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LAMPIRAN 1

DAFTAR PERJANJIAN BILATERAL

TENTANG PENANAMAN MODAL INDONESIA

No.	Nama Perjanjian	Para Pihak	Status	Tanggal ditanda-tangani	Tanggal Berlaku	Tanggal Berakhir
1.	BIT Indonesia - Switzerland	Indonesia; Singapura;	Ditanda-tangani	24-05-2022	-	
2.	Bit Indonesia – Uni Emirat Arab	Indonesia; Uni Emirat Arab	Berlaku	24-07-2019	03-12-2021	
3.	BIT Indonesia - Singapura (2018)	Indonesia; Singapura;	Berlaku	11-10-2018	09-03-2021	-
4.	BIT Indonesia - Serbia (2011)	Indonesia; Serbia;	Ditanda-tangani	06-09-2011		
5.	BIT Indonesia - Libya (2009)	Indonesia; Libya;	Ditanda-tangani	04-04-2009		
6.	BIT Guyana - Indonesia (2008)	Guyana; Indonesia;	Ditanda-tangani	30-01-2008		
7.	BIT Indonesia - Federasi Rusia (2007)	Indonesia; Federasi Rusia ;	Berlaku	06-09-2007	15-10-2009	
8.	BIT Denmark - Indonesia (2007)	Denmark; Indonesia;	Berlaku	22-01-2007	15-10-2009	
9.	BIT Finlandia - Indonesia (2006)	Finlandia; Indonesia;	Berlaku	12-09-2006	02-08-2008	
10.	BIT Indonesia – Republik Iran (2005)	Indonesia; Republik Iran;	Berlaku	22-06-2005	28-03-2009	
11.	BIT Indonesia – Singapura (2005)	Indonesia; Singapura;	Dihentikan	16-02-2005	21-06-2006	20-06-2016
12.	BIT Indonesia - Tajikistan (2003)	Indonesia; Tajikistan;	Ditanda-tangani	28-10-2003		
13.	BIT Indonesia - Saudi Arabia (2003)	Indonesia; Saudi Arabia;	Berlaku	15-09-2003	05-07-2004	
14.	BIT Bulgaria - Indonesia (2003)	Bulgaria; Indonesia;	Dihentikan	13-09-2003	23-01-2005	25-01-2015
15.	BIT Jerman - Indonesia BIT (2003)	Jerman; Indonesia;	Dihentikan	14-05-2003	02-06-2007	01-06-2017
16.	BIT Kroasia – Indonesia	Kroasia; Indonesia;	Ditanda-tangani	10-09-2002		

	(2002)					
17.	BIT Indonesia - Filipina (2001)	Indonesia; Filipina;	Ditanda-tangani	12-11-2001		
18.	BIT Indonesia - Venezuela, (2000)	Indonesia; Venezuela,	Berlaku	18-12-2000	23-03-2003	
19.	BIT Indonesia - Qatar (2000)	Indonesia; Qatar;	Berlaku	18-04-2000	17-02-2018	
20.	BIT Algeria - Indonesia (2000)	Algeria; Indonesia;	Ditanda-tangani	21-03-2000		
21.	BIT Indonesia - Korea, (2000)	Indonesia; Korea	Ditanda-tangani	21-02-2000		
22.	BIT Chili – Indonesia (1999)	Chili; Indonesia;	Ditanda-tangani	07-04-1999		
23.	BIT Indonesia - Mozambik (1999)	Indonesia; Mozambik;	Berlaku	26-03-1999	25-07-2000	
24.	BIT Kamboja - Indonesia (1999)	Kamboja; Indonesia;	Dihentikan	16-03-1999		07-01-2016
25.	BIT Indonesia - Jamaica (1999)	Indonesia; Jamaica;	Ditanda-tangani	10-02-1999		
26.	BIT Indonesia - Zimbabwe (1999)	Indonesia; Zimbabwe;	Ditanda-tangani	10-02-1999		
27.	BIT India - Indonesia (1999)	India; Indonesia;	Dihentikan	10-02-1999	22-01-2004	07-04-2016
28.	BIT Czech - Indonesia (1998)	Czech; Indonesia;	Berlaku	17-09-1998	21-06-1999	
29.	BIT Indonesia - Yaman (1998)	Indonesia; Yaman;	Ditanda-tangani	20-02-1998		
30.	BIT Indonesia - Thailand (1998)	Indonesia; Thailand;	Berlaku	17-02-1998	05-11-1998	
31.	BIT Indonesia - Sudan (1998)	Indonesia; Sudan;	Ditanda-tangani	10-02-1998		
32.	BIT Bangladesh - Indonesia (1998)	Bangladesh; Indonesia;	Berlaku	09-02-1998	22-04-1999	
33.	BIT Kuba - Indonesia (1997)	Kuba; Indonesia;	Berlaku	19-09-1997	29-09-1999	
34.	BIT Indonesia – Siria (1997)	Indonesia; Syrian Arab Republic;	Berlaku	27-06-1997	20-02-2000	
35.	BIT Indonesia - Rumania (1997)	Indonesia; Rumania;	Dihentikan	27-06-1997	21-08-1999	07-01-2016

36.	BIT Indonesia - Maroko (1997)	Indonesia; Maroko;	Berlaku	14-03-1997	21-03-2002	
37.	BIT Indonesia - Mauritius (1997)	Indonesia; Mauritius;	Berlaku	05-03-1997	28-03-2000	
38.	BIT Indonesia - Mongolia (1997)	Indonesia; Mongolia;	Berlaku	04-03-1997	13-04-1999	
39.	BIT Indonesia - Turki (1997)	Indonesia; Turki;	Dihentikan	25-02-1997	28-09-1998	07-01-2016
40.	BIT Indonesia - Yordan (1996)	Indonesia; Yordania;	Berlaku	12-11-1996	09-02-1999	
41.	BIT Indonesia - Uzbekistan (1996)	Indonesia; Uzbekistan;	Berlaku	27-08-1996	27-04-1997	
42.	BIT Indonesia - Sri Langka (1996)	Indonesia; Sri Langka;	Berlaku	10-06-1996	21-07-1997	
43.	BIT Indonesia - Ukraine (1996)	Indonesia; Ukraina;	Berlaku	11-04-1996	22-06-1997	
44.	BIT Finlandia - Indonesia (1996)	Finland; Indonesia;	Dihentikan	13-03-1996	07-06-1997	02-08-2008
45.	BIT Indonesia - Pakistan (1996)	Indonesia; Pakistan;	Dihentikan	08-03-1996	03-12-1996	02-12-2016
46.	BIT Argentina - Indonesia (1995)	Argentina; Indonesia;	Dihentikan	07-11-1995	01-03-2001	19-10-2016
47.	BIT Indonesia - Suriname (1995)	Indonesia; Suriname;	Ditanda-tangani	28-10-1995		
48.	BIT Indonesia - Kyrgyzstan (1995)	Indonesia; Kyrgyzstan;	Dihentikan	19-07-1995	23-04-1997	18-02-2018
49.	BIT Indonesia - Spanyol (1995)	Indonesia; Spanyol;	Dihentikan	30-05-1995	18-12-1996	18-12-2016
50.	BIT Cina - Indonesia (1994)	Cina; Indonesia;	Dihentikan	18-11-1994	01-04-1995	31-03-2015
51.	BIT Indonesia - Laos (1994)	Indonesia; Laos;	Dihentikan	18-10-1994	14-10-1995	13-10-2015
52.	BIT Indonesia - Slovakia (1994)	Indonesia; Slovakia;	Dihentikan	12-07-1994	01-03-1995	28-02-2015
53.	BIT Indonesia - Turkmenistan (1994)	Indonesia; Turkmenistan;	Ditanda-tangani	02-06-1994		
54.	BIT Indonesia - Belanda (1994)	Indonesia; Belanda;	Dihentikan	06-04-1994	01-07-1995	30-06-2015
55.	BIT Indonesia - Malaysia (1994)	Indonesia; Malaysia;	Dihentikan	22-01-1994	27-10-1999	20-06-2015
56.	BIT Mesir-	Mesir;	Dihentikan	19-01-1994	29-11-1994	30-11-2014

	Indonesia (1994)	Indonesia;				
57.	BIT Australia – Indonesia (1992)	Australia; Indonesia;	Dihentikan	17-11-1992	29-07-1993	06-08-2020
58.	BIT Indonesia - Polandia (1992)	Indonesia; Poland;	Berlaku	06-10-1992	01-07-1993	
59.	Indonesia - Sweden BIT (1992)	Indonesia; Sweden;	Berlaku	17-09-1992	18-02-1993	
60.	BIT Hungaria - Indonesia (1992)	Hungaria; Indonesia;	Dihentikan	20-05-1992	13-02-1996	12-02-2016
61.	BIT Indonesia - Tunisia (1992)	Indonesia; Tunisia;	Berlaku	13-05-1992	12-09-1992	
62.	BIT Indonesia - Norwegia (1991)	Indonesia; Norwegia;	Dihentikan	26-11-1991	01-10-1994	30-09-2004
63.	BIT Indonesia - Vietnam (1991)	Indonesia; Vietnam;	Dihentikan	25-10-1991	03-04-1994	07-01-2016
64.	BIT Indonesia - Italia (1991)	Indonesia; Italia;	Dihentikan	25-04-1991	25-06-1995	23-06-2015
65.	Indonesia - Korea, Republic of BIT (1991)	Indonesia; Korea, Republic of;	In force	16-02-1991	10-03-1994	
66.	BIT Indonesia - Singapura(1990)	Indonesia; Singapura;	Dihentikan	28-08-1990	28-08-1990	20-06-2006
67.	BIT Indonesia – Inggris (1976)	Indonesia; Inggris;	Berlaku	27-04-1976	24-03-1977	
68.	BIT Indonesia - Swiss (1974)	Indonesia; Swiss;	Dihentikan	06-06-1974	09-04-1976	08-04-2016
69.	BIT Perancis - Indonesia (1973)	Perancis; Indonesia;	Dihentikan	14-06-1973	29-04-1975	29-04-2015
70.	BIT Belgia - Indonesia (1970)	Belgia; Indonesia;	Dihentikan	15-01-1970	17-06-1972	16-06-2002
71.	BIT Indonesia - Norwegia (1969)	Indonesia; Norwegia;	Dihentikan	26-11-1969		01-10-1994
72.	BIT Jerman – Indonesia (1968)	Jerman; Indonesia;	Dihentikan	08-11-1968	19-04-1971	02-06-2007
73.	BIT Belanda - Netherlands (1968)	Indonesia; Belanda;	Dihentikan	07-07-1968	17-07-1971	01-07-1995
74.	BIT Denmark - Indonesia (1968)	Denmark; Indonesia;	Dihentikan	30-01-1968	02-07-1968	15-10-2009

LAMPIRAN 2

The Agreement was previously published as Indonesia No. 1 (1976) Cmnd. 6490

INDONESIA

Treaty Series No. 62 (1977)

Agreement

between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia

for the Promotion and Protection of Investments

London, 27 April 1976

[The Agreement entered into force on 24 March 1977]

Presented to Parliament
by the Secretary of State for Foreign and Commonwealth Affairs
by Command of Her Majesty
July 1977

LONDON
HER MAJESTY'S STATIONERY OFFICE

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Cmnd. 6858

AGREEMENT

BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN AND NORTHERN IRELAND AND THE GOVERNMENT OF THE REPUBLIC OF INDONESIA FOR THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Indonesia;

Desiring to create favourable conditions for greater economic co-operation between them and in particular for investments by nationals and companies of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;

Have agreed as follows:

ARTICLE 1

Definitions

For the purposes of this Agreement:

(a) "investment" means every kind of asset and in particular, though not exclusively, includes:

(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;

(ii) shares, stock and debentures of companies wherever incorporated or interests in the property of such companies;

(iii) claims to money or to any performance under contract having a financial value;

(iv) intellectual property rights and goodwill;

(v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources;

(b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interest, capital gains, dividends, royalties or fees;

(c) "nationals" means:

(i) in respect of the United Kingdom: persons who are citizens of the United Kingdom and Colonies, British subjects by virtue of sections 2, 13 or 16 of the British Nationality Act 1948 or the provisions of the British Nationality Act 1965 and British protected persons;

(ii) in respect of the Republic of Indonesia: persons who according to the laws of the Republic of Indonesia are Indonesian nationals;

(*d*) " companies " means:

(i) in respect of the United Kingdom: corporations, firms or associa- tions incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 10;

(ii) in respect of the Republic of Indonesia: any company with a limited liability incorporated in the territory of the Republic of Indonesia, or any juridical person constituted in accordance with its legislation;

(*e*) " territory " means:

(i) in respect of the United Kingdom: Great Britain and Northern Ireland and any territory to which this Agreement is extended in accordance with the provisions of Article 10;

(ii) in respect of the Republic of Indonesia: the territory over which the Republic of Indonesia has sovereignty or jurisdiction.

