Montevideo, Uruguay
4–29 April 2016

INTERNATIONAL INVESTMENT LAW

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Codification Division of the United Nations Office of Legal Affairs

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REQUIRED READINGS *(printed format)*

Legal instruments and documents

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

   For text, see *ICSID Convention, Regulations and Rules*, International Centre for Settlement of Investment Disputes, Washington, 2006

2. South African Development Community (SADC) Model Bilateral Investment Treaty Template, with Commentary, 2012

3. United States Model Bilateral Investment Treaty, 2012

RECOMMENDED READINGS *(electronic format)*

Legal instruments and documents

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

2. The Dominican Republic – Central America – United States Free Trade Agreement (CAFTA-DR), 2004 (Chapter Ten: Investment)

3. ASEAN Comprehensive Investment Agreement, 2009

4. Investment Agreement for the COMESA Common Investment Area, 2007

5. Canadian Model Bilateral Agreement for the Promotion and Protection of Investments, 2004

6. Colombian Model Bilateral Agreement for the Promotion and Protection of Investments, 2007

7. German Model Treaty concerning the Encouragement and Reciprocal Protection of Investment, 2008

8. Indian Model Agreement for the Promotion and Protection of Investments, 2003

9. United Kingdom Model Bilateral Investment Treaty, 2005 with 2006 amendments

10. International Institute for Sustainable Development (IISD) Model International Agreement on Investment for Sustainable Development, 2005

Case law

11. *Brandes Investment Partners, LP* v. *The Bolivarian Republic of Venezuela*, Award, ICSID Case No. ARB/08/3, 2 August 2011

12. *Salini Costruttori S.P.A.and Italstrade S.P.A.* v. *Kingdom of Morocco*, Decision on Jurisdiction, ICSID Case No. ARB/00/4, 23 July 2001

13. *Emilio Agustín Maffezini* v. *The Kingdom of Spain*, Decision of the Tribunal on Objections to Jurisdiction, ICSID Case No. ARB/97/7, 25 January 2000

14. *CMS Gas Transmission Company* v. *Argentine Republic*, Award, ICSID Case No. ARB/01/8, 12 May 2005

15. *CMS Gas Transmission Company* v. *Argentine Republic*, Decision of the *Ad Hoc* Committee on the Application for Annulment of the Argentine Republic, ICSID Case No. ARB/01/8, 25 September 2007

16. *Saluka Investments BV (The Netherlands)* v. *The Czech Republic*, Partial Award, Permanent Court of Arbitration, 17 March 2006

17. *Daimler Financial Services AG* v. *Argentine Republic*, Award, ICSID Case No. ARB/05/1, 22 August 2012

South African Development Community (SADC) Model Bilateral Investment Treaty Template, with Commentary, 2012

SADC Model Bilateral Investment Treaty Template
with Commentary

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY •• JULY 2012

SADC Model Bilateral Investment Treaty Template
with Commentary

Published by the Southern African Development Community.

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SADC Model Bilateral Investment Treaty Template with Commentary
July 2012
ISBN 978-1-894784-58-0

Introduction

The development of the SADC Model Bilateral Investment Treaty Template has taken place under the overall goal of the SADC Protocol on Finance and Investment to promote harmonization of the Member States' investment policies and laws. For the purposes of this project, the specific goal was to develop a comprehensive approach from which Member States can choose to use all or some of the model provisions as a basis for developing their own specific Model Investment Treaty or as a guide through any given investment treaty negotiation. Inclusion of any given provision in this document does not mean every individual State has endorsed it. Each Member State will ultimately be responsible for its choice of clauses and the final result of any particular BIT negotiation.

Given the above, the SADC Model BIT is not intended to be and is not a legally binding document. Rather, it provides advice to governments that they may consider in any future negotiations they enter into relating to an investment treaty. It also provides an educational tool for officials, and may serve as the basis of training sessions for SADC government officials.

To support these roles, each article is accompanied by a commentary after the proposed text. The commentary forms an integral part of the final product.

The preparation of the SADC Model BIT Template has been undertaken in an interactive process by a drafting committee consisting of representatives form Malawi, Mauritius, Namibia, South-Africa and Zimbabwe, with technical support provided by Mr Howard Mann, Senior International Law Advisor, International Institute for Sustainable Development (IISD). Representatives from Angola, Botswana, Mozambique and the Seychelles also participated in the final drafting committee meeting of May 2012. The SADC Secretariat facilitated the process. The SADC Model BIT Template was supported by the EU funded FIP Project and the Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH on behalf of the German Government.

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Preamble

The Government of _____ and the Government of _____ ,

Desiring to strengthen the bonds of friendship and cooperation between the State Parties;

Recognizing the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human rights and human development;

Seeking to promote, encourage and increase investment opportunities that enhance sustainable development within the territories of the State Parties;

Understanding that sustainable development requires the fulfilment of the economic, social and environmental pillars that are embedded within the concept;

Reaffirming the right of the State Parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives, and—taking into account any asymmetries with respect to the measures in place—the particular need of developing countries to exercise this right;

Seeking an overall balance of the rights and obligations among the State Parties, the investors, and the investments under this Agreement;

Have agreed as follows:

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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

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 ***Salini* test**: If Option 2 or Option 3 is used, it is strongly recommended that the test of the relationship of the investment to the Host economy be added. This test arises from arbitrations that have looked at what qualifies as an investment under the ICSID Convention, concluding that, as seen in the *Salini* arbitration award, "In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significance for the Host State's development." This text appears above as paragraph 10 in the second option above, and as paragraph 7 in the final option. It is not likely it is needed in the first option because it starts from the enterprise-based approach, but could be included for greater certainty.

Investment authorization is included here due to a reference to this term in the dispute settlement section. It relates to the scope of dispute settlement under the treaty, in particular if an investor-State system is included. It may be noted that in the U.S. Model BIT, this term is used to expand the scope of investor-State arbitration under a treaty by including any dispute related to an investment authorization within the scope of the treaty. Thus a dispute over a regulatory interpretation in an environmental assessment could be covered. However, the United States usually excludes all state-level authorizations from this, which covers almost all of the U.S. authorizations. In the present approach, the term is included to narrow the scope of investor-State disputes by ensuring that if any investment law, regulation, permit or contract includes a dispute resolution clause, it must be respected and utilized before any investor-State process can be initiated.

Investor addresses the critical issues to prevent dual nationals from using the treaty to invest back into his or her Home State, and to preclude "treaty shopping." This occurs when investors adopt locational choices as their Home State, where no substantive business is actually done, for the sole purpose of taking advantage of investment and/or taxation treaties. The provisions of the text seek to forestall this practice.

- The proposed text suggests options to preclude this, including possible requirements that the investment be legally owned or controlled by a person or business from the Home State and/or conduct substantive business in the Home State in order to qualify as an investor under the treaty.
- Not all governments may wish to foreclose all flexibility for foreign investments. Under the Common Market for Eastern and Southern Africa (COMESA) agreement, for instance, the substantial business test is adopted, but not the requirement for effective ownership and control.

- The terms [substantial][substantive] are both used in the text in this regard. Substantial has become the more common term in investment treaties, including in the FIP. Substantive is used in the SADC Services protocol and the GATS. There is not likely to be a significant difference in how these two terms are interpreted in this context, and both will be seen in context relative to the nature of the enterprise at issue. Both would ensure that, for example, simply being incorporated in a State with no actual business activity would not suffice to meet the test of being an investor for treaty protection purposes.
- A final issue is reflected in the "optional" paragraph in the proposed definition of investor, relating to an exclusion of State-owned enterprises. This is a highly debated issue. One can treat them the same as a private investor, which will be done by saying nothing specific in the text, removing them from coverage with a text such as that set out above. An additional option, so far untested, is to include a reference to the Santiago Principles on the operation of sovereign wealth funds and State-owned enterprises to establish a minimum expected standard of conduct and transparency of such enterprises, and penalizing a failure to meet these standards with a withdrawal of coverage under the treaty. As this is a new area of debate, the reference here can be seen as a placeholder to allow for debate on this issue between the negotiating parties.

Measure is set up to accommodate different forms of government. Governments should choose what levels of government should be covered. Note also that a judicial decision would be included in the list proposed. This is commonly understood to be within the scope of investment treaties to avoid a potential major loophole.

- "**directly affecting**" as used in the definition means the measure must have a direct impact on or relation to the investment, not simply lead to some tangential or indirect impact upon it. This is seen in several arbitrations.

UNCITRAL rules definition adjusts for the pending negotiation on specific rules for investor-State arbitration now underway at UNCITRAL and would automatically include any resulting updated versions.

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ARTICLE 3 •• Admission of Investments of Investors of the Other Party

SPECIAL NOTE: This article replaces any other possible article on Investment Liberalization.

The State Parties shall promote and admit Investments in accordance with their applicable law, and shall apply such laws in good faith.

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Commentary

The treatment of investment liberalization provisions in an investment treaty is a highly controversial issue. In the context of investment treaties, liberalization provisions almost always come in the form of allowing foreign investors to receive national treatment, or the same treatment as domestic investors, in making an investment. The commitment is often then tailored to exclude or include certain sectors for which the commitment will apply. This is described in more detail below. This type of provision does not mean that a foreign investor is not subject to regulation, but rather that the regulation cannot be any less favourable than that applied to a domestic investor.

It is also important to note at the outset of this discussion that investment liberalization decisions take place through a State's domestic law and policy, and not, as is often suggested, in a treaty. ***Thus, not including a binding provision in a treaty does not in any way prevent a State from taking any and all measures to fully or partially open its investment markets, as it so wishes.*** However, including such provisions in a treaty can legally preclude a State from later altering its domestic law as circumstances may warrant, most notably closing a sector that is listed as open in the treaty if domestic economic needs should so require. This can entail a significant loss of domestic control over one's economy, and it is for this reason that the recommendation is not to include such a binding provision in a treaty.

While there is growing pressure to include investment liberalization guarantees into such treaties, the primary recommendation here, as noted, is not to do so. The SADC FIP does not do so, and the vast majority of existing BITS with a SADC Member State do not do so. The Drafting Committee proposal is to avoid including binding investment liberalization commitments. The present text, however, does include specific notes to assist those governments that do choose to include such a commitment. Some States are facing very heavy pressure under the EPA negotiations, for example, to include investment liberalization provisions.

The short draft provision suggested above does not entail any international law commitments on investment liberalization. However, it does entail a commitment to apply the domestic law relating to admissions of investments in good faith. This, unless excluded from dispute settlement, would create legal obligations under the treaty for how the government treats a potential investor.

For example, if two investors are competing for a mining licence and one achieves the licence by corruption, the other would have a possible claim under this provision for not acting in good faith. Damages would potentially include all the costs of seeking the investment, including possible several millions for assessments, environmental reviews,

negotiating with local communities, etc., and possibly some level of lost profits. Therefore, the above draft provision does have a legal impact, though not one of mandatory investment liberalization.

The phrase "in accordance with their applicable law" in the text is understood here to include in accordance with treaty obligations that are in force for the State.

Some treaty texts include what are referred to as standstill or "no-backsliding" clauses on investment liberalization. Such a clause would require a State to not close or restrict entry into a sector once it has been opened to foreign investors of the other State. It is highly recommended that such a provision, if proposed in a negotiation, not be adopted, as it produces the same loss of future policy space as a direct liberalization commitment.

In support of the above approach, the Drafting Committee also noted that there are significant capacity constraints on developing countries to prepare and negotiate the schedules that are needed for a proper liberalization provision, thus producing significant risks of inadvertent error.

If a State does choose to adopt legally binding investment liberalization commitments, ***the Drafting Committee strongly recommended that it should follow the GATS "list-in" model.*** Thus, a schedule of liberalization commitments would be required for each party to the agreement. This stands in contrast to the North American Free Trade Agreement (NAFTA) model, which includes an open-ended provision for liberalization, subject to a schedule that excludes certain sectors or subsectors.

Establishing an investment liberalization commitment (or "pre-establishment right") does not require much drafting. Indeed, in most cases, it is simply added into the type of post-establishment national treatment provision seen in draft Article 4, below. This is done simply by including the additional words "establishment, acquisition, expansion." Thus, it is critical to watch out for the inclusion of these words in any draft text presented as part of a negotiation.

Even with a list-in approach, however, provisions for exclusion lists for certain subsectors and for inconsistent measures would need to be included. Thus, a properly constructed provision for investment liberalization would include three related elements:

- A list of sectors included for the liberalization commitment
- A list of subsectors that are excluded from the commitment
- A list of existing or future potential measures that are excluded from the scope of the treaty, at the national level, plus a clear statement on how any existing non-conforming measures at subnational levels are to be treated. This exclusion list should also note that any amendments to these measures would remain excluded as long as they are not more inconsistent than allowed by the original exclusion.

A failure to include all of these three elements places the Host State at significant risk of an improper commitment that can seriously constrain future government measures. In this regard, it may be noted that this is reflective of good practice: The NAFTA, for example, includes over 100 pages of such exclusions from coverage under its investment rules. ***It is normal and prudent practice for States to clearly address these issues in a treaty text.*** It is also not contrary to other international law to do so.

Two additional alternatives relating to investment liberalization may be noted:

It is possible to include an investment liberalization component, but exclude it from any formal dispute settlement system. This reduces the risk of potential arbitration by would-be investors.

Liberalization commitments can be included, but subject to the right of each State Party to alter the commitments unilaterally over time, without any form of penalty. While any existing investor would remain fully protected, this would allow the termination of future rights to make an investment in any specified sector.

Additionally, there are related issues related to ensuring that no prohibitions on performance requirements are included in the text, whether or not investment liberalization is articulated in the text. This is specifically covered by an exception later on for measures to promote development.

Finally, the Drafting Committee noted that there are significant capacity constraints on managing and regulating investments when flows in new sectors begin. Thus, it is recommended that any acceptance of a liberalization provision should be tied to ensuring the capacity to adequately regulate is present prior to the commitment becoming legally binding. This could be part of a development package in relation to such a provision and should help secure development benefits for the Host State.

