persons (such as interpreters, translators, reporters or secretaries) especially engaged by the Centre for a particular proceeding;
  - (d) the host of any proceeding held away from the seat of the Centre pursuant to Article 63 of the Convention.

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

- (a) the parties shall make advance payments to the Centre as follows:
  - (i) initially as soon as a Commission or Tribunal has been constituted, the Secretary-General shall, after consultation with the President of the body in question and, as far as possible, the parties, estimate the expenses that will be incurred by the Centre during the next three to six months and request the parties to make an advance payment of this amount;
  - (ii) if at any time the Secretary-General determines, after consultation with the President of the body in question and as far as possible the parties, that the advances made by the parties will not cover a revised estimate of expenses for the period or any subsequent period, he shall request the parties to make supplementary advance payments.

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

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

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

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

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

### **Regulation 15 Special Services to Parties**

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

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

### **Regulation 16 Fee for Lodging Requests**

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

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## **Regulation 17 The Budget**

- (1) The fiscal year of the Centre shall run from July 1 of each year to June 30 of the following year.
- (2) Before the end of each fiscal year the Secretary-General shall prepare and submit, for adoption by the Administrative Council at its next Annual Meeting and in accordance with Article 6(1)(f) of the Convention, a budget for the following fiscal year. This budget is to indicate the expected expenditures of the Centre (excepting those to be incurred on a reimbursable basis) and the expected revenues (excluding reimbursements).
- (3) If, during the course of a fiscal year, the Secretary-General determines that the expected expenditures will exceed those authorized in the budget, or if he should wish to incur expenditures not previously authorized, he shall, in consultation with the Chairman, prepare a supplementary budget, which he shall submit to the Administrative Council for adoption, either at the Annual Meeting or at any other meeting, or in accordance with Regulation 7(3).
- (4) The adoption of a budget constitutes authority for the Secretary-General to make expenditures and incur obligations for the purposes and within the limits specified in the budget. Unless otherwise provided by the Administrative Council, the Secretary-General may exceed the amount specified for any given budget item, provided that the total amount of the budget is not exceeded.
- (5) Pending the adoption of the budget by the Administrative Council, the Secretary-General may incur expenditures for the purposes and within the limits specified in the budget he submitted to the Council, up to one quarter of the amount authorized to be expended in the previous fiscal year but in no event exceeding the amount that the Bank has agreed to make available for the current fiscal year.

## **Regulation 18 Assessment of Contributions**

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

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

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

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

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

## **Regulation 19 Audits**

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

## **Chapter IV General Functions of the Secretariat**

### **Regulation 20 List of Contracting States**

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

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- (a) the date on which the Convention entered into force with respect to it;
- (b) any territories excluded pursuant to Article 70 of the Convention and the dates on which the notice of exclusion and any modification of such notice were received by the depositary;
- (c) any designation, pursuant to Article 25(1) of the Convention, of constituent subdivisions or agencies to whose investment disputes the jurisdiction of the Centre extends;
- (d) any notification, pursuant to Article 25(3) of the Convention, that no approval by the State is required for the consent by a constituent subdivision or agency to the jurisdiction of the Centre;
- (e) any notification, pursuant to Article 25(4) of the Convention, of the class or classes of disputes which the State would or would not consider submitting to the jurisdiction of the Centre;
- (f) the competent court or other authority for the recognition and enforcement of arbitral awards, designated pursuant to Article 54(2) of the Convention;
- (g) any legislative or other measures taken, pursuant to Article 69 of the Convention, for making its provisions effective in the territories of the State and communicated by the State to the Centre.

### **Regulation 21 Establishment of Panels**

- (1) Whenever a Contracting State has the right to make one or more designations to the Panel of Conciliators or of Arbitrators, the Secretary-General shall invite the State to make such designations.
- (2) Each designation made by a Contracting State or by the Chairman shall indicate the name, address and nationality of the designee, and include a statement of his qualifications, with particular reference to his competence in the fields of law, commerce, industry and finance.
- (3) As soon as the Secretary-General is notified of a designation, he shall inform the designee thereof, indicating to him the designating authority and the terminal date of the period of designation, and requesting confirmation that the designee is willing to serve.
- (4) The Secretary-General shall maintain lists, which he shall transmit from time to time to all Contracting States and on request to any State or person, of the members of the Panels of Conciliators and of Arbitrators, indicating for each member:

- (a) his address;
- (b) his nationality;
- (c) the terminal date of the current designation;
- (d) the designating authority;
- (e) his qualifications.

### **Regulation 22 Publication**

- (1) The Secretary-General shall appropriately publish information about the operation of the Centre, including the registration of all requests for conciliation or arbitration and in due course an indication of the date and method of the termination of each proceeding.
- (2) If both parties to a proceeding consent to the publication of:
  - (a) reports of Conciliation Commissions;
  - (b) arbitral awards; or
  - (c) the minutes and other records of proceedings,
 the Secretary-General shall arrange for the publication thereof, in an appropriate form with a view to furthering the development of international law in relation to investments.

## **Chapter V Functions with Respect to Individual Proceedings**

### **Regulation 23 The Registers**

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

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isters, and a schedule of charges for the provision of certified and uncertified extracts therefrom.

**Regulation 24  
Means of Communication**

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

- (a) the parties may communicate directly with each other unless the communication is one required by the Convention or the Institution, Conciliation or Arbitration Rules (hereinafter referred to as the "Rules");
- (b) the members of any Commission, Tribunal or Committee shall communicate directly with each other.

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

- (a) shall inform the party submitting it of the deficiency, and of any consequent action the Secretary-General is taking;
- (b) may, if the deficiency is merely a formal one, accept it subject to subsequent correction;
- (c) may, if the deficiency consists merely of an insufficiency in the number of copies or the lack of required translations, provide the necessary copies or translations at the cost of the party concerned.

**Regulation 25  
Secretary**

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

- (a) represent the Secretary-General and may perform all functions assigned to the latter by these Regulations or the Rules with regard to individual proceedings or assigned to the latter by the Convention, and delegated by him to the Secretary;
- (b) be the channel through which the parties may request particular services from the Centre;

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

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

**Regulation 26  
Place of Proceedings**

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

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

**Regulation 27  
Other Assistance**

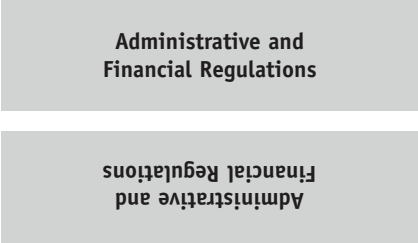
(1) The Secretary-General shall provide such other assistance as may be required in connection with all meetings of Commissions, Tribunals and Committees, in particular in making translations and interpretations from one official language of the Centre into another.

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

**Regulation 28  
Depositary Functions**

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

- (a) of the request and of all instruments and documents filed or prepared in connection with any proceeding, including the minutes of any hearing;
- (b) of any report by a Commission or of any award or decision by a Tribunal or Committee.



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

## Chapter VI Special Provisions Relating to Proceedings

### Regulation 29 Time Limits

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

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

### Regulation 30 Supporting Documentation

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

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

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

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

## Chapter VII Immunities and Privileges

### Regulation 31 Certificates of Official Travel

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

### Regulation 32 Waiver of Immunities

- (1) The Secretary-General may waive the immunity of:
- (a) the Centre;
  - (b) members of the staff of the Centre.
- (2) The Chairman of the Council may waive the immunity of:
- (a) the Secretary-General or any Deputy Secretary-General;
  - (b) members of a Commission, Tribunal or Committee;

- (c) the parties, agents, counsel, advocates, witnesses or experts appearing in a proceeding, if a recommendation for such waiver is made by the Commission, Tribunal or Committee concerned.
- (3) The Administrative Council may waive the immunity of:
  - (a) the Chairman and members of the Council;
  - (b) the parties, agents, counsel, advocates, witnesses or experts appearing in a proceeding, even if no recommendation for such a waiver is made by the Commission, Tribunal or Committee concerned;
  - (c) the Centre or any person mentioned in paragraph (1) or (2).

## **Chapter VIII Miscellaneous**

### **Regulation 33 Communications with Contracting States**

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

### **Regulation 34 Official Languages**

- (1) The official languages of the Centre shall be English, French and Spanish.
- (2) The texts of these Regulations in each official language shall be equally authentic.

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

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Institution Rules

Institution Rules

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

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

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

## Institution Rules

### Rule 1 The Request

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

## Institution Rules

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

- (i) its nationality on the date of consent; and
  - (ii) if the party is a natural person:
    - (A) his nationality on the date of the request; and
    - (B) that he did not have the nationality of the Contracting State party to the dispute either on the date of consent or on the date of the request; or
  - (iii) if the party is a juridical person which on the date of consent had the nationality of the Contracting State party to the dispute, the agreement of the parties that it should be treated as a national of another Contracting State for the purposes of the Convention;
  - (e) contain information concerning the issues in dispute indicating that there is, between the parties, a legal dispute arising directly out of an investment; and
  - (f) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.
- (2) The information required by subparagraphs (1)(c), (1)(d)(iii) and (1)(f) shall be supported by documentation.
  - (3) “Date of consent” means the date on which the parties to the dispute consented in writing to submit it to the Centre; if both parties did not act on the same day, it means the date on which the second party acted.

### Rule 3 Optional Information in the Request

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

### Rule 4 Copies of the Request

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

### Rule 2 Contents of the Request

- (1) The request shall:
  - (a) designate precisely each party to the dispute and state the address of each;
  - (b) state, if one of the parties is a constituent subdivision or agency of a Contracting State, that it has been designated to the Centre by that State pursuant to Article 25(1) of the Convention;
  - (c) indicate the date of consent and the instruments in which it is recorded, including, if one party is a constituent subdivision or agency of a Contracting State, similar data on the approval of such consent by that State unless it had notified the Centre that no such approval is required;

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

### **Rule 5 Acknowledgement of the Request**

- (1) On receiving a request the Secretary-General shall:
- (a) send an acknowledgement to the requesting party;
  - (b) take no other action with respect to the request until he has received payment of the prescribed fee.
- (2) As soon as he has received the fee for lodging the request, the Secretary-General shall transmit a copy of the request and of the accompanying documentation to the other party.

### **Rule 6 Registration of the Request**

- (1) The Secretary-General shall, subject to Rule 5(1)(b), as soon as possible, either:
- (a) register the request in the Conciliation or the Arbitration Register and on the same day notify the parties of the registration; or
  - (b) if he finds, on the basis of the information contained in the request, that the dispute is manifestly outside the jurisdiction of the Centre, notify the parties of his refusal to register the request and of the reasons therefor.
- (2) A proceeding under the Convention shall be deemed to have been instituted on the date of the registration of the request.

provisions agreed by them regarding the number and the method of appointment of the conciliators or arbitrators;

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

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

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

### **Rule 8 Withdrawal of the Request**

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

### **Rule 9 Final Provisions**

- (1) The texts of these Rules in each official language of the Centre shall be equally authentic.
- (2) These Rules may be cited as the “Institution Rules” of the Centre.

The notice of registration of a request shall:

- (a) record that the request is registered and indicate the date of the registration and of the dispatch of that notice;
- (b) notify each party that all communications and notices in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Centre;
- (c) unless such information has already been provided, invite the parties to communicate to the Secretary-General any

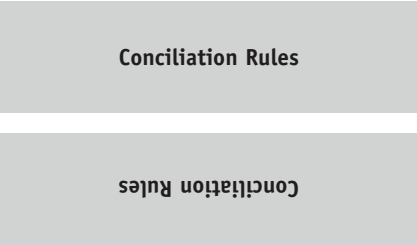
### **Rule 7 Notice of Registration**

**RULES OF PROCEDURE  
FOR CONCILIATION PROCEEDINGS  
(CONCILIATION RULES)**

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

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

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

## Conciliation Rules

### Chapter I Establishment of the Commission

#### Rule 1 General Obligations

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

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

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

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

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

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

- (i) accept such proposals; or
  - (ii) make other proposals regarding the number of conciliators and the method of their appointment;
- (c) within 20 days after receipt of the reply containing any such other proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.

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

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

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

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

- (a) either party shall, in a communication to the other party:
  - (i) name two persons, identifying one of them as the conciliator appointed by it and the other as the conciliator proposed to be the President of the Commission; and
  - (ii) invite the other party to concur in the appointment of the conciliator proposed to be the President of the Commission and to appoint another conciliator;
- (b) promptly upon receipt of this communication the other party shall, in its reply:

- (i) name a person as the conciliator appointed by it; and
- (ii) concur in the appointment of the conciliator proposed to be the President of the Commission or name another person as the conciliator proposed to be President;

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

### **Rule 6 Constitution of the Commission**

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

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

“To the best of my knowledge there is no reason why I should not serve on the Conciliation Commission constituted by the International Centre for Settlement of Investment Disputes with respect to a dispute between \_\_\_\_\_ and \_\_\_\_\_.”

“I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any report drawn up by the Commission.

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

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

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

### **Rule 7 Replacement of Conciliators**

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

### **Rule 8 Incapacity or Resignation of Conciliators**

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

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

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

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

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

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

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

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

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

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

### **Rule 5 Acceptance of Appointments**

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

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

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

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

### **Rule 9 Disqualification of Conciliators**

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

(2) The Secretary-General shall forthwith:

- (a) transmit the proposal to the members of the Commission and, if it relates to a sole conciliator or to a majority of the members of the Commission, to the Chairman of the Administrative Council; and
  - (b) notify the other party of the proposal.
- (3) The conciliator to whom the proposal relates may, without delay, furnish explanations to the Commission or the Chairman, as the case may be.

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

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

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

### **Rule 10 Procedure during a Vacancy on the Commission**

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

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

### **Rule 11 Filling Vacancies on the Commission**

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

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

- (a) to fill a vacancy caused by the resignation, without the consent of the Commission, of a conciliator appointed by a party; or
  - (b) at the request of either party, to fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.
- (3) The procedure for filling a vacancy shall be in accordance with Rules 1, 4(4), 4(5), 5 and, *mutatis mutandis*, 6(2).

### **Rule 12 Resumption of Proceeding after Filling a Vacancy**

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

## **Chapter II Working of the Commission**

### **Rule 13 Sessions of the Commission**

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

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

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

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

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

#### **Rule 14** **Sittings of the Commission**

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

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

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

#### **Rule 15** **Deliberations of the Commission**

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

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

#### **Rule 16** **Decisions of the Commission**

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

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

#### **Rule 17** **Incapacity of the President**

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

#### **Rule 18** **Representation of the Parties**

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

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

### **Chapter III** **General Procedural Provisions**

#### **Rule 19** **Procedural Orders**

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

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## Chapter IV Conciliation Procedures

### Rule 20 Preliminary Procedural Consultation

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

- (a) the number of members of the Commission required to constitute a quorum at its sittings;
- (b) the language or languages to be used in the proceedings;
- (c) the evidence, oral or written, which each party intends to produce or to request the Commission to call for, and the written statements which each party intends to file, as well as the time limits within which such evidence should be produced and such statements filed;
- (d) the number of copies desired by each party of instruments filed by the other; and
- (e) the manner in which the record of the hearings shall be kept.

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

### Rule 21 Procedural Languages

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

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

### Rule 22 Functions of the Commission

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

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

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

- (a) request from either party oral explanations, documents and other information;
- (b) request evidence from other persons; and
- (c) with the consent of the party concerned, visit any place connected with the dispute or conduct inquiries there, provided that the parties may participate in any such visits and inquiries.

### Rule 23 Cooperation of the Parties

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

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

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### **Rule 24 Transmission of the Request**

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

### **Rule 25 Written Statements**

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

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

### **Rule 26 Supporting Documentation**

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

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

### **Rule 27 Hearings**

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

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

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

### **Rule 28 Witnesses and Experts**

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

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

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

## **Chapter V Termination of the Proceeding**

### **Rule 29 Objections to Jurisdiction**

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

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

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

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

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

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

### **Rule 30 Closure of the Proceeding**

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

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

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

### **Rule 31 Preparation of the Report**

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

### **Rule 32 The Report**

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

- (a) a precise designation of each party;
- (b) a statement that the Commission was established under the Convention, and a description of the method of its constitution;
- (c) the names of the members of the Commission, and an identification of the appointing authority of each;
- (d) the names of the agents, counsel and advocates of the parties;
- (e) the dates and place of the sittings of the Commission; and
- (f) a summary of the proceeding.

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

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

### **Rule 33 Communication of the Report**

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

- (a) authenticate the original text of the report and deposit it in the archives of the Centre; and
- (b) dispatch a certified copy to each party, indicating the date of dispatch on the original text and on all copies.

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

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

## **Chapter VI General Provisions**

### **Rule 34 Final Provisions**

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

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

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**RULES OF PROCEDURE  
FOR ARBITRATION  
PROCEEDINGS  
(ARBITRATION RULES)**



**RULES OF PROCEDURE FOR  
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(ARBITRATION RULES)**

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

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

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

## Arbitration Rules

### Chapter I Establishment of the Tribunal

#### Rule 1 General Obligations

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

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

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

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

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

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

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

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

(i) accept such proposals; or

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

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

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

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

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

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

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

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- (i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and
  - (ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;
- (b) promptly upon receipt of this communication the other party shall, in its reply:
- (i) name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and
  - (ii) concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President;
  - (c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.
- (2) The communications provided for in this Rule shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General.

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

- (1) If the Tribunal is not constituted within 90 days after the dispatch by the Secretary-General of the notice of registration, or such other period as the parties may agree, either party may, through the Secretary-General, address to the Chairman of the Administrative Council a request in writing to appoint the arbitrator or arbitrators not yet appointed and to designate an arbitrator to be the President of the Tribunal.
- (2) The provision of paragraph (1) shall apply *mutatis mutandis* in the event that the parties have agreed that the arbitrators shall elect the President of the Tribunal and they fail to do so.
- (3) The Secretary-General shall forthwith send a copy of the request to the other party.

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

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

**Rule 5**  
**Acceptance of Appointments**

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

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

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

**Rule 6**  
**Constitution of the Tribunal**

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

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

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

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

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

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

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

### **Rule 7 Replacement of Arbitrators**

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

### **Rule 8 Incapacity or Resignation of Arbitrators**

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

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

### **Rule 9 Disqualification of Arbitrators**

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

(2) The Secretary-General shall forthwith:

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

(b) notify the other party of the proposal.

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

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

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

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

### **Rule 10 Procedure during a Vacancy on the Tribunal**

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

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

### **Rule 11 Filling Vacancies on the Tribunal**

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

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

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

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

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

#### **Rule 12**

#### **Resumption of Proceeding after Filling a Vacancy**

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

### **Chapter II Working of the Tribunal**

#### **Rule 13**

#### **Sessions of the Tribunal**

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

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

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

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

#### **Rule 14**

#### **Sittings of the Tribunal**

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

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

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

#### **Rule 15**

#### **Deliberations of the Tribunal**

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

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

#### **Rule 16**

#### **Decisions of the Tribunal**

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

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

#### **Rule 17**

#### **Incapacity of the President**

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

#### **Rule 18**

#### **Representation of the Parties**

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

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

### **Chapter III General Procedural Provisions**

#### **Rule 19 Procedural Orders**

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

#### **Rule 20 Preliminary Procedural Consultation**

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

- (a) the number of members of the Tribunal required to constitute a quorum at its sittings;
- (b) the language or languages to be used in the proceedings;
- (c) the number and sequence of the pleadings and the time limits within which they are to be filed;
- (d) the number of copies desired by each party of instruments filed by the other;
- (e) dispensing with the written or the oral procedure;
- (f) the manner in which the cost of the proceeding is to be apportioned; and
- (g) the manner in which the record of the hearings shall be kept.

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

#### **Rule 21 Pre-Hearing Conference**

(1) At the request of the Secretary-General or at the discretion of the President of the Tribunal, a pre-hearing conference between the Tri-

bunal and the parties may be held to arrange for an exchange of information and the stipulation of uncontested facts in order to expedite the proceeding.

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

#### **Rule 22 Procedural Languages**

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

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

#### **Rule 23 Copies of Instruments**

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

- (a) before the number of members of the Tribunal has been determined: five;
- (b) after the number of members of the Tribunal has been determined: two more than the number of its members.

#### **Rule 24 Supporting Documentation**

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

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### **Rule 25 Correction of Errors**

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

### **Rule 26 Time Limits**

- (1) Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding. The Tribunal may delegate this power to its President.
- (2) The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.
- (3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

### **Rule 27 Waiver**

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

### **Rule 28 Cost of Proceeding**

- (1) Without prejudice to the final decision on the payment of the cost of the proceeding, the Tribunal may, unless otherwise agreed by the parties, decide:
  - (a) at any stage of the proceeding, the portion which each party shall pay, pursuant to Administrative and Financial Regulation 14, of the fees and expenses of the Tribunal and the charges for the use of the facilities of the Centre;
  - (b) with respect to any part of the proceeding, that the related costs (as determined by the Secretary-General) shall be borne entirely or in a particular share by one of the parties.

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

## **Chapter IV Written and Oral Procedures**

### **Rule 29 Normal Procedures**

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

### **Rule 30 Transmission of the Request**

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

### **Rule 31 The Written Procedure**

- (1) In addition to the request for arbitration, the written procedure shall consist of the following pleadings, filed within time limits set by the Tribunal:
  - (a) a memorial by the requesting party;
  - (b) a counter-memorial by the other party;
  - (c) a reply by the requesting party; and
  - (d) a rejoinder by the other party.
- (2) If the request was made jointly, each party shall, within the same time limit determined by the Tribunal, file its memorial and, if the parties so agree or the Tribunal deems it necessary, its reply; however,

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

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

### **Rule 32** **The Oral Procedure**

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

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

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

### **Rule 33** **Marshalling of Evidence**

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

### **Rule 34** **Evidence: General Principles**

- (1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.
- (2) The Tribunal may, if it deems it necessary at any stage of the proceeding:

- (a) call upon the parties to produce documents, witnesses and experts; and
- (b) visit any place connected with the dispute or conduct inquiries there.

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

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

### **Rule 35** **Examination of Witnesses and Experts**

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

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

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

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

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

### **Rule 36** **Witnesses and Experts: Special Rules**

Notwithstanding Rule 35 the Tribunal may:

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

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## Chapter V Particular Procedures

### Rule 39 Provisional Measures

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

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

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

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

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

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

### Rule 40 Ancillary Claims

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

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

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

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

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

- (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
- (b) the non-disputing party submission would address a matter within the scope of the dispute;
- (c) the non-disputing party has a significant interest in the proceeding.

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

### Rule 38 Closure of the Proceeding

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

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

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

### **Rule 41 Preliminary Objections**

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

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

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

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

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

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

### **Rule 42 Default**

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

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

- (a) if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or
- (b) if that party had failed to appear or present its case at a hearing, fix a new date for the hearing.

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

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

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

### **Rule 43 Settlement and Discontinuance**

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

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

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**Rule 44**  
**Discontinuance at Request of a Party**

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

**Rule 45**  
**Discontinuance for Failure of Parties to Act**

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

**Chapter VI**  
**The Award**

**Rule 46**  
**Preparation of the Award**

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

**Rule 47**  
**The Award**

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

- (c) the name of each member of the Tribunal, and an identification of the appointing authority of each;
- (d) the names of the agents, counsel and advocates of the parties;
- (e) the dates and place of the sittings of the Tribunal;
- (f) a summary of the proceeding;
- (g) a statement of the facts as found by the Tribunal;
- (h) the submissions of the parties;
- (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and
- (j) any decision of the Tribunal regarding the cost of the proceeding.

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

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

**Rule 48**  
**Rendering of the Award**

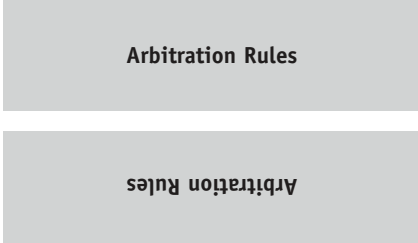
(1) Upon signature by the last arbitrator to sign, the Secretary-General shall promptly:

- (a) authenticate the original text of the award and deposit it in the archives of the Centre, together with any individual opinions and statements of dissent; and
- (b) dispatch a certified copy of the award (including individual opinions and statements of dissent) to each party, indicating the date of dispatch on the original text and on all copies.

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

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

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



## Rule 49 Supplementary Decisions and Rectification

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

- (a) identify the award to which it relates;
  - (b) indicate the date of the request;
  - (c) state in detail:
    - (i) any question which, in the opinion of the requesting party, the Tribunal omitted to decide in the award; and
    - (ii) any error in the award which the requesting party seeks to have rectified; and
  - (d) be accompanied by a fee for lodging the request.
- (2) Upon receipt of the request and of the lodging fee, the Secretary-General shall forthwith:
- (a) register the request;
  - (b) notify the parties of the registration;
  - (c) transmit to the other party a copy of the request and of any accompanying documentation; and
  - (d) transmit to each member of the Tribunal a copy of the notice of registration, together with a copy of the request and of any accompanying documentation.

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

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

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

## Chapter VII Interpretation, Revision and Annulment of the Award

### Rule 50 The Application

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

- (a) identify the award to which it relates;
  - (b) indicate the date of the application;
  - (c) state in detail:
    - (i) in an application for interpretation, the precise points in dispute;
    - (ii) in an application for revision, pursuant to Article 51(1) of the Convention, the change sought in the award, the discovery of some fact of such a nature as decisively to affect the award, and evidence that when the award was rendered that fact was unknown to the Tribunal and to the applicant, and that the applicant's ignorance of that fact was not due to negligence;
    - (iii) in an application for annulment, pursuant to Article 52(1) of the Convention, the grounds on which it is based. These grounds are limited to the following:
      - that the Tribunal was not properly constituted;
      - that the Tribunal has manifestly exceeded its powers;
      - that there was corruption on the part of a member of the Tribunal;
      - that there has been a serious departure from a fundamental rule of procedure;
      - that the award has failed to state the reasons on which it is based;
  - (d) be accompanied by the payment of a fee for lodging the application.
- (2) Without prejudice to the provisions of paragraph (3), upon receiving an application and the lodging fee, the Secretary-General shall forthwith:
- (a) register the application;
  - (b) notify the parties of the registration; and

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

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

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

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

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

- the Tribunal was not properly constituted;
- the Tribunal has manifestly exceeded its powers;
- there has been a serious departure from a fundamental rule of procedure;
- the award has failed to state the reasons on which it is based;

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

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

### **Rule 51** **Interpretation or Revision:** **Further Procedures**

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

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

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

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

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

### **Rule 52** **Annulment: Further Procedures**

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

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

### **Rule 53** **Rules of Procedure**

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

### **Rule 54** **Stay of Enforcement** **of the Award**

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

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

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

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

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

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

### **Rule 55 Resubmission of Dispute after an Annulment**

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

- (a) identify the award to which it relates;
- (b) indicate the date of the request;
- (c) explain in detail what aspect of the dispute is to be submitted to the Tribunal; and
- (d) be accompanied by a fee for lodging the request.

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

- (a) register it in the Arbitration Register;
- (b) notify both parties of the registration;
- (c) transmit to the other party a copy of the request and of any accompanying documentation; and
- (d) invite the parties to proceed, as soon as possible, to constitute a new Tribunal, including the same number of arbit-

trators, and appointed by the same method, as the original one.

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

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

## **Chapter VIII General Provisions**

### **Rule 56 Final Provisions**

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

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

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**ICSID Additional Facility Rules, as amended in 2006**

# **ICSID ADDITIONAL FACILITY RULES**



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## Introduction

The International Centre for Settlement of Investment Disputes (ICSID or the Centre) is established by the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or the Convention). As at April 10, 2006, 143 countries have ratified the Convention to become Contracting States. Under the ICSID Convention, the Centre provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States. The jurisdiction of ICSID, or in other terms, the scope of the Convention, is elaborated upon in Article 25(1) of the Convention. According to Article 25(1), “[t]he jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre.”

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

The Additional Facility Rules comprise a principal set of Rules Governing the Additional Facility and their three schedules: Fact-Finding Rules (Schedule A), Conciliation Rules (Schedule B) and Arbitration Rules (Schedule C). The latest amendments of the Additional Facility Rules adopted by the Administrative Council of the Centre came into effect on April 10, 2006.

Reprinted in this booklet are the Additional Facility Rules as amended effective April 10, 2006.

# ADDITIONAL FACILITY RULES

Additional Facility Rules

Additional Facility Rules

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

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*Proceedings under the Additional Facility are not governed by the ICSID Convention. In accordance with Article 5 of the Additional Facility Rules, however, certain provisions of the Administrative and Financial Regulations of ICSID apply mutatis mutandis in respect of proceedings under the Additional Facility. The Administrative and Financial Regulations are reprinted in ICSID Convention, Regulations and Rules, Document ICSID/15 (April 2006).*

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

### **Article 1 Definitions**

- (1) “Convention” means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, submitted to Governments by the Executive Directors of the International Bank for Reconstruction and Development on March 18, 1965, which entered into force on October 14, 1966.
- (2) “Centre” means the International Centre for Settlement of Investment Disputes established pursuant to Article 1 of the Convention.
- (3) “Secretariat” means the Secretariat of the Centre.
- (4) “Contracting State” means a State for which the Convention has entered into force.
- (5) “Secretary-General” means the Secretary-General of the Centre or his deputy.
- (6) “National of another State” means a person who is not, or whom the parties to the proceeding in question have agreed not to treat as, a national of the State party to that proceeding.

### **Article 2 Additional Facility**

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

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

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

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

### **Article 3 Convention Not Applicable**

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

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

- (1) Any agreement providing for conciliation or arbitration proceedings under the Additional Facility in respect of existing or future disputes requires the approval of the Secretary-General. The parties may apply for such approval at any time prior to the institution of proceedings by submitting to the Secretariat a copy of the agreement concluded or proposed to be concluded between them together with other relevant documentation and such additional information as the Secretariat may reasonably request.
- (2) In the case of an application based on Article 2(a), the Secretary-General shall give his approval only if (a) he is satisfied that the requirements of that provision are fulfilled at the time, and (b) both parties give their consent to the jurisdiction of the Centre under Article 25 of the Convention (in lieu of the Additional Facility) in the event that the jurisdictional requirements *ratione personae* of that Article shall have been met at the time when proceedings are instituted.

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

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

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

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

## **Article 5** **Administrative and Financial Provisions**

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

## **Article 6** **Schedules**

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

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

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

Schedule A  
Fact-Finding (Additional Facility) Rules

Schedule A  
Fact-Finding (Additional Facility) Rules

# Schedule A Fact-Finding (Additional Facility) Rules

## Chapter I Institution of Proceedings

### Article 1 The Request

- (1) Any State or national of a State wishing to institute an inquiry under the Additional Facility to examine and report on facts (hereinafter called a “fact-finding proceeding”) shall send a request to that effect in writing to the Secretariat at the seat of the Centre. It shall be drawn up in an official language of the Centre, shall be dated and shall be signed by the requesting party or its duly authorized representative.
- (2) The request may be made jointly by the parties to the fact-finding proceeding.

### Article 2 Contents of the Request

- (1) The request shall:
  - (a) designate precisely each party to the fact-finding proceeding and state the address of each;
  - (b) set forth the agreement between the parties providing for recourse to the fact-finding proceeding; and
  - (c) state the circumstances to be examined and reported on.
- (2) The request shall in addition set forth any provisions agreed by the parties regarding the number of commissioners, their qualifications, appointment, replacement, resignation and disqualification, the extent of the powers of the Committee, the appointment of its President, and the place of its sessions, as well as the procedure to be followed in the fact-finding proceeding (hereinafter called the “Procedural Arrangement”).
- (3) The request shall be accompanied by five additional signed copies and by the fee prescribed pursuant to Regulation 16 of the Administrative and Financial Regulations of the Centre.

### Article 3 Registration of the Request

- (1) As soon as the Secretary-General has satisfied himself that the request conforms in form and substance to the provisions of Article 2 of these Rules he shall register the request in the Fact-finding (Additional Facility) Register, notify the requesting party and the other party of the registration and transmit to the other party a copy of the request and of the accompanying documentation, if any.
- (2) The notice of registration of a request shall:
  - (a) record that the request is registered and indicate the date of the registration and of the dispatch of that notice;
  - (b) notify each party that all communications in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Secretariat; and
  - (c) request the other party to inform the Secretary-General in writing within 30 days after receipt of the notice whether it agrees with the request or it objects thereto.
- (3) In agreeing with the request, the other party may state additional circumstances which it wishes to be examined and reported on within the scope of the agreement between the parties for recourse to fact-finding proceedings. In that event, the Secretary-General shall request the requesting party to inform him promptly in writing whether it agrees to the inclusion of the additional facts or whether it objects thereto.

### Article 4 Objections to the Request

- (1) Any objection by the other party pursuant to Article 3(2)(c) of these Rules shall be filed by it in writing with the Secretary-General and shall indicate on which of the following grounds it is based and the reasons therefor:
  - (a) the other party is under no obligation to have recourse to fact-finding;
  - (b) the circumstances indicated in the request as the circumstances to be examined and reported on are wholly or partly outside the scope of the agreement between the parties for recourse to fact-finding.
- (2) The provisions of paragraph (1) of this Article shall apply *mutatis mutandis* to an objection by the requesting party pursuant to Article 3(3) of these Rules.

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

- (1) Promptly upon receipt of the notice of objections, the Secretary-General shall send a copy thereof to the requesting party or the other party, as the case may be, and shall invite the parties to meet with him in order to seek to resolve the objections by agreement.
- (2) Failing such agreement, he shall invite the parties to designate within 30 days a third party (hereinafter called the "Special Commissioner") to rule on the objections.
- (3) If the parties shall not have designated the Special Commissioner within the period specified in paragraph (2) of this Article, or such other period as the parties may agree, and if they or either one of them shall not be willing to request the Chairman of the Administrative Council (hereinafter called the "Chairman") or any other authority to designate the Special Commissioner, the Secretary-General shall inform the parties that the fact-finding proceeding cannot be held, recording the failure of the parties or one of them to cooperate.
- (4) The Special Commissioner shall rule on the objections only after hearing both parties and in his ruling shall decide whether or not the fact-finding proceeding is to continue, stating the reasons for his decision. If he decides that the proceeding is to continue, he shall determine the scope thereof.

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

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

## **Chapter II The Committee and Its Working**

### **Article 7 Number of Commissioners**

- (1) Except as the parties may otherwise agree, the Committee shall consist of a sole commissioner or any uneven number of commissioners.
- (2) If the Committee is to consist of three or more commissioners, one person shall be appointed the President of the Committee. References in these Rules to a Committee or a President of a Committee shall include a sole commissioner.

### **Article 8 Constitution of the Committee**

- (1) The Committee shall be deemed to be constituted and the proceeding to have begun on the date the Secretary-General notifies the parties that all the commissioners have accepted their appointments.
- (2) Before or at the first session of the Committee, each commissioner shall sign a declaration in the following form:  
"To the best of my knowledge there is no reason why I should not serve on the Fact-finding Committee constituted to examine certain facts under the Additional Facility pursuant to an agreement between \_\_\_\_\_ and \_\_\_\_\_."  
"I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any report drawn up by the Committee."  
"I shall not accept any instruction or compensation with regard to the proceeding from any source except as provided in the Administrative and Financial Regulations of the Centre."

### **Article 6 Absence of Procedural Arrangement**

- (1) If, or to the extent that, the request does not set forth an agreement between the parties regarding the matters referred to in Article 2(2) of these Rules, the Secretary-General shall invite the parties to conclude in writing and furnish to the Secretariat within 30 days a Procedural Arrangement. The Procedural Arrangement may include any other matter or matters the parties may agree.
- (2) If the Procedural Arrangement cannot be concluded within the period referred to in paragraph (1) of this Article, or such other period as the parties may agree, the Procedural Arrangement shall be drawn up by the Chairman after consulting with the parties and shall be binding upon the parties.
- (3) Unless the parties agree otherwise, the Procedural Arrangement drawn up by the Chairman shall provide for the appointment of three commissioners. Other provisions made by the Chairman relating to: (a) qualifications, appointment, replacement, resignation, and disqualification of the commissioners, filling up of the vacancies and consequential resumption of proceedings; and (b) incapacity of the

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

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

### **Article 9 Sessions of the Committee**

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

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

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

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

### **Article 10 Conduct of Investigations and Examinations**

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

### **Article 11 Decisions of the Committee**

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

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

### **Article 12 Notices to Be Served by the Committee**

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

### **Article 13 Determinations of Questions of Procedure**

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

### **Chapter III Termination of the Proceedings**

#### **Article 14 Closure of the Proceeding**

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

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

#### **Article 15 The Report**

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

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



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

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

**Article 16**  
**Effect to Be Given to the Report**

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

**Chapter IV**  
**Miscellaneous**

**Article 17**  
**Cooperation with the Committee**

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

**Article 18**  
**Cost of the Proceeding**

The fees and expenses of the members of the Committee and of any Special Commissioner, as well as the charges for the use of the facilities of the Centre, shall be borne equally by the parties. Each party shall bear any other expenses it incurs in connection with the proceeding.

**Article 19**  
**Final Provision**

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

**SCHEDULE B  
CONCILIATION  
(ADDITIONAL FACILITY)  
RULES**

Schedule B  
Conciliation (Additional Facility) Rules

**SCHEDULE B**  
**CONCILIATION (ADDITIONAL FACILITY) RULES**

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# Schedule B Conciliation (Additional Facility) Rules

## Chapter I Introduction Article 1 Scope of Application

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

## Chapter II Institution of Proceedings

### Article 2 The Request

- (1) Any State or any national of a State wishing to institute conciliation proceedings under the Additional Facility shall send a request to that effect in writing to the Secretariat at the seat of the Centre. It shall be drawn up in an official language of the Centre, shall be dated and shall be signed by the requesting party or its duly authorized representative.
- (2) The request may be made jointly by the parties to the dispute.

### Article 3 Contents of the Request

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

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

- (e) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.
- (2) The request may in addition set forth any provisions agreed by the parties regarding the number of conciliators and the method of their appointment, as well as any other provisions agreed concerning the settlement of the dispute.

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

### Article 4 Registration of the Request

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

### Article 5 Notice of Registration

The notice of registration of a request shall:

- (a) record that the request is registered and indicate the date of the registration and of the dispatch of the notice;
- (b) notify each party that all communications in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Secretariat;
- (c) unless such information has already been provided, invite the parties to communicate to the Secretary-General any provisions agreed by them regarding the number and the method of appointment of the conciliators;
- (d) remind the parties that the registration of the request is without prejudice to the powers and functions of the Conciliation Commission in regard to competence and the merits; and
- (e) invite the parties to proceed, as soon as possible, to constitute a Conciliation Commission in accordance with Chapter III of these Rules.

## Schedule B Conciliation (Additional Facility) Rules

## Schedule B Conciliation (Additional Facility) Rules

## Chapter III The Commission

### Article 6 General Provisions

- (1) Upon the dispatch of the notice of registration of the request for conciliation, the parties shall promptly proceed to constitute a Conciliation Commission.
- (2) The Commission shall consist of a sole conciliator or any uneven number of conciliators appointed as the parties shall agree.
- (3) In the absence of agreement between the parties regarding the number of conciliators and the method of their appointment, the Commission shall consist of three conciliators, one conciliator appointed by each party and the third, who shall be the President of the Commission, appointed by agreement of the parties.
- (4) If the Commission shall not have been constituted within 90 days after the notice of registration of the request for conciliation has been dispatched by the Secretary-General, or such other period as the parties may agree, the Chairman of the Administrative Council (hereinafter called the "Chairman") shall, at the request in writing of either party transmitted through the Secretary-General, appoint the conciliator or conciliators not yet appointed and, unless the President shall already have been designated or is to be designated later, designate a conciliator to be President of the Commission.

### Article 7 Qualifications of Conciliators

Conciliators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.

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

- (1) If the parties, at the time of the registration of the request for conciliation, have not agreed upon the number of conciliators and the method of their appointment, they shall, unless they agree otherwise, follow the following procedures:
  - (a) the requesting party shall, within 10 days after the registration of the request, propose to the other party the appointment of a sole conciliator or of a specified uneven number

of conciliators and specify the method proposed for their appointment;

- (b) within 20 days after receipt of the proposals made by the requesting party, the other party shall:
    - (i) accept such proposals; or
    - (ii) make other proposals regarding the number of conciliators and the method of their appointment; and
  - (c) within 20 days after receipt of the reply containing any such proposals, the requesting party shall notify the other party whether it accepts or rejects such proposals.
- (2) The communications provided for in paragraph (1) of this Article shall be made or promptly confirmed in writing and shall either be transmitted through the Secretary-General or directly between the parties with a copy to the Secretary-General. The parties shall promptly notify the Secretary-General of the contents of any agreement reached.
- (3) At any time 60 days after the registration of the request, if no agreement on another procedure is reached, either party may inform the Secretary-General that it chooses the formula provided for in Article 6(3) of these Rules. The Secretary-General shall thereupon promptly inform the parties that the Commission is to be constituted in accordance with that provision.

## Schedule B Conciliation (Additional Facility) Rules

## Schedule B Conciliation (Additional Facility) Rules

### Article 9

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

- (1) If the Commission is to be constituted in accordance with Article 6(3) of these Rules:
  - (a) either party shall, in a communication to the other party:
    - (i) name two persons, identifying one of them as the conciliator appointed by it and the other as the conciliator proposed to be the President of the Commission; and
    - (ii) invite the other party to concur in the appointment of the conciliator proposed to be the President of the Commission and to appoint another conciliator;
  - (b) promptly upon receipt of this communication the other party shall, in its reply:
    - (i) name a person as the conciliator appointed by it; and
    - (ii) concur in the appointment of the conciliator proposed to be the President of the Commission or name another person as the conciliator proposed to be the President; and

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

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

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

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

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

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

**Article 11**  
**Acceptance of Appointments**

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

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

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

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

At any time before the Commission is constituted, each party may replace any conciliator appointed by it and the parties may by common consent agree to replace any conciliator.

**Article 13**  
**Constitution of the Commission**

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

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

“To the best of my knowledge there is no reason why I should not serve on the Conciliation Commission constituted with respect to a dispute between \_\_\_\_\_ and \_\_\_\_\_.”

“I shall keep confidential all information coming to my knowledge as a result of my participation in this proceeding, as well as the contents of any report drawn up by the Commission.

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

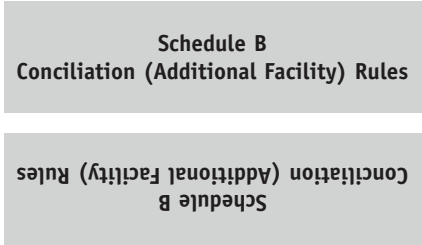
“A statement of my past and present professional, business and other relevant relationships (if any) with the parties is attached hereto.”

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

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

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

(2) If a conciliator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of conciliators set forth in Article 15 shall apply.



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

### **Article 15 Disqualification of Conciliators**

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

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

(3) The Secretary-General shall forthwith:

- (a) transmit the proposal to the members of the Commission and, if it relates to a sole conciliator or to a majority of the members of the Commission, to the Chairman; and
- (b) notify the other party of the proposal.

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

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

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

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

### **Article 16 Procedure during a Vacancy on the Commission**

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

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

### **Article 17 Filling Vacancies on the Commission**

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

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

- (a) fill a vacancy caused by the resignation, without the consent of the Commission, of a conciliator appointed by a party; or
- (b) at the request of either party, fill any other vacancy, if no new appointment is made and accepted within 45 days of the notification of the vacancy by the Secretary-General.

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

### **Article 18 Resumption of Proceeding after Filling a Vacancy**

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

## **Chapter IV Place of Proceedings**

### **Article 19 Determination of Place of Conciliation Proceeding**

Unless the parties have agreed upon the place where the conciliation proceeding is to be held, such place shall be determined by the Secretary-General in consultation with the President of the Commis-

### **Schedule B Conciliation (Additional Facility) Rules**

### **Schedule B Conciliation (Additional Facility) Rules**

sion, or if there is no President, with the single conciliator, having regard to the circumstances of the proceeding and the convenience of the parties.

**Chapter V  
Working of the Commission**

**Article 20  
Sessions of the Commission**

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

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

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

**Article 21  
Sittings of the Commission**

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

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

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

**Article 22  
Deliberations of the Commission**

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

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

**Article 23  
Decisions of the Commission**

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

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

**Article 24  
Incapacity of the President**

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

**Article 25  
Representation of the Parties**

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

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

**Chapter VI  
General Procedural Provisions**

**Article 26  
Procedural Orders**

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

**Schedule B  
Conciliation (Additional Facility) Rules**

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**Article 27**  
**Preliminary Procedural Consultation**

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

- (a) the number of members of the Commission required to constitute a quorum at its sittings;
- (b) the language or languages to be used in the proceeding;
- (c) the evidence, oral or written, which each party intends to produce or to request the Commission to call for, and the written statements which each party intends to file, as well as the time limits within which such evidence should be produced and such statements filed;
- (d) the number of copies desired by each party of instruments filed by the other; and
- (e) the manner in which the record of the hearings shall be kept.

(2) In the conduct of the proceeding the Commission shall apply any agreement between the parties on procedural matters, which is not inconsistent with any provisions of the Additional Facility Rules and the Administrative and Financial Regulations of the Centre.

**Article 28**  
**Procedural Languages**

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

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

**Article 29**  
**Supporting Documentation**

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

**Chapter VII**  
**Conciliation Procedures**

**Article 30**  
**Functions of the Commission**

(1) It shall be the duty of the Commission to clarify the issues in dispute between the parties and to endeavour to bring about agreement between them upon mutually acceptable terms.

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

(3) In order to bring about agreement between the parties, the Commission may, from time to time at any stage of the proceedings, make recommendations to the parties, together with arguments in favor thereof, including recommendations to the effect that the parties accept specific terms of settlement or that they refrain, while it seeks to bring about agreement between them, from specific acts that might aggravate the dispute. It may fix time limits within which each party shall inform the Commission of its decision concerning the recommendations made. The parties shall give their most serious consideration to such recommendations.

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

- (a) request from either party oral explanations, documents and other information;
- (b) request evidence from other persons; and
- (c) with the consent of the party concerned, visit any place connected with the dispute or conduct inquiries there, provided that the parties may participate in any such visits and inquiries.

**Schedule B**  
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**Article 31  
Cooperation of the Parties**

The parties shall cooperate in good faith with the Commission in order to enable the Commission to carry out its functions, and shall give their most serious consideration to its recommendations. Without prejudice to the generality of the foregoing, the parties shall: (a) at the request of the Commission, furnish all relevant documents, information and explanations as well as use the means at their disposal to enable the Commission to hear witnesses and experts whom it desires to call; (b) facilitate visits to and inquiries at any place connected with the dispute that the Commission desires to undertake; and (c) comply with any time limits agreed with or fixed by the Commission.

**Article 32  
Transmission of the Request**

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

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

**Article 33  
Written Statements**

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

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

**Article 34  
Hearings**

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

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

**Article 35  
Witnesses and Experts**

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

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

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

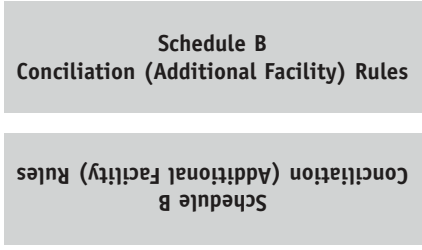
**Chapter VIII  
Termination of the Proceeding**

**Article 36  
Objections to Competence**

(1) The Commission shall have the power to rule on its competence.  
(2) Any objection that the dispute is not within the competence of the Commission, shall be filed by a party with the Secretary-General as soon as possible after the constitution of the Commission and in any event no later than in its first written statement or at the first hearing if that occurs earlier, unless the facts on which the objection is based are unknown to the party at that time.

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

(4) Upon the formal raising of an objection, the proceeding on the merits shall be suspended. The Commission may deal with the objection as a preliminary question or join it to the merits of the dispute. If



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

**Article 37**  
**Closure of the Proceeding**

- (1) If one party fails to appear or participate in the proceeding, the Commission shall, after notice to the parties, close the proceeding and draw up its report noting the reference of the dispute to conciliation and recording the failure of that party to appear or participate.
- (2) If at any stage of the proceeding it appears to the Commission that there is no likelihood of settlement between the parties, the Commission shall, after notice to the parties, close the proceeding and draw up its report noting the reference of the dispute to conciliation and recording the failure of the parties to reach a settlement.
- (3) If the parties reach agreement on the issues in dispute, the Commission shall close the proceeding and draw up its report noting the issues in dispute and recording that the parties have reached agreement. At the request of the parties, the report shall record the detailed terms and conditions of their agreement.
- (4) Except as the parties otherwise agree, neither party to a conciliation proceeding may in any other proceeding before arbitrators, courts or otherwise invoke or rely on any views expressed or statements or admissions or offers of settlement made by the other party in the conciliation proceeding, or the report or any recommendations made by the Commission.

**Article 38**  
**The Report**

- (1) The report of the Commission shall be drawn up and signed as soon as possible after the closure of the proceeding. It shall contain, in addition to the material specified in Article 37 of these Rules, as appropriate:
  - (a) a precise designation of each party;
  - (b) a description of the method of constitution of the Commission;
  - (c) the names of the members of the Commission, and an identification of the appointing authority of each;
  - (d) the names of the agents, counsel and advocates of the parties;
  - (e) the dates and place of the sittings of the Commission; and
  - (f) a summary of the proceeding.

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

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

**Article 39**  
**Communication of the Report**

- (1) Upon signature of the last conciliator to sign, the Secretary-General shall promptly:
  - (a) authenticate the original text of the report and deposit it in the archives of the Secretariat; and
  - (b) dispatch a certified copy of the report to each party, indicating the date of dispatch on the original text and on all copies.
- (2) The Secretary-General shall, upon request, make available to a party additional certified copies of the report.

**Chapter IX**  
**Costs**

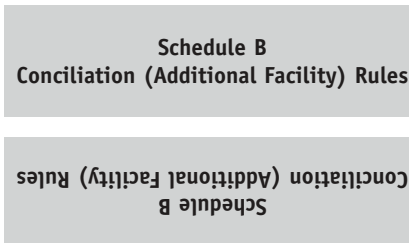
**Article 40**  
**Cost of Proceeding**

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

**Chapter X**  
**General Provisions**

**Article 41**  
**Final Provision**

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



**SCHEDULE C**  
**ARBITRATION (ADDITIONAL FACILITY) RULES**

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**SCHEDULE C**  
**ARBITRATION**  
**(ADDITIONAL FACILITY)**  
**RULES**

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# Schedule C

## Arbitration (Additional Facility) Rules

### Chapter I Introduction

#### Article 1 Scope of Application

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

### Chapter II Institution of Proceedings

#### Article 2 The Request

- (1) Any State or any national of a State wishing to institute arbitration proceedings shall send a request to that effect in writing to the Secretariat at the seat of the Centre. It shall be drawn up in an official language of the Centre, shall be dated and shall be signed by the requesting party or its duly authorized representative.
- (2) The request may be made jointly by the parties to the dispute.

#### Article 3 Contents of the Request

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

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

- (d) contain information concerning the issues in dispute and an indication of the amount involved, if any; and
  - (e) state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request.
- (2) The request may in addition set forth any provisions agreed by the parties regarding the number of arbitrators and the method of their appointment, as well as any other provisions agreed concerning the settlement of the dispute.

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

#### Article 4 Registration of the Request

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

#### Article 5 Notice of Registration

The notice of registration of a request shall:

- (a) record that the request is registered and indicate the date of the registration and of the dispatch of the notice;
- (b) notify each party that all communications in connection with the proceeding will be sent to the address stated in the request, unless another address is indicated to the Secretariat;
- (c) unless such information has already been provided, invite the parties to communicate to the Secretary-General any provisions agreed by them regarding the number and the method of appointment of the arbitrators;
- (d) remind the parties that the registration of the request is without prejudice to the powers and functions of the Arbitral Tribunal in regard to competence and the merits; and
- (e) invite the parties to proceed, as soon as possible, to constitute an Arbitral Tribunal in accordance with Chapter III of these Rules.

## Chapter III The Tribunal

### Article 6 General Provisions

(1) In the absence of agreement between the parties regarding the number of arbitrators and the method of their appointment, the Tribunal shall consist of three arbitrators, one arbitrator appointed by each party and the third, who shall be the President of the Tribunal, appointed by agreement of the parties, all in accordance with Article 9 of these Rules.

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

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

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

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

### Article 7 Nationality of Arbitrators

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

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

### Article 8 Qualifications of Arbitrators

Arbitrators shall be persons of high moral character and recognized competence in the fields of law, commerce, industry or finance, who may be relied upon to exercise independent judgment.