Article 2

Scope of the Agreement

(1) This Agreement shall only apply to investments by nationals or companies of the United Kingdom in the territory of the Republic of Indonesia which have been granted admission in accordance with the Foreign Capital Investment Law No. 1 of 1967 or any law amending or replacing it.

(2) In the event of the law of the United Kingdom making provision regarding the admission of foreign investment, investments by nationals or companies of the Republic of Indonesia in the territory of the United Kingdom made after the coming into force of such provisions shall only enjoy protection under this Agreement if they have been admitted in accord- ance with such provisions.

(3) The rights and obligations of both Contracting Parties with respect to investments made before 10 January 1967 shall be in no way affected by the provisions of this Agreement.

Article 3

Promotion and protection of investment

(1) Each Contracting Party shall encourage and create favourable con- ditions for nationals or companies of the other Contracting Party to invest capital in its territory and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) Investments of nationals or companies of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Each Contracting Party shall ensure that the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies

of the other Contracting Party is not in any way impaired by unreasonable or discriminatory measures. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

ARTICLE 4

Most-favoured-nation provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to nationals or companies of any third State.

(3) Nationals or companies of one Contracting Party, whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, not less favourable than that which the latter Contracting Party accords to nationals or companies of any third State.

ARTICLE 5

Expropriation

(1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of the expropriating Party and against compensation. Such compensation shall amount to the market value of the investment expropriated immediately before the expropriation or impending expropriation became public knowledge, shall be made without undue delay, shall be effectively realizable and shall be freely transferable. Appropriate provision shall be made for the determination and payment of such compensation. The legality of any expropriation and the amount and method of payment of compensation shall be subject to review by due process of law.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee the compensation provided for in that paragraph to the owners of these shares.

ARTICLE 6

Repatriation of investment

Each Contracting Party shall in respect of investments grant to nationa or companies of the other Contracting Party the right of free transfer of the capital and of the returns from it, subject to the right of each Contractin Party in exceptional financial or economic circumstances to exercise equitabl and in good faith powers conferred by its laws existing when this Agreeme enters into force.

ARTICLE 7

Reference to International Centre for Settlement of Investment Disputes

(1) The Contracting Party in the territory of which a national or compan of the other Contracting Party makes or intends to make an investment sha assent to any request on the part of such national or company to submit, f conciliation or arbitration, to the Centre established by the Convention o the Settlement of Investment Disputes between States and Nationals of Oth States opened for signature at Washington on 18 March 1965[1] any dispu that may arise in connection with the investment.

(2) A company which is incorporated or constituted under the law in for in the territory of one Contracting Party and in which immediately befo such a dispute arises the majority of shares are owned by nationals or co panies of the other Contracting Party shall in accordance wi Article 25 (2) (*b*) of the Convention be treated for the purposes of t Convention as a company of the other Contracting Party.

ARTICLE 8

Disputes between the Contracting Parties

(1) Disputes concerning the interpretation or implementation of th Agreement shall if possible be settled through diplomatic negotiation betwe the Governments of the Contracting Parties.

(2) If the Contracting Parties are unable to reach an agreement, the di pute shall, upon request of either Contracting Party, be submitted to arbitral tribunal composed of three members. Each Contracting Party sh appoint one arbitrator and these two arbitrators shall nominate a thi arbitrator as Chairman who shall be a national of a third State.

(3) If either Contracting Party has not appointed its arbitrator wit two months of the receipt of the request for arbitration, that arbitrator sh be appointed, upon the request of the other Contracting Party, by President of the International Court of Justice.

(4) If the two arbitrators are unable to reach an agreement on the cho of the third arbitrator within two months after the appointment of second, the third shall be appointed, upon the request of either Contracti Party, by the President of the International Court of Justice.

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[1] Treaty Series No. 25 (1967), Cmnd. 3255.

(5) If, in the cases specified under paragraphs (3) and (4) of this Article, the President of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the Vice-President, and if the latter is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the Member of the Court next in seniority who is not a national of either Contracting Party.

(6) Unless the Contracting Parties decide otherwise, the tribunal shall determine its own procedure.

(7) The tribunal shall reach its decision by a majority of votes and such decision shall be final and binding on the Contracting Parties.

(8) Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the proceedings. The cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties.

ARTICLE 9

Subrogation

(1) If either Contracting Party makes payment under an indemnity it has given in respect of an investment or any part thereof in the territory of the other Contracting Party, the latter Contracting Party shall recognise

(*a*) the assignment, whether under law or pursuant to a legal transaction, of any right or claim from the party indemnified to the former Contracting Party (or its designated Agency), and

(*b*) that the former Contracting Party (or its designated Agency) is entitled by virtue of subrogation to exercise the rights and enforce the claims of such a party.

The former Contracting Party (or its designated Agency) shall accordingly if it so desires be entitled to assert any such right or claim to the same extent as its predecessor in title either before a court or tribunal in the territory of the latter Contracting Party or in any other circumstances.

(2) If the former Contracting Party acquires amounts in the lawful currency of the other Contracting Party or credits thereof by assignment under the terms of an indemnity, the former Contracting Party shall be accorded in respect thereof treatment not less favourable than that accorded to the funds of nationals or companies of the latter Contracting Party or of any third State deriving from investment activities similar to those in which the party indemnified was engaged. Such amounts and credits shall be freely available to the former Contracting Party concerned for the purpose of meeting its expenditure in the territory of the other Contracting Party.

ARTICLE 10

Territorial extension

At the time this Agreement comes into force or at any time thereafter, its provisions may be extended to such territories, for whose international relations the Government of the United Kingdom are responsible, as may be agreed upon by the Contracting Parties in an Exchange of Notes.

ARTICLE 11

Entry into force and termination

(1) This Agreement shall come into force on the day the Government of the Republic of Indonesia notifies the Government of the United Kingdom by diplomatic Note that its constitutional requirements for the coming into force of this Agreement have been fulfilled, and shall remain in force for a period of ten years from the date of such notification.([2])

(2) This Agreement may be terminated by either Contracting Party by giving written notice of termination at any time during the six months immediately preceding the expiry of the initial ten year period. If no such notice is given, the Agreement shall continue in force for further periods of five years subject to the right of each Contracting Party to give notice of termination during the six months immediately preceding the expiry of any five year period.

(3) In the event of termination of this Agreement, its provisions shall continue in effect with respect to investments made whilst it is in force for the approved period of validity of such investments admitted by the relevant Contracting Party or, where there are no provisions regarding admission, for a period of twenty years from the date of such termination.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

Done in duplicate at London this 27th day of April 1976.

For the Government of the United Kingdom of Great Britain and Northern Ireland:	For the Government of the Republic of Indonesia:
GORONWY-ROBERTS OF CAERNARVON & OGWEN	R. SUBONO

([2]) The Agreement entered into force on 24 March 1977.

Printed in England by Her Majesty's Stationery Office

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ISBN 0 10 168580 7

AGREEMENT
BETWEEN
THE GOVERNMENT OF THE REPUBLIC OF INDONESIA
AND
THE GOVERNMENT OF THE KINGDOM OF DENMARK
CONCERNING THE PROMOTION AND PROTECTION OF INVESTMENTS

Preamble

The Government of the Republic of Indonesia and the Government of the Kingdom of Denmark, hereinafter referred to as the "**Contracting Parties**";

DESIRING to promote greater economic cooperation between the Contracting Parties, with respect to investments by investors of one Contracting Party in the territory of the other Contracting Party;

RECOGNIZING that a fair and equitable treatment of investments will stimulate the flow of private capital between the Contracting Parties, and promote sustainable development;

RECOGNIZING the need to protect investments of the investors of one Contracting Party in the territory of the other Contracting Party on a non-discriminatory basis;

AGREEING that a stable framework for investment will contribute to increasing the effective utilization of economic resources;

RECOGNIZING, that pursuant to the prevailing laws and regulations of the Contracting Parties and taking into account the provisions of this Agreement, the Contracting Parties resolve to conclude an agreement concerning the promotion and protection of investments;

HAVE AGREED as follows:

Article 1
Definitions

For the purpose of this Agreement,

1. The term of "investment" means every kind of asset established or acquired by an investor of one Contracting Party in the territory of

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the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party, including in particular, but not exclusively:

a. Moveable and immovable property or any property rights such as mortgages, liens, pledges, leases and similar rights;

b. Reinvested returns;

c. Shares and stocks in and debentures of a company or any other forms of participation in a company;

d. Claims to money or rights to a performance having a financial value;

e. Intellectual property rights including but not limited to patents, copyrights, trade marks, geographical indications, industrial designs, layout design of integrated circuits, trade secrets, and rights in plants varieties, as well as business names, technical processes, know-how and good will;

f. Concessions conferred by law, by an administrative act or under a contract by a competent authority, including concession to search for, develop, extract or exploit natural resources.

Investments made in the territory of one Contracting Party by any legal entity of that same Contracting Party, but actually owned by investors of the other Contracting Party, shall likewise be considered as investments of investors of the latter Contracting Party if they have been made in accordance with the laws and regulations of the former Contracting Party.

A change in the form in which assets are invested or reinvested, does not affect their character as investments.

2. The term "returns" means the amounts yielded by an investment and includes in particular, though not exclusively, profit, interest, capital gains, dividends, royalties or fees.

Returns, and in case of reinvestment amounts yielded from the reinvestment, shall be given the same protection as the investment in accordance with the provisions of this Agreement.

3. The term "investor" means:

a. in respect of the Republic of Indonesia

i. Any natural person having the nationality of the Republic of Indonesia; or
ii. Any legal person constituted under the law of the Republic of Indonesia.

b. in respect of the Kingdom of Denmark
   i. Any natural person who is a national of the Kingdom of Denmark in accordance with its laws; or

   ii. Any legal entity such as company, corporation, firm, partnership, business association, institution or organization, incorporated or constituted in accordance with the laws and regulations of the Kingdom of Denmark and having its registered office or central administration or principal place of business within the jurisdiction of the Kingdom of Denmark, and whether or not for profit and whether its liabilities are limited or not.

4. The term "territory" means:

   a. With respect to the Republic of Indonesia, its territory as defined in its laws including part of the continental shelf and adjacent seas over which the Republic of Indonesia has sovereignty, sovereign rights or jurisdiction in accordance with the provisions of the United Nations Convention on the Law of the Sea of 1982.

   b. With respect to the Kingdom of Denmark, the territory under its sovereignty as well as maritime zones and continental shelf over which the Kingdom of Denmark exercises sovereign rights or jurisdiction in accordance with its national laws in force and international law.

Article 2
Promotion and Protection of Investments

1. Each Contracting Party shall promote and encourage in its territory investments by investors of the other Contracting Party and shall, in accordance with its laws and regulations, admit such investments.

2. Each Contracting Party shall in its territory accord to investments and returns of investments of investors of the other Contracting Party fair and equitable treatment and full protection and security, under the provisions of this Agreement.

3. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of investors of the other Contracting Party.

Article 3
Treatment of Investments

1. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments once admitted, a treatment no less favourable than the treatment it accords to its own investors and their investments with respect to the acquisition, expansion, operation, management, maintenance, use and sale or other disposal of investments.

2. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments, a treatment no less favourable than the treatment it accords to investors of the most favoured nation and to their investments with respect to the establishment, acquisition, expansion, operation, management, maintenance, use and sale or other disposal of investments.

3. Each Contracting Party shall accord to investors of the other Contracting Party and to their investments the better of the treatments required by paragraph 1 and paragraph 2 of this Article, whichever is more favourable to the investors or investments, according to the investors.

4. Neither Contracting Party shall mandate or enforce in its territory measures on investments by investors of the other Contracting Party, concerning purchase of materials, means of production, operation, transport, marketing of its products or similar orders having discriminatory effects.

Article 4
Exceptions

The provisions of this Agreement in relation to the granting of treatment not less favourable than that accorded to the investors of each Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from:

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a) membership of any existing or future regional economic integration organisation or customs union of which one of the Contracting Parties is or may become a party, or

b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

Article 5
Expropriation and Compensation

1. Investments of investors of each Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for expropriations made in the public interest, on a basis of non-discrimination, carried out under due process of law, and against prompt, adequate and effective compensation.

2. Such compensation shall amount to the fair market value of the investment expropriated immediately before the expropriation or impending expropriation became known in such a way as to affect the value of the investment (hereinafter referred to as the "valuation date").

3. The investor affected shall have a right to prompt review under the law of the Contracting Party making the expropriation, by a judicial or other competent and independent authority of that Contracting Party, of its case, of the valuation of its investment, and of the payment of compensation, in accordance with the principles set out in paragraph 1 of this Article.

4. Such fair market value shall be calculated in a freely convertible currency on the basis of the market rate of exchange existing for that currency on the valuation date. Compensation shall be paid promptly and include interest at a commercial rate established on a market basis from the date of expropriation until the date of payment.