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NOTES ••

Part 2: Investor Rights Post-Establishment

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,[1] but uses the language specifically as opposed to other more simple references to the case or to customary international law. This is to be more specific and precise in the standard to be applied. A reference to customary international law, or even the customary international law on the treatment of aliens, does not appear, as a result of some arbitral decisions and academic writings, to suffice to restrain arbitrator creativity in this regard.

[1] Neer v Mexico, Opinion, 15 October 1926, 4 RIIA (1926) 60

Some States may find this too high a standard to be meaningful to investors today. However, it is clear that this was the intended standard when the original treaties were drafted and that the expansive interpretations since provided by some tribunals had not been anticipated.

It is because of the large degree of unpredictability of the FET standard that the Government of South Africa has developed and proposed the formulation of a different standard on fair administrative treatment. This alternative approach seeks to avoid the most controversial elements of FET, while still addressing levels and types of actions by States toward an investor that should create a liability. The Drafting Committee was unanimous in believing this could be a constructive alternative approach.

Some key elements in the approach include changing the focus of the language from investor rights to a focus on governance standards. This should help alter the interpretational approach in the event of an arbitration. Second, the text refers to just one part of what other texts refer to as being included in the FET concept. Thus it is expressly narrower in scope and coverage. Third, the language sets a fairly high standard of "arbitrary" conduct by a government agency, or conduct that amounts to "a denial" of procedural justice or due process. These are significant thresholds to be met, in keeping with concepts of a breach of natural justice.

Given the above, the Drafting Committee was impressed with the potential viability of Option 2 as a replacement for the FET standard. It was believed that this would still provide useful protection for investors, while limiting the risks of the expansive rulings associated with the FET standard in a number of arbitral awards.

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ARTICLE 6 •• Expropriation

6.1. A State Party shall not directly or indirectly nationalize or expropriate investments in its territory except:

(a) in the public interest;

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

(c) on payment of fair and adequate compensation within a reasonable period of time.

6.2. **Option 1:** The assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking into account the current and past use of the property, the history of its acquisition, the fair market value of the property, the purpose of the expropriation, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment.

6.2. **Option 2:** Fair and adequate compensation shall normally be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier. However, where appropriate, the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking account of: the current and past use of the property, the history of its acquisition, the fair market value of the investment, the purpose of the expropriation, the extent of previous profit made by the foreign investor through the investment, and the duration of the investment.

6.2. **Option 3:** Fair and adequate compensation shall be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and not reflect any change in value occurring because the intended expropriation had become known earlier.

6.3. Any payment shall be made in a freely convertible currency. Payment shall include simple interest at the [LIBOR rate][current commercial rate of the Host State] from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable.

6.4. Awards that are significantly burdensome on a Host State may be paid yearly over a three-year period or such other period as agreed by the parties to the arbitration, subject to interest at the rate established by agreement of the parties to the arbitration or by a tribunal failing such agreement.

6.5. This Article shall not apply to the issuance of compulsory licences granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property.

6.6. A [non-discriminatory] measure of general application shall not be considered an expropriation of a debt security or loan covered by this Agreement solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.

6.7. A [non-discriminatory] measure of a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Agreement.

6.8. The Investor affected by the expropriation shall have a right under the law of the State Party making the expropriation to a review by a judicial or other independent authority of that State Party of his/its case and the valuation of his/its investment in accordance with the principles set out in this Article.

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Commentary

Paragraph 6.1 follows most existing models in relation to expropriation, with the exception that the often-seen condition that an expropriation must be non-discriminatory has been removed. This is because, in many instances, expropriations are specific and targeted, and thus in a strict legal sense could be defined as being discriminatory by their very nature. If parties to a negotiation were to wish to reinsert this condition, it is strongly recommended that it be tied to the obligation of non-discrimination set out in the actual treaty text, as opposed to creating an additional stand-alone obligation just for the expropriation tests. This is already built in with the inclusion of paragraph 4.6 in the Article on non-discrimination.

The structure set out above follows most recent models, including the COMESA CCIA and SADC approaches, as well as the Canadian and U.S. Model BITs. Variations relating to the valuation of an expropriation have been added here.

The above text also uses the fair and adequate payment standard, and requires compensation to be paid in a reasonably timely manner. This text leaves open the possibility that compensation may not always be fair market value (FMV), depending on the option chosen for paragraph 6.2. In essence, Member States can determine if fair and adequate must always and only equal FMV, or if and when other factors may be considered. Under Option 3 on valuation of damages, FMV is the basis to use for valuation, and it is therefore the most favourable toward the investor. Under Option 2, there is a presumption FMV will

be used, but the State can rebut the presumption on the basis of the equitable criteria set out in the option. The State bears the burden of doing so. This provides a more balanced approach. Under Option 1, there is no presumption but FMV would remain one of several factors to consider on an equal basis.

The language on a reasonable time period is meant to leave some flexibility but also respond to realities on the ground, that determining compensation may take some time, including for a negotiated agreement.

The calculation of interest can be a difficult issue. Two alternatives are presented. One is the Host State commercial interest rate. The second is a neutral alternative using the London inter-bank rate known as LIBOR. This reduces the potential volatility factor as well for interest rates in some States.

The exclusion of compulsory licensing measures by a State, or other removals of intellectual property rights (IPRs) that are consistent with international agreements on the subject is consistent with many, many treaties. This is especially important for medicines that developing States fought hard to secure IPR limitations for. The text here is reflected in NAFTA, COMESA and many other agreements.

The exclusion for regulatory measures in paragraph 6.7 is specific and clear, rather than leaving open possibilities for investors to argue otherwise. This is the traditional customary international law approach, drawn from the notion that "police powers" measures are not, by definition, acts of expropriation. The text is inspired by the COMESA CCIA and ASEAN texts. The 1990s and early 2000s' texts did not include such provisions, but these types of clauses are becoming increasingly common and should be made clear and apparent in the treaty text. Indeed, it is likely that a failure to include such a provision now would lead to the assumption that such a clear exclusion was not meant to be included and create the risk that a tribunal will hold that by not excluding regulatory measures the parties meant to include them within the scope of the expropriation article.

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ARTICLE 7 •• Senior Management and Employees

7.1. A State Party shall not require an Investor to appoint, to senior management positions for its Investment, individuals of any particular nationality.

7.2. A State Party may require that a majority of the board of directors, or any committee thereof, of an Investment be of a particular nationality, or resident in the territory of the State Party, provided that the requirement does not materially impair the ability of the Investor to exercise control over its Investment.

7.3. Subject to its laws, regulations and policies relating to the entry of aliens and engagement of non-national labour or management, each State Party shall grant temporary entry to nationals of the other State Party, employed by an Investor of the other State Party, for the purpose of rendering services to an Investment of that Investor in the territory of the Host State Party, in a capacity that is senior managerial or executive or requires specialized knowledge.

7.4. Notwithstanding any provisions of this Agreement, a State Party may require an Investor of the other Party or its Investment, in keeping with its size and nature, to have progressive increases in the number of senior management, executive or specialized knowledge positions that nationals of the Host State occupy; institute training programs for the purposes of achieving the increases

set out in the preceding paragraph and to Board of Director positions; and to establish mentoring programs for this purpose.

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Commentary

This is an article that most investors want to see, yet that must be balanced with the underlying premise that FDI should lead to skills transfers and upgrade and higher value added positions for nationals of the Host State.

The paragraphs each address specific segments of senior management and personnel positions, with specifically nuanced obligations. These include senior management, those employees with special knowledge or skills, and the Board of Directors.

Only these levels of employees are covered. But this may raise some issues where highly technical but not senior management positions are at issue. This is particularly so when labour, health and safety, and environmental risks are at issue. Allusion to this is seen in paragraph 7.3, on admission of foreign personnel, as regards persons with specialized knowledge.

Paragraph 7.4 is an addition to the traditional form of this type of article and reflects the additional balance for improving opportunities for nationals of the Host State. It is not mandatory on any given investor or State Party, but ensures such requirements can be imposed in a transparent and legal manner.

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ARTICLE 8 •• Repatriation of Assets

8.1. A State Party shall accord to Investors the right to:

(a) repatriate the capital invested and the Investment returns;

(b) repatriate funds for repayment of loans;

(c) repatriate proceeds from compensation upon expropriation, the liquidation or sale of the whole or part of the Investment including an appreciation or increase of the value of the Investment capital;

(d) transfer payments for maintaining or developing the Investment project, such as funds for acquiring raw or auxiliary materials, semi-finished products as well as replacing capital assets;

(e) remit the unspent earnings of expatriate staff of the Investment project;

(f) any compensation to the investor paid pursuant to this Agreement; and

(g) make payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the State Party to the dispute.

8.2. Each State Party shall allow transfers in paragraph 8.1 to be made in a freely convertible currency at the market rate of exchange prevailing at the time of transfer.

8.3. Notwithstanding paragraphs 8.1 and 8.2, a State Party may prevent or delay a transfer through the non-discriminatory application of its law and regulations relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading or dealing in securities, futures, options or derivatives;

(c) criminal or penal offences and the recovery of the proceeds of crime;

(d) financial reporting or record keeping of transactions when necessary to assist law enforcement or financial regulatory authorities;

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings;

(f) taxation;

(g) social security, public retirement or compulsory savings schemes;

(h) severance entitlements of employees; and

(i) the formalities required to register and satisfy the Central Bank and other relevant authorities of a State Party.

8.4. Safeguard provision:

(a) Where, in the opinion of a State Party, payments and capital movements under this Agreement cause or threaten to cause serious

(i) difficulties for balance of payment purposes,

(ii) external financial difficulties, or

(iii) difficulties for macroeconomic management including monetary policy or exchange rate policy,

the State Party concerned may take safeguard measures with regard to capital movements on a temporary basis so as to be eliminated as soon as conditions permit, and in any event as it relates to measures taken under paragraphs (ii)-(iii), for a period of not longer than 12 months if it considers such measures to be necessary.

(b) Where such measures are taken under 4.1(a)(ii) or (iii), a State Party shall enter into consultations with the other State Party at its request, with a view to review such measures and seek the minimum impact of such measures on an investor.

(c) Where, in the opinion of a State Party that has taken such measures, it is necessary to extend them for a further period due to the extended period of conditions described in paragraph 4.1(a), the State Party shall offer to enter into consultations with the other State Party with a view to seeking the minimum impact of such measures on an investor. Such measures shall again be taken on a temporary basis so as to be eliminated as soon as conditions permit, and in any event for a period of no longer than 12 months from their renewal.

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Commentary

This article provides for the inclusion of the general right of an investor to repatriate its assets, subject to prudential measures, law enforcement, tax obligations, and a general emergency balance of payments situation. It is consistent with Canada and U.S. Model BITs, several regional examples, and the COMESA CCIA text, though with a clearer and stronger safeguards provision to ensure the ability of States to reply to emergency situations.

The language in the safeguards section, paragraph 8.4 of the Article, is broader than just balance of payments concerns, but is limited time-wise to the conditions identified in the grounds for the exception, either by reference to the conditions still being in existence or a 12-month period. The language is drawn in significant part from the Japan–Korea BIT. Examples of the circumstances in which such measures might be taken include national balance of payments crises, financial system crashes such as Argentina experienced, regional economic crises such as experienced in Asia, or responding to particular impacts of a global financial crisis.

Importantly, the safeguards provision is also self-executing. In other words, once the State taking the safeguard measure declares it to be necessary, that is the end of the matter: subject to patent abuse, the decision cannot be challenged under the arbitration process. However, in order to ensure a certain level of discipline, the State Party taking such measures is compelled to consult with the other State Party after taking such measures, or prior to their renewal if needed. This does not give a right of veto to the other State Party, but does impose a measure of accountability in the process.

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ARTICLE 9 •• Protection and Security

9.1. A State Party shall accord Investments of Investors of the other State Party protection and security no less favourable than that which it accords to investments of its own investors or to investments of investors of any third State.

9.2. Investors of one State Party whose Investments in the territory of the other State Party suffer losses as a result of a breach of paragraph 9.1, in particular owing to war or other armed conflict, revolution, revolt, insurrection or riot in the territory of the Host State shall be accorded by the Host State treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the Host State accords to investors of any third State.

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Commentary

Many agreements include the issue of full protection and security in the general minimum standards of treatment or FET provisions. We believe it is best, if included, as a stand-alone provision, with the compensation for breach of the standard clearly set out in the same article. This better identifies its scope and limits the potential for huge damage awards. The standard set out here is essentially that of an MFN standard: all foreign investors must receive the same level of compensation in the event of a breach of the obligation, on a pro-rata basis for the level of loss (e.g., 10 per cent or 30 per cent or whatever the level may be).

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NOTES ••

Part 3: Rights and Obligations of Investors and State Parties

Part 3: Rights and Obligations of Investors and State

ARTICLE 10 •• Common Obligation against Corruption

10.1. Investors and their Investments shall not, prior to the establishment of an Investment or afterwards, offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a public official of the Host State, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an Investment.

10.2. Investors and their Investments shall not be complicit in any act described in Paragraph 10.1, including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.

10.3. A breach of this article by an Investor or an Investment is deemed to constitute a breach of the domestic law of the Host State Party concerning the establishment and operation of an investment.

10.4. The State Parties to this Agreement, consistent with their applicable law, shall prosecute and where convicted penalize persons that have breached the applicable law implementing this obligation.

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Commentary

This article would create one common obligation on corruption for investors, Host States and Home States, instead of separate articles for each such actor. The main obligation against corruption is derived from the UN and OECD conventions on bribery, but closes a loophole that allows payments to be made to a family member or business associate instead of directly to a politician or senior official.