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

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

- (a) either party shall, in a communication to the other party:
  - (i) name two persons, identifying one of them, who shall not have the same nationality as nor be a national of either party, as the arbitrator appointed by it, and the other as the arbitrator proposed to be the President of the Tribunal; and
  - (ii) invite the other party to concur in the appointment of the arbitrator proposed to be the President of the Tribunal and to appoint another arbitrator;
- (b) promptly upon receipt of this communication the other party shall, in its reply:
  - (i) name a person as the arbitrator appointed by it, who shall not have the same nationality as nor be a national of either party; and
  - (ii) concur in the appointment of the arbitrator proposed to be the President of the Tribunal or name another person as the arbitrator proposed to be President; and
- (c) promptly upon receipt of the reply containing such a proposal, the initiating party shall notify the other party whether it concurs in the appointment of the arbitrator proposed by that party to be the President of the Tribunal.

(2) The communications provided for in paragraph (1) of this Article shall be made or promptly confirmed in writing and shall either

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

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

- (1) Promptly upon receipt of a request by a party to the Chairman to make an appointment or designation pursuant to Article 6(4) of these Rules, the Secretary-General shall send a copy thereof to the other party.
- (2) The Chairman shall use his best efforts to comply with that request within 30 days after its receipt. Before he proceeds to make appointments or a designation, he shall consult both parties as far as possible.
- (3) The Secretary-General shall promptly notify the parties of any appointment or designation made by the Chairman.

### **Article 11** **Acceptance of Appointments**

- (1) The party or parties concerned shall notify the Secretary-General of the appointment of each arbitrator and indicate the method of his appointment.
- (2) As soon as the Secretary-General has been informed by a party or the Chairman of the appointment of an arbitrator, he shall seek an acceptance from the appointee.
- (3) If an arbitrator fails to accept his appointment within 15 days, the Secretary-General shall promptly notify the parties, and if appropriate the Chairman, and invite them to proceed to the appointment of another arbitrator in accordance with the method followed for the previous appointment.

### **Article 12** **Replacement of Arbitrators prior to Constitution of the Tribunal**

At any time before the Tribunal is constituted, each party may replace any arbitrator appointed by it and the parties may by common consent agree to replace any arbitrator.

### **Article 13** **Constitution of the Tribunal**

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

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

“To the best of my knowledge there is no reason why I should not serve on the Arbitral Tribunal constituted with respect to a dispute between \_\_\_\_\_ and \_\_\_\_\_.

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

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

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

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

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

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

(2) If an arbitrator becomes incapacitated or unable to perform the duties of his office, the procedure in respect of the disqualification of arbitrators set forth in Article 15 shall apply.

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



## Article 15 Disqualification of Arbitrators

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

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

(3) The Secretary-General shall forthwith:

- (a) transmit the proposal to the members of the Tribunal and, if it relates to a sole arbitrator or to a majority of the members of the Tribunal, to the Chairman; and
- (b) notify the other party of the proposal.

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

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

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

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

## Article 16 Procedure during a Vacancy on the Tribunal

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

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

## Article 17 Filling Vacancies on the Tribunal

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

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

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

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

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

## Article 18 Resumption of Proceeding after Filling a Vacancy

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

## Chapter IV Place of Arbitration

### Article 19 Limitation on Choice of Forum

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

## Article 20

### Determination of Place of Arbitration

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

## Chapter V

### Working of the Tribunal

## Article 21

### Sessions of the Tribunal

- (1) The Tribunal shall meet for its first session within 60 days after its constitution or such other period as the parties may agree. The dates of that session shall be fixed by the President of the Tribunal after consultation with its members and the Secretariat, and with the parties as far as possible. If, upon its constitution, the Tribunal has no President, such dates shall be fixed by the Secretary-General after consultation with the members of the Tribunal, and with the parties as far as possible.
- (2) Subsequent sessions shall be convened by the President within time limits determined by the Tribunal. The dates of such sessions shall be fixed by the President of the Tribunal after consultation with its members and the Secretariat, and with the parties as far as possible.
- (3) The Secretary-General shall notify the members of the Tribunal and the parties of the dates and place of the sessions of the Tribunal in good time.

## Article 22

### Sittings of the Tribunal

- (1) The President of the Tribunal shall conduct its hearings and preside at its deliberations.
- (2) Except as the parties otherwise agree, the presence of a majority of the members of the Tribunal shall be required at its sittings.
- (3) The President of the Tribunal shall fix the date and hour of its sittings.

## Article 23

### Deliberations of the Tribunal

- (1) The deliberations of the Tribunal shall take place in private and remain secret.
  - (2) Only members of the Tribunal shall take part in its deliberations. No other person shall be admitted unless the Tribunal decides otherwise.
- (1) Any award or other decision of the Tribunal shall be made by a majority of the votes of all its members. Abstention by any member of the Tribunal shall count as a negative vote.
  - (2) Except as otherwise provided by these Rules or decided by the Tribunal, it may take any decisions by correspondence among its members, provided that all of them are consulted. Decisions so taken shall be certified by the President of the Tribunal.

## Article 24

### Decisions of the Tribunal

## Article 25

### Incapacity of the President

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

## Article 26

### Representation of the Parties

- (1) Each party may be represented or assisted by agents, counsel or advocates whose names and authority shall be notified by that party to the Secretariat, which shall promptly inform the Tribunal and the other party.
- (2) For the purposes of these Rules, the expression "party" includes, where the context so admits, an agent, counsel or advocate authorized to represent that party.

## Chapter VI General Procedural Provisions

### Article 27 Procedural Orders

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

### Article 28 Preliminary Procedural Consultation

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

- (a) the number of members of the Tribunal required to constitute a quorum at its sittings;
  - (b) the language or languages to be used in the proceeding;
  - (c) the number and sequence of the pleadings and the time limits within which they are to be filed;
  - (d) the number of copies desired by each party of instruments filed by the other;
  - (e) dispensing with the written or oral procedure;
  - (f) the manner in which the cost of the proceeding is to be apportioned; and
  - (g) the manner in which the record of the hearings shall be kept.
- (2) In the conduct of the proceeding the Tribunal shall apply any agreement between the parties on procedural matters, which is not inconsistent with any provisions of the Additional Facility Rules and the Administrative and Financial Regulations of the Centre.

### Article 29 Pre-Hearing Conference

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

resentatives, may be held to consider the issues in dispute with a view to reaching an amicable settlement.

### Article 30 Procedural Languages

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

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

### Article 31 Copies of Instruments

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

- (a) before the number of members of the Tribunal has been determined: five; and
- (b) after the number of members of the Tribunal has been determined: two more than the number of its members.

### Article 32 Supporting Documentation

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

### **Article 33 Time Limits**

- (1) Where required, time limits shall be fixed by the Tribunal by assigning dates for the completion of the various steps in the proceeding. The Tribunal may delegate this power to its President.
- (2) The Tribunal may extend any time limit that it has fixed. If the Tribunal is not in session, this power shall be exercised by its President.
- (3) Any step taken after expiration of the applicable time limit shall be disregarded unless the Tribunal, in special circumstances and after giving the other party an opportunity of stating its views, decides otherwise.

### **Article 34 Waiver**

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

### **Article 35 Filling of Gaps**

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

## **Chapter VII Written and Oral Procedures**

### **Article 36 Normal Procedures**

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

### **Article 37 Transmission of the Request**

As soon as the Tribunal is constituted, the Secretary-General shall transmit to each member of the Tribunal a copy of the request by which the proceeding was commenced, of the supporting documentation, of

the notice of registration of the request and of any communication received from either party in response thereto.

### **Article 38 The Written Procedure**

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

- (a) a memorial by the requesting party;
  - (b) a counter-memorial by the other party;
- and, if the parties so agree or the Tribunal deems it necessary:
- (c) a reply by the requesting party; and
  - (d) a rejoinder by the other party.

(2) If the request was made jointly, each party shall, within the same time limit determined by the Tribunal, file its memorial. However, the parties may instead agree that one of them shall, for the purposes of paragraph (1) of this Article, be considered as the requesting party.

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

### **Article 39 The Oral Procedure**

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

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

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

## Article 40 Marshalling of Evidence

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

## Article 41 Evidence: General Principles

- (1) The Tribunal shall be the judge of the admissibility of any evidence adduced and of its probative value.
- (2) The Tribunal may, if it deems it necessary at any stage of the proceeding, call upon the parties to produce documents, witnesses and experts.
- (3) After consulting both parties, the Tribunal may allow a person or entity that is not a party to the dispute (in this Article called the “non-disputing party”) to file a written submission with the Tribunal regarding a matter within the scope of the dispute. In determining whether to allow such a filing, the Tribunal shall consider, among other things, the extent to which:
  - (a) the non-disputing party submission would assist the Tribunal in the determination of a factual or legal issue related to the proceeding by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties;
  - (b) the non-disputing party submission would address a matter within the scope of the dispute;
  - (c) the non-disputing party has a significant interest in the proceeding.

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

## Article 42 Examination of Witnesses and Experts

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

## Article 43 Witnesses and Experts: Special Rules

The Tribunal may:

- (a) admit evidence given by a witness or expert in a written deposition;
- (b) with the consent of both parties, arrange for the examination of a witness or expert otherwise than before the Tribunal itself. The Tribunal shall define the procedure to be followed. The parties may participate in the examination; and
- (c) appoint one or more experts, define their terms of reference, examine their reports and hear from them in person.

## Article 44 Closure of the Proceeding

- (1) When the presentation of the case by the parties is completed, the proceeding shall be declared closed.
- (2) Exceptionally, the Tribunal may, before the award has been rendered, reopen the proceeding on the ground that new evidence is forthcoming of such a nature as to constitute a decisive factor, or that there is a vital need for clarification on certain specific points.

## Chapter VIII Particular Procedures

### Article 45 Preliminary Objections

- (1) The Tribunal shall have the power to rule on its competence. For the purposes of this Article, an agreement providing for arbitration under the Additional Facility shall be separable from the other terms of the contract in which it may have been included.
- (2) Any objection that the dispute is not within the competence of the Tribunal shall be filed with the Secretary-General as soon as possi-

ble after the constitution of the Tribunal and in any event no later than the expiration of the time limit fixed for the filing of the counter-memorial or, if the objection relates to an ancillary claim, for the filing of the rejoinder—unless the facts on which the objection is based are unknown to the party at that time.

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

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

(5) The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (2) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures.

(6) Unless the parties have agreed to another expedited procedure for making preliminary objections, a party may, no later than 30 days after the constitution of the Tribunal, and in any event before the first session of the Tribunal, file an objection that a claim is manifestly without legal merit. The party shall specify as precisely as possible the basis for the objection. The Tribunal, after giving the parties the opportunity to present their observations on the objection, shall, at its first session or promptly thereafter, notify the parties of its decision on the objection. The decision of the Tribunal shall be without prejudice to the right of a party to file an objection pursuant to paragraph (2) or to object, in the course of the proceeding, that a claim lacks legal merit.

(7) If the Tribunal decides that the dispute is not within its competence or that all claims are manifestly without legal merit, it shall issue an award to that effect.

#### **Article 46** **Provisional Measures of Protection**

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

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

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

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

#### **Article 47** **Ancillary Claims**

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

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

#### **Article 48** **Default**

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

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

- (a) if that party had failed to file a pleading or any other instrument within the time limit fixed therefor, fix a new time limit for its filing; or
- (b) if that party had failed to appear or present its case at a hearing, fix a new date for the hearing.

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

(3) After the expiration of the period of grace or when, in accordance with paragraph (2) of this Article, no such period is granted, the Tribunal shall examine whether the dispute is within its jurisdiction and, if it is satisfied as to its jurisdiction, decide whether the submissions made are well-founded in fact and in law. To this end, it may, at

any stage of the proceeding, call on the party appearing to file observations, produce evidence or submit oral explanations.

#### **Article 49 Settlement and Discontinuance**

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

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

#### **Article 50 Discontinuance at Request of a Party**

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

#### **Article 51 Discontinuance for Failure of Parties to Act**

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

## **Chapter IX The Award**

### **Article 52 The Award**

- (1) The award shall be made in writing and shall contain:
  - (a) a precise designation of each party;
  - (b) a statement that the Tribunal was established under these Rules, and a description of the method of its constitution;
  - (c) the name of each member of the Tribunal, and an identification of the appointing authority of each;
  - (d) the names of the agents, counsel and advocates of the parties;
  - (e) the dates and place of the sittings of the Tribunal;
  - (f) a summary of the proceeding;
  - (g) a statement of the facts as found by the Tribunal;
  - (h) the submissions of the parties;
  - (i) the decision of the Tribunal on every question submitted to it, together with the reasons upon which the decision is based; and
  - (j) any decision of the Tribunal regarding the cost of the proceeding.
- (2) The award shall be signed by the members of the Tribunal who voted for it; the date of each signature shall be indicated. Any member of the Tribunal may attach his individual opinion to the award, whether he dissents from the majority or not, or a statement of his dissent.
- (3) If the arbitration law of the country where the award is made requires that it be filed or registered by the Tribunal, the Tribunal shall comply with this requirement within the period of time required by law.
- (4) The award shall be final and binding on the parties. The parties waive any time limits for the rendering of the award which may be provided for by the law of the country where the award is made.

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

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

- (a) authenticate the original text of the award and deposit it in the archives of the Secretariat, together with any individual opinions and statements of dissent; and
- (b) dispatch a certified copy of the award (including individual opinions and statements of dissent) to each party, indicating the date of dispatch on the original text and on all copies;

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

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

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

#### **Article 54** **Applicable Law**

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

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

#### **Article 55** **Interpretation of the Award**

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

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

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

#### **Article 56** **Correction of the Award**

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

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

#### **Article 57** **Supplementary Decisions**

(1) Within 45 days after the date of the award either party, with notice to the other party may request the Tribunal, through the Secretary-General, to decide any question which it had omitted to decide in the award.

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

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

### **Chapter X** **Costs**

#### **Article 58** **Cost of Proceeding**

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

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



**Chapter XI  
General Provisions**

**Article 59  
Final Provision**

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



**Office of the Spokesperson of the U.S. Department of State,  
Fact Sheet on the United States Model Bilateral Investment  
Treaty, 20 April 2012**



## Model Bilateral Investment Treaty

### Fact Sheet

Office of the Spokesperson

Washington, DC

April 20, 2012

In February 2009, the Obama Administration initiated a review of the United States' model bilateral investment treaty (BIT) to ensure that it was consistent with the public interest and the Administration's overall economic agenda. The Administration sought and received extensive input from Congress, companies, business associations, labor groups, environmental and other non-governmental organizations, and academics. While revisions to a U.S. model BIT do not require Congressional action, negotiated BITs require advice and consent of two thirds of the Senate.

The 2012 model BIT maintains language from the 2004 model BIT, in particular its carefully calibrated balance between providing strong investor protections and preserving the government's ability to regulate in the public interest. The Administration made several targeted and important changes from the previous model text, however, in order to improve protections for American firms, promote transparency, and strengthen the protection of labor rights and the environment.

### Transparency and Public Participation

Stakeholders representing a range of interests called on the Administration to enhance transparency and opportunities for public participation in the model BIT. The revised model BIT enhances transparency and public participation in several important ways, including:

1. **Transparency consultations.** The 2012 model BIT requires the Parties to consult periodically regarding how to improve their transparency practices, both in the context of developing and implementing laws, regulations, and other measures affecting investment and in the context of investor-State dispute settlement.
2. **Notice and comment procedures.** The 2012 model BIT bolsters Parties' obligations to publish proposed regulations, explain their purposes and rationales, and address substantive comments provided by stakeholders (among other actions), including, as appropriate, with respect to financial services.
3. **Multilateral appellate procedures.** The Administration enhanced language regarding the possibility of a future multilateral appellate mechanism by requiring Parties to strive to ensure that any such mechanism includes provisions on transparency and public participation comparable to those already provided for in investor-State dispute settlement under the BIT.

### Labor and Environment

It was an Administration priority to enhance labor and environmental standards in the model BIT. As a result, the 2012 model BIT expands obligations in the areas of labor and environment in four important ways.

1. **New obligation not to "waive or derogate" from domestic laws.** The 2012 model BIT includes an obligation on Parties to not waive or derogate from their domestic labor and environmental laws as an encouragement for investment.
2. **New obligation to "effectively enforce" domestic laws.** The 2012 model BIT also contains an obligation on Parties not to fail to effectively enforce their domestic labor and environmental laws as an encouragement for investment.
3. **New provision whereby Parties reaffirm and recognize international commitments.** Under the 2012 model BIT, Parties reaffirm their commitments under the International Labor Organization (ILO) Declaration and recognize the importance of multilateral environmental agreements.
4. **Strengthened consultations procedure.** Finally, the 2012 model BIT subjects the articles on labor and environment to more detailed and extensive consultation procedures than those applicable under the 2004 model BIT.

### State-Led Economies

During the Administration's review, several stakeholders raised concerns regarding "state-led economies," *i.e.*, countries that organize economic activity to a significant degree on the basis of state-owned enterprises (SOEs) and other mechanisms of state influence and control. While the 2004 model BIT already contains numerous tools to address such concerns, the Administration responded to this input by including three key innovations in the text.

1. **Domestic technology requirements.** The Administration crafted a new discipline to prevent Parties from imposing domestic technology requirements, *i.e.*, requiring the purchase, use, or according of a preference to domestically developed technology in order to provide an advantage to a Party's own investors, investments, or technology.
2. **Participation in standard-setting.** U.S. investors may be at a competitive disadvantage when product standards in foreign markets are developed in an opaque, unpredictable, or discriminatory fashion, especially where governments use standards or technical regulations to favor domestic firms and technologies. The 2012 model BIT includes new language requiring Parties to allow investors of the other Party to participate in the development of

standards and technical regulations on non-discriminatory terms. This provision also recommends that non-governmental standards bodies observe this requirement.

3. **Delegated government authority.** The Administration developed a new footnote to clarify the standard for whether a Party has delegated governmental authority to an SOE or any other person or entity, in order to help ensure that the actions of SOEs and other entities acting under delegated governmental authority are fully covered by the BIT's obligations.

The text of the 2012 Model BIT can be viewed at: <http://www.state.gov/e/eb/afd/bit/index.htm>.

PRN: 2012/612



**United States Model Bilateral Investment Treaty, 2012**

## 2012 U.S. Model Bilateral Investment Treaty

### TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF [Country] CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The Government of the United States of America and the Government of [Country] (hereinafter the “Parties”);

*Desiring* to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;

*Recognizing* that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

*Agreeing* that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;

*Recognizing* the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;

*Desiring* to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;

*Having* resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:



## SECTION A

### Article 1: Definitions

For purposes of this Treaty:

**“central level of government”** means:

(a) for the United States, the federal level of government; and

(b) for [Country], [\_\_\_\_].

**“Centre”** means the International Centre for Settlement of Investment Disputes (“ICSID”) established by the ICSID Convention.

**“claimant”** means an investor of a Party that is a party to an investment dispute with the other Party.

**“covered investment”** means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.

**“disputing parties”** means the claimant and the respondent.

**“disputing party”** means either the claimant or the respondent.

**“enterprise”** means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.

**“enterprise of a Party”** means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

**“existing”** means in effect on the date of entry into force of this Treaty.

**“freely usable currency”** means “freely usable currency” as determined by the International Monetary Fund under its *Articles of Agreement*.

**“GATS”** means the *General Agreement on Trade in Services*, contained in Annex 1B to the WTO Agreement.

**“government procurement”** means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or use in the production or supply of goods or services for commercial sale or resale.

**“ICSID Additional Facility Rules”** means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*.

**“ICSID Convention”** means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, done at Washington, March 18, 1965.

[**“Inter-American Convention”** means the *Inter-American Convention on International Commercial Arbitration*, done at Panama, January 30, 1975.]

**“investment”** means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;<sup>1</sup>
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;<sup>2, 3</sup> and

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<sup>1</sup> Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

<sup>2</sup> Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

**“investment agreement”** means a written agreement<sup>4</sup> between a national authority<sup>5</sup> of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

- (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
- (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
- (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

**“investment authorization”**<sup>6</sup> means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party.

**“investor of a non-Party”** means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party.

**“investor of a Party”** means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

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<sup>3</sup> The term “investment” does not include an order or judgment entered in a judicial or administrative action.

<sup>4</sup> “Written agreement” refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 30[Governing Law](2). For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

<sup>5</sup> For purposes of this definition, “national authority” means (a) for the United States, an authority at the central level of government; and (b) for [Country], [ ].

<sup>6</sup> For greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.

“**measure**” includes any law, regulation, procedure, requirement, or practice.

“**national**” means:

- (a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act; and
- (b) for [Country], [\_\_\_\_].

“**New York Convention**” means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958.

“**non-disputing Party**” means the Party that is not a party to an investment dispute.

“**person**” means a natural person or an enterprise.

“**person of a Party**” means a national or an enterprise of a Party.

“**protected information**” means confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law.

“**regional level of government**” means:

- (a) for the United States, a state of the United States, the District of Columbia, or Puerto Rico; and
- (b) for [Country], [\_\_\_\_].

“**respondent**” means the Party that is a party to an investment dispute.

“**Secretary-General**” means the Secretary-General of ICSID.

“**state enterprise**” means an enterprise owned, or controlled through ownership interests, by a Party.

“**territory**” means:

- (a) with respect to the United States,
  - (i) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico;
  - (ii) the foreign trade zones located in the United States and Puerto Rico.
- (b) with respect to [Country,] [\_\_\_\_].

- (c) with respect to each Party, the territorial sea and any area beyond the territorial sea of the Party within which, in accordance with customary international law as reflected in the United Nations Convention on the Law of the Sea, the Party may exercise sovereign rights or jurisdiction.

“**TRIPS Agreement**” means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, contained in Annex 1C to the WTO Agreement.<sup>7</sup>

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

“**WTO Agreement**” means the *Marrakesh Agreement Establishing the World Trade Organization*, done on April 15, 1994.

## **Article 2: Scope and Coverage**

1. This Treaty applies to measures adopted or maintained by a Party relating to:
  - (a) investors of the other Party;
  - (b) covered investments; and
  - (c) with respect to Articles 8 [Performance Requirements], 12 [Investment and Environment], and 13 [Investment and Labor], all investments in the territory of the Party.
2. A Party’s obligations under Section A shall apply:
  - (a) to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party;<sup>8</sup> and
  - (b) to the political subdivisions of that Party.
3. For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.

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<sup>7</sup> For greater certainty, “TRIPS Agreement” includes any waiver in force between the Parties of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement.

<sup>8</sup> For greater certainty, government authority that has been delegated includes a legislative grant, and a government order, directive or other action transferring to the state enterprise or other person, or authorizing the exercise by the state enterprise or other person of, governmental authority.

### **Article 3: National Treatment**

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

### **Article 4: Most-Favored-Nation Treatment**

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

### **Article 5: Minimum Standard of Treatment<sup>9</sup>**

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

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<sup>9</sup> Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.

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

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

4. Notwithstanding Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants], each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:

- (a) requisitioning of its covered investment or part thereof by the latter’s forces or authorities; or
- (b) destruction of its covered investment or part thereof by the latter’s forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation](2) through (4), *mutatis mutandis*.

6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 [National Treatment] but for Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants].

## **Article 6: Expropriation and Compensation<sup>10</sup>**

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:

- (a) for a public purpose;
- (b) in a non-discriminatory manner;
- (c) on payment of prompt, adequate, and effective compensation; and

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<sup>10</sup> Article 6 [Expropriation] shall be interpreted in accordance with Annexes A and B.

- (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).

2. The compensation referred to in paragraph 1(c) shall:

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);
- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
- (d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

- (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus
- (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.

## **Article 7: Transfers**

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

- (a) contributions to capital;
- (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;



- (c) interest, royalty payments, management fees, and technical assistance and other fees;
- (d) payments made under a contract, including a loan agreement;
- (e) payments made pursuant to Article 5 [Minimum Standard of Treatment](4) and (5) and Article 6 [Expropriation and Compensation]; and
- (f) payments arising out of a dispute.

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

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party.

4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
- (c) criminal or penal offenses;
- (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

## **Article 8: Performance Requirements**

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:<sup>11</sup>

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

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<sup>11</sup> For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “commitment or undertaking” for the purposes of paragraph 1.

- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;
- (g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market; or
- (h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party<sup>12</sup>; or
  - (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, particular technology,
 so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

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<sup>12</sup> For purposes of this Article, the term “technology of the Party or of persons of the Party” includes technology that is owned by the Party or persons of the Party, and technology for which the Party holds, or persons of the Party hold, an exclusive license.

- (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
- 3.
- (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
  - (b) Paragraphs 1(f) and (h) do not apply:
    - (i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
    - (ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.<sup>13</sup>
  - (c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f), and (h), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
    - (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;
    - (ii) necessary to protect human, animal, or plant life or health; or
    - (iii) related to the conservation of living or non-living exhaustible natural resources.
  - (d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
  - (e) Paragraphs 1(b), (c), (f), (g), and (h), and 2(a) and (b), do not apply to government procurement.

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<sup>13</sup> The Parties recognize that a patent does not necessarily confer market power.

- (f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

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

#### **Article 9: Senior Management and Boards of Directors**

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

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

#### **Article 10: Publication of Laws and Decisions Respecting Investment**

1. Each Party shall ensure that its:

- (a) laws, regulations, procedures, and administrative rulings of general application; and
- (b) adjudicatory decisions

respecting any matter covered by this Treaty are promptly published or otherwise made publicly available.

2. For purposes of this Article, “administrative ruling of general application” means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:

- (a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular covered investment or investor of the other Party in a specific case; or
- (b) a ruling that adjudicates with respect to a particular act or practice.

## **Article 11: Transparency**

1. The Parties agree to consult periodically on ways to improve the transparency practices set out in this Article, Article 10 and Article 29.

### 2. Publication

To the extent possible, each Party shall:

- (a) publish in advance any measure referred to in Article 10(1)(a) that it proposes to adopt; and
- (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

3. With respect to proposed regulations of general application of its central level of government respecting any matter covered by this Treaty that are published in accordance with paragraph 2(a), each Party:

- (a) shall publish the proposed regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets;
- (b) should in most cases publish the proposed regulations not less than 60 days before the date public comments are due;
- (c) shall include in the publication an explanation of the purpose of and rationale for the proposed regulations; and
- (d) shall, at the time it adopts final regulations, address significant, substantive comments received during the comment period and explain substantive revisions that it made to the proposed regulations in its official journal or in a prominent location on a government Internet site.

4. With respect to regulations of general application that are adopted by its central level of government respecting any matter covered by this Treaty, each Party:

- (a) shall publish the regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets; and
- (b) shall include in the publication an explanation of the purpose of and rationale for the regulations.

### 5. Provision of Information

- (a) On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure that the requesting Party considers might materially affect the operation of this Treaty or otherwise substantially affect its interests under this Treaty.

- (b) Any request or information under this paragraph shall be provided to the other Party through the relevant contact points.
- (c) Any information provided under this paragraph shall be without prejudice as to whether the measure is consistent with this Treaty.

## 6. Administrative Proceedings

With a view to administering in a consistent, impartial, and reasonable manner all measures referred to in Article 10(1)(a), each Party shall ensure that in its administrative proceedings applying such measures to particular covered investments or investors of the other Party in specific cases:

- (a) wherever possible, covered investments or investors of the other Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy;
- (b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and
- (c) its procedures are in accordance with domestic law.

## 7. Review and Appeal

- (a) Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Treaty. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.
- (b) Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:
  - (i) a reasonable opportunity to support or defend their respective positions; and
  - (ii) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.

- (c) Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.

## 8. Standards-Setting

- (a) Each Party shall allow persons of the other Party to participate in the development of standards and technical regulations by its central government bodies.<sup>14</sup> Each Party shall allow persons of the other Party to participate in the development of these measures, and the development of conformity assessment procedures by its central government bodies, on terms no less favorable than those it accords to its own persons.
- (b) Each Party shall recommend that non-governmental standardizing bodies in its territory allow persons of the other Party to participate in the development of standards by those bodies. Each Party shall recommend that non-governmental standardizing bodies in its territory allow persons of the other Party to participate in the development of these standards, and the development of conformity assessment procedures by those bodies, on terms no less favorable than those they accord to persons of the Party.
- (c) Subparagraphs 8(a) and 8(b) do not apply to:
  - (i) sanitary and phytosanitary measures as defined in Annex A of the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures; or
  - (ii) purchasing specifications prepared by a governmental body for its production or consumption requirements.
- (d) For purposes of subparagraphs 8(a) and 8(b), “central government body”, “standards”, “technical regulations” and “conformity assessment procedures” have the meanings assigned to those terms in Annex 1 of the WTO Agreement on Technical Barriers to Trade. Consistent with Annex 1, the three latter terms do not include standards, technical regulations or conformity assessment procedures for the supply of a service.

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<sup>14</sup> A Party may satisfy this obligation by, for example, providing interested persons a reasonable opportunity to provide comments on the measure it proposes to develop and taking those comments into account in the development of the measure.

## Article 12: Investment and Environment

1. The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.
2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws<sup>15</sup> in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.
3. The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.
4. For purposes of this Article, “environmental law” means each Party’s statutes or regulations,<sup>16</sup> or provisions thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through the:
  - (a) prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
  - (b) control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or
  - (c) protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas,

in the Party’s territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

5. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to

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<sup>15</sup> Paragraph 2 shall not apply where a Party waives or derogates from an environmental law pursuant to a provision in law providing for waivers or derogations.

<sup>16</sup> For the United States, “statutes or regulations” for the purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.



ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

6. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

7. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

### **Article 13: Investment and Labor**

1. The Parties reaffirm their respective obligations as members of the International Labor Organization (“ILO”) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. For purposes of this Article, “labor laws” means each Party’s statutes or regulations,<sup>17</sup> or provisions thereof, that are directly related to the following:

- (a) freedom of association;
- (b) the effective recognition of the right to collective bargaining;
- (c) the elimination of all forms of forced or compulsory labor;
- (d) the effective abolition of child labor and a prohibition on the worst forms of child labor;
- (e) the elimination of discrimination in respect of employment and occupation; and
- (f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

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<sup>17</sup> For the United States, “statutes or regulations” for purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

4. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

5. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

#### **Article 14: Non-Conforming Measures**

1. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at:
  - (i) the central level of government, as set out by that Party in its Schedule to Annex I or Annex III,
  - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I or Annex III, or
  - (iii) a local level of government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], or 9 [Senior Management and Boards of Directors].

2. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this Treaty and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment] do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of

the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.

5. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], and 9 [Senior Management and Boards of Directors] do not apply to:

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

### **Article 15: Special Formalities and Information Requirements**

1. Nothing in Article 3 [National Treatment] shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Treaty.

2. Notwithstanding Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment], a Party may require an investor of the other Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

### **Article 16: Non-Derogation**

This Treaty shall not derogate from any of the following that entitle an investor of a Party or a covered investment to treatment more favorable than that accorded by this Treaty:

- 1. laws or regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party;
- 2. international legal obligations of a Party; or
- 3. obligations assumed by a Party, including those contained in an investment authorization or an investment agreement.

### **Article 17: Denial of Benefits**

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

- (a) does not maintain diplomatic relations with the non-Party; or
- (b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

#### **Article 18: Essential Security**

Nothing in this Treaty shall be construed:

- 1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
- 2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

#### **Article 19: Disclosure of Information**

Nothing in this Treaty shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

#### **Article 20: Financial Services**

1. Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial

system.<sup>18</sup> Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty.

2. (a) Nothing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 7 [Transfers] or Article 8 [Performance Requirements].<sup>19</sup>
- (b) For purposes of this paragraph, "public entity" means a central bank or monetary authority of a Party.

3. Where a claimant submits a claim to arbitration under Section B [Investor-State Dispute Settlement], and the respondent invokes paragraph 1 or 2 as a defense, the following provisions shall apply:

- (a) The respondent shall, within 120 days of the date the claim is submitted to arbitration under Section B, submit in writing to the competent financial authorities<sup>20</sup> of both Parties a request for a joint determination on the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. The respondent shall promptly provide the tribunal, if constituted, a copy of such request. The arbitration may proceed with respect to the claim only as provided in subparagraph (d).
- (b) The competent financial authorities of both Parties shall make themselves available for consultations with each other and shall attempt in good faith to make a determination as described in subparagraph (a). Any such determination shall be transmitted promptly to the disputing parties and, if constituted, to the tribunal. The determination shall be binding on the tribunal.
- (c) If the competent financial authorities of both Parties, within 120 days of the date by which they have both received the respondent's written request for a joint determination under subparagraph (a), have not made a determination as described in that subparagraph, the tribunal shall decide the issue or issues left

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<sup>18</sup> It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions, as well as the maintenance of the safety and financial and operational integrity of payment and clearing systems.

<sup>19</sup> For greater certainty, measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.

<sup>20</sup> For purposes of this Article, "competent financial authorities" means, for the United States, the Department of the Treasury for banking and other financial services, and the Office of the United States Trade Representative, in coordination with the Department of Commerce and other agencies, for insurance; and for [Country], [\_\_\_\_].

unresolved by the competent financial authorities. The provisions of Section B shall apply, except as modified by this subparagraph.

- (i) In the appointment of all arbitrators not yet appointed to the tribunal, each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to the particular sector of financial services in which the dispute arises shall be taken into account in the appointment of the presiding arbitrator.
  - (ii) If, before the respondent submits the request for a joint determination in conformance with subparagraph (a), the presiding arbitrator has been appointed pursuant to Article 27(3), such arbitrator shall be replaced on the request of either disputing party and the tribunal shall be reconstituted consistent with subparagraph (c)(i). If, within 30 days of the date the arbitration proceedings are resumed under subparagraph (d), the disputing parties have not agreed on the appointment of a new presiding arbitrator, the Secretary-General, on the request of a disputing party, shall appoint the presiding arbitrator consistent with subparagraph (c)(i).
  - (iii) The tribunal shall draw no inference regarding the application of paragraph 1 or 2 from the fact that the competent financial authorities have not made a determination as described in subparagraph (a).
  - (iv) The non-disputing Party may make oral and written submissions to the tribunal regarding the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. Unless it makes such a submission, the non-disputing Party shall be presumed, for purposes of the arbitration, to take a position on paragraph 1 or 2 not inconsistent with that of the respondent.
- (d) The arbitration referred to in subparagraph (a) may proceed with respect to the claim:
- (i) 10 days after the date the competent financial authorities' joint determination has been received by both the disputing parties and, if constituted, the tribunal; or
  - (ii) 10 days after the expiration of the 120-day period provided to the competent financial authorities in subparagraph (c).
- (e) On the request of the respondent made within 30 days after the expiration of the 120-day period for a joint determination referred to in subparagraph (c), or, if the tribunal has not been constituted as of the expiration of the 120-day period, within 30 days after the tribunal is constituted, the tribunal shall address and decide the issue or issues left unresolved by the competent financial authorities as referred to

in subparagraph (c) prior to deciding the merits of the claim for which paragraph 1 or 2 has been invoked by the respondent as a defense. Failure of the respondent to make such a request is without prejudice to the right of the respondent to invoke paragraph 1 or 2 as a defense at any appropriate phase of the arbitration.

4. Where a dispute arises under Section C and the competent financial authorities of one Party provide written notice to the competent financial authorities of the other Party that the dispute involves financial services, Section C shall apply except as modified by this paragraph and paragraph 5.

- (a) The competent financial authorities of both Parties shall make themselves available for consultations with each other regarding the dispute, and shall have 180 days from the date such notice is received to transmit a report on their consultations to the Parties. A Party may submit the dispute to arbitration under Section C only after the expiration of that 180-day period.
- (b) Either Party may make any such report available to a tribunal constituted under Section C to decide the dispute referred to in this paragraph or a similar dispute, or to a tribunal constituted under Section B to decide a claim arising out of the same events or circumstances that gave rise to the dispute under Section C.

5. Where a Party submits a dispute involving financial services to arbitration under Section C in conformance with paragraph 4, and on the request of either Party within 30 days of the date the dispute is submitted to arbitration, each Party shall, in the appointment of all arbitrators not yet appointed, take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to financial services shall be taken into account in the appointment of the presiding arbitrator.

6. Notwithstanding Article 11(2)-(4) [Transparency – Publication], each Party, to the extent practicable,

- (a) shall publish in advance any regulations of general application relating to financial services that it proposes to adopt and the purpose of the regulation;
- (b) shall provide interested persons and the other Party a reasonable opportunity to comment on such proposed regulations; and
- (c) should at the time it adopts final regulations, address in writing significant substantive comments received from interested persons with respect to the proposed regulations.

7. The terms “financial service” or “financial services” shall have the same meaning as in subparagraph 5(a) of the Annex on Financial Services of the GATS.

8. For greater certainty, nothing in this Treaty shall be construed to prevent the adoption or enforcement by a party of measures relating to investors of the other Party, or covered

investments, in financial institutions that are necessary to secure compliance with laws or regulations that are not inconsistent with this Treaty, including those related to the prevention of deceptive and fraudulent practices or that deal with the effects of a default on financial services contracts, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment in financial institutions.

## **Article 21: Taxation**

1. Except as provided in this Article, nothing in Section A shall impose obligations with respect to taxation measures.
2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:
  - (a) the claimant has first referred to the competent tax authorities<sup>21</sup> of both Parties in writing the issue of whether that taxation measure involves an expropriation; and
  - (b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.
3. Subject to paragraph 4, Article 8 [Performance Requirements] (2) through (4) shall apply to all taxation measures.
4. Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Treaty and that convention.

## **Article 22: Entry into Force, Duration, and Termination**

1. This Treaty shall enter into force thirty days after the date the Parties exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.

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<sup>21</sup> For the purposes of this Article, the “competent tax authorities” means:

- (a) for the United States, the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury; and
- (b) for [Country], [\_\_\_\_].



2. A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.

3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.

## SECTION B

### **Article 23: Consultation and Negotiation**

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

### **Article 24: Submission of a Claim to Arbitration**

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

(i) that the respondent has breached

- (A) an obligation under Articles 3 through 10,
- (B) an investment authorization, or
- (C) an investment agreement;

and

- (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:

- (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
- (b) for each claim, the provision of this Treaty, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
- (c) the legal and factual basis for each claim; and
- (d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

- (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
- (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
- (c) under the UNCITRAL Arbitration Rules; or
- (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration"):

- (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;
- (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;
- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules, are received by the respondent; or
- (d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Treaty.

6. The claimant shall provide with the notice of arbitration:

- (a) the name of the arbitrator that the claimant appoints; or
- (b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

#### **Article 25: Consent of Each Party to Arbitration**

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

- (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; [and]
- (b) Article II of the New York Convention for an "agreement in writing[.]" [;]" and
- (c) Article I of the Inter-American Convention for an "agreement.""]

## **Article 26: Conditions and Limitations on Consent of Each Party**

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage.

2. No claim may be submitted to arbitration under this Section unless:

- (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Treaty; and
- (b) the notice of arbitration is accompanied,
  - (i) for claims submitted to arbitration under Article 24(1)(a), by the claimant's written waiver, and
  - (ii) for claims submitted to arbitration under Article 24(1)(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 24.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 24(1)(a)) and the claimant or the enterprise (for claims brought under Article 24(1)(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

## **Article 27: Selection of Arbitrators**

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. Subject to Article 20(3), if a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.
4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:
  - (a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
  - (b) a claimant referred to in Article 24(1)(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and
  - (c) a claimant referred to in Article 24(1)(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

#### **Article 28: Conduct of the Arbitration**

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 24(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.
2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.
3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.
4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 34.
  - (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

- (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
- (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
- (d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 24. For purposes of this paragraph, an order includes a recommendation.

9. (a) In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.
- (b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 10.

10. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.

#### **Article 29: Transparency of Arbitral Proceedings**

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

- (a) the notice of intent;
- (b) the notice of arbitration;
- (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [*Amicus* Submissions] and Article 33 [Consolidation];
- (d) minutes or transcripts of hearings of the tribunal, where available; and
- (e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article].

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

- (a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
- (b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;
- (c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and
- (d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

### **Article 30: Governing Law**

1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 24(1)(b)(i)(B) or (C), the tribunal shall apply:

- (a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or



- (b) if the rules of law have not been specified or otherwise agreed:
  - (i) the law of the respondent, including its rules on the conflict of laws;<sup>22</sup> and
  - (ii) such rules of international law as may be applicable.

3. A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

### **Article 31: Interpretation of Annexes**

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II, or III, the tribunal shall, on request of the respondent, request the interpretation of the Parties on the issue. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 90 days of delivery of the request.

2. A joint decision issued under paragraph 1 by the Parties, each acting through its representative designated for purposes of this Article, shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that joint decision. If the Parties fail to issue such a decision within 90 days, the tribunal shall decide the issue.

### **Article 32: Expert Reports**

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

### **Article 33: Consolidation**

1. Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

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<sup>22</sup> The “law of the respondent” means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

- (a) the names and addresses of all the disputing parties sought to be covered by the order;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

- (a) one arbitrator appointed by agreement of the claimants;
- (b) one arbitrator appointed by the respondent; and
- (c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the Secretary-General shall appoint a national of the non-disputing Party.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 24(1) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims;
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
- (c) instruct a tribunal previously established under Article 27 [Selection of Arbitrators] to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

- (i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and
- (ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 24(1) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

- (a) the name and address of the claimant;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 27 [Selection of Arbitrators] shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 27 [Selection of Arbitrators] be stayed, unless the latter tribunal has already adjourned its proceedings.

#### **Article 34: Awards**

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

- (a) monetary damages and any applicable interest; and
- (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs and attorney's fees in accordance with this Treaty and the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 24(1)(b):
  - (a) an award of restitution of property shall provide that restitution be made to the enterprise;
  - (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
  - (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.
3. A tribunal may not award punitive damages.
4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.
5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
6. A disputing party may not seek enforcement of a final award until:
  - (a) in the case of a final award made under the ICSID Convention,
    - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
    - (ii) revision or annulment proceedings have been completed; and
  - (b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 24(3)(d),
    - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or
    - (ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.
7. Each Party shall provide for the enforcement of an award in its territory.
8. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a tribunal shall be established under Article 37 [State-State Dispute Settlement]. Without prejudice to other remedies available under applicable rules of international law, the requesting Party may seek in such proceedings:

- (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Treaty; and
- (b) a recommendation that the respondent abide by or comply with the final award.

9. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention [or the Inter-American Convention] regardless of whether proceedings have been taken under paragraph 8.

10. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention [and Article I of the Inter-American Convention].

### **Article 35: Annexes and Footnotes**

The Annexes and footnotes shall form an integral part of this Treaty.

### **Article 36: Service of Documents**

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex C.

## **SECTION C**

### **Article 37: State-State Dispute Settlement**

1. Subject to paragraph 5, any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the UNCITRAL Arbitration Rules shall govern, except as modified by the Parties or this Treaty.

2. Unless the Parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each Party and the third, who shall be the presiding arbitrator, appointed by agreement of the Parties. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of either Party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

3. Expenses incurred by the arbitrators, and other costs of the proceedings, shall be paid for equally by the Parties. However, the tribunal may, in its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

4. Articles 28(3) [*Amicus Curiae* Submissions], 29 [Investor-State Transparency], 30(1) and (3) [Governing Law], and 31 [Interpretation of Annexes] shall apply *mutatis mutandis* to arbitrations under this Article.

5. Paragraphs 1 through 4 shall not apply to a matter arising under Article 12 or Article 13.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at [city] this [number] day of [month, year], in the English and [foreign] languages, each text being equally authentic.

FOR THE GOVERNMENT OF  
THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF  
[Country]:

## **Annex A**

### **Customary International Law**

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

## **Annex B**

### **Expropriation**

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

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

3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

- (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
  - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
  - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
  - (iii) the character of the government action.
- (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.



**Annex C**

**Service of Documents on a Party**

**United States**

Notices and other documents shall be served on the United States by delivery to:

Executive Director (L/EX)  
Office of the Legal Adviser  
Department of State  
Washington, D.C. 20520  
United States of America

**[Country]**

Notices and other documents shall be served on [Country] by delivery to:

[insert place of delivery of notices and other documents for [Country]]



**South African Development Community (SADC) Model  
Bilateral Investment Treaty Template with Commentary,  
July 2012**

# SADC Model Bilateral Investment Treaty Template with Commentary



# **SADC Model Bilateral Investment Treaty Template with Commentary**

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## Introduction

The development of the SADC Model Bilateral Investment Treaty Template has taken place under the overall goal of the SADC Protocol on Finance and Investment to promote harmonization of the Member States' investment policies and laws. For the purposes of this project, the specific goal was to develop a comprehensive approach from which Member States can choose to use all or some of the model provisions as a basis for developing their own specific Model Investment Treaty or as a guide through any given investment treaty negotiation. Inclusion of any given provision in this document does not mean every individual State has endorsed it. Each Member State will ultimately be responsible for its choice of clauses and the final result of any particular BIT negotiation.

Given the above, the SADC Model BIT is not intended to be and is not a legally binding document. Rather, it provides advice to governments that they may consider in any future negotiations they enter into relating to an investment treaty. It also provides an educational tool for officials, and may serve as the basis of training sessions for SADC government officials.

To support these roles, each article is accompanied by a commentary after the proposed text. The commentary forms an integral part of the final product.

The preparation of the SADC Model BIT Template has been undertaken in an interactive process by a drafting committee consisting of representatives from Malawi, Mauritius, Namibia, South-Africa and Zimbabwe, with technical support provided by Mr Howard Mann, Senior International Law Advisor, International Institute for Sustainable Development (IISD). Representatives from Angola, Botswana, Mozambique and the Seychelles also participated in the final drafting committee meeting of May 2012. The SADC Secretariat facilitated the process. The SADC Model BIT Template was supported by the EU funded FIP Project and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH on behalf of the German Government.

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## Preamble

The Government of \_\_\_\_\_ and the Government of \_\_\_\_\_ ,

**Desiring to strengthen** the bonds of friendship and cooperation between the State Parties;

**Recognizing** the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development;

**Seeking to promote, encourage and increase** investment opportunities that enhance sustainable development within the territories of the State Parties;

**Understanding** that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept;

**Reaffirming** the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the measures in place—the particular need of developing countries to exercise this right;

**Seeking** an overall balance of the rights and obligations among the State Parties, the investors, and the investments under this Agreement;

Have agreed as follows:

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## Commentary

The preamble of an international agreement of any type provides an introduction to the goals and thinking of the drafters of the agreement. It also provides an introduction for those who may interpret and apply the treaty at a later date. Of primary significance from this perspective is the role arbitrators may look to a preamble to play as they interpret and apply the treaty in an arbitration context between an investor and a State.

In these circumstances, there have been several instances where arbitral tribunals have examined the preamble of a given treaty and found only references to the promotion of investment and the provision of investor rights under the treaty. As a result, the preamble has been held to establish a presumption that the sole purpose of the treaty is the protection of the investor in order, presumably, to attract higher levels of investment. This has led to several instances where arbitrators have specifically held that this creates a presumption in favour of broader over narrower rights for the investor, fewer and more limited rights for government regulatory activity in relation to an investment, and an overall presumption of investor-friendly interpretations.

Although there are several arbitrations that have rejected this approach and it has been the subject of much academic and other professional criticism, it continues to be used in some instances. This includes in decisions made as recently as in 2010 and 2011. As a result, the preamble set out above is crafted to:

- Reflect development goals of the SADC Member States, both in general terms and specifically in relation to FDI.

- Be balanced, as between development objectives and investor interests, so as to preclude unintended expansive interpretation of substantive provisions in favour of investors on the basis of the intent to protect investors expressed in the preamble, as seen in several arbitrations.
- Be focused on key issues and not become a listing of all of the issues reflected in the final text.

The paragraph on the right to regulate and the recognition of asymmetry issues, with modification for the broader subject matter here, is drawn from the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS), which of course has all developed countries as State Parties. This should enhance its acceptability in a north-south negotiating context. At least in some measure, asymmetry is part of the policy mix for developing States' development policy building. This preamble recognizes such asymmetries as part of this mix for international investment law purposes, which overlaps with Mode 3 of the GATS. Hence there is a strong correlation between the two, and the proposed text can be seen as derived from the already agreed upon GATS.

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## Part 1: Common Provisions

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## Part 1: Common Provisions

### ARTICLE 1 •• Objective

The main objective of this Agreement is to encourage and increase investments [between investors of one State Party into the territory of the other State Party] that support the sustainable development of each Party, and in particular the Host State where an investment is to be located.

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#### Commentary

Many treaties include an objective article to highlight, in a succinct manner within the substantive text, the treaty's main goal. This gives added weight to the objective as an interpretational guide, beyond that which is normally attributed to the preamble. The link between foreign direct investment (FDI) and the promotion of sustainable development is recognized in the Finance and Investment Protocol (FIP) and other SADC instruments. It is used here to support the key objective of the SADC Member States: for FDI to contribute to the development objectives of each State and the region as a whole, rather than simply being an end in itself.

The bracketed text reflects simply a stylistic choice: its inclusion is technically correct and appropriate, but the text reads more directly and succinctly without the bracketed language.

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### ARTICLE 2 •• Definitions

For the purposes of this Agreement:

**Home State** means, in relation to

1. a natural person, the State Party of nationality or predominant residence of the investor in accordance with the laws of that State Party
2. a legal or juridical person, the State Party of incorporation or registration of the investor in accordance with the laws of that State Party

[and declared as the Home State at the time of registration where required under the law of the Host State].

**Host State** means the State Party where the investment is located.

**ICSID** means the International Centre for Settlement of Investment Disputes, established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

#### Investment

*SPECIAL NOTE: The definition of investment is very critical and still very controversial. Three options are included here in full: an enterprise-based definition, a closed-list asset-based approach, and an open-list asset-based approach. These are presented in order from the least to the most expansive in terms of what they cover. The pros and cons of each will be fully explained in the final commentary of Article 2.*

## I. ENTERPRISE-BASED DEFINITION

**Investment** means an enterprise within the territory of one State Party established, acquired or expanded by an investor of the other State Party, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise is established or acquired in accordance with the laws of the Host State[; and [registered][approved][recognized] in accordance with the legal requirements of the Host State]. An enterprise may possess assets such as:

1. Shares, stocks, debentures and other equity instruments of the enterprise or another enterprise
2. A debt security of another enterprise
3. Loans to an enterprise
4. Movable or immovable property and other property rights such as mortgages, liens or pledges
5. Claims to money or to any performance under contract having a financial value
6. Copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State
7. Rights conferred by law or under contract, including licences to cultivate, extract or exploit natural resources

For greater certainty, Investment does not include:

1. Debt securities issued by a government or loans to a government
2. Portfolio investments
3. Claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (g) above.

## II. ASSET-BASED OPTION 1: CLOSED-LIST, EXHAUSTIVE TEST (BASED ON CANADIAN MODEL BIT)

**Investment** means the following assets admitted or established in accordance with the laws and regulations of the Party in whose territory the investment is made:

1. An enterprise
2. An equity security of an enterprise
3. A debt security of an enterprise
  - (a) where the enterprise is an affiliate of the investor, or
  - (b) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a State or State enterprise

4. A loan to an enterprise
  - (a) where the enterprise is an affiliate of the investor, or
  - (b) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a State enterprise
5. An interest in an enterprise that entitles the owner to share in income or profits of the enterprise
6. An interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (3) or (4) of this Article
7. Real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes
8. Interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
  - (a) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
  - (b) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise
9. For greater certainty, an investment for the purposes of this Agreement does not include assets that are solely in the nature of portfolio investments; goodwill; market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods or services to or from the territory of a Party to the territory of the other Party, or a loan to a Party or to a State enterprise; a bank letter of credit; the extension of credit in connection with a commercial transaction, such as trade financing; or a loan to, or debt security issued by a State Party or a State enterprise thereof.
10. In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and significance for the Host State's development.

**OR**

### **III. ASSET-BASED OPTION 2: NON-EXHAUSTIVE ASSET-BASED TEST (BASED ON U.S. MODEL TEXT)**

**Investment** means assets admitted or established in accordance with the laws and regulations of the Party in whose territory the investment is made, and includes:

1. Movable and immovable property and other related property rights such as mortgages, liens and pledges
2. Claims to money, goods, services or other performance having economic value
3. Stocks, shares and debentures of enterprises and interest in the property of such enterprises
4. Intellectual property rights, technical processes, know-how, goodwill and other benefits or advantages associated with a business operating in the territory of the Party in which the investment is made

5. Business concessions conferred by law or under contract, including
  - (a) contracts to build, operate, own/transfer, rehabilitate, expand, restructure and/or improve infrastructure, and
  - (b) concessions to search for, cultivate, extract or exploit natural resources
6. For greater certainty, an investment for the purposes of this Agreement does not include assets that are solely in the nature of portfolio investment; goodwill; market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods or services to or from the territory of a Party to the territory of the other Party, or a loan to a Party or to a State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing.
7. In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and significance for the Host State's development.

**Investment authorization** means any government permit, authorization, licence, registration certificate or similar legal instrument that entitles an investor to establish, expand, acquire, own or operate an investment.

**Investor** means a natural person or a juridical person of the Home State Party making an investment into the territory of the Host State Party, provided that:

1. the natural person, if a dual citizen, is predominantly a resident of the Home State[, and in any event is not a national of the Host State Party as well]
2. for a juridical person, [it is a legally incorporated enterprise under the laws of the Home State.] [it is a legally incorporated enterprise under the laws of the Home State and is effectively owned or controlled by a natural or juridical person of the Home State Party.][it is a legally incorporated enterprise under the laws of the Home State, and conducts [substantial] [substantive] business activity in the Home State Party.] [it is a legally incorporated enterprise under the laws of the Home State, is effectively owned or controlled by a natural or juridical person of the Home State Party and conducts [substantial][substantive] business activity in the Home State Party.]