5. When a Contracting Party expropriates the assets of a company or an enterprise in its territory, which is incorporated or constituted under its law, and in which investors of the other Contracting Party have an investment, including through shareholding, the provisions of this Article shall apply to ensure prompt, adequate and effective compensation for those investors for any impairment or

diminishment of the fair market value of such investment resulting from the expropriation.

Article 6
Compensation for Losses

1. Investors of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, or riot in the territory of the latter Contracting Party, shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own investors or to investors of any third State, whichever of these standards is the more favourable from the point of view of the investor.

2. Without prejudice to paragraph 1 of this Article, an investor of a Contracting Party who, in any of the situations referred to in that paragraph, suffers a loss in the area of another Contracting Party resulting from:

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

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

   shall be accorded restitution or compensation which in either case shall be prompt, adequate and effective.

Article 7
Transfer of Capital and Returns

1. Each Contracting Party shall with respect to investments in its territory by investors of the other Contracting Party allow the free transfer into and out of its territory of:

   a) the initial capital and any additional capital for the maintenance and development of an investment;

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b) the invested capital or the proceeds from the sale or liquidation of all or any part of an investment;

c) interest, dividends, profits and other returns realised;

d) payments made for the reimbursement of the credits for investments, and interest due;

e) payments derived from rights enumerated in Article 1, paragraph 1, (d), of this Agreement;

f) unspent earnings and other remuneration of personnel engaged from abroad in connection with an investment;

g) compensation, restitution, indemnification or other settlement pursuant to Articles 5 and 6.

2. Transfers of payments under paragraph 1 of this Article shall, subject to its prevailing laws and regulations, be allowed and effected without delay, and shall be made without restriction in a freely convertible currency.

3. Transfers shall be made at the market rate of exchange existing on the date of transfer with respect to spot transactions in the currency to be transferred. In the absence of a market for foreign exchange, the rate to be used will be the most recent exchange rate applied to inward investments.

4. The provisions of the foregoing paragraphs of this article do not prejudice a Contracting Party's exercise in good faith of its international obligations or of its rights and obligations by virtue of its participation or association in a free trade zone, customs union, common market, economic or monetary union or any other form of regional cooperation or integration.

Article 8
Subrogation

1. If the investments of an investor of one Contracting Party are insured against non-commercial risks, any subrogation of the insurer or re-insurer to the rights of the said investor pursuant to the terms of such insurance shall be recognized by the other Contracting Party, provided, however, that the insurer or the re-insurer shall not

be entitled to exercise any rights other than the rights which the investor would have been entitled to exercise.

2. The Contracting Party exercising subrogation shall disclose the coverage of the claims arrangements with its investors to the other Contracting Party.

Article 9
Settlement of Disputes between a Contracting Party and an Investor

1. Any dispute arising directly from an investment between one Contracting Party and an investor of the other Contracting Party should be settled amicably between the two parties to the dispute, through consultations and negotiations.

2. If any such dispute cannot be settled within six months following the date on which the dispute has been raised by the investor through written notification to the Contracting Party, each Contracting Party hereby consents to the submission of the dispute, at the investor's choice, for resolution by international arbitration to one of the following fora:

   a. the competent courts of the Contracting Party in whose territory the investment is made, or

   b. by arbitration in accordance with the Rules of Arbitration of the International Chamber of Commerce (ICC), or

   c. an ad hoc tribunal set up under Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The appointing authority under the said rules shall be the Secretary General of ICSID, or

   d. the International Centre for Settlement of Investment Disputes (ICSID) for settlement by arbitration under the Washington Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States provided both Contracting Parties are parties to the said Convention.

   e. any other ad hoc arbitration tribunal agreed by the Parties.

3. For the purpose of this Article and Article 25(2)(b) of the said Washington Convention, any legal person which is constituted in

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accordance with the legislation of one Contracting Party and which, before a dispute arises, was controlled by an investor of the other Contracting Party, shall be treated as a national of the other Contracting Party.

4. Any arbitration under paragraph 2 b) – d) of this Article shall, at the request of either party to the dispute, be held in a state that is a party to the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done at New York, June 10, 1958 (the New York Convention).

5. The consent given by each Contracting Party in paragraph (2) and the submission of the dispute by an investor under the said paragraph shall constitute the written consent and written agreement of the parties to the dispute to its submission for settlement for the purposes of Chapter II of the Washington Convention (Jurisdiction of the Centre) and for the purpose of the Additional Facility Rules, Article 1 of the UNCITRAL Arbitration Rules, the Rules of Arbitration of the ICC and Article II of the New York Convention.

6. In any proceeding involving an investment dispute, a Contracting Party shall not assert, as a defence, counterclaim or for any other reason, that indemnification or other compensation for all or part of the alleged damages has been received pursuant to an insurance or guarantee contract.

7. Any arbitral award rendered pursuant to this Article shall be final and binding on the parties to the dispute. Each Contracting Party shall carry out without delay the provisions of any such award and provide in its territory for the enforcement of such award.

Article 10
Settlement of Disputes between the Contracting Parties

1. Disputes between the Contracting Parties concerning the interpretation and application of this Agreement shall, as far as possible, be settled through diplomatic channels.

2. If a dispute according to paragraph 1 of this Article cannot be settled within six (6) months, it shall, upon the request of either Contracting Party, be submitted to an arbitral tribunal.

3. Such arbitral tribunal shall be constituted on an *ad hoc* basis as follows: each Contracting Party shall appoint one arbitrator and

these two arbitrators shall agree upon a national of a third State as their chairman to be appointed by the two Contracting Parties. Such arbitrators shall be appointed within two (2) months from the date one Contracting Party has informed the other Contracting Party, of its intention to submit the dispute to an arbitral tribunal and the chairman shall be appointed within four (4) months following the appointment of the two arbitrators.

Such an Arbitral Tribunal shall be constituted for each individual case in the following way. Within two (2) months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the Tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the Tribunal. The Chairman shall be appointed within four (4) months from the date of appointment of the other two members.

4. If the periods specified in paragraph 3 of this Article are not observed, either Contracting Party may, in the absence of any other relevant arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President of the International Court of Justice is a national of either of the Contracting Parties or if he is otherwise prevented from discharging the said function, the Vice-President or in case of his inability the member of the International Court of Justice next in seniority should be invited under the same conditions to make the necessary appointments.

5. The tribunal shall establish its own rules of procedure.

6. The arbitral tribunal shall reach its decision on the basis of the present Agreement and applicable rules of international law. It shall reach its decision by a majority of votes; the decision shall be final and binding.

7. Each Contracting Party shall bear the costs of its own member and of its legal representation in the arbitration proceedings. The costs of the chairman and the remaining costs shall be borne in equal parts by both Contracting Parties. The tribunal may, however, in its award determine another distribution of costs.

Article 11
Consultations

Each Contracting Party may propose to the other Contracting Party to consult on any matter affecting the application of this Agreement. These consultations shall be held on the proposal of one of the Contracting Parties at a place and at a time agreed upon through diplomatic channels.

Article 12
Application of this Agreement

This Agreement shall apply to all investments made by investors of either Contracting Party in the territory of the other Contracting Party, whether made before or after the entry into force of this Agreement, but shall not apply to any dispute concerning an investment that arose or any claim that was settled before its entry into force.

Article 13
Territorial Extension

1. This Agreement shall not apply to the Faroe Islands and Greenland.

2. The provisions of this Agreement may be extended to the Faroe Islands and Greenland as may be agreed between the Contracting Parties in an Exchange of Notes.

Article 14
Amendments

This Agreement may be amended at any time, if deemed necessary, by mutual consent of both Contracting Parties and through the same procedure as the original Agreement.

Article 15
Entry Into Force, Duration and Termination

1. The Contracting Parties shall notify each other when the constitutional requirements for the entry into force of this Agreement have been fulfilled. The Agreement shall enter into force thirty (30) days after the date of that last notification through diplomatic channel.

2. Upon its entry into force, this Agreement substitutes and supersedes the Agreement between the Government of the Republic of Indonesia and the Government of the Kingdom of Denmark concerning the Promotion and Reciprocal Protection of Investments done at Jakarta on the 30th day of January 1968.

3. This Agreement shall remain in force for a period of ten years. It shall remain in force thereafter until either Contracting Party notifies in writing the other Contracting Party of its intention to terminate this Agreement. The notice of termination shall become effective one year after the date of such notification.

4. In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 13 shall remain in force for a further period of ten (10) years from the effective date of termination of this Agreement.

IN WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed this Agreement.

DONE in duplicate at Jakarta, on January 22, 2007, in the English language. Both texts being equally authentic.

For the Government of the Republic of Indonesia	For the Government of the Kingdom of Denmark
Signed	Signed
Dr. N. Hassan Wirajuda Minister for Foreign Affairs	Dr. Per Stig Møller Minister for Foreign Affairs

REPUBLIK INDONESIA

AGREEMENT
BETWEEN
THE GOVERNMENT OF THE REPUBLIC OF INDONESIA
AND
THE GOVERNMENT OF THE REPUBLIC OF SINGAPORE
ON THE PROMOTION AND PROTECTION OF INVESTMENTS

PREAMBLE

The Government of the Republic of Indonesia and the Government of the Republic of Singapore (hereinafter collectively referred to as the "Parties" or individually as a "Party"),

RECOGNISING that the creation of a business-friendly environment will be conducive to the stimulation of business initiative for greater investment between the Parties;

ACKNOWLEDGING the important contribution that investments can make to sustainable development, and seeking to promote and facilitate such investments within the territories of the Parties;

RECOGNISING that the encouragement and reciprocal protection of such investments can stimulate business initiative, foster the inflow of capital and technology, and increase economic development and prosperity in both States;

REAFFIRMING the right of the Parties to regulate and to introduce new measures relating to investments in their territories in order to meet legitimate policy objectives,

HAVE AGREED AS FOLLOWS:

CHAPTER I
DEFINITIONS AND SCOPE

ARTICLE 1
DEFINITIONS

For the purposes of this Agreement:

enterprise means any entity, with or without legal personality, constituted or organised 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 organisation, and a branch of an enterprise;

enterprise of a Party means an enterprise constituted or organised under the law of a Party, and carrying out business activities there;

freely usable currency means "freely usable currency" as determined by the International Monetary Fund under its *Articles of Agreement of the International Monetary Fund* and any amendments thereto;

ICSID means the International Centre for Settlement of Investment Disputes;

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*, as amended and in effect on April 10, 2006;

ICSID Arbitration Rules means the *Rules of Procedure for Arbitration Proceedings (Arbitration Rules)*, as amended and in effect on April 10, 2006;

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

investment means any kind of asset owned or controlled, directly or indirectly, by an investor that has the characteristics of an investment.[1] Forms that an investment may take include, but are not limited to[2]:

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

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[1] Where an asset lacks the characteristics of an investment, that asset is not an investment regardless of the form it may take. The characteristics of an investment include the commitment of capital, the expectation of gain or profit, the assumption of risk or certain duration.

[2] The term "investment" does not include an order or judgment entered in a judicial or administrative action or an arbitral award made in an arbitral proceeding.

(b) bonds, debentures, loans and other debt instruments[3, 4], including rights derived therefrom;

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

(d) claims to money or to any contractual performance related to a business and under contract having an economic value;[5]

(e) intellectual property rights which are conferred pursuant to the laws and regulations of a Party where the investment is located and goodwill;

(f) licences, authorisations, permits, and similar rights conferred pursuant to applicable domestic law, including any concession to search for, cultivate, extract or exploit natural resources;[6] and

(g) other tangible or intangible, movable or immovable property and related property rights such as mortgages, liens or pledges;

For the purpose of the definition of "investment", returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their character as investments.

investor means:

(a) an enterprise of a Party; or

(b) a natural person who, under the law of a Party, is a national[7] of that Party or has the right of permanent residence in that Party where both that Party and the other Party in which the person is making or has made an investment

[3] For the purpose of this Agreement, "loans and other debt instruments" described in (b) and "claims to money or to any contractual performance" described in (d) of this Article refer to assets which relate to a business activity and do not refer to assets which are of a personal nature, unrelated to any business activity.

[4] A loan issued by a Party to the other Party is not an investment

[5] For greater certainty, investment does not mean claims to money that arise solely from:

(a) commercial contracts for the sale of goods or services, domestic financing of such contracts; or

(b) the extension of credit in connection with such commercial contracts.

[6] Whether a particular type of licence, authorisation, 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 Party's law. Among such instruments that do not have the characteristics of an investment are those that do not create any rights protected under the Party's law. For greater certainty, the foregoing is without prejudice to whether any asset associated with such instruments has the characteristics of an investment.