Implementation of the article from most enforcement and penal perspectives is through domestic law. However, and this is very important, paragraph 10.3 makes it clear that an investment achieved by corruption in breach of this article or of applicable domestic law is a breach of the treaty and domestic law related to the establishment and operation of the investment, and therefore, by virtue of the definition of an investment that requires it to be made in accordance with domestic law, it is no longer a covered investment and no longer has dispute settlement rights. This is consistent with recent arbitral decisions relating to corruption in the making of an investment that have negated investment arbitration rights as a result of a finding of corruption.

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ARTICLE 11 •• Compliance with Domestic Law

Investors and Investments shall comply with all laws, regulations, administrative guidelines and policies of the Host State concerning the establishment, acquisition, management, operation and disposition of investments.

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Commentary

This article is drawn from the SADC FIP as well as several other investment treaties. This seeks only to establish an obvious legal obligation and does not go beyond what would be in the domestic law of the Host State. This is, or should be, a basic expectation of all parties. It also means that an investor cannot plead a provision of this agreement as a legal excuse for not complying with the domestic law, though it may seek damages afterwards if the law is inconsistent with a protection in this agreement.

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ARTICLE 12 •• Provision of Information

12.1. An Investor shall provide such information to an actual or potential Host State as that State Party may require concerning the Investment in question and the corporate history and practices of the Investor, for purposes of decision making in relation to that Investment or solely for statistical purposes.

12.2. The actual or potential Host State shall have the right to timely and accurate information in this regard. An Investor shall not commit fraud or provide false or misleading information provided in accordance with this Article.

12.3. A material breach of paragraph 12.2 by an Investor or an Investment is deemed to constitute a breach of the domestic law of the Host State concerning the establishment, acquisition, management, operation and disposition of Investments.

12.4. The actual or potential Host State Party may make such information available to the public in the location where the Investment is to be located, subject to other applicable law and the redaction of confidential business information. The State Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the Investor or the Investment.

12.5. Nothing in this Article shall be construed to prevent a State Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its domestic law or in connection with disputes between the Investor and the State regarding the Investment.

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Commentary

This article carries forward the anti-corruption idea to issues of fraud and misrepresentation in the making of an investment. It is consistent with recent arbitral decisions that have found material fraud and misrepresentation by investors in the information provided to a State in the making of an investment. In essence, it sets out clearly an obligation for honesty and plain dealing in making investments.

Paragraph 12.3 establishes the same penalty for fraud and misrepresentation as for corruption, but sets a standard of "material" to avoid severe penalties for *de minimus* errors or inconsequential misrepresentations in the course of "selling" the investment to the government. Material is a legal standard that requires a finding that the information was relied on as part of, but not solely, in the making of relevant decisions by the government.

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ARTICLE 13 •• Environmental and Social Impact Assessment

13.1. Investors or their Investments shall comply with environmental and social assessment screening criteria and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the Host State for such an investment [[or the laws of the Home State for such an investment][or the International Finance Corporation's performance standards on Environmental and Social Impact Assessment], whichever is more rigorous in relation to the Investment in question.]

13.2. The impact assessments required under paragraph 13.1 shall include assessments of the impacts on the human rights of the persons in the areas potentially impacted by the investment, including the progressive realization of human rights in those areas.

13.3. Investors or their Investments shall make the environmental and social impact assessments:

(a) public [including via the Internet] and

(b) accessible to the local communities, or other areas with potentially affected interests, in an effective and sufficiently timely manner so as to allow comments to be made to the Investor, Investment and/or government prior to the completion of the Host State processes for establishing an Investment.

13.4. Investors, their Investments and the Host State authorities shall apply the precautionary principle[2] to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigating or alternative approaches to the Investment, or precluding the Investment if necessary. The application of the precautionary principle by Investors and Investments shall be described in the environmental impact assessment.

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Commentary

This obligation is consistent with domestic law in virtually every State today. It reiterates the need for compliance by investors, and supplements the domestic law of the Host State where this may be necessary.

Where the domestic law is sufficiently developed, such supplementing will not be needed. However, where the domestic law may for some reason be insufficient, due to the nature or size of the project being new for example, gaps can be made up by reference to the

[2] The precautionary principle is defined in Article 15 of the Rio Declaration on Environment and Development as follows: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as reason for postponing cost-effective measures to prevent environmental degradation."

International Finance Corporation's standards or the law applicable to the proposed investment were it to be located in the Home State. This is an effort to create a floor standard in the event of gaps in the domestic law in relation to a given project, in particular larger projects that may be more extensive in terms of potential impacts than previously seen in a developing country Party. It does not, however, set any restrictions on the applicable domestic law, which remains the law of first recourse.

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ARTICLE 14 •• Environmental Management and Improvement

14.1. Investments shall, in keeping with good practice requirements relating to the size and nature of the Investment, maintain an environmental management system consistent with recognized international environmental management standards and good business practice standards.

14.2. Emergency response and decommissioning plans shall be included, and regularly reviewed and updated in the environmental management system process, and made accessible to the Host State and the public.

14.3. A closure fund to ensure that resources are available to implement the decommissioning plan shall be established and maintained by the Investor or its Investment in accordance with good industry practice for such funds.

14.4. Environmental management plans shall include provision for the continued improvement of environmental management technologies and practices over the life of the Investment. Such improvements shall be consistent with applicable laws, but shall strive to exceed legally applicable standards and always maintain high levels of environmental performance consistent with best industry practice.

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Commentary

This article reflects good industry practice in environmental management and planning. It does not create a one-size-fits-all obligation, but rather an obligation that is scaled to the nature and size of the investment, in accordance with international standards (such as ISO 14000) and good business practice. Thus, the obligation here is flexible, and practicable.

Environmental management systems can assist in ensuring that domestic environmental laws are in fact complied with. But they go beyond this to require ongoing environmental diligence and improvement. This basic component of all environmental management standards is important in many respects, including as an answer to potential investors that may seek environmental law stabilization clauses, which are increasingly understood as inappropriate despite ongoing requests by some investors.

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ARTICLE 15 •• Minimum Standards for Human Rights, Environment and Labour

15.1. Investors and their investments have a duty to respect human rights in the workplace and in the community and State in which they are located. Investors and their investments shall not undertake or cause to be undertaken acts that breach such human rights. Investors and their investments shall not assist in, or be complicit in, the violation of the human rights by others in the Host State, including by public authorities or during civil strife.

15.2. Investors and their investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.[3]

15.3. Investors and their investments shall not [establish,] manage or operate Investments in a manner inconsistent with international environmental, labour, and human rights obligations binding on the Host State or the Home State, whichever obligations are higher.

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Commentary

Paragraph 15.1 begins with the concept of Prof. John Ruggie as UN Secretary-General Special Representative on Business and Human Rights on the corporate duty to respect human rights. The second sentence then makes this an obligation on the investors.

Sentence 3 of paragraph 15.1 then comes back to the Ruggie concept that investors also should not be complicit in breaches of human rights by others. Complicity is a legal standard that requires some form of direct affiliation or deliberate failure to act in the face of human rights abuses. Complicity does not generally include simply paying taxes or other compliance with law, absent specific factors that might inform the investor or investment of human rights abuses related to such acts.

For labour standards, the ILO Declaration sets out what are considered as the minimum global standards, or core labour standards. Almost all States have subscribed to these minimum standards. There is no evident rationale for any investor to operate in a manner than denies these standards, given the tripartite nature of the process by which ILO standards are adopted, as between government, industry and labour.

Paragraph 15.3 broadens paragraph 15.2 by imposing a duty on investors and investments to respect the international human rights, environmental and labour standards adopted by the Host State though participation in international agreements. These are easily identifiable. It sets such international agreements as a floor for their conduct, even if not fully incorporated into domestic law. These are not open-ended obligations, but derive expressly from the act or ratification of an agreement by the Host State, or Home State in certain circumstances

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[3] These core labour standards are further elaborated, in accordance with the Declaration, in ILO Conventions concerning freedom of association, the elimination of forced labour, the abolition of child labour and the elimination of discrimination in the work place.
Several international environmental agreements have differentiated obligations. Circumvention of an agreement does not occur when the differentiated obligations of the Host State under an agreement are not breached.

ARTICLE 16 •• Corporate Governance Standards

16.1. Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and in the application of internationally accepted accounting standards.

16.2. Investors and their investments shall ensure that all transactions with related or affiliated companies shall be arms length transactions at fair market price. Investors and their investments shall not undertake any transfer pricing practices between themselves or any other related or affiliated companies.

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Commentary

This article should not be required, but sadly the practices of many multinational companies still make it necessary. The article would set a basic level of expectation of corporate conduct and governance.

The transfer pricing issue in paragraph 16.2 is a major factor in protecting government revenues from improper internal corporate practices that reallocate costs and expenses to reduce or avoid taxes in the Host State. For developing countries, with less capacity to monitor such practices, transfer pricing can have a significant impact on tax revenues. Clarity here can establish clear expectations as well as the possibility of claims against the company when other domestic laws may not be sufficiently clear.

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ARTICLE 17 •• Investor Liability

17.1. Investors and Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.

17.2. Home States shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investors in relation to their Investments in the territory of the Host State.

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Commentary

This article requires Home States to restrict the use of such procedural or jurisdictional constraints as seen in the *forum non conveniens* rule, or similar rules, that impede hearings on the merits of cases relating to investor acts or decisions. Such measures by the Home State will in turn allow persons in the Host State to sue in the Home State for the impacts of decisions made by the investor.

Alternatively, the provision could be phrased as a requirement for an investment to waive any right to claim *forum non conveniens* or a similar jurisdictional bar, but this may be more difficult to apply in practice than a governmental measure that prevents the use of the doctrine in the circumstances envisioned here.

The above does not in any way create a determination of any liability of the investor. It simply terminates a jurisdictional barrier invented in a different era by courts operating under very different circumstances. This would ensure that an investor can be held liable for the impacts in foreign countries of its decisions in the Home State. The legal process of the Home State, together with the standard and burden of proof, etc., would continue to apply to the proceedings. This is the same approach as is currently applied, for example, in the European Union.

The Drafting Committee recognized the need for careful attention to be paid to the national implementation of this obligation, should it be adopted. New legislation or regulation concerning access to domestic courts and/or the jurisdiction of domestic courts may be needed by Member States, depending on current jurisdictional rules in each state. Specific training for this purpose may be needed for governments in the region.

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ARTICLE 18 •• Transparency of Contracts and Payments

18.1. Investors or their investments shall make public in a timely manner all contracts related to the establishment or right to operate an Investment made by the Investor or the Investment with a government in the Host State.

18.2. Investors or their investments shall make public in a timely manner all payments made to a government related to the establishment or right to operate of an Investment, including all taxes, royalties and similar payments.

18.3. Where feasible, such contracts and payments shall be made available on an Internet website freely accessible by the public.

18.4. The State Party that is the recipient of payments or party to an investment-related contract shall [have the right to] make the payments and contracts available to the public, including through an Internet site freely accessible to the public.

18.5. Confidential business information shall be redacted from contracts made public in accordance with this Article.

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Commentary

There is a growing concern for transparency in contract negotiation that many developing countries and international organizations are now responding to. Indeed, many now see this as one of the most important ingredients in the fight against corruption. This article sets out the principle of transparency and an expectation that both investors and governments will act on this expectation.

Payments by investors to the government, which may be in the form of taxes, rents, royalties, etc., are similarly subject to increased demands for transparency. The Extractive Industry Transparency Initiative is one application of this principle. This article again adopts a pro-transparency position in this regard.

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ARTICLE 19 •• Relation to Dispute Settlement

19.1. Subject to any other specific directions under this Agreement as to the consequences of a breach of an obligation, where an Investor or its Investment is alleged by a State Party in a dispute settlement proceeding under this Agreement to have failed to comply with its obligations under this Agreement, the tribunal hearing such a dispute shall consider whether this breach, if proven, is materially relevant to the issues before it, and if so, what mitigating or off-setting effects this may have on the merits of a claim or on any damages awarded in the event of such award.

19.2. A Host State may initiate a counterclaim against the Investor before any tribunal established pursuant to this Agreement for damages or other relief resulting from an alleged breach of the Agreement.

19.3. In accordance with its applicable domestic law, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts against the Investor or Investment for damages arising from an alleged breach of the obligations set out in this Agreement.

19.4. In accordance with the domestic law of the Home State, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts of the Home State against the Investor, where such an action relates to the specific conduct of the Investor, and claims damages arising from an alleged breach of the obligations set out in this Agreement.

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Commentary

One issue that frequently arises in relation to including obligations on investors in BITs is their enforcement. Here, the issue is addressed in two ways. The first is making it clear that such breaches can and should be taken into account in any dispute settlement proceedings initiated under the agreement. This includes a specific provision allowing counterclaims by States, the subject of inconclusive discussions under other treaties.

The second method of enforcement is by creating a monetary liability in domestic courts of the Host State for a breach of the treaty obligations by an investor. This is, arguably, the most effective method of all, as it does not rely on government officials or capacity. The initiation of a complaint against an investor does not, of course, presume its guilt, simply that the matter can be tried and damages assessed if the breach is proven.

The opening words of paragraph 19.1 ensure that consequences related to corruption and fraud remain under the direction of those specific articles.

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ARTICLE 20 •• Right of States to Regulate

20.1. In accordance with customary international law and other general principles of international law, the Host State has the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development, and with other legitimate social and economic policy objectives.

20.2. Except where the rights of a Host State are expressly stated as an exception to the obligations of this Agreement, a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in this Agreement

20.3. For greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement.

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Commentary

This article confirms that the treaty does not alter the Host State's basic right to regulate, but without eliminating all the effects of the investor protections. It should be read with more specific articles that enable performance requirements to be imposed, and carefully define the non-discrimination and expropriation rules, for example. All of these provisions are intended to work together.

The broader goal is restated in paragraph 20.2, again ensuring that some of the predilections of arbitrators to view investment treaties purely as investor rights would be untenable under the present approach. In view of the broad obligations in BITs, it is useful to reaffirm the Host State's right to regulate investments in the public interest.