[**Optional addition:** The provisions of this Agreement shall not apply to investments owned or controlled by State-owned enterprises or sovereign wealth funds.]

**Measure** means any form of legally binding governmental act directly affecting an investor or its investment, and includes any law, regulation, procedure, requirement, final judicial decision, or binding executive decision [subject to the exclusion of measures of a [state][provincial] [municipal] level government].

**Portfolio investment** means investment that constitutes less than 10 per cent of the shares of the company or otherwise does not give the portfolio investor the possibility to exercise effective management or influence on the management of the investment.

**State Party or Party** means a State that is party to this Agreement.

**Territory** in relation to a State means the total land area of that State Party and, in relation to [a coastal State] \_\_\_\_\_, includes, in addition, the territorial sea and any maritime area situated beyond the territorial sea that has been designated, or that may in future be designated, under the law of \_\_\_\_\_ and in accordance with international law, as an area over which \_\_\_\_\_ may exercise rights with regard to the sea bed, subsoil or natural resources.

**Transfers** means international payments and transactions in cash or electronic form.

**UNCITRAL Arbitration Rules** means the arbitration rules of the United Nations Commission on International Trade Law as approved at the time an arbitration is commenced pursuant to the submission of a notice of arbitration under such Rules, including any rules or annexes specific to investor-State arbitration processes.

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## Commentary

For many definitions, such as “investor” and “investment,” perfect solutions are illusive. One should focus, therefore, on drafting good definitions that are clear and consistent, rather than seeking perfect definitions that will fit every possible “what if” question.

Additional definitions will be added at the completion of drafting when it is determined that they are needed. Below are some commentaries on the key issues raised in the draft definitions above.

**Investment** is perhaps the most controversial and critical issue to define. The definition will determine which foreign capital flows will be covered by the Agreement.

- Three options are presented here, in order from the most specific and narrowly drafted to the most open-ended and broadly drafted. Option 1 adopts an enterprise-based approach. It requires the establishment or acquisition of an enterprise, as one classically associates with FDI. The assets of the enterprise are then included among the covered assets of the investor. The language used is taken in significant part from the GATS definition of commercial presence, which requires the establishment of an operating enterprise in the Host State. The illustrative list of assets that follows the opening paragraph in Option 1 is not the test of an investment, but illustrates the types of assets an investment covered under the treaty may own or possess.
- Option 2 is a closed-list, asset-based definition, drawing on the Canadian Model BIT of 2004 and subsequent treaties entered into by Canada. The list starts from an enterprise approach, but expands this to include such assets as intellectual property rights, whether or not they are associated with an existing enterprise in the Host State. This mixed approach is broader than an enterprise-based approach, but has the virtue of setting out a defined and limited list. Thus it is a middle ground between Options 1 and 3 in terms of scope of coverage, but should not be seen as an “easy” compromise text as it goes outside the enterprise-based approach. Many of the listed items can be interpreted in a very expansive manner by tribunals.
- Option 3 is the most expansive approach, an open-ended asset-based test that allows most assets to be claimed as covered investments. This is the most favourable to investors, and least predictable for Host States. Many of the texts that adopt this approach use language such as “every asset,” allowing tribunals to read it just in that way, with no limitations. This is the approach in most existing SADC BITs and it is recommended that



this be rejected for all future treaties in favour of Option 1 in particular.

- The choice of options should, we believe, also be considered in light of the overall objective, which is being formulated here from a developing country perspective, to promote investment that is supportive of sustainable development, which development policy suggests means business that brings constructive economic and social benefits.
- It should be noted that a failure to include a broader definition does not mean other assets cannot be owned by foreign investors or foreign citizens. That question then becomes a matter for each State to determine. Rather, it simply means they will be protected through domestic law processes and not through international treaties.
- The so-called **Salinitest**: If Option 2 or Option 3 is used, it is strongly recommended that the test of the relationship of the investment to the Host economy be added. This test arises from arbitrations that have looked at what qualifies as an investment under the ICSID Convention, concluding that, as seen in the *Salini* arbitration award, “In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significance for the Host State’s development.” This text appears above as paragraph 10 in the second option above, and as paragraph 7 in the final option. It is not likely it is needed in the first option because it starts from the enterprise-based approach, but could be included for greater certainty.

**Investment authorization** is included here due to a reference to this term in the dispute settlement section. It relates to the scope of dispute settlement under the treaty, in particular if an investor-State system is included. It may be noted that in the U.S. Model BIT, this term is used to expand the scope of investor-State arbitration under a treaty by including any dispute related to an investment authorization within the scope of the treaty. Thus a dispute over a regulatory interpretation in an environmental assessment could be covered. However, the United States usually excludes all state-level authorizations from this, which covers almost all of the U.S. authorizations. In the present approach, the term is included to narrow the scope of investor-State disputes by ensuring that if any investment law, regulation, permit or contract includes a dispute resolution clause, it must be respected and utilized before any investor-State process can be initiated.

**Investor** addresses the critical issues to prevent dual nationals from using the treaty to invest back into his or her Home State, and to preclude “treaty shopping.” This occurs when investors adopt locational choices as their Home State, where no substantive business is actually done, for the sole purpose of taking advantage of investment and/or taxation treaties. The provisions of the text seek to forestall this practice.

- The proposed text suggests options to preclude this, including possible requirements that the investment be legally owned or controlled by a person or business from the Home State and/or conduct substantive business in the Home State in order to qualify as an investor under the treaty.
- Not all governments may wish to foreclose all flexibility for foreign investments. Under the Common Market for Eastern and Southern Africa (COMESA) agreement, for instance, the substantial business test is adopted, but not the requirement for effective ownership and control.

- The terms [substantial][substantive] are both used in the text in this regard. Substantial has become the more common term in investment treaties, including in the FIP. Substantive is used in the SADC Services protocol and the GATS. There is not likely to be a significant difference in how these two terms are interpreted in this context, and both will be seen in context relative to the nature of the enterprise at issue. Both would ensure that, for example, simply being incorporated in a State with no actual business activity would not suffice to meet the test of being an investor for treaty protection purposes.
- A final issue is reflected in the “optional” paragraph in the proposed definition of investor, relating to an exclusion of State-owned enterprises. This is a highly debated issue. One can treat them the same as a private investor, which will be done by saying nothing specific in the text, removing them from coverage with a text such as that set out above. An additional option, so far untested, is to include a reference to the Santiago Principles on the operation of sovereign wealth funds and State-owned enterprises to establish a minimum expected standard of conduct and transparency of such enterprises, and penalizing a failure to meet these standards with a withdrawal of coverage under the treaty. As this is a new area of debate, the reference here can be seen as a placeholder to allow for debate on this issue between the negotiating parties.

**Measure** is set up to accommodate different forms of government. Governments should choose what levels of government should be covered. Note also that a judicial decision would be included in the list proposed. This is commonly understood to be within the scope of investment treaties to avoid a potential major loophole.

- “**directly affecting**” as used in the definition means the measure must have a direct impact on or relation to the investment, not simply lead to some tangential or indirect impact upon it. This is seen in several arbitrations.

**UNCITRAL** rules definition adjusts for the pending negotiation on specific rules for investor-State arbitration now underway at UNCITRAL and would automatically include any resulting updated versions.

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## ARTICLE 3 •• Admission of Investments of Investors of the Other Party

*SPECIAL NOTE: This article replaces any other possible article on Investment Liberalization.*

The State Parties shall promote and admit Investments in accordance with their applicable law, and shall apply such laws in good faith.

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### Commentary

The treatment of investment liberalization provisions in an investment treaty is a highly controversial issue. In the context of investment treaties, liberalization provisions almost always come in the form of allowing foreign investors to receive national treatment, or the same treatment as domestic investors, in making an investment. The commitment is often then tailored to exclude or include certain sectors for which the commitment will apply. This is described in more detail below. This type of provision does not mean that a foreign investor is not subject to regulation, but rather that the regulation cannot be any less favourable than that applied to a domestic investor.

It is also important to note at the outset of this discussion that investment liberalization decisions take place through a State's domestic law and policy, and not, as is often suggested, in a treaty. **Thus, not including a binding provision in a treaty does not in any way prevent a State from taking any and all measures to fully or partially open its investment markets, as it so wishes.** However, including such provisions in a treaty can legally preclude a State from later altering its domestic law as circumstances may warrant, most notably closing a sector that is listed as open in the treaty if domestic economic needs should so require. This can entail a significant loss of domestic control over one's economy, and it is for this reason that the recommendation is not to include such a binding provision in a treaty.

While there is growing pressure to include investment liberalization guarantees into such treaties, the primary recommendation here, as noted, is not to do so. The SADC FIP does not do so, and the vast majority of existing BITS with a SADC Member State do not do so. The Drafting Committee proposal is to avoid including binding investment liberalization commitments. The present text, however, does include specific notes to assist those governments that do choose to include such a commitment. Some States are facing very heavy pressure under the EPA negotiations, for example, to include investment liberalization provisions.

The short draft provision suggested above does not entail any international law commitments on investment liberalization. However, it does entail a commitment to apply the domestic law relating to admissions of investments in good faith. This, unless excluded from dispute settlement, would create legal obligations under the treaty for how the government treats a potential investor.

For example, if two investors are competing for a mining licence and one achieves the licence by corruption, the other would have a possible claim under this provision for not acting in good faith. Damages would potentially include all the costs of seeking the investment, including possible several millions for assessments, environmental reviews,

negotiating with local communities, etc., and possibly some level of lost profits. Therefore, the above draft provision does have a legal impact, though not one of mandatory investment liberalization.

The phrase “in accordance with their applicable law” in the text is understood here to include in accordance with treaty obligations that are in force for the State.

Some treaty texts include what are referred to as standstill or “no-backsliding” clauses on investment liberalization. Such a clause would require a State to not close or restrict entry into a sector once it has been opened to foreign investors of the other State. It is highly recommended that such a provision, if proposed in a negotiation, not be adopted, as it produces the same loss of future policy space as a direct liberalization commitment.

In support of the above approach, the Drafting Committee also noted that there are significant capacity constraints on developing countries to prepare and negotiate the schedules that are needed for a proper liberalization provision, thus producing significant risks of inadvertent error.

If a State does choose to adopt legally binding investment liberalization commitments, **the Drafting Committee strongly recommended that it should follow the GATS “list-in” model.** Thus, a schedule of liberalization commitments would be required for each party to the agreement. This stands in contrast to the North American Free Trade Agreement (NAFTA) model, which includes an open-ended provision for liberalization, subject to a schedule that excludes certain sectors or subsectors.

Establishing an investment liberalization commitment (or “pre-establishment right”) does not require much drafting. Indeed, in most cases, it is simply added into the type of post-establishment national treatment provision seen in draft Article 4, below. This is done simply by including the additional words “establishment, acquisition, expansion.” Thus, it is critical to watch out for the inclusion of these words in any draft text presented as part of a negotiation.

Even with a list-in approach, however, provisions for exclusion lists for certain subsectors and for inconsistent measures would need to be included. Thus, a properly constructed provision for investment liberalization would include three related elements:

- A list of sectors included for the liberalization commitment
- A list of subsectors that are excluded from the commitment
- A list of existing or future potential measures that are excluded from the scope of the treaty, at the national level, plus a clear statement on how any existing non-conforming measures at subnational levels are to be treated. This exclusion list should also note that any amendments to these measures would remain excluded as long as they are not more inconsistent than allowed by the original exclusion.

A failure to include all of these three elements places the Host State at significant risk of an improper commitment that can seriously constrain future government measures. In this regard, it may be noted that this is reflective of good practice: The NAFTA, for example, includes over 100 pages of such exclusions from coverage under its investment rules. **It is normal and prudent practice for States to clearly address these issues in a treaty text.** It is also not contrary to other international law to do so.

Two additional alternatives relating to investment liberalization may be noted:

It is possible to include an investment liberalization component, but exclude it from any formal dispute settlement system. This reduces the risk of potential arbitration by would-be investors.

Liberalization commitments can be included, but subject to the right of each State Party to alter the commitments unilaterally over time, without any form of penalty. While any existing investor would remain fully protected, this would allow the termination of future rights to make an investment in any specified sector.

Additionally, there are related issues related to ensuring that no prohibitions on performance requirements are included in the text, whether or not investment liberalization is articulated in the text. This is specifically covered by an exception later on for measures to promote development.

Finally, the Drafting Committee noted that there are significant capacity constraints on managing and regulating investments when flows in new sectors begin. Thus, it is recommended that any acceptance of a liberalization provision should be tied to ensuring the capacity to adequately regulate is present prior to the commitment becoming legally binding. This could be part of a development package in relation to such a provision and should help secure development benefits for the Host State.

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## Part 2: Investor Rights Post-Establishment

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## Part 2: Investor Rights Post-Establishment

### ARTICLE 4 •• Non-Discrimination

**4.1.** Subject to paragraphs 4.3-4.5, each State Party shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, in like circumstances, to its own investors and their investments with respect to the management, operation and disposition of Investments in its territory.

**4.2.** For greater certainty, references to “like circumstances” in paragraph 4.1 requires an overall examination on a case-by-case basis of all the circumstances of an Investment including, inter alia:

- (a) its effects on third persons and the local community;
- (b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
- (c) the sector the Investor is in;
- (d) the aim of the measure concerned;
- (e) the regulatory process generally applied in relation to the measure concerned; and
- (f) other factors directly relating to the Investment or Investor in relation to the measure concerned.

The examination referred to in this paragraph shall not be limited to or be biased toward any one factor.

**4.3.** Non-conforming measures and excluded sectors:

- (a) This Article shall not apply to the measures, present or future, or sectors and activities set out in the Schedules to this Agreement.

*[NOTE: The Schedules will include, to be listed on a State-by-State basis:*

- *Measures, including all existing non-conforming government measures, future amendments to same, and other possible areas, including performance requirements.*
- *Sectors or subsectors to be excluded from post-establishment national treatment obligations.]*

- (b) Unless otherwise set out in the Schedules, Paragraph 4.1 shall not apply to non-conforming measures, if any, existing at the date of entry into force of this Agreement maintained by each State Party under its laws and regulations or any amendment or modification to such measures, provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification. Subject to paragraph 4.3(a), treatment granted to investment once admitted shall in no case be less favourable than that granted at the time when the original investment was made.

**4.4.** Notwithstanding any other provision of this Agreement, the provisions of this Article shall not apply to concessions, advantages, exemptions or other measures that may result from:

- (a) a bilateral investment treaty or free trade agreement [that entered into force prior to this agreement]; or
- (b) any multilateral or regional agreement relating to investment or economic integration in which a State Party is participating or may participate.



#### 4.5. Exception for formalities

Nothing in this Article shall be construed to prevent a State Party from adopting or maintaining a measure that prescribes special formalities in connection with the Investments of Investors, such as a requirement that their Investments be legally constituted under the laws or regulations of the State Party, provided that such formalities do not materially impair the protections afforded by a State Party to Investors of the other State Party and their Investments pursuant to this Agreement.

#### 4.6. Application to Agreement

This Article shall constitute the definition and scope of all references to non-discrimination or national treatment [or Most Favoured Nation treatment] for all purposes under this Agreement. Any reference to any such term elsewhere in this Agreement shall be applied and interpreted in accordance with this Article.

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### Commentary

The text above is on non-discrimination. Many treaties include two elements: national treatment that requires non-discrimination as between domestic and foreign investors; and Most Favoured Nation treatment (MFN) that requires non-discrimination between different foreign investors. The Drafting Committee, as explained more below, has recommended against including an MFN provision here.

***It is critical to note that the scope of coverage for post-establishment non-discrimination is just as important to set out as the scope of any pre-establishment rights in a treaty. Indeed, the most advanced agreements include many exceptions to national treatment or MFN coverage post-establishment.*** Such inclusions and exclusions can relate to sectors or subsectors and to existing or new measures that may be inconsistent with the non-discrimination obligations. This is similar to what is described in the commentary to Article 3 in relation to the inclusion of pre-establishment rights. The same types of exclusion lists should be created in every treaty for post-establishment rights as well. This is what is set out in paragraph 4.3, which refers to separate Schedules.

In addition to the exclusions and limits that would be included in a schedule, there are several exclusions from national treatment set out directly in the text of the article, most notably the exclusion of any advantages given to an investor due to other international agreements relating to investment. A broad approach to doing this is set out above in paragraph 4.5. (In practice, this may be more important for an MFN than a national treatment provision, but it is included here for extra certainty.)

The text above also sets out a proper basis for comparison of investors “in like circumstances.” This is to ensure that a broad view is taken, rather than simply a narrow question of whether the investors are in the same or a related or competitive sector, an approach seen in a number of earlier arbitrations. This additional text, also seen in the COMESA Investment Agreement (CCIA), ensures the reasons for any measures can be fully considered, and not just their financial impacts.

The exceptions for non-conforming measures and the excluded sectors have two elements. The first is the capacity to exclude existing and future measures from coverage, as well as specified activities or sectors. Items included in the Schedules constitute a permanent exception from the non-discrimination obligation. The second element is a grandfathering clause that reduces the need for States to list all existing non-conforming measures of the central and other levels of government. This sets out an exemption for all existing non-

conforming measures, including future amendments as long as the amendments are not more discriminatory in nature. This automatic exemption can then be supplemented for future measures or specific economic matters by using the Schedules option set out in the previous paragraph. This approach is drawn from the recently concluded Japan–Korea–China Investment Treaty.

The inclusion of paragraph 4.6 ensures that further references to non-discrimination in the text do not create additional or alternative, freestanding, legal obligations relating to non-discrimination. This ensures consistency and should prevent unanticipated consequences.

The language in the article is limited to the **management, operation and disposition** of investments. These are key terms of art relating to post-establishment phases. What is excluded are the terms referring to pre-establishment rights noted above: **establishment, acquisition and expansion**. The inclusion of these words would extend the article to pre-establishment rights of national treatment for investors. That said, there is some debate as to whether “expansion” of an existing business should be considered an establishment process, in particular when it is the actual expansion of productive capacity as opposed to expansion via a merger or acquisition. This may be one issue where some flexibility may be warranted, when it can be so limited, and subject to any other laws such as those relating to competition practices and consumer protection.

As noted, MFN treatment is excluded above. ***The Drafting Committee noted that these should be bilateral treaties and that, as such, they should not establish unintended multilateralization through the MFN provision.*** This is even more important should a treaty include a pre-establishment right for foreign investors. The Committee also noted that the MFN provision has been very broadly, and on several occasions unexpectedly, interpreted in arbitrations, making it very unpredictable in practice. This poses unnecessary risks for States, especially developing countries.

Nevertheless, should a Member State choose to include an MFN provision, the Drafting Committee recommended that the Member State should insert the following paragraph into the above text as paragraph 4.2, with appropriate changes in subsequent paragraph numbering and cross references to the remaining paragraphs:

- **4.2. Most Favoured Nation Treatment:** Subject to paragraphs 4.4-4.6, each State Party shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, in like circumstances, to investors of any other State and their investments with respect to the management, operation and disposition of Investments in its territory.

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## ARTICLE 5 •• Fair and Equitable Treatment

*SPECIAL NOTE: The fair and equitable treatment provision is, again, a highly controversial provision. The Drafting Committee recommended against its inclusion in a treaty due to very broad interpretations in a number of arbitral decisions. It requested the inclusion of an alternative formulation of a provision on “Fair Administrative Treatment.” Both options are now set out below.*

### Article 5: Option 1: Fair and Equitable Treatment

**5.1.** Each State Party shall accord to Investments or Investors of the other State Party fair and equitable treatment in accordance with customary international law on the treatment of aliens.

**5.2.** For greater certainty, paragraph 5.1 requires the demonstration of an act or actions by the government that are an outrage, in bad faith, a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency.

### **Article 5: Option 2: Fair Administrative Treatment**

**5.1.** The State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice][due process] to investors of the other State Party or their investments [taking into consideration the level of development of the State Party].

**5.2.** Investors or their Investments, as required by the circumstances, shall be notified in a timely manner of administrative or judicial proceedings directly affecting the Investment(s), unless, due to exceptional circumstances, such notice is contrary to domestic law.

**5.3.** Administrative decision-making processes shall include the right of [administrative review] [appeal] of decisions, commensurate with the level of development and available resources at the disposal of State Parties.

**5.4.** The Investor or Investment shall have access to government-held information in a timely fashion and in accordance with domestic law, and subject to the limitations on access to information under the applicable domestic law.

**5.5.** State Parties will progressively strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes in accordance with their respective domestic laws and regulations.

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## **Commentary**

Two alternatives are suggested in this text. One is based on the traditional fair and equitable treatment (FET) provision common to many BITs. The second is an alternative formulation that would be a new approach to addressing key issues in a more restricted and careful manner than the FET text.

The FET provisions in other treaties have become very broadly interpreted, leaving more recent treaties to provide interpretational guidance in the event of future disputes. The language on FET presented here is the least likely to lead to mischief through expansive interpretations by arbitrators.

The language in the first paragraph 5.2 is derived from the well-known *Neer* case,<sup>1</sup> but uses the language specifically as opposed to other more simple references to the case or to customary international law. This is to be more specific and precise in the standard to be applied. A reference to customary international law, or even the customary international law on the treatment of aliens, does not appear, as a result of some arbitral decisions and academic writings, to suffice to restrain arbitrator creativity in this regard.

<sup>1</sup> *Neer v Mexico*, Opinion, 15 October 1926, 4 RIIA (1926) 60

Some States may find this too high a standard to be meaningful to investors today. However, it is clear that this was the intended standard when the original treaties were drafted and that the expansive interpretations since provided by some tribunals had not been anticipated.

It is because of the large degree of unpredictability of the FET standard that the Government of South Africa has developed and proposed the formulation of a different standard on fair administrative treatment. This alternative approach seeks to avoid the most controversial elements of FET, while still addressing levels and types of actions by States toward an investor that should create a liability. The Drafting Committee was unanimous in believing this could be a constructive alternative approach.

Some key elements in the approach include changing the focus of the language from investor rights to a focus on governance standards. This should help alter the interpretational approach in the event of an arbitration. Second, the text refers to just one part of what other texts refer to as being included in the FET concept. Thus it is expressly narrower in scope and coverage. Third, the language sets a fairly high standard of “arbitrary” conduct by a government agency, or conduct that amounts to “a denial” of procedural justice or due process. These are significant thresholds to be met, in keeping with concepts of a breach of natural justice.

Given the above, the Drafting Committee was impressed with the potential viability of Option 2 as a replacement for the FET standard. It was believed that this would still provide useful protection for investors, while limiting the risks of the expansive rulings associated with the FET standard in a number of arbitral awards.

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## ARTICLE 6 •• Expropriation

**6.1.** A State Party shall not directly or indirectly nationalize or expropriate investments in its territory except:

- (a) in the public interest;
- (b) in accordance with due process of law; and
- (c) on payment of fair and adequate compensation within a reasonable period of time.

**6.2. Option 1:** The assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking into account the current and past use of the property, the history of its acquisition, the fair market value of the property, the purpose of the expropriation, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment.

**6.2. Option 2:** Fair and adequate compensation shall normally be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”) and shall not reflect any change in value occurring because the intended expropriation had become known earlier. However, where appropriate, the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking account of: the current and past use of the property, the history of its acquisition, the fair market value of the investment, the purpose of the expropriation, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment.

- 6.2. Option 3:** Fair and adequate compensation shall be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place (“date of expropriation”) and not reflect any change in value occurring because the intended expropriation had become known earlier.
- 6.3.** Any payment shall be made in a freely convertible currency. Payment shall include simple interest at the [LIBOR rate][current commercial rate of the Host State] from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable.
- 6.4.** Awards that are significantly burdensome on a Host State may be paid yearly over a three-year period or such other period as agreed by the parties to the arbitration, subject to interest at the rate established by agreement of the parties to the arbitration or by a tribunal failing such agreement.
- 6.5.** This Article shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property.
- 6.6.** A [non-discriminatory] measure of general application shall not be considered an expropriation of a debt security or loan covered by this Agreement solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.
- 6.7.** A [non-discriminatory] measure of a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Agreement.
- 6.8.** The Investor affected by the expropriation shall have a right under the law of the State Party making the expropriation to a review by a judicial or other independent authority of that State Party of his/its case and the valuation of his/its investment in accordance with the principles set out in this Article.



## Commentary

Paragraph 6.1 follows most existing models in relation to expropriation, with the exception that the often-seen condition that an expropriation must be non-discriminatory has been removed. This is because, in many instances, expropriations are specific and targeted, and thus in a strict legal sense could be defined as being discriminatory by their very nature. If parties to a negotiation were to wish to reinsert this condition, it is strongly recommended that it be tied to the obligation of non-discrimination set out in the actual treaty text, as opposed to creating an additional stand-alone obligation just for the expropriation tests. This is already built in with the inclusion of paragraph 4.6 in the Article on non-discrimination.

The structure set out above follows most recent models, including the COMESA CCA and SADC approaches, as well as the Canadian and U.S. Model BITs. Variations relating to the valuation of an expropriation have been added here.

The above text also uses the fair and adequate payment standard, and requires compensation to be paid in a reasonably timely manner. This text leaves open the possibility that compensation may not always be fair market value (FMV), depending on the option chosen for paragraph 6.2. In essence, Member States can determine if fair and adequate must always and only equal FMV, or if and when other factors may be considered. Under Option 3 on valuation of damages, FMV is the basis to use for valuation, and it is therefore the most favourable toward the investor. Under Option 2, there is a presumption FMV will

be used, but the State can rebut the presumption on the basis of the equitable criteria set out in the option. The State bears the burden of doing so. This provides a more balanced approach. Under Option 1, there is no presumption but FMV would remain one of several factors to consider on an equal basis.

The language on a reasonable time period is meant to leave some flexibility but also respond to realities on the ground, that determining compensation may take some time, including for a negotiated agreement.

The calculation of interest can be a difficult issue. Two alternatives are presented. One is the Host State commercial interest rate. The second is a neutral alternative using the London inter-bank rate known as LIBOR. This reduces the potential volatility factor as well for interest rates in some States.

The exclusion of compulsory licensing measures by a State, or other removals of intellectual property rights (IPRs) that are consistent with international agreements on the subject is consistent with many, many treaties. This is especially important for medicines that developing States fought hard to secure IPR limitations for. The text here is reflected in NAFTA, COMESA and many other agreements.

The exclusion for regulatory measures in paragraph 6.7 is specific and clear, rather than leaving open possibilities for investors to argue otherwise. This is the traditional customary international law approach, drawn from the notion that “police powers” measures are not, by definition, acts of expropriation. The text is inspired by the COMESA CCIA and ASEAN texts. The 1990s and early 2000s’ texts did not include such provisions, but these types of clauses are becoming increasingly common and should be made clear and apparent in the treaty text. Indeed, it is likely that a failure to include such a provision now would lead to the assumption that such a clear exclusion was not meant to be included and create the risk that a tribunal will hold that by not excluding regulatory measures the parties meant to include them within the scope of the expropriation article.

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## **ARTICLE 7 •• Senior Management and Employees**

**7.1.** A State Party shall not require an Investor to appoint, to senior management positions for its Investment, individuals of any particular nationality.

**7.2.** A State Party may require that a majority of the board of directors, or any committee thereof, of an Investment be of a particular nationality, or resident in the territory of the State Party, provided that the requirement does not materially impair the ability of the Investor to exercise control over its Investment.

**7.3.** Subject to its laws, regulations and policies relating to the entry of aliens and engagement of non-national labour or management, each State Party shall grant temporary entry to nationals of the other State Party, employed by an Investor of the other State Party, for the purpose of rendering services to an Investment of that Investor in the territory of the Host State Party, in a capacity that is senior managerial or executive or requires specialized knowledge.

**7.4.** Notwithstanding any provisions of this Agreement, a State Party may require an Investor of the other Party or its Investment, in keeping with its size and nature, to have progressive increases in the number of senior management, executive or specialized knowledge positions that nationals of the Host State occupy; institute training programs for the purposes of achieving the increases

set out in the preceding paragraph and to Board of Director positions; and to establish mentoring programs for this purpose.

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## Commentary

This is an article that most investors want to see, yet that must be balanced with the underlying premise that FDI should lead to skills transfers and upgrade and higher value added positions for nationals of the Host State.

The paragraphs each address specific segments of senior management and personnel positions, with specifically nuanced obligations. These include senior management, those employees with special knowledge or skills, and the Board of Directors.

Only these levels of employees are covered. But this may raise some issues where highly technical but not senior management positions are at issue. This is particularly so when labour, health and safety, and environmental risks are at issue. Allusion to this is seen in paragraph 7.3, on admission of foreign personnel, as regards persons with specialized knowledge.

Paragraph 7.4 is an addition to the traditional form of this type of article and reflects the additional balance for improving opportunities for nationals of the Host State. It is not mandatory on any given investor or State Party, but ensures such requirements can be imposed in a transparent and legal manner.

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## ARTICLE 8 •• Repatriation of Assets

- 8.1.** A State Party shall accord to Investors the right to:
- (a) repatriate the capital invested and the Investment returns;
  - (b) repatriate funds for repayment of loans;
  - (c) repatriate proceeds from compensation upon expropriation, the liquidation or sale of the whole or part of the Investment including an appreciation or increase of the value of the Investment capital;
  - (d) transfer payments for maintaining or developing the Investment project, such as funds for acquiring raw or auxiliary materials, semi-finished products as well as replacing capital assets;
  - (e) remit the unspent earnings of expatriate staff of the Investment project;
  - (f) any compensation to the investor paid pursuant to this Agreement; and
  - (g) make payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the State Party to the dispute.
- 8.2.** Each State Party shall allow transfers in paragraph 8.1 to be made in a freely convertible currency at the market rate of exchange prevailing at the time of transfer.

**8.3.** Notwithstanding paragraphs 8.1 and 8.2, a State Party may prevent or delay a transfer through the non-discriminatory application of its law and regulations relating to:

- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
- (b) issuing, trading or dealing in securities, futures, options or derivatives;
- (c) criminal or penal offences and the recovery of the proceeds of crime;
- (d) financial reporting or record keeping of transactions when necessary to assist law enforcement or financial regulatory authorities;
- (e) ensuring compliance with orders or judgments in judicial or administrative proceedings;
- (f) taxation;
- (g) social security, public retirement or compulsory savings schemes;
- (h) severance entitlements of employees; and
- (i) the formalities required to register and satisfy the Central Bank and other relevant authorities of a State Party.

**8.4.** Safeguard provision:

- (a) Where, in the opinion of a State Party, payments and capital movements under this Agreement cause or threaten to cause serious
  - (i) difficulties for balance of payment purposes,
  - (ii) external financial difficulties, or
  - (iii) difficulties for macroeconomic management including monetary policy or exchange rate policy,

the State Party concerned may take safeguard measures with regard to capital movements on a temporary basis so as to be eliminated as soon as conditions permit, and in any event as it relates to measures taken under paragraphs (ii)-(iii), for a period of not longer than 12 months if it considers such measures to be necessary.

- (b) Where such measures are taken under 4.1(a)(ii) or (iii), a State Party shall enter into consultations with the other State Party at its request, with a view to review such measures and seek the minimum impact of such measures on an investor.
- (c) Where, in the opinion of a State Party that has taken such measures, it is necessary to extend them for a further period due to the extended period of conditions described in paragraph 4.1(a), the State Party shall offer to enter into consultations with the other State Party with a view to seeking the minimum impact of such measures on an investor. Such measures shall again be taken on a temporary basis so as to be eliminated as soon as conditions permit, and in any event for a period of no longer than 12 months from their renewal.

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## **Commentary**

This article provides for the inclusion of the general right of an investor to repatriate its assets, subject to prudential measures, law enforcement, tax obligations, and a general emergency balance of payments situation. It is consistent with Canada and U.S. Model BITs, several regional examples, and the COMESA CCI text, though with a clearer and stronger



safeguards provision to ensure the ability of States to reply to emergency situations.

The language in the safeguards section, paragraph 8.4 of the Article, is broader than just balance of payments concerns, but is limited time-wise to the conditions identified in the grounds for the exception, either by reference to the conditions still being in existence or a 12-month period. The language is drawn in significant part from the Japan–Korea BIT. Examples of the circumstances in which such measures might be taken include national balance of payments crises, financial system crashes such as Argentina experienced, regional economic crises such as experienced in Asia, or responding to particular impacts of a global financial crisis.

Importantly, the safeguards provision is also self-executing. In other words, once the State taking the safeguard measure declares it to be necessary, that is the end of the matter: subject to patent abuse, the decision cannot be challenged under the arbitration process. However, in order to ensure a certain level of discipline, the State Party taking such measures is compelled to consult with the other State Party after taking such measures, or prior to their renewal if needed. This does not give a right of veto to the other State Party, but does impose a measure of accountability in the process.

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## ARTICLE 9 •• Protection and Security

**9.1.** A State Party shall accord Investments of Investors of the other State Party protection and security no less favourable than that which it accords to investments of its own investors or to investments of investors of any third State.

**9.2.** Investors of one State Party whose Investments in the territory of the other State Party suffer losses as a result of a breach of paragraph 9.1, in particular owing to war or other armed conflict, revolution, revolt, insurrection or riot in the territory of the Host State shall be accorded by the Host State treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the Host State accords to investors of any third State.

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### Commentary

Many agreements include the issue of full protection and security in the general minimum standards of treatment or FET provisions. We believe it is best, if included, as a stand-alone provision, with the compensation for breach of the standard clearly set out in the same article. This better identifies its scope and limits the potential for huge damage awards. The standard set out here is essentially that of an MFN standard: all foreign investors must receive the same level of compensation in the event of a breach of the obligation, on a pro-rata basis for the level of loss (e.g., 10 per cent or 30 per cent or whatever the level may be).

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## Part 3: Rights and Obligations of Investors and State Parties



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## Part 3: Rights and Obligations of Investors and State

### ARTICLE 10 •• Common Obligation against Corruption

**10.1.** Investors and their Investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an Investment.

**10.2.** Investors and their Investments shall not be complicit in any act described in Paragraph 10.1, including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.

**10.3.** A breach of this article by an Investor or an Investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment.

**10.4.** The State Parties to this Agreement, consistent with their applicable law, shall prosecute and where convicted penalize persons that have breached the applicable law implementing this obligation.

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### Commentary

This article would create one common obligation on corruption for investors, Host States and Home States, instead of separate articles for each such actor. The main obligation against corruption is derived from the UN and OECD conventions on bribery, but closes a loophole that allows payments to be made to a family member or business associate instead of directly to a politician or senior official.

Implementation of the article from most enforcement and penal perspectives is through domestic law. However, and this is very important, paragraph 10.3 makes it clear that an investment achieved by corruption in breach of this article or of applicable domestic law is a breach of the treaty and domestic law related to the establishment and operation of the investment, and therefore, by virtue of the definition of an investment that requires it to be made in accordance with domestic law, it is no longer a covered investment and no longer has dispute settlement rights. This is consistent with recent arbitral decisions relating to corruption in the making of an investment that have negated investment arbitration rights as a result of a finding of corruption.

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## ARTICLE 11 •• Compliance with Domestic Law

Investors and Investments shall comply with all laws, regulations, administrative guidelines and policies of the Host State concerning the establishment, acquisition, management, operation and disposition of investments.

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### Commentary

This article is drawn from the SADC FIP as well as several other investment treaties. This seeks only to establish an obvious legal obligation and does not go beyond what would be in the domestic law of the Host State. This is, or should be, a basic expectation of all parties. It also means that an investor cannot plead a provision of this agreement as a legal excuse for not complying with the domestic law, though it may seek damages afterwards if the law is inconsistent with a protection in this agreement.

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## ARTICLE 12 •• Provision of Information

**12.1.** An Investor shall provide such information to an actual or potential Host State as that State Party may require concerning the Investment in question and the corporate history and practices of the Investor, for purposes of decision making in relation to that Investment or solely for statistical purposes.

**12.2.** The actual or potential Host State shall have the right to timely and accurate information in this regard. An Investor shall not commit fraud or provide false or misleading information provided in accordance with this Article.

**12.3.** A material breach of paragraph 12.2 by an Investor or an Investment is deemed to constitute a breach of the domestic law of the Host State concerning the establishment, acquisition, management, operation and disposition of Investments.

**12.4.** The actual or potential Host State Party may make such information available to the public in the location where the Investment is to be located, subject to other applicable law and the redaction of confidential business information. The State Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the Investor or the Investment.

**12.5.** Nothing in this Article shall be construed to prevent a State Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its domestic law or in connection with disputes between the Investor and the State regarding the Investment.

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### Commentary

This article carries forward the anti-corruption idea to issues of fraud and misrepresentation in the making of an investment. It is consistent with recent arbitral decisions that have found material fraud and misrepresentation by investors in the information provided to a State in the making of an investment. In essence, it sets out clearly an obligation for honesty and plain dealing in making investments.

Paragraph 12.3 establishes the same penalty for fraud and misrepresentation as for corruption, but sets a standard of “material” to avoid severe penalties for *de minimus* errors or inconsequential misrepresentations in the course of “selling” the investment to the government. Material is a legal standard that requires a finding that the information was relied on as part of, but not solely, in the making of relevant decisions by the government.

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## ARTICLE 13 •• Environmental and Social Impact Assessment

**13.1.** Investors or their Investments shall comply with environmental and social assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the Host State for such an investment [[or the laws of the Home State for such an investment][or the International Finance Corporation’s performance standards on Environmental and Social Impact Assessment], whichever is more rigorous in relation to the Investment in question.]

**13.2.** The impact assessments required under paragraph 13.1 shall include assessments of the impacts on the human rights of the persons in the areas potentially impacted by the investment, including the progressive realization of human rights in those areas.

**13.3.** Investors or their Investments shall make the environmental and social impact assessments:

(a) public [including via the Internet] and

(b) accessible to the local communities, or other areas with potentially affected interests, in an effective and sufficiently timely manner so as to allow comments to be made to the Investor, Investment and/or government prior to the completion of the Host State processes for establishing an Investment.

**13.4.** Investors, their Investments and the Host State authorities shall apply the precautionary principle<sup>2</sup> to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the Investment, or precluding the Investment if necessary. The application of the precautionary principle by Investors and Investments shall be described in the environmental impact assessment.

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### Commentary

This obligation is consistent with domestic law in virtually every State today. It reiterates the need for compliance by investors, and supplements the domestic law of the Host State where this may be necessary.

Where the domestic law is sufficiently developed, such supplementing will not be needed. However, where the domestic law may for some reason be insufficient, due to the nature or size of the project being new for example, gaps can be made up by reference to the

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<sup>2</sup> The precautionary principle is defined in Article 15 of the Rio Declaration on Environment and Development as follows: “In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as reason for postponing cost-effective measures to prevent environmental degradation.”

International Finance Corporation's standards or the law applicable to the proposed investment were it to be located in the Home State. This is an effort to create a floor standard in the event of gaps in the domestic law in relation to a given project, in particular larger projects that may be more extensive in terms of potential impacts than previously seen in a developing country Party. It does not, however, set any restrictions on the applicable domestic law, which remains the law of first recourse.

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## **ARTICLE 14 •• Environmental Management and Improvement**

**14.1.** Investments shall, in keeping with good practice requirements relating to the size and nature of the Investment, maintain an environmental management system consistent with recognized international environmental management standards and good business practice standards.

**14.2.** Emergency response and decommissioning plans shall be included, and regularly reviewed and updated in the environmental management system process, and made accessible to the Host State and the public.

**14.3.** A closure fund to ensure that resources are available to implement the decommissioning plan shall be established and maintained by the Investor or its Investment in accordance with good industry practice for such funds.

**14.4.** Environmental management plans shall include provision for the continued improvement of environmental management technologies and practices over the life of the Investment. Such improvements shall be consistent with applicable laws, but shall strive to exceed legally applicable standards and always maintain high levels of environmental performance consistent with best industry practice.

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### **Commentary**

This article reflects good industry practice in environmental management and planning. It does not create a one-size-fits-all obligation, but rather an obligation that is scaled to the nature and size of the investment, in accordance with international standards (such as ISO 14000) and good business practice. Thus, the obligation here is flexible, and practicable.

Environmental management systems can assist in ensuring that domestic environmental laws are in fact complied with. But they go beyond this to require ongoing environmental diligence and improvement. This basic component of all environmental management standards is important in many respects, including as an answer to potential investors that may seek environmental law stabilization clauses, which are increasingly understood as inappropriate despite ongoing requests by some investors.

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## **ARTICLE 15 •• Minimum Standards for Human Rights, Environment and Labour**

**15.1.** Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife.

**15.2.** Investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.<sup>3</sup>

**15.3.** Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher.

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### **Commentary**

Paragraph 15.1 begins with the concept of Prof. John Ruggie as UN Secretary-General Special Representative on Business and Human Rights on the corporate duty to respect human rights. The second sentence then makes this an obligation on the investors.

Sentence 3 of paragraph 15.1 then comes back to the Ruggie concept that investors also should not be complicit in breaches of human rights by others. Complicity is a legal standard that requires some form of direct affiliation or deliberate failure to act in the face of human rights abuses. Complicity does not generally include simply paying taxes or other compliance with law, absent specific factors that might inform the investor or investment of human rights abuses related to such acts.

For labour standards, the ILO Declaration sets out what are considered as the minimum global standards, or core labour standards. Almost all States have subscribed to these minimum standards. There is no evident rationale for any investor to operate in a manner than denies these standards, given the tripartite nature of the process by which ILO standards are adopted, as between government, industry and labour.

Paragraph 15.3 broadens paragraph 15.2 by imposing a duty on investors and investments to respect the international human rights, environmental and labour standards adopted by the Host State through participation in international agreements. These are easily identifiable. It sets such international agreements as a floor for their conduct, even if not fully incorporated into domestic law. These are not open-ended obligations, but derive expressly from the act or ratification of an agreement by the Host State, or Home State in certain circumstances

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<sup>3</sup> These core labour standards are further elaborated, in accordance with the Declaration, in ILO Conventions concerning freedom of association, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in the work place.

Several international environmental agreements have differentiated obligations. Circumvention of an agreement does not occur when the differentiated obligations of the Host State under an agreement are not breached.



## ARTICLE 16 •• Corporate Governance Standards

**16.1.** Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and in the application of internationally accepted accounting standards.

**16.2.** Investors and their investments shall ensure that all transactions with related or affiliated companies shall be arms length transactions at fair market price. Investors and their investments shall not undertake any transfer pricing practices between themselves or any other related or affiliated companies.

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### Commentary

This article should not be required, but sadly the practices of many multinational companies still make it necessary. The article would set a basic level of expectation of corporate conduct and governance.

The transfer pricing issue in paragraph 16.2 is a major factor in protecting government revenues from improper internal corporate practices that reallocate costs and expenses to reduce or avoid taxes in the Host State. For developing countries, with less capacity to monitor such practices, transfer pricing can have a significant impact on tax revenues. Clarity here can establish clear expectations as well as the possibility of claims against the company when other domestic laws may not be sufficiently clear.

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## ARTICLE 17 •• Investor Liability

**17.1.** Investors and Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.

**17.2.** Home States shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investors in relation to their Investments in the territory of the Host State.

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### Commentary

This article requires Home States to restrict the use of such procedural or jurisdictional constraints as seen in the *forum non conveniens* rule, or similar rules, that impede hearings on the merits of cases relating to investor acts or decisions. Such measures by the Home State will in turn allow persons in the Host State to sue in the Home State for the impacts of decisions made by the investor.

Alternatively, the provision could be phrased as a requirement for an investment to waive any right to claim *forum non conveniens* or a similar jurisdictional bar, but this may be more difficult to apply in practice than a governmental measure that prevents the use of the doctrine in the circumstances envisioned here.

The above does not in any way create a determination of any liability of the investor. It simply terminates a jurisdictional barrier invented in a different era by courts operating under very different circumstances. This would ensure that an investor can be held liable for the impacts in foreign countries of its decisions in the Home State. The legal process of the Home State, together with the standard and burden of proof, etc., would continue to apply to the proceedings. This is the same approach as is currently applied, for example, in the European Union.

The Drafting Committee recognized the need for careful attention to be paid to the national implementation of this obligation, should it be adopted. New legislation or regulation concerning access to domestic courts and/or the jurisdiction of domestic courts may be needed by Member States, depending on current jurisdictional rules in each state. Specific training for this purpose may be needed for governments in the region.

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## ARTICLE 18 •• Transparency of Contracts and Payments

**18.1.** Investors or their investments shall make public in a timely manner all contracts related to the establishment or right to operate an Investment made by the Investor or the Investment with a government in the Host State.

**18.2.** Investors or their investments shall make public in a timely manner all payments made to a government related to the establishment or right to operate of an Investment, including all taxes, royalties and similar payments.

**18.3.** Where feasible, such contracts and payments shall be made available on an Internet website freely accessible by the public.

**18.4.** The State Party that is the recipient of payments or party to an investment-related contract shall [have the right to] make the payments and contracts available to the public, including through an Internet site freely accessible to the public.

**18.5.** Confidential business information shall be redacted from contracts made public in accordance with this Article.

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### Commentary

There is a growing concern for transparency in contract negotiation that many developing countries and international organizations are now responding to. Indeed, many now see this as one of the most important ingredients in the fight against corruption. This article sets out the principle of transparency and an expectation that both investors and governments will act on this expectation.

Payments by investors to the government, which may be in the form of taxes, rents, royalties, etc., are similarly subject to increased demands for transparency. The Extractive Industry Transparency Initiative is one application of this principle. This article again adopts a pro-transparency position in this regard.

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## ARTICLE 19 •• Relation to Dispute Settlement

**19.1.** Subject to any other specific directions under this Agreement as to the consequences of a breach of an obligation, where an Investor or its Investment is alleged by a State Party in a dispute settlement proceeding under this Agreement to have failed to comply with its obligations under this Agreement, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.

**19.2.** A Host State may initiate a counterclaim against the Investor before any tribunal established pursuant to this Agreement for damages or other relief resulting from an alleged breach of the Agreement.

**19.3.** In accordance with its applicable domestic law, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts against the Investor or Investment for damages arising from an alleged breach of the obligations set out in this Agreement.

**19.4.** In accordance with the domestic law of the Home State, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts of the Home State against the Investor, where such an action relates to the specific conduct of the Investor, and claims damages arising from an alleged breach of the obligations set out in this Agreement.

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### Commentary

One issue that frequently arises in relation to including obligations on investors in BITs is their enforcement. Here, the issue is addressed in two ways. The first is making it clear that such breaches can and should be taken into account in any dispute settlement proceedings initiated under the agreement. This includes a specific provision allowing counterclaims by States, the subject of inconclusive discussions under other treaties.

The second method of enforcement is by creating a monetary liability in domestic courts of the Host State for a breach of the treaty obligations by an investor. This is, arguably, the most effective method of all, as it does not rely on government officials or capacity. The initiation of a complaint against an investor does not, of course, presume its guilt, simply that the matter can be tried and damages assessed if the breach is proven.

The opening words of paragraph 19.1 ensure that consequences related to corruption and fraud remain under the direction of those specific articles.

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## ARTICLE 20 •• Right of States to Regulate

**20.1.** In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.

**20.2.** Except where the rights of a Host State are expressly stated as an exception to the obligations of this Agreement, a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in this Agreement

**20.3.** For greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement.

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### **Commentary**

This article confirms that the treaty does not alter the Host State's basic right to regulate, but without eliminating all the effects of the investor protections. It should be read with more specific articles that enable performance requirements to be imposed, and carefully define the non-discrimination and expropriation rules, for example. All of these provisions are intended to work together.

The broader goal is restated in paragraph 20.2, again ensuring that some of the predilections of arbitrators to view investment treaties purely as investor rights would be untenable under the present approach. In view of the broad obligations in BITs, it is useful to reaffirm the Host State's right to regulate investments in the public interest.

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## **ARTICLE 21 •• Right to Pursue Development Goals**

**21.1.** Notwithstanding any other provision of this Agreement, a State Party may grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals.

**21.2.** Notwithstanding any other provision of this Agreement, a State Party may

- (a) support the development of local entrepreneurs, and
- (b) seek to enhance productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer and other benefits of investment through the use of specified requirements on investors made at the time of the establishment or acquisition of the investment and applied during its operation.

**21.3.** Notwithstanding any other provision of this Agreement, a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement.

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### **Commentary**

These provisions are developed in part from the existing SADC FIP and in part from other regionally based agreements. Collectively they provide a significant exclusion from the disciplines of the Agreement for measures specifically taken to promote development within the Host State's economy.

Paragraph 21.1 is derived from the FIP.

Paragraph 21.2 is partly from the FIP but has been expanded to ensure that performance requirements may be imposed on foreign investors in order to promote the social and economic benefits that are often ascribed to FDI. This provision does not impose any performance requirements, but does enable a government to require them without fear of potential claims that they are in breach of the agreement, in particular the non-discrimination provision. Combined, these articles will help reinforce the right of States to utilize performance requirement obligations when imposed at the outset of an investment.

Paragraph 3 captures the Black Economic Empowerment type of measures that are seen in many southern African States. It is derived from South African investment treaty language.

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## ARTICLE 22 •• Obligations of States on Environment and Labour Standards

**22.1.** Each State Party has the right to establish its own levels of domestic environmental protection and development policies and priorities, and labour laws and standards, and to adopt or modify such laws, standards and policies. In the exercise of this right, each State Party shall strive to ensure that it provides for high levels of environmental and labour protection, taking into account internationally accepted standards, and shall strive to continue to improve their standards.

**22.2.** The State Parties recognize that it is inappropriate to encourage investment by relaxing domestic environmental and labour legislation. Accordingly, the State Parties shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an Investment. If a State Party considers that the other State Party has offered such an encouragement, it may request consultations with the other State Party.

[**22.3.** This Article is not subject to the dispute settlement process set out in the investor-State dispute settlement process of this Agreement.]

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### Commentary

A provision to preclude the lowering of environmental and related standards, labour standards, and human rights standards, in order to attract or maintain investments, was first included in NAFTA's Chapter 11 in 1992. However, it was done in a non-legally binding manner. The text above sets out a mandatory obligation not to lower such standards in order to attract or maintain investment. The SADC FIP includes a similar provision in mandatory language as well; hence this approach has already been adopted region-wide.

Of note, the above text includes a note suggesting the removal of this provision from the purview of an investor-State arbitration process if one is adopted. The Drafting Committee has not recommended the inclusion of an investor-State arbitration process, but recognizes that States may choose in some circumstances to do so; hence this is included to ensure attention is drawn to this question, in the event a State does choose this direction.

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# Part 4: General Provisions

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## Part 4: General Provisions

### ARTICLE 23 •• Cooperation in Promotion of Investment

**23.1.** The State Parties shall cooperate in the promotion of investment by their Investors into the territory of the other Party. Such cooperation may include joint investment promotion events, tours with industrial leaders and investors, technology promotion, and other measures designed to promote investment.

**23.2.** The State Parties shall exchange information with respect to the investment opportunities, laws and regulations for foreign investors in their territories.

**23.3.** The State Parties may provide Investment financing and Investment guarantee facilities for Investors from their State into the territory of the other State Party. Such facilities shall, if used, promote compliance with the obligations of Investors set forth in this Agreement.

**23.4.** [State Party X shall provide technical assistance to State Party B in the implementation of this Article.]

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#### Commentary

Investment treaties are often styled as investment promotion and protection treaties. But they contain few if any provisions relating to the promotion of investment or to reviewing the effectiveness of the treaty in doing so.

This article sets out the obligation to promote investment, and proposes some specific tools that may, with the agreement of the parties, be used to do so. It is a minimal first step in this direction.

In addition, the article allows Home States to require that its investors who seek to make an investment under the treaty comply with the obligations contained herein as a condition of State financing or insuring of the investment. This gives some specific responsibility to the Home State for the conduct of its investors where governmental facilities are being used to support the investor. The concluding paragraph on assistance is intended to apply in a developed/developing State context. For a south-south context, one might consider including a sentence on the exchange of best practices in the implementation of this article instead.

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## ARTICLE 24 •• Transparency of Investment Information

**24.1.** Each State Party shall promptly publish, or otherwise make publicly available, its laws and regulations of general application as well as international agreements that may affect the Investments of Investors of the other State Party.

**24.2.** Each State Party shall endeavour to promptly publish, or otherwise make publicly available, its policies and administrative guidelines or procedures that may affect investment under this Agreement.

**24.3.** Nothing in this Agreement shall require a State Party to furnish or allow access to any confidential or proprietary information, including information concerning particular Investors or Investments, the disclosure of which would impede law enforcement or be contrary to its domestic laws protecting confidentiality.