[7] For greater certainty, if a natural person possesses dual nationality, she or he shall be deemed to possess exclusively the nationality of the Party of her or his dominant and effective nationality.

recognise permanent residents and accord substantially the same treatment to their respective permanent residents as they accord to their respective nationals in respect of measures affecting investment;

that has made an investment;

locally established enterprise means an enterprise owned or controlled[8] by an investor of a Party, established in the territory of the other Party;

measure means any measure by a Party, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form, and includes measures taken by:

(a) central, regional or local governments and authorities; and

(b) non-governmental bodies in the exercise of powers delegated by central, regional or local governments or authorities;

New York Convention means the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, adopted at the United Nations in New York on June 10, 1958;

returns means amounts yielded by or derived from an investment, including, but not limited to, any profits, interest, capital gains, dividends, royalties or fees;

territory means:

(a) in respect of the Republic of Indonesia: the land territories, territorial sea, archipelagic waters, internal waters, including sea-bed and subsoil thereof, and airspace over such territories, as well as continental shelf and exclusive economic zone, over which Indonesia has sovereignty, sovereign rights or jurisdiction, as defined in its laws, and in accordance with the United Nations Convention on the Law of the Sea, done at Montego Bay, 10 December 1982;

(b) in respect of the Republic of Singapore: its land territory, internal waters and territorial sea, as well as any maritime area situated beyond the territorial sea which has been or might in the future be designated under its national law, in accordance with international law, as an area within which Singapore may exercise sovereign rights or jurisdiction with regards to the sea, the sea-bed, the subsoil and the natural resources;

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[8] An enterprise is:

(a) owned by natural persons or enterprises of a Party if more than 50 per cent of the equity interest in it is beneficially owned by natural persons or enterprises of that Party;

(b) controlled by natural persons or enterprises of a Party if such natural persons or enterprises have the power to name a majority of its directors or otherwise to legally direct its actions.

UNCITRAL Arbitration Rules means the *Arbitration Rules of the United Nations Commission on International Trade Law*, as adopted by the United Nations General Assembly on 15 December 1976; and

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

ARTICLE 2
APPLICABILITY OF AGREEMENT

1. This Agreement shall apply, with respect to a Party, to an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Agreement or made, established, acquired or expanded thereafter, and has been admitted according to the laws, regulations, and national policies of the former Party, and where applicable, specifically approved in writing[9] by the competent authority of the former Party.

2. The provisions in this Agreement shall not apply to claims arising out of events which occurred,[10] or claims which had been raised, prior to the entry into force of this Agreement.

3. This Agreement shall not apply to:

(a) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance, or to any conditions attached to the receipt or continued receipt of such subsidies or grants, whether or not such subsidies or grants are offered exclusively to investors of the Party or investments of investors of the Party;

(b) government procurement;

(c) services supplied in the exercise of governmental authority;

(d) matters of taxation[11] in the territory of a Party, which shall, except as set out in Article 43 (Taxation), be governed by the domestic laws of the Party and by any tax treaty between the Parties.

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[9] Where specific approval in writing is required for investments by a Party's domestic laws, regulations and national policies, that Party shall take all reasonable steps to observe transparency, fairness and efficiency in processing the application. These steps would include:

(a) ensuring that information on that Party's competent authority and its approval processes are promptly published or otherwise made available;

(b) in the case of an application for approval in writing, promptly notifying the applicant in writing of any additional information required and the outcome of the application; and

(c) in the case that an application is denied, promptly notifying the applicant in writing of the reasons for denying the application. If an application is denied, the applicant shall have the opportunity of submitting, at the applicant's discretion, a new application.

[10] For greater certainty, this Agreement shall not bind a Party in relation to an act or fact that took place or a situation that ceased to exist before the date of entry into force of this Agreement for that Party.

[11] For greater certainty, nothing in this Agreement shall affect the rights and obligations of any Party under any tax treaty. In the event of any inconsistency between this Agreement and any such tax treaty, that treaty shall prevail to the extent of the inconsistency. In the case of a tax treaty between the Parties, the competent authorities under that treaty shall have sole responsibility for determining whether any inconsistency exists between this Agreement and that treaty.

CHAPTER II
PROTECTION

ARTICLE 3
TREATMENT OF INVESTMENT

1. Each Party shall accord to investments fair and equitable treatment and full protection and security.

2. For greater certainty:

(a) "fair and equitable treatment" requires each Party not to deny justice in any legal or administrative proceedings in accordance with the principle of due process of law;

(b) "full protection and security" requires each Party to take such measures as may be reasonably necessary to ensure the protection and security of the investment;

(c) the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the investment as a result; and

(d) 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 under customary international law, and do not create additional substantive rights.

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

ARTICLE 4
NATIONAL TREATMENT[12, 13]

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

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[12] Article 4 (National Treatment) is subject to Annex I (National Treatment).

[13] For greater certainty, whether treatment is accorded in "like circumstances" under Article 4 (National Treatment) or Article 5 (Most-Favoured-Nation Treatment) depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investments on the basis of legitimate public welfare objectives.

2. For greater certainty, the treatment to be accorded by a Party under paragraph 1 means, with respect to a regional level of government, treatment no less favourable than the most favourable treatment accorded, in like circumstances, by that regional level of government to investments of investors, of the Party of which that regional level of government forms a part.

ARTICLE 5
MOST-FAVOURED-NATION TREATMENT

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

2. The provisions of this Article shall not be construed so as to oblige a Party to extend to the investors of the other Party and investments of investors of the other Party the benefit of any treatment, preference or privilege resulting from:

(a) any bilateral investment agreements (also commonly referred to as "investment guarantee agreements", "investment promotion and protection agreements", or "international investment agreements") that were initialled, signed or have entered into force prior to the entry into force of this Agreement;[14] or

(b) any arrangement with a non-Party or parties in the same geographical region designed to promote regional cooperation in the economic, social, labour, industrial or monetary fields within the framework of specific projects.

3. For greater certainty, paragraphs 1 and 2 shall not apply to options or procedures for the settlement of disputes that are available in other agreements, and shall not be construed as granting to investors options or procedures for the settlement of disputes other than those set out in Section One (Settlement of Disputes between a Party and an Investor of the Other Party) of Chapter III (Dispute Settlement).

4. For greater certainty, substantive obligations in other international investment treaties or other trade agreements do not in themselves constitute "treatment", and thus cannot give rise to a breach of this Article, provided that no measures have been adopted or maintained by a Party pursuant to such obligations.

[14] For greater certainty, "bilateral investment agreements" include any subsequent reviews or amendments to those agreements.

ARTICLE 6
EXPROPRIATION[15]

1. Neither Party shall expropriate or nationalise an investment either directly or indirectly through measures equivalent to expropriation or nationalisation (hereinafter referred to as "expropriation"), except:

(a) for a public purpose;[16]

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate and effective compensation in accordance with paragraphs 2 and 3;[17] and

(d) in accordance with due process of law.

2. Compensation shall:

(a) be paid without undue delay;[18]

(b) be equivalent to the fair market value[19] of the expropriated investment immediately before the expropriation took place ("the date of expropriation") or before the impending expropriation became public knowledge, whichever is earlier;

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

(d) be effectively realisable, freely usable and freely transferable in accordance with Article 8 (Transfers).

3. The compensation shall include interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment. Valuation criteria used to determine fair market value may include going concern value, asset value including

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[15] This Article shall be interpreted in accordance with the Annex II (Expropriation).

[16] For greater certainty, for the purposes of this Article, the term "public purpose" refers to a concept in customary international law. Domestic law may express this or a similar concept by using different terms, such as "public necessity", "public interest" or "public use".

[17] For greater certainty, where there is a dispute on whether a Party's conduct amounts to indirect expropriation within the meaning of this Article, the fact that compensation has not been paid while that dispute remains unresolved does not render such conduct inherently unlawful if it is subsequently found to constitute indirect expropriation within the meaning of this Article.

[18] The Parties understand that there may be legal and administrative processes that need to be observed before payment can be made.

[19] The valuation of fair market value of the expropriated investment shall exclude any speculative or windfall profits claimed by the investor.

the declared tax value of tangible property, replacement value, capital invested, the nature and duration of the investment, and other criteria, as appropriate.

4. Notwithstanding paragraphs 1, 2 and 3, any measure of expropriation relating to land, which shall be defined in the existing domestic legislation of the expropriating Party on the date of entry into force of this Agreement, shall be for a purpose and upon payment of compensation in accordance with the aforesaid legislation.

5. Any measure of expropriation or valuation may, at the request of investors, be reviewed by a judicial or other independent authority of the Party taking the measure in the manner prescribed by its laws.

6. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the *Agreement on Trade-Related Aspects of Intellectual Property Rights* in Annex 1C to the WTO Agreement.[20]

ARTICLE 7
COMPENSATION FOR LOSSES

Investors of a Party whose investments in the territory of the other Party suffer losses owing to war or other armed conflict, civil disturbances, a state of national emergency, revolt, insurrection, riot or other similar situations in the territory of the latter Party, shall be accorded by the latter Party treatment, as regards restitution, indemnification, compensation or other settlement, if any, no less favourable than that which the latter Party accords to investors of any non-Party or to its own investors, whichever is more favourable. Any resulting compensation shall be made in freely usable currency and be freely transferable in accordance with Article 8 (Transfers).

ARTICLE 8
TRANSFERS

1. Each Party shall permit all transfers relating to investments of an investor of the other Party in its territory to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital, including the initial contribution;

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

[20] For greater certainty, the term "revocation" of intellectual property rights includes the cancellation or nullification of such rights, and the term "limitation" of intellectual property rights includes exceptions to such rights.

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

(d) payments made under a contract, entered into by the investor, or its investment, including payments made pursuant to a loan agreement;

(e) payments made pursuant to Article 6 (Expropriation) and Article 7 (Compensation for Losses); and

(f) payments arising under Chapter III (Dispute Settlement).

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

3. Notwithstanding paragraphs 1 and 2, a 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 offences;

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

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

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

(g) severance entitlements of employees; or

(h) the requirement to register and satisfy other formalities imposed by the central bank or other relevant authorities of a Party.

4. Nothing in this Agreement shall affect the rights and obligations of the members of the International Monetary Fund under the Articles of Agreement of the International Monetary Fund, including the use of exchange actions which are in conformity with the *Articles of Agreement of the International Monetary Fund* provided that a Party shall not impose restrictions on any capital transactions inconsistently with its obligations under this Agreement regarding such transactions, except under Article 9 (Restrictions to Safeguard the Balance of Payments) or at the request of the International Monetary Fund.

ARTICLE 9
RESTRICTIONS TO SAFEGUARD THE BALANCE OF PAYMENTS

1. In the event of serious balance of payments and external financial difficulties or threat thereof, or in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies, a Party may adopt or maintain restrictions on payments, transfers or capital movements, related to investments. It is recognised that particular pressures on the balance of payments of a Party in the process of economic development may necessitate the use of restrictions to ensure, *inter alia*, the maintenance of a level of financial reserves adequate for the implementation of its programme of economic development.

2. The restrictions referred to in paragraph 1 shall:

(a) be consistent with the *Articles of Agreement of the International Monetary Fund*;

(b) avoid unnecessary damage to the commercial, economic and financial interests of the other Party;

(c) not exceed those necessary to deal with the circumstances described in paragraph 1;

(d) be temporary and be phased out progressively as the situation specified in paragraph 1 improves; and

(e) be applied on a non-discriminatory basis such that the other Party is treated no less favourably than any non-Party;

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

4. The Party adopting any restrictions under paragraph 1 shall promptly agree to the other Party's request for consultation to review the restrictions adopted by it, if such consultations are not otherwise taking place outside this Agreement.

ARTICLE 10
SUBROGATION

1. If either Party (or any agency, institution, statutory body or corporation designated by it), as a result of an indemnity it has given on non-commercial risks in respect of an investment or any part thereof, makes payment to its own investors in respect of any of their claims under this Agreement, the other Party shall recognise that the Party making payment to its own investors (or any agency, institution, statutory body or corporation designated by it) is entitled by virtue of subrogation to exercise the rights and assert the claims of its own investors. The subrogated rights or claims shall not be greater than the original rights or

claims of the said investor. This, however, does not necessarily imply recognition by the other Party of the merits of any case or the amount of any claims arising therefrom.

2. Where a Party (or any agency, institution, statutory body or corporation designated by it) has made a payment to an investor of that Party and has taken over rights and claims of the investor, that investor shall not, unless authorised to act on behalf of the Party (or any agency, institution, statutory body or corporation designated by it) making the payment, pursue those rights and claims against the other Party.

3. In the exercise of subrogated rights or claims, a Party (or any agency, institution, statutory body or corporation designated by it) exercising such rights or claims shall disclose the coverage of the claims arrangement with its investors to the other Party.

ARTICLE 11
RIGHT TO REGULATE

1. The Parties reaffirm their right to regulate within their respective territories to achieve legitimate policy objectives, such as the protection of public health, social services, public education, safety, environment or public morals, social or consumer protection, privacy and data protection, and the promotion and protection of cultural diversity.

2. For greater certainty, the mere fact that a Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectations of profits, does not amount to a breach of an obligation under this Agreement.

ARTICLE 12
CORPORATE SOCIAL RESPONSIBILITY

Each Party affirms the importance of encouraging enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognised standards, guidelines, and principles of corporate social responsibility that have been endorsed or are supported by that Party.