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ARTICLE 21 •• Right to Pursue Development Goals

21.1. Notwithstanding any other provision of this Agreement, a State Party may grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals.

21.2. Notwithstanding any other provision of this Agreement, a State Party may

(a) support the development of local entrepreneurs, and

(b) seek to enhance productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer and other benefits of investment through the use of specified requirements on investors made at the time of the establishment or acquisition of the investment and applied during its operation.

21.3. Notwithstanding any other provision of this Agreement, a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Agreement.

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Commentary

These provisions are developed in part from the existing SADC FIP and in part from other regionally based agreements. Collectively they provide a significant exclusion from the disciplines of the Agreement for measures specifically taken to promote development within the Host State's economy.

Paragraph 21.1 is derived from the FIP.

Paragraph 21.2 is partly from the FIP but has been expanded to ensure that performance requirements may be imposed on foreign investors in order to promote the social and economic benefits that are often ascribed to FDI. This provision does not impose any performance requirements, but does enable a government to require them without fear of potential claims that they are in breach of the agreement, in particular the non-discrimination provision. Combined, these articles will help reinforce the right of States to utilize performance requirement obligations when imposed at the outset of an investment.

Paragraph 3 captures the Black Economic Empowerment type of measures that are seen in many southern African States. It is derived from South African investment treaty language.

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ARTICLE 22 •• Obligations of States on Environment and Labour Standards

22.1. Each State Party has the right to establish its own levels of domestic environmental protection and development policies and priorities, and labour laws and standards, and to adopt or modify such laws, standards and policies. In the exercise of this right, each State Party shall strive to ensure that it provides for high levels of environmental and labour protection, taking into account internationally accepted standards, and shall strive to continue to improve their standards.

22.2. The State Parties recognize that it is inappropriate to encourage investment by relaxing domestic environmental and labour legislation. Accordingly, the State Parties shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an Investment. If a State Party considers that the other State Party has offered such an encouragement, it may request consultations with the other State Party.

[**22.3.** This Article is not subject to the dispute settlement process set out in the investor-State dispute settlement process of this Agreement.]

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Commentary

A provision to preclude the lowering of environmental and related standards, labour standards, and human rights standards, in order to attract or maintain investments, was first included in NAFTA's Chapter 11 in 1992. However, it was done in a non-legally binding manner. The text above sets out a mandatory obligation not to lower such standards in order to attract or maintain investment. The SADC FIP includes a similar provision in mandatory language as well; hence this approach has already been adopted region-wide.

Of note, the above text includes a note suggesting the removal of this provision from the purview of an investor-State arbitration process if one is adopted. The Drafting Committee has not recommended the inclusion of an investor-State arbitration process, but recognizes that States may choose in some circumstances to do so; hence this is included to ensure attention is drawn to this question, in the event a State does choose this direction.

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Part 4: General Provisions

Part 4: General Provisions

ARTICLE 23 •• Cooperation in Promotion of Investment

23.1. The State Parties shall cooperate in the promotion of investment by their Investors into the territory of the other Party. Such cooperation may include joint investment promotion events, tours with industrial leaders and investors, technology promotion, and other measures designed to promote investment.

23.2. The State Parties shall exchange information with respect to the investment opportunities, laws and regulations for foreign investors in their territories.

23.3. The State Parties may provide Investment financing and Investment guarantee facilities for Investors from their State into the territory of the other State Party. Such facilities shall, if used, promote compliance with the obligations of Investors set forth in this Agreement.

23.4. [State Party X shall provide technical assistance to State Party B in the implementation of this Article.]

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Commentary

Investment treaties are often styled as investment promotion and protection treaties. But they contain few if any provisions relating to the promotion of investment or to reviewing the effectiveness of the treaty in doing so.

This article sets out the obligation to promote investment, and proposes some specific tools that may, with the agreement of the parties, be used to do so. It is a minimal first step in this direction.

In addition, the article allows Home States to require that its investors who seek to make an investment under the treaty comply with the obligations contained herein as a condition of State financing or insuring of the investment. This gives some specific responsibility to the Home State for the conduct of its investors where governmental facilities are being used to support the investor. The concluding paragraph on assistance is intended to apply in a developed/developing State context. For a south-south context, one might consider including a sentence on the exchange of best practices in the implementation of this article instead.

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ARTICLE 24 •• Transparency of Investment Information

24.1. Each State Party shall promptly publish, or otherwise make publicly available, its laws and regulations of general application as well as international agreements that may affect the Investments of Investors of the other State Party.

24.2. Each State Party shall endeavour to promptly publish, or otherwise make publicly available, its policies and administrative guidelines or procedures that may affect investment under this Agreement.

24.3. Nothing in this Agreement shall require a State Party to furnish or allow access to any confidential or proprietary information, including information concerning particular Investors or Investments, the disclosure of which would impede law enforcement or be contrary to its domestic laws protecting confidentiality.

24.4. [This Article shall not be subject to the investor-State dispute settlement process.]

24.5. [State Party X shall provide technical assistance to State Party B in the implementation of this Article.]

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Commentary

This article aims to promote transparency for the information that should be available to investors about the investment making process. It sets out a binding obligation in relation to laws and regulations and a best efforts obligation in relation to policies and other administrative measures. This division recognizes that some forms of information may be more accessible than others on a short-term basis for implementation, while seeking to ensure that higher levels of transparency are brought into place as capacity is available.

At the same time, the obligation is removed from the investor-State dispute settlement process, if such a process is included in the treaty. If there is no investor-State provision then this paragraph can be removed.

The additional language on technical assistance recognizes that one of the State Parties may lack the technical capacity or resources to ensure this goal is achieved. When this is the case and support from the other treaty partner may be available, the text encourages this to be considered. As seen previously, the provision on assistance is intended to apply in a developed/developing State context. For a south-south context, one might consider including a sentence on the exchange of best practices in the implementation of this article instead.

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ARTICLE 25 •• Exceptions

25.1. [Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination pursuant to Article [4]] Nothing in this Agreement shall be construed to oblige a State Party to pay compensation for adopting or enforcing measures taken in good faith and designed and applied:

(a) to protect public morals and safety;

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

(c) for the conservation of living or non-living exhaustible natural resources; and

(d) to protect the environment.

25.2. For greater certainty, nothing in this Agreement shall be construed to oblige a State Party to pay compensation if it adopts or maintains reasonable measures for prudential reasons, such as:

(a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;

(b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and

(c) ensuring the integrity and stability of a State Party's financial system.

25.3. Nothing in this Agreement shall apply to taxation measures, subject to the continued application of Article 6 [Expropriation].

25.4. Nothing in this Agreement shall apply to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a State Party's obligations under Article 8 [Repatriation of Assets].

25.5. Nothing in this Agreement shall apply to a State Party's measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its national security interests.

25.6. Nothing in this Agreement requires a State Party to furnish or allow access to any information, the disclosure of which it determines to be contrary to its national security interests.

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Commentary

This article combines a number of exceptions issues seen in various regional and bilateral agreements. Each is considered in order.

Paragraph 25.1 is drawn from Article XX of the GATT, and is also reflected in the COMESA CCIA and other bilateral agreements. However, it is more specifically drafted to make clear that no compensation is required to be paid to an investor for the types of measures set out therein as long as they are taken in good faith. This avoids a situation, for example, where a measure is "made legal" by virtue of paying compensation. Hence the test is not one of being a breach of the treaty or not, but a more refined and specific statement that the covered measures simply do not require compensation when taken in a *bona fide* manner. The addition of the last subparagraph is to ensure that the environment is clearly included, as opposed to simply implied by virtue of the other terms or by reference to WTO dispute settlement decisions. This makes the provision complete and express, rather than implied.

The role of a non-discrimination proviso (in square brackets at the beginning of the text) here is unclear, though it is always included in such formulations derived from the GATT. Yet this would negate any application of a general exception such as this to the national treatment or MFN provisions. Moreover, many measures may legitimately differentiate between investors in a region or in similar sectors. Hence, it is considered vital that if such introductory language is included, it should be made clear, again, that this is to be understood as per the article on non-discrimination and not as creating a new or different standard for non-discrimination. This, as noted previously, is done through the use of paragraph 4.6 in the text above.

We are not aware of such a general provision being used to date in an investment arbitration, and there remains some doubt as to its efficacy. Nonetheless, many agreements now contain this or similar text.

Paragraph 25.2 relates to measures to ensure the stability and integrity of the financial system. The notion of prudential measures in this text is intended to relate to the technical use of that term in relation to the financial sector only. It may be seen as complementary to the provision on safeguards measures enabling certain limitations on the export of assets by an investor.

Paragraph 25.3 concerns a broad exclusion for taxation measures. This is one approach seen in investment treaties, and is very clearly stated. Another approach is to make this subject to review by the Parties themselves in the event of an arbitration. This is used in the U.S. treaties now. It allows the Parties to the treaty to determine if a measure is a valid tax measure or not, a determination which, if agreed upon, becomes determinative. If the two State Parties do not agree, however, the issue falls back to the arbitration tribunal to determine.

Paragraph 25.4 relates to a general exception for financial and exchange rate policies, again as a complement to the safeguards provision relating to the repatriation of assets.

The exclusions relating to national security are inspired by the U.S. Model BIT and subsequent U.S. treaties. They are self-executing here, meaning that as soon as a State declares this exception, it is binding and not subject to arbitral review. This removes the review of this issue from any dispute settlement process. This self-executing approach is seen in the U.S. treaties.

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ARTICLE 26 •• Denial of Benefits

26.1. A Party may at any time deny the benefits of this Agreement to an investor of another Party that is an enterprise of such Party and to investments of such investor if investors of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party, or

(b) adopts or maintains measures with respect to the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments.

26.2. Subject to prior notification and consultation with the other State Party, a State Party may at any time deny the benefits of this Agreement to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.

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Commentary

This article has become a common feature of investment treaties. As set out here, it provides for two types of situations where a State Party may exercise its right to deny an investor the benefits of the treaty, including access to any dispute settlement benefits. The first is where a State Party does not have diplomatic relations with the Home State of the actual beneficial owner of the investor making the putative investment, or the actual beneficial owner is from a State subject to economic sanctions by the Host State Party.

The second situation is where the actual beneficial owner of the investor is from a third State not a party to the treaty and the investor does not actually carry on substantial business activity in the putative Home State. This is included here out of a sense of caution due to the multiple options set out for defining an investor under the treaty. If a substantial (or substantive) business test is adopted there, paragraph 2 above will not likely be needed. The paragraph is designed to act as a barrier to formal incorporation being the sole test of whether an investor is properly to be covered by the treaty benefits, and thus to prevent simply forum shopping to achieve the benefits of the treaty.

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ARTICLE 27 •• Periodic Review of this Agreement

27.1. The State Parties shall meet every five years after the entry into force of this Agreement to review its operation and effectiveness, including the levels of investment between the Parties.

27.2. The State Parties may adopt joint measures in order to improve the effectiveness of this Agreement.

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Commentary

This article seeks to give an ongoing, active life to the Agreement beyond the risk of arbitrations for alleged breaches of the treaty being commenced. It requires the State Parties to consider value and effectiveness of the agreement every five years, and enables the adoption of adjustments if needed. This has been found in a number of Canadian investment treaties, and is also included in the review mechanisms in broader economic cooperation or trade agreements with investment chapters.

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Part 5: Dispute Settlement

Part 5: Dispute Settlement

ARTICLE 28 •• State-State Dispute Settlement

28.1. Disputes between the State Parties concerning the interpretation or application of this Agreement should, as far as possible, be settled through the amicable means. The treaty review mechanism in Article 26 shall be used to raise such issues in a regular meeting or through a special ad hoc meeting convened by either State Party for this purpose.

28.2. If a dispute between the State Parties cannot thus be settled within six months of the initiation of consultations to resolve the dispute, either State Party may request mediation of the dispute, including through recognized institutions or the use of good offices for such purposes. Both State Parties shall cooperate in good faith when one State Party has made such a request.

28.3. Subject to the provisions of paragraph 28.4, a State Party may submit a claim to arbitration

(a) seeking damages for an alleged breach of this Agreement on behalf of an Investor or Investment, or

(b) for a matter concerning the interpretation or application of a provision of this Agreement in which it is in dispute with the other State Party.

28.4. A State Party may not submit a claim to arbitration seeking damages for an alleged breach of this Agreement on behalf of an Investor or Investment

(a) unless the Investor or Investment, as appropriate, has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State, or

(b) unless the claimant State Party demonstrates to the tribunal established under this Article that there are no reasonably available domestic legal remedies capable of providing effective relief for the dispute concerning the underlying measure, or that the legal remedies provide no reasonable possibility of such relief in a reasonable period of time.

28.5. Subject to paragraphs 28.3 and 28.4, a State Party may request an arbitration [at a designated regional arbitration center in accordance with its Rules or] under an ad hoc process in accordance with the following rules. Within two months of the receipt of the request for arbitration, each State Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who, on approval by the two State Parties, shall be appointed Chairperson of the tribunal. The Chairperson shall be appointed within two months from the date of appointment of the other two members.

28.6. If within the periods specified in paragraph 28.5 the necessary appointments have not been made, either State Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either State Party or if he or she is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either State Party or if he or she, too, is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either State Party shall be invited to make the necessary appointments.

28.7. The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both State Parties.

28.8. Each State Party shall share equally the costs and expenses of the tribunal unless the tribunal shall decide otherwise.

28.9. [The tribunal shall determine its own procedure.][The tribunal shall apply the [UNCITRAL] [ICSID] Arbitration Rules in force at the time of the submission of the dispute to arbitration, in accordance with paragraph 28.5.]

28.10. All documents relating to a notice of arbitration, the settlement or resolution of any dispute pursuant to this Article, and the pleadings, evidence and decisions in them, shall be available to the public, subject to the redaction of confidential information.

28.11. *Amicus Curiae* submissions: The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a governmental entity of either State Party. The procedures in Schedule 4 shall apply for this purpose.