**24.4.** [This Article shall not be subject to the investor-State dispute settlement process.]

**24.5.** [State Party X shall provide technical assistance to State Party B in the implementation of this Article.]

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### Commentary

This article aims to promote transparency for the information that should be available to investors about the investment making process. It sets out a binding obligation in relation to laws and regulations and a best efforts obligation in relation to policies and other administrative measures. This division recognizes that some forms of information may be more accessible than others on a short-term basis for implementation, while seeking to ensure that higher levels of transparency are brought into place as capacity is available.

At the same time, the obligation is removed from the investor-State dispute settlement process, if such a process is included in the treaty. If there is no investor-State provision then this paragraph can be removed.

The additional language on technical assistance recognizes that one of the State Parties may lack the technical capacity or resources to ensure this goal is achieved. When this is the case and support from the other treaty partner may be available, the text encourages this to be considered. As seen previously, the provision on assistance is intended to apply in a developed/developing State context. For a south-south context, one might consider including a sentence on the exchange of best practices in the implementation of this article instead.

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## ARTICLE 25 •• Exceptions

**25.1.** [Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination pursuant to Article [4]] Nothing in this Agreement shall be construed to oblige a State Party to pay compensation for adopting or enforcing measures taken in good faith and designed and applied:

- (a) to protect public morals and safety;
- (b) to protect human, animal or plant life or health;
- (c) for the conservation of living or non-living exhaustible natural resources; and
- (d) to protect the environment.

**25.2.** For greater certainty, nothing in this Agreement shall be construed to oblige a State Party to pay compensation if it adopts or maintains reasonable measures for prudential reasons, such as:

- (a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
- (b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
- (c) ensuring the integrity and stability of a State Party's financial system.

**25.3.** Nothing in this Agreement shall apply to taxation measures, subject to the continued application of Article 6 [Expropriation].

**25.4.** Nothing in this Agreement shall apply to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a State Party's obligations under Article 8 [Repatriation of Assets].

**25.5.** Nothing in this Agreement shall apply to a State Party's measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its national security interests.

**25.6.** Nothing in this Agreement requires a State Party to furnish or allow access to any information, the disclosure of which it determines to be contrary to its national security interests.

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### Commentary

This article combines a number of exceptions issues seen in various regional and bilateral agreements. Each is considered in order.

Paragraph 25.1 is drawn from Article XX of the GATT, and is also reflected in the COMESA CCIA and other bilateral agreements. However, it is more specifically drafted to make clear that no compensation is required to be paid to an investor for the types of measures set out therein as long as they are taken in good faith. This avoids a situation, for example,

where a measure is “made legal” by virtue of paying compensation. Hence the test is not one of being a breach of the treaty or not, but a more refined and specific statement that the covered measures simply do not require compensation when taken in a *bona fide* manner. The addition of the last subparagraph is to ensure that the environment is clearly included, as opposed to simply implied by virtue of the other terms or by reference to WTO dispute settlement decisions. This makes the provision complete and express, rather than implied.

The role of a non-discrimination proviso (in square brackets at the beginning of the text) here is unclear, though it is always included in such formulations derived from the GATT. Yet this would negate any application of a general exception such as this to the national treatment or MFN provisions. Moreover, many measures may legitimately differentiate between investors in a region or in similar sectors. Hence, it is considered vital that if such introductory language is included, it should be made clear, again, that this is to be understood as per the article on non-discrimination and not as creating a new or different standard for non-discrimination. This, as noted previously, is done through the use of paragraph 4.6 in the text above.

We are not aware of such a general provision being used to date in an investment arbitration, and there remains some doubt as to its efficacy. Nonetheless, many agreements now contain this or similar text.

Paragraph 25.2 relates to measures to ensure the stability and integrity of the financial system. The notion of prudential measures in this text is intended to relate to the technical use of that term in relation to the financial sector only. It may be seen as complementary to the provision on safeguards measures enabling certain limitations on the export of assets by an investor.

Paragraph 25.3 concerns a broad exclusion for taxation measures. This is one approach seen in investment treaties, and is very clearly stated. Another approach is to make this subject to review by the Parties themselves in the event of an arbitration. This is used in the U.S. treaties now. It allows the Parties to the treaty to determine if a measure is a valid tax measure or not, a determination which, if agreed upon, becomes determinative. If the two State Parties do not agree, however, the issue falls back to the arbitration tribunal to determine.

Paragraph 25.4 relates to a general exception for financial and exchange rate policies, again as a complement to the safeguards provision relating to the repatriation of assets.

The exclusions relating to national security are inspired by the U.S. Model BIT and subsequent U.S. treaties. They are self-executing here, meaning that as soon as a State declares this exception, it is binding and not subject to arbitral review. This removes the review of this issue from any dispute settlement process. This self-executing approach is seen in the U.S. treaties.

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## ARTICLE 26 •• Denial of Benefits

**26.1.** A Party may at any time deny the benefits of this Agreement to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party:

- (a) does not maintain diplomatic relations with the non-Party, or
- (b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments.

**26.2.** Subject to prior notification and consultation with the other State Party, a State Party may at any time deny the benefits of this Agreement to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.

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### Commentary

This article has become a common feature of investment treaties. As set out here, it provides for two types of situations where a State Party may exercise its right to deny an investor the benefits of the treaty, including access to any dispute settlement benefits. The first is where a State Party does not have diplomatic relations with the Home State of the actual beneficial owner of the investor making the putative investment, or the actual beneficial owner is from a State subject to economic sanctions by the Host State Party.

The second situation is where the actual beneficial owner of the investor is from a third State not a party to the treaty and the investor does not actually carry on substantial business activity in the putative Home State. This is included here out of a sense of caution due to the multiple options set out for defining an investor under the treaty. If a substantial (or substantive) business test is adopted there, paragraph 2 above will not likely be needed. The paragraph is designed to act as a barrier to formal incorporation being the sole test of whether an investor is properly to be covered by the treaty benefits, and thus to prevent simply forum shopping to achieve the benefits of the treaty.

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## **ARTICLE 27 •• Periodic Review of this Agreement**

**27.1.** The State Parties shall meet every five years after the entry into force of this Agreement to review its operation and effectiveness, including the levels of investment between the Parties.

**27.2.** The State Parties may adopt joint measures in order to improve the effectiveness of this Agreement.

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### **Commentary**

This article seeks to give an ongoing, active life to the Agreement beyond the risk of arbitrations for alleged breaches of the treaty being commenced. It requires the State Parties to consider value and effectiveness of the agreement every five years, and enables the adoption of adjustments if needed. This has been found in a number of Canadian investment treaties, and is also included in the review mechanisms in broader economic cooperation or trade agreements with investment chapters.

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## Part 5: Dispute Settlement

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## Part 5: Dispute Settlement

### ARTICLE 28 •• State-State Dispute Settlement

**28.1.** Disputes between the State Parties concerning the interpretation or application of this Agreement should, as far as possible, be settled through the amicable means. The treaty review mechanism in Article 26 shall be used to raise such issues in a regular meeting or through a special ad hoc meeting convened by either State Party for this purpose.

**28.2.** If a dispute between the State Parties cannot thus be settled within six months of the initiation of consultations to resolve the dispute, either State Party may request mediation of the dispute, including through recognized institutions or the use of good offices for such purposes. Both State Parties shall cooperate in good faith when one State Party has made such a request.

**28.3.** Subject to the provisions of paragraph 28.4, a State Party may submit a claim to arbitration

- (a) seeking damages for an alleged breach of this Agreement on behalf of an Investor or Investment, or
- (b) for a matter concerning the interpretation or application of a provision of this Agreement in which it is in dispute with the other State Party.

**28.4.** A State Party may not submit a claim to arbitration seeking damages for an alleged breach of this Agreement on behalf of an Investor or Investment

- (a) unless the Investor or Investment, as appropriate, has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State, or
- (b) unless the claimant State Party demonstrates to the tribunal established under this Article that there are no reasonably available domestic legal remedies capable of providing effective relief for the dispute concerning the underlying measure, or that the legal remedies provide no reasonable possibility of such relief in a reasonable period of time.

**28.5.** Subject to paragraphs 28.3 and 28.4, a State Party may request an arbitration [at a designated regional arbitration center in accordance with its Rules or] under an ad hoc process in accordance with the following rules. Within two months of the receipt of the request for arbitration, each State Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who, on approval by the two State Parties, shall be appointed Chairperson of the tribunal. The Chairperson shall be appointed within two months from the date of appointment of the other two members.

**28.6.** If within the periods specified in paragraph 28.5 the necessary appointments have not been made, either State Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either State Party or if he or she is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either State Party or if he or she, too, is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either State Party shall be invited to make the necessary appointments.



- 28.7.** The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both State Parties.
- 28.8.** Each State Party shall share equally the costs and expenses of the tribunal unless the tribunal shall decide otherwise.
- 28.9.** [The tribunal shall determine its own procedure.][The tribunal shall apply the [UNCITRAL] [ICSID] Arbitration Rules in force at the time of the submission of the dispute to arbitration, in accordance with paragraph 28.5.]
- 28.10.** All documents relating to a notice of arbitration, the settlement or resolution of any dispute pursuant to this Article, and the pleadings, evidence and decisions in them, shall be available to the public, subject to the redaction of confidential information.
- 28.11.** *Amicus Curiae* submissions: The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a governmental entity of either State Party. The procedures in Schedule 4 shall apply for this purpose.
- 28.12.** Procedural and substantive oral hearings shall be open to the public. This may be achieved though live broadcasting of the hearings by Internet broadcast.
- 28.13.** An arbitral tribunal may take such steps as are necessary, by exception, to protect confidential business information in written form or at oral hearings.
- 28.14.** No claims under this provision may be commenced if more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired, knowledge of the breach alleged in the arbitration claim and knowledge that the Investor has incurred loss or damage; or one year from the conclusion of the request for local remedies initiated in the domestic courts.



## Commentary

Most investment treaties include a State-State dispute settlement provision. The text above divides out the two possible roles of a State-State dispute settlement system: a State claiming damages on behalf of an investor for an alleged breach of the treaty; and a “pure” dispute between the State Parties themselves over the interpretation or application of the treaty. Importantly, the former is made subject to the same exhaustion of local remedies requirements as the text below on investor-State, should governments choose to include investor-State arbitration.

Paragraphs 28.1 and 28.2 set out a requirement to seek to resolve disputes by amicable means prior to resorting to a formal and binding dispute settlement process. This is very common. Paragraph 28.2 seeks to encourage a formal mediation process and makes it mandatory for both parties to enter into such a process if one party formally states it desires to do so. Mediation is a non-binding process; hence a solution to the potential dispute cannot be imposed during mediation without the consent of both State Parties.

Paragraph 28.3 sets out the two options for State-State dispute settlement noted above: a State acting on behalf of an investor and a State initiating the process in order to resolve a dispute directly between itself and the other State Party. States have, under customary international law, a right to make claims for damages suffered by their citizens or businesses due to breaches of international law by a State. The provisions allowing for a State Party to make a claim on behalf of an investor here reflects a concrete application of this customary law right.

Paragraph 28.4 requires the exhaustion of local remedies by an investor or investment before a State may initiate a claim on behalf of an investor. The exhaustion of local remedies clause means that before any claim can be taken under the dispute settlement process set out in the treaty, the investor or investment must have sought to resolve the dispute in the local courts or other dispute settlement processes available in the Host State. It is important to note here that the language for such a clause must be set out as domestic proceedings relating to the measures underlying the claim under this Agreement. Some treaties have phrased the condition as requiring a claim concerning the breach of the treaty to be taken in the domestic courts, if it can be so taken. However, most States do not allow claims for a breach of the treaty per se to be taken, but rather a claim that the measure taken by the government is otherwise in breach of the domestic law or constitution. This difference is important.

In addition, the exhaustion of local remedies clause allows a State seeking to take a claim on behalf of an investor or investment to argue that no local remedies are available under which to challenge the underlying measure. A State making such a claim must show evidence of this in order to be entitled to go directly to the international process.

Paragraphs 28.5–28.8 are fairly standard paragraphs relating to the appointment and operation of a tribunal at the international level. They ensure that the tribunal can be appointed and become functional even if one State is recalcitrant and uncooperative.

Paragraph 28.9 sets out options that States may consider for identifying the arbitration rules that will be applied by the tribunal to the dispute. This can be made specific, or left general. It should be noted that a tribunal can utilize the ICSID arbitration rules, which are fully accessible at any time to the public, without having to utilize the ICSID process if it does not wish to. Similarly, the UNCITRAL arbitration rules can be adopted, or any other rules, without any other impacts on the organization of the arbitration.

Paragraphs 28.10–28.13 are drawn from the COMESA approach and more recent approaches to investor-State arbitration in the U.S. and Canadian treaties, as well as others. Paragraph 28.10 requires that all the key arbitral documents be made public. Posting them on a website is the easiest way to do this.

Paragraph 28.11 allows for the participation of amicus curiae, either organizations or individuals, with an interest in the case. This is now common in investor-State arbitration and is carried over into the State-State process here as well.

Paragraph 28.12 requires the tribunal hearings to be open to the public. Paragraph 28.13 sets out the exception to the previous few paragraphs, that the tribunal can take such steps as may be needed to protect confidential business information from being put into the public domain. For documents this can be done by redacting any such information from the public versions. For oral hearings it may mean holding portions of a session in camera.

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## ARTICLE 29 •• Investor-State Dispute Settlement

*SPECIAL NOTE: The Drafting Committee was of the view that the preferred option is not to include investor-State dispute settlement. Several States are opting out or looking at opting out of investor-State mechanisms, including Australia, South Africa and others. However, if a State does decide to negotiate and include this, the text below provides comprehensive guidance for this purpose. This text is drawn primarily from the U.S. and Canadian Model BITs, other recent treaties, and existing arbitration rules. Due to the length of the text, commentary follows each paragraph.*

### 29.1. Amicable Settlement of Disputes

In the event of an investment dispute between an Investor or its Investment (referred to as an “Investor” for the purposes of the Investor-State dispute settlement provisions) and a Host State pursuant to this Agreement, the Investor and the Host State should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party mediation or other mechanisms.

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### Commentary

It is widely accepted that prior to initiating any arbitration process, investors and/or their investments should have a general obligation to resolve the dispute amicably. This paragraph sets out such a requirement.

It may be noted here that the right to initiate an arbitration, if it is given, could be exercised by the investor or the investment, which are usually two distinct legal entities. This is quite common.

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### 29.2. Notice of Intent to Arbitrate

At least six months before submitting any claim to arbitration under this Part, an Investor shall deliver to the Host State a written notice of its intention to submit the claim to arbitration (“Notice of Intent”). The notice shall specify:

- (a) the name and address of the Investor;
- (b) for each claim, the provision of this Agreement alleged to have been breached and any other relevant provisions;
- (c) the legal and factual basis for each claim; and
- (d) the relief sought and the approximate amount of damages claimed.

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### Commentary

This paragraph begins the arbitration process with a preliminary step known as a Notice of Intent to arbitrate. The Notice of Intent is the formal signal of the investor’s intent to initiate the process if it is not otherwise resolved in an amicable fashion. The notice period in practice today ranges from 3 to 12 months. The Drafting Committee has suggested 6 months here.

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### 29.3. Mediation

After submission of the Notice of Intent, the Investor or the Host State may request mediation of the dispute, in which case the other disputing party may agree to such mediation. The costs of the mediation shall be shared equally [unless the mediator decides otherwise for good cause. The mediator shall provide written reasons for such a decision].

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### Commentary

This article provides for a mediation option where both parties to the potential arbitration agree. The United Nations Conference on Trade and Development (UNCTAD) and some academics are promoting such an option. In some instances, however, States are simply not able to mediate, for example when a claim contends that a new public safety regulation to reduce smoking is an expropriation of a company's intellectual property rights. Such a claim has recently been made against both Uruguay and Australia. A State simply cannot accept such a position and mediation that requires it to alter its public health measure. Where mediation is used, it does not require that a settlement be reached. So there is no obligation to successfully conclude a mediation process.

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### 29.4. Conditions for Submission of a Claim to Arbitration

An Investor may submit a claim to arbitration pursuant to this Agreement, provided that:

- (a) six months have elapsed since the Notice of Intent was filed with the State Party and no solution has been reached;
- (b) the Investor or Investment, as appropriate,
  - (i) has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State; or
  - (ii) the Investor demonstrates to a tribunal established under this Agreement that there are no reasonably available legal remedies capable of providing effective remedies of the dispute concerning the underlying measure, or the legal remedies provide no reasonable possibility of such remedies in a reasonable period of time.
- (c) The Investor has provided a clear and unequivocal waiver of any right to pursue and/or to continue any claim relating to the measures underlying the claim made pursuant to this Agreement, on behalf of both the Investor and the Investment, before local courts in the Host State or in any other dispute settlement forum.
- (d) No more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired, knowledge of the breach alleged in the Notice of Arbitration and knowledge that the Investor has incurred loss or damage, or one year from the conclusion of the request for local remedies initiated in the domestic courts.

- (e) The Investor consents in writing to arbitration in accordance with the procedures set out in this Agreement.
- (f) For the avoidance of doubt, the provisions in this Agreement relating to arbitration procedures shall prevail over those in the arbitration rules selected to govern the arbitration in the event of any inconsistency.

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## Commentary

This article sets out the full range of conditions that MUST be fulfilled prior to an investor initiating an arbitration. These include, in order from above:

- A six-month waiting period is becoming increasingly standard after the Notice of Intent.
- The investor has exhausted local remedies, as described above, or no such remedies are available and this can be demonstrated to a tribunal. The SADC FIP has such an exhaustion of local remedies provision.
- Paragraph (c) is what is known as a fork-in-the-road provision: an investor can choose arbitration under this Agreement or another form of dispute settlement, but not both. For example, if an investor has a separate investment contract with an arbitration provision, it might seek to use that provision. The paragraph would make this impossible by making a waiver of any other dispute settlement rights a requirement. This estops (“estoppel”) an investor from utilizing other remedies in most legal systems.
- As in the exhaustion of local remedies provisions, the fork-in-the-road provision must be carefully drafted to address not “treaty” claims per se, but any claims relating to the underlying measures to the treaty claim that may be subject to domestic or other proceedings.
- The three-year period in (d) is a “statute of limitations” period. Three years is emerging as a common period. This period is defined by when the investor knew, or ought to have known if it had been acting reasonably, of the taking of the underlying measure.
- The consent in writing to arbitration is a basic requirement. This is set out clearly here.
- The final paragraph is an interpretive provision that ensures the treaty will prevail over any arbitration rules that may be used and might be either inconsistent with, or not as complete as, the present text. This ensures the will of the parties is maintained.

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### 29.5. Exception for Interim Relief

Notwithstanding paragraph 29.4(c), the Investor may initiate or continue an action that seeks interim relief before a judicial or administrative tribunal of the State Party, for the sole purpose of preserving the Investor’s rights and interests during the pendency of the arbitration, and that does not involve the payment of monetary damages.

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## Commentary

This allows an investor to use the courts of the Host State to seek to an injunction against further government measures, or the implementation of the challenged measure, if the investor believes it will cause the situation to deteriorate more. No damages are claimable under such a measure. The intent here is merely to preserve the status quo from getting worse. Whether such an injunction may be granted is then a matter for the domestic courts to decide.

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### 29.6. Applicable Arbitration Rules

Subject to Article 29.3, an Investor may submit an arbitration claim:

- (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the Host State and the other State Party are parties to the ICSID Convention;
- (b) under the ICSID Additional Facility Rules, provided that either the Host State or the other State Party is a party to the ICSID Convention;
- (c) under the UNCITRAL Arbitration Rules;
- [(d) to XX regional arbitration forum in a region of one or both State Parties,] or
- (d/e) if the Investor and the Host State agree, to any other arbitration institution or under any other arbitration rules.

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## Commentary

It is very common for an investment treaty to indicate which arbitration rules the investor may draw from when initiating an arbitration. The list of options above is now fairly standard, though some States have stopped including the ICSID option. The list can be adjusted by the States negotiating to include other rules or fora such as those under the International Chamber of Commerce and the Stockholm Chamber of Commerce.

The list above also assumes that no regional forum for arbitration exists that may be able to provide the appropriate rules and, in some cases, facilities. Where such a forum exists, the Drafting Committee was of the view that it should be carefully considered for inclusion or as an exclusive option to be used.

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### 29.7. Date of Submission of Claim

A claim shall be deemed submitted to arbitration under this Part when the Investor's notice of arbitration or request for arbitration ("Notice of Arbitration"):

- (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

- (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;
- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or
- (d) referred to under any arbitral institution or arbitral rules selected under paragraph 29.6 is received by the Host State.

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### Commentary

The formal date of submission is determined by the acts needed to be taken under the rules of arbitration chosen for the proceedings when the investor submits its claim to arbitration under that set of rules. It may at some time need to be established with certainty, for example if it is argued that the three-year period for initiating an arbitration has lapsed.

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#### 29.8. Place of Arbitration

The place of arbitration and legal situs of the arbitration shall be [in the capital city of the Host State] [in XXX (to be an agreed neutral venue)][in a place determined by agreement of the parties to the arbitration or determined by the tribunal in the absence of such agreement].

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### Commentary

The choice of location of the arbitration has both legal and political contexts. The legal issues include the process and standards for review of an arbitral decision by the supervising courts. In addition, some States now have legislation requiring all investment related arbitration to be within the territory of the (Host) State. The text provides three options that allow for the negotiators to raise and address these issues and reach specific decisions on how to address them.

#### 29.9. Scope of Arbitration

- (a) An arbitration under this Article shall relate to an allegation of a breach of one or more rights or obligations under this Agreement that is subject to arbitration.
- (b) Where an investment authorization or a contract includes a choice of forum clause for the resolution of disputes pertaining to that investment or the authorization or contract, no arbitration under this Agreement may be initiated by the Investor when the underlying measure in the arbitration would be covered by such a choice of forum clause.

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### Commentary

This paragraph addresses the very critical issue of what types of claims can be made in the arbitration process. This is in fact a very controversial issue, and the drafting of this provision should be undertaken with great care, as much can be at stake.

The above text is specific to claims based on an alleged breach of one or more of the obligations under the treaty that are subject to arbitration. It does not, for example, say simply an alleged breach of this treaty, which may be read to override another provision that excludes an obligation from the scope of dispute settlement. This drafting avoids any such risk.

This is the narrowest possible approach and it is strongly recommended.

In paragraph 29.9(b), it is supported by a clear statement directing the tribunal to recognize and enforce any other choice of forum clause applicable between the State and the investor/investment related to the underlying measure being complained of. In particular, paragraph 29.9(b) requires the tribunal to give full priority to any choice of forum clauses specifically agreed or accepted by the investor in a contract or investment authorization. (Investment authorization is a defined term and includes, essentially, any form of permit, authorization, licence, etc.)

This has been a very controversial issue in investment arbitration and subject to different and opposite results in various arbitrations. The drafting above resolves the issue clearly and in favour of the choice of forum clause adopted by the investor and State directly. It is important, again, that the provision relates to the underlying measure, rather than the dispute under the Agreement, for the reasons explained previously.

This paragraph also goes a long way to address a problem where multiple dispute settlement fora have been authorized by a tribunal under a treaty, under a contract, and at the same time under a judicial process. In many cases, a breach of contract claim has, for example, simply been restated as a breach of treaty claim, a simple linguistic exercise for a junior lawyer to complete. The above text helps address all of these issues that have arisen in practice.

Other agreements have also included additional claims that could be included in arbitration under the treaty. These are noted here, with a strong recommendation that they not be included in the text:

- Several treaties allow any obligations undertaken by a State toward an investor in whatever legal form, a so-called umbrella clause, to be taken to arbitration by including respect for such obligations as substantive treaty provisions. This is not included in the obligations set out above.
- It is important, then, that this not be accomplished indirectly through language in the dispute settlement provisions that authorize a broad scope. Language such as “any dispute relating to an investment” or “any matter relating to an investment” have been seen and should be avoided.
- Some treaties’ dispute settlement provisions have included disputes relating to any investment agreement or contract, or investment authorization, including some recent U.S. treaties. Again, this is in our view too broad and inappropriately risks replacing the choice of forum clause in such agreements or contracts instead of respecting them, as paragraph 29.9(b) would require.
- Some treaties have allowed an alleged breach of any legal provision in the Host State’s domestic law that provides guarantees to an investor to be litigated in the arbitration instead of in the domestic court, where domestic law should be litigated.

Getting these provisions right is very important as it determines the scope of the arbitration and whether the arbitration process will override any other process selected directly by the State and investor.



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**29.10. Selection of Investor Arbitrator**

The claimant shall provide with the Notice of Arbitration:

- (a) the name of the arbitrator that the claimant appoints, or
- (b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

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**Commentary**

This is a simple procedural requirement.

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**29.11. Consent to Arbitration**

- (a) Each Party consents to the submission of a claim to arbitration under this Section in accordance with this treaty.
- (b) The consent under paragraph 29.11(a) and the submission of a claim to arbitration under this Section shall satisfy the requirements of:
  - (i) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; [and]
  - (ii) Article II of the New York Convention for an "agreement in writing"; [and]
  - (iii) [Name any other body used and reference rule on submission of an arbitration]

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**Commentary**

This is also a common procedural article and confirms the consent by each State Party to the arbitration is valid for the primary arbitration rules that are listed above as available for use under the process.

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**29.12. Establishment of Tribunal**

- (a) Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
- (b) [All arbitrators shall be drawn from a roster of eligible arbitrators established by the State Parties within 12 months of the entry into force of this Agreement and maintained up to date by the State Parties. Said roster shall be composed of persons of good standing, independence and with experience in international law, international investment, and/or dispute settlement under international law.]
- (c) If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Article, the Secretary-General, on the request of a

disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

- (d) For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality,
  - (i) the State Party hereby agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules; and
  - (ii) an Investor may submit a claim to arbitration under this Article, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the Investor agrees in writing to the appointment of each individual member of the tribunal.

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## Commentary

The establishment of a tribunal has traditionally been done through the appointment, by each side, of its own selection and the appointment of a president of the tribunal by either the agreement of the other appointed arbitrators, the arbitrating parties, or through the intervention of the appointing authority under the selected rules of arbitration of the treaty in question. This is the approach generally described here.

However, an alternative approach has also been included here for further consideration. This is the selection by the parties to the treaty of a roster of potential arbitrators under the treaty, from which the three arbitrators must be chosen. This allows for greater certainty of the necessary qualities of an arbitrator in the selection process and less opportunity for parties to manipulate the process with arbitrators known to represent investors or States in the process. This alternative approach is gaining currency today.

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### 29.13. Avoidance of Conflict of Interest of Arbitrators

The arbitrators appointed to resolve disputes under this Agreement must, at all times during the arbitration:

- (a) be impartial, free of actual conflicts of interest and an appearance of conflict of interest, and independent of the disputing parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated; and
- (b) disclose to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, any items that may, in the eyes of a reasonable third person, give rise to doubts as to the arbitrator's impartiality, freedom from conflicts of interest, or independence.

For greater certainty, the above requirements include the requirement not to act concurrently as counsel in another actual or potential treaty-based arbitration involving a foreign investor and a State.

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## Commentary

Conflicts of interest are a growing concern in investment arbitration, and have led to a range of very controversial decisions as regard what constitutes conflict of interest for arbitrators. This provision addresses the concerns by providing clear and unequivocal language requiring arbitrators to be impartial, independent and free of any conflict of interest for the entire period of the arbitration. The language suggested extends and tightens the rules to avoid conflicts of interest by arbitrators in the UNCITRAL and ICSID processes, primarily by eliminating the “manifest” requirement in ICSID. It also clearly sets out the common standard of an “appearance of conflict of interest”, incorporated into the International Bar Association’s Guidelines on Conflicts of Interests in International Arbitration.

In addition, the final paragraph raises an issue of some debate, whether arbitrators should serve as counsel in other arbitrations at the same time. A growing number of arbitrators have said they will no longer do so due to the conflicts of interest it creates. Others have refused to recognize this as a problem. The text suggested resolves this issue in favour of ensuring no conflict can arise in this regard by disallowing arbitrators from concurrently acting as counsel in other treaty based investment arbitrations.

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### 29.14. Submissions by Non-Disputing State Party

The non-disputing State Party to this Agreement may make oral and written submissions to the tribunal regarding the interpretation of this treaty and be present at the oral arguments.

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## Commentary

This provision addresses the State Party to the treaty that is not party to the arbitration. It was first seen in the NAFTA investor-State provisions and has been adopted on a number of occasions since then. It is a useful position for the States to have such a right under the treaty and can help avoid significant unexpected interpretations by tribunals when the considered views of both State Parties are before them in any given instance.

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### 29.15. *Amicus Curiae* Submissions

The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party. The procedures in Schedule 4 shall apply for this purpose.

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#### Commentary

The acceptance of *amicus curiae* submissions in investment arbitration began in 2000 and is now understood to be common practice. It is certainly not controversial. It is usually done now through an application to the tribunal by the person or organization that intends to make the submission. ICSID now has specific but not very detailed rules for this and UNCITRAL is in the process of negotiating such rules at this time. The suggested Schedule 4 would set out a clear set of rules in the treaty for the State Parties, any investor, the tribunal and the would-be *amicus* petitioners to follow in a clear and consistent manner.

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### 29.16. Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, on its own initiative subject to the consent of the disputing parties, which consent shall not be unreasonably withheld, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

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#### Commentary

This is an increasingly common provision in investment arbitration processes and is also similar to one found in the WTO dispute settlement process. It ensures the tribunal can engage its own technical experts on any given matter and not have to rely only upon evidence of the disputing parties.

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### 29.17. Transparency of Proceedings

- (a) Subject to paragraphs 29.17(c) and (d), the State Party that is party to the arbitration shall, after receiving the following documents, promptly make them available to the public and the non-disputing State Party:
  - (i) the Notice of Intent;
  - (ii) the Notice of Arbitration;
  - (iii) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted in the form of *amicus* submissions;

- (iv) minutes or transcripts of hearings of the tribunal, where available; and
  - (v) orders, awards, and decisions of the tribunal.
- (b) The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.
- (c) Any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.
- (d) Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:
- (i) Subject to subparagraph (iv), neither the disputing parties nor the tribunal shall disclose to the non-disputing State Party or to the public any protected information where the disputing State Party that provided the information clearly designates it in accordance with subparagraph (ii).
  - (ii) Any disputing State Party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal.
  - (iii) A disputing State Party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the public in accordance with paragraph 29.17(a).
  - (iv) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may withdraw all or part of its submission containing such information, or agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (iii). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents that either remove the information withdrawn by the disputing party that first submitted the information or re-designate the information, consistent with the designation of the disputing party that first submitted the information.



## Commentary

This article is within the emerging international standards on transparency for investor-State arbitration. It is seen in the COMESA CCI and in many other treaties. ICSID enables many such steps to be taken, and UNCITRAL is in the process of revising the rules for investor-State arbitration toward this same end.

The transparency principle is set out clearly, subject to an ability of the parties and the tribunal to ensure that legitimate confidential business information is protected. The process for doing so is set out in detail above, drawn from the most advanced texts for this purpose.



### 29.18. Consolidation of Arbitrations

- (a) Where two or more claims have been submitted separately to arbitration under this Article and the claims have a question of law or fact in common and arise out of the same underlying measure or measures or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 29.2 – 29.10.
- (b) A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the [President of the International Court of Justice] and to all the disputing parties sought to be covered by the order and shall specify in the request:
  - (i) the names and addresses of all the disputing parties sought to be covered by the order;
  - (ii) the nature of the order sought
  - (iii) the grounds on which the order is sought
- (c) Unless the [President of the International Court of Justice] finds within 30 days after receiving a request under paragraph 29.18(b) that the request is manifestly unfounded, a tribunal shall be established under this Article.
- (d) Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:
  - (i) one arbitrator appointed by agreement of the claimants;
  - (ii) one arbitrator appointed by the respondent; and
  - (iii) the presiding arbitrator appointed by the [President of the International Court of Justice], provided, however, that the presiding arbitrator shall not be a national of either Party.
- (e) If, within 60 days after the [President of the International Court of Justice] receives a request made under paragraph 29.18(b), the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 29.18(d), the [President of the International Court of Justice], on the request of any disputing Party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the [President] shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the [President] shall appoint a national of the non-disputing Party.
- (f) Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under this Agreement have a question of law or fact in common and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
  - (i) assume jurisdiction over, and hear and determine together, all or part of the claims,
  - (ii) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others, or
  - (iii) instruct a tribunal previously established under Article 29 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

- (a) that tribunal, at the request of any Investor not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 29.18(d)(i) and (e),, and
- (b) that tribunal shall decide whether any prior hearing shall be repeated.
- (g) Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under this Agreement and that has not been named in a request made under paragraph 29.18(b) may make a written request to the tribunal that it be included in any order made under paragraph 29.18(f), and shall specify in the request:
  - (i) The name and address of the claimant;
  - (ii) The nature of the order sought; and
  - (iii) The grounds on which the order is sought

The Investor shall deliver a copy of its request to the [President].
- (h) A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules in force at the time the proceedings are initiated, except as modified by this Agreement.
- (I) A tribunal established under this Article shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this paragraph has assumed jurisdiction.
- (J) On application of a disputing party, a tribunal established under this paragraph, pending its decision under subparagraph (f), may order that the proceedings of a tribunal established under this Article be stayed, unless the latter tribunal has already adjourned its proceedings.



## Commentary

The initiation of a number of arbitrations against a State all arising from the same measure and similar investment treaties is a growing phenomenon. The article above is derived from revised U.S. texts and is comprehensive on how to address the possible consolidation of such multiple claims into one process.



### 29.19. Awards

- (a) Where a tribunal makes a final award against a Host State or against an Investor in the light of a counterclaim by a State authorized under this agreement, the tribunal may award, separately or in combination, only:
  - (i) monetary damages and any applicable interest;
  - (ii) restitution of property, in which case the award shall provide that the Host State or Investor, as the case may be, may pay monetary damages and any applicable interest in lieu of restitution.

- (b) A tribunal established under this Agreement [shall issue an award for costs and legal representation fees for any arbitration where the jurisdiction of the tribunal is denied to the Investor, and][may][shall][shall, unless by special exception there is good reason not to do so] issue an award for costs and legal representation to the disputing party that prevails in the final award.
- (c) A tribunal may not award punitive damages.
- (d) An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.
- (e) Subject to paragraph 29.19(f) and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
- (f) A disputing party may not seek enforcement of a final award until:
  - (i) in the case of a final award made under the ICSID Convention, (a) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or (b) revision or annulment proceedings have been completed;
  - (ii) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other rules selected pursuant to this Article, 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.
- (g) Each Party shall provide for the enforcement of an award in its territory.
- (h) A disputing party may seek enforcement of an arbitration award [under the ICSID Convention when it is in force for both Parties] or the New York Convention.
- (i) A claim that is submitted to arbitration under this Section shall be presumed to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention, unless the State Party has proven that the claim has related to a sovereign matter.

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## **Commentary**

This provision addresses a number of issues relating to a final decision against a State or an investor if a counterclaim has also been initiated.

First, it ensures that only monetary damages can be awarded in most cases, as opposed, for example, to ordering a State to withdraw a measure to protect the environment that it has enacted. The restitution of property may be a possible award as well, but the losing party in such a case may elect to pay monetary damages instead.

Second, the text precludes any punitive damages being awarded (known as exemplary damages in some jurisdictions). Thus, an award can only be for the value of proven economic damages resulting from the breach of the Agreement.



Third, the text addresses the issue of costs clearly. Today, the practice is more often to not award any costs of the proceedings or legal representation to the winning party. This practice is reversed in the text, subject to some discretion for the tribunal depending on the final formulation chosen. However, where a tribunal finds it has no jurisdiction to hear a claim brought by an investor, it must, under the text, award costs in favour of the Host State.

The remaining paragraphs deal with issues of enforcement of the award and are fairly typical provisions ensuring enforceability under the New York Convention. Paragraph (i) refers to Article 1 of the New York Convention, which establishes the scope of the Convention for enforcement related matters. It requires arbitral decisions to be commercial arbitration in order for the Convention regime to apply. Paragraph (i) establishes a rebuttable presumption that arbitrations under the Agreement meet this test of being commercial arbitrations.

••

### **29.20. Appeal Mechanism**

If a separate, multilateral or bilateral agreement enters into force between the State Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the State Parties shall strive to reach an agreement that would have such appellate body review awards rendered under this Agreement in arbitrations commenced after the multilateral agreement enters into force between the State Parties.

••

### **Commentary**

This is a “precautionary” provision dealing with an appeal mechanism. Several States and organizations are considering how such a mechanism might be developed in an efficient and economical manner. This text simply notes this situation as a future possibility, but does not automatically adopt any such mechanism that may be developed in the future.

••

A joint decision of the State Parties, each acting through its representative designated for purposes of this Article, declaring their joint interpretation of a provision of this Agreement, shall be binding on any tribunal, and any decision or award issued by a tribunal must apply and be consistent with that joint decision.

••

## **Commentary**

This provision was also used first in the NAFTA agreement and is present in the U.S. and Canadian Model BITs and treaties derived from them. A very recent UNCTAD report recommends the inclusion of such provisions today. The parties to NAFTA have in fact issued such an interpretative statement to restrict the broad interpretation of FET by arbitration tribunals ruling under that treaty.

This is a highly recommended provision as it is the only effective safety valve to preclude unintended interpretations being binding on the parties over the longer term. Implementing this provision is a much simpler and more direct process than amending the treaty, making it a very functional process.

••

## **ARTICLE 31 •• Governing Law in Dispute Settlement**

**31.1.** When a claim is submitted to a tribunal under this Agreement, it shall be decided in accordance with this Agreement. The governing law for the interpretation of this Agreement shall be this Agreement and the general principles of international law relating to the interpretation of treaties, including the presumption of consistency between international treaties to which the State Parties are party. For matters related to domestic law, the national law of the Host State shall be resorted to as the governing law.

**31.2.** For greater certainty, paragraph 31.1 does not expand or alter the scope of obligations contained in this Agreement or incorporate other standards except where specifically expressed herein.

••

## **Commentary**

The identification of the governing law in an agreement is increasingly important. The above provision ensures a broad purposive approach to the interpretation and application of the Agreement and again mitigates against the ability of a tribunal to focus only on the investor protection provisions as the basis of an interpretative exercise.

The text also limits the role of the governing law clause to the interpretation of the treaty and precludes the addition of new obligations from other parts of international law.

••

## **ARTICLE 32 •• Service of Documents**

Delivery of notices and other documents on a State Party shall be made to the place named for that State Party in Schedule C.

••

### **Commentary**

This is a simple technical provision that clearly identifies the appropriate contact points in the event of a dispute under this Agreement.

••



## Part 6: Final Provisions

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## Part 6: Final Provisions

### ARTICLE 33 •• Entry into Force

This Agreement shall be subject to ratification by the State Parties in accordance with their constitutional procedures. It shall enter into force 60 days after the deposit by the last State Party of its instrument of ratification with the other Party.

••

#### Commentary

This is a simple clause on entry into force. This is a key technical legal provision required to ensure clarity on when the obligations on the parties become legally binding.

••

### ARTICLE 34 •• Period in Force and Termination

**34.1.** The Agreement shall remain in force for ten years following its entry into force.

**34.2. Option 1** This Agreement shall be renewed for further periods of ten years following the exchange of official instruments between each State Party confirming the renewal of the Agreement. The notices of renewal shall be exchanged prior to the expiration of the Agreement. This Agreement shall expire where no such exchange of instruments is completed prior to the expiration of each ten-year period.

**34.2. Option 2:** This Agreement shall automatically be renewed for an additional period of ten years, unless either State Party has submitted a Notice of Intent to terminate the Agreement at the expiration of the current ten-year period at least six months prior to the renewal date.

**34.3.** Either State Party may terminate this Agreement by giving an official notice to the other Party twelve months prior to its intended termination date, notwithstanding any prior renewal of this Agreement.

**34.4.** The rights of Investors and the State Parties shall continue in force for [five][ten] years following the expiration of the period in force for investments made during the period the Agreement was in force.

••

#### Commentary

Many existing investment treaties have minimal provisions on the minimum period for which the treaty will be in force and provisions for its renewal or for the withdrawal of a Party. This leaves the Parties free to rely upon rules from outside the treaty, in particular the Vienna Convention on the Law of Treaties, to determine these issues. The view of the Drafting Committee was that the Model Agreement should contain the needed rules on this issue.

The initial period for which the treaty would be in force is ten years. Afterwards, two options are set out. One is a requirement for the Parties to exchange letters of intent to renew the treaty. A failure of either Party to do so means the treaty would then lapse. The second option is the opposite: the treaty renews automatically at the end of ten years for a further ten years, indefinitely, unless either Party notifies the other of its wish to not have the treaty renew itself. There is no legal difference in the end result, but Option 1 requires the positive acts of renewal, while Option 2 requires steps to avoid the automatic renewal. The Drafting Committee felt it was prudent to include both of the options.

In addition, the text provides a mechanism for either Party to terminate the treaty upon 12 months notice to the other Party. This provides an additional safety valve for the Parties in the event of significant difficulties being experienced, significant differences in interpretation or application of the treaty, or other policy reasons a State may have to terminate the treaty. This specific rule would replace general rules under the Vienna Convention.

Finally, it is common for investment treaties to provide for a period of continued application of the treaty in favour of investors of the other State Party made prior to the termination of the treaty. In some instances, treaties have extended this period to between 20 and 30 years. In other instances, the period has been 10 years. The shorter period is adopted here, with an additional option to adopt only a 5-year time period. The Drafting Committee was unanimously of the view that the time period should be kept at the shorter end.

••

## ARTICLE 35 •• Amendment

This Agreement may be amended by the mutual consent of the State Parties through an exchange of notes or signing of an amendment agreement. An amendment shall enter into force 60 days following the deposit by the last State Party of its instrument of ratification of the amendment with the other Party.

••

### Commentary

Again, many investment treaties do not include provisions on amendment of the treaty. This is virtually unique to investment treaties, given that almost all other types of treaties do include such provisions. The language above allows easy adaptation to the form of treaty making and amendment that is used in different States. If this provision is not included, the amendment process would be defined by the Vienna Convention instead.

••

## **ARTICLE 36 •• Schedules and Notes Part of Treaty**

The Schedules and notes to this Agreement form an integral part of this Agreement.

••

### **Commentary**

This is a common article. It simply ensures that all of the elements of the negotiated text are considered in the event of any dispute. It is common for important elements to be included in schedules or agreed notes of the negotiating parties.

••

## **ARTICLE 37 •• Authentic Text**

The authentic text of this Agreement shall be in [English][and French][and Portuguese].

••

### **Commentary**

This is again a common technical element, essential to ensure which languages are the critical texts in the event of a dispute.

••



*SPECIAL NOTE: The following are the suggested schedules, based on the text set out above. The content of each would then be proposed by each negotiating party for itself, and adopted as part of the text by agreement. It is possible that a State may object to some of the proposed inclusions, and this could be subject to negotiation. In practice, many developed States do seek to minimize any such schedules proposed by their developing country negotiating partners, while maximizing the use of them themselves. It is important for negotiators to focus on these details, and for early preparation of these schedules by SADC Member States, in order to achieve a balanced result in the negotiations.*

### **SCHEDULE 1 •• Excluded/Included Sectors for Investment Liberalization, If Applicable**

- List of included or excluded sectors, depending on model chosen; and excluded subsectors
- List of excluded non-conforming measures

### **SCHEDULE 2 •• Excluded/Included Sectors for Post-Establishment Investor Protections, If Applicable**

- List of excluded sectors (if top-down drafting), or subsectors
- List of excluded non-conforming measures

### **SCHEDULE 3 •• List on National Authorities and Contact Points**

The Official Contact Point for the purposes of this Agreement shall be:

State Party A:

State Party B:

The contact points shall be responsible for the exchange of information required under this Agreement.

### **SCHEDULE 4 •• Procedure for *Amicus Curiae* Submissions**

1. The person or organization seeking *amicus curiae* status shall serve the tribunal and all disputing parties with a Petition for leave to file an *amicus curiae* submission and the planned submission.

••

#### **Commentary**

The full text of this schedule is sequential, setting out the process as it should move forward. This ensures transparency and efficiency in the *amicus* process. The first step is the petition for *amicus* status by the interested person or group, along with the submission they intend to submit.

••

2. The Petition for leave to file an *amicus curiae* submission shall:
  - (a) be made in writing, dated and signed by the person or organization filing the application, and include the address and other contact details of the Petitioner. Counsel may file and represent the person or organization for this purpose;
  - (b) be no longer than ten typed pages;
  - (c) describe the Petitioner, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);
  - (d) disclose whether or not the Petitioner has any affiliation, direct or indirect, with any disputing party;
  - (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;
  - (f) specify the nature of the interest that the Petitioner has in the arbitration;
  - (g) identify the specific issues of fact or law in the arbitration that the Petitioner has addressed in its written submission;
  - (h) explain, by reference to the factors specified in paragraph 4 below, why the tribunal should accept the submission; and
  - (i) be made in a language of the arbitration or the primary language of the disputing State Party.

••

## **Commentary**

This provision ensures transparency by the potential *amicus* on who is making the Petition and why. Any relationships to either of the litigation parties must be made clear, including organizational or financial. The Petitioner must also indicate the reasons it is making the submission and what its broader interest in the outcome of the arbitration may be. This could be more local in nature, such as specific environmental impacts, or more broadly developed, such as the proper approach to interpreting the treaty due to the impact the approaches may have on other related situations the *amicus* is concerned with.

••

3. The submission filed by an *amicus curiae* shall:
  - (a) be dated and signed by the person filing the submission;
  - (b) be concise, and in no case longer than [50][40] typed pages, including any appendices;
  - (c) set out a precise statement supporting the *amicus curiae's* position on the issues; and
  - (d) only address matters within the scope of the dispute.

••

## Commentary

This text gives specific direction to the amicus Petitioner on the form, scope and length for the submission itself. The most critical element is that the submission should be legal and not political in nature. This is an important discipline for the Petitioners.

••

4. The tribunal shall set an appropriate date for the disputing parties to comment on the Petition for leave to file an *amicus curiae* submission.

••

## Commentary

This is an important element of ensuring that the arbitrating parties each have ample and fair opportunity to comment on the amicus submissions, ensuring neither side is unequally affected.

••

5. In determining whether to grant leave to file an *amicus curiae* submission, the tribunal shall consider, *inter alia*, the extent to which:
  - (a) the *amicus curiae* submission would assist the tribunal in the determination of a factual or legal issue related to the dispute;
  - (b) the *amicus curiae* submission would address a matter within the scope of the dispute;
  - (c) the *amicus curiae* has a significant interest in the arbitration; and
  - (d) there is a public interest in the subject-matter of the arbitration.

••

## Commentary

This is critical guidance that ensures the Petitioner and the tribunal and the arbitrating parties all understand the criteria upon which a decision to admit (or not admit) an amicus submission is to be made.

••

6. The tribunal shall ensure that:
  - (a) any *amicus curiae* submission does not disrupt the proceedings; and
  - (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

••

## Commentary

This places the burden on the tribunal to manage its procedure in such a way as to be transparent and equal and fair in its treatment of the arbitrating parties in light of their interests as the primary litigants.

••

7. The tribunal shall decide whether to grant leave to file an *amicus curiae* submission. If leave to file is granted, the tribunal shall set an appropriate date for the disputing parties and the non-disputing State Party to respond in writing to the *amicus curiae* submission.

••

## Commentary

This is a procedural provision to ensure proper scheduling of the timetable for all parties.

••

8. A tribunal that grants leave to file an *amicus curiae* submission is not required to address the submission at any point in the arbitration. The tribunal may request any person or organization making a submission to appear before the tribunal to reply to specific issues or questions concerning the submission.

••

## Commentary

Again, this is primarily addressed to ensure that the tribunal can efficiently manage its operations.

••

9. Access to hearings and documents by persons or organizations that file petitions under these procedures shall be governed by the provisions pertaining to public access to hearings and documents under this Agreement[, unless otherwise determined by the tribunal after consultations with the disputing parties].

••

## Commentary

As public access to arbitrations under the agreement is already permitted, this is a safety provision allowing the tribunal to make adjustments to those rules if that may be useful to manage the procedure properly.

••

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**United Nations Conference on Trade and Development  
(UNCTAD), Investment Policy Framework for Sustainable  
Development, 12 July 2012**



# INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT



UNITED NATIONS



## Note

The Division on Investment and Enterprise of UNCTAD is a global centre of excellence dealing with issues related to investment and enterprise development in the United Nations System. It builds on three-and-a-half decades of experience and international expertise in research and policy analysis, fosters intergovernmental consensus-building, and provides technical assistance to developing countries.

The terms country/economy as used in this *Report* also refer, as appropriate, to territories or areas; the designations employed and the presentation of the material do not imply the expression of any opinion whatsoever on the part of the Secretariat of the United Nations concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries. In addition, the designations of country groups are intended solely for statistical or analytical convenience and do not necessarily express a judgment about the stage of development reached by a particular country or area in the development process. The major country groupings used in this *Report* follow the classification of the United Nations Statistical Office. These are:

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Transition economies: South-East Europe and the Commonwealth of Independent States.

Developing economies: in general all economies not specified above. For statistical purposes, the data for China do not include those for Hong Kong Special Administrative Region (Hong Kong SAR), Macao Special Administrative Region (Macao SAR) and Taiwan Province of China.

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The following symbols have been used in the tables:

- Two dots (..) indicate that data are not available or are not separately reported. Rows in tables have been omitted in those cases where no data are available for any of the elements in the row.
- A dash (–) indicates that the item is equal to zero or its value is negligible.
- A blank in a table indicates that the item is not applicable, unless otherwise indicated.
- A slash (/) between dates representing years, e.g., 1994/95, indicates a financial year.
- Use of a dash (–) between dates representing years, e.g. 1994–1995, signifies the full period involved, including the beginning and end years.
- Reference to “dollars” (\$) means United States dollars, unless otherwise indicated.
- Annual rates of growth or change, unless otherwise stated, refer to annual compound rates.

Details and percentages in tables do not necessarily add to totals because of rounding.

The material contained in this study may be freely quoted with appropriate acknowledgement.

## Preface

### *Towards a New Generation of Investment Policies*

At a time of persistent crises and pressing social and environmental challenges, harnessing economic growth for sustainable and inclusive development is more important than ever. Investment is a primary driver of such growth. Mobilizing investment and ensuring that it contributes to sustainable development objectives is therefore a priority for all countries and for developing countries in particular.

Against this background, a new generation of investment policies is emerging, pursuing a broader and more intricate development policy agenda, while building or maintaining a generally favourable investment climate. “New generation” investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment. Although these concepts are not new in and by themselves, to date they have not been systematically integrated in mainstream investment policymaking. “New generation” investment policies aim to operationalize sustainable development in concrete measures and mechanisms at the national and international level, and at the level of policy making and implementation.

Broadly, “new generation” investment policies strive to:

- create synergies with wider economic development goals or industrial policies, and achieve seamless *integration in development strategies*;
- foster *responsible investor behavior* and incorporate principles of corporate social responsibility (CSR);
- ensure *policy effectiveness* in their design and implementation and in the institutional environment within which they operate.

To help policymakers address the challenges posed by this new agenda, this report takes a fresh look at investment policymaking, and does so by taking a systemic approach, examining the universe of national and international policies through the lens of today’s key investment policy challenges. It explicitly focuses on the development dimension, and presents a comprehensive Investment Policy Framework for Sustainable Development (IPFSD).

The IPFSD consists of a set of Core Principles for investment policymaking, guidelines for national investment policies, and guidance for policymakers on how to engage in the international investment policy regime, in the form of options for the design and use of international investment agreements (IIAs).

The IPFSD is built on the experience of UNCTAD and other organizations in designing investment policies for development, and it incorporates lessons learned on what policies and measures work well, or not so well, under what circumstances. It represents the best endeavour by the UNCTAD secretariat, in collaboration with numerous international experts and investment stakeholders. It is the result of collective wisdom.

It is hoped that the IPFSD may serve as a reference for policymakers in formulating national investment policies and in negotiating investment agreements or revising existing ones. It can also serve as the basis for capacity building on investment policy and for UNCTAD’s technical assistance work. And it may come to act as a point of convergence for international cooperation on investment issues.

The IPFSD has been designed as a “living document”. UNCTAD will continuously update its contents based on feedback from its numerous policy forums and from its work in the field, and it will provide a platform for “open sourcing” of best practice investment policies.

## Acknowledgements

UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) was prepared by a team led by James Zhan. The team members included Richard Bolwijn, Quentin Dupriez, Joachim Karl, Sergey Ripinsky, Elisabeth Türk, and Jörg Weber. Wolfgang Alschner, Anna-Lisa Brahms, Hamed El Kady, Diana Rosert and Thomas van Giffen also contributed to the work.

At various stages of preparation, in particular during a series of expert group meetings organized to discuss drafts of the framework, the team benefited from comments and inputs received from Michael Addo, Yuki Arai, Nathalie Bernasconi, Jeremy Clegg, Zachary Douglas, Roberto Echandi, Lorraine Eden, Alejandro Faya, Stephen Gelb, Robert Howse, Christine Kaufmann, Jan Kleinheisterkamp, John Kline, Markus Krajewski, Arvind Mayaram, Yuki Arai, Kate Miles, Ted Moran, Peter Muchlinski,

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The IPFSD benefited from review and discussion at several intergovernmental meetings, including the International Investment Agreements Conference and the Ministerial Round Table at the World Investment Forum 2012 (WIF2012) and UNCTAD XIII in Doha, Qatar.