ARTICLE 13
MEASURES AGAINST CORRUPTION

1. The Parties reaffirm that bribery and other forms of corruption in any investment activities can undermine democracy and rule of law, discourage foreign investment and adversely affect economic development of the Parties.

2. Nothing in this Agreement shall prevent a Party from undertaking measures to prevent and combat bribery and other forms of corruption in any investment activities within its territory, provided that such measures are not inconsistent with this Agreement.

CHAPTER III
DISPUTE SETTLEMENT

SECTION ONE: SETTLEMENT OF DISPUTES BETWEEN A PARTY AND AN INVESTOR OF THE OTHER PARTY

ARTICLE 14
SCOPE AND BASIC PRINCIPLES

1. This Section shall apply to disputes between a Party (hereinafter referred to as the "disputing Party") and an investor of the other Party (hereinafter referred to as the "disputing investor") concerning an alleged breach of an obligation of the former under this Agreement which causes loss or damage to the investor or its investment (hereinafter referred to as an "investment dispute"). In the event of an investment dispute, the disputing parties should seek to resolve the dispute with a view towards reaching an amicable settlement.

2 For greater certainty, objections that a disputing Party may raise in any proceedings under this Section would include, but not be limited to, objections on the ground that an investment has been made, established, acquired or admitted through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process.

ARTICLE 15
CONSULTATIONS

1. The disputing parties shall initially seek to resolve an investment dispute by consultations and negotiations ("consultations"), which may include the use of non-binding, third party procedures, such as good offices, conciliation and mediation. Such consultations shall be initiated by a written request for consultations delivered by the disputing investor to the disputing Party.

2. With the objective of resolving an investment dispute through consultations, the written request for consultations shall contain information regarding the legal and factual basis for the investment dispute, including the name and address of the disputing investor, the provisions of this Agreement alleged to have been breached, the relief sought and the estimated amount of damages claimed.

3. Consultations shall commence within 30 days of receipt by the disputing Party of the written request for consultations, unless the disputing parties otherwise agree, and the place for consultations shall be Jakarta, Indonesia where the disputing Party is Indonesia, or Singapore where the disputing Party is Singapore.

ARTICLE 16
MEDIATION

1. The disputing parties may, at any time, agree to have recourse to mediation. A request to have recourse to mediation shall be addressed by a disputing party to the other disputing party in writing. The party to which the request is addressed shall give sympathetic consideration to the request, and reply by accepting or rejecting it in writing within 10 days of its receipt.

2. Recourse to mediation is voluntary and without prejudice to the legal position of either disputing party.

3. Recourse to mediation may be governed by the mediation rules of mediation institutions in Indonesia or Singapore, or such other rules as the disputing parties may agree. Mediators shall comply with Annex IV (Code of Conduct of Arbitrators and Mediators).

4. Each disputing party shall bear its own expenses derived from the participation in the mediation process. Expenses incurred in relation to the conduct of the mediation process, including the remuneration and expenses of the mediator, shall be borne equally by the disputing parties.

5. On request of the disputing parties, the mediator shall issue to the disputing parties, in writing, a draft factual report, providing a brief summary of (1) the measure at issue in these procedures; (2) the procedures followed; and (3) any mutually agreed solution reached as the final outcome of these procedures, including possible interim solutions. The mediator shall provide the disputing parties 15 working days to comment on the draft report. After considering the comments of the disputing parties submitted within the period, the mediator shall submit, in writing, a final factual report to the disputing parties within 15 working days. The factual report shall not include any interpretation of this Agreement.

6. Where a mutually agreed solution has been reached as a result of the mediation process, the disputing parties shall enter into a written settlement agreement to take the measures necessary to implement the mutually agreed solution within the agreed timeframe.

7. Nothing in this Article shall preclude the disputing parties from having recourse to other forms of alternative dispute resolution.

ARTICLE 17
SUBMISSION OF A CLAIM

1. If an investment dispute cannot be resolved within 1 year from the date of delivery of the written request for consultations pursuant to Article 15 (Consultations) then, unless the disputing parties agree otherwise, the disputing investor may submit the dispute to:

   (a) the courts or tribunals of the disputing Party, provided that such court or tribunal have jurisdiction over such claim;

(b) arbitration under the ICSID Convention and the ICSID Arbitration Rules, provided that both the disputing Party and the Party of the disputing investor are parties to the ICSID Convention;

(c) arbitration under the ICSID Additional Facility Rules, provided that either the disputing Party or the Party of the disputing investor is a party to the ICSID Convention;

(d) arbitration under the UNCITRAL Arbitration Rules; or

(e) any other arbitral institutions or under any other arbitration rules, if the disputing parties so agree,

provided that resort to any arbitration rules or *fora* under sub-paragraphs (b) to (e) shall exclude resort to the others.

For the avoidance of doubt, the disputing investor may submit a claim on its own behalf in respect of loss or damage that has been incurred by the disputing investor, or on behalf of an enterprise of the disputing Party that the disputing investor owns or controls, either directly or indirectly, in respect of loss or damage that has been incurred by the enterprise.

2. Each Party hereby consents to the submission of an investment dispute to arbitration under paragraph 1 in accordance with the provisions of this Section, conditional upon:

(a) the submission of the dispute to such arbitration taking place within three years of the time at which the disputing investor became aware, or should have reasonably become aware, of a breach of an obligation under this Agreement causing loss or damage to the disputing investor or its investment;

(b) the disputing investor providing written consent to arbitration in accordance with the provisions set out in this Section;

(c) the legal and factual basis for the dispute was subject to prior consultation or mediation pursuant to Article 15 (Consultations) or Article 16 (Mediation) respectively;

(d) the disputing investor providing written notice, which shall be submitted at least 90 days before the claim is submitted, to the disputing Party of its intent to submit the dispute to such arbitration and which:

    (i) states the name and address of the disputing investor and, where a dispute is submitted on behalf of an enterprise, the name, address, and place of constitution of the enterprise;

    (ii) nominates one of the *fora* referred to in paragraph 1 as the forum for dispute settlement;

(iii) waives the disputing investor's right to initiate or continue any proceedings before any of the other dispute settlement *fora* referred to in paragraph 1 in relation to the matter under dispute;

(iv) provides, where a dispute is submitted on behalf of a locally established enterprise, the enterprise's written waiver of its right to initiate or continue any proceedings before any of the other dispute settlement fora referred to in paragraph 1 in relation to the matter under dispute;

(v) briefly summarises the alleged breach of the disputing Party under this Agreement (including the provisions alleged to have been breached), the legal and factual basis for the dispute, and the loss or damage allegedly caused to the disputing investor or its investment by reason of that breach; and

(e) no final award concerning the same treatment as alleged to breach the provisions of Chapter II (Protection) having been rendered in a claim submitted by the disputing investor to another international tribunal established pursuant to this Section, or any other treaty.

3. Notwithstanding sub-paragraph 2(d)(iii), the disputing investor shall not be prevented from initiating or continuing an action that seeks interim measures of protection for the sole purpose of preserving the disputing investor's rights and interests and does not involve the payment of damages or resolution of the substance of the matter in dispute, before the courts or administrative tribunals of the disputing Party.

4. For the purposes of sub-paragraph 2(e), the term "disputing investor" refers to the investor and, where applicable, to the locally established enterprise, and includes all persons who directly or indirectly have an ownership interest in, or who are controlled by the investor or, where applicable, the locally established enterprise.

5. Upon request of the disputing Party, the tribunal shall decline jurisdiction where the disputing investor fails to respect any of the requirements referred to in paragraph 2.

6. The consent under paragraph 2 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".

7. A claim that is submitted for arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.

ARTICLE 18
THIRD PARTY FUNDING

1. Any disputing party benefiting from third party funding shall notify the other disputing party and the Tribunal of the name and address of the third party funder.

2. Such notification shall be made at the time of submission of a claim, or without delay as soon as the third party funding is agreed, donated or granted, as applicable.

ARTICLE 19
CONSTITUTION OF THE ARBITRAL TRIBUNAL

1. Unless the disputing parties otherwise agree, the arbitral tribunal shall be composed of three arbitrators, who shall not be nationals or permanent residents of either Party. Each disputing party shall appoint one arbitrator and the disputing parties shall agree upon a third arbitrator, who shall be the chairman of the arbitral tribunal. The chairman of the arbitral tribunal shall be a national of a non-Party which has diplomatic relations with the disputing Party and the non-disputing Party. If an arbitral tribunal has not been established within 90 days from the date on which the claim was submitted to arbitration, either because a disputing party failed to appoint an arbitrator or because the disputing parties failed to agree upon the chairman, the Secretary-General of ICSID, upon request of either disputing party, shall appoint, at his own discretion, the arbitrator or arbitrators not yet appointed. If the Secretary-General is a national or permanent resident of either Party, or he or she is otherwise unable to act, the Deputy Secretary-General of ICSID, who is not a national or permanent resident of either Party, may be invited to make the necessary appointments.

2. The arbitrators shall have experience or expertise in public international law. It is desirable that they have expertise, in particular, in international investment law, international trade law, or the resolution of disputes arising under international investment or international trade agreements. The arbitrators shall be independent from the Parties and the disputing investor, and not be affiliated to or receive instructions from any of them.

3. The disputing parties may establish rules relating to expenses incurred by the tribunal, including remuneration of the arbitrators.

4. Where any arbitrator appointed as provided for in this Article resigns or becomes unable to act, a successor shall be appointed in the same manner as prescribed for the appointment of the original arbitrator, and the successor shall have all the powers and duties of the original arbitrator.

5. Arbitrators appointed under this Section shall comply with Annex IV (Code of Conduct of Arbitrators and Mediators).

ARTICLE 20
GOVERNING LAW

1. Subject to paragraphs 2 and 3, when a claim is submitted under Article 17 (Submission of a Claim), the tribunal shall decide the issues in dispute in accordance with this Agreement, any other applicable agreements between the Parties, and the applicable rules of international law and where applicable, any relevant domestic law of the disputing Party.

2. The tribunal may, on its own account or at the request of a disputing Party, request a joint interpretation of any provision of this Agreement that is in issue in a dispute. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of the delivery of the request. For the avoidance of doubt, the Parties may also adopt, on their own account, joint interpretations of provisions of this Agreement.

3. A joint decision of the Parties on the interpretation of a provision of this Agreement shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that joint decision.

ARTICLE 21
PLACE OF ARBITRATION

Unless the disputing parties otherwise agree, the tribunal shall determine the place of arbitration in accordance with the applicable arbitration rules, provided that the place shall be in the territory of a State that is a party to the New York Convention and outside the territories of the Parties.

ARTICLE 22
ARBITRAL PROCEEDINGS

1. Without prejudice to a tribunal's authority to address other objections as a preliminary question, such as an objection that a dispute is not within the competence of the tribunal, a tribunal shall, before proceeding to the merits, address and decide as a preliminary question any objection by the disputing Party that, as a matter of law, a claim submitted is not a claim for which an award in favour of the disputing investor may be made under Article 24 (Awards), or that a claim is frivolous or manifestly without merit, even if the facts alleged[21] were assumed to be true. The tribunal may also consider any relevant facts not in dispute. The disputing Party shall specify as precisely as possible the basis for the objection.

(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 disputing Party to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the disputing Party to submit its response to the amendment).

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[21] For the purposes of this paragraph, the facts alleged refer to those made in support of the 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 the relevant article of the UNCITRAL Arbitration Rules.

(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. The disputing parties shall be given a reasonable opportunity to present their views and observations to the tribunal.

(c) The disputing Party does not waive any objection as to competence or any argument on the merits merely because the disputing Party did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 2. For greater certainty, such objections or arguments may be raised at another stage of the proceedings.

2. In the event that the disputing Party so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis any preliminary objection under paragraph 1 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.

3. The tribunal may, if warranted, award to the prevailing disputing party reasonable costs and fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claim or the objection was frivolous or manfestly without merit, and shall provide the disputing parties a reasonable opportunity to comment.

ARTICLE 23
DIPLOMATIC PROTECTION

Neither Party shall give diplomatic protection, or bring an international claim, in respect of a dispute which one of its investors and the other Party shall have consented to submit or have submitted to arbitration under this Section, unless such other Party has failed to abide by and comply with the award rendered in such dispute. Diplomatic protection, for the purposes of this paragraph, shall not include informal diplomatic exchanges for the sole purpose of facilitating a settlement of the dispute.

ARTICLE 24
AWARDS

1. Where a tribunal makes a final award against a disputing Party, the tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest; and

(b) restitution of property, provided that the disputing Party may pay monetary damages and any applicable interest, as determined by the tribunal in accordance with Chapter II (Protection), in lieu of restitution.

2. A tribunal may also award costs and attorney's fees in accordance with this Section and the applicable arbitration rules.

3. A tribunal may not award punitive damages.

4. In any arbitration conducted under this Section, at the request of a disputing investor, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of the 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.

5. Where a claim is submitted on behalf of an enterprise of the disputing Party, the arbitral award shall be made to the enterprise.