28.12. Procedural and substantive oral hearings shall be open to the public. This may be achieved though live broadcasting of the hearings by Internet broadcast.

28.13. An arbitral tribunal may take such steps as are necessary, by exception, to protect confidential business information in written form or at oral hearings.

28.14. No claims under this provision may be commenced if more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired, knowledge of the breach alleged in the arbitration claim and knowledge that the Investor has incurred loss or damage; or one year from the conclusion of the request for local remedies initiated in the domestic courts.

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Commentary

Most investment treaties include a State-State dispute settlement provision. The text above divides out the two possible roles of a State-State dispute settlement system: a State claiming damages on behalf of an investor for an alleged breach of the treaty; and a "pure" dispute between the State Parties themselves over the interpretation or application of the treaty. Importantly, the former is made subject to the same exhaustion of local remedies requirements as the text below on investor-State, should governments choose to include investor-State arbitration.

Paragraphs 28.1 and 28.2 set out a requirement to seek to resolve disputes by amicable means prior to resorting to a formal and binding dispute settlement process. This is very common. Paragraph 28.2 seeks to encourage a formal mediation process and makes it mandatory for both parties to enter into such a process if one party formally states it desires to do so. Mediation is a non-binding process; hence a solution to the potential dispute cannot be imposed during mediation without the consent of both State Parties.

Paragraph 28.3 sets out the two options for State-State dispute settlement noted above: a State acting on behalf of an investor and a State initiating the process in order to resolve a dispute directly between itself and the other State Party. States have, under customary international law, a right to make claims for damages suffered by their citizens or businesses due to breaches of international law by a State. The provisions allowing for a State Party to make a claim on behalf of an investor here reflects a concrete application of this customary law right.

Paragraph 28.4 requires the exhaustion of local remedies by an investor or investment before a State may initiate a claim on behalf of an investor. The exhaustion of local remedies clause means that before any claim can be taken under the dispute settlement process set out in the treaty, the investor or investment must have sought to resolve the dispute in the local courts or other dispute settlement processes available in the Host State. It is important to note here that the language for such a clause must be set out as domestic proceedings relating to the measures underlying the claim under this Agreement. Some treaties have phrased the condition as requiring a claim concerning the breach of the treaty to be taken in the domestic courts, if it can be so taken. However, most States do not allow claims for a breach of the treaty per se to be taken, but rather a claim that the measure taken by the government is otherwise in breach of the domestic law or constitution. This difference is important.

In addition, the exhaustion of local remedies clause allows a State seeking to take a claim on behalf of an investor or investment to argue that no local remedies are available under which to challenge the underlying measure. A State making such a claim must show evidence of this in order to be entitled to go directly to the international process.

Paragraphs 28.5–28.8 are fairly standard paragraphs relating to the appointment and operation of a tribunal at the international level. They ensure that the tribunal can be appointed and become functional even if one State is recalcitrant and uncooperative.

Paragraph 28.9 sets out options that States may consider for identifying the arbitration rules that will be applied by the tribunal to the dispute. This can be made specific, or left general. It should be noted that a tribunal can utilize the ICSID arbitration rules, which are fully accessible at any time to the public, without having to utilize the ICSID process if it does not wish to. Similarly, the UNCITRAL arbitration rules can be adopted, or any other rules, without any other impacts on the organization of the arbitration.

Paragraphs 28.10–28.13 are drawn from the COMESA approach and more recent approaches to investor-State arbitration in the U.S. and Canadian treaties, as well as others. Paragraph 28.10 requires that all the key arbitral documents be made public. Posting them on a website is the easiest way to do this.

Paragraph 28.11 allows for the participation of amicus curiae, either organizations or individuals, with an interest in the case. This is now common in investor-State arbitration and is carried over into the State-State process here as well.

Paragraph 28.12 requires the tribunal hearings to be open to the public. Paragraph 28.13 sets out the exception to the previous few paragraphs, that the tribunal can take such steps as may be needed to protect confidential business information from being put into the public domain. For documents this can be done by redacting any such information from the public versions. For oral hearings it may mean holding portions of a session in camera.

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ARTICLE 29 •• Investor-State Dispute Settlement

SPECIAL NOTE: The Drafting Committee was of the view that the preferred option is not to include investor-State dispute settlement. Several States are opting out or looking at opting out of investor-State mechanisms, including Australia, South Africa and others. However, if a State does decide to negotiate and include this, the text below provides comprehensive guidance for this purpose. This text is drawn primarily from the U.S. and Canadian Model BITs, other recent treaties, and existing arbitration rules. Due to the length of the text, commentary follows each paragraph.

29.1. Amicable Settlement of Disputes

In the event of an investment dispute between an Investor or its Investment (referred to as an "Investor" for the purposes of the Investor-State dispute settlement provisions) and a Host State pursuant to this Agreement, the Investor and the Host State should initially seek to resolve the dispute through consultation and negotiation, which may include the use of nonbinding, third-party mediation or other mechanisms.

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Commentary

It is widely accepted that prior to initiating any arbitration process, investors and/or their investments should have a general obligation to resolve the dispute amicably. This paragraph sets out such a requirement.

It may be noted here that the right to initiate an arbitration, if it is given, could be exercised by the investor or the investment, which are usually two distinct legal entities. This is quite common.

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29.2. Notice of Intent to Arbitrate

At least six months before submitting any claim to arbitration under this Part, an Investor shall deliver to the Host State a written notice of its intention to submit the claim to arbitration ("Notice of Intent"). The notice shall specify:

(a) the name and address of the Investor;

(b) for each claim, the provision of this Agreement alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for each claim; and

(d) the relief sought and the approximate amount of damages claimed.

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Commentary

This paragraph begins the arbitration process with a preliminary step known as a Notice of Intent to arbitrate. The Notice of Intent is the formal signal of the investor's intent to initiate the process if it is not otherwise resolved in an amicable fashion. The notice period in practice today ranges from 3 to 12 months. The Drafting Committee has suggested 6 months here.

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29.3. Mediation

After submission of the Notice of Intent, the Investor or the Host State may request mediation of the dispute, in which case the other disputing party may agree to such mediation. The costs of the mediation shall be shared equally [unless the mediator decides otherwise for good cause. The mediator shall provide written reasons for such a decision].

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Commentary

This article provides for a mediation option where both parties to the potential arbitration agree. The United Nations Conference on Trade and Development (UNCTAD) and some academics are promoting such an option. In some instances, however, States are simply not able to mediate, for example when a claim contends that a new public safety regulation to reduce smoking is an expropriation of a company's intellectual property rights. Such a claim has recently been made against both Uruguay and Australia. A State simply cannot accept such a position and mediation that requires it to alter its public health measure. Where mediation is used, it does not require that a settlement be reached. So there is no obligation to successfully conclude a mediation process.

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29.4. Conditions for Submission of a Claim to Arbitration

An Investor may submit a claim to arbitration pursuant to this Agreement, provided that:

(a) six months have elapsed since the Notice of Intent was filed with the State Party and no solution has been reached;

(b) the Investor or Investment, as appropriate,

(i) has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State; or

(ii) the Investor demonstrates to a tribunal established under this Agreement that there are no reasonably available legal remedies capable of providing effective remedies of the dispute concerning the underlying measure, or the legal remedies provide no reasonable possibility of such remedies in a reasonable period of time.

(c) The Investor has provided a clear and unequivocal waiver of any right to pursue and/or to continue any claim relating to the measures underlying the claim made pursuant to this Agreement, on behalf of both the Investor and the Investment, before local courts in the Host State or in any other dispute settlement forum.

(d) No more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired, knowledge of the breach alleged in the Notice of Arbitration and knowledge that the Investor has incurred loss or damage, or one year from the conclusion of the request for local remedies initiated in the domestic courts.

(e) The Investor consents in writing to arbitration in accordance with the procedures set out in this Agreement.

(f) For the avoidance of doubt, the provisions in this Agreement relating to arbitration procedures shall prevail over those in the arbitration rules selected to govern the arbitration in the event of any inconsistency.

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Commentary

This article sets out the full range of conditions that MUST be fulfilled prior to an investor initiating an arbitration. These include, in order from above:

- A six-month waiting period is becoming increasingly standard after the Notice of Intent.
- The investor has exhausted local remedies, as described above, or no such remedies are available and this can be demonstrated to a tribunal. The SADC FIP has such an exhaustion of local remedies provision.
- Paragraph (c) is what is known as a fork-in-the-road provision: an investor can choose arbitration under this Agreement or another form of dispute settlement, but not both. For example, if an investor has a separate investment contract with an arbitration provision, it might seek to use that provision. The paragraph would make this impossible by making a waiver of any other dispute settlement rights a requirement. This estops ("estoppel") an investor from utilizing other remedies in most legal systems.
- As in the exhaustion of local remedies provisions, the fork-in-the-road provision must be carefully drafted to address not "treaty" claims per se, but any claims relating to the underlying measures to the treaty claim that may be subject to domestic or other proceedings.
- The three-year period in (d) is a "statute of limitations" period. Three years is emerging as a common period. This period is defined by when the investor knew, or ought to have known if it had been acting reasonably, of the taking of the underlying measure.
- The consent in writing to arbitration is a basic requirement. This is set out clearly here.
- The final paragraph is an interpretive provision that ensures the treaty will prevail over any arbitration rules that may be used and might be either inconsistent with, or not as complete as, the present text. This ensures the will of the parties is maintained.

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29.5. Exception for Interim Relief

Notwithstanding paragraph 29.4(c), the Investor may initiate or continue an action that seeks interim relief before a judicial or administrative tribunal of the State Party, for the sole purpose of preserving the Investor's rights and interests during the pendency of the arbitration, and that does not involve the payment of monetary damages.

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Commentary

This allows an investor to use the courts of the Host State to seek to an injunction against further government measures, or the implementation of the challenged measure, if the investor believes it will cause the situation to deteriorate more. No damages are claimable under such a measure. The intent here is merely to preserve the status quo from getting worse. Whether such an injunction may be granted is then a matter for the domestic courts to decide.

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29.6. Applicable Arbitration Rules

Subject to Article 29.3, an Investor may submit an arbitration claim:

(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the Host State and the other State Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the Host State or the other State Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules;

[(d) to XX regional arbitration forum in a region of one or both State Parties,] or

(d/e) if the Investor and the Host State agree, to any other arbitration institution or under any other arbitration rules.

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Commentary

It is very common for an investment treaty to indicate which arbitration rules the investor may draw from when initiating an arbitration. The list of options above is now fairly standard, though some States have stopped including the ICSID option. The list can be adjusted by the States negotiating to include other rules or fora such as those under the International Chamber of Commerce and the Stockholm Chamber of Commerce.

The list above also assumes that no regional forum for arbitration exists that may be able to provide the appropriate rules and, in some cases, facilities. Where such a forum exists, the Drafting Committee was of the view that it should be carefully considered for inclusion or as an exclusive option to be used.

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29.7. Date of Submission of Claim

A claim shall be deemed submitted to arbitration under this Part when the Investor's notice of arbitration or request for arbitration ("Notice of Arbitration"):

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 29.6 is received by the Host State.

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Commentary

The formal date of submission is determined by the acts needed to be taken under the rules of arbitration chosen for the proceedings when the investor submits its claim to arbitration under that set of rules. It may at some time need to be established with certainty, for example if it is argued that the three-year period for initiating an arbitration has lapsed.

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29.8. Place of Arbitration

The place of arbitration and legal situs of the arbitration shall be [in the capital city of the Host State] [in XXX (to be an agreed neutral venue)][in a place determined by agreement of the parties to the arbitration or determined by the tribunal in the absence of such agreement].

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Commentary

The choice of location of the arbitration has both legal and political contexts. The legal issues include the process and standards for review of an arbitral decision by the supervising courts. In addition, some States now have legislation requiring all investment related arbitration to be within the territory of the (Host) State. The text provides three options that allow for the negotiators to raise and address these issues and reach specific decisions on how to address them.

29.9. Scope of Arbitration

(a) An arbitration under this Article shall relate to an allegation of a breach of one or more rights or obligations under this Agreement that is subject to arbitration.

(b) Where an investment authorization or a contract includes a choice of forum clause for the resolution of disputes pertaining to that investment or the authorization or contract, no arbitration under this Agreement may be initiated by the Investor when the underlying measure in the arbitration would be covered by such a choice of forum clause.

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Commentary

This paragraph addresses the very critical issue of what types of claims can be made in the arbitration process. This is in fact a very controversial issue, and the drafting of this provision should be undertaken with great care, as much can be at stake.

The above text is specific to claims based on an alleged breach of one or more of the obligations under the treaty that are subject to arbitration. It does not, for example, say simply an alleged breach of this treaty, which may be read to override another provision that excludes an obligation from the scope of dispute settlement. This drafting avoids any such risk.

This is the narrowest possible approach and it is strongly recommended.

In paragraph 29.9(b), it is supported by a clear statement directing the tribunal to recognize and enforce any other choice of forum clause applicable between the State and the investor/investment related to the underlying measure being complained of. In particular, paragraph 29.9(b) requires the tribunal to give full priority to any choice of forum clauses specifically agreed or accepted by the investor in a contract or investment authorization. (Investment authorization is a defined term and includes, essentially, any form of permit, authorization, licence, etc.)

This has been a very controversial issue in investment arbitration and subject to different and opposite results in various arbitrations. The drafting above resolves the issue clearly and in favour of the choice of forum clause adopted by the investor and State directly. It is important, again, that the provision relates to the underlying measure, rather than the dispute under the Agreement, for the reasons explained previously.

This paragraph also goes a long way to address a problem where multiple dispute settlement fora have been authorized by a tribunal under a treaty, under a contract, and at the same time under a judicial process. In many cases, a breach of contract claim has, for example, simply been restated as a breach of treaty claim, a simple linguistic exercise for a junior lawyer to complete. The above text helps address all of these issues that have arisen in practice.