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## Introduction

### *Investment Policy Framework for Sustainable Development*

The policy environment for cross-border investment is subject to constant change. At the national level, governments continue to adopt investment policy measures (at a rate of around 150 annually over the past decade according to UNCTAD's monitoring of such measures), not to speak of countless measures taken every year that influence the overall business environment for investors. At the international level, new investment agreements have been concluded at a rate of more than one per week for the past few years. At the level of "soft law", the universe of codes and standards that govern the behavior of corporate investors also continues to expand.

Over the last two decades, as more and more governments have come to realize the crucial role of private investment, including FDI, in fuelling economic growth and development, great strides have been made to improve both national and international investment policies. Very significant efforts have been made by governments in developing countries in particular, often aided by the international development community through policy frameworks, model treaties and technical assistance (such as UNCTAD's Investment Policy Reviews). A lot of experience has been gained and documented that now helps policymakers identify measures that work well, or less well, under what circumstances and in what context.

Despite the progress made, and despite the lessons learned, important questions remain unanswered for policymakers. Some perceived or acknowledged shortcomings in investment policy regimes are addressed only partially, or not at all, by existing models and frameworks intended to support policymakers.

This report takes a fresh look at investment policymaking – *focusing on direct private investment in productive assets* (i.e. excluding

other capital flows which should be addressed by the financial system and policies) – by taking a systemic approach that examines the universe of national and international policies through the lens of today's key investment policy challenges. It also aims explicitly to strengthen the development dimension of investment policies, and presents a comprehensive *Investment Policy Framework for Sustainable Development* (IPFSD).

Encouragement to pick up this gauntlet comes from discussions with senior policymakers in numerous forums, including at UNCTAD's biennial World Investment Forum; at its Commission on Investment, Enterprise and Development; and at its regular intergovernmental expert group meetings on investment and enterprise. It also stems from discussions with academics and business advisors in UNCTAD's round tables on investment policy, and from UNCTAD's technical assistance work with developing countries. Further encouragement has emerged from other important policy platforms, most notably the G-20, which in its Seoul Declaration in 2010 and the accompanying Multi-Year Action Plan for Development specifically refers to the need to strengthen the sustainable development dimension of national and international investment policies.

The IPFSD also comes at a time when many other investment stakeholders are putting forward suggestions for the future of investment policymaking. At UNCTAD's 2012 World Investment Forum the International Chamber of Commerce (ICC) launched its contribution in the form of (revised) Guidelines for International Investment. The OECD has announced its intention to start work on an update of its policy framework for investment. The recently adopted European Union-United States Statement on Shared Principles for International Investment and the release of the new

United States' model BIT are also testimony of policy dynamism. These developments appear to signal a window of opportunity to strengthen the sustainable development dimension of investment policies.

The remainder of this report first details the drivers of change in the investment policy environment – introducing a “new generation” of investment policies – and the challenges that need to be addressed in a comprehensive IPFSD (chapter I). It then proposes a set of Core Principles for investment policymaking,

which serve as “design criteria” for national and international investment policies (chapter II). Chapter III presents a framework for national investment policy. Chapter IV focuses on IIAs and translates the Core Principles into options for the formulation and negotiation of such instruments, with a particular focus on development-friendly options. The final chapter looks at the way forward, suggesting how policymakers and the international development community could make use of the IPFSD, and how it could be further improved.

## I. A “New Generation” of Investment Policies

### 1. The changing investment policy environment

Investment policy is not made in a vacuum. It is made in a political and economic context that, at the global and regional levels, has been buffeted in recent years by a series of crises in the areas of finance, food security and the environment, and that faces persistent global imbalances and social challenges, especially with regard to poverty alleviation. These crises and challenges are having profound effects on the way policy is shaped at the global level. First, the economic and financial crisis has accentuated a longer-term shift in economic weight from developed countries to emerging markets. Global challenges such as food security and climate change, where developing country engagement is an indispensable prerequisite for any viable solution, have further added to a greater role for those countries in global policymaking. Second, the financial crisis in particular has boosted the role of governments in the economy, both in the developed and the developing world. Third, the nature of the challenges, which no country can address in isolation, makes better international coordination imperative. And fourth, the global political and economic context and the challenges that need to be addressed – with social and environmental concerns taking center stage – are leading policymakers to reflect on an emerging new development paradigm that places inclusive and sustainable development goals on the same footing as economic growth and development goals.

Trends in investment policy naturally mirror these developments.

*There have been fundamental changes in the investment and investor landscape.*

Developing countries and economies in transition are now primary FDI destinations, and their importance as FDI recipients continues to increase. In 2010, for the first time, developing countries received more than half of global FDI flows – in part as a result of the fall in investment in developed countries. This increases the opportunities, but also multiplies the stakes, for strategic investment

targeting, promotion and protection policies in developing countries.

Emerging economies have not only become important recipients of FDI, they are increasingly large investors themselves, with their share in world outflows approaching 30 per cent. While these countries might previously have been more concerned with the pressure they faced to provide protection for investments made by others, they now also consider the security and treatment of their own investors’ interests abroad.

There are also new types of investors on the scene. State-owned enterprises (SOEs) are becoming important FDI players; UNCTAD counted some 650 multinational SOEs in 2010, operating about 8,500 foreign affiliates (*WIR11*). Although SOEs account for only 1 per cent of the total number of multinational enterprises, their overseas investments amount to roughly 11 per cent of global FDI flows. Sovereign wealth funds (SWFs), similarly, are gaining importance as FDI players. Their total FDI stock amounted to some \$110 billion in 2011, and their overseas investments make up less than 1 per cent of global FDI flows. But with total assets under management of \$4-5 trillion, the scope for further direct investment in productive assets is significant.

Clearly the patterns and types of investment of these new players (in terms of home and host countries and in terms of investors) are different, and so are their policy priorities. Furthermore, it is necessary to be vigilant concerning waning support for open investment climates in developed market economies in the face of competition from increasingly active developing-country investors.

*Governments are playing a greater role in the economy and are giving more direction to investment policy.*

Governments have become decidedly less reticent in *regulating* and *steering* the economy. More and more governments are moving away from the hands-off approach to economic growth and development that prevailed previously.<sup>1</sup> Industrial policies and industrial development strategies are proliferating in developing and developed countries

alike (WIR11). These strategies often contain elements of targeted investment promotion or restriction, increasing the importance of integrated and coherent development and investment policies.

Governments are also becoming more active in their efforts to integrate domestic companies into global value chains (GVCs). They promote such integration through local capacity building, technological upgrading and investment promotion activities, such as matchmaking or the establishment of special economic zones. Expectations of governments' promotion efforts have become higher as they increasingly focus on the *quality* – and not only on the *quantity* – of investment.

Fears and, to some extent, evidence of a job-less (or job-poor) recovery in many regions are also adding pressure on governments to look for “*the right types*” of investment, and to adopt measures to maximize the job-creation impact of investment. In developed countries, such fears have at times sparked debate on whether and how to discourage domestic companies from investing abroad or to promote the repatriation of foreign investment back home. In developing countries, the same fears are fuelling the debate on whether investment is bringing enough jobs for the poor and is sufficiently inclusive.

A stronger role of the State also manifests itself with regard to other sustainability issues. New social and environmental regulations are being introduced or existing rules reinforced – all of which has implications for investment. In addition to regulatory activities, governments are increasing efforts to promote actively the move towards sustainable development, for example through the encouragement of low-carbon FDI. They are also placing more emphasis on corporate responsibility by promoting the adoption of private codes of corporate conduct.

The trend for policymakers to intervene more in the economy and, to an extent, to steer investment activity, is visible in the constantly increasing share of regulatory and restrictive policies in total investment policy measures over the last five years. This trend reflects, in part, a renewed realism about the economic and social costs of unregulated market forces but it also gives rise to concerns that an accumulation of regulatory activities may

gradually increase the risk of over-regulation or investment protectionism that hinders inward and outward FDI (see box 1).

*There is a greater need for global coordination on investment policy.*

The need to address common sustainable development challenges and to respond effectively to global economic and financial turmoil to avoid future crises, has instigated calls for new models of global economic governance. In the area of investment, there are compelling reasons for such improved international coordination. It could help keep protectionist tendencies and discriminatory treatment of foreign investors in check. Further, in a world in which governments increasingly “*compete*” for their preferred types of investment it could help avoid a “*race to the bottom*” in regulatory standards or a ‘*race to the top*’ in incentives.

A number of specific investment issues accentuate the need for better global coordination on investment policy as, by their nature, they can be addressed effectively only in a cooperative manner. For one, better international coordination would help overcome coherence problems posed by the highly atomized system of IIAs, consisting of more than 3,100 core treaties (i.e. bilateral investment treaties (BITs) and other agreements with investment provisions). Another example where policymakers are increasingly engaged in international dialogue is international tax cooperation. Unsustainable levels of public deficits and sovereign debt have made governments far more sensitive to tax avoidance, manipulative transfer pricing, tax havens and similar options available to multinational firms to unduly reduce their tax obligations in host and home countries.

Other, non-financial, global challenges also require better coordination on investment, as witnessed by efforts to promote green investment in support of environmentally friendly growth, and international collaboration on investment in agriculture to help improve food security (WIR09, WIR10).

*A new generation of investment policies is emerging.*

As a result of the developments described above, a new generation of investment policies is emerging, pursuing a broader and more intricate development policy agenda within a framework that seeks to



### Box 1. Defining Investment Protectionism

Despite the fact that international policy forums at the highest level (e.g. the G20<sup>2</sup>) frequently make reference to “investment protectionism”, there is no universally agreed definition of the term. Different schools of thought take different approaches.

Broadly, protectionist measures related to investment would include: (1) measures directed at foreign investors that explicitly or “de facto” discriminate against them (i.e. treating them differently from domestic investors) and that are designed to prevent or discourage them from investing in, or staying in, the country. And (2) measures directed at domestic companies that require them to repatriate assets or operations to the home country or that discourage new investments abroad.<sup>3</sup> In this context, “measures” refer to national regulatory measures, but also include the application of *administrative procedures* or, even less tangible, *political pressure*.

The above reasoning ignores any possible *justification* of investment protectionism – i.e. measures may be motivated by legitimate policy concerns such as the protection of national security, public health or environmental objectives, or a desire to increase the contribution of FDI to economic development. It also does not refer to any assessment of *proportionality* of measures relative to such legitimate policy concerns. Nor does it attempt to assess the *legality* of relevant measures under any applicable international normative framework (whether investment-specific, i.e. international investment agreements; trade-related, e.g. WTO rules; or otherwise). Disregarding these considerations is analogous to the situation in trade, where a tariff may be applied to imports for legitimate policy reasons and may be legal under WTO rules, but is often still considered a protectionist measure.

From a development perspective this approach is clearly unsatisfactory: measures taken for legitimate public policy objectives, relevant and proportional to those objectives and taken in compliance with relevant international instruments, should not be considered protectionist. The challenge lies in defining the boundaries of legitimacy, relevance and proportionality, in order to distinguish between measures taken in good faith for the public good and measures with underlying discriminatory objectives.

For many policymakers the term “protectionism” has a negative connotation. The lack of a common language among policymakers and the investment community – one country’s protectionism is another country’s industrial policy – is not helpful to efforts to maintain an international investment policy environment that aims to balance openness and pursuit of the public good while minimizing potentially harmful distortionary effects on investment flows.

Source: UNCTAD.

maintain a generally favourable investment climate. This new generation of investment policies has been in the making for some time, and is reflected in the dichotomy in policy directions over the last few years – with simultaneous moves to further liberalize investment regimes and promote foreign investment, on the one hand, and to regulate investment in pursuit of public policy objectives on the other. It reflects the recognition that liberalization, if it is to generate sustainable development outcomes, has to be accompanied – if not preceded – by the establishment of proper regulatory and institutional frameworks. The key policy challenge is to strike the right balance between regulation and openness (Epilogue *WIR10*).

“New generation” investment policies place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment.

Sustainable development issues – including environmental, social and poverty alleviation concerns – as well as investor responsibility in these areas, are not “new” in and by themselves. However, to date, the myriad of solutions and options developed over the years to address sustainable development concerns have not been part and parcel of mainstream investment policymaking, and the international consensus on sustainable development is not reflected in it. “New generation” investment policies aim to *systematically integrate* sustainable development and *operationalize* it in concrete measures and mechanisms at the national and international level, and at the level of policy making and implementation.

Broadly, “new generation” investment policies are characterized by (i) a recognition of the role of investment as a primary driver of economic growth

and development and the consequent realization that investment policies are a *central part of development strategies*; and (ii) a desire to pursue sustainable development through *responsible investment*, placing social and environmental goals on the same footing as economic growth and development objectives. Furthermore, (iii) a shared recognition of the need to promote responsible investment as a cornerstone of economic growth and job creation is giving renewed impetus to efforts to resolve, in a comprehensive manner, long-standing issues and shortcomings of investment policy that may hamper *policy effectiveness* and risk causing uncertainty for investors. These three broad aspects of “new generation” investment policies translate into specific investment policy challenges at the national and international levels.

## 2. Key investment policy challenges

At the national level, key investment policy challenges are (table 1):

- To connect the investment policy framework to an overall development strategy or industrial development policy that works in the context of national economies, and to ensure coherence with other policy areas, including overall private sector or enterprise development, and policies in support of technological advancement, international trade and job creation. “New generation” investment policies increasingly incorporate targeted
- objectives to channel investment to areas key for economic or industrial development and for the build-up, maintenance and improvement of productive capacity and international competitiveness.
- To ensure that investment supports sustainable development and inclusiveness objectives. Investment policymaking will focus increasingly on qualitative aspects of investment. Because the behaviour of firms, including international investors, with respect to social and environmental issues is driven in part by corporate responsibility standards developed outside the traditional regulatory realm, one aspect of this challenge is finding the right balance between regulatory and private sector initiatives. A focus on sustainable development objectives also implies that investment policy puts increasing emphasis on the promotion of specific types of investment, e.g. ‘green investments’ and ‘low-carbon investment’ (WIR10).
- To ensure continued investment policy relevance and effectiveness, building stronger institutions to implement investment policy and to manage investment policy dynamically, especially by measuring the sustainable development impact of policies and responding to changes in the policy environment. With the greater role that governments are assuming in

**Table 1. National investment policy challenges**

Integrating investment policy in development strategy	<ul style="list-style-type: none"> <li>• Channeling investment to areas key for the build-up of productive capacity and international competitiveness</li> <li>• Ensuring coherence with the host of policy areas geared towards overall development objectives</li> </ul>
Incorporating sustainable development objectives in investment policy	<ul style="list-style-type: none"> <li>• Maximizing positive and minimizing negative impacts of investment</li> <li>• Fostering responsible investor behaviour</li> </ul>
Ensuring investment policy relevance and effectiveness	<ul style="list-style-type: none"> <li>• Building stronger institutions to implement investment policy</li> <li>• Measuring the sustainable development impact of investment</li> </ul>

steering investment to support sustainable development objectives, and with the selective departure from an open and liberal approach to investment, comes greater responsibility on the part of policymakers to ensure the effectiveness of their measures, especially where such measures imply restrictions on the freedom of economic actors or outlays of public funds (e.g. in the case of incentives or the establishment of special economic zones).

Similarly, *at the international level*, the changing investment policy environment is giving rise to three broad challenges (table 2):

- To *strengthen the development dimension* of the international investment policy regime. In the policy debate this development dimension principally encompasses two aspects:
  - Policymakers in some countries, especially those seeking to implement industrial development strategies and targeted investment measures, have found that IIAs can unduly constrain national economic development policymaking.
  - Many policymakers have observed that IIAs are focused almost exclusively on protecting investors and do not do enough to promote investment for development.
- To *adjust the balance between the rights and obligations of States and investors*, making
- it more even. IIAs currently do not set out any obligations on the part of investors in return for the protection rights they are granted. Negotiators could consider including obligations for investors to comply with national laws of the host country. In addition, and parallel to the debate at the level of national policies, corporate responsibility initiatives, standards and guidelines for the behaviour of international investors increasingly shape the investment policy landscape. Such standards could serve as an indirect way to add the sustainable development dimension to the international investment policy landscape, although there are concerns among developing countries that they may also act as barriers to investment and trade.
- To *resolve issues stemming from the increasing complexity of the international investment policy regime*. The current regime is a system of thousands of treaties (mostly bilateral investment treaties, free trade agreements with investment provisions, and regional agreements), many ongoing negotiations and multiple dispute-settlement mechanisms, which nevertheless offers protection to only two-thirds of global FDI stock, and which covers only one-fifth of bilateral investment relationships (*WIR 11*). Most governments continue to participate in

**Table 2. International investment policy challenges**

Strengthening the development dimension of IIAs	<ul style="list-style-type: none"> <li>• Safeguarding policy space for sustainable development needs</li> <li>• Making investment promotion provisions more concrete and consistent with sustainable development objectives</li> </ul>
Balancing rights and obligations of states and investors	<ul style="list-style-type: none"> <li>• Reflecting investor responsibilities in IIAs</li> <li>• Learning from and building on CSR principles</li> </ul>
Managing the systemic complexity of the IIA regime	<ul style="list-style-type: none"> <li>• Dealing with gaps, overlaps and inconsistencies in IIA coverage and content and resolving institutional and dispute settlement issues</li> <li>• Ensuring effective interaction and coherence with other public policies (e.g. climate change, labour) and systems (e.g. trading, financial)</li> </ul>

the process of adding ever more agreements to the system, despite the fact that many are not fully satisfied with its overall design. It has a number of systemic problems, including gaps, overlaps and inconsistencies in coverage and content; ambiguities in treaty interpretation by arbitral tribunals; onerous arbitration procedures and unpredictability of arbitration awards. Also, the “interconnect” between international investment policies and other policy areas such as trade, finance, competition or environmental (e.g. climate change) policies, is absent.

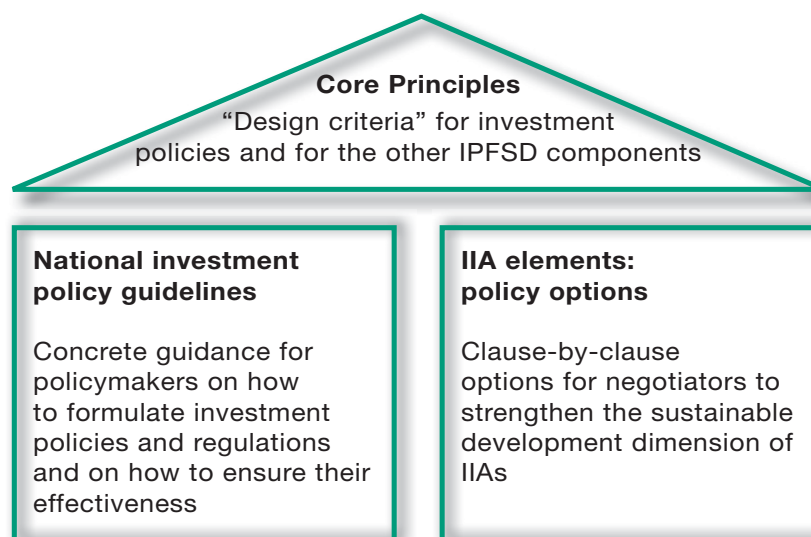
### 3. Addressing the challenges: UNCTAD’s Investment Policy Framework for Sustainable Development

To address the challenges discussed in the previous section, UNCTAD proposes a comprehensive *Investment Policy Framework for Sustainable Development* (IPFSD), consisting of a set of Core Principles for investment policymaking, guidelines for national investment policies, and guidance for policymakers on how to engage in the international investment policy regime, in the form of options for the design and use of IIAs (figure 1 and box 2). These build on the experience and lessons learned of UNCTAD and other organizations in

designing investment policies for development. By consolidating good practices, the IPFSD also attempts to establish a benchmark for assessing the quality of a country’s policy environment for foreign investment – taking into account that one single policy framework cannot address the specific investment policy challenges of individual countries (see boxes 4, 6 and 7 on the need for custom-designed investment policy advice).

Although there are a number of existing international instruments that provide guidance to investment policymakers,<sup>4</sup> UNCTAD’s IPFSD distinguishes itself in several ways. First, it is meant as a comprehensive instrument dealing with all aspects of national and international investment policymaking. Second, it puts a particular emphasis on the relationship between foreign investment and sustainable development, advocating a balanced approach between the pursuit of purely economic growth objectives by means of investment liberalization and promotion, on the one hand, and the need to protect people and the environment, on the other hand. Third, it underscores the interests of developing countries in investment policy making. Fourth, it is neither a legally binding text nor a voluntary undertaking between States, but expert guidance by an international organization, leaving national policymakers free to “adapt and adopt” as appropriate.

Figure 1. Structure and components of the IPFSD



**Box 2. Scope of the IPFSD**

This box addresses a number of key questions relating to the scope, coverage and target audience of the IPFSD:

*What policies are covered by the IPFSD?*

The IPFSD is meant to provide guidance on investment policies, with a particular focus on foreign direct investment (FDI). This includes policies with regard to the establishment, treatment and promotion of investment. In addition, a comprehensive IPFSD needs to look beyond investment policies per se and include investment-related aspects of other policy areas.

*Does the IPFSD deal with national and international investment policies?*

Investment policies and related policy areas covered by the IPFSD comprise national and international policies, as coherence between the two is fundamental.

*Does the IPFSD cover domestic and foreign investment?*

The IPFSD's focus on FDI is evident in sections on, for example, the entry and establishment of investment, the promotion of outward investment and the chapter on international investment policies. However, many of the guidelines in the chapter on national investment policies have relevance for domestic investment as well.

*Does the IPFSD consider portfolio investment?*

The IPFSD focuses on direct investment in productive assets. Portfolio investment is considered only where explicitly stated in the context of IIAs, which in many cases extend coverage beyond direct investment.

*Is the IPFSD concerned with inward and outward investment?*

The IPFSD primarily offers policy advice for countries where the investment – domestic or foreign – is made, as this is typically the principal concern of investment policies. However, the IPFSD does not ignore the fact that policies with regard to *outward* investment may also be part of a country's development strategy.

*Is the IPFSD addressed to policymakers from developing and developed countries?*

The addressees of the IPFSD are, in principle, both developing and developed countries. It has been designed with the particular objective to assist the former in the design of investment policies in support of sustainable development objectives, but is equally relevant for developed countries.

*Does the IPFSD focus on the attraction of investment or on its impact?*

The policy guidelines of the IPFSD serve a dual purpose. On the one hand, they intend to assist governments in improving the attractiveness of their countries as investment locations. To this end, they contain specific recommendations concerning the institutional set-up, the general business climate and the treatment of investors. On the other hand, they also provide guidance on how countries can maximize the sustainable development benefits from investment, in particular foreign investment.

Source: UNCTAD.

## II. Core Principles for Investment Policymaking

### 1. Scope and objectives of the Core Principles

The Core Principles for investment policymaking aim to guide the development of national and international investment policies. To this end, they translate the challenges of investment policymaking into a set of “design criteria” for investment policies. Taking the challenges discussed in the previous chapter as the starting point, they call for integrating investment policy in overall development strategies, enhancing sustainable development as part of investment policies, balancing rights and obligations of States and investors in the context of investment protection and promotion, including CSR into investment policymaking, and encouraging international cooperation on investment-related challenges.

The Core Principles are not a set of rules per se. They are an integral part of the IPFSD, as set out in this report, which attempts to convert them, collectively and individually, into a concrete set of policy guidelines

for national investment policymakers and for negotiators of IIAs (chapters III and IV). As such, they do not always follow the traditional “policy areas” of a national investment policy framework, nor the usual articles of IIAs.

The Core Principles are grouped as follows:

- Principle 1 states the overarching objective of investment policymaking.
- Principles 2, 3 and 4 relate to the general process of policy development and the policymaking environment as relevant for investment policies.
- Principles 5 through 10 address the specifics of investment policymaking.
- Principle 11 refers to cooperation in investment-related matters at the international level.

The design of the Core Principles has been inspired by various sources of international law and politics. Some of these instruments have importance for the entire set of the Core Principles as they relate – to various degrees – to sustainable development. Several other international instruments relate to individual Core Principles (see box 3).

#### Box 3. The origins of the Core Principles in international law

The Core Principles can be traced back to a wide range of existing bodies of international law, treaties and declarations.

The UN Charter (Article 55) promotes, *inter alia*, the goal of economic and social progress and development. The UN Millennium Development Goals call for a Global Partnership for Development. In particular, its Goal 8 (Target 12) encourages the further development of an open, rule-based, predictable, non-discriminatory trading and financial system, which includes a commitment to good governance, development, and poverty reduction, both nationally and internationally – concepts that apply equally to the investment system. The “Monterrey Consensus” of the UN Conference on Financing for Development of 2002 acknowledges that countries need to continue their efforts to achieve a transparent, stable and predictable investment climate, with proper contract enforcement and respect for property rights, embedded in sound macroeconomic policies and institutions that allow businesses, both domestic and international, to operate efficiently and profitably and with maximum development impact. The UN Johannesburg Plan of Implementation of September 2002, following up on the “Rio Declaration”, calls for the formulation and elaboration of national strategies for sustainable development, which integrate economic, social and environmental aspects. The 4th UN Conference on LDCs in May 2011 adopted the Istanbul Programme of Action for the LDCs 2011-2020 with a strong focus on productive capacity-building and structural transformation as core elements to achieve more robust, balanced, equitable, and sustainable growth and sustainable development. Finally, the 2012 UNCTAD XIII Conference – as well as previous UNCTAD Conferences – recognized the role of FDI in the development process and called on countries to design policies aimed at enhancing the impact of foreign investment on sustainable development and inclusive growth, while underlining the importance of stable, predictable and enabling investment climates.

Several other international instruments relate to individual Core Principles. They comprise, in particular, the Universal Declaration of Human Rights and the UN Guiding Principles on Business and Human Rights, the Convention on the Establishment of the Multilateral Investment Guarantee Agency, the World Bank Guidelines on the Treatment of Foreign Direct Investment, the UN Global Compact, the OECD Guidelines for Multinational Enterprises and the ILO Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, and several WTO-related agreements, including the GATS, the TRIMs Agreement and the Agreement on Government Procurement.

Source: UNCTAD.

## 2. Core Principles for investment policymaking for sustainable development

Area	Core Principles
1 <b>Investment for sustainable development</b>	<ul style="list-style-type: none"> <li>The overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development.</li> </ul>
2 <b>Policy coherence</b>	<ul style="list-style-type: none"> <li>Investment policies should be grounded in a country's overall development strategy. All policies that impact on investment should be coherent and synergetic at both the national and international level.</li> </ul>
3 <b>Public governance and institutions</b>	<ul style="list-style-type: none"> <li>Investment policies should be developed involving all stakeholders, and embedded in an institutional framework based on the rule of law that adheres to high standards of public governance and ensures predictable, efficient and transparent procedures for investors.</li> </ul>
4 <b>Dynamic policymaking</b>	<ul style="list-style-type: none"> <li>Investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics.</li> </ul>
5 <b>Balanced rights and obligations</b>	<ul style="list-style-type: none"> <li>Investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all.</li> </ul>
6 <b>Right to regulate</b>	<ul style="list-style-type: none"> <li>Each country has the sovereign right to establish entry and operational conditions for foreign investment, subject to international commitments, in the interest of the public good and to minimize potential negative effects.</li> </ul>
7 <b>Openness to investment</b>	<ul style="list-style-type: none"> <li>In line with each country's development strategy, investment policy should establish open, stable and predictable entry conditions for investment.</li> </ul>
8 <b>Investment protection and treatment</b>	<ul style="list-style-type: none"> <li>Investment policies should provide adequate protection to established investors. The treatment of established investors should be non-discriminatory in nature.</li> </ul>
9 <b>Investment promotion and facilitation</b>	<ul style="list-style-type: none"> <li>Policies for investment promotion and facilitation should be aligned with sustainable development goals and designed to minimize the risk of harmful competition for investment.</li> </ul>
10 <b>Corporate governance and responsibility</b>	<ul style="list-style-type: none"> <li>Investment policies should promote and facilitate the adoption of and compliance with best international practices of corporate social responsibility and good corporate governance.</li> </ul>
11 <b>International cooperation</b>	<ul style="list-style-type: none"> <li>The international community should cooperate to address shared investment-for-development policy challenges, particularly in least developed countries. Collective efforts should also be made to avoid investment protectionism.</li> </ul>

## 3. Annotations to the Core Principles

### *Principle 1: Investment for sustainable development*

This overarching principle defines the overall objective of the Investment Policy Framework for Sustainable Development. It recognizes the need to promote investment not only for economic growth as such, but for growth that benefits all, including

the poorest. It also calls for the mainstreaming of sustainable development issues – i.e. development that meets the needs of the present without compromising the ability of future generations to meet theirs – in investment policymaking, both at the national and international levels.

### *Principle 2: Policy coherence*

This principle recognizes that investment is a means to an end, and that investment policy should thus be

integrated in an overarching development strategy. It also acknowledges that success in attracting and benefiting from investment depends not only on investment policy “*stricto sensu*” (i.e. entry and establishment rules, treatment and protection) but on a host of investment-related policy areas ranging from tax to trade to environmental and labour market policies. It recognizes that these policy areas interact with each other and that there is consequently a need for a coherent overall approach to make them conducive to sustainable development and to achieve synergies. The same considerations apply with respect to the interaction between national investment policies and international investment rulemaking. Successful experiences with investment for development often involved the establishment of special agencies with a specific mandate to coordinate the work of different ministries, government units and policy areas, including the negotiation of IIAs.

***Principle 3: Public governance and institutions***

The concept of good public governance refers to the efficiency and effectiveness of government services, including such aspects as accountability, predictability, clarity, transparency, fairness, rule of law, and the absence of corruption. This principle recognizes the importance of good public governance as a key factor in creating an environment conducive to attracting investment. It also stresses the significance of a participatory approach to policy development as a basic ingredient of investment policies aimed at inclusive growth and fairness for all. The element of transparency is especially important, as in and by itself it tends to facilitate dialogue between public and private sector stakeholders, including companies, organized labour and non-governmental organizations (NGOs).

***Principle 4: Dynamic policymaking***

This principle recognizes that national and international investment policies need flexibility to adapt to changing circumstances, while recognizing that a favourable investment climate requires stability and predictability. For one, different policies are needed at different development stages. New factors may emerge on the domestic policy scene, including government changes, social pressures or

environmental degradation. International dynamics can have an impact on national investment policies as well, including through regional integration or through international competition for the attraction of specific types of foreign investment. The increasing role of emerging economies as outward investors and their corresponding desire better to protect their companies abroad drives change in investment policies as well.

The dynamics of investment policies also imply a need for countries continuously to assess the effectiveness of existing instruments. If these do not achieve the desired results in terms of economic and social development, or do so at too high a cost, they may need to be revised.

***Principle 5: Balanced rights and obligations***

Investment policies need to serve two potentially conflicting purposes. On the one hand, they have to create attractive conditions for foreign investors. To this end, investment policies include features of investment liberalization, protection, promotion and facilitation. On the other hand, the overall regulatory framework of the host country has to ensure that any negative social or environmental effects are minimized. More regulation may also be warranted to find appropriate responses to crises (e.g. financial crisis, food crisis, climate change).

Against this background, this core principle suggests that the investment climate and policies of a country should be “balanced” as regards the overall treatment of foreign investors. Where and how to strike this balance is basically an issue for the domestic law of host countries and therefore requires adequate local capacities. International policies vis-à-vis foreign investors likewise play a role and – if not carefully designed – might tilt the balance in favour of those investors. The principle does not mean that each individual investment-related regulation of a host country would have to be balanced.

***Principle 6: Right to regulate***

The right to regulate is an expression of a country’s sovereignty. Regulation includes both the general legal and administrative framework of host countries as well as sector- or industry-specific rules. It also entails effective implementation of rules, including



the enforcement of rights. Regulation is not only a State right, but also a necessity. Without an adequate regulatory framework, a country will not be attractive for foreign investors, because such investors seek clarity, stability and predictability of investment conditions in the host country.

The authority to regulate can, under certain circumstances, be ceded to an international body to make rules for groups of states. It can be subject to international obligations that countries undertake; with regard to the treatment of foreign investors this often takes place at the bilateral or regional level. International commitments thus reduce “policy space”. This principle advocates that countries maintain sufficient policy space to regulate for the public good.

***Principle 7: Openness to investment***

This principle considers a welcoming investment climate, with transparent and predictable entry conditions and procedures, a precondition for attracting foreign investment conducive for sustainable development. The term “openness” is not limited to formal openness as expressed in a country’s investment framework and, possibly, in entry rights granted in IIAs. Equally important is the absence of informal investment barriers, such as burdensome, unclear and non-transparent administrative procedures. At the same time, the principle recognizes that countries have legitimate reasons to limit openness to foreign investment, for instance in the context of their national development strategies or for national security reasons.

In addition, the issue of “openness” reaches beyond the establishment of an investment. Trade openness can be of crucial importance, too; in particular, when the investment significantly depends on imports or exports.

***Principle 8: Investment protection***

This principle acknowledges that investment protection, although only one among many determinants of foreign investment, can be an important policy tool for the attraction of investment. It therefore closely interacts with the principle on investment promotion and facilitation (Principle 9). It has a national and an international component. Core elements of protection at the

national level include, inter alia, the rule of the law, the principle of freedom of contract and access to courts. Key components of investment protection frequently found in IIAs comprise the principle of non-discrimination (national treatment and most-favoured nation treatment), fair and equitable treatment, protection in case of expropriation, provisions on movement of capital, and effective dispute settlement.

***Principle 9: Investment promotion and facilitation***

Most countries have set up promotion schemes to attract and facilitate foreign investment. Promotion and facilitation measures often include the granting of fiscal or financial incentives, the establishment of special economic zones or “one-stop shops”. Many countries have also set up special investment promotion agencies (IPAs) to target foreign investors, offer matchmaking services and provide aftercare.

The principle contains two key components. First, it stipulates that in their efforts to improve the investment climate, countries should not compromise sustainable development goals, for instance by lowering regulatory standards on social or environmental issues, or by offering incentives that annul a large part of the economic benefit of the investment for the host country. Second, the principle acknowledges that, as more and more countries seek to boost investment and target specific types of investment, the risk of harmful competition for investment increases; i.e. a race to the regulatory bottom or a race to the top of incentives (with negative social and environmental consequences or escalating commitments of public funds). Investment policies should be designed to minimize this risk. This underlines the importance of international coordination (see Principle 11 below).

***Principle 10: Corporate governance and responsibility***

This principle recognizes that corporate governance and CSR standards are increasingly shaping investment policy at the national and international levels. This development is reflected in the proliferation of standards, including several intergovernmental organization standards of the United Nations, the ILO, the IFC and the OECD, providing guidance on fundamental CSR issues;<sup>5</sup>

dozens of multi-stakeholder initiatives; hundreds of industry association codes; and thousands of individual company codes (*WIR11*). Most recently, the UN Human Rights Council adopted a resolution endorsing the Report of the Special Representative of the Secretary-General on the issue of human rights and transnational corporations and other business enterprises.

CSR standards are voluntary in nature and so exist as a unique dimension of “soft law”. The principle calls on governments to actively promote CSR standards and to monitor compliance with them. Promotion also includes the option to adopt existing CSR standards as part of regulatory initiatives, turning voluntary standards into mandatory requirements.

***Principle 11: International cooperation***

This principle considers that investment policies touch upon a number of issues that would benefit from more international cooperation. The principle also advocates that particular efforts should be made to encourage foreign investment in LDCs.

Home countries can support outward investment conducive to sustainable development. For a long time, developed countries have provided investment guarantees against certain political risks in the host country or offered loans to companies investing abroad. The Multilateral Investment Guarantee Agency (MIGA) provides investment insurance at the international level. The principle builds upon examples of countries that have started to condition the granting of investment guarantees on an assessment of social and environmental impacts.

The importance of international cooperation also grows as more and more countries make use of targeted investment promotion policies. Better international coordination is called for to avoid a global race to the bottom in regulatory standards, or a race to the top in incentives, and to avoid a return of protectionist tendencies.

More international coordination, in particular at the regional level, can also help to create synergies so as to realize investment projects that would be too complex and expensive for one country alone. Another policy area that would benefit from more international cooperation is investment in sensitive sectors. For example, recent concerns about possible land grabs and the crowding out of local farmers by foreign investors have resulted in the development by the FAO, UNCTAD, the World Bank and IFAD of Principles for Responsible Investment in Agriculture (PRI).

\* \* \*

Some Core Principles relate to a specific investment policy area (e.g. openness to investment, investment protection and promotion, corporate governance and social responsibility) and can therefore relatively easily be traced to specific guidelines and options in the national and international parts of the framework. Other Core Principles (e.g. on public governance and institutions, balanced rights and obligations, the right to regulate) are important for investment policymaking as a whole. As a consequence, they are reflected in guidelines dispersed across the entire range of relevant policy issues covered by the framework.

The Core Principles interact with each other. The individual principles and corresponding guidelines therefore must not be applied and interpreted in isolation. In particular, Principle 1 – as the overarching rule within the policy framework – has relevance for all subsequent principles. Integrating investment policies into sustainable development strategies requires a coherent policy framework. Good public governance is needed in its design and implementation. Sustainable development is an ongoing challenge, which underlines the importance of policymaking dynamics. And an IPFSD needs to comprise elements of investment regulation and corporate governance, on the one hand, and openness, protection and promotion, on the other hand, thereby contributing to an investment climate with balanced rights and obligations for investors.

## III. National Investment Policy Guidelines

This chapter translates the Core Principles for investment policymaking into concrete guidelines at the national level, with a view to addressing the policy challenges discussed in chapter I. To address these policy challenges – ensuring that investment policy is coherent with other policy areas supporting a country's overall development strategy; enhancing the sustainable development impact of investment and promoting responsible investment; and improving policy effectiveness, while maintaining an attractive investment climate – this chapter, including the detailed policy guidelines it contains, argues for policy action at three levels:

1. At the *strategic* level, policymakers should ground investment policy in a broad road map for economic growth and sustainable development – such as those set out in formal economic or industrial development strategies in many countries.
2. At the *normative* level, through the setting of rules and regulations, on investment and in a range of other policy areas, policymakers can promote and regulate investment that is geared towards sustainable development goals.
3. At the *administrative* level, through appropriate implementation and institutional mechanisms, policymakers can ensure continued relevance and effectiveness of investment policies.

The following sections will look at each of these levels in turn.

### 1. Grounding investment policy in development strategy

Many countries have elaborated explicit development strategies that set out an action plan to achieve economic and social objectives and to strengthen international competitiveness. These strategies will vary by country, depending on their stage of development, their domestic endowments and individual preferences, and depending on the degree to which the political and economic system allows or requires the participation of the

State in economic planning. Because investment is a key driver of economic growth, a prerequisite for the build-up of productive capacity and an enabler of industrial development and upgrading, investment policy must be an integrated part of such development strategies (see box 4).

#### *Defining the role of public, private, domestic and foreign direct investment*

Mobilizing investment for sustainable development remains a major challenge for developing countries, particularly for LDCs. Given the often huge development financing gaps in these countries, foreign investment can provide a necessary complement to domestic investment, and it can be particularly beneficial when it interacts in a synergetic way with domestic public and private investment. Agriculture, infrastructure and climate change-related investments, among others, hold significant potential for mutually beneficial interaction between foreign and domestic, and public and private investment. For example, public-private partnerships (PPPs) have become important avenues for infrastructure development in developing countries, although experience has shown that high-quality regulatory and institutional settings are critical to ensure the development benefits of such infrastructure PPPs (*WIR08*).

Given the specific development contributions that can be expected from investment – private and public, domestic and foreign – policymakers should consider carefully what role each type can play in the context of their development strategies. In particular the opportunities and needs for *foreign* investment – intended as direct investment in productive assets (i.e. excluding portfolio investment) – differ from country to country, as does the willingness to open sectors and industries to foreign investors. Examples include the improvement of infrastructure, investment in skills and education, investments to secure food supply, or investments in other specific industries that are of crucial importance for a country.

Even looking at the role of foreign investment per se policymakers should be aware of different types, each with distinct development impacts.

#### Box 4. Integrating Investment Policy in Development Strategy: UNCTAD's Investment Policy Reviews

UNCTAD's Investment Policy Review (IPR) program was launched in 1999 in response to growing demand from member States for advice on FDI policy. The IPRs aim to provide an independent and objective evaluation of the policy, regulatory and institutional environment for FDI and to propose customized recommendations to governments to attract and benefit from increased flows of FDI. To date IPRs have been undertaken for 34 countries, including 17 developing countries, 4 transition economies and 13 LDCs, of which 5 in post-conflict situations (box table 1).

**Box table 1. Beneficiaries of the UNCTAD IPR program, 1999 – 2011**

Categories	Countries
Developing countries	Algeria, Botswana, Colombia, Dominican Republic, Ecuador, Egypt, El Salvador, Ghana, Guatemala, Kenya, Mauritius, Morocco, Mongolia, Nigeria, Peru, Sri Lanka, Viet Nam
Transition economies	Belarus, The FYR of Macedonia, Republic of Moldova, Uzbekistan
Least Developed Countries	Benin, Burkina Faso, Burundi, Ethiopia, Lesotho, Mauritania, Mozambique, Nepal, Rwanda, Sierra Leone, United Republic of Tanzania, Uganda, Zambia

UNCTAD coordinates its IPR activities with the work of other development partners (including other UN agencies such as the UNDP and UNIDO, the OECD, the World Bank, national and regional development banks, local development institutions and NGOs) in order to create synergies.

IPRs are carried out through a structured process, starting with (i) a formal request from the national government to UNCTAD expressing commitment to policy reforms; (ii) preparation of the IPR advisory report and its presentation at a national workshop where government and national stakeholders review findings; (iii) intergovernmental peer review and sharing of best practices in investment policy in Geneva; (iv) implementation and follow-up technical assistance and capacity building; and (v) preparation of an implementation assessment and additional follow-up actions.

Substantively, key areas of recommendations common to nearly all IPRs conducted to date include: (i) Defining the strategic role of investment (and in particular FDI) in countries' development strategies; (ii) Reforming investment laws and regulations; (iii) Designing policies and measures for attracting and benefitting from FDI; and (iv) Addressing institutional issues related to FDI promotion and facilitation.

A number of case-specific areas for recommendations or themes have included privatizations, the promotion of investment in target industries, promotion and facilitation of infrastructure investment, private sector development initiatives and business linkages, skill building and technology transfer, and regional cooperation initiatives.

Recently, the IPR approach has been strengthened further with the inclusion of sections on specific priority industries, containing a quantitative assessment of the potential for investment in those industries and the potential development impact of investment through such indicators as value added, employment generation, and export generation, with a view to helping governments attract and negotiate higher value added types of investment.

Source: UNCTAD; [www.unctad.org/diae/ipr](http://www.unctad.org/diae/ipr).

Greenfield investment has different impacts than investment driven by mergers and acquisitions (M&As). The former will generally imply a greater immediate contribution to productive capacity and job creation; the latter may bring benefits such as technology upgrading or access to international markets (or survival in case of troubled acquisition targets), but may also have negative effects (e.g. on employment in case of restructurings). Similarly, efficiency-seeking investments will have different development impacts than market-seeking

investments, both with potential positive and negative contributions. And foreign investment also comes in different financial guises: FDI does not always imply an influx of physical capital (e.g. reinvested earnings), nor does it always translate into actual capital expenditures for the build-up of productive assets (e.g. retained earnings) and can sometimes behave in a manner not dissimilar to portfolio investment.

Furthermore, the role of foreign investors and multinational firms in an economy is not limited

to FDI. They can also contribute to economic development through non-equity modes of international production (NEMs), such as contract manufacturing, services outsourcing, licensing, franchising or contract farming. Because this form of involvement is based on a contractual relation between the foreign company and domestic business partners, it requires that the host country has sufficiently qualified local entrepreneurs, which calls for coordinated policies on investment, enterprise development and human resource development (*WIR11*).

A key aspect in defining the role of investment in economic growth and development strategies is the need for calibrated policies to stimulate job creation and to maximize the job content of investment, both quantitatively and qualitatively. This has become especially urgent in light of the cumulative employment losses during the global financial crisis, and the relatively low job content of economic growth since, leading to a global employment deficit estimated at over 200 million workers.<sup>6</sup>

#### *Harnessing investment for productive capacity building and enhancing international competitiveness*

The potential contribution of foreign investment to building or reinforcing local productive capacities should guide investment policy and targeting efforts. This is particularly important where investment is intended to play a central role in industrial upgrading and structural transformation in developing economies. The most crucial aspects of productive capacity building include human resources and skills development, technology and know-how, infrastructure development, and enterprise development.

*Human resources and skills.* Human resources development is a crucial determinant of a country's long-term economic prospects. In addition, the availability of skilled, trainable and productive labour at competitive costs is a major magnet for efficiency-seeking foreign investors. As such, education and human resource development policy should be considered a key complement to investment policy. Particular care should be given to matching skills needs and skills development, including in terms of

vocational and technical training. Vocational training that prepares trainees for jobs involving manual or practical activities related to a specific trade or occupation is a key policy tool, for instance, to enhance the capacity of local suppliers.

As economies develop, skills needs and job opportunities evolve, making a constant adaptation and upgrading of education and human development policies a necessity. The latter are essential not just to provide the necessary skills to investors, but more crucially to ensure that the population can gain access to decent work opportunities.

FDI – as well as NEMs – are particularly sensitive to the availability of local skills, which can frequently be a “make or break” factor in investment location decisions. Where local skills are partially lacking, foreign and national investors may wish to rely on expatriate workers to fill the gaps. Although particular care should be paid to promoting employment by nationals and to protecting national security, countries have a lot to gain from enabling investors to tap foreign skills readily and easily where needed. Well-crafted immigration and labour policies have had demonstrated benefits in countries that have allowed foreign skills to complement and fertilize those created locally. Knowledge spillovers also occur through international employees. An adequate degree of openness in granting work permits to skilled foreign workers is therefore important not only to facilitate investments that may otherwise not materialize for lack of skills, but also to support and complement the national human resource development policy through education.

*Technology and know-how.* An important policy task is to encourage the dissemination of technology. For example, governments can promote technology clusters that promote R&D in a particular industry and that can help upgrading industrial activities by bringing together technology firms, suppliers and research institutes. Disseminating and facilitating the acquisition of technology can also improve the involvement of domestic producers in GVCs (e.g. call centers, business processing operations or contract farming).

Appropriate protection of intellectual property rights is an important policy tool because it is often a

precondition for international investors to disclose technology to licensees in developing countries, especially in areas involving easily imitable technologies (e.g. software, pharmaceuticals), and hence can affect chances of attracting equity investments (e.g. joint ventures) or non-equity modes of involvement (e.g. licensing). At the same time the level of protection should be commensurate with the level of a country's development and conducive to the development of its technological capacities. It can be a means of encouraging independent research activities by local companies, because businesses are more likely to invest resources in R&D and technological upgrading if their innovations are protected.

*Infrastructure.* The development of domestic infrastructure may necessitate investments of such magnitude that it is impossible for domestic companies to undertake them alone. Infrastructure development may also require certain technological skills and know-how, which domestic firms do not have (e.g. telecommunication, energy, exploration of natural resources in remote areas). Likewise, the move to a low-carbon economy will often necessitate bringing in the technological capacities of foreign investors.

Most developing countries, especially LDCs, continue to suffer from vast deficiencies in infrastructure, in particular electricity, water and transport, and to a lesser extent telecommunications. Following technological progress and changes in regulatory attitudes, many countries have succeeded in introducing private (foreign) investment and competition in what used to be public sector monopolies, e.g. mobile telecommunications or power generation.

Given the potential contribution of FDI to build high-quality infrastructure, countries should consider the extent to which certain sectors or sub-sectors could be opened to (foreign) private investment, and under what conditions – balancing considerations of public service provision, affordability and accessibility. National security-related concerns with regard to the liberalization of critical infrastructure can be taken care of by screening procedures. A clear vision of what is doable and desirable socially, technically and from a business perspective is

essential given the dependence of economic growth on infrastructure development.

All too many developing countries have attempted to privatize infrastructure or public services only to fail or achieve less than optimal outcomes.<sup>7</sup> Governments need to develop not only a clear assessment of what can be achieved and at what costs, but also a comprehensive understanding of the complex technicalities involved in infrastructure investments and their long-term implications in terms of cost, quality, availability and affordability of services. A sound legal framework to guide concessions, management contracts and all forms of public-private partnerships is a key piece in the infrastructure development and investment strategies (*WIRO8*).

*Enterprise development.* Domestic enterprise development is a key transfer mechanism for the development benefits of investment to materialize. At the same time, especially for foreign investors, the presence of viable local enterprise is a crucial determinant for further investment and for partnerships in NEMs. A comprehensive discussion of policy options to foster domestic entrepreneurial development – including in areas such as the regulatory environment, access to finance, education and training, and technological development – can be found in UNCTAD's Entrepreneurship Policy Framework (box 5).

Enterprise development policies aimed at enhancing the benefits from investment focus on building capacity to absorb and adapt technology and know-how, to cooperate with multinational firms, and to compete internationally.

Another important policy task is the promotion of linkages and spillover effects between foreign investment and domestic enterprises (*WIRO1*). Policy coordination is needed to ensure that investment promotion is targeted to those industries that could have the biggest impact in terms of creating backward and forward linkages and contribute not just to direct, but also to indirect employment creation. At the same time, policymakers in developing countries need to address the risk of foreign investment impeding domestic enterprise development by crowding out local firms, especially SMEs. Industrial policies may

### Box 5. UNCTAD's Entrepreneurship Policy Framework

Entrepreneurship is vital for economic growth and development. The creation of new business entities generates value added, fiscal revenues, employment and innovation, and is an essential ingredient for the development of a vibrant small- and medium-sized business sector. It has the potential to contribute to specific sustainable development objectives, such as the employment of women, young people or disadvantaged groups. Entrepreneurship development can also contribute to structural transformation and building new industries, including the development of eco-friendly economic activities.

UNCTAD's *Entrepreneurship Policy Framework (EPF)* aims to support developing-country policymakers in the design of initiatives, measures and institutions to promote entrepreneurship. It sets out a structured framework of relevant policy areas, embedded in an overall entrepreneurship strategy, which helps guide policymakers through the process of creating an environment that facilitates the emergence of start-ups, as well as the growth and expansion of new enterprises.

The EPF recognizes that in designing entrepreneurship policy "one size does not fit all". Although the national economic and social context and the specific development challenges faced by a country will largely determine the overall approach to entrepreneurship development, UNCTAD has identified six priority areas that have a direct impact on entrepreneurial activity (box figure 1). In each area the EPF suggests policy options and recommended actions.

**Box figure 1. Key components of UNCTAD's Entrepreneurship Policy Framework**



The EPF further proposes checklists and numerous references in the form of good practices and case studies. The case studies are intended to equip policy makers with implementable options to create the most conducive and supportive environment for entrepreneurs. The EPF includes a user guide, a step-by-step approach to developing entrepreneurship policy, and contains a set of indicators that can measure progress. An on-line inventory of good practices in entrepreneurship development, available on UNCTAD's web-site, completes the EPF. This online inventory will provide an opportunity for all stakeholders to contribute cases, examples, comments and suggestions, as a basis for the inclusive development of future entrepreneurship policies.

Source: UNCTAD; [www.unctad.org/diae/epf](http://www.unctad.org/diae/epf).

play a role in protecting infant industries or other sensitive industries with respect to which host countries see a need to limit foreign access.

In the long run, enterprise development is essential for host countries to improve international competitiveness. Promotion efforts should therefore not be limited to low value-added activities within international value chains, but gradually seek to move to higher-value added segments. This is

crucial for remaining competitive once developing countries lose their low labour cost advantage. However, switching from labour-intensive low-value activities to more capital-intensive higher value production methods may raise unemployment in the transition phase and thus calls for vigilant labour market and social policies. This confirms the important dynamic dimension of investment and enterprise development strategies, calling for regular reviews and adaptation of policy instruments.

*Ensuring coherence between investment policies and other policy areas geared towards overall development objectives*

The interaction between investment policy and other elements of a country's overall economic development and growth strategy – including human resource development, infrastructure, technology, enterprise development, and others – is complex. It is critical that government authorities work coherently towards the common national objective of sustainable development and inclusive growth, and seek to create synergies. This requires coordination at the earliest stages of policy design, as well as the involvement of relevant stakeholders, including the investor community and civil society.