6. Any arbitral award shall be final and binding upon the disputing parties. An award shall have no binding force except between the disputing parties and in respect of the particular case.

7. Subject to paragraph 8 of this Article and the applicable review procedure for an interim award, the disputing parties shall abide by and comply with an award without delay.

8. A disputing investor may not seek enforcement of a final award until:

(a) in the case of a final award under the ICSID Convention:

(i) 120 days has elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed;

(b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to paragraph 1(e) of Article 17 (Submission of a Claim):

(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.

9. Each Party shall provide for the enforcement of an award in its territory. Each Party shall ensure the recognition and enforcement of the award in accordance with its relevant laws and regulations.

ARTICLE 25
COSTS

1. The tribunal shall order that the costs of the proceedings be borne by the unsuccessful disputing party. In exceptional circumstances, the tribunal may apportion costs between the disputing parties if it determines that apportionment is appropriate in the circumstances of the case.

2. Other reasonable costs, including costs of legal representation and assistance, shall be borne by the unsuccessful disputing party, unless the tribunal determines that such apportionment is unreasonable in the circumstances of the claim.

3. If only parts of the claims have been successful, the costs awarded shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.

ARTICLE 26
SECURITY FOR COSTS

1. Upon request by the disputing Party, the tribunal may order the disputing investor to post security for all or a part of the costs, if there are reasonable grounds to believe that the disputing investor risks not being able to honour a possible decision on costs issued against it.

2. If the security for costs is not posted in full within 30 days after the tribunal's order or within any other time period set by the tribunal, the tribunal shall so inform the disputing parties. The tribunal may order the suspension or termination of the proceedings.

ARTICLE 27
CONSOLIDATION

Where two or more claims have been submitted separately to arbitration under Article 17 (Submission of a Claim) and the claims have a question of law or fact in common and arise out of the same or similar events or circumstances, all concerned disputing parties may agree to consolidate those claims in any manner they deem appropriate.

ARTICLE 28
DISCONTINUANCE

If, following the submission of a claim under this Section, the disputing investor fails to take any steps in the proceedings within 180 days or such periods as the disputing parties may agree, the disputing investor shall be deemed to have withdrawn its claim and to have discontinued the proceedings. The tribunal shall, at the request of the disputing Party, and after giving notice to the disputing parties, issue an order taking note of the discontinuance of the proceedings. After such an order has been rendered, the authority of the tribunal shall lapse. Unless the disputing investor's failure to take steps in the proceedings was reasonable in the circumstances, the disputing investor may not subsequently submit a claim on the same matter.

ARTICLE 29
SERVICE OF DOCUMENTS

1. Notices and other documents in disputes under this Section shall be served on Indonesia by delivery to:

Director General for Legal Affairs and International Treaties
Ministry of Foreign Affairs
Jalan Taman Pejambon No.6
Jakarta 10110
Indonesia

2. Notices and other documents in disputes under this Section shall be served on Singapore by delivery to:

Permanent Secretary
Ministry of Trade & Industry
100 High Street #09-01
Singapore 179434
Singapore

SECTION TWO: SETTLEMENT OF DISPUTES BETWEEN THE PARTIES

ARTICLE 30
SCOPE

This Section applies to the settlement of disputes between the Parties arising from the interpretation or application of the provisions of this Agreement.

ARTICLE 31
CONSULTATIONS

1. Either Party may request in writing, consultations on the interpretation or application of this Agreement. If a dispute arises between the Parties on the interpretation or application of this Agreement, it shall, to the extent possible, be settled amicably through consultations.

2. In the event the dispute is not settled through the means mentioned above within 6 months from the date such consultations were requested in writing, then, unless the Parties agree otherwise, either Party may submit such dispute to an arbitral tribunal established in accordance with this Section or, by agreement of the Parties, to any other international tribunal.

ARTICLE 32
CONSTITUTION OF THE ARBITRAL TRIBUNAL

1. Arbitration proceedings shall initiate upon written notice delivered by a Party (hereinafter referred to as "requesting Party") to the other Party (hereinafter referred to as "respondent Party") through diplomatic channels. Such notice shall contain a statement setting forth the provisions of Chapter II (Protection) alleged to have been breached, the legal and factual grounds of the claim, a summary of the development and results of the consultations pursuant to Article 31 (Consultations), the requesting Party's intention to initiate proceedings under this Section and the name of the arbitrator appointed by such requesting Party.

2. Within 30 days after delivery of such notice, the respondent Party shall notify the requesting Party the name of its appointed arbitrator.

3. Within 30 days following the date on which the second arbitrator was appointed, the Parties shall appoint, by mutual agreement, a third arbitrator, who shall be the chairman of the arbitral tribunal. In the event that the Parties fail to mutually agree on the appointment of the third arbitrator, the arbitrators appointed by the Parties shall, within 30 days, appoint the third arbitrator, who shall be the chairman of the arbitral tribunal.

4. The arbitrators shall have experience or expertise in public international law. It is desirable that they have expertise, in particular, in international investment law, international

trade law, or the resolution of disputes arising under international investment or international trade agreements. The arbitrators shall be independent from the Parties, and not be affiliated to or receive instructions from either of them.

5. With regard to the selection of arbitrators under paragraphs 1, 2 and 3 of this Article, both Parties and, where relevant, the arbitrators appointed by them, shall not select arbitrators that are nationals or permanent residents of either Party. In addition, the third arbitrator shall be a national of a non-Party which has diplomatic relations with the Parties.

6. If the required appointments have not been made within the time limits set forth in paragraphs 2 and 3 above, either Party may invite the President of the International Court of Justice to appoint the arbitrator or arbitrators not yet appointed. If the President is a national or a permanent resident of either Party, or he or she is otherwise unable to act, the Vice-President of the International Court of Justice shall be invited to make the said appointments. If the Vice-President of the International Court of Justice is a national or a permanent resident of either Party, or he or she is otherwise unable to act, the Member of the International Court of Justice next in seniority who is neither a national nor a permanent resident of either Party shall be invited to make the necessary appointments.

7. In the event an arbitrator appointed under this Article resigns or becomes unable to act, a successor shall be appointed in the same manner as prescribed for the appointment of the original arbitrator, and he or she shall have the same powers and duties that the original arbitrator had.

8. Each Party shall bear the costs of its appointed arbitrator and of any legal representation in the proceedings. The costs of the chairman of the arbitral tribunal and of other expenses associated with the conduct of the arbitration shall be borne equally by the Parties, unless the arbitral tribunal decides that a higher proportion of costs be borne by one of the Parties.

ARTICLE 33
PLACE OF ARBITRATION

Unless the Parties agree otherwise, the place of arbitration shall be determined by the arbitral tribunal.

ARTICLE 34
ARBITRAL PROCEEDINGS

1. A tribunal established under this Section shall decide all questions relating to its competence and, subject to any agreement between the Parties, determine its own procedure. At any stage of the proceedings, the arbitral tribunal may propose to the Parties that the dispute be settled amicably. At all times, the arbitral tribunal shall afford a fair hearing to the Parties.

2. The arbitral tribunal shall decide the issues in dispute in accordance with this Agreement and the applicable rules and principles of international law.

3. The arbitral tribunal shall reach its decision by majority vote. The award shall be issued in writing and shall contain the applicable factual and legal findings. A signed award shall be delivered to each Party. The award shall be final and binding on the Parties.

CHAPTER IV
FINAL PROVISIONS

ARTICLE 35
OTHER OBLIGATIONS

If the legislation of either Party or international obligations existing at present or established hereafter between the Parties in addition to this Agreement, results in a position entitling investments by investors of the other Party to treatment more favourable than is provided for by this Agreement, such position shall not be affected by this Agreement.

ARTICLE 36
DENIAL OF BENEFITS

1. A Party may deny the benefits of this Agreement to:

   (a) an investor of the other Party that is an enterprise of such other Party and to investments of such investor if an investor of a non-Party owns or controls the enterprise and the denying Party does not maintain diplomatic relations with the non-Party;

   (b) an investor of the other Party that is an enterprise of such other Party and to investments of such investor if an investor of a non-Party or the denying Party owns or controls the enterprise and the enterprise has no substantive business operations in the territory of such other Party;

   (c) an investor that is a natural person of the other Party and to investments of that investor if that natural person is also a national of the denying Party; or

   (d) an investor of the other Party that is an enterprise of that other Party and to investments of that investor if a natural person or an enterprise of a non-Party owns or controls the enterprise and the denying Party adopts or maintains measures with respect to the non-Party or a natural person or an enterprise of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Agreement were accorded to the enterprise or to its investments.

2. For the purposes of this Article, an enterprise is:

   (a) "owned" by an investor if more than fifty (50) percent of the equity interest in it is beneficially owned by the investor; and

   (b) "controlled" by an investor if the investor has the power to name a majority of its directors or otherwise to legally direct its actions.

ARTICLE 37
TRANSPARENCY

1. Each Party shall ensure that its laws, regulations and administrative rulings of general application pertaining to or affecting any matter covered by this Agreement are promptly published or otherwise made available in such a manner as to enable interested persons or the other Party to become acquainted with them. International agreements pertaining to or affecting investors or investment activities, to which a Party is a signatory, shall also be published.

2. To the extent feasible, each Party shall make the measures and international agreements of the kind referred to in paragraph 1 available on the internet. Each Party shall, upon request by the other Party, respond within a reasonable period of time to specific questions from and provide information to the other Party with respect to matters referred to in paragraph 1.

ARTICLE 38
INFORMATION REQUIREMENTS AND DISCLOSURE OF INFORMATION

1. Notwithstanding Article 4 (National Treatment) and Article 5 (Most-Favoured-Nation Treatment), a Party may require an investor of the other Party, or its investment, to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect such business information that is confidential from any disclosure that would prejudice the competitive position of the investor or its 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.

2. Nothing in this Agreement shall require either Party to provide 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 39
GENERAL EXCEPTIONS[22]

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Party or its investors where like conditions prevail, or a disguised restriction on investments of investors of the other Party in the territory of a Party, nothing in this Agreement shall be construed to prevent the adoption or enforcement by a Party of measures:

(a) necessary to protect public morals or to maintain public order;[23]

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[22] For greater certainty, the application of the general exceptions to these provisions shall not be interpreted so as to diminish the ability of governments to take measures where investors are not in like circumstances due to the existence of legitimate regulatory objectives.

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

(c) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement including those relating to:

  (i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;

  (ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts;

  (iii) safety;

(d) imposed for the protection of national treasures of artistic, historic or archaeological value; or

(e) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[24]

ARTICLE 40
SECURITY EXCEPTIONS[25]

Nothing in this Agreement shall be construed to:

(a) require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests; or

(b) preclude a Party from applying 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 own essential security interests.

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[23] The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.

[24] For greater certainty, this provision also applies to measures relating to the conservation of living and non-living exhaustible natural resources.

[25] For greater certainty, nothing in this Agreement shall prevent a Party from taking any action which it considers necessary for the protection of critical public infrastructure, such as the communications, power, water and transportation infrastructure, including but not limited to imposing restrictions on operators of such infrastructure and preventing deliberate attempts intended to disable or degrade such infrastructure.

ARTICLE 41
PRUDENTIAL MEASURES

1. Notwithstanding any other provisions in this Agreement, a Party shall not be prevented from taking measures in a non-discriminatory manner relating to financial services for prudential reasons,[26] including measures 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 its financial system.

2. Where the measures taken by a Party pursuant to paragraph 1 do not conform with this Agreement, they shall not be used as a means of avoiding the commitments or obligations of the Party under this Agreement.

3. Nothing in this Agreement shall be construed to require a Party to disclose information relating to the affairs and accounts of individual customers or any confidential or proprietary information in the possession of public entities.

ARTICLE 42
PROMOTION AND FACILITATION OF INVESTMENT

1. Subject to its laws and regulations, each Party shall endeavour to cooperate in the facilitation of investments between the Parties including through:

(a) creating the necessary environment for all forms of investments;

(b) simplifying procedures for investment applications and approvals;

(c) promoting dissemination of investment information, including investment rules, regulations, policies and procedures; and

(d) establishing an appropriate mechanism, to the extent possible, to provide assistance and advisory services to investors including facilitation of operating licences and permits.

2. Subject to its laws and regulations, cooperation activities under subparagraph (1)(d) may be built on existing agreements or arrangements already in place for economic cooperation.

3. Nothing in this Article shall be construed to affect any obligation in the provisions of Chapter II (Protection), or be subject to or otherwise affect any dispute resolution proceedings under this Agreement.

[26] The Parties understand that the term 'prudential reasons' includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial service suppliers as well as the safety, and financial and operational integrity of payment and clearing systems.