Other agreements have also included additional claims that could be included in arbitration under the treaty. These are noted here, with a strong recommendation that they not be included in the text:

- Several treaties allow any obligations undertaken by a State toward an investor in whatever legal form, a so-called umbrella clause, to be taken to arbitration by including respect for such obligations as substantive treaty provisions. This is not included in the obligations set out above.
- It is important, then, that this not be accomplished indirectly through language in the dispute settlement provisions that authorize a broad scope. Language such as "any dispute relating to an investment" or "any matter relating to an investment" have been seen and should be avoided.
- Some treaties' dispute settlement provisions have included disputes relating to any investment agreement or contract, or investment authorization, including some recent U.S. treaties. Again, this is in our view too broad and inappropriately risks replacing the choice of forum clause in such agreements or contracts instead of respecting them, as paragraph 29.9(b) would require.
- Some treaties have allowed an alleged breach of any legal provision in the Host State's domestic law that provides guarantees to an investor to be litigated in the arbitration instead of in the domestic court, where domestic law should be litigated.

Getting these provisions right is very important as it determines the scope of the arbitration and whether the arbitration process will override any other process selected directly by the State and investor.

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29.10. Selection of Investor Arbitrator

The claimant shall provide with the Notice of Arbitration:

(a) the name of the arbitrator that the claimant appoints, or

(b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

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Commentary

This is a simple procedural requirement.

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29.11. Consent to Arbitration

(a) Each Party consents to the submission of a claim to arbitration under this Section in accordance with this treaty.

(b) The consent under paragraph 29.11(a) and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(i) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; [and]

(ii) Article II of the New York Convention for an "agreement in writing"; [and]

(iii) [Name any other body used and reference rule on submission of an arbitration]

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Commentary

This is also a common procedural article and confirms the consent by each State Party to the arbitration is valid for the primary arbitration rules that are listed above as available for use under the process.

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29.12. Establishment of Tribunal

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

(b) [All arbitrators shall be drawn from a roster of eligible arbitrators established by the State Parties within 12 months of the entry into force of this Agreement and maintained up to date by the State Parties. Said roster shall be composed of persons of good standing, independence and with experience in international law, international investment, and/or dispute settlement under international law.]

(c) If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Article, the Secretary-General, on the request of a

disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

(d) For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality,

(i) the State Party hereby agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules; and

(ii) an Investor may submit a claim to arbitration under this Article, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the Investor agrees in writing to the appointment of each individual member of the tribunal.

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Commentary

The establishment of a tribunal has traditionally been done through the appointment, by each side, of its own selection and the appointment of a president of the tribunal by either the agreement of the other appointed arbitrators, the arbitrating parties, or through the intervention of the appointing authority under the selected rules of arbitration of the treaty in question. This is the approach generally described here.

However, an alternative approach has also been included here for further consideration. This is the selection by the parties to the treaty of a roster of potential arbitrators under the treaty, from which the three arbitrators must be chosen. This allows for greater certainty of the necessary qualities of an arbitrator in the selection process and less opportunity for parties to manipulate the process with arbitrators known to represent investors or States in the process. This alternative approach is gaining currency today.

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29.13. Avoidance of Conflict of Interest of Arbitrators

The arbitrators appointed to resolve disputes under this Agreement must, at all times during the arbitration:

(a) be impartial, free of actual conflicts of interest and an appearance of conflict of interest, and independent of the disputing parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated; and

(b) disclose to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the co-arbitrators, any items that may, in the eyes of a reasonable third person , give rise to doubts as to the arbitrator's impartiality, freedom from conflicts of interest, or independence.

For greater certainty, the above requirements include the requirement not to act concurrently as counsel in another actual or potential treaty-based arbitration involving a foreign investor and a State.

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Commentary

Conflicts of interest are a growing concern in investment arbitration, and have led to a range of very controversial decisions as regard what constitutes conflict of interest for arbitrators. This provision addresses the concerns by providing clear and unequivocal language requiring arbitrators to be impartial, independent and free of any conflict of interest for the entire period of the arbitration. The language suggested extends and tightens the rules to avoid conflicts of interest by arbitrators in the UNCITRAL and ICSID processes, primarily by eliminating the "manifest" requirement in ICSID. It also clearly sets out the common standard of an "appearance of conflict of interest", incorporated into the International Bar Association's Guidelines on Conflicts of Interests in International Arbitration.

In addition, the final paragraph raises an issue of some debate, whether arbitrators should serve as counsel in other arbitrations at the same time. A growing number of arbitrators have said they will no longer do so due to the conflicts of interest it creates. Others have refused to recognize this as a problem. The text suggested resolves this issue in favour of ensuring no conflict can arise in this regard by disallowing arbitrators from concurrently acting as counsel in other treaty based investment arbitrations.

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29.14. Submissions by Non-Disputing State Party

The non-disputing State Party to this Agreement may make oral and written submissions to the tribunal regarding the interpretation of this treaty and be present at the oral arguments.

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Commentary

This provision addresses the State Party to the treaty that is not party to the arbitration. It was first seen in the NAFTA investor-State provisions and has been adopted on a number of occasions since then. It is a useful position for the States to have such a right under the treaty and can help avoid significant unexpected interpretations by tribunals when the considered views of both State Parties are before them in any given instance.

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29.15. *Amicus Curiae* Submissions

The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party. The procedures in Schedule 4 shall apply for this purpose.

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Commentary

The acceptance of *amicus curiae* submissions in investment arbitration began in 2000 and is now understood to be common practice. It is certainly not controversial. It is usually done now through an application to the tribunal by the person or organization that intends to make the submission. ICSID now has specific but not very detailed rules for this and UNCITRAL is in the process of negotiating such rules at this time. The suggested Schedule 4 would set out a clear set of rules in the treaty for the State Parties, any investor, the tribunal and the would-be *amicus* petitioners to follow in a clear and consistent manner.

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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.

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Commentary

This article is within the emerging international standards on transparency for investor-State arbitration. It is seen in the COMESA CCIA and in many other treaties. ICSID enables many such steps to be taken, and UNCITRAL is in the process of revising the rules for investor-State arbitration toward this same end.

The transparency principle is set out clearly, subject to an ability of the parties and the tribunal to ensure that legitimate confidential business information is protected. The process for doing so is set out in detail above, drawn from the most advanced texts for this purpose.

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29.18. Consolidation of Arbitrations

(a) Where two or more claims have been submitted separately to arbitration under this Article and the claims have a question of law or fact in common and arise out of the same underlying measure or measures or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 29.2 – 29.10.

(b) A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the [President of the International Court of Justice] and to all the disputing parties sought to be covered by the order and shall specify in the request:

(i) the names and addresses of all the disputing parties sought to be covered by the order;

(ii) the nature of the order sought

(iii) the grounds on which the order is sought

(c) Unless the [President of the International Court of Justice] finds within 30 days after receiving a request under paragraph 29.18(b) that the request is manifestly unfounded, a tribunal shall be established under this Article.

(d) Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

(i) one arbitrator appointed by agreement of the claimants;

(ii) one arbitrator appointed by the respondent; and

(iii) the presiding arbitrator appointed by the [President of the International Court of Justice], provided, however, that the presiding arbitrator shall not be a national of either Party.

(e) If, within 60 days after the [President of the International Court of Justice] receives a request made under paragraph 29.18(b), the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 29.18(d), the [President of the International Court of Justice], on the request of any disputing Party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the [President] shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the [President] shall appoint a national of the non-disputing Party.

(f) Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under this Agreement have a question of law or fact in common and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

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

(ii) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others, or

(iii) instruct a tribunal previously established under Article 29 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

(a) that tribunal, at the request of any Investor not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 29.18(d)(i) and (e),, and

(b) that tribunal shall decide whether any prior hearing shall be repeated.

(g) Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under this Agreement and that has not been named in a request made under paragraph 29.18(b) may make a written request to the tribunal that it be included in any order made under paragraph 29.18(f), and shall specify in the request:

(i) The name and address of the claimant;

(ii) The nature of the order sought; and

(iii) The grounds on which the order is sought

The Investor shall deliver a copy of its request to the [President].

(h) A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules in force at the time the proceedings are initiated, except as modified by this Agreement.

(I) A tribunal established under this Article shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this paragraph has assumed jurisdiction.

(J) On application of a disputing party, a tribunal established under this paragraph, pending its decision under subparagraph (f), may order that the proceedings of a tribunal established under this Article be stayed, unless the latter tribunal has already adjourned its proceedings.

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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.

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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.

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29.20. Appeal Mechanism

If a separate, multilateral or bilateral agreement enters into force between the State Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the State Parties shall strive to reach an agreement that would have such appellate body review awards rendered under this Agreement in arbitrations commenced after the multilateral agreement enters into force between the State Parties.

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Commentary

This is a “precautionary” provision dealing with an appeal mechanism. Several States and organizations are considering how such a mechanism might be developed in an efficient and economical manner. This text simply notes this situation as a future possibility, but does not automatically adopt any such mechanism that may be developed in the future.

••

A joint decision of the State Parties, each acting through its representative designated for purposes of this Article, declaring their joint interpretation of a provision of this Agreement, shall be binding on any tribunal, and any decision or award issued by a tribunal must apply and be consistent with that joint decision.

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Commentary

This provision was also used first in the NAFTA agreement and is present in the U.S. and Canadian Model BITs and treaties derived from them. A very recent UNCTAD report recommends the inclusion of such provisions today. The parties to NAFTA have in fact issued such an interpretative statement to restrict the broad interpretation of FET by arbitration tribunals ruling under that treaty.

This is a highly recommended provision as it is the only effective safety valve to preclude unintended interpretations being binding on the parties over the longer term. Implementing this provision is a much simpler and more direct process than amending the treaty, making it a very functional process.

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ARTICLE 31 •• Governing Law in Dispute Settlement

31.1. When a claim is submitted to a tribunal under this Agreement, it shall be decided in accordance with this Agreement. The governing law for the interpretation of this Agreement shall be this Agreement and the general principles of international law relating to the interpretation of treaties, including the presumption of consistency between international treaties to which the State Parties are party. For matters related to domestic law, the national law of the Host State shall be resorted to as the governing law.

31.2. For greater certainty, paragraph 31.1 does not expand or alter the scope of obligations contained in this Agreement or incorporate other standards except where specifically expressed herein.

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Commentary

The identification of the governing law in an agreement is increasingly important. The above provision ensures a broad purposive approach to the interpretation and application of the Agreement and again mitigates against the ability of a tribunal to focus only on the investor protection provisions as the basis of an interpretative exercise.

The text also limits the role of the governing law clause to the interpretation of the treaty and precludes the addition of new obligations from other parts of international law.

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ARTICLE 32 •• Service of Documents

Delivery of notices and other documents on a State Party shall be made to the place named for that State Party in Schedule C.

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Commentary

This is a simple technical provision that clearly identifies the appropriate contact points in the event of a dispute under this Agreement.

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NOTES ••

Part 6: Final Provisions

Part 6: Final Provisions

ARTICLE 33 •• Entry into Force

This Agreement shall be subject to ratification by the State Parties in accordance with their constitutional procedures. It shall enter into force 60 days after the deposit by the last State Party of its instrument of ratification with the other Party.

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Commentary

This is a simple clause on entry into force. This is a key technical legal provision required to ensure clarity on when the obligations on the parties become legally binding.

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ARTICLE 34 •• Period in Force and Termination

34.1. The Agreement shall remain in force for ten years following its entry into force.

34.2. **Option 1** This Agreement shall be renewed for further periods of ten years following the exchange of official instruments between each State Party confirming the renewal of the Agreement. The notices of renewal shall be exchanged prior to the expiration of the Agreement. This Agreement shall expire where no such exchange of instruments is completed prior to the expiration of each ten-year period.

34.2. **Option 2:** This Agreement shall automatically be renewed for an additional period of ten years, unless either State Party has submitted a Notice of Intent to terminate the Agreement at the expiration of the current ten-year period at least six months prior to the renewal date.

34.3. Either State Party may terminate this Agreement by giving an official notice to the other Party twelve months prior to its intended termination date, notwithstanding any prior renewal of this Agreement.

34.4. The rights of Investors and the State Parties shall continue in force for [five][ten] years following the expiration of the period in force for investments made during the period the Agreement was in force.

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Commentary

Many existing investment treaties have minimal provisions on the minimum period for which the treaty will be in force and provisions for its renewal or for the withdrawal of a Party. This leaves the Parties free to rely upon rules from outside the treaty, in particular the Vienna Convention on the Law of Treaties, to determine these issues. The view of the Drafting Committee was that the Model Agreement should contain the needed rules on this issue.

The initial period for which the treaty would be in force is ten years. Afterwards, two options are set out. One is a requirement for the Parties to exchange letters of intent to renew the treaty. A failure of either Party to do so means the treaty would then lapse. The second option is the opposite: the treaty renews automatically at the end of ten years for a further ten years, indefinitely, unless either Party notifies the other of its wish to not have the treaty renew itself. There is no legal difference in the end result, but Option 1 requires the positive acts of renewal, while Option 2 requires steps to avoid the automatic renewal. The Drafting Committee felt it was prudent to include both of the options.

In addition, the text provides a mechanism for either Party to terminate the treaty upon 12 months notice to the other Party. This provides an additional safety valve for the Parties in the event of significant difficulties being experienced, significant differences in interpretation or application of the treaty, or other policy reasons a State may have to terminate the treaty. This specific rule would replace general rules under the Vienna Convention.

Finally, it is common for investment treaties to provide for a period of continued application of the treaty in favour of investors of the other State Party made prior to the termination of the treaty. In some instances, treaties have extended this period to between 20 and 30 years. In other instances, the period has been 10 years. The shorter period is adopted here, with an additional option to adopt only a 5-year time period. The Drafting Committee was unanimously of the view that the time period should be kept at the shorter end.

••

ARTICLE 35 •• Amendment

This Agreement may be amended by the mutual consent of the State Parties through an exchange of notes or signing of an amendment agreement. An amendment shall enter into force 60 days following the deposit by the last State Party of its instrument of ratification of the amendment with the other Party.