## **2. Designing policies for responsible investment and sustainable development**

From a development perspective, FDI is more than a flow of capital that can stimulate economic growth. It comprises a package of assets that includes long-term capital, technology, market access, skills and know-how (WIR99). As such, it can contribute to sustainable development by providing financial resources where such resources are often scarce; generating employment (WIR94); strengthening export capacities (WIR02); transferring skills and disseminating technology; adding to GDP through investment and value added, both directly and indirectly; and generating fiscal revenues. In addition, FDI can support industrial diversification and upgrading, or the upgrading of agricultural productivity (WIR09) and the build up of productive capacity, including infrastructure (WIR08). Importantly, it can contribute to local enterprise development through linkages with suppliers (WIR01) and by providing access to GVCs (WIR11) – the growing importance of GVCs can have an important pro-poor dynamic to the extent that marginalized communities and small suppliers can integrate into global or regional value chains as producers, suppliers or providers of goods and services.

These positive development impacts of FDI do not always materialize automatically. And the effect of FDI can also be negative in each of the impact areas listed above. For example, it can lead

to outflows of financial resources in the form of repatriated earnings or fees; it can, under certain circumstances, crowd out domestic investment and domestic enterprise (WIR97); it can at times reduce employment by introducing more efficient work practices or through restructurings (WIR94, WIR00), or jobs created may be unstable due to the footloose nature of some investment types; it can increase imports more than exports (or yield limited net export gains), e.g. in case of investment operations requiring intermediate inputs or for market-seeking investments (WIR02, WIR11); technology dissemination might not take place, or only at high cost (e.g. through licensing fees) (WIR11), and local technological development may be slowed down; skills transfers may be limited by the nature of jobs created; fiscal gains may be limited by tax avoidance schemes available to international investors, including transfer pricing; and so forth.

The balance of potential positive and negative development contributions of FDI is proof that investment policy matters in order to maximize the positive and minimize the negative impacts. Reaping the development benefits from investment requires not only an enabling policy framework that combines elements of investment promotion and regulation and that provides clear, unequivocal and transparent rules for the entry and operation of foreign investors (see box 6), it also requires adequate regulation to minimize any risks associated with investment.

The host of different impact types listed above indicates that such regulations need to cover a broad range of policy areas beyond investment policies per se, such as trade, taxation, intellectual property, competition, labour market regulation, environmental policies and access to land. The coverage of such a multitude of different policy areas confirms the need for consistency and coherence in policymaking across government.

Fostering sustainable development and inclusive growth through investment requires a balance of promotion and regulation. On the promotion side, attracting low-carbon investment, for example, may imply the need to set up new policy frameworks for a nascent renewable energy sector, which may also require government assistance in the start-up



phase, be it through tax incentives or measures aimed at creating a market (*WIR10*). Encouraging investment in sectors that are crucial for the poor may imply building sound regulatory frameworks and facilitation of responsible investment in agriculture (including contract farming), as agriculture continues to be the main source of income in many developing countries (*WIR09*).

At the same time, on the regulatory side, sustainability considerations should be a key consideration when deciding on the granting of investment incentives. The short-term advantages of an investment need to be weighed against the potential long-term environmental effects. And the sensitive issue of access to land requires careful balancing of the rights and obligation of agricultural investors. For many developing countries, it is a

### Box 6. Designing Sound Investment Rules and Procedures: UNCTAD's Investment Facilitation Compact

UNCTAD's Investment Facilitation Compact combines a number of programs aimed at assisting developing countries in strengthening their policy and institutional framework for attracting and retaining foreign investment, and in developing a regulatory climate in which investors can thrive.

The *UNCTAD-ICC Investment Guides* aim to provide accurate and up-to-date information on regulatory conditions in participating countries (as well as on the investment climate and emerging investment opportunities). They are prepared in collaboration with governments, national chambers of commerce and investors and are distributed by investment promotion agencies, foreign missions and other government departments, as well as by the International Chamber of Commerce.

The guides aim to provide a reliable source of third-party information for investors looking to invest in countries that are rarely covered by commercial publishers. They highlight often under-reported economic and investment policy reform efforts, including fiscal incentives, regional integration, easier access to land, establishment of alternative dispute settlement mechanisms, simplified border procedures, facilitation of permits and licenses and laws enabling private investment in power generation and infrastructure. Because the guides are produced through a collaborative process they also build capacities of governments to promote investment opportunities and understand investors' needs.

UNCTAD's *Business Facilitation* program aims to help developing countries build a regulatory and institutional environment that facilitates investment and business start-ups. It works through a methodology that first provides full transparency on existing rules and procedures for investors; it does so by offering online detailed, practical and up-to-date descriptions of the steps investors have to follow for procedures such as business or investment registration, license and permit issuance, payment of taxes, or obtaining work permits. Once full transparency has been created, the program helps governments simplify procedures by identifying unnecessary steps or developing alternatives.

The program promotes good governance by increasing the awareness of administrative rules and procedures, establishing the conditions for a balanced dialogue between the users of the public services, including investors, and civil servants. It also sets a basis for regional or international harmonization of rules by facilitating the exchange of good practices among countries.

Individual programs within the Investment Facilitation Compact have to date been undertaken in more than 35 countries and regions, with a strong focus on LDCs (box table 1).

**Box table 1. Beneficiaries of selected programs of UNCTAD's Investment Facilitation Compact**

Categories	Countries/regions
Investment Guides	Bangladesh, Benin, Bhutan, Burkina Faso, Cambodia, Comoros, East African Community, Ethiopia, Kenya, Lao PDR, Mali, Morocco, Oriental Region of Morocco, Mauritania, Mozambique, Nepal, Rwanda, Tanzania, Silk Road Region, Uganda, Uzbekistan, Zambia
Business Facilitation	Benin, Burkina Faso, Cape Verde, Cameroon, Colombia, Comoros, Costa Rica, El Salvador, Guatemala, Mali, Nicaragua, Togo, Russian Federation (City of Moscow), Rwanda, Viet Nam

Source: UNCTAD; [www.unctad.org](http://www.unctad.org); [www.theiguides.org](http://www.theiguides.org); [www.eregulations.org](http://www.eregulations.org).

key challenge to strengthen such environmental and social protection while maintaining an attractive investment climate.

Sustainability issues should also be a main consideration in investment contracts between the host country and individual investors. Such contracts can be a means to commit investors to environmental or social standards beyond the level established by the host country's general legislation, taking into account international standards and best practices.

While laws and regulations are the basis of investor responsibility, voluntary CSR initiatives and standards have proliferated in recent years, and they are increasingly influencing corporate practices, behaviour and investment decisions. Governments can build on them to complement the regulatory framework and maximize the development benefits of investment (*WIR11*).

Because CSR initiatives and voluntary standards are a relatively new area that is developing quickly and in many directions, the management of their policy implications is a challenge for many developing countries. In particular, the potential interactions between soft law and hard law can be complex, and the value of standards difficult to extract for lack of monitoring capacity and limited comparability. A number of areas can benefit from the encouragement of CSR initiatives and the voluntary dissemination of standards; for example, they can be used to promote responsible investment and business behaviour (including the avoidance of corrupt business practices), and they can play an important role in promoting low-carbon and environmentally sound investment. Care needs to be taken to avoid these standards becoming undue barriers to trade and investment flows.

### 3. Implementation and institutional mechanisms for policy effectiveness

Investment policy and regulations must be adequately enforced by impartial, competent and efficient public institutions, which is as important for policy effectiveness as policy design itself. Policies to address implementation issues should be an integral part of the investment strategy and should strive to achieve both integrity across government

and regulatory institutions and a service orientation where warranted. As a widely accepted best-practice principle, regulatory agencies should be free of political pressure and have significant independence, subject to clear reporting guidelines and accountability to elected officials or representatives. These principles are particularly relevant for investors in institutions including courts and judiciary systems; sectoral regulators (e.g. electricity, transport, telecommunications, banking); customs; tax administration or revenue authority; investment promotion agency; and licensing bodies.

As stated in the fourth Core Principle, managing investment policy dynamically is of fundamental importance to ensure the continued relevance and effectiveness of policy measures. Revisions in investment policy may be driven by changes in strategy – itself caused by adaptations in the overall development strategy – or by external factors and changing circumstances. Countries require different investment policies at different stages of development, policies may need to take into account those in neighbouring countries, and be cognizant of trade patterns or evolving relative shares of sectors and industry in the economy. Policy design and implementation is a continuous process of fine-tuning and adaptation to changing needs and circumstances.

Beyond such adaptations, investment policy may also need adjustment where individual measures, entire policy areas, or the overall investment policy regime is deemed not to achieve the intended objectives, or to do so at a cost higher than intended. Understanding when this is the case, understanding it in time for corrective action to be taken, and understanding the reasons for the failure of measures to have the desired effect, is the essence of measuring policy effectiveness.

A significant body of academic literature exists on methodologies for evaluating policy effectiveness. Specifically in the area of investment policy, there are three objective difficulties associated with the measurement of policy effectiveness:

- It is often difficult to assess the effectiveness of discrete investment policy measures, such as the provision of incentives, let alone the effectiveness of the overall investment policy

framework. Many *exogenous factors* and investment determinants beyond policy drive the investment attraction performance of a country – e.g. market size and growth, the presence of natural resources, the quality of basic infrastructure, labour productivity, and many others (see UNCTAD's Investment Potential Index).

- Investment policy effectiveness measures should also provide an indication of the extent to which policies help realize the benefits from investment and maximize its development impact. However, it is often difficult to find solid evidence for the discrete impact on various dimensions of *investment*, let alone for the impact of the *policies* that led to that investment or that guide the behaviour of investors.
- Much of the impact of investment policies and thus their effectiveness depends on the way such policies are applied, and on the capabilities of institutions charged with *the implementation and enforcement of policies and measures*, rules and regulations.

Given these objective difficulties in measuring the effectiveness of investment policies, and to ensure that potentially important policy changes are not delayed by complex analyses of the impact of individual measures, policymakers may be guided by a few simplifying rules in evaluating the effectiveness of their policies:

- Investment policy should be based on a set of explicitly formulated policy objectives with clear priorities, a time frame for achieving them, and the principal measures intended to support the objectives. These objectives should be the principal yardstick for measuring policy effectiveness.
- The detailed quantitative (and therefore complex) measurement of the effectiveness of individual policy measures should focus principally on those measures that are most costly to implement, such as investment incentives.
- Assessment of progress in policy implementation and verification of the application of rules and regulations at all

administrative levels is at least as important as the measurement of policy effectiveness. A review process should be put in place to ensure that policies are correctly implemented as a part of the assessment of policy effectiveness.

Goals and objectives for investment policy, as set out in a formal investment strategy in many countries, should be SMART:<sup>8</sup>

- *Specific*: they should break down objectives for investment attraction and impact for priority industries or activities as identified in the development strategy.
- *Measurable*: investment goals and objectives should identify a focused set of quantifiable indicators.
- *Attainable*: as part of investment policy development, policymakers should compare investment attraction and investment impact with peer countries to inform realistic target setting.
- *Relevant*: objectives (and relevant indicators) should relate to impacts that can be ascribed to investment (and by implication investment policy), to the greatest extent possible filtered for 'general development strategy' impacts.
- *Time-bound*: objectives should fall within a variety of time frames. Even though broad development and investment-related objectives are of a long-term nature (e.g. 10-20 years), intermediate and specific objectives should refer to managerially and politically relevant time frames, e.g. 3-4 years. In addition, short-term benchmarks should be set within shorter time periods (a few quarters or a year) to ensure effective progress and implementation.

Objectives of investment policy should ideally include a number of quantifiable goals for both the *attraction of investment* and the *impact of investment*. To measure policy effectiveness for the attraction of investment, UNCTAD's Investment Potential and Performance Matrix can be a useful tool. This matrix compares countries with their peers, plotting investment inflows against potential based on a standardized set of economic determinants, thereby providing a proxy for the effect of policy determinants.

Similarly, for the measurement of policy effectiveness in terms of impact, UNCTAD's Investment Contribution Index may be a starting point. Also important is the choice of impact indicators. Policymakers should use a focused set of key indicators that are the most direct expression of the core development contributions of private investments, including direct contributions to GDP growth through additional value added, capital formation and export generation; entrepreneurial development and development of the formal sector and tax base; and job creation. The indicators could also address labour, social, environmental and development sustainability aspects.

The impact indicator methodology developed for the G-20 Development Working Group by UNCTAD, in collaboration with other agencies, may provide guidance to policymakers on the choice of indicators of investment impact and, by extension, of investment policy effectiveness (see table 3). The indicator framework, which has been tested in a number of developing countries, is meant to serve as a tool that countries can adapt and adopt in accordance with their national economic development priorities and strategies. At early stages of development, pure GDP contribution and job creation impacts may be more relevant; at more advanced stages, quality of employment and technology contributions may gain relevance.

**Table 3. Possible indicators for the definition of investment impact objectives and the measurement of policy effectiveness**

Area	Indicators	Details and examples
<b>Economic Value Added</b>	1. Total value added	<ul style="list-style-type: none"> <li>Gross output (GDP contribution) of the new/additional economic activity resulting from the investment (direct and induced)</li> </ul>
	2. Value of capital formation	<ul style="list-style-type: none"> <li>Contribution to GFCF</li> </ul>
	3. Total and net export generation	<ul style="list-style-type: none"> <li>Total export generation; net export generation (net of imports) is also captured by the value added indicator</li> </ul>
	4. Number of formal business entities	<ul style="list-style-type: none"> <li>Number of businesses in the value chain supported by the investment; this is a proxy for entrepreneurial development and expansion of the formal (tax-paying) economy</li> </ul>
	5. Total fiscal revenues	<ul style="list-style-type: none"> <li>Total fiscal take from the economic activity resulting from the investment, through all forms of taxation</li> </ul>
<b>Job creation</b>	6. Employment (number)	<ul style="list-style-type: none"> <li>Total number of jobs generated by the investment, both direct and induced (value chain view), dependent and self-employed</li> </ul>
	7. Wages	<ul style="list-style-type: none"> <li>Total household income generated, direct and induced</li> </ul>
	8. Typologies of employee skill levels	<ul style="list-style-type: none"> <li>Number of jobs generated, by ILO job-type, as a proxy for job quality and technology-levels (including technology transfer)</li> </ul>
<b>Sustainable development</b>	9. Labour impact indicators	<ul style="list-style-type: none"> <li>Employment of women (and comparable pay) and of disadvantaged groups</li> <li>Skills upgrading, training provided</li> <li>Health and safety effects, occupational injuries</li> </ul>
	10. Social impact indicators	<ul style="list-style-type: none"> <li>Number of families lifted out of poverty, wages above subsistence level</li> <li>Expansion of goods and services offered, access to and affordability of basic goods and services</li> </ul>
	11. Environmental impact indicators	<ul style="list-style-type: none"> <li>GHG emissions, carbon off-set/credits, carbon credit revenues</li> <li>Energy and water consumption/efficiency hazardous materials</li> <li>Enterprise development in eco-sectors</li> </ul>
	12. Development impact indicators	<ul style="list-style-type: none"> <li>Development of local resources</li> <li>Technology transfer</li> </ul>

*Source:* "Indicators for measuring and maximizing economic value added and job creation arising from private sector investment in value chains", Report to the G20 Cannes Summit, November 2011; produced by an inter-agency working group coordinated by UNCTAD. UNCTAD has included this methodology in its technical assistance work on investment policy, see box 4.

#### 4. The IPFSD's national policy guidelines

The national investment policy guidelines are organized in four sections, starting from the strategic level, which aims to ensure integration of investment policy in overall development strategy, moving to investment policy 'stricto sensu', to investment-related policy areas such as trade, taxation, labour and environmental regulations, and intellectual property policies, to conclude with a section on investment policy effectiveness (table 4).

While the national guidelines in the IPFSD are meant to establish a generally applicable setting for investment-related policymaking, it cannot provide a "one-size-fits-all" solution for all economies. Countries have different development strategies and any policy guide must acknowledge these

divergences. Governments may have different perceptions about which industries to promote and in what manner, and what role foreign investors should play in this context. Social, cultural, geographical and historical differences play a role as well. Furthermore, the investment climate of each country has its individual strengths and weaknesses; therefore, policies aimed at building upon existing strengths and reducing perceived deficiencies will differ. Thus investment policies need to be fine-tuned based on specific economic contexts, sectoral investment priorities and development issues faced by individual countries. The IPFSD's national investment policy guidelines establish a basic framework. Other tools are available to complement the basic framework with customized best practice advice (box 7).

**Table 4. Structure of the National Investment Policy Guidelines**

Investment and sustainable development strategy	<ul style="list-style-type: none"> <li>• Integrating investment policy in sustainable development strategy</li> <li>• Maximizing the contribution of investment to productive capacity building and international competitiveness</li> </ul>
Investment regulation and promotion	<ul style="list-style-type: none"> <li>• Designing investment-specific policies regarding:               <ul style="list-style-type: none"> <li>– Establishment and operations</li> <li>– Treatment and protection of investments</li> <li>– Investor responsibilities</li> <li>– Investment promotion and facilitation</li> </ul> </li> </ul>
Investment-related policy areas	<ul style="list-style-type: none"> <li>• Ensuring coherence with other policy areas, including: trade, taxation, intellectual property, competition, labour market regulation, access to land, corporate responsibility and governance, environmental protection, and infrastructure and public-private partnerships</li> </ul>
Investment policy effectiveness	<ul style="list-style-type: none"> <li>• Building effective public institutions to implement investment policy</li> <li>• Measuring investment policy effectiveness and feeding back lessons learned into new rounds of policymaking</li> </ul>

### **Box 7. Investment Policy advice to “adapt and adopt”: UNCTAD’s Series on Best Practices in Investment for Development**

As with UNCTAD’s IPR approach (see box 4), in which each IPR is custom-designed for relevance in the specific context of individual countries, the UNCTAD work program on Best Practices in Investment for Development acknowledges that *one size does not fit all*.

The program consists of a series of studies on investment policies tailored to:

- specific sectors of the economy (e.g. infrastructure, natural resources,...);
- specific development situations (e.g. small economies, post-conflict economies,...);
- specific development issues (e.g. capacity building, linkages,...).

The program aims to build an inventory of best policy practices in order to provide a reference framework for policy makers in developing countries through concrete examples that can be adapted to their national context. Each study therefore looks at one or two specific country case studies from which lessons can be drawn on good investment policy practices related to the theme of the study. The following studies are currently available:

- How to Utilize FDI to Improve Transport Infrastructure: Roads – Lessons from Australia and Peru;
- How to Utilize FDI to Improve Transport Infrastructure: Ports – Lessons from Nigeria;
- How to Utilize FDI to Improve Infrastructure: Electricity – Lessons from Chile and New Zealand;
- How to Attract and Benefit from FDI in Mining – Lessons from Canada and Chile;
- How to Attract and Benefit from FDI in Small Countries – Lessons from Estonia and Jamaica;
- How Post-Conflict Countries can Attract and Benefit from FDI – Lessons from Croatia and Mozambique;
- How to Integrate FDI and Skill Development – Lessons from Canada and Singapore;
- How to Create and Benefit from FDI-SME Linkages – Lessons from Malaysia and Singapore;
- How to Prevent and Manage Investor-State Disputes – Lessons from Peru.

Source: UNCTAD; [www.unctad.org](http://www.unctad.org).

**UNCTAD Investment Policy Framework for Sustainable Development**  
**National investment policy guidelines**

Sections	Sub-sections	Policy Guidelines	
<b>1 Investment and sustainable development strategy</b>	<b>1.1 Strategic investment policy priorities</b>	1.1.1 Investment policy should be geared towards the realization of national sustainable development goals and grounded in a country's overall development strategy. It should set out strategic priorities, including: <ul style="list-style-type: none"> <li>- Investment in specific economic activities, e.g. as an integral part of an industrial development strategy.</li> <li>- Areas for mutual reinforcement of public and private investment (including a framework for public-private partnerships).</li> <li>- Investment that makes a significant development contribution by creating decent work opportunities, enhancing sustainability, and/or by expanding and qualitatively improving productive capacity (see 1.2) and international competitiveness. Investment policy priorities should be based on a thorough analysis of the country's comparative advantages and development challenges and opportunities, and should address key bottlenecks for attracting FDI.</li> </ul>	
		1.1.2 Strategic investment policy priorities may be effectively formalized in a published document (e.g. investment strategy), making explicit the intended role of private and foreign investment in the country's sustainable development strategy and development priorities, and providing a clear signal to both investors and stakeholders involved in investment policymaking.	
	<b>1.2 Investment policy coherence for productive capacity building</b>	<b>Human resource development</b>	1.2.1 The potential for job creation and skills transfer should be one of the criteria for determining investment priorities. Taking into account the mutually reinforcing link between human resource development (HRD) and investment, investment policy should inform HRD policy to prioritize skill building in areas crucial for development priorities, whether technical, vocational, managerial or entrepreneurial skills.
			1.2.2 The potential for the transfer of appropriate technologies and the dissemination of know-how should be one of the criteria for determining investment priorities, and should be promoted through adequate investment-related policies, including taxation and intellectual property.
		<b>Infrastructure</b>	1.2.3 The potential for infrastructure development through FDI, in particular under PPPs, should be an integral part of investment policy. Infrastructure development policies should give due consideration to basic infrastructure areas crucial for the building of productive capacities, including utilities, roads, sea- and airports or industrial parks, in line with investment priorities.
		<b>Enterprise development</b>	1.2.4 A specific regulatory framework for PPPs should be in place to ensure that investor-State partnerships serve the public interest (see also section 3.9 below).
		<b>Enterprise development</b>	1.2.5 The potential for FDI to generate business linkages and to stimulate local enterprise development should be a key criterion in defining investment policy and priorities for FDI attraction. Enterprise development and business facilitation policies (including access to finance) should promote entrepreneurial activity where such activity yields particularly significant benefits through linkages and acts as a crucial locational determinant for targeted foreign investments.
	<b>2 Investment regulation and promotion</b>	<b>2.1 Entry, establishment and operations of foreign investors</b>	2.1.1 Investment policy benefits from a clear message towards the international business community on FDI (e.g. in a country's investment strategy or law on foreign investment, where these exist). Attracting high levels of diverse and beneficial FDI calls for a general policy of openness and avoidance of investment protectionism, subject to qualifications and selective restrictions to address country-specific development needs and policy concerns, such as regarding the provision of public goods or the control over strategic industries and critical infrastructure.

Sections	Sub-sections	Policy Guidelines	
<b>Investment regulation and promotion (continued)</b>	Screening and entry restrictions	<p>2.1.2 Ownership restrictions or limitations on the entry of foreign investment, in full accordance with countries' right to regulate, should be justified by legitimate national policy objectives and should not be influenced by special interests. They are best limited to a few explicitly stated aims, including:</p> <ul style="list-style-type: none"> <li>- protecting the national interest, national security, control over natural resources, critical infrastructure, public health, the environment; or</li> <li>- promoting national development objectives in accordance with a published development strategy or investment strategy.</li> </ul> <p>Such restrictions need to be in conformity with international commitments.</p>	
		<p>2.1.3 Restrictions on foreign ownership in specific industries or economic activities should be clearly specified; a list of specific industries where restrictions (e.g. prohibitions, limitations) apply has the advantage of achieving such clarity while preserving a policy of general openness to FDI.</p>	
		<p>2.1.4 A periodic review should take place of any ownership restrictions and of the level of ownership caps to evaluate whether they remain the most appropriate and cost-effective method to ensure these objectives.</p>	
		<p>2.1.5 Screening procedures for investment entry and establishment, where applicable, should be conducted following pre-established objective criteria.</p>	
	Property registration	<p>2.1.6 Investors should be able to register ownership of or titles to land and other forms of property securely, effectively and timely, including in order to facilitate access to debt finance, bearing in mind specific development challenges in this regard (see also 3.6 below).</p>	
	Freedom of operations	<p>2.1.7 Governments should avoid direct or indirect intrusions in business management and respect the freedom of operations of private companies, subject to compliance with domestic laws. This includes the freedom of investors to decide whether they want to invest at home or abroad.</p>	
	Performance requirements	<p>2.1.8 Performance requirements and related operational constraints should be used sparingly and only to the extent that they are necessary to achieve legitimate public policy purposes. They need to be in compliance with international obligations and would typically be imposed principally as conditions for special privileges, including fiscal or financial incentives.</p>	
	<b>2.2 Treatment and protection of investors</b>	Treatment under the rule of law	<p>2.2.1 Established investors and investments, foreign or domestic, should be granted treatment that is based on the rule of law.</p>
	Core standards of treatment	<p>2.2.2 As a general principle, foreign investors and investments should not be discriminated against vis-à-vis national investors in the post-establishment phase and in the conduct of their business operations. Where development objectives require policies that distinguish between foreign and domestic investment, these should be limited, transparent and periodically reviewed for efficacy against those objectives. They need to be in line with international commitments, including REIOs.</p>	
		<p>2.2.3 While recognizing that countries have not only the <i>right</i> but the <i>duty</i> to regulate, regulatory changes should take into account the need to ensure stability and predictability of the investment climate.</p>	
Transfer of funds	<p>2.2.4 Where the level of development or macro-economic considerations warrant restrictions on the transfer of capital, countries should seek to treat FDI-related transactions differently from other (particularly short-term) capital account transactions. Countries should guarantee the freedom to transfer and repatriate capital related to investments in productive assets, subject to reporting requirements (including to fight money laundering) and prior compliance with tax obligations, and subject to potential temporary restrictions due to balance of payment crises and in compliance with international law. Controls should be periodically reviewed for efficacy.</p>		



Sections	Sub-sections	Policy Guidelines	
Investment regulation and promotion (continued)		2.2.5 Countries should guarantee the free convertibility of their currency for current account transactions, including FDI-related earnings and dividends, interests, royalties and others. Any restriction to convertibility for current account transactions should be in accordance with existing international obligations and flexibilities, in particular the IMF Articles of Agreement.	
	Contract enforcement and dispute settlement	2.2.6 All investors should be entitled to equal treatment in the enforcement of contracts. Mechanisms and proceedings for the enforcement of contracts should be timely, efficient and effective, and available to all investors so as to duly operate under the rule of law.	
	Investment contracts	2.2.7 States should honour their obligations deriving from investment contracts with investors, unless they can invoke a fundamental change of circumstances or other legitimate reasons in accordance with national and international law.	
	Expropriation	2.2.8 When warranted for legitimate public policy purposes, expropriations or nationalization should be undertaken in a non-discriminatory manner and conform to the principle of due process of law, and compensation should be provided. Decisions should be open to recourse and reviews to avoid arbitrariness.	
	International commitments	2.2.9 Government should assign explicit responsibility and accountability for the implementation and periodic review of measures to ensure effective compliance with commitments under IIAs. Strong alternative dispute resolution (ADR) mechanisms can be effective means to avoid international arbitration of disputes.	
	<b>2.3 Investor obligations</b>		
	Responsible investment	2.3.1 Investors' first and foremost obligation is to comply with a host country's laws and regulations. This obligation should apply and be enforced indiscriminately to national and foreign investors, as should sanctions for non-compliance.	
	Standards	2.3.2 Governments should encourage adherence to international standards of responsible investment and codes of conduct by foreign investors. Standards which may serve as reference include the ILO Tri-partite Declaration, the OECD Guidelines for Multinational Enterprises, the UNCTAD, FAO IFAD and World Bank Principles for Responsible Agricultural Investment, the UN Guiding Principles on Business and Human Rights and others. In addition, countries may wish to translate soft rules into national legislation.	
	<b>2.4 Promotion and facilitation of investment</b>		
	Investment authority and investment promotion agency	2.4.1 Explicit responsibility and accountability should be assigned to an investment promotion agency (IPA) to encourage investment and to assist investors in complying with administrative and procedural requirements with a view towards facilitating their establishment, operation and development.	
	2.4.2 The mission, objectives and structure of the IPA should be grounded in national investment policy objectives and regularly reviewed. The core functions of IPAs should include image building, targeting, facilitation, aftercare and advocacy.		
	2.4.3 As the prime interface between Government and investors, IPAs should support efforts to improve the general business climate and eliminate red tape.		
	2.4.4 Where screening or preliminary approval are imposed on foreign investors, responsibility and accountability for such procedures should be clearly separate from investment promotion and facilitation functions in order to avoid potential conflicts of interest.		
	2.4.5 IPAs should be in a position to resolve cross-ministerial issues through its formal and informal channels of communication, and by reporting at a sufficiently high level of Government. Its governance should be ensured through an operational board that includes members from relevant ministries and from the private sector.		
	2.4.6 The effectiveness of the IPA in attracting investment should be periodically reviewed against investment policy objectives. The efficiency of the IPA and its working methods should also be reviewed in light of international best practice.		

Sections	Sub-sections	Policy Guidelines
Investment regulation and promotion (continued)	Investment incentives and guarantees	2.4.7 The work of national and sub-national IPAs, as well as that of authorities promoting investment in special economic zones, should be closely coordinated to ensure maximum efficiency and effectiveness.
		2.4.8 Being at the core of Government efforts to promote and facilitate investment, the IPA should establish close working relationships (including through secondment of staff) with regulatory agencies dealing directly with investors. It should seek to promote a client-oriented attitude in public administration. It may enlist the diplomatic service to strengthen overseas promotion efforts.
		2.4.9 Investment incentives, in whatever form (fiscal, financial or other), should be carefully assessed in terms of long-term costs and benefits prior to implementation, giving due consideration to potential distortion effects. The costs and benefits of incentives should be periodically reviewed and their effectiveness in achieving the desired objectives thoroughly evaluated.
		2.4.10 Where investment incentives are granted to support nascent industries, self-sustained viability (i.e. without the need for incentives) should be the ultimate goal so as to avoid subsidizing non-viable industries at the expense of the economy as a whole. A phase-out period built in the incentive structure is good practice, without precluding permanent tax measures to address positive or negative externalities.
		2.4.11 The rationale and justification for investment incentives should be directly and explicitly derived from the country's development strategy. Their effectiveness for achieving the objectives should be fully assessed before adoption, including through international comparability.
		2.4.12 The granting and administration of incentives should be the responsibility of an independent entity or ministry that does not have conflicting objectives or performance targets for investment attraction.
		2.4.13 Environmental, labour and other regulatory standards should not be lowered as a means to attract investment, or to compete for investment in a "regulatory race to the bottom".
		2.4.14 Investment incentives should be granted on the basis of a set of pre-determined, objective, clear and transparent criteria. They should be offered on a non-discriminatory basis to projects fulfilling these criteria. Compliance with the criteria (performance requirements) should be monitored on a regular basis as a condition to benefit from the incentives.
		2.4.15 Investment incentives over and above pre-defined incentives must be shown to make an exceptional contribution to development objectives, and additional requirements should be attached, including with a view to avoiding a "race to the top of incentives".
		2.4.16 Investment incentives offered by sub-national entities which have the discretion to grant incentives over and above the pre-defined limits, should be coordinated by a central investment authority to avoid investors "shopping around".
		Promotion of business linkages and spillovers
	2.4.18 Measures that Governments should consider to promote linkages include: (1) direct intermediation between national and foreign investors to close information gaps; (2) support (financial and other) to national companies for process or technology upgrading; (3) selective FDI targeting; (4) establishment of national norms and standards, along the lines of international ones (e.g. ISO standards); and (5) incentives for foreign investors to assist in upgrading of local SMEs and promotion of entrepreneurship.	
	2.4.19 Mandatory practices to promote linkages, such as joint-venture requirements, should be used sparingly and carefully considered to avoid unintended adverse effects.	
	2.4.20 Explicit responsibility and accountability should be assigned to the investment authority or IPA to nurture and promote business linkages established by foreign investors as part of its aftercare mandate.	
	2.4.21 Specific policies should encourage businesses to offer training to employees in skill areas deemed crucial in the country's policy on human resource development, including through performance requirements linked to investment incentives.	

Sections	Sub-sections	Policy Guidelines
<b>3 Investment-related policies</b>	<b>3.1 Trade policy</b> International trade agreements	3.1.1 Access to global markets is essential for resource- and efficiency-seeking foreign investors, and the size of local/regional markets is equally important for market-seeking investors. Active participation in international trade agreements (in particular the WTO) and enhanced integration at the regional level should be considered an integral part of development strategy and a key factor in promoting investment.
		3.1.2 Trade policies, including tariffs and non-tariff barriers, and trade promotion/facilitation measures (e.g. export finance, import insurance schemes, support to obtain compliance with international standards and norms) can selectively promote or discourage investment in specific industries. They should be defined in line with (industrial) development objectives and investment policy.
		3.1.3 Compliance costs and efficiency of border procedures should be periodically benchmarked against international best practice and should avoid as much as possible forming an obstacle to the attraction of export-oriented investment or investment that relies on imports of intermediate goods.
	<b>3.2 Tax policy</b> Corporate taxation	3.2.1 A periodic review, including international benchmarking, of corporate taxation (and fiscal incentives) for effectiveness, costs and benefits should be an integral part of investment policy. Reviews should consider costs linked to the structure of the tax regime, including (1) administrative and compliance costs for investors, (2) administrative and monitoring costs for the tax authorities, and (3) forgone revenue linked to tax evasion and/or tax engineering.
		3.2.2 Undue complexity of income tax law and regulations should be avoided and they should be accompanied by clear guidelines, as transparency, predictability and impartiality of the tax regime are essential for all investors, foreign and national alike.
		3.2.3 The tax system should tend to neutrality in its treatment of domestic and foreign investors.
		3.2.4 In line with a country's development strategy, incentives can be used for the encouragement of investment in specific industries or in order to achieve specific objectives (e.g. regional development, job creation, skills upgrading, technology dissemination).
		3.2.5 Fiscal incentives for investors should not by nature seek to compensate for an unattractive or inappropriate general tax regime. The general corporate income tax regime should be the norm and not the exception and proliferation of tax incentives should be avoided as they quickly lead to distortions, generate unintended tax avoidance opportunities, become difficult to monitor, create administrative costs and may end up protecting special interests at the expense of the general public.
		3.2.6 Well-established and clearly defined transfer pricing rules are essential to minimize tax engineering and tax evasion. Developing countries can build on international best practices. International cooperation between tax authorities is key to fight manipulative transfer pricing practices.
		3.2.7 Double taxation treaties are an effective tool to promote inward and outward FDI. Developing countries should carefully negotiate such treaties to ensure that the principle of "taxation at the source" prevails.
3.2.8 A country's international tax treaty network should focus on major countries of origin for the types of investment prioritized in its investment policy.		
<b>3.3 Intellectual property</b>	3.3.1 Laws and regulations for the protection of intellectual property rights and mechanisms for their enforcement should meet the need of prospective investors (especially where investment policy aims to attract investment in IP-sensitive industries) and encourage innovation and investment by domestic and foreign firms, while providing for sanctions against the abuse by IPR holders of IP rights (e.g. the exercise of IP rights in a manner that prevents the emergence of legitimate competing designs or technologies) and allowing for the pursuit of the public good. As national investors are frequently less aware of their IP rights they should be sensitized on the issue.	

Sections	Sub-sections	Policy Guidelines
Investment-related policies (continued)		<p>3.3.2 Developing countries are encouraged to integrate the flexibilities in IP protection granted under international treaties, including the WTO's TRIPS agreement, into national legislation and consider the extent to which these flexibilities can create opportunities for investment attraction (e.g. in the production of pharmaceuticals).</p>
	<b>3.4 Competition policy</b>	
	Competition laws and regulations	<p>3.4.1 Competition laws and regulations, covering practices in restraint of competition, abuse of market power and economic concentration together with effective monitoring and enforcement mechanisms, are essential to reap the benefits from investment and should provide fair rules and a level playing field for all investors, foreign and domestic.</p>
	Coordination of investment and competition authorities	<p>3.4.2 Investment policy makers should cooperate closely with competition authorities, with a view to addressing any anti-competitive practices by incumbent enterprises that may inhibit investment. Particular attention should be paid to priority industries and investment types.</p>
	M&As and privatizations	<p>3.4.3 Where investment policy pursues objectives for sectors that may be considered to fall under a public services obligation or for regulated sectors (e.g. public transport, utilities, telecommunications), competition authorities should be actively involved in the shaping of relevant policies and measures, coordinating closely with sectoral regulators.</p>
		<p>3.4.4 Competition laws and decisions related to M&amp;As, as well as the policy framework for privatizations, should support development strategy and investment policy objectives, and should ensure continued attractiveness of the relevant sector for further investment by avoiding market exclusivity and preventing abuse of dominant market power.</p>
		<p>3.4.5 Close coordination between competition authorities in neighbouring countries should be pursued in case of cross-border M&amp;As, particularly in small economies.</p>
	<b>3.5 Labour market regulation</b>	
	Balancing labour market flexibility and protection of employees	<p>3.5.1 Labour market regulations should support job creation objectives in investment policy, including through an appropriate degree of labour market flexibility. At the same time, employees should be protected from abusive labour practices.</p>
	Core labour standards	<p>3.5.2 Countries need to guarantee internationally recognized core labour standards, in particular regarding child labour, the right for collective representation and other core protections as guaranteed by the ILO conventions the country is a party to. Effective mechanisms to promote core labour standards should be put in place and applied equally to foreign and domestic firms.</p>
Adjustment costs of investment policy	<p>3.5.3 Adjustment costs or friction caused by shifting productive capacity and employment to priority investment areas, industries or activities as per investment policy should be addressed both in labour market policies (e.g. re-training, social support) and in investment policy (e.g. encouraging investors to help ease transition costs).</p>	
Hiring of international staff	<p>3.5.4 Expatriate staff can at times be critical to the success of individual investment projects. Labour policy and/or immigration policy should avoid unduly restricting or delaying the employment of foreign personnel, including in skilled trades/artisan jobs, by investors in order not to hinder the build-up of productive capacity. At the same time, employment opportunities for nationals in jobs they can adequately fill should be promoted.</p>	
	<p>3.5.5 Transfer of skills from expatriate staff to nationals should be actively encouraged, including through technical and vocational training requirements at the company level whenever expatriates are employed. The use of foreign employees in skilled trades/artisan jobs may be time-bound in order to encourage foreign invested firms to establish local linkages.</p>	

Sections	Sub-sections	Policy Guidelines
Investment-related policies (continued)	3.6 Access to land	3.6.1 More than the nature of land titles (full ownership, long-term lease, land-use rights or other), predictability and security are paramount for investors. Governments should aim to ease access to land titles, adequately register and protect them, and guarantee stability. Developing and properly administering a national cadastre system can be an effective tool to encourage investment.
	Titles	3.6.2 Full ownership of land or tradable land titles can help companies secure financing for investment, as land can be used as collateral. Transferable titles should be encouraged where specific country circumstances do not prevent this option.
	Agricultural land	3.6.3 Foreign ownership or user titles over agricultural land is particularly sensitive in most countries, in particular those with large rural populations and where food security is an issue. Governments should pay particular care in putting in place and enforcing regulations to protect the long-term national interest and not compromise it for short-term gains by special interest groups. Adherence to the UNCTAD, FAO, IFAD, and World Bank Principles for Responsible Agricultural Investment should be encouraged.
	Industrial land and industrial parks	3.6.4 The development of industrial, technology or services parks as public-private partnerships has worked well in a number of countries and can be an effective tool to facilitate access to fully-serviced land by (foreign) investors.
3.7 Corporate responsibility and governance	CSR standards	3.7.1 Governments should encourage compliance with high standards of responsible investment and corporate behaviour, including through: (1) capacity building and technical assistance to local industry to improve their ability to access markets or work with investors that prefer or require certified products; (2) public procurement criteria; (3) incorporating existing standards into regulatory initiatives, and/or turning voluntary standards (soft law) into regulation (hard law).
Corporate governance	3.7.2	Countries should aim to adopt international standards of corporate governance for large formal businesses under their company law or commercial code, in particular: (1) protection of minority shareholders; (2) transparency and disclosure on a timely, reliable and relevant basis; (3) external auditing of accounts; and (4) adoption of high standards and codes of good practices on corruption, health, environment, and safety issues. The OECD Principles of Corporate Governance and the UNCTAD Guidance on Good Practices in Corporate Governance Disclosure may serve as guidance.
Reporting standards	3.7.3	Corporate reporting standards should provide for disclosure by foreign-controlled firms on local ownership and control structures, finances and operations, and health, safety, social and environmental impacts, following international best practice. Recommendations by the UNCTAD Intergovernmental Working Group of Experts on International Standards of Accounting and Reporting (ISAR) may serve as guidance.
3.8 Environmental policy	Environmental impact of investment	3.8.1 Environmental impact assessments (EIA) should be part of investment policies; it is useful to classify projects based on a number of pre-defined criteria, including sector, nature, size and location to place more stringent or less stringent requirements on preliminary environmental impact assessments (or absence thereof).
Environmental dumping	3.8.2	Environmental norms, including EIA requirements, should be transparent, non-discriminatory vis-à-vis foreign investors, predictable and stable; Governments should ensure that environmental licensing procedures are conducted without undue delay and in full technical objectivity.
Environmental dumping	3.8.3	Foreign investors should be encouraged to adhere to international standards of environmental protection and committed not to engage in environmental dumping; in specific cases (e.g. mining or oil extraction), Governments may wish to legally require international best practices (including the use of technologies) to be strictly adhered to.

Sections	Sub-sections	Policy Guidelines	
<b>Investment-related policies (continued)</b>	<b>3.9 Infrastructure, concessioning and PPP policies</b> Opening infrastructure sectors to investors	<p>3.9.1 Given the potential contribution of private investment to building high-quality infrastructure, countries should consider the extent to which basic infrastructure sectors can be opened to domestic and foreign private investment, and under what conditions.</p> <p>3.9.2 In sectors opened to private investment, careful efforts should go into identifying specific projects to be taken up by private investors. Shortlists of projects for concessioning are a useful tool, and Governments should initially focus on projects of moderate complexity, where commercial gains are easier to realize for investors, and where the socio-economic gains are clearly measurable.</p> <p>3.9.3 Following strategic decisions on which sectors to open to private investment, Governments should put in place a carefully crafted legal framework for concession contracts and public-private partnerships. Given the long-term nature of concession agreements in infrastructure, the legal framework should provide significant assurances to investors, including regarding contractual terms and their enforcement, and property rights.</p> <p>3.9.4 The legal framework for concession contracts needs to adequately protect the long-term national interest and consumers, ensuring adequate sharing of risks between the private and public partners.</p> <p>3.9.5 Wherever possible, concessioning to private investors should aim to introduce competition so as not to replace a public monopoly with a private one. Placing natural monopolies under private concession should be limited to cases where it increases efficiency and the delivery of services. Putting in place appropriate competition and sectoral regulations should be considered a pre-requisite for the successful concessioning of infrastructure services.</p> <p>3.9.6 Given the complexity of contractual terms involved in large infrastructure concessions, strong institutions need to be put in place first in order to achieve desirable outcomes; in addition to strengthening sectoral regulators, countries should consider the establishment of a dedicated PPP unit.</p>	
	<b>4 Investment policy effectiveness</b>	<b>4.1 Public governance and institutions</b>	<p>4.1.1 In the implementation of investment policies Governments should strive to achieve: (1) integrity and impartiality across Government and independence of regulatory institutions, subject to clear reporting lines and accountability to elected officials; (2) transparency and predictability for investors; (3) a service-orientation towards investors, where warranted.</p> <p>4.1.2 Close cooperation and formal communication channels should be in place between institutions and agencies dealing with investors. The IPA should play a coordinating role given its comprehensive perspective on issues confronting investors.</p> <p>4.1.3 Governments should adopt effective anti-corruption legislation and fight corruption with appropriate administrative, institutional and judicial means, for which international best practices should serve as guidance. Investors should be held to adhere to good corporate governance principles, which include refraining from paying bribes and denouncing corrupt practices.</p>
		From framework to implementation	
		Inter-agency cooperation Anti-corruption efforts	

Sections	Sub-sections	Policy Guidelines
<b>Investment policy effectiveness</b> (continued)	4.2 Dynamic policy development	<p>4.2.1 Policy design and implementation is a continuous process of fine-tuning and adaptation to changing needs and circumstances. Periodic review (every 3-4 years) of performance against objectives should take place, with a view to:</p> <ul style="list-style-type: none"> <li>- verifying continued coherence of investment policy with overall development strategy</li> <li>- assessing investment policy effectiveness against objectives through a focused set of indicators</li> <li>- identifying and addressing underlying causes of underperformance</li> <li>- evaluating "return on investment" of the more costly investment policy measures (e.g. incentives).</li> </ul>
	4.3 Measuring investment policy effectiveness	<p>4.3.1 Objectives for investment policy should be the yard stick for measurement of policy effectiveness. (Where countries have a formal investment strategy it should set out such objectives, see 1.1 above.) They should break down objectives for investment attraction and development impact, and set clear priorities. Performance (especially in terms of investment attraction) should be benchmarked against peers.</p>
	4.3.2	<p>Indicators for objectives related to the <i>attraction of investment</i> may include:</p> <ul style="list-style-type: none"> <li>- investment inflows (total, by industry, activity,...),</li> <li>- investment flows as a share of gross output and capital formation (idem),</li> <li>- greenfield investment as a share of total investment,</li> <li>- positioning on UNCTAD's "<i>investment potential/performance matrix</i>".</li> </ul>
	4.3.3	<p>Indicators for objectives related to the <i>impact of investment</i> may include:</p> <ul style="list-style-type: none"> <li>- value added of investment activity,</li> <li>- value of capital formation,</li> <li>- export generation,</li> <li>- contribution to the creation of formal business entities,</li> <li>- fiscal revenues,</li> <li>- employment generation and wage contribution,</li> <li>- technology and skills contribution (e.g. as measured through the skill-types of jobs created),</li> <li>- social and environmental measures,</li> <li>- positioning on UNCTAD's "<i>investment contribution matrix</i>".</li> </ul>

## IV. Elements of International Investment Agreements: Policy Options

The guidance on international investment policies set out in this chapter aims to translate the Core Principles into concrete options for policymakers, with a view to addressing today's investment policy challenges. While national investment policymakers address these challenges through rules, regulations, institutions and initiatives, at the international level policy is translated through a complex web of treaties (including, principally, bilateral investment treaties, free trade agreements with investment provisions, economic partnership agreements and regional agreements).<sup>9</sup> As discussed in chapter I, the complexity of that web, which leads to gaps, overlaps and inconsistencies in the system of IIAs, is itself one of the challenges to be addressed. The other is the need to strengthen the development dimension of IIAs, balancing the rights and obligations of States and investors, ensuring sufficient policy space for sustainable development policies and making investment promotion provisions more concrete and aligned with sustainable development objectives.

International investment policy challenges must be addressed at three levels:

1. When formulating their *strategic approach to international engagement on investment*, policymakers need to embed international investment policymaking into their countries' development strategies. This involves managing the interaction between IIAs and national policies (e.g. ensuring that IIAs support industrial policies (WIR11)) and that between IIAs and other international policies or agreements (e.g. ensuring that IIAs do not contradict international environmental agreements (WIR10) or human rights obligations). The overall objective is to ensure coherence between IIAs and sustainable development needs.
2. *In the detailed design of provisions in investment agreements* between countries, policymakers need to incorporate sustainable development considerations, addressing concerns related to policy space (e.g.,

through reservations and exceptions), balanced rights and obligations of States and investors (e.g., through encouraging compliance with CSR standards), and effective investment promotion (e.g., through home-country measures).

3. *Multilateral consensus building on investment policy*, in turn, can help address some of the systemic challenges stemming from the multi-layered and multi-faceted nature of the IIA regime, including the gaps, overlaps and inconsistencies in the system, its multiple dispute resolution mechanisms, and its piecemeal and erratic expansion.

This chapter, therefore, first discusses how policymakers can strategically engage in the international investment regime at different levels and in different ways in the interest of sustainable development. It then provides a set of options for the detailed design of IIAs. The final chapter of this report (chapter V) will suggest an avenue for further consensus building and international cooperation on investment policy.

UNCTAD's proposed options for addressing the challenges described above come at a time when a multitude of investment stakeholders are putting forward suggestions for the future of IIA policymaking. With the recently adopted European Union-United States Statement on Shared Principles for International Investment, the revision of the International Chamber of Commerce (ICC) Guidelines for International Investment, and the release of the new United States model BIT, IIA policymaking is in one of its more dynamic evolutionary stages, providing a window of opportunity to strengthen the sustainable development dimension of IIAs.

### 1. Defining the role of IIAs in countries' development strategy and investment policy

International investment instruments are an integral part of investment policymaking that supports investment promotion objectives but that can



also constrain investment and development policymaking. As a promotion tool, IIAs complement national rules and regulations by offering additional assurances to foreign investors concerning the protection of their investments and the stability, transparency and predictability of the national policy framework. As to the constraints, these could take many forms: they could limit options for developing countries in the formulation of development strategies that might call for differential treatment of investors, e.g. industrial policies (see *WIR11*); or they could hinder policymaking in general, including for sustainable development objectives, where investors could perceive new measures as unfavourable to their interests and resort to IIA-defined dispute settlement procedures outside the normal domestic legal process.

Given such potential constraints on policymaking, it is important to ensure the coherence of IIAs with other economic policies (e.g. trade, industrial, technology, infrastructure or enterprise policies that aim at building productive capacity and strengthening countries' competitiveness) as well as with non-economic policies (e.g. environmental, social, health or cultural policies).<sup>10</sup> Policymakers should carefully set out an agenda for international engagement and negotiation on investment (including the revision and renegotiation of existing agreements).

When considering the pros and cons of engaging in IIAs, policymakers should have a clear understanding of what IIAs can and cannot achieve.

- IIAs *can*, by adding an international dimension to investment protection and by fostering stability, predictability and transparency, reinforce investor confidence and thus promote investment. From an investor's perspective, IIAs essentially act as an insurance policy, especially important for investments in countries with unfavourable country-risk ratings.
- IIAs *can* promote investment in other ways beyond granting investor protection. Some IIAs include commitments on the part of home countries to promote outward investment or to engage in collaborative initiatives for this purpose (although this is currently a small minority of treaties).<sup>11</sup>

- IIAs *can* help to build and advertise a more attractive investment climate. By establishing international commitments, they can foster good governance and facilitate or support domestic reforms.
- On the other hand, IIAs alone *cannot* turn a bad domestic investment climate into a good one and they cannot guarantee the inflow of foreign investment. There is no mono-causal link between the conclusion of an IIA and FDI inflows; IIAs play a complementary role among many determinants that drive firms' investment decisions.<sup>12</sup> Most importantly, IIAs cannot be a substitute for domestic policies and a sound national regulatory framework for investment.

Host countries' engagement in the current IIA system may not be solely driven by a clear and explicit design that grounds their treaties in a solid development purpose, but rather influenced by the negotiation goals of their treaty partners or other non-economic considerations.<sup>13</sup> As such, there is a risk that IIAs, in number and substance, become largely a vehicle for the protection of interests of investors and home countries without giving due consideration to the development concerns of developing countries. Not surprisingly, a detailed analysis of the substance of model treaties of major outward investing countries shows that, on average, treaty provisions are heavily skewed towards providing a high level of protection, with limited concessions to development aspects that can be a trade-off against investor protection (i.e. leaving countries more policy space generally implies granting less protection to investors). This trade-off suggests that there may be an inherent development challenge in IIAs: developing countries with the most unfavourable risk ratings are most in need of the protecting qualities of IIAs to attract investment, but they are generally also the countries most in need of flexibility (or policy space) for specific development policies.

Moreover, not only low-income developing countries may experience IIAs as a straightjacket, but also higher income countries, and even developed market economies, are sometimes faced with unexpected consequences of their own treaties. As more and more countries with sound and credible

domestic legal systems and stable investment climates continue to conclude IIAs granting high levels of investor protection, they risk being confronted themselves with investor-State dispute settlement (ISDS) rules originally intended to shield their investors abroad. This risk is exacerbated by the changing investor landscape, in which more and more developing countries, against whose policies the IIA protective shield was originally directed, are becoming important outward investors in their own right, turning the tables on the original developed country IIA *demandeurs*. Spelling out the underlying drivers and objectives of a country's approach to IIAs thus becomes important not only for developing countries, but also for developed ones.

In addition to taking into account the development purpose of IIAs, in defining their agenda for international engagement and negotiation on investment, IIA policymakers should:

- *Consider the type of agreements to prioritize*, and whether to go for dedicated agreements on investment or for investment provisions integrated in broader agreements, e.g. covering also trade, competition and/or other policy areas. The latter option provides for comprehensive treatment of inter-related issues in different policy areas. It also recognizes the strong interaction between trade and investment and the blurring boundaries between the two (due to the phenomenon of non-equity modes of international production; see *WIR11*), as well as the FDI and trade inducing effect of enlarged markets.
- *Consider whether to pursue international engagement* on investment policy in the context of regional economic cooperation or integration or through bilateral agreements. For smaller developing countries, with limited potential to attract market-seeking investment in their own right, opportunities for regional integration and collaboration on investment policy, particularly when combined with potentially FDI-inducing regional trade integration (UNCTAD 2009), may well take priority over other types of investment agreements. The benefits of this approach may be largest when combined with technical

assistance and efforts towards regulatory cooperation and institution building.

- *Set priorities – where countries pursue bilateral collaboration on investment – in terms of treaty partners* (i.e. prioritize the most important home countries of international investors in sectors that are key in the country's development strategy and where foreign involvement is desired).