ARTICLE 43
TAXATION

1. Article 6 (Expropriation) and Section One (Settlement of Disputes between a Party and an Investor of the Other Party) of Chapter III (Dispute Settlement) shall apply to taxation measures to the extent that such taxation measures constitute expropriation as provided for in Article 6 (Expropriation).[27] An investor that seeks to invoke Article 6 (Expropriation) with respect to a taxation measure must first refer to the competent taxation authorities of both Parties as described in paragraph 2, at the time that it gives notice under Section One (Settlement of Disputes between a Party and an Investor of the other Party) of Chapter III (Dispute Settlement), the issue of whether that taxation measure involves an expropriation as provided for under Article 6 (Expropriation). If the competent taxation authorities of both Parties do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation as provided for under Article 6 (Expropriation) within a period of six (6) months of the receipt of such referral, the investor may submit its claim to arbitration under Section One (Settlement of Disputes between a Party and an Investor of the Other Party) of Chapter III (Dispute Settlement).

2. For the purposes of this Article, "competent taxation authorities" means:

(a) in the case of the Republic of Indonesia, Minister of Finance or his or her authorised representative;

(b) in the case of the Republic of Singapore, the Chief Tax Policy Officer, Ministry of Finance, or his successor or such other public officer as may be designated by Singapore;

or their successors.

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[27] With reference to Article 6 (Expropriation), in assessing whether a taxation measure constitutes expropriation, the following considerations are relevant:

(a) the imposition of taxes does not generally constitute expropriation. The mere introduction of new taxation measures or the imposition of taxes in more than one jurisdiction in respect of an investment, does not in and of itself constitute expropriation;

(b) taxation measures which are consistent with internationally recognised tax policies, principles and practices do not constitute expropriation. In particular, taxation measures aimed at preventing the avoidance or evasion of taxes should not, generally, be considered to be expropriatory; and

(c) taxation measures including tax enforcement activities, which are applied on a non-discriminatory basis, as opposed to being targeted at investors of a particular nationality or specific individual taxpayers, are less likely to constitute expropriation. A taxation measure should not constitute expropriation if, when the investment is made, it was already in force, and information about the measure was made public or otherwise made publicly available.

ARTICLE 44
ENTRY INTO FORCE, DURATION AND TERMINATION

1. This Agreement shall enter into force on the date of exchange of Instruments of Ratification by the Parties.

2. This Agreement may be amended by mutual consent of the Parties in writing. The amendments shall enter into force in accordance with the same legal procedure prescribed under paragraph 1.

3. This Agreement shall remain in force for a period of 10 years and shall continue in force thereafter, unless, at any time after the expiry of the initial period of 10 years, either Party notifies in writing the other Party of its intention to terminate this Agreement. The notice of termination shall become effective one year after it has been received by the other Party.

4. In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of this Agreement shall remain in force for a further period of 10 years from that date.

IN WITNESS WHEREOF, the undersigned, duly authorised thereto by their respective Governments, have signed this Agreement.

DONE in duplicate at Bali, Indonesia on 11th October 2018 in the Indonesian and English languages, both texts being equally authentic. In the event of any divergence concerning interpretation, the English text shall prevail.

FOR THE GOVERNMENT OF THE REPUBLIC OF INDONESIA	FOR THE GOVERNMENT OF THE REPUBLIC OF SINGAPORE
RETNO L. P. MARSUDI **Minister for Foreign Affairs**	**CHAN CHUN SING** **Minister for Trade and Industry**

ANNEX I
NATIONAL TREATMENT

Article 4 (National Treatment) shall not apply to any measure relating to:

(a) the collection, purification, treatment, disposal and distribution of water, including waste water;

(b) real estate, including but not limited to the ownership, purchase, development, management, maintenance, use, enjoyment, sale or other disposal of real estate; or

(c) a national public health service scheme.

ANNEX II
EXPROPRIATION

The Parties confirm their shared understanding that:

1. 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[28] in an investment.

2. Paragraph 1 of Article 6 (Expropriation) addresses two situations. The first is direct expropriation, where an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure.

3. The second situation addressed by paragraph 1 of Article 6 (Expropriation) 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;[29] and

(iii) the character of the government action, including its objective and whether the action is disproportionate to the public purpose.

(b) 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.

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[28] For greater certainty, property interest refers to such property interest as applicable under the law of that Party.

[29] For greater certainty, whether an investor's investment-backed expectations are reasonable depends, to the extent relevant, on factors such as whether the government provided the investor with binding written assurances and the nature and extent of governmental regulation or the potential for government regulation in the relevant sector.

ANNEX III
PUBLIC DEBT

1. The Parties recognise that the purchase of debt issued by a Party entails commercial risk. For greater certainty, no award shall be made in favour of a disputing investor for a claim under Article 17 (Submission of a Claim) with respect to default or non-payment of debt issued by a Party unless the disputing investor meets its burden of proving that such default or non-payment constitutes a breach of an obligation under Chapter II (Protection), including an uncompensated expropriation pursuant to Article 6 (Expropriation).

2. No claim that a restructuring of debt issued by a Party breaches an obligation under Chapter II (Protection) shall be submitted to, or if already submitted continued in, arbitration under Section One (Settlement of Disputes between a Party and an Investor of the Other Party) of Chapter III (Dispute Settlement) if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after that submission, except for a claim that the restructuring violates Article 4 (National Treatment) or Article 5 (Most-Favoured-Nation Treatment).[30]

3. Notwithstanding Article 17 (Submission of a Claim), and subject to paragraph 2, an investor of the other Party shall not submit a claim under Section One (Settlement of Disputes between a Party and an Investor of the Other Party) of Chapter III (Dispute Settlement) that a restructuring of debt issued by a Party breaches an obligation under Chapter II (Protection), other than Article 4 (National Treatment) or Article 5 (Most-Favoured-Nation Treatment), unless 450 days have elapsed from the date of receipt by the disputing Party of the written request for consultations pursuant to Article 15 (Consultations).

4. For the purposes of this Annex, "**negotiated restructuring**" means the restructuring or rescheduling of a debt instrument that has been effected through (a) a modification or amendment of that debt instrument, as provided for under its terms, or (b) a comprehensive debt exchange or other similar process in which the holders of no less than 75 per cent of the aggregate principal amount of the outstanding debt under that debt instrument have consented to the debt exchange or other process.

[30] For the purpose of this Annex, the mere fact that the relevant treatment distinguishes between investors or investments on the basis of legitimate public policy objectives in the context of a debt crisis or a threat thereof does not amount to a breach of Article 4 (National Treatment) or Article 5 (Most-Favoured-Nation Treatment).

ANNEX IV
CODE OF CONDUCT FOR ARBITRATORS AND MEDIATORS

Definitions

1. In this Code of Conduct:

arbitrator means a member of an arbitral tribunal established pursuant to Article 19 (Constitution of the Arbitral Tribunal);

mediator means a person who conducts mediation in accordance with Article 16 (Mediation);

candidate means an individual who is under consideration for selection as an arbitrator;

assistant means a person who, under the terms of appointment of an arbitrator, conducts research or provides assistance to the arbitrator;

staff, in respect of an arbitrator, means any person under the direction and control of the arbitrator, other than an assistant; and

proceedings, unless otherwise specified, means arbitral proceedings under Section One (Settlement of Disputes between a Party and an Investor of the Other Party) of Chapter III (Dispute Settlement).

Responsibilities to the Process

2. Throughout the proceedings, every candidate and arbitrator shall avoid impropriety and the appearance of impropriety, shall be independent and impartial, shall avoid direct and indirect conflicts of interests and shall observe high standards of conduct so that the integrity and impartiality of the dispute settlement mechanism is preserved.

3. Arbitrators shall not take instructions from any organisation or government with regard to matters before the arbitral tribunal.

Disclosure Obligations

4. Prior to his or her appointment as an arbitrator, a candidate shall disclose to the disputing parties any past or present interest, relationship or matter that is likely to affect his or her independence or impartiality or that might reasonably create an appearance of impropriety or bias in the proceedings. To this end, a candidate shall make all reasonable efforts to become aware of any such interests, relationships and matters.

5. Once appointed, an arbitrator shall at all times continue to make all reasonable efforts to become aware of any interests, relationships or matters referred to in paragraph 4 and shall disclose them. The disclosure obligation is a continuing duty, which requires an arbitrator to disclose any such interests, relationships or matters that may arise during any stage of the

proceedings at the earliest time the arbitrator becomes aware of it. The arbitrator shall disclose such interests, relationships or matters by informing the disputing parties, in writing, for their consideration.

6. Disclosure of an interest, relationship or matter is without prejudice as to whether that interest, relationship or matter is indeed covered by paragraphs 4 or 5, or whether it warrants recusal or disqualification. In the event of uncertainty regarding whether an interest, relationship or matter must be disclosed, a candidate or arbitrator should err in favour of disclosure.

7. An arbitrator shall communicate matters concerning actual or potential violations of this Code of Conduct to the disputing parties.

Duties of Arbitrators

8. An arbitrator shall comply with the provisions of Section One (Settlement of Disputes between a Party and an Investor of the Other Party) of Chapter III (Dispute Settlement) and the applicable rules of procedure.

9. An arbitrator shall perform his or her duties thoroughly and expeditiously throughout the course of the proceedings, and with fairness and diligence.

10. An arbitrator shall not deny other arbitrators the opportunity to participate in all aspects of the proceedings.

11. An arbitrator shall consider only those issues raised in the proceedings and necessary for a decision or award and shall not delegate this duty to any other person.

12. An arbitrator shall take all appropriate steps to ensure that his or her assistants and staff are aware of, and comply with, paragraphs 2 to 6 and 21 to 24 of this Code of Conduct.

13. An arbitrator shall not engage in any ex parte contacts concerning the proceedings.

Independence and Impartiality of Arbitrators

14. An arbitrator shall be independent and impartial and avoid creating an appearance of bias or impropriety and shall not be influenced by self-interest, outside pressure, political considerations, public clamour, loyalty to a disputing party or a non-disputing Party, or fear of criticism.

15. An arbitrator shall not, directly or indirectly, incur any obligation or accept any benefit that would in any way interfere, or appear to interfere, with the proper performance of his or her duties.

16. An arbitrator shall not use his or her position on the arbitral tribunal to advance any personal or private interests and shall avoid actions that may create the impression that others are in a special position to influence him or her.

17. An arbitrator shall not allow past or existing financial, business, professional, family or social relationships or responsibilities to influence his or her conduct or judgement.

18. An arbitrator shall avoid entering into any relationship or acquiring any financial interest that is likely to affect his or her impartiality or that might reasonably create an appearance of impropriety or bias.

Obligations of Former Arbitrators

19. A former arbitrator shall avoid actions that may create the appearance that he or she was biased in carrying out his or her duties or derived any advantage from the decisions or awards of the arbitral tribunal.

Confidentiality

20. An arbitrator or former arbitrator shall not at any time disclose or use any non-public information concerning a proceeding or acquired during a proceeding, except for the purposes of that proceedings, and shall not, in particular, disclose or use any such information to gain a personal advantage or an advantage for others or to adversely affect the interests of others.

21. An arbitrator shall not make any public statement regarding the merits of a pending proceedings.

22. An arbitrator shall not disclose a decision or award or parts thereof prior to its publication.

23. An arbitrator or former arbitrator shall not at any time disclose the deliberations of the arbitral tribunal, or any arbitrator's view regarding the deliberations, except as required by law.

Expenses

24. Each arbitrator shall keep a record and render a final account of the time devoted to the procedure and of his or her expenses, as well as the time and expenses of his or her assistants.

Responsibilities of Assistants and Staff

25. Paragraphs 2 to 6, 8, 13, and 19 to 23 of this Code of Conduct shall also apply to assistants and staff.

Mediators

26. The rules set out in this Code of Conduct as applying to arbitrators or former arbitrators shall apply, *mutatis mutandis*, to mediators.

Agreement on reciprocal promotion and protection of investments between

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and

the Kingdom of the Netherlands.

The-------------------------------------- and the Kingdom of the Netherlands,

hereinafter referred to as the Contracting Parties,

Desiring to strengthen their traditional ties of friendship and to extend and intensify economic relations between them by creating conditions with a view to attract and promote responsible foreign investment of the Contracting Parties in their respective territories that contribute to sustainable economic development;

Recognizing that fostering an open and transparent policy environment and protecting investments of investors of one Contracting Party in the territory of the other Contracting Party are conducive to the stimulation of mutually beneficial economic activity and intensification of economic cooperation;

Reaffirming their commitment to sustainable development and to enhancing the contribution of international trade and investment to sustainable development;

Considering that these objectives can be achieved without compromising the right of the Contracting Parties to regulate within their territories through measures necessary to achieve legitimate policy objectives, such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons;

Netherlands draft model BIT

Have agreed as follows:

Section 1: definitions and scope

Article 1
Definitions

For the purposes of this Agreement:

(a) “investment” means every kind of asset that has the characteristics of an investment, which includes a certain duration, the commitment of capital or other resources, the expectation of gain or profit, and the assumption of risk. Forms that an investment may take include:

(i) movable and immovable property as well as any other property rights in rem in respect of every kind of asset, such as mortgages, liens and pledges;
(ii) rights derived from shares, bonds and other kinds of interests in companies and joint ventures;
(iii) claims to money, to other assets or to any contractual performance having an economic value;
(iv) rights in the field of intellectual property, technical processes, goodwill and know-how;
(v) rights granted under public law or under contract, including rights to prospect, explore, extract and exploit natural resources.