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Commentary

Again, many investment treaties do not include provisions on amendment of the treaty. This is virtually unique to investment treaties, given that almost all other types of treaties do include such provisions. The language above allows easy adaptation to the form of treaty making and amendment that is used in different States. If this provision is not included, the amendment process would be defined by the Vienna Convention instead.

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ARTICLE 36 •• Schedules and Notes Part of Treaty

The Schedules and notes to this Agreement form an integral part of this Agreement.

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Commentary

This is a common article. It simply ensures that all of the elements of the negotiated text are considered in the event of any dispute. It is common for important elements to be included in schedules or agreed notes of the negotiating parties.

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ARTICLE 37 •• Authentic Text

The authentic text of this Agreement shall be in [English][and French][and Portuguese].

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Commentary

This is again a common technical element, essential to ensure which languages are the critical texts in the event of a dispute.

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SPECIAL NOTE: The following are the suggested schedules, based on the text set out above. The content of each would then be proposed by each negotiating party for itself, and adopted as part of the text by agreement. It is possible that a State may object to some of the proposed inclusions, and this could be subject to negotiation. In practice, many developed States do seek to minimize any such schedules proposed by their developing country negotiating partners, while maximizing the use of them themselves. It is important for negotiators to focus on these details, and for early preparation of these schedules by SADC Member States, in order to achieve a balanced result in the negotiations.

SCHEDULE 1 •• Excluded/Included Sectors for Investment Liberalization, If Applicable

- List of included or excluded sectors, depending on model chosen; and excluded subsectors
- List of excluded non-conforming measures

SCHEDULE 2 •• Excluded/Included Sectors for Post-Establishment Investor Protections, If Applicable

- List of excluded sectors (if top-down drafting), or subsectors
- List of excluded non-conforming measures

SCHEDULE 3 •• List on National Authorities and Contact Points

The Official Contact Point for the purposes of this Agreement shall be:

State Party A:

State Party B:

The contact points shall be responsible for the exchange of information required under this Agreement.

SCHEDULE 4 •• Procedure for *Amicus Curiae* Submissions

1. The person or organization seeking *amicus curiae* status shall serve the tribunal and all disputing parties with a Petition for leave to file an *amicus curiae* submission and the planned submission.

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Commentary

The full text of this schedule is sequential, setting out the process as it should move forward. This ensures transparency and efficiency in the *amicus* process. The first step is the petition for amicus status by the interested person or group, along with the submission they intend to submit.

••

2. The Petition for leave to file an *amicus curiae* submission shall:

   (a) be made in writing, dated and signed by the person or organization filing the application, and include the address and other contact details of the Petitioner. Counsel may file and represent the person or organization for this purpose;

   (b) be no longer than ten typed pages;

   (c) describe the Petitioner, including, where relevant, its membership and legal status (e.g., company, trade association or other non-governmental organization), its general objectives, the nature of its activities, and any parent organization (including any organization that directly or indirectly controls the applicant);

   (d) disclose whether or not the Petitioner has any affiliation, direct or indirect, with any disputing party;

   (e) identify any government, person or organization that has provided any financial or other assistance in preparing the submission;

   (f) specify the nature of the interest that the Petitioner has in the arbitration;

   (g) identify the specific issues of fact or law in the arbitration that the Petitioner has addressed in its written submission;

   (h) explain, by reference to the factors specified in paragraph 4 below, why the tribunal should accept the submission; and

   (i) be made in a language of the arbitration or the primary language of the disputing State Party.

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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.

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3. The submission filed by an *amicus curiae* shall:

   (a) be dated and signed by the person filing the submission;

   (b) be concise, and in no case longer than [50][40] typed pages, including any appendices;

   (c) set out a precise statement supporting the *amicus curiae's* position on the issues; and

   (d) only address matters within the scope of the dispute.

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Commentary

This text gives specific direction to the amicus Petitioner on the form, scope and length for the submission itself. The most critical element is that the submission should be legal and not political in nature. This is an important discipline for the Petitioners.

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4. The tribunal shall set an appropriate date for the disputing parties to comment on the Petition for leave to file an *amicus curiae* submission.

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Commentary

This is an important element of ensuring that the arbitrating parties each have ample and fair opportunity to comment on the amicus submissions, ensuring neither side is unequally affected.

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5. In determining whether to grant leave to file an *amicus curiae* submission, the tribunal shall consider, *inter alia*, the extent to which:

   (a) the *amicus curiae* submission would assist the tribunal in the determination of a factual or legal issue related to the dispute;

   (b) the *amicus curiae* submission would address a matter within the scope of the dispute;

   (c) the *amicus curiae* has a significant interest in the arbitration; and

   (d) there is a public interest in the subject-matter of the arbitration.

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Commentary

This is critical guidance that ensures the Petitioner and the tribunal and the arbitrating parties all understand the criteria upon which a decision to admit (or not admit) an amicus submission is to be made.

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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.

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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.

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7. The tribunal shall decide whether to grant leave to file an *amicus curiae* submission. If leave to file is granted, the tribunal shall set an appropriate date for the disputing parties and the non-disputing State Party to respond in writing to the *amicus curiae* submission.

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Commentary

This is a procedural provision to ensure proper scheduling of the timetable for all parties.

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8. A tribunal that grants leave to file an *amicus curiae* submission is not required to address the submission at any point in the arbitration. The tribunal may request any person or organization making a submission to appear before the tribunal to reply to specific issues or questions concerning the submission.

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Commentary

Again, this is primarily addressed to ensure that the tribunal can efficiently manage its operations.

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9. Access to hearings and documents by persons or organizations that file petitions under these procedures shall be governed by the provisions pertaining to public access to hearings and documents under this Agreement[, unless otherwise determined by the tribunal after consultations with the disputing parties].

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Commentary

As public access to arbitrations under the agreement is already permitted, this is a safety provision allowing the tribunal to make adjustments to those rules if that may be useful to manage the procedure properly.

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United States Model Bilateral Investment Treaty, 2012

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:

Article 1: Definitions

For purposes of this Treaty:

"central level of government" means:

(a) for the United States, the federal level of government; and

(b) for [Country], [___].

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

"claimant" means an investor of a Party that is a party to an investment dispute with the other Party.

"covered investment" means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.

"disputing parties" means the claimant and the respondent.

"disputing party" means either the claimant or the respondent.

"enterprise" means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.

"enterprise of a Party" means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

"existing" means in effect on the date of entry into force of this Treaty.

"freely usable currency" means "freely usable currency" as determined by the International Monetary Fund under its *Articles of Agreement*.

"GATS" means the *General Agreement on Trade in Services*, contained in Annex 1B to the WTO Agreement.

"government procurement" means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or use in the production or supply of goods or services for commercial sale or resale.

"ICSID Additional Facility Rules" means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*.

"ICSID Convention" means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, done at Washington, March 18, 1965.

[**"Inter-American Convention"** means the *Inter-American Convention on International Commercial Arbitration*, done at Panama, January 30, 1975.]

"investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;[1]

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;[2, 3] and

[1] Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

[2] Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

"investment agreement" means a written agreement[4] between a national authority[5] of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

(a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;

(b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or

(c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

"investment authorization"[6] means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party.

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

"investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

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

[4] "Written agreement" refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 30[Governing Law](2). For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

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

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

"measure" includes any law, regulation, procedure, requirement, or practice.

"national" means:

(a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act; and

(b) for [Country], [___].

"New York Convention" means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958.

"non-disputing Party" means the Party that is not a party to an investment dispute.

"person" means a natural person or an enterprise.

"person of a Party" means a national or an enterprise of a Party.

"protected information" means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law.

"regional level of government" means:

(a) for the United States, a state of the United States, the District of Columbia, or Puerto Rico; and

(b) for [Country], [___].

"respondent" means the Party that is a party to an investment dispute.

"Secretary-General" means the Secretary-General of ICSID.

"state enterprise" means an enterprise owned, or controlled through ownership interests, by a Party.

"territory" means:

(a) with respect to the United States,

(i) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico;

(ii) the foreign trade zones located in the United States and Puerto Rico.

(b) with respect to [Country,] [___].

(c) with respect to each Party, the territorial sea and any area beyond the territorial sea of the Party within which, in accordance with customary international law as reflected in the United Nations Convention on the Law of the Sea, the Party may exercise sovereign rights or jurisdiction.

"TRIPS Agreement" means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, contained in Annex 1C to the WTO Agreement.[7]

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

"WTO Agreement" means the *Marrakesh Agreement Establishing the World Trade Organization*, done on April 15, 1994.

Article 2: Scope and Coverage

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

(a) investors of the other Party;

(b) covered investments; and

(c) with respect to Articles 8 [Performance Requirements], 12 [Investment and Environment], and 13 [Investment and Labor], all investments in the territory of the Party.

2. A Party's obligations under Section A shall apply:

(a) to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party;[8] and

(b) to the political subdivisions of that Party.

3. For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.

[7] For greater certainty, "TRIPS Agreement" includes any waiver in force between the Parties of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement.

[8] For greater certainty, government authority that has been delegated includes a legislative grant, and a government order, directive or other action transferring to the state enterprise or other person, or authorizing the exercise by the state enterprise or other person of, governmental authority.

Article 3: National Treatment

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

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

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

Article 4: Most-Favored-Nation Treatment

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

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

Article 5: Minimum Standard of Treatment[9]

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

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

[9] Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

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

4. Notwithstanding Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants], each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:

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

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

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation](2) through (4), *mutatis mutandis*.

6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 [National Treatment] but for Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants].

Article 6: Expropriation and Compensation[10]

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

(a) for a public purpose;

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation; and

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

(d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).

2. The compensation referred to in paragraph 1(c) shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.

Article 7: Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

(d) payments made under a contract, including a loan agreement;

(e) payments made pursuant to Article 5 [Minimum Standard of Treatment](4) and (5) and Article 6 [Expropriation and Compensation]; and

(f) payments arising out of a dispute.

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

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party.

4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:

(a) bankruptcy, insolvency, or the protection of the rights of creditors;

(b) issuing, trading, or dealing in securities, futures, options, or derivatives;

(c) criminal or penal offenses;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

Article 8: Performance Requirements

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:[11]

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

[11] For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a "commitment or undertaking" for the purposes of paragraph 1.

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

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

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

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

(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;

(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market; or

(h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party[12]; or

(ii) that prevents the purchase or use of, or the according of a preference to, in its territory, particular technology,

so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

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

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

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

[12] For purposes of this Article, the term "technology of the Party or of persons of the Party" includes technology that is owned by the Party or persons of the Party, and technology for which the Party holds, or persons of the Party hold, an exclusive license.

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

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

(b) Paragraphs 1(f) and (h) do not apply:

(i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.[13]

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f), and (h), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;

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

(iii) related to the conservation of living or non-living exhaustible natural resources.

(d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

(e) Paragraphs 1(b), (c), (f), (g), and (h), and 2(a) and (b), do not apply to government procurement.

[13] The Parties recognize that a patent does not necessarily confer market power.

(f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

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

Article 9: Senior Management and Boards of Directors

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

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

Article 10: Publication of Laws and Decisions Respecting Investment

1. Each Party shall ensure that its:

(a) laws, regulations, procedures, and administrative rulings of general application; and

(b) adjudicatory decisions

respecting any matter covered by this Treaty are promptly published or otherwise made publicly available.

2. For purposes of this Article, "administrative ruling of general application" means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:

(a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular covered investment or investor of the other Party in a specific case; or

(b) a ruling that adjudicates with respect to a particular act or practice.

Article 11: Transparency

1. The Parties agree to consult periodically on ways to improve the transparency practices set out in this Article, Article 10 and Article 29.

2. Publication

To the extent possible, each Party shall:

(a) publish in advance any measure referred to in Article 10(1)(a) that it proposes to adopt; and

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

3. With respect to proposed regulations of general application of its central level of government respecting any matter covered by this Treaty that are published in accordance with paragraph 2(a), each Party:

(a) shall publish the proposed regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets;

(b) should in most cases publish the proposed regulations not less than 60 days before the date public comments are due;

(c) shall include in the publication an explanation of the purpose of and rationale for the proposed regulations; and

(d) shall, at the time it adopts final regulations, address significant, substantive comments received during the comment period and explain substantive revisions that it made to the proposed regulations in its official journal or in a prominent location on a government Internet site.

4. With respect to regulations of general application that are adopted by its central level of government respecting any matter covered by this Treaty, each Party:

(a) shall publish the regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets; and

(b) shall include in the publication an explanation of the purpose of and rationale for the regulations.

5. Provision of Information

(a) On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure that the requesting Party considers might materially affect the operation of this Treaty or otherwise substantially affect its interests under this Treaty.

(b) Any request or information under this paragraph shall be provided to the other Party through the relevant contact points.

(c) Any information provided under this paragraph shall be without prejudice as to whether the measure is consistent with this Treaty.

6. Administrative Proceedings

With a view to administering in a consistent, impartial, and reasonable manner all measures referred to in Article 10(1)(a), each Party shall ensure that in its administrative proceedings applying such measures to particular covered investments or investors of the other Party in specific cases:

(a) wherever possible, covered investments or investors of the other Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy;

(b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and

(c) its procedures are in accordance with domestic law.

7. Review and Appeal

(a) Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Treaty. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

(b) Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:

(i) a reasonable opportunity to support or defend their respective positions; and

(ii) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.

(c) Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.

8. Standards-Setting

(a) Each Party shall allow persons of the other Party to participate in the development of standards and technical regulations by its central government bodies.[14] Each Party shall allow persons of the other Party to participate in the development of these measures, and the development of conformity assessment procedures by its central government bodies, on terms no less favorable than those it accords to its own persons.