Furthermore, international engagement on investment policy should recognize that international agreements interact with each other and with other bodies of international law. Policymakers should be aware, for example, that commitments made to some treaty partners may easily filter through to others through most-favoured nation (MFN) clauses, with possibly unintended consequences. Commitments may clash, or hard-won concessions in a negotiation (e.g. on policy space for performance requirements) may be undone through prior or subsequent treaties.

Finally, a particularly sensitive policy issue is whether to include liberalization commitments in IIAs by granting pre-establishment rights to foreign investors. Most IIAs grant protection to investments from the moment they are established in the host State; the host country thus retains discretion with respect to the admission of foreign investors to its market. However, in recent years an increasing number of IIAs include provisions that apply in the pre-establishment phase of investment, contributing to a more open environment for investment, at the cost of a lower degree of discretion in regulating entry matters domestically. When granting pre-establishment rights, managing the interaction between international and national policies is particularly crucial: policymakers can use IIAs to bind – at the international level – the degree of openness granted in domestic laws; or they can use IIA negotiations as a driving force for change, fostering greater openness at the national level (*WIR04*).<sup>14</sup> Granting pre-establishment rights also adds new complexities to the interaction between agreements. For example, a question may arise whether an unqualified MFN clause of a pre-establishment IIA could allow investors to enforce host countries' obligations under the WTO GATS agreement through ISDS.<sup>15</sup>

The following section, which discusses how today's investment policy challenges can be addressed in the content and detailed provisions of IIAs, covers both pre- and post-establishment issues. Policymakers have so far mostly opted for agreements limited to the post-establishment phase of investment; where they opt for pre-establishment coverage, numerous tools are available to calibrate obligations in line with their countries' specific needs.

## 2. Negotiating sustainable-development-friendly IIAs

Addressing sustainable development challenges through the detailed design of provisions in investment agreements principally implies four areas of evolution in treaty-making practice. Such change can be promoted either by including new elements and clauses into IIAs, or by taking a fresh approach to existing, traditional elements.

1. *Incorporating concrete commitments to promote and facilitate investment for sustainable development:* Currently, IIAs mostly promote foreign investment only indirectly through the granting of investment protection – i.e. obligations on the part of host countries – and do not contain commitments by home countries to promote responsible investment. Most treaties include hortatory language on encouraging investment in preambles or non-binding provisions on investment promotion. Options to improve the investment promotion aspect of treaties include concrete facilitation mechanisms (information sharing, investment promotion forums), outward investment promotion schemes (insurance and guarantees), technical assistance and capacity-building initiatives targeted at sustainable investment, supported by appropriate institutional arrangements for long-term cooperation.
2. *Balancing State commitments with investor obligations and promoting responsible investment:* Most IIAs currently provide for State obligations but do not specify investor obligations or responsibilities. Legally binding obligations on companies and individuals are stipulated by national law but are absent in international treaties, which traditionally do

not apply to private parties directly.<sup>16</sup> However, there are examples where IIAs impose obligations on investors (e.g. COMESA Investment Agreement of 2007<sup>17</sup>) or where international conventions establish criminal responsibility of individuals (e.g. the Rome Statute of the International Criminal Court). These examples, together with the changes in the understanding of the nature and functions of international law, would suggest that international treaties can, in principle, impose obligations on private parties.<sup>18</sup> While stopping short of framing IIAs so as to impose outright obligations on investors, a few options may merit consideration.

For example, IIAs could include a requirement for investors to comply with investment-related national laws of the host State when making and operating an investment, and even at the post-operations stage (e.g., environmental clean-up), provided that such laws conform to the host country's international obligations, including those in the IIA.<sup>19</sup> Such an investor obligation could be the basis for further stipulating in the IIA the consequences of an investor's failure to comply with domestic laws, such as the right of host States to make a counter-claim in ISDS proceedings with the investor.

In addition, IIAs could refer to commonly recognized international standards (e.g. the UN Guidelines on Business and Human Rights). This would not only help balance State commitments with investor obligations but also support the spread of CSR standards – which are becoming an ever more important feature of the investment policy landscape (*WIR11*). Options for treaty language in this regard could range from commitments to promote best international CSR standards to ensuring that tribunals consider an investor's compliance with CSR standards when deciding an ISDS case.

3. *Ensuring an appropriate balance between protection commitments and regulatory space for development:* IIAs protect foreign investment by committing host country governments to grant certain

standards of treatment and protection to foreign investors; it is the very nature of an IIA's standards of protection, and the attendant stabilizing effect, to place limits on government regulatory freedom. For example, where host governments aim to differentiate between domestic and foreign investors, or require specific corporate behaviour, they would be constrained by IIA provisions on non-discrimination or on performance requirements. In addition, to the extent that foreign investors perceive domestic policy changes to negatively affect their expectations, they may challenge them under IIAs by starting arbitration proceedings against host States. Countries can safeguard some policy space by carefully crafting the structure of IIAs and by clarifying the scope and meaning of particularly vague treaty provisions such as the fair and equitable treatment standard and expropriation as well as by using specific flexibility mechanisms such as general or national security exceptions and reservations. More recent IIA models, such as the one adopted by the United States in 2004, offer examples in this regard. The right balance between protecting foreign investment and maintaining policy space for domestic regulation should flow from each country's development strategy, ensuring that flexibility mechanisms do not erode a principal objective of IIAs – their potentially investment enhancing effect.

4. *Shielding host countries from unjustified liabilities and high procedural costs:* Most IIAs reinforce their investment protection provisions by allowing investors directly to pursue relief through investor-State dispute settlement (ISDS). The strength of IIAs in granting protection to foreign investors has become increasingly evident through the number of ISDS cases brought over the last decade, most of which are directed at developing countries. Host countries have faced claims of up to \$114 billion<sup>20</sup> and awards of up to \$867 million.<sup>21</sup> Added to these financial liabilities are the costs of procedures, all together putting a significant burden on defending countries and

exacerbating the concerns related to policy space. Host countries – both developed and developing – have experienced that the possibility of bringing ISDS claims can be used by foreign investors in unanticipated ways. A number of recent cases have challenged measures adopted in the public interest (e.g. measures to promote social equity, foster environmental protection or protect public health), and show that the borderline between protection from political risk and undue interference with legitimate domestic policies is becoming increasingly blurred. Shielding countries from unjustified liabilities and excessive procedural costs through treaty design thus involves looking at options both in ISDS provisions themselves and in the scope and application of substantive clauses (see below).

These areas of evolution are also relevant for “pre-establishment IIAs”, i.e. agreements that – in addition to protecting established investors – contain binding rules regarding the establishment of new investments. While a growing number of countries opt for the pre-establishment approach, it is crucial to ensure that any market opening through IIAs is in line with host countries' development strategies. Relevant provisions opt for selective liberalization, containing numerous exceptions and reservations designed to protect a country from over-committing and/or ensuring flexibilities in the relevant treaty obligations (see box 8).

These four types of evolution in current treaty practice filter through to specific clauses in different ways. The following are examples of how this would work, focusing on some of the key provisions of current treaty practice – scope and definition, national treatment, most-favoured nation treatment, fair and equitable treatment, expropriation and ISDS. In addition to shaping specific clauses, sustainable development concerns can also be addressed individually, e.g. through special and differential treatment (SDT), a key aspect of the multilateral trading system but largely unknown in IIA practice (see box 9).

- *Scope and Definition:* An IIA's coverage determines the investments/investors that

### Box 8. Pre-establishment commitments in IIAs

Pre-establishment IIAs signal that a country is generally committed to an open investment environment, although the fact that a country “only” concludes post-establishment IIAs does not necessarily mean that it follows a restrictive FDI policy. Also, pre-establishment commitments in IIAs do not necessarily have to mirror the actual degree of openness of an economy. Establishment rights in IIAs can remain below this level or go beyond it, i.e. IIAs can be used to open up hitherto closed industries to foreign investors.

Pre-establishment IIAs typically operate by extending national treatment and MFN treatment to the “establishment, acquisition and expansion” of investments. This prevents each contracting party from treating investors from the other contracting party less favourably than it treats its own investors and/or investors from other countries in these matters.

Properly defining the scope of pre-establishment commitments is key. The two main mechanisms are the positive and negative listing of sectors/industries. Under the latter, investors benefit from pre-establishment commitments in all industries except in those that are explicitly excluded. The negative-list approach is more demanding in terms of resources: it requires a thorough audit of existing domestic policies. In addition, under a negative-list approach and in the absence of specific reservations, a country commits to openness also in those sectors/activities, which, at the time the IIA is signed, may not yet exist in the country, or where regulatory frameworks are still evolving. In contrast, a positive-list approach offers selective liberalization by way of drawing up a list of industries in which investors will enjoy pre-establishment rights. Another, more limited method is to include a positive list of “committed” industries and complement it by a list of reservations preserving certain measures or aspects in those industries (“hybrid”, or GATS-type approach).

Pre-establishment treaties display a range of options – typically through country-specific reservations – for preserving policy flexibility even in “committed” industries (see the IPFSD IIA-elements table, Part B, on pre-establishment options).

Source: UNCTAD.

benefit from the protection offered by the IIA. Past disputes have demonstrated the potential of IIAs to be interpreted broadly, so as to apply to types of transactions that were originally not envisaged to benefit from the IIA (such as government debt securities).<sup>22</sup> When negotiating an IIA with a stronger sustainable development dimension, it may thus be appropriate to safeguard policy space and exclude some types of financial transactions (e.g. portfolio investment or short-term, speculative financial flows) from a treaty's scope and to focus application of the treaty to those types of investment that the contracting parties wish to attract (e.g. direct investment in productive assets).

Whether IIAs should exclude portfolio investment is a policy choice that has been subject to intense debate. Portfolio investment can make a contribution to development by providing financial capital. However, the sometimes volatile nature of portfolio investment flows can be damaging. At the practical level, portfolio and direct investment are often difficult to differentiate, both in

terms of identifying relevant financial flows of either type, and in terms of targeted policy instruments.

It may also be appropriate to exclude from a treaty's scope specific areas of public policy or specific (sensitive) economic sectors. Or, in order to limit liability and to avoid “treaty shopping” and “roundtrip investment”, it may be appropriate to confine application to genuine investors from the contracting parties, excluding investments that are only channelled through legal entities based in the contracting parties.

- *National Treatment (NT)*: National treatment protects foreign investors against discrimination vis-à-vis comparable domestic investors, with a view to ensuring a “level playing field”. Non-discriminatory treatment is generally considered conducive to good governance and is, in principle, enshrined in many countries' domestic regulatory frameworks. Nevertheless, even if national treatment is provided under domestic legislation, countries may be reluctant to “lock in” all aspects of their domestic regulatory

### Box 9. Special and differential treatment (SDT) and IIAs

A large number of IIAs are concluded between developed and developing countries. SDT gives legal expression to the special needs and concerns of developing countries and/or least developed countries in international (economic) agreements. It is based on the notion that treaty parties at different stages of development should not necessarily be bound by the same obligations.

Expression of the principle can be found in a multilateral context in over 145 provisions of WTO agreements<sup>23</sup> essentially i) granting less onerous obligations to developing countries – either permanently or temporarily; and/or ii) imposing special obligations on developed countries vis-à-vis developing countries.<sup>24</sup> Over time, SDT has found its way into other aspects of international relations, most prominently international environmental law, including the climate change framework.

Thus far, SDT has largely been absent from IIAs. Despite incorporating the general concepts of policy space and flexibility for development, IIAs – being mostly of a bilateral nature – are based on legal symmetry and reciprocity, meaning that the rights and obligations of the parties are generally the same. Moreover, IIAs typically do not deal with pre-establishment/market access issues, for which SDT considerations are particularly relevant.

Exceptionally, however, the COMESA Investment Agreement contains an SDT clarification with respect to the fair and equitable treatment standard: “*For greater certainty, Member States understand that different Member States have different forms of administrative, legislative and judicial systems and that Member States at different levels of development may not achieve the same standards at the same time.*”<sup>25</sup>

Reinvigorating SDT with a view to making IIAs work better for sustainable development could take a number of forms. For example, lower levels of obligations for developing countries could be achieved through i) development-focused exceptions from obligations/commitments; ii) best endeavour commitments for developing countries; iii) asymmetrically phased implementation timetables with longer time frames for developing countries; or iv) a development-oriented interpretation of treaty obligations by arbitral tribunals. Best endeavour commitments by more advanced countries could, for example, relate to: i) technical assistance and training (e.g. assisting in the handling of ISDS cases or when putting in place appropriate domestic regulatory systems to ensure compliance with obligations); ii) promotion of the transfer/dissemination of technology; iii) support and advice for companies from developing countries (e.g. to become outward investors or adopt CSR standards); iv) investment promotion (e.g. provide outward investment incentives such as investment guarantees, tax breaks).

While SDT remains largely absent from IIAs, negotiators could consider adding SDT elements, offering a further promising tool for making IIAs more sustainable-development-friendly, particularly for least-developed and low-income countries.

Source: UNCTAD.

framework at the international level (e.g. private sector development initiatives, including regulatory, financial or fiscal incentives) and, depending on their development strategy, States may wish to afford preferential treatment to national investors/investments as part of industrial development policies or for other reasons. In such cases, negotiators could circumscribe the scope of national treatment clauses and/or allow for derogations (e.g. through the lodging of reservations excluding sectors, policy areas or specific measures from its application (see *WIR11*)).

- *Most-Favoured-Nation (MFN) Treatment*: MFN clauses aim to prevent discrimination between

comparable investors of different foreign nationality. The meaning of such treatment has been subject to diverging and unanticipated interpretations by tribunals. Several arbitral decisions interpreted MFN as allowing investors to invoke more investor-friendly language from treaties between the respondent State and a third country, thereby effectively sidelining the “base” treaty (i.e. the actual treaty between the investor’s home and host country on the basis of which the case was brought). This practice can be seen in a positive light as “upward harmonization” of IIA standards or in a negative one as “cherry picking” best clauses from different treaties, endangering individual treaty bargains. MFN treatment

needs to be carefully considered, particularly in light of countries' growing networks of IIAs with different obligations and agreements including pre-establishment issues. To avoid misinterpretation, IIAs have started explicitly to exclude dispute settlement issues as well as obligations undertaken in treaties with third States from the scope of the MFN obligation. Other options include limiting the clause's reach through country-specific reservations.

- *Fair and Equitable Treatment (FET)*: The obligation to accord fair and equitable treatment to foreign investments appears in the great majority of IIAs. Investors (claimants) have frequently – and with considerable success – invoked it in ISDS. There is a great deal of uncertainty concerning the precise meaning of the concept, because the notions of “fairness” and “equity” do not connote a clear set of legal prescriptions in international investment law and allow for a significant degree of subjective judgment. Some tribunals have read an extensive list of disciplines into the FET clause, which are taxing on any State, but especially on developing and least-developed countries; lack of clarity persists regarding the appropriate threshold of liability. The use of FET to protect investors' legitimate expectations can indirectly restrict countries' ability to change investment-related policies or to introduce new policies – including those for the public good – that may have a negative impact on individual foreign investors. Options to reduce uncertainty regarding States' liabilities and to preserve policy space include qualifying or clarifying the FET clause, including by way of an exhaustive list of State obligations under FET, or even considering omitting it.
- *Expropriation*: An expropriation provision protects foreign investors/investments against dispossession or confiscation of their property by the host country without compensation. As most IIAs also prohibit indirect expropriation (i.e. apply to regulatory takings), and as some arbitral tribunals have tended to interpret this broadly (i.e. including legitimate regulatory measures in the pursuit of the public interest), the expropriation clause has the potential to pose undue constraints on a State's regulatory

capacity. To avoid this, policymakers could clarify the notion of indirect expropriation and introduce criteria to distinguish between indirect expropriation and legitimate regulation that does not require compensation.

- *Investor-State Dispute Settlement (ISDS)*: Originally, the system of international investor-State arbitration was conceived as an effective tool to enforce foreign investors' rights. It offered direct access to international arbitration for investors to avoid national courts of host countries and to solve disputes in a neutral forum that was expected to be cheap, fast, and flexible. It was meant to provide finality and enforceability, and to depoliticise disputes. While some of these advantages remain valid, the ISDS system has more recently displayed serious shortcomings (e.g. inconsistent and unintended interpretations of clauses, unanticipated uses of the system by investors, challenges against policy measures taken in the public interest, costly and lengthy procedures, limited or no transparency), undermining its legitimacy. While some ISDS concerns can be addressed effectively only through a broader approach requiring international collaboration, negotiators can go some way to improving the institutional and procedural aspects of ISDS and to limiting liability and the risk of becoming embroiled in costly procedures. They can do so by qualifying the scope of consent given to ISDS, promoting the use of alternative dispute resolution (ADR) methods, increasing transparency of procedures, encouraging arbitral tribunals to take into account standards of investor behaviour when settling investor-State disputes, limiting resort to ISDS and increasing the role of domestic judicial systems, providing for the possibility of counterclaims by States, or even refraining from offering ISDS.<sup>26</sup>

### 3. IIA elements: policy options

The IPFSD table on IIA-elements (see page 47-62) contains a comprehensive compilation of policy options available to IIA negotiators, including options to operationalize sustainable development objectives (also see table 5). The

options include both mainstream IIA provisions as well as more idiosyncratic treaty language used by fewer countries. In some instances, the IPFSD IIA-elements table contains new suggestions by UNCTAD.<sup>27</sup>

As a comprehensive set of policy options, the IPFSD IIA-elements table aims to represent two different approaches on the design of IIAs. At one side of the spectrum is the school of thought that prefers IIAs with straightforward provisions focusing on investment protection and limiting clarifications and qualifications to the minimum. At the other side, a comprehensive approach to investment policymaking adds a host of considerations – including on sustainable development – in the wording of IIA clauses.

The objective of the IPFSD IIA-elements table is to provide policymakers with an overview of options for designing an IIA. It offers a broad menu from which IIA negotiators can pick and choose. This table is not meant to identify preferred options for IIA negotiators or to go so far as to suggest a model IIA. However, the table briefly comments on the various drafting possibilities with regard to each IIA provision and highlights – where appropriate – their implications for sustainable development. It is hoped that these explanations will help IIA negotiators identify those drafting options that best suit their countries' needs, preferences and objectives.

The IPFSD IIA-elements table includes various options that could be particularly supportive of sustainable development. Examples are:

- Including a carefully crafted scope and definitions clause that excludes portfolio, short-term or speculative investments from treaty coverage.
- Formulating an FET clause as an exhaustive list of State obligations (e.g. not to (i) deny justice in judicial or administrative procedures, (ii) treat investors in a manifestly arbitrary manner, (iii) flagrantly violate due process, etc.).
- Clarifying – to the extent possible – the distinction between legitimate regulatory activity and regulatory takings (indirect expropriations) giving rise to compensation.

- Limiting the Full Protection and Security (FPS) provision to “physical” security and protection only and specifying that protection shall be commensurate with the country’s level of development.
- Limiting the scope of a transfer of funds clause by providing an exhaustive list of covered payments/transfers; including exceptions in case of serious balance-of-payments difficulties; and conditioning the transfer right on the investor’s compliance with its fiscal and other transfer-related obligations in the host country.
- Including carefully crafted exceptions to protect human rights, health, core labour standards and the environment, with well working checks and balances, so as to guarantee policy space while avoiding abuse.
- Considering, in light of the quality of the host country’s administrative and judicial system, the option of “no ISDS” or of designing the dispute settlement clause to make ISDS the last resort (e.g. after exhaustion of local remedies and ADR).
- Establishing an institutional set-up that makes the IIA adaptable to changing development contexts and major unanticipated developments (e.g. ad hoc committees to assess the effectiveness of the agreement and to further improve its implementation through amendments or interpretations).

The IPFSD IIA-elements table recognizes that specific policy objectives can be pursued by different treaty elements, thereby inviting treaty drafters to choose their “best-fit” combination. For example, a country that wishes to preserve regulatory space for policies aimed at ensuring access to essential services can opt for (i) excluding investments in essential services from the scope of the treaty; (ii) excluding essential services policies from the scope of specific provisions (e.g. national treatment); (iii) scheduling reservations (for national treatment or the prohibition of performance requirements) for specific (existing and/or future) essential services policies; (iv) including access to essential services as a legitimate policy objective in the IIA’s general exceptions; or (v) referring to the importance of ensuring access to essential services in the preamble of the agreement.



Table 5. Policy options to operationalize sustainable development objectives in IIAs

Options	Mechanisms	Examples
<b>Adjusting existing/ common provisions</b> to make them more sustainable-development-friendly through clauses that: <ul style="list-style-type: none"> <li>• safeguard policy space</li> <li>• limit State liability</li> </ul>	Hortatory language	- <i>Preamble</i> : stating that attracting responsible foreign investment that fosters sustainable development is one of the key objectives of the treaty.
	Clarifications	- <i>Expropriation</i> : specifying that non-discriminatory good faith regulations pursuing public policy objectives do not constitute indirect expropriation. - <i>FET</i> : including an exhaustive list of State obligations.
	Qualifications/ limitations	- <i>Scope and definition</i> : requiring covered investments to fulfill specific characteristics, e.g., positive development impact on the host country.
	Reservations/ carve-outs	- <i>Country-specific reservations</i> to NT, MFN or pre-establishment obligations, carving out policy measures (e.g. subsidies), policy areas (e.g. policies on minorities, indigenous communities) or sectors (e.g. social services).
	Exclusions from coverage/ exceptions	- <i>Scope and definition</i> : excluding portfolio, short-term or speculative investments from treaty coverage. - <i>General exception</i> for domestic regulatory measures that aim to pursue legitimate public policy objectives.
	Omissions	- Omit FET, umbrella clause.
<b>Adding new provisions</b> or new, stronger paragraphs within provisions for sustainable development purposes to: <ul style="list-style-type: none"> <li>• balance investor rights and responsibilities</li> <li>• promote responsible investment</li> <li>• strengthen home-country support</li> </ul>	Investor obligations and responsibilities	- Requirement that investors comply with host State laws at both the entry and the post-entry stage of an investment. - Encouragement to investors to comply with universal principles or to observe applicable CSR standards.
	Institutional set-up for sustainable development impact	- Institutional set-up under which State parties cooperate to e.g. review the functioning of the IIA or issue interpretations of IIA clauses. - Call for cooperation between the Parties to promote observance of applicable CSR standards.
	Home-country measures to promote responsible investment	- Encouragement to offer incentives for sustainable-development-friendly outward investment; investor compliance with applicable CSR standards may be an additional condition. - Technical assistance provisions to facilitate the implementation of the IIA and to maximize its sustainable development impact, including through capacity building on investment promotion and facilitation.
<b>Introducing Special and Differential Treatment</b> for the less developed Party – with effect on both existing and new provisions – to: <ul style="list-style-type: none"> <li>• calibrate the level of obligations to the country's level of development</li> </ul>	Lower levels of obligations	- Pre-establishment commitments that cover fewer economic activities.
	Development-focused exceptions from obligations/ commitments	- Reservations, carving out sensitive development related areas, issues or measures.
	Best endeavour commitments	- FET, NT commitments that are not legally binding.
	Asymmetric implementation timetables	- Phase-in of obligations, including pre-establishment, NT, MFN, performance requirements, transfer of funds and transparency.

Source: UNCTAD.

The IPFSD IIA-elements table likewise reflects that negotiators can determine the normative intensity of IIA provisions: they can ensure the legally binding and enforceable nature of some obligations while at the same time resorting to hortatory, best endeavour language for others. These choices can help negotiators design a level of protection best suited to the specific circumstances of negotiating partners and in line with the need for proper balancing between investment protection and policy space for sustainable development.

The ultimate shape of an IIA is the result of a specific combination of options that exist in respect of each IIA provision. It is this blend that determines where on a spectrum between utmost investor protection and maximum policy flexibility a particular IIA is located. The same holds true for the IIA's impact on sustainable development. Combinations of and interactions between IIA provisions can take a number of forms:

- *Interaction between a treaty's scope/definitions and the obligations it establishes for the contracting parties:* An agreement's "protective strength" stems not only from the substantive and procedural standards of protection it offers to investors, but also from the breadth and variety of categories of investors and investments it covers (i.e. that benefit from the standards of protection offered by the IIA). Hence, when designing a particular IIA and calibrating the degree of protection it grants, negotiators can use different combinations of the two. For example, (i) a broad open-ended definition of investment could be combined with few substantive obligations, or with obligations formulated in a manner reducing their "bite"; or (ii) a narrow definition of investment (e.g. covering direct investments in a few priority sectors only) could be combined with more expansive protections such as an unqualified FET standard or the prohibition of numerous performance requirements.
- *Interaction between protection-oriented clauses:* Some IIAs combine narrowly drafted clauses in some areas with "broad" provisions in others. An example is the combination between a carefully circumscribed

expropriation clause and an unqualified FET provision. Another option is to limit the impact of ISDS by either formulating substantive standards of protection as best endeavour (i.e. hortatory) clauses, or by precluding the use of ISDS in respect of particularly vague treaty articles, such as the FET standard.<sup>28</sup> Under such scenarios, protective standards may still have a good-governance-enhancing effect on host countries' regulatory framework, while reducing the risk to be drawn into ISDS. Consideration also has to be given to the interaction with the MFN provision: with the inclusion of a "broad" MFN clause, investors may be tempted to circumvent "weak" protection clauses by relying on more protective (i.e. "stronger") clauses in treaties with third parties.

- *Interaction between protection and exceptions:* Strong protection clauses and effective flexibilities for contracting parties are not mutually exclusive; rather, the combination of the two helps achieve a balanced agreement that meets the needs of different investment stakeholders. For example, an IIA can combine "strong" substantive protection (e.g. non-discrimination, capital transfer guarantees) with "strong" exceptions (e.g. national security exceptions or general exceptions to protect essential public policy objectives).<sup>29</sup>

The policy options presented in the IPFSD IIA-elements table are grounded in the Core Principles. For example, (i) the principle of investment protection directly manifests itself in IIA clauses on FET, non-discrimination, capital transfer, protection in case of expropriation or protection from strife; (ii) the principle of good governance is reflected, amongst others, in IIA clauses that aim at increasing host State's transparency regarding laws and regulations or in IIA clauses that foster transparency by the foreign investor vis-à-vis the host State; (iii) the right to regulate principle is reflected, amongst others, in IIA clauses stating that investments need to be in accordance with the host country's laws, allowing countries to lodge reservations (including for future policies); clarifying and circumscribing the content of indirect expropriation or general exceptions.

**UNCTAD's Investment Policy Framework for Sustainable Development***Elements of International Investment Agreements: Policy Options***Summary of contents**

Sections	Description
<b>Part A. Post-establishment</b>	
1 Preamble	... sets out objectives of the treaty and the intentions of the Contracting Parties
2 Treaty scope	... defines the investment and investors protected under the treaty and its temporal application
3 Admission	... governs entry of investments into the host State
4 Standards of treatment and protection	... prescribe the treatment, protection and rights which host States are required to accord foreign investors/investments
5 Public policy exceptions	... permit public policy measures, otherwise inconsistent with the treaty, to be taken under specified, exceptional circumstances
6 Dispute settlement	... governs settlement of disputes between the Contracting Parties and those between foreign investors and host States
7 Investor obligations and responsibilities	... promote compliance by investors with domestic and/or international norms at the entry and operation stage
8 Relationship to other agreements	... establishes a hierarchy in case of competing international norms
9 Not lowering of standards clause	... discourages Contracting Parties from attracting investment through the relaxation of labour or environmental standards
10 Investment promotion	... aims to encourage foreign investment through additional means beyond investment protection provisions in IIAs
11 Institutional set-up	... establishes an institutional platform for collaboration between the Contracting Parties
12 Final provisions	... define the duration of the treaty, including its possible prolongation
<b>Part B. Pre-establishment</b>	
1 Pre-establishment obligations	... govern establishment of foreign investments in the host State
<b>Part C. Special and Differential Treatment (SDT)</b>	
1 Asymmetrical obligations	... enable imposition of less onerous obligations on a less developed Contracting Party
2 Additional tools	... encourage positive contributions by a more developed Contracting Party

## UNCTAD's Investment Policy Framework for Sustainable Development

### Policy options for IIAs Part A. Post-establishment

The different sections of the table, starting with the preamble and closing with the final provisions, follow the order of articles as commonly found in IIAs. Where possible, the policy options are organized along a scale ranging from i) the most investor-friendly or most protective to ii) the options providing more flexibility to the State, balance and/or legal precision. In some sections, two or more policy options can be combined.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
<b>1 Preamble</b> ... sets out objectives of the treaty and the intentions of the Contracting Parties	1.1.0 Refer to the objective of creating and maintaining favourable conditions for investment and intensifying economic cooperation between the Parties. 1.1.1 Clarify that the Parties conclude this IIA with a view to <ul style="list-style-type: none"> <li>- attracting and fostering responsible inward and outward foreign investment that contributes to SD</li> <li>- promoting good governance.</li> </ul> 1.1.2 Clarify that the investor protection objectives shall not override States' right to regulate in the public interest as well as with respect to certain important policy goals, such as: <ul style="list-style-type: none"> <li>- SD</li> <li>- protection of human rights</li> <li>- maintenance of health, labour and/or environmental standards</li> <li>- corporate social responsibility and good corporate governance.</li> </ul> 1.1.3 Indicate that the promotion and protection of investments should be pursued in compliance with the Parties' obligations under international law including in particular their obligations with respect to human rights, labour rights and protection of the environment.	The treaty preamble does not set out binding obligations but plays a significant role in interpreting substantive IIA provisions.  When a preamble refers to the creation of "a stable framework for investments" or "favourable conditions for investments" as the sole aim of the treaty (i.e. if the IIA only refers to those objectives), tribunals will tend to resolve interpretive uncertainties in favour of investors. In contrast, where a preamble complements investment promotion and protection objectives with other objectives such as SD, the Millennium Development Goals (MDGs) or the Contracting Parties' right to regulate, this can lead to more balanced interpretations and foster coherence between different policy objectives/bodies of law.
<b>2 Treaty scope</b>	2.1.0 Offer coverage of any tangible and intangible assets in the host State (through an illustrative/open-ended list), directly or indirectly owned/controlled by covered investors. 2.1.1 Compile an exhaustive list of covered investments and/or exclude specific types of assets from coverage, e.g.: <ul style="list-style-type: none"> <li>- portfolio investment</li> <li>- sovereign debt instruments</li> <li>- commercial contracts for the sale of goods or services</li> <li>- assets for non-business purposes</li> <li>- intellectual property rights not protected under domestic law.</li> </ul> 2.1.2 Require investments to fulfil specific characteristics, e.g. that the investment: <ul style="list-style-type: none"> <li>- involves commitment of capital, expectation of profit and assumption of risk</li> <li>- involves assets acquired for the purpose of establishing lasting economic relations</li> <li>- must be made in "accordance with host country laws and regulations"</li> <li>- delivers a positive development impact on the host country (i.e. Parties could list specific criteria according to their needs and expectations).</li> </ul>	A traditional open-ended definition of "investment" grants protection to all types of assets. It may have the strongest attraction effect but can end up covering economic transactions not contemplated by the Parties or investments/assets with questionable SD contribution. It may also expose States to unexpected liabilities.  States may want to tailor their definition of investment to target assets conducive to SD by granting protection only to investments that bring concrete benefits to the host country, e.g. long-term capital commitment, employment generation etc. To that effect, the Parties may wish to develop criteria for development-friendly investments.  A treaty may further specifically exclude certain types of assets from the definition of "investment" (e.g. portfolio investment – which can include short-term and speculative investments – intellectual property rights that are not protected under domestic legislation).

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
<p><b>2.2 Definition of investor</b> ... sets out the types of investors protected under the treaty</p>	<p>2.2.0 Offer coverage of any natural and legal persons originating from the other Contracting Party. With respect to legal entities, cover all those established in the other Contracting Party.</p> <p>2.2.1 Exclude certain categories of natural or legal persons from treaty coverage, e.g.: - investors with double nationality (of which one is the host country nationality) - permanent residents of the host country - legal entities that do not have their seat or any real economic activity in the home country.</p> <p>2.2.2 Include a denial-of-benefits clause that enables the host State to deny treaty protection to: - legal entities that are owned/controlled by third-country nationals or host State nationals and that do not have real economic activity in the of the home Party ("mailbox" companies) - legal entities owned/controlled by investors from countries with which the host country does not have diplomatic relations or those countries that are subject to an economic embargo.</p>	<p>A broad definition of "investor" can result in unanticipated or unintended coverage of persons (natural or legal). For example, if a treaty determines the nationality of a legal entity solely on the basis of the place of incorporation, it creates opportunities for treaty shopping or free riding by investors not conceived to be beneficiaries (e.g. a third-country/host-country investor may channel its investment through a "mailbox" company established in the territory of a Party, in order to obtain treaty protection). A related set of issues arises with respect to dual nationals where one nationality is that of the host State.</p> <p>There are various options to narrow the range of covered persons. For example, to eliminate the risk of abuse and enhance legal predictability, a treaty may add a requirement that a company must have its seat in the home State and carry out real economic activities there. An alternative is to supplement the country-of-incorporation approach to determining nationality of a company with a denial-of-benefits clause.</p>
<p><b>2.3 Exclusions from the scope</b> ... carve out specific policy areas and/or industries from the scope of the treaty</p>	<p>2.3.0 No exclusions.</p> <p>2.3.1 Exclude specific policy areas from treaty coverage, e.g.: - subsidies and grants - public procurement - taxation.</p> <p>2.3.2 Exclude specific sectors and industries from treaty coverage, e.g.: - essential social services (e.g. health, education) - specific sensitive industries (e.g. cultural industries, fisheries, nuclear energy, defence industry, natural resources).</p>	<p>The broader a treaty's scope, the wider its protective effect and its potential contribution to the attraction of foreign investment. However, a broad treaty also reduces a host State's policy space and flexibility and ultimately heightens its exposure to investors' claims. States can tailor the scope of the agreement to meet the country's SD agenda.</p> <p>By carving out specific policy areas and sectors/industries from treaty coverage, States preserve flexibility to implement national policies, such as industrial policies (e.g. to grant preferential treatment to domestic investors or to impose performance requirements), or to ensure access to essential/public services.</p>
<p><b>2.4 Temporal scope</b> ... determines whether the treaty applies to investments and/or measures pre-dating the treaty</p>	<p>2.4.0 Extend the treaty scope to investments established both before and after the treaty's entry into force.</p> <p>2.4.1 Limit temporal scope to investments made after the conclusion/entry into force of the treaty.</p> <p>2.4.2 Clarify that the treaty shall not allow IIA claims arising out of any State acts which ceased to exist prior to the IIAs entry into force, even though it may still have an ongoing effect on the investor.</p> <p>2.4.3 Clarify that the treaty shall not allow IIA claims based on measures adopted prior to conclusion of the treaty.</p>	<p>The treaty's scope will be widest if its application is extended to all investments, regardless of the time of their establishment in the host State. Another approach is to exclude already "attracted" (i.e. pre-treaty) investments: it could be seen as preventing free-riding by "old" investors but at the same time would result in discrimination between "old" and "new" investments. Moreover, this can create uncertainty with respect to re-investments by "old" investors.</p>
		<p>Policy-makers should consider the effect of the treaty on State acts, adopted prior to the treaty's entry into force, but with a lasting effect: «continuing» breaches (e.g. maintenance of an earlier legislative provision which comes into conflict with treaty obligations), individual acts whose effects continue over time (e.g. effect of a direct expropriation on the former owner of the asset) and «composite» acts, i.e. a series of actions or omissions which, taken together, are wrongful. It is useful to provide additional language to clarify whether the treaty would cover or exclude such lasting acts or effects.</p>

## Sections

## Policy options for international investment agreements (IIAs)

## Sustainable development (SD) implications

An express provision that precludes application of the treaty to acts that ceased to exist before the treaty's entry into force would enhance legal certainty, especially with regard to the period between the date of the treaty's signature and its entry into force. This approach would nevertheless keep open to challenge those prior laws and regulations that come into contradiction with the new treaty once it enters into force. An alternative is to apply the treaty only to those measures that are adopted after the treaty's entry into force: this would automatically preclude all of the State's earlier non-conforming measures from being challenged (e.g., preferential treatment to domestic investors in a particular industry in violation of the National Treatment obligation), eliminating the need to identify and schedule such measures individually.

Most IIAs provide for admission of investments in accordance with the host State's national laws. Thus, unlike in the treaties that belong to the "pre-establishment" type, in this case States do not give any international guarantees of admission and can change relevant domestic laws as they deem appropriate. However, the promise to admit investments in accordance with domestic law still has a certain value as it affords protection to investors in case a host State refuses admission in contradiction or by disregarding its internal laws.

NT guarantees foreign investors a level-playing field vis-à-vis comparable domestic investors and is generally considered conducive to good governance. Yet under some circumstances, and in accordance with their SD strategies, States may want to be able to accord preferential treatment to national investors/investments (e.g. through temporary grants or subsidies) without extending the same benefits to foreign-owned companies. In this case, NT provisions need to allow flexibility to regulate for SD goals.

For example, countries with a nascent/emerging regulatory framework that are reluctant to rescind the right to discriminate in favour of domestic investors can make the NT obligation "subject to their domestic laws and regulations". This approach gives full flexibility to grant preferential (e.g. differentiated) treatment to domestic investors as long as this is in accordance with the country's legislation. However, such a significant limitation to the NT obligation may be perceived as a disincentive to foreign investors. Even more so, omitting the NT clause from the treaty may significantly undermine its protective value.

There can be a middle ground between full policy freedom, on the one hand, and a rigid guarantee of non-discrimination, on the other. For example, States may exempt specific policy areas or measures as well as sensitive or vital economic sectors/industries from the scope of the obligation in order to meet both current and future regulatory or public-policy needs such as addressing market failures (this can be done either as an exception applicable to both Contracting Parties or as a country-specific reservation).

<b>3 Admission</b> ... govern entry into the host State (see also "Part B: Pre-establishment")	3.1.0 Provide that investments are admitted in accordance with domestic laws of the host State.  3.1.1 No clause.
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**4 Standards of treatment and protection**

<b>4.1 National treatment (NT)</b> ... protects foreign investors/investments against discrimination vis-à-vis domestic investors	4.1.0 Prohibit less favourable treatment of covered foreign investors/investments vis-à-vis comparable domestic investors/investments, without restrictions or qualifications.  4.1.1 Circumscribe the scope of the NT clause (for both/all Contracting Parties), noting that it, e.g.: - subordinates the right of NT to a host country's domestic laws - reserves the right of each Party to derogate from NT - does not apply to certain policy areas (e.g. subsidies, government procurement).  4.1.2 Include country-specific reservations to NT, e.g. carve-out: - certain policies/measures (e.g. subsidies and grants, government procurement, measures regarding government bonds) - specific sectors/industries where the host countries wish to preserve the right to favour domestic investors - certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities) - measures related to companies of a specific size (e.g. SMEs).  4.1.3 Omit NT clause.
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Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
<p><b>4.2 Most-favoured nation (MFN) treatment</b> ... protects foreign investors/investments against discrimination vis-à-vis other foreign investors</p>	<p>4.2.0 Prohibit less favourable treatment of covered investors/investments vis-à-vis comparable investors/investments of any third country.</p> <p>4.2.1 Limit the application of the MFN clause, noting that MFN does not apply to more favourable treatment granted to third-country investors under, e.g.:</p> <ul style="list-style-type: none"> <li>- Economic integration agreements</li> <li>- Double taxation treaties</li> <li>- IIAs concluded prior to (and/or after) the conclusion of the IIA in question (e.g. if the latter contains rules that are less favourable to investors, as compared to earlier IIAs)</li> <li>- ISDS clauses / procedural rights.</li> </ul> <p>4.2.2 Limit the application of the MFN clause to treatment accorded to foreign investors under domestic laws, regulations, administrative practices and de facto treatment.</p> <p>4.2.3 Include country-specific reservations to MFN, e.g. carve out:</p> <ul style="list-style-type: none"> <li>- certain policies/measures (e.g. subsidies, etc.)</li> <li>- specific sectors/industries</li> <li>- certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities)</li> </ul>	<p>The MFN provision ensures a level-playing field between investors from the IIA home country and comparable investors from any third country. However, competing objectives and implications may come into play when designing an MFN clause. While an MFN clause may be used to ensure upward harmonization of IIA treaty standards, it can also result in the unanticipated incorporation of stronger investor rights from IIAs with third countries and complicate consensual treaty design. This is particularly the case if the MFN clause extends to pre-establishment issues or when the treaty includes carefully balanced provisions that could be rendered ineffective by an overly broad MFN clause.</p> <p>An example of the latter are recent arbitral decisions that have read the MFN obligation as allowing investors to invoke more investor-friendly provisions from third treaties, e.g. to incorporate standards not included in the base treaty, to benefit from higher protection standards compared to the ones found in the base treaty or to circumvent procedural (ISDS-related) requirements in the base treaty.</p> <p>Should a country wish to preclude the MFN clause from applying to any relevant international agreement, it can do so by excluding specific types of instruments from the scope of the MFN clause (see section 4.2.1) or, in a broader manner, by restricting the scope of the MFN clause to domestic treatment (see section 4.2.2). Carving out certain sectors/industries or policy measures through country-specific reservations, catering for both current and future regulatory needs, is an additional tool that allows managing the scope of the MFN clause in a manner targeted to the specific needs of individual IIA Parties.</p>
<p><b>4.3 Fair and equitable treatment (FET)</b> ... protects foreign investors/investments against, e.g. denial of justice, arbitrary and abusive treatment</p>	<p>4.3.0 Give an unqualified commitment to treat foreign investors/investments "fairly and equitably".</p> <p>4.3.1 Qualify the FET standard by reference to:</p> <ul style="list-style-type: none"> <li>- minimum standard of treatment of aliens under customary international law (MST/CIL)</li> <li>- international law or principles of international law.</li> </ul> <p>4.3.2 Include an exhaustive list of State obligations under FET, e.g. obligation not to</p> <ul style="list-style-type: none"> <li>- deny justice in judicial or administrative proceedings</li> <li>- treat investors in a manifestly arbitrary manner</li> <li>- flagrantly violate due process</li> <li>- engage in manifestly abusive treatment involving continuous, unjustified coercion or harassment</li> <li>- infringe investors' legitimate expectations based on investment-inducing representations or measures.</li> </ul> <p>4.3.3 Clarify (with a view to giving interpretative guidance to arbitral tribunals) that:</p> <ul style="list-style-type: none"> <li>- the FET clause does not preclude States from adopting good faith regulatory or other measures that pursue legitimate policy objectives</li> <li>- the investor's conduct (including the observance of universally recognized standards, see section 7) is relevant in determining whether the FET standard has been breached</li> <li>- the country's level of development is relevant in determining whether the FET standard has been breached</li> <li>- a breach of another provision of the IIA or of another international agreement cannot establish a claim for breach of the clause.</li> </ul> <p>4.3.4 Omit FET clause.</p>	<p>FET is a critical standard of treatment: while it is considered to help attract foreign investors and foster good governance in the host State, almost all claims brought to date by investors against States have included an allegation of the breach of this all-encompassing standard of protection.</p> <p>Through an <i>unqualified</i> promise to treat investors "fairly and equitably", a country provides maximum protection for investors but also risks posing limits on its policy space, raising its exposure to foreign investors' claims and resulting financial liabilities. Some of these implications stem from the fact that there is a great deal of uncertainty concerning the precise meaning of the concept, because the notions of "fairness" and "equity" do not connote a clear set of legal prescriptions and are open to subjective interpretations. A particularly problematic issue concerns the use of the FET standard to protect investors' "legitimate expectations", which may restrict the ability of countries to change policies or to introduce new policies that - while pursuing SD objectives - may have a negative impact on foreign investors.</p> <p>Several options exist to address the deficiencies of <i>unqualified</i> FET standard, each with its pros and cons. The reference to customary international law may raise the threshold of State liability and help to preserve States' ability to adapt public policies in light of changing objectives (except when these measures constitute manifestly arbitrary conduct that amounts to egregious mistreatment of foreign investors), but the exact contours of MST/CIL remain elusive. An omission of the FET clause would reduce States' exposure to investor claims, but foreign investors may perceive the country as not offering a sound and reliable investment climate. Another solution would be to replace the general FET clause with an exhaustive list of more specific obligations. While agreeing on such a list may turn out to be a challenging endeavour, its exhaustive nature would help avoid unanticipated and far-reaching interpretations by tribunals.</p>

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
<p><b>4.4 Full protection and security (FPS)</b> ...requires host States to exercise due diligence in protecting foreign investments</p>	<p>4.4.0 Include a guarantee to provide investors/investments full protection and security.</p> <p>4.4.1 Clarify the FPS clause by:</p> <ul style="list-style-type: none"> <li>- specifying that the standard refers to “physical” security and protection</li> <li>- linking it to customary international law (e.g. specifying that this obligation does not go beyond what is required by CIL)</li> <li>- providing that the expected level of police protection should be commensurate with the level of development of the country’s police and security forces.</li> </ul> <p>4.4.2 Omit FPS clause.</p>	<p>Most IIAs include a guarantee of full protection and security (FPS), which is generally regarded as codifying customary international law obligations to grant a certain level of police protection and physical security. However, some tribunals may interpret the FPS obligation so as to cover more than just police protection: if FPS is understood to include economic, legal and other protection and security, it can constrain government regulatory prerogatives, including for SD objectives.</p> <p> Policymakers may follow a recent trend to qualify the FPS standard by explicitly linking it to customary international law or including a definition of the standard clarifying that it is limited to “physical” security. This would provide predictability and prevent expansive interpretations that would constrain regulatory prerogatives.</p>
<p><b>4.5 Expropriation</b> ... protects foreign investors in case of dispossession of their investments by the host country</p>	<p>4.5.0 Provide that an expropriation must comply with/respect four conditions: public purpose, non-discrimination, due process and payment of compensation.</p> <p>4.5.1 Limit protection in case of indirect expropriation (regulatory taking) by</p> <ul style="list-style-type: none"> <li>- establishing criteria that need to be met for indirect expropriation to be found</li> <li>- defining in general terms what measures do not constitute indirect expropriation (non-discriminatory good faith regulations relating to public health and safety, protection of the environment, etc.)</li> <li>- clarifying that certain specific measures do not constitute an indirect expropriation (e.g. compulsory licensing in compliance with WTO rules).</li> </ul> <p>4.5.2 Specify the compensation to be paid in case of lawful expropriation:</p> <ul style="list-style-type: none"> <li>- appropriate, just or equitable compensation</li> <li>- prompt, adequate and effective compensation, i.e. full market value of the investment (“Hull formula”).</li> </ul> <p>4.5.3 Clarify that only expropriations violating any of the three substantive conditions (public purpose, non-discrimination, due process), entail full reparation.</p>	<p>An expropriation provision is a fundamental element of an IIA. IIAs with expropriation clauses do not take away States’ right to expropriate property, but protect investors against arbitrary or uncompensated expropriations, contributing to a stable and predictable legal framework, conducive to foreign investment.</p> <p>IIA provisions typically cover “indirect” expropriation, which refers to regulatory takings, creeping expropriation and acts “tantamount to” or “equivalent to” expropriation. Such provisions have been used to challenge general regulations with an alleged negative effect on the value of an investment. This raises the question of the proper borderline between expropriation and legitimate public policy making (e.g. environmental, social or health regulations).</p> <p>To avoid undue constraints on a State’s prerogative to regulate in the public interest, an IIA may set out general criteria for State acts that may (or may not) be considered an indirect expropriation. While this does not exclude liability risks altogether, it allows for better balancing of investor and State interests.</p> <p>The standard of compensation for lawful expropriation is another important aspect. The use of terms such as “appropriate”, “just” or “fair” in relation to compensation gives room for flexibility in the calculation of compensation. States may find it beneficial to provide further guidance to arbitrators on how to calculate compensation and clarify what factors should be taken into account.</p>
<p><b>4.6 Protection from strife</b> ... protects investors in case of losses incurred as a result of armed conflict or civil strife</p>	<p>4.6.0 Grant non-discriminatory (i.e. NT, MFN) treatment with respect to restitution/compensation in case of armed conflict or civil strife.</p> <p>4.6.1 Guarantee – under certain circumstances – compensation in case of losses incurred as a result of armed conflict or civil strife as an absolute right (e.g. by requiring reasonable compensation).</p> <p>4.6.2 Define civil strife as not including “acts of God”, natural disasters or force majeure.</p> <p>4.6.3 Omit protection-from-strife clause.</p>	<p>IIAs often contain a clause on compensation for losses incurred under specific circumstances, such as armed conflict or civil strife. Some countries have expanded the coverage of such a clause by including compensation in case of natural disasters or <i>force majeure</i> situations. Such a broad approach increases the risk for a State to face financial liabilities arising out of ISDS claims for events outside of the State’s control.</p> <p>Most IIAs only confer a relative right to compensation on foreign investors, meaning that a host country undertakes to compensate covered investors in a manner at least equivalent to comparable host State nationals or investors from third countries. Some IIAs provide an absolute right to compensation obliging a State to reconstitute or pay for certain types of losses (e.g. those caused by the requisitioning of their property by government forces or authorities). The latter approach is more burdensome for host States but provides a higher level of protection to investors.</p>



Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
<p><b>4.7 Transfer of funds</b> ... grants the right to free movement of investment-related financial flows into and out of the host country</p>	<p>4.7.0 Grant foreign investors the right to freely transfer any investment-related funds (e.g. open ended list) into and out of the host country.</p> <p>4.7.1 Provide an exhaustive list of types of qualifying transfers.</p> <p>4.7.2 Include exceptions (e.g. temporary derogations):</p> <ul style="list-style-type: none"> <li>- in the event of serious balance-of-payments and external financial difficulties or threat thereof</li> <li>- where movements of funds cause or threaten to cause serious difficulties in macro-economic management, in particular, related to monetary and exchange rate policies.</li> </ul> <p>Condition these exceptions to prevent their abuse (e.g. application in line with IMF rules and respecting conditions of temporality, equity, non-discrimination, good faith and proportionality).</p> <p>4.7.3 Reserve the right of host States to restrict an investor's transfer of funds in connection with the country's (equitable, non-discriminatory, and good faith application of its) laws, relating to, e.g.:</p> <ul style="list-style-type: none"> <li>- fiscal obligations of the investor/investment in the host country</li> <li>- reporting requirements in relation to currency transfers</li> <li>- bankruptcy, insolvency, or the protection of the rights of creditors</li> <li>- issuing, trading, or dealing in securities, futures, options, or derivatives</li> <li>- criminal or penal offences (e.g. imposing criminal penalties)</li> <li>- prevention of money laundering</li> <li>- compliance with orders or judgments in judicial or administrative proceedings.</li> </ul>	<p>IIAs virtually always contain a clause regarding investment-related transfers. The objective is to ensure that a foreign investor can make free use of invested capital, returns on investment and other payments related to the establishment, operation or disposal of an investment.</p> <p>However, an unqualified transfer-of-funds provision significantly reduces a host country's ability to deal with sudden and massive outflows or inflows of capital, balance-of-payments (BoP) difficulties and other macroeconomic problems. An exception increasingly found in recent IIAs allows States to impose restrictions on the free transfer of funds in specific circumstances, usually qualified by checks and balances (safeguards) to prevent misuse.</p> <p>Countries may also need to reserve their right to restrict transfers if this is required for the enforcement of the Party's laws (e.g. to prevent fraud on creditors etc.), again with checks and balances to prevent abuse.</p>
<p><b>4.8 Transparency</b> ... fosters access to information</p>	<p>4.8.0 Require Contracting Parties to promptly publish documents which may affect covered investments, including e.g.</p> <ul style="list-style-type: none"> <li>- laws and regulations</li> <li>- procedures/administrative rulings of general application</li> <li>- IIAs.</li> </ul> <p>4.8.1 Require countries to grant investment-related information upon request.</p> <p>4.8.2 Require countries to publish in advance measures that they propose to adopt regarding matters covered by the IIA and to provide a reasonable opportunity for affected stakeholders (investors) to comment (prior-comment procedures).</p> <p>4.8.3 Explicitly reserve host States' rights and/or encourage State Parties</p> <ul style="list-style-type: none"> <li>- to implement policies placing transparency and disclosure requirements on investors</li> <li>- to seek information from a potential (or already established) investor or its home State</li> <li>- to make relevant information available to the public</li> </ul> <p>Qualify with an obligation upon the State to protect confidential information.</p> <p>4.8.4 No clause.</p>	<p>Some IIAs include a clause requiring countries to promptly publish laws and regulations. Providing investors (prospective and established ones) with access to such information improves a country's investment climate. This might, however, also pose administrative difficulties for some countries that do not have the human resources and technological infrastructure required. The treaty may incorporate commitments to provide technical assistance to developing countries to support implementation. The administrative burden imposed by transparency obligations could be lessened by using phrases such as "to the extent possible".</p> <p>The few IIAs that contain so-called "prior-comment procedures" require an even higher level of action by governments and may expose States to lobbying and pressure in the process of developing those laws.</p> <p>Transparency obligations are often excluded from the scope of ISDS (see 6.2.4). They can still be useful, given that any related problems can be discussed on a State-State level and addressed through technical assistance.</p> <p>Transparency provisions generally do not include any reference to transparency obligations applicable to investors. This contributes to the perception that IIAs lack i) corporate governance enhancing features; and ii) balance in the rights and obligations. IIAs could encourage States to strengthen domestic transparency requirements (e.g. including mechanisms for due diligence procedures).</p>