(b) Each Party shall recommend that non-governmental standardizing bodies in its territory allow persons of the other Party to participate in the development of standards by those bodies. Each Party shall recommend that non-governmental standardizing bodies in its territory allow persons of the other Party to participate in the development of these standards, and the development of conformity assessment procedures by those bodies, on terms no less favorable than those they accord to persons of the Party.

(c) Subparagraphs 8(a) and 8(b) do not apply to:

(i) sanitary and phytosanitary measures as defined in Annex A of the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures; or

(ii) purchasing specifications prepared by a governmental body for its production or consumption requirements.

(d) For purposes of subparagraphs 8(a) and 8(b), “central government body”, “standards”, “technical regulations” and “conformity assessment procedures” have the meanings assigned to those terms in Annex 1 of the WTO Agreement on Technical Barriers to Trade. Consistent with Annex 1, the three latter terms do not include standards, technical regulations or conformity assessment procedures `for the supply of a service.

[14] A Party may satisfy this obligation by, for example, providing interested persons a reasonable opportunity to provide comments on the measure it proposes to develop and taking those comments into account in the development of the measure.

Article 12: Investment and Environment

1. The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws[15] in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.

4. For purposes of this Article, "environmental law" means each Party's statutes or regulations,[16] or provisions thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through the:

(a) prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;

(b) control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or

(c) protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas,

in the Party's territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.

5. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

6. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

7. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

Article 13: Investment and Labor

1. The Parties reaffirm their respective obligations as members of the International Labor Organization ("ILO") and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. For purposes of this Article, "labor laws" means each Party's statutes or regulations,[17] or provisions thereof, that are directly related to the following:

(a) freedom of association;

(b) the effective recognition of the right to collective bargaining;

(c) the elimination of all forms of forced or compulsory labor;

(d) the effective abolition of child labor and a prohibition on the worst forms of child labor;

(e) the elimination of discrimination in respect of employment and occupation; and

(f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

[15] Paragraph 2 shall not apply where a Party waives or derogates from an environmental law pursuant to a provision in law providing for waivers or derogations.

[16] For the United States, "statutes or regulations" for the purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

[17] For the United States, "statutes or regulations" for purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

4. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

5. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

Article 14: Non-Conforming Measures

1. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to:

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

(i) the central level of government, as set out by that Party in its Schedule to Annex I or Annex III,

(ii) a regional level of government, as set out by that Party in its Schedule to Annex I or Annex III, or

(iii) a local level of government;

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

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], or 9 [Senior Management and Boards of Directors].

2. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this Treaty and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment] do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of

the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.

5. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], and 9 [Senior Management and Boards of Directors] do not apply to:

(a) government procurement; or

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

Article 15: Special Formalities and Information Requirements

1. Nothing in Article 3 [National Treatment] shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Treaty.

2. Notwithstanding Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment], a Party may require an investor of the other Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 16: Non-Derogation

This Treaty shall not derogate from any of the following that entitle an investor of a Party or a covered investment to treatment more favorable than that accorded by this Treaty:

1. laws or regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party;

2. international legal obligations of a Party; or

3. obligations assumed by a Party, including those contained in an investment authorization or an investment agreement.

Article 17: Denial of Benefits

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

(a) does not maintain diplomatic relations with the non-Party; or

(b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

Article 18: Essential Security

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Article 19: Disclosure of Information

Nothing in this Treaty shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 20: Financial Services

1. Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system.[18] Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty.

2. (a) Nothing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 7 [Transfers] or Article 8 [Performance Requirements].[19]

(b) For purposes of this paragraph, "public entity" means a central bank or monetary authority of a Party.

3. Where a claimant submits a claim to arbitration under Section B [Investor-State Dispute Settlement], and the respondent invokes paragraph 1 or 2 as a defense, the following provisions shall apply:

(a) The respondent shall, within 120 days of the date the claim is submitted to arbitration under Section B, submit in writing to the competent financial authorities[20] of both Parties a request for a joint determination on the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. The respondent shall promptly provide the tribunal, if constituted, a copy of such request. The arbitration may proceed with respect to the claim only as provided in subparagraph (d).

(b) The competent financial authorities of both Parties shall make themselves available for consultations with each other and shall attempt in good faith to make a determination as described in subparagraph (a). Any such determination shall be transmitted promptly to the disputing parties and, if constituted, to the tribunal. The determination shall be binding on the tribunal.

(c) If the competent financial authorities of both Parties, within 120 days of the date by which they have both received the respondent's written request for a joint determination under subparagraph (a), have not made a determination as described in that subparagraph, the tribunal shall decide the issue or issues left

[18] It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions, as well as the maintenance of the safety and financial and operational integrity of payment and clearing systems.

[19] For greater certainty, measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.

[20] For purposes of this Article, "competent financial authorities" means, for the United States, the Department of the Treasury for banking and other financial services, and the Office of the United States Trade Representative, in coordination with the Department of Commerce and other agencies, for insurance; and for [Country], [___].

unresolved by the competent financial authorities. The provisions of Section B shall apply, except as modified by this subparagraph.

(i) In the appointment of all arbitrators not yet appointed to the tribunal, each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to the particular sector of financial services in which the dispute arises shall be taken into account in the appointment of the presiding arbitrator.

(ii) If, before the respondent submits the request for a joint determination in conformance with subparagraph (a), the presiding arbitrator has been appointed pursuant to Article 27(3), such arbitrator shall be replaced on the request of either disputing party and the tribunal shall be reconstituted consistent with subparagraph (c)(i). If, within 30 days of the date the arbitration proceedings are resumed under subparagraph (d), the disputing parties have not agreed on the appointment of a new presiding arbitrator, the Secretary-General, on the request of a disputing party, shall appoint the presiding arbitrator consistent with subparagraph (c)(i).

(iii) The tribunal shall draw no inference regarding the application of paragraph 1 or 2 from the fact that the competent financial authorities have not made a determination as described in subparagraph (a).

(iv) The non-disputing Party may make oral and written submissions to the tribunal regarding the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. Unless it makes such a submission, the non-disputing Party shall be presumed, for purposes of the arbitration, to take a position on paragraph 1 or 2 not inconsistent with that of the respondent.

(d) The arbitration referred to in subparagraph (a) may proceed with respect to the claim:

(i) 10 days after the date the competent financial authorities' joint determination has been received by both the disputing parties and, if constituted, the tribunal; or

(ii) 10 days after the expiration of the 120-day period provided to the competent financial authorities in subparagraph (c).

(e) On the request of the respondent made within 30 days after the expiration of the 120-day period for a joint determination referred to in subparagraph (c), or, if the tribunal has not been constituted as of the expiration of the 120-day period, within 30 days after the tribunal is constituted, the tribunal shall address and decide the issue or issues left unresolved by the competent financial authorities as referred to

in subparagraph (c) prior to deciding the merits of the claim for which paragraph 1 or 2 has been invoked by the respondent as a defense. Failure of the respondent to make such a request is without prejudice to the right of the respondent to invoke paragraph 1 or 2 as a defense at any appropriate phase of the arbitration.

4. Where a dispute arises under Section C and the competent financial authorities of one Party provide written notice to the competent financial authorities of the other Party that the dispute involves financial services, Section C shall apply except as modified by this paragraph and paragraph 5.

(a) The competent financial authorities of both Parties shall make themselves available for consultations with each other regarding the dispute, and shall have 180 days from the date such notice is received to transmit a report on their consultations to the Parties. A Party may submit the dispute to arbitration under Section C only after the expiration of that 180-day period.

(b) Either Party may make any such report available to a tribunal constituted under Section C to decide the dispute referred to in this paragraph or a similar dispute, or to a tribunal constituted under Section B to decide a claim arising out of the same events or circumstances that gave rise to the dispute under Section C.

5. Where a Party submits a dispute involving financial services to arbitration under Section C in conformance with paragraph 4, and on the request of either Party within 30 days of the date the dispute is submitted to arbitration, each Party shall, in the appointment of all arbitrators not yet appointed, take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to financial services shall be taken into account in the appointment of the presiding arbitrator.

6. Notwithstanding Article 11(2)-(4) [Transparency – Publication], each Party, to the extent practicable,

(a) shall publish in advance any regulations of general application relating to financial services that it proposes to adopt and the purpose of the regulation;

(b) shall provide interested persons and the other Party a reasonable opportunity to comment on such proposed regulations; and

(c) should at the time it adopts final regulations, address in writing significant substantive comments received from interested persons with respect to the proposed regulations.

7. The terms "financial service" or "financial services" shall have the same meaning as in subparagraph 5(a) of the Annex on Financial Services of the GATS.

8. For greater certainty, nothing in this Treaty shall be construed to prevent the adoption or enforcement by a party of measures relating to investors of the other Party, or covered

investments, in financial institutions that are necessary to secure compliance with laws or regulations that are not inconsistent with this Treaty, including those related to the prevention of deceptive and fraudulent practices or that deal with the effects of a default on financial services contracts, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment in financial institutions.

Article 21: Taxation

1. Except as provided in this Article, nothing in Section A shall impose obligations with respect to taxation measures.

2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:

(a) the claimant has first referred to the competent tax authorities[21] of both Parties in writing the issue of whether that taxation measure involves an expropriation; and

(b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.

3. Subject to paragraph 4, Article 8 [Performance Requirements] (2) through (4) shall apply to all taxation measures.

4. Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Treaty and that convention.

Article 22: Entry into Force, Duration, and Termination

1. This Treaty shall enter into force thirty days after the date the Parties exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.

[21] For the purposes of this Article, the "competent tax authorities" means:

(a) for the United States, the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury; and

(b) for [Country], [___].

2. A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.

3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.

SECTION B

Article 23: Consultation and Negotiation

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

Article 24: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) an investment agreement;

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:

(a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

(b) for each claim, the provision of this Treaty, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for each claim; and

(d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration"):

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Treaty.

6. The claimant shall provide with the notice of arbitration:

(a) the name of the arbitrator that the claimant appoints; or

(b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

Article 25: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; [and]

(b) Article II of the New York Convention for an "agreement in writing[."] [;" and

(c) Article I of the Inter-American Convention for an "agreement."]

Article 26: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage.

2. No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Treaty; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 24(1)(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 24(1)(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 24.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 24(1)(a)) and the claimant or the enterprise (for claims brought under Article 24(1)(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

Article 27: Selection of Arbitrators

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. Subject to Article 20(3), if a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

(a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a claimant referred to in Article 24(1)(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and

(c) a claimant referred to in Article 24(1)(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

Article 28: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 24(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.

3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 34.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 24. For purposes of this paragraph, an order includes a recommendation.

9. (a) In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

(b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 10.

10. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.

Article 29: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [*Amicus* Submissions] and Article 33 [Consolidation];

(d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article].

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

Article 30: Governing Law

1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 24(1)(b)(i)(B) or (C), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed:

(i) the law of the respondent, including its rules on the conflict of laws;[22] and

(ii) such rules of international law as may be applicable.

3. A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

Article 31: Interpretation of Annexes

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II, or III, the tribunal shall, on request of the respondent, request the interpretation of the Parties on the issue. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 90 days of delivery of the request.

2. A joint decision issued under paragraph 1 by the Parties, each acting through its representative designated for purposes of this Article, shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that joint decision. If the Parties fail to issue such a decision within 90 days, the tribunal shall decide the issue.

Article 32: Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 33: Consolidation

1. Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

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

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

(a) the names and addresses of all the disputing parties sought to be covered by the order;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

(a) one arbitrator appointed by agreement of the claimants;

(b) one arbitrator appointed by the respondent; and

(c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the Secretary-General shall appoint a national of the non-disputing Party.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 24(1) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

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

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

(c) instruct a tribunal previously established under Article 27 [Selection of Arbitrators] to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

(i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 24(1) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

(a) the name and address of the claimant;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 27 [Selection of Arbitrators] shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 27 [Selection of Arbitrators] be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 34: Awards

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest; and

(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs and attorney's fees in accordance with this Treaty and the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 24(1)(b):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A tribunal may not award punitive damages.

4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

6. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention,

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 24(3)(d),

(i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or

(ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

7. Each Party shall provide for the enforcement of an award in its territory.

8. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a tribunal shall be established under Article 37 [State-State Dispute Settlement]. Without prejudice to other remedies available under applicable rules of international law, the requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Treaty; and

(b) a recommendation that the respondent abide by or comply with the final award.

9. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention [or the Inter-American Convention] regardless of whether proceedings have been taken under paragraph 8.

10. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention [and Article I of the Inter-American Convention].

Article 35: Annexes and Footnotes

The Annexes and footnotes shall form an integral part of this Treaty.

Article 36: Service of Documents

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex C.

SECTION C

Article 37: State-State Dispute Settlement

1. Subject to paragraph 5, any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the UNCITRAL Arbitration Rules shall govern, except as modified by the Parties or this Treaty.

2. Unless the Parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each Party and the third, who shall be the presiding arbitrator, appointed by agreement of the Parties. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of either Party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

3. Expenses incurred by the arbitrators, and other costs of the proceedings, shall be paid for equally by the Parties. However, the tribunal may, in its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

4. Articles 28(3) [*Amicus Curiae* Submissions], 29 [Investor-State Transparency], 30(1) and (3) [Governing Law], and 31 [Interpretation of Annexes] shall apply *mutatis mutandis* to arbitrations under this Article.

5. Paragraphs 1 through 4 shall not apply to a matter arising under Article 12 or Article 13.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at [city] this [number] day of [month, year], in the English and [foreign] languages, each text being equally authentic.

FOR THE GOVERNMENT OF
THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF
[Country]:

Annex A

Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Annex B

Expropriation

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

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

3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

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

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

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

(iii) the character of the government action.

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

Annex C

Service of Documents on a Party

United States

Notices and other documents shall be served on the United States by delivery to:

Executive Director (L/EX)
Office of the Legal Adviser
Department of State
Washington, D.C. 20520
United States of America

[Country]

Notices and other documents shall be served on [Country] by delivery to:

[insert place of delivery of notices and other documents for [Country]]