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<p><b>4.9 Performance requirements</b> ... regulate the extent to which host States can impose certain operational conditions on foreign investors/investments</p>	<p>4.9.0 Preclude Contracting Parties from placing trade-related performance requirements (e.g. local content requirements) on investments operating in the goods sector (in accordance with/incorporating the WTO TRIMs Agreement).</p> <p>4.9.1 Preclude Contracting Parties from placing performance requirements on investments, beyond trade-related ones, e.g. requirements to transfer technology, to achieve a certain level of R&amp;D operations or to employ a certain percentage of local personnel (TRIMs +).</p> <p>4.9.2 Preclude Contracting Parties from imposing performance requirements unless they are linked to the granting of incentives (usually in combination with the above TRIMs + option).</p> <p>4.9.3 Include country-specific reservations to the TRIMs+ obligation, e.g. carving out: - certain policies/measures (e.g. subsidies) - specific sectors/industries (e.g. banking, defence, fisheries, forestry, transport, infrastructure, social services) - certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities) - measures related to companies of a specific size (e.g. SMEs).</p> <p>4.9.4 No clause prohibiting imposition of performance requirements</p>	<p>Performance requirements (PRs) refer to the imposition of conditions on businesses limiting their economic choices and managerial discretion (e.g. requirements to use locally produced inputs or to export a certain percentage of production). While PRs may be considered as creating economic inefficiencies, they can also be a potentially important tool for industrial or other economic development policies. From the transfer of technology to the employment of local workers, PRs can help materialize expected spill-over effects from foreign investment.</p> <p>Thus, to reap the full benefits of foreign investment and to align investment policy with SD objectives, policymakers need to carefully consider the need for policy flexibility when devising clauses on PRs. This is important, even if the IIA simply refers to the WTO TRIMs Agreement (because even though this does not add any new obligations on States who are also WTO members, the incorporation of TRIMs into an IIA gives investors the opportunity to directly challenge a TRIMs violation through ISDS). It is particularly important when considering the prohibition of an extensive list of PRs beyond TRIMs (e.g. requirements to transfer technology or employ local workers). The relevant exceptions and reservations should be considered from the point of view of both current and future regulatory needs. Finally, even if the IIA does not contain a clause explicitly ruling out PRs, the NT clause would prohibit the discriminatory imposition of PRs on foreign investors only.</p>
<p><b>4.10 «Umbrella» clause</b> ... establishes a commitment on the part of the host State to respect its obligations regarding specific investments (including in investment contracts)</p>	<p>4.10.0 Include a clause that requires each Party to observe any obligation (e.g. contractual) which it has assumed with respect to an investment of a covered investor.</p> <p>4.10.1 Clarify that a breach of the “umbrella” clause may only result from an exercise of sovereign powers by a government (i.e. not an ordinary breach of contract by the State) and that disputes arising from such breaches shall be settled in the forum prescribed by the contract.</p> <p>4.10.2 Introduce a “two-way” umbrella clause that requires both the State and the investor to observe their specific obligations related to the investment.</p> <p>4.10.3 No “umbrella” clause.</p>	<p>An “umbrella” clause requires a host State to respect any obligation assumed by it with regard to a specific investment (for example, in an investment contract). The clause thus brings contractual and other individual obligations under the “umbrella” of the IIA, making them potentially enforceable through ISDS. By subjecting contractual violations to IIA arbitration an umbrella clause therefore makes it even more important for countries to have the technical capacity to carefully craft the respective contractual arrangements (e.g. when they enter into investment or concession contracts).</p> <p>The main difficulties with “umbrella” clauses are that they (1) effectively expand the scope of the IIA by incorporating non-treaty obligations of the host State into the treaty, which may increase the risk of being faced with costly legal proceedings, and (2) have given rise to conflicting interpretations by investor-State tribunals resulting in a high degree of unpredictability.</p> <p>One way of solving these problems – followed by many countries – would be to omit the “umbrella” clause from their IIAs. This means that an investor party to an investment contract would always have to show a breach of an IIA obligation, and not a breach of the contract. Alternatively, a country may clarify the scope of the umbrella clause and the competent dispute settlement forum to avoid conflicting interpretations. Finally, there is an option to make the umbrella clause work both ways, that is, to use it to incorporate into the IIA not only a State’s obligations but also those of an investor, which would give States an opportunity to bring counterclaims against investors in the relevant ISDS proceedings.</p>

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<p><b>4.11 Personnel and staffing</b> ... facilitates the entry, sojourn and employment of foreign personnel</p>	<p>4.11.0 Provide for the facilitation of entry, sojourn and issuing of work permits for nationals of one Party (or individuals regardless of nationality) into the territory of the other Party for purposes relating to an investment, subject to national immigration and other laws, covering: - all personnel, including families - only senior management and key personnel.</p> <p>4.11.1 Ensure the right of investors to make appointments to senior management positions without regard to nationality.</p> <p>4.11.2 Include country-specific reservations to the senior-management obligation (section 4.11.1), e.g. carve out: - certain policies/measures - specific sectors/industries - certain policy areas (minorities, indigenous communities) - measures related to companies of a specific size.</p> <p>4.11.3 No clause.</p>	<p>Facilitating the entry and sojourn of foreign employees and the right to hire expatriate personnel (including senior management and members of the board of directors) can help to attract foreign investment.</p> <p>At the same time these provisions interact with host State's immigration laws - a particularly sensitive area of policy making. It is important that host States retain control over their immigration policies or ensure coherence between relevant international and national regulations.</p> <p>Moreover, States may wish to encourage SD-related spill-overs such as employment for domestic or indigenous workers and trickle-down effects with respect to technological knowledge (e.g. by requiring foreign investments to employ indigenous personnel or by limiting the number of expatriate personnel working for the investor).</p> <p>Carefully choosing the right normative intensity (e.g. opting for a best-efforts approach), and other mechanisms for preserving flexibility (e.g. ensuring the priority of national laws) are key.</p>
<p><b>5 Public policy exceptions</b> ... permit public policy measures, otherwise inconsistent with the treaty, to be taken under specified, exceptional circumstances</p>	<p>5.1.0 No public policy exceptions.</p> <p>5.1.1 Include exceptions for national security measures and/or measures related to the maintenance of international peace and security: - formulate the exception as not self-judging (can be subject to arbitral review) - formulate the exception as self-judging.</p> <p>5.1.2 Broaden the exception by clarifying that national security may encompass economic security.</p> <p>5.1.3 Limit the exception by specifying: - that the exception only relates to certain types of measures, e.g. those relating to trafficking in arms or nuclear non-proliferation; or taken in pursuance of States' obligations under the UN Charter for the maintenance of international peace and security - that it only applies in times of war or armed conflict or an emergency in international relations.</p> <p>5.1.4 Include exceptions for domestic regulatory measures that aim to pursue legitimate public policy objectives, e.g. to: - protect human rights - protect public health - preserve the environment (e.g. biodiversity, climate change) - protect public morals or maintain public order - preserve cultural and/or linguistic diversity - ensure compliance with laws and regulations that are not inconsistent with the treaty - allow for prudential measures (e.g. to preserve the integrity and stability of the financial system) - ensure the provision of essential social services (e.g. health, education, water supply) - allow for broader safeguards, including on developmental grounds (to address host countries' trade, financial and developmental needs) - prevent tax evasion - protect national treasures of artistic, historic or archaeological value (or "cultural heritage").</p>	<p>To date few IIAs include public policy exceptions. However, more recent treaties increasingly reaffirm States' right to regulate in the public interest by introducing general exceptions. Such provisions make IIAs more conducive to SD goals, foster coherence between IIAs and other public policy objectives, and reduce States' exposure to claims arising from any conflict that may occur between the interests of a foreign investor and the promotion and protection of legitimate public-interest objectives.</p> <p>Exceptions allow for measures, otherwise prohibited by the agreement, to be taken under specified circumstances. General exceptions identify the policy areas for which flexibility is to be preserved.</p> <p>A number of features determine how easy or difficult it is for a State to use an exception. To avoid review of the relevant measure by a court or a tribunal, the general exception can be made self-judging (i.e. the necessity/appropriateness of the measure is judged only by the invoking State itself). This approach gives a wide margin of discretion to States, reduces legal certainty for investors and potentially opens possibilities for abuse. In contrast, exceptions designed as not self-judging imply that in case of a dispute, a court or tribunal will be able to determine whether the measure in question is allowed by the exception.</p> <p>In order to facilitate the use of exceptions by States, the provision may adjust the required link between the measure and the alleged policy objective pursued by this measure. For example, instead of providing that the measure must be "necessary" to achieve the policy objective, the IIA could require that the measure be "related" to the policy objective.</p> <p>Finally, in order to prevent abuse of exceptions, it is useful to clarify that "exceptional" measures must be applied in a non-arbitrary manner and not as disguised investment protectionism.</p>

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	<p>5.1.5 Prevent abuse of the exceptions by host States:</p> <ul style="list-style-type: none"> <li>- provide that «exceptional» measures shall not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors, or a disguised restriction on international trade or investment</li> <li>- choose the appropriate threshold which an “exceptional” measure must meet, e.g. the measure must be “necessary” (indispensable) to achieve the alleged policy objective, or be “related” (making a contribution) to this policy objective.</li> </ul>	
<b>6 Dispute settlement</b>		
<b>6.1 State-State</b>	<p>6.1.0 Establish that any unresolved IIA-related disputes can be submitted to State-State dispute settlement (arbitration).</p> <p>6.1.1 Provide an option or require that the States engage in prior consultations and negotiations and/or resort to conciliation or mediation.</p>	<p>To date, State-State arbitrations under IIAs have been very rare. This is a natural consequence of including ISDS into IIAs (and investors themselves taking host States to arbitration) to complement the system of diplomatic protection.</p> <p>However, if a question about the meaning of a specific IIA obligation arises, and the Contracting Parties fail to resolve the uncertainty through consultations, a State-State arbitration can be a useful mechanism to clarify it. In this sense, State-State procedures retain their “supportive” function for ISDS.</p>
<b>6.2 Investor-State</b>	<p>6.2.0 Grant investors the right to bring any investment-related dispute with the host country to international arbitration.</p> <p>6.2.1 Define the range of disputes that can be subject to ISDS:</p> <ul style="list-style-type: none"> <li>- any investment-related disputes (regardless of the legal basis for a claim, be it IIA, contract, domestic law or other)</li> <li>- disputes arising from specifically listed instruments (e.g. IIAs, contracts, investment authorisations/licenses)</li> <li>- disputes regarding IIA violations only</li> <li>- States’ counterclaims.</li> </ul> <p>6.2.2 Promote the use of alternative dispute resolution (ADR) methods</p> <ul style="list-style-type: none"> <li>- encourage resort to conciliation (e.g. ICSD or UNCITRAL conciliation rules) or mediation</li> <li>- agree to cooperate in developing dispute prevention mechanisms (including by creating investment ombudsmen or “ombuds” offices).</li> </ul> <p>6.2.3 Clarify that investors can only resort to international arbitration</p> <ul style="list-style-type: none"> <li>- after local remedies have been exhausted or a manifest ineffectiveness/bias of domestic courts has been demonstrated</li> <li>- if the investor agrees not to bring (“fork-in-the-road”), or undertakes to discontinue (“no U-turn”), the same case in another forum</li> <li>- within a limitation period, in order to prevent claims resulting from «old» measures (e.g. claim has to be brought within three years)</li> <li>- with respect to claims that arose after the treaty’s entry into force (see section 2.4).</li> </ul> <p>6.2.4 Limit States’ exposure to ISDS, e.g.:</p> <ul style="list-style-type: none"> <li>- clarify that certain treaty provisions and/or sensitive areas are excluded from ISDS, e.g. national security issues, including review of incoming investments; measures to protect the environment, health and human rights; prudential measures; measures relating to transfer of funds (or respective IIA provisions); tax measures that do not amount to expropriation; IIA provisions on transparency</li> <li>- specify only those issues/provisions to which ISDS should apply (e.g. only to the expropriation provision).</li> </ul>	<p>ISDS allows foreign investors to sue a host State if the latter violates its IIA obligations. Most IIAs allow investors to bypass domestic courts of host States and bring international arbitration proceedings (e.g. to constitute an <i>ad hoc</i> 3-person tribunal, most often at ICSD or under the UNCITRAL arbitration rules). The goal is to take the dispute out of the domestic sphere, to ensure independence and impartiality of the arbitrators, speed and effectiveness of the process and finality and enforceability of arbitral awards.</p> <p>As the number of ISDS cases increases, questions have arisen with regard to the effectiveness and the SD implications of ISDS. Many ISDS procedures are very expensive and often take several years to resolve. ISDS cases increasingly challenge domestic regulatory measures implemented for public policy objectives. Almost all ISDS cases lead to the break down of the relationship between the investor and the host State. Due to the lack of a single, unified mechanism, different tribunals have issued divergent interpretations of similarly worded treaty provisions, resulting in contradictory outcomes of cases involving identical/similar facts and/or treaty language. Many ISDS proceedings are conducted confidentially, which has raised concerns when tribunals address matters of public policy.</p> <p>A number of policy options are available to deal with these problems. If the Contracting Parties consider each other’s judicial systems to be effective and efficient, ISDS can be omitted from their IIA altogether. The Parties may also choose to subject only the most fundamental IIA protections to ISDS (e.g. the protection against uncompensated expropriation), reserve the right to give consent to arbitration on a case-by-case basis or minimize States’ exposure to ISDS by other means (e.g. by removing certain areas from its purview, introducing limitation periods).</p> <p>Parties may also consider promoting the use of alternative dispute resolution (ADR) methods, such as conciliation and mediation. If employed at the early stages of a dispute, ADR can help to prevent escalation of the conflict,</p>

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	<p>6.2.5 Reserve State's consent to arbitration, so that it would be given separately for each specific dispute.</p> <p>6.2.6 Omit investor-State arbitration (i.e. do not consent to investor-State arbitration in the treaty) and nominate host State's domestic courts as the appropriate forum.</p>	<p>preserve the investment relationship, and find a workable common-sense solution in a faster, cheaper and more flexible manner. As part of the IIA rebalancing, a treaty may refer to the possibility of States bringing counterclaims for investors' non-compliance with the host State's national laws (section 7.1.1) or breach of investor's specific obligations undertaken in relation to its investment (section 4.10.3).</p>
<b>6.3 ISDS institutions and procedures</b> ... propose improvements of an institutional and procedural nature	<p>6.3.0 Improve the institutional set-up of ISDS, e.g.:</p> <ul style="list-style-type: none"> <li>- consider a system with permanent or quasi-permanent arbitrators and/or an appellate mechanism</li> <li>- foster accessibility of documents (e.g. information about the case, party submissions, decisions and other relevant documents)</li> <li>- foster public participation (e.g. amicus curiae and public hearings)</li> <li>- specify that disputes concerning certain sensitive policy areas, such as tax and/or prudential measures, shall be submitted to the competent authorities of the Parties for a preliminary joint determination of whether they are in breach of the treaty</li> <li>- consider cooperation on training and assistance for adequate State representation in investor-State disputes, including through establishing an investment advisory centre.</li> </ul> <p>6.3.1 Add features that would improve the arbitral process, e.g.:</p> <ul style="list-style-type: none"> <li>- mechanism for prompt/simplified disposal of "frivolous" claims</li> <li>- mechanism for consolidation of claims</li> <li>- requirement to interpret the IIA in accordance with customary international law (as codified in the Vienna Convention on the Law of Treaties)</li> <li>- mechanism for joint interpretation of the treaty by the Parties in case of ambiguities</li> <li>- caps on arbitrator fees.</li> </ul>	<p>The institutional set-up of the ISDS system is the cause of numerous concerns including perceived lack of legitimacy, inconsistent decisions, secrecy or participatory challenges for developing countries.</p> <p>IIA policymakers can improve the institutional set-up of ISDS in the treaty. An appellate mechanism could contribute to more coherent interpretation and foster trust in the system. Enhanced transparency of ISDS claims could enable broader and informed public debate as well as a more adequate representation of stakeholder interests, prevent non-transparent deals and stimulate balanced and well-reasoned arbitral decisions.</p> <p>Procedural improvements such as simplified disposals of «frivolous» claims, consolidation of claims and caps on arbitrator fees, could help streamline the arbitral process and make it less expensive and more effective. A reference to customary international law as controlling interpretation of the IIA, coupled with a possibility for the State Parties to issue joint interpretations, would ensure a common interpretative framework and the ability of the contracting States to influence this process, thereby limiting the discretion of arbitrators.</p>
<b>6.4 Remedies and compensation</b> ... determines remedies available in case of treaty breach and gives guidance on compensation	<p>6.4.0 No clause.</p> <p>6.4.1 Limit available remedies to monetary compensation and restitution of property (or to compensation only).</p> <p>6.4.2 Provide that the amount of compensation shall be equitable in light of circumstances of the case and set out specific rules on compensation for a treaty breach, e.g.:</p> <ul style="list-style-type: none"> <li>- exclude recoverability of punitive and/or moral damages</li> <li>- limit recoverability of lost profits (up to the date of award)</li> <li>- ensure that the amount is commensurate with the country's level of development.</li> </ul>	<p>Most IIAs are silent on the issue of remedies and compensation. In theory this permits arbitral tribunals to apply any remedy they deem appropriate, including, for example, an order to the country to modify or annul its law or regulation. Remedies of the latter type could unduly intrude into the sovereign sphere of a State and impede its policy-making powers; thus, Parties to an IIA may consider limiting available remedies to monetary compensation and restitution of property (or compensation only).</p> <p>As regards the amount of compensation for a treaty breach, international law requires compensation to be "full", which may include moral damages, loss of future profits and consequential damages.</p> <p>States may find it beneficial to provide guidance to arbitrators on applicable remedies and, similar to the case of expropriation above, on calculation of compensation. If the Contracting Parties believe that certain types of damages should not be recoverable by investors (e.g. punitive or moral damages), they can explicitly rule them out in their IIA. They can also restrict recoverability of future profits and provide that compensation should cover a claimant's direct losses and not exceed the capital invested plus interest. However, such rules may be seen as undermining the protective quality of the IIA.</p>

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<p><b>7 Investor obligations and responsibilities</b> ... promote compliance by investors with domestic and/or international norms at the entry and operation stage</p>	<p>7.1.0 No clause.</p> <p>7.1.1 Require that investors comply with host State laws at both the entry and the post-entry stage of an investment. Establish sanctions for non-compliance: - deny treaty protection to investments <i>made in violation</i> of the host State law - deny treaty protection to investments <i>operating in violation</i> of those host State laws that reflect international legally binding obligations (e.g. core labour standards, anti-corruption, environment conventions) and other laws as identified by the Contracting Parties - provide for States' right to bring counterclaims in ISDS arising from investors' violations of host State law.</p> <p>7.1.2 Encourage investors to comply with universally recognized standards such as the ILO Tripartite MNE Declaration and the UN Guiding Principles on Business and Human Rights, and to carry out corporate due diligence relating to economic development, social and environmental risks. Provide that non-compliance may be considered by a tribunal when interpreting and applying treaty protections (e.g. FET) or determining the amount of compensation due to the investor.</p> <p>7.1.3 Encourage investors to observe applicable CSR standards: - without specifying the relevant CSR standards - by giving a list of relevant CSR standards (e.g. in an annex) - by spelling out the content of relevant CSR standards (e.g. as best endeavour clauses). Provide that non-observance may be considered by a tribunal when interpreting and applying treaty protections (e.g. FET) or determining the amount of compensation due to the investor.</p> <p>7.1.4 Call for cooperation between the Parties to promote observance of applicable CSR standards, e.g. by - supporting the development of voluntary standards - building local industries' capacity for the uptake of voluntary standards - considering investors' adoption/compliance with voluntary standards when engaging in public procurement - conditioning the granting of incentives on the observance of CSR standards - promoting the uptake of CSR-related reporting (e.g. in the context of stock exchange listing rules).</p> <p>7.1.5 Encourage home countries to condition the granting of outward investment promotion incentives on an investor's socially and environmentally sustainable behaviour (see also 10.1.1 on investment promotion).</p>	<p>Most IIAs only set out obligations for States. To correct this asymmetry, an IIA could also set out investor obligations/responsibilities. Noting the evolving views on the capacity of international law to impose obligations on private parties, IIA policymakers could consider a number of options, each with its advantages and disadvantages.</p> <p>These IPFSD options (i) condition treaty protection upon certain investor behaviour; (ii) raise the obligation to comply with domestic laws to the international level (increasing its relevance in arbitration); and (iii) take a best-endeavour approach to universally recognised standards or applicable CSR standards.</p> <p>A far-reaching option is to include an obligation for investors to comply with laws and regulations of the host State at both, the entry and post-entry stage. While investors' observance of domestic laws can generally be enforced through national courts, including this obligation in an IIA could further improve means to ensure compliance (e.g. by way of denying treaty protection to non-complying investors or giving States a right to bring counterclaims in ISDS proceedings). Challenges may arise from the fact that domestic laws are usually directed at local enterprises as opposed to those who own or control them and from the need to ensure that minor/technical violations should not lead to complete denial of treaty benefits. Also, the elevation to a treaty level of the obligation to comply with domestic law should not affect the general principle that domestic laws must not be contrary to a country's international obligations - this can be made explicit in option 7.1.1 (e.g. by specifying that relevant domestic laws must not be inconsistent with the IIA and international law).</p> <p>Another option is to promote responsible investment through IIA language that encourages investors to comply with relevant universal principles or with applicable CSR standards. Such a best-endeavour clause would be given additional weight if the treaty instructs tribunals to take into account investors' compliance with relevant principles and standards when deciding investors' ISDS claims. Given the multitude of existing CSR standards, it may be useful to refer to specific documents such as the UN Global Compact.</p>
<p><b>8 Relationship to other agreements</b> ... establishes a hierarchy in case of competing international norms</p>	<p>8.1.0 No clause.</p> <p>8.1.1 Stipulate that if another international treaty, to which the contracting States are parties, provides for more favourable treatment of investors/investments, that other treaty shall prevail in the relevant part.</p> <p>8.2.0 Stipulate that in case of a conflict between the IIA and a host State's international commitments, such conflicts should be resolved in accordance with customary international law, including with reference to the Vienna Convention on the Law of Treaties.</p> <p>8.2.1 Stipulate that in case of a conflict between the IIA and a host State's international commitments under a multilateral agreement in another policy area, such as environment and public health, the latter shall prevail.</p>	<p>IIAs usually provide that more favourable treatment of investors granted under another international treaty (e.g. a multilateral treaty to which both IIAs signatories are Parties) would take precedence. It is much less usual to address a relationship between an IIA and a treaty that governs a different policy area (e.g. protection of environment, human rights, etc.). Addressing this issue would help arbitral tribunals to take into account these other international commitments in order to ensure, as much as possible, harmonious interpretation of IIA provisions and see them as part of general international law.</p>

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
<p><b>9 Not lowering of standards clause</b></p> <p>... discourages Contracting Parties from attracting investment through the relaxation of labour or environmental standards</p>	<p>9.1.0 No clause.</p> <p>9.1.1 Include environmental, human rights and labour clauses that - include a commitment to refrain from relaxing domestic environmental and labour legislation to encourage investment (expressed as a binding obligation or as a soft law clause)</p> <p>9.1.2 - reaffirm commitments under, e.g. international environmental agreements or with regard to international health standards, internationally recognized labour rights or human rights. Encourage cooperation between treaty Parties to provide enhanced environmental, human rights and labour protection and hold expert consultations on such matters.</p>	<p>There is a concern that international competition for foreign investment may lead some countries to lower their environmental, human rights and labour standards and that this could lead to a "race to the bottom" in terms of regulatory standards.</p> <p>Some recent IIAs include language to address this concern. "Not lowering standards" provisions, for example, prohibit or discourage host States to compromise on environmental and labour protection for the purpose of attracting foreign investment. In doing so, the IIA goes beyond its traditional role of investment protection and pursues the goal of maintaining a regulatory framework that would be conducive to SD.</p> <p>While current IIAs often exclude "not lowering standards" clauses from ISDS or dispute settlement as such, it may be beneficial to foster consultations on this issue, including through institutional mechanisms, so as to ensure that the clause will effectively be implemented.</p>
<p><b>10 Investment promotion</b></p> <p>... aims to encourage foreign investment through additional means beyond investment protection provisions in IIAs</p>	<p>10.1.0 No clause.</p> <p>10.1.1 Establish provisions encouraging investment flows, with a special emphasis on those which are most beneficial in light of a country's development strategy. Possible mechanisms include, e.g.:</p> <ul style="list-style-type: none"> <li>- encourage home countries to provide outward investment incentives, e.g. investment guarantees, possibly conditioned on the SD enhancing effect of the investment and investors' compliance with universal principles and applicable CSR standards</li> <li>- organise joint investment promotion activities such as exhibitions, conferences, seminars and outreach programmes</li> <li>- exchange information on investment opportunities</li> <li>- ensure regular consultations between investment promotion agencies</li> <li>- provide technical assistance programmes to developing host countries to facilitate FDI flows</li> </ul> <p>10.1.2 - strengthen promotion activities through IIAs' institutional set up (see 11.1.1 below). - include a subrogation clause.</p>	<p>While host States conclude IIAs to attract development-enhancing investment, the investment enhancing effect of IIAs is mostly indirect (through the protection offered to foreign investors). Only a few IIAs include special promotional provisions to encourage investment flows and increase investors' awareness of investment opportunities (e.g. by exchanging information or joint investment-promotion activities).</p> <p>Creating a joint committee responsible for investment promotion may help to operationalize the relevant provisions. Through these committees, the Parties can set up an agenda, organize and monitor the agreed activities and take corrective measures if necessary. The "promotional" provisions are "soft" (unenforceable), and their ultimate usefulness largely depends on the will and action of the Parties.</p> <p>The mechanism of subrogation supports investment promotion by ensuring the effective functioning of investment insurance schemes maintained by home States, or their respective agencies, to support their outward FDI. If the insurer covers the losses suffered by an investor in the host State, it acquires the investor's right to bring a claim and may exercise it to the same extent as, previously, the investor. Subrogation makes it possible for the insurer to be a direct beneficiary of any compensation by the host State to which the investor would have been entitled.</p>

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
<p><b>11 Institutional set-up</b> ...establishes an international platform collaboration between the Contracting Parties</p>	<p>11.1.0 No clause.</p> <p>11.1.1 Set up an institutional framework under which the Parties (and, where relevant, other IIA stakeholders such as investors, local community representatives etc.) shall cooperate and hold meetings from time to time, to foster the implementation of the agreement with a view to maximising its contribution to SD. More specifically, this can include a commitment to:</p> <ul style="list-style-type: none"> <li>- issue interpretations of IIA clauses</li> <li>- review the functioning of the IIA</li> <li>- discuss and agree upon modification of commitments (in line with special procedures) and facilitate adaptation of IIAs to the evolving SD policies of State Parties; e.g. through renegotiation</li> <li>- organize and review investment promotion activities, including by involving investment promotion agencies, exchanging information on investment opportunities, organizing seminars on investment promotion</li> <li>- discuss the implementation of the agreement, including by addressing specific bottlenecks, informal barriers, red tape and resolution of investment disputes</li> <li>- regularly review Parties' compliance with the agreement's not-lowering standards clauses</li> <li>- provide technical assistance to developing Contracting Parties to enable them to engage in the institutionalized follow-up to the treaty</li> <li>- identify/update relevant CSR standards and organize activities to promote their observance.</li> </ul>	<p>While countries have concluded numerous IIAs, generally, there has been little follow-up to ensure that IIAs are properly implemented and kept up-to-date.</p> <p>Recent IIAs have started to include provisions for permanent institutional arrangements that perform a number of specific functions. For example, agreed interpretation can help ensure consistency in arbitral awards. Similarly, deliberations can ensure informed decision making on further investment liberalization, or prolonging or amending IIAs. All of this can help maximize the contribution of IIAs to SD, for example, by monitoring the development implications of IIAs and by engaging in dispute prevention activities and CSR promotion.</p> <p>A clear treaty mandate facilitates the implementation of the listed activities. Furthermore, it provides a forum to reach out to other relevant investment stakeholders including investors, local community representatives and academia.</p>
<p><b>12 Final provisions</b> ... define the duration of the treaty and its possible prolongation</p>	<p>12.1.0 Specify the temporal application of the treaty (e.g. 10 or 20 years) with quasi-automatic renewal (the treaty is renewed unless one of the Parties notifies the other(s) of its intention to terminate).</p> <p>12.1.1 State a specific duration of the treaty but stipulate that renewal is based on a written agreement of both Parties on the basis of a (joint) informed review of the IIA.</p> <p>12.1.2 Include a "survival" clause which guarantees that in case of unilateral termination of the treaty, it will remain in effect for a number of years after the termination of the treaty (e.g. for another 5, 10 or 15 years) with respect to investments, made prior to the termination.</p> <p>12.1.3 Do not specify minimum initial temporal duration but allow for termination of the treaty at any time upon the notification of either Party.</p>	<p>There is an emerging concern about aging treaty networks that may eventually be unsuitable for changing economic realities, novel or emerging forms of investment and new regulatory challenges. This partly results from the fact that IIAs often provide for a fixed period of duration and quasi-automatic renewal (in an attempt to provide a stable investment regime).</p> <p>An alternative would be to provide for renewal if both Parties explicitly agree to it in writing after a joint review of the treaty and an assessment of its impact on FDI flows and any attendant development implications. This exercise would help to assess whether the treaty is still needed and whether any amendments are required.</p> <p>Another issue concerns the protection of investors after the IIAs termination. An IIA may include a "survival" clause, which effectively locks in treaty standards for a number of years after the treaty is terminated. While it provides longer-term legal security for investors, which may be necessary for investors with long-term projects involving substantial commitment of capital (e.g. in the extractive industries), it may limit States' ability to regulate their economies in accordance with new realities (especially if the treaty's provisions do not grant sufficient policy flexibility). Negotiators may opt for a balanced solution by ensuring that the "survival" clause is not overly long.</p>



## UNCTAD's Investment Policy Framework for Sustainable Development

### Policy options for IIAs

#### part B. Pre-establishment

Policy options in Part B are supplementary to those in Part A and can be used by countries wishing to extend their IIA to pre-establishment matters. As in Part A, policy options are organized from most investor-friendly (i.e. highest level of liberalization) to the options providing fewer establishment rights and more flexibility to the prospective host State.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
<b>1 Pre-establishment obligations</b> ... govern establishment of foreign investments in the host State	<p>1.1.0 Grant the right of establishment, subject to restrictions on public policy grounds (EU Treaty approach).</p> <p>1.1.1 Undertake to refrain from imposing specific restrictions, including of a non-discriminatory nature, on the establishment in the host State's market (GATS approach), such as:</p> <ul style="list-style-type: none"> <li>- limitations on the participation of foreign capital in terms of maximum percentage limits on foreign shareholding</li> <li>- limitations on the number of establishments (quotas, monopolies, exclusive rights)</li> <li>- limitations on the total value of transactions or assets.</li> </ul> <p>1.1.2 Extend national treatment and/or MFN treatment to foreign investors with respect to "establishment, acquisition and expansion" of investments, i.e. prohibit discrimination <i>vis-à-vis</i> domestic investors and/or investors from third countries, subject to exceptions and reservations (sections 1.1.3 and 1.1.4 below).</p> <p>1.1.3 Undertake pre-establishment commitments only with respect to sectors/industries specifically mentioned (<i>positive list</i>) or to all sectors/industries except those specifically excluded (<i>negative list</i>) or combining the two ("hybrid"). Country-specific reservations may carve out, as necessary, e.g.:</p> <ul style="list-style-type: none"> <li>- existing measures that provide preferential rights of establishment to domestic investors or investors from certain third countries (e.g. on the basis of preferential trade and investment agreements)</li> <li>- existing measures/laws that would otherwise be inconsistent with the newly concluded treaty (grandfathering)</li> <li>- sectors/industries where the Party wishes to retain full discretion on establishment, including future restrictive measures</li> <li>- specific procedures such as investment screening or an economic needs test (ENT).</li> </ul> <p>1.1.4 Preserve additional policy flexibility on pre-establishment issues, with respect to "committed" (locked-in) sectors e.g.:</p> <ul style="list-style-type: none"> <li>- preserve the right of a Party to adopt new non-conforming measures in the future, as long as they do not "affect the overall level of commitments of that Party under the Agreement"</li> <li>- include a wide "catch-all" reservation into the schedule, e.g. that establishment is "subject to the requirement that no objection for reasons of national economy is made".</li> </ul> <p>1.1.5 Reduce normative intensity of pre-establishment commitments e.g.:</p> <ul style="list-style-type: none"> <li>- postpone the entry into force of pre-establishment obligations until the date when the Parties agree on covered sectors/measures</li> <li>- agree to undertake negotiations on pre-establishment at a future date</li> <li>- exclude pre-establishment disciplines from dispute settlement provisions or subject them to State-State dispute settlement only</li> <li>- use "best efforts", as opposed to legally binding, language.</li> </ul>	<p>Most IIAs grant protection to investors and their investments only after their establishment in the host State; the host country thus retains full regulatory freedom as regards the admission of foreign investors to its territory. For example, it can impose limits on foreign ownership of domestic companies or assets, apply screening procedures and block acquisitions for industrial or other policy reasons (e.g. national security).</p> <p>However, in recent years an increasing number of IIAs include provisions that apply at the pre-establishment phase of investment, with the aim of liberalizing access for investors from the other Party. This is usually achieved by (i) prohibiting countries to impose certain restrictions on market access (quotas, monopolies, exclusive rights and others), (ii) prohibiting countries to discriminate against covered investors at the stage of establishment and acquisition of investments, or (iii) using both approaches concurrently.</p> <p>It is an important policy choice to decide whether to extend the IIA to pre-establishment matters and, if so, to find a right balance between binding international commitments and domestic policy flexibility. The first step is to choose between the positive- and the negative-list approach to identifying industries in which the pre-establishment rights will be granted. The former offers selective liberalization by way of drawing up a "positive list" of industries in which investors will enjoy pre-establishment rights. Under the latter, investors benefit from pre-establishment commitments in all industries except in those that are explicitly excluded.</p> <p>The negative-list approach is more demanding in terms of resources: it requires a thorough audit of existing domestic policies. In addition, under a negative-list approach and in the absence of specific reservations, a country commits to openness also in those sectors/activities, which, at the time an IIA is signed, do not yet exist or where the regulatory frameworks are still evolving. Generally, when aiming to preserve regulatory space, making commitments on a positive-list basis is considered to be safer. Properly managing a negative-list approach requires countries to have i) a sophisticated domestic regulatory regime and ii) sufficient institutional capacity for properly designing and negotiating the scheduling of liberalization commitments. In either case most IIAs include a list of reservations preserving specific non-conforming measures ("hybrid" approach).</p>

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
1.1.6	<p>Preserve policy flexibility on pre-establishment issues by carefully crafting relevant general provisions of the IIA, e.g.:</p> <ul style="list-style-type: none"> <li>- specifying the scope and coverage of the treaty (see section 2.3 of Part A)</li> <li>- including general and national security exceptions (see section 5 of Part A).</li> </ul>	<p>The need for reservations and «safety valves» is arguably greatest if a country opts for the negative list. From a SD perspective, it may be prudent to consider excluding certain sub-industries or grandfathering specific non-conforming measures, reserving the right to change the country's commitments under specified conditions or choose the right level of the normative intensity of commitments.</p>
1.1.7	<p>Provide that admission of investments is in accordance with domestic laws of the host State.</p>	

**UNCTAD's Investment Policy Framework for Sustainable Development**  
**Policy options for IIAs**  
**Part C. Special and Differential Treatment (SDT)**

SDT provisions could be an option where Contracting Parties to an IIA have significantly different levels of development, especially when one of the Parties is a least-developed country. SDT presupposes that a treaty can be built asymmetrically, i.e. treaty obligations may differ between the Contracting Parties.

Sections	Policy options for international investment agreements (IIAs)	Sustainable development (SD) implications
<p><b>1 Asymmetrical obligations</b>                      ... enable imposition of less onerous obligations on a less developed Party</p>	<p><b>1.1.0 Delayed implementation of obligations</b>                      Introduce a timetable for implementation of IIA commitments with longer time-frames for a less developed Party. Could be used for, e.g.:</p> <ul style="list-style-type: none"> <li>- pre-establishment obligations</li> <li>- national treatment</li> <li>- transfer of funds</li> <li>- performance requirements</li> <li>- transparency</li> <li>- investor-State dispute settlement.</li> </ul> <p><b>1.1.1 Reduced normative intensity</b>                      Replace binding obligations with best-endeavour obligations for a less developed Party. Could be used for, e.g.:</p> <ul style="list-style-type: none"> <li>- pre-establishment obligations</li> <li>- national treatment</li> <li>- performance requirements</li> <li>- transparency.</li> </ul> <p><b>1.1.2 Reservations</b>                      Include country-specific reservations from general obligations, e.g. carving out sensitive sectors, policy areas or enterprises of specific size (e.g. SMEs). Could be used for, e.g.:</p> <ul style="list-style-type: none"> <li>- pre-establishment obligations</li> <li>- national treatment</li> <li>- MFN treatment</li> <li>- performance requirements</li> <li>- personnel and staffing (senior management).</li> </ul> <p><b>1.1.3 Development-friendly interpretation</b>                      Promote interpretation of protection standards that takes into account States' different level of development. Could be used for, e.g.:</p> <ul style="list-style-type: none"> <li>- fair and equitable treatment</li> <li>- full protection and security</li> <li>- amount of compensation awarded.</li> </ul>	<p>SDT provisions give expression to the special needs and concerns of developing and particularly least-developed countries (LDCs). Largely absent from existing IIAs, this principle is expressed in numerous provisions of the WTO agreements and has found its way into other aspects of international law such as the international climate change framework. SDT may be necessary in order to ensure that a less developed Party to a treaty does not undertake obligations that would be too burdensome to comply with or contrary to its development strategy.</p> <p>There are different ways to make an IIA asymmetrical and to reflect special needs of less developed Parties; moreover, several SDT options can be combined in the same treaty. For example, it can establish longer phase-in periods for pre-establishment obligations, country-specific carve-outs from the prohibition of performance requirements, best-endeavour obligations with respect to transparency, and account for the level of development in the FET provision.</p>
<p><b>2 Additional tools</b>                      ... encourage positive contributions by a more developed Party</p>	<p><b>2.1.0 Technical assistance</b>                      Undertake a (best-endeavour) obligation to provide technical assistance to implement IIA obligations and facilitate FDI flows.</p> <p><b>2.1.1 Investment promotion</b>                      Provide investment incentives to outward FDI such as investment guarantees.</p>	<p>SDT can also manifest itself in special obligations for the more developed Contracting Party. These are meant to operationalize the IIA, so that it performs its FDI-promoting function and, if necessary, to help the less developed Party implement certain IIA obligations. Including such provisions in the treaty, even in a non-binding manner, would provide a mandate to the more developed partner to put in place relevant technical-assistance and promotion activities.</p>

#### 4. Implementation and institutional mechanisms for policy effectiveness

Implementation of IIAs at the national level entails:

- *Completing the ratification process.* This may vary from a few months to several years, depending on the countries involved and the concrete issues at stake. The distinction between the conclusion of an agreement and its entry into force is important, since the legal rights and obligations deriving from it do not become effective before the treaty has entered into force. The time lag between the conclusion of an IIA and its entry into force may therefore have implications, for both foreign investors and their respective host countries.
- *Bringing national laws and practices into conformity with treaty commitments.* As with any other international treaty, care needs to be taken that the international obligations arising from the IIA are properly translated into national laws and regulations, and depending on the scope of the IIA, e.g. with regard to transparency obligations, also into the administrative practices of the countries involved.
- *Disseminating information about IIA obligations.* Informing and training ministries, government agencies and local authorities on the implications of IIAs for their conduct in regulatory and administrative processes is important so as to avoid other arms of the government causing conflicts with treaty commitments and thus giving rise to investor grievances, which if unresolved could lead to arbitral disputes.
- *Preventing disputes,* including through ADR mechanisms. This may involve the establishment of adequate institutional mechanisms to prevent disputes from emerging and avoid the breach of contracts and treaties on the part of government agencies. This involves assuring that the State and various government agencies take account of the legal obligations made under investment agreements when enacting laws and implementing policy measures, and establishing a system to identify more easily potential areas where disputes with investors can arise, and to respond to the disputes where and when they emerge.

- *Managing disputes* that may arise under IIAs. If dispute prevention efforts fail, States need to be prepared to engage effectively and efficiently in managing the disputes from beginning to end. This involves setting up the required mechanisms to take action in case of the receipt of a notice of arbitration, to handle the case, and ultimately to bring it to a conclusion, including possibly through settlement.
- *Establishing a review mechanism* to verify periodically the extent to which the IIA contributes to achieving expected results in terms of investment attraction and enhancing sustainable development – while keeping in mind that there is no mono-causal link between concluding an IIA and investment flows.

Moreover, because national and international investment policy must be considered in an integrated manner, and both need to evolve with a country's changing circumstances, countries have to assess continuously the suitability of their policy choices with regard to key elements of investment protection and promotion, updating model treaties and renegotiating existing IIAs.

Undertaking these implementation and follow-up efforts effectively and efficiently can be burdensome for developing countries, especially the least developed, because they often lack the required institutional capabilities or financial and human resources. Similarly, they often face challenges when it comes to analyzing ex ante the scope of obligations into which they are entering when they conclude an IIA, and the economic and social implications of the commitments contained in IIAs.

This underlines the importance of capacity-building technical cooperation to help developing countries in assessing various policy options before entering into new agreements and subsequently to assist them in implementing their commitments. IIAs can include relevant provisions to this end, including setting up institutional frameworks under which the contracting parties (and, where appropriate and relevant, other IIA stakeholders such as investors or civil society) can review progress in the implementation of IIA commitments, with a view to maximizing their contribution to sustainable development. International organizations can also play an important capacity building role.

## V. The Way Forward

A new generation of investment policies is emerging, pursuing a broader and more intricate development policy agenda within a framework that seeks to maintain a generally favourable investment climate. “New generation” investment policies recognize that investment is a primary driver of economic growth and development, and seek to give investment policy a more prominent place in development strategy. They recognize that investment must be responsible, as a prerequisite for inclusive and sustainable development. And in the design of “new generation” investment policies policymakers seek to address long-standing shortcomings of investment policy in a comprehensive manner in order to ensure policy effectiveness and build a stable investment climate.

This report has painted the contours of a new investment policy framework for sustainable development. The Core Principles set out the design criteria for investment policies. The national investment policy guidelines suggest how to ensure integration of investment policy with development strategy, how to ensure policy coherence and design investment policies in support of sustainable development, and how to improve policy effectiveness. The policy options for key elements of IIAs provide guidance to IIA negotiators for the drafting of sustainable-development-friendly agreements; they form the first comprehensive overview of the myriad of options available to them in this respect.

In developing the IPFSD, UNCTAD has had the benefit of a significant body of existing work and experience on the topic. UNCTAD itself has carried out more than 30 investment policy reviews (IPRs) in developing countries over the years (box 4), analyzed in detail investment regulations in numerous countries for the purpose of investment facilitation (box 6), and produced many publications on best practices in investment policy (box 7), including in the *WIR* series. Other agencies have a similar track record, notably the OECD and the World Bank, various regional organizations, and a number of NGOs. In defining an IPFSD, this report has attempted to harness the best of existing

work on investment policies, investment policy frameworks, guidelines and models, and to build on experience in the field in their implementation.

The IPFSD is not a negotiated text or an undertaking between States. It is an initiative by the UNCTAD secretariat, representing expert guidance for policymakers by an international organization, leaving national policymakers free to “adapt and adopt” as appropriate.

It is hoped that the IPFSD may serve as a key point of reference for policymakers in formulating national investment policies and in negotiating or reviewing IIAs. It may also serve as a reference for policymakers in areas as diverse as trade, competition, industrial policy, environmental policy, or any other field where investment plays an important role. The IPFSD can also serve as the basis for capacity building on investment policy. And it may come to act as a point of convergence for international cooperation on investment issues.

In its current form the IPFSD has gone through numerous consultations, comprehensively and by individual parts, with expert academics and practitioners. It is UNCTAD’s intention to provide a platform for further consultation and discussion with all investment stakeholders, including policymakers, the international development community, investors, business associations, labour unions, and relevant NGOs and interest groups. To allow for further improvements resulting from such consultations, the IPFSD has been designed as a “living document”.

The dynamic nature of investment policymaking adds to the rationale for such an approach, in particular for the specific investment policy guidelines. The continuous need to respond to newly emerging challenges with regard to foreign investment makes it mandatory to review and, where necessary, modify these guidelines from time to time. Thus, from UNCTAD’s perspective, while the IPFSD will serve to inform the investment policy debate and to guide technical assistance work in the field, new insights from that work will feed back into it.

The IPFSD thus provides a point of reference and a common language for debate and cooperation on national and international investment policies. UNCTAD will add the infrastructure for such cooperation, not only through its numerous policy forums on investment, but also by providing a platform for “open sourcing” of best practice investment policies through its website, as a basis for the inclusive development of future investment policies with the participation of all.<sup>30</sup>

### Notes

- <sup>1</sup> Many successful developing countries maintained a significant level of government influence over the direction of economic growth and development throughout; see *Development-led globalization: Towards sustainable and inclusive development paths*, Report of the Secretary-General of UNCTAD to UNCTAD XIII.
- <sup>2</sup> The G-20, in its 2010 Seoul declaration, asked international organizations (specifically, UNCTAD, WTO and OECD) to monitor the phenomenon of investment protectionism.
- <sup>3</sup> See Sauvart, K.P. (2009). “FDI Protectionism Is on the Rise.” *World Bank Policy Research Working Paper 5052*.
- <sup>4</sup> For example, the World Bank’s Guidelines on the Treatment of Foreign Direct Investment, the OECD’s Policy Framework for Investment (PFI), and instruments developed by various regional organizations and NGOs.
- <sup>5</sup> These include, inter alia, the UN Global Compact, the UN Guiding Principles on Business and Human Rights, the ILO Declaration on Fundamental Principles and Rights at Work, the IFC’s Sustainability Framework and the OECD Guidelines for Multinational Enterprises.
- <sup>6</sup> See ILO Global Employment Trends 2012, available on [www.ilo.org](http://www.ilo.org).
- <sup>7</sup> See, for example, “Promoting investment for development: Best practices in strengthening investment in basic infrastructure in developing countries,” note by the UNCTAD secretariat to the Investment, Enterprise and Development Commission, May 2011, TD/B/C.II/14, [www.unctad.org](http://www.unctad.org).
- <sup>8</sup> Based on Doran, G. T. (1981). “There’s a S.M.A.R.T. way to write management’s goals and objectives.” *Management Review*, 70 (11 AMA FORUM); 35-36.
- <sup>9</sup> The universe of “core IIAs” principally consists of BITs and other agreements that contain provisions on investment, so-called “other IIAs”. Examples of the latter include free trade agreements (FTAs) or economic partnership agreements (EPAs). As regards their substantive obligations, “other IIAs”, usually fall into one of three categories: IIAs including obligations commonly found in BITs; agreements with limited investment-related provisions; and IIAs focusing on investment cooperation and/or providing for future negotiating mandate on investment. In addition to “core IIAs”, there are numerous other legal instruments that matter for foreign investment, including double taxation treaties (DTTs).
- <sup>10</sup> Examples include the interaction between IIAs and other bodies of international law or policy in the field of public health (e.g. the World Health Organization Framework Convention on Tobacco Control, WHO FCTC), environment (e.g. the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes) or human rights (e.g. International Covenant on Economic, Social and Cultural Rights), to name a few. In the context of ensuring coherence between investment protection and climate change, *WIR10* suggested a “multilateral declaration” clarifying that IIAs do not constrain climate change measures enacted in good faith.
- <sup>11</sup> In some countries the existence of an IIA is a prerequisite for the granting of investment guarantees.
- <sup>12</sup> This impact is generally stronger in the case of preferential trade and investment agreements (PTIAs) than with regards to BITs. See “The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries,” UNCTAD Series on International Investment Policies for Development, December 2009; [www.unctad.org](http://www.unctad.org). For a full discussion of FDI determinants, see *WIR98*.
- <sup>13</sup> See also Skovgaard Poulsen, Lauge N. and Aisbett, Emma (2011) “When the Claim Hits: Bilateral Investment Treaties and Bounded Rational Learning.” *Crawford School Research Paper No. 5*.
- <sup>14</sup> As discussed in *WIR04*, interaction can be either autonomous-liberalization-led or IIA-driven, or anywhere in-between.
- <sup>15</sup> Related are questions of forum-choice, double incorporation, dual liability and re-litigation of issues, all of which call for a careful consideration of how to manage the overlaps between agreements. See also Babette Ancery (2011), “Applying Provisions of Outside Trade Agreements in Investor-State Arbitration through the MFN-clause.” *TDB*, 8 (3).
- <sup>16</sup> This is in line with the traditional view of international law, as governing relations between its subjects, primarily between States. Accordingly, it is impossible for an international treaty to impose obligations on private actors (investors), which are not parties to the treaty (even though they are under the jurisdiction of the respective contracting parties).

- <sup>17</sup> Article 13 “Investor Obligation” provides: “COMESA investors and their investments shall comply with all applicable domestic measures of the Member State in which their investment is made.”
- <sup>18</sup> In fact, in the course of the past century, international law has been moving away from the traditional, strict view towards including, where appropriate, non-State actors into its sphere. See, e.g., A. Bianchi (ed.) (2009), “Non-State Actors and International Law.” (Ashgate, Dartmouth).
- <sup>19</sup> Also the 2012 Revision of the International Chamber of Commerce (ICC) Guidelines for International Investment refer to investors’ obligations to comply with the laws and regulations of the host State at all times and, in particular, to their obligation to comply with national and international labour laws, even where these are not effectively enforced by the host State.
- <sup>20</sup> The aggregate amount of compensation sought by the three claimants constituting the majority shareholders of former Yukos Oil Company in the ongoing arbitration proceedings against Russia. See *Hulley Enterprises Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 226; *Yukos Universal Limited (Isle of Man) v. The Russian Federation*, PCA Case No. AA 227; *Veteran Petroleum Limited (Cyprus) v. The Russian Federation*, PCA Case No. AA 228.
- <sup>21</sup> *Ceskoslovenska Obchodni Banka (CSOB) v. The Slovak Republic*, ICSID Case No. ARB/97/4, Final Award, 29 December 2004. The case was brought by CSOB on the basis of consent to arbitration contained in the 1992 BIT between the Czech Republic and the Slovak Republic. The findings on liability and damages were based on the underlying contract and Czech law. For more information on ISDS consult <http://www.unctad.org/ia-dbcases/cases.aspx>.
- <sup>22</sup> For details, see UNCTAD (2011) “Sovereign Debt Restructuring and International Investment Agreements.” *IIA Issues Note, No.2*, [www.unctad.org](http://www.unctad.org), *Abaclat and others v. Argentine Republic*, ICSID Case No. ARB/07/5, Decision on Jurisdiction and Admissibility, 4 August 2011.
- <sup>23</sup> Nottage, Hunter (2003), Trade and Competition in the WTO: Pondering the Applicability of Special and Differential Treatment, *Journal of International Economic Law*, 6(1), p.28.
- <sup>24</sup> Based on six categories as identified in WTO (2000) “Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions,” Note by Secretariat, WT/COMTD/W/77, 25 October 2000, available at [www.wto.org](http://www.wto.org). More recently, also the Doha Ministerial Declaration (2001) reaffirmed SDT as an integral part of the multilateral trade regime.
- <sup>25</sup> COMESA Investment Agreement (2007), Article 14(3).
- <sup>26</sup> Any comprehensive effort to reform the ISDS regime would also have to go beyond IIA clauses, and address other rules, including those for conducting international arbitrations (e.g. ICSID or UNCITRAL).
- <sup>27</sup> Experience with ISDS has revealed numerous instances of unclear or ambiguous clauses that risk being interpreted in an unanticipated and broad manner. Therefore the table includes options to clarify. However, these clarifications should not be used by arbitrators to interpret earlier clauses that lack clarifications in broad and open-ended manner.
- <sup>28</sup> Absence of ISDS – and hence of the possibility to be subject to financial liabilities arising from ISDS – may make it easier for countries to agree to certain standards of protections.
- <sup>29</sup> Similarly, one can combine far-reaching liberalization or protection clauses with a possibility to lodge reservations (e.g. for pre- and post-establishment clauses, and for existing and future measures). See “Preserving Flexibility in IIAs: The Use of Reservations”, UNCTAD Series on International Investment Policies for Development, June 2006; [www.unctad.org](http://www.unctad.org).
- <sup>30</sup> Interested stakeholders and experts are invited to provide feedback and suggestions through the dedicated UNCTAD IPFSD website, at [www.unctad.org/IPFSD](http://www.unctad.org/IPFSD).