‘Claims to money’ within the meaning of sub (iii) does not include claims to money that arise solely from commercial contracts for the sale of goods or services by a natural or legal in the territory of a Contracting Party to a natural or legal person in the territory of the other Contracting Party, the domestic financing of such contracts, or any related order, judgment, or arbitral award.

Returns that are invested shall be treated as investments and any alteration of the form in which assets are invested or reinvested shall not affect their qualification as investments.

(b) “investor” means with regard to either Contracting Party:

(i) any natural person having the nationality of that Contracting Party under its applicable law;
(ii) any legal person constituted under the law of that Contracting Party and having substantial business activities in the territory of that Contracting Party; or

(iii) any legal person that is constituted under the law of that Contracting Party and is directly or indirectly owned or controlled by a natural person as defined in (i) or by a legal person as defined in (ii).

A natural person who has the nationality of the Kingdom of the Netherlands and the other Contracting Party is deemed to be exclusively a natural person of the Contracting Party of his or her dominant and effective nationality.

(c) "freely convertible currency" means a currency which is widely traded in international foreign exchange markets and widely used in international transactions.

(d) "territory" means the territory of the Contracting Party concerned, including [if applicable] its territorial sea and any area beyond and adjacent to its territorial sea within which it exercises jurisdiction or sovereign rights in accordance with international law.

Article 2
Scope and application

1. This Agreement shall apply to an investment, made in accordance with the applicable law of the host Contracting Party at the time the investment is made, that is directly or indirectly owned or controlled by an investor of the other Contracting Party and existing on the date of entry into force of this Agreement or made thereafter.

2. The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons. The mere fact that a Contracting Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectations, including its expectation of profits, is not a breach of an obligation under this Agreement.

3. The Contracting Parties reserve the right to introduce or maintain non-discriminatory, appropriate and necessary measures for the purpose of preventing investors who, alone or together, have the ability to affect materially the terms of participation in the relevant market as a result of their position in the market, from engaging in or continuing anti-competitive practices.

4. Nothing in this Agreement shall be construed as preventing a Contracting Party from discontinuing the granting of a subsidy and/or requesting its reimbursement, where such measure is necessary in order to comply with international obligations between the Contracting Parties or where it has been ordered by a competent court, administrative tribunal or other competent authority, or requiring that Contracting Party to compensate the investor therefor.

5. If a Contracting Party has accorded special advantages to nationals of any third State by virtue of agreements establishing customs unions, economic unions, monetary unions or similar institutions, such as the European Union, or on the basis of interim agreements leading to such unions or institutions, that Contracting Party shall not be obliged to accord such advantages to investors of the other Contracting Party.

Section 2: Investment promotion and facilitation

Article 3
Favorable conditions for investment

1. Each Contracting Party shall, within the framework of its laws and regulations and in accordance with international obligations, promote economic cooperation and encourage the creation of favorable conditions for investment in its territory. Subject to its right to exercise powers conferred by its laws and regulations, each Contracting Party shall admit such investments.

2. The Contracting Parties affirm the G20 Guiding Principles for Global Investment Policymaking.

3. The Contracting Parties strive to strengthen the promotion and facilitation of investments that contribute to sustainable development, including but not limited through regular consultations between investment promotion and facilitation agencies and the exchange of information regarding investment opportunities.

Article 4
Transparency

Each Contracting Party shall ensure that its laws, regulations, judicial decisions, procedures and administrative rulings of general application with respect to any matter covered by this Agreement are promptly published or made available in such a manner as to enable interested persons and the other Contracting Party to become

acquainted with them. Whenever possible, such instruments will be made available through the internet in English.

Article 5
Rule of law

1. The Contracting Parties shall guarantee the principles of good administrative behavior, such as consistency, impartiality, independence, openness and transparency, in all issues that relate to the scope and aim of this Agreement.

2. Each Contracting Party shall ensure that investors have access to effective mechanisms of dispute resolution and enforcement, such as judicial, quasi-judicial or administrative tribunals or procedures for the purpose of prompt review, which mechanisms should be fair, impartial, independent, transparent and based on the rule of law.

Section 3: Sustainable development

Article 6
Sustainable development

1. The Contracting Parties are committed to promote the development of international investment in such a way as to contribute to the objective of sustainable development.

2. Each Contracting Party shall ensure that its investment laws and policies provide for and encourage high levels of environmental and labor protection and shall strive to continue to improve those laws and policies and their underlying levels of protection.

3. The Contracting Parties recognize that it is inappropriate to lower the levels of protection afforded by domestic environmental or labor laws in order to encourage investment.

4. A Contracting Party shall not adopt and apply domestic laws contributing to the objective of sustainable development in a manner that would constitute unjustifiable discrimination or a disguised restriction on trade.

5. Within the scope and application of this Agreement, the Contracting Parties reaffirm their obligations under the multilateral agreements in the field of environmental protection, labor standards and the protection of human rights to which they are party, such as the Paris Agreement, the fundamental ILO Conventions and the Universal Declaration of Human Rights. Furthermore, each Contracting Party shall continue to make sustained efforts towards ratifying the fundamental ILO Conventions that it has not yet ratified.

6. The Contracting Parties are committed to cooperate as appropriate on investment-related sustainable development matters of mutual interest in multilateral fora.

Article 7
Corporate Social Responsibility

The Contracting Parties reaffirm the importance of each Contracting Party to encourage investors operating within its territory or subject to its jurisdiction to voluntarily incorporate into their internal policies those internationally recognized standards, guidelines and principles of corporate social responsibility that have been endorsed or are supported by that Party, such as the OECD Guidelines for Multinational Enterprises, the United Nations Guiding Principles on Business and Human Rights, and the Recommendation CM/REC(2016) of the Committee of Ministers to Member States on human rights and business.

Section 4 – investment protection

Article 8
Non-discriminatory treatment

1. Each Contracting Party shall accord to an investor of the other Contracting Party and to an investment of an investor of the other Contracting Party, treatment no less favorable than the treatment it accords, in like situations, to its own investors and to their investments with respect to conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

2. Each Contracting Party shall accord to an investor of the other Contracting Party and/or to an investment of an investor of the other Contracting Party, treatment no less favorable than the treatment it accords in like situations, to investors of a third country and to their investments with respect to the conduct, operation, management, maintenance, use, enjoyment and sale or disposal of their investments in its territory.

3. Substantive obligations in other international investment and trade agreements do not in themselves constitute “treatment”, and thus cannot give rise to a breach of paragraph 2 of this Article, absent measures adopted or maintained by a Contracting Party pursuant to those obligations. Furthermore, the “treatment” referred to in paragraph 2 of this Article does not include procedures for the resolution of investment disputes between investors and States provided for in other international investment and trade agreements.

Article 9
Treatment of investors and of covered investments

1. Each Contracting Party shall ensure fair and equitable treatment of the investments of investors of the other Contracting Party. In addition, each Contracting Party shall accord to such investments full physical security and protection.

2. A Contracting Party breaches the aforementioned obligation of fair and equitable treatment where a measure or series of measures constitutes:
   a) Denial of justice in criminal, civil or administrative proceedings;
   b) Fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
   c) Manifest arbitrariness;
   d) Direct or targeted indirect discrimination on wrongful grounds, such as gender, race, nationality, sexual orientation or religious belief;
   e) Abusive treatment of investors such as harassment, coercion, abuse of power, corrupt practices or similar bad faith conduct; or
   f) A breach of any further elements of the fair and equitable treatment obligation adopted by the Contracting Parties in accordance with paragraph 3 of this Article.

3. The Contracting Parties shall, upon request of a Contracting Party, review the content of the obligation to provide fair and equitable treatment and may complement this list through a joint interpretative declaration within the meaning of Article 31, paragraph 3, sub a, of the Vienna Convention on the Law of Treaties.

4. When applying paragraph 2 of this Article, a Tribunal may take into account whether a Contracting Party made a specific representation to an investor to induce an investment that created a legitimate expectation, and upon which the investor relied in deciding to make or maintain that investment, but that the Contracting Party subsequently frustrated.

5. When a Contracting Party has entered into a written commitment with investors of the other Contracting Party regarding a specific investment, that Contracting Party shall not, either itself or through an entity exercising governmental authority, breach the said commitment through the exercise of governmental authority in a way that causes loss or damage to the investor or its investment.

6. For greater certainty, a breach of another provision of this Agreement or of any other international agreement does not constitute a breach of this Article. In addition, the fact that a measure breaches domestic law does not, in and of itself, establish a breach of this Article.

Article 10
Fiscal Treatment

With respect to taxes, fees, charges and to fiscal deductions and exemptions, each Contracting Party shall, regarding the operation, management, maintenance, use, enjoyment and disposal of the investment, accord to investors of the other Contracting Party who are engaged in any economic activity in its territory, treatment not less favorable than that accorded to its own investors or to those of any third State who are in like situations, whichever is more favorable to the investors concerned. For this purpose, however, any special fiscal advantages accorded by that Contracting Party, shall not be taken into account:

a) under an agreement for the avoidance of double taxation; or
b) by virtue of its participation in a customs union, economic union, monetary union or similar institution, such as the European Union, or on the basis of interim agreements leading to such unions or institutions; or
c) on the basis of reciprocity with a third State.

Article 11
Treatment related to free transfer

1. The Contracting Parties shall guarantee that payments relating to an investment may be transferred. The transfers shall be made in a freely convertible currency, without restriction or delay, and at the market rate of exchange applicable on the date of transfer. Such transfers include in particular though not exclusively:

a) profits, interests, dividends and other current income;
b) funds necessary;

i. for the acquisition of raw or auxiliary materials, semi-fabricated or finished products, or
ii. to replace capital assets in order to safeguard the continuity of an investment;

c) additional funds necessary for the development of an investment;
d) funds in repayment of loans;
e) royalties or fees;
f) earnings of natural persons;
g) the proceeds of sale or liquidation of the investment;
h) payments arising under Articles 12 and 13 of this Agreement.

2. This Agreement shall not be construed so as to prevent the Contracting Parties from fulfilling, in good faith, its international obligations for the purpose of maintaining international peace and security.

3. Notwithstanding paragraph 1, nothing in this Article shall be construed to prevent a Contracting Party from applying in an equitable and non-discriminatory manner and not in a way that would constitute a disguised restriction on transfers, its laws relating to:

a) bankruptcy, insolvency, bank recovery and resolution, or the protection of the rights of creditors, and the prudential supervision of financial institutions;
b) issuing, trading, or dealing in financial instruments;
c) financial reporting or record keeping of transfers where necessary to assist law enforcement or financial regulatory authorities;
d) criminal or penal offenses, deceptive or fraudulent practices;
e) the satisfaction of judgments in adjudicatory proceedings.
f) social security, public retirement or compulsory savings schemes.

Article 12
Expropriation

1. Neither Contracting Party shall nationalize or take any other measures depriving, directly or indirectly, the investors of the other Contracting Party of their investments, unless the following conditions are complied with:

a) the measure is taken in the public interest;
b) the measure is taken under due process of law;
c) the measure is taken in a non-discriminatory manner; and
d) the measure is taken against prompt, adequate and effective compensation.

2. Direct expropriation occurs when an investment is nationalised or otherwise directly taken through formal transfer of title or outright seizure.

3. Indirect expropriation occurs if a measure or a series of measures of a Contracting Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure.

4. The determination of whether a measure or a series of measures by a Contracting Party, in a specific factual situation, constitutes an indirect expropriation requires a case-by-case, fact-based inquiry that considers, amongst other factors:

a) the economic impact of the measure or series of measures, although the sole fact that a measure or a series of measures of a Contracting Party has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred;
b) the duration of the measure or series of measures by a Contracting Party; and
c) the character of the measure or series of measures, notably their object and context.

5. The compensation referred to in paragraph 1 of this Article shall amount to the fair market value of the investment at the time immediately before the expropriation or the impending expropriation became known, whichever is earlier. For greater certainty, this Agreement creates no other method for evaluation of the compensation. Valuation criteria shall include going concern value, asset value including the declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value.

6. In addition to paragraph 5 of this Article, the compensation shall include interest at a normal commercial rate from the date of expropriation until the date of payment and shall, in order to be effective for the investor, be paid and made transferable, without delay, to the State designated by the investor and in the currency of the State of which the investor is a national or in any freely convertible currency accepted by the investor.

7. The affected investor shall have the right, under the law of the expropriating Contracting Party, to a prompt review of its claim and of the valuation of its investment, by a judicial or other independent authority of that Contracting Party, in accordance with the principles set out in this Article.

8. Except in the rare circumstance when the impact of a measure or series of measures is so severe in light of its purpose that it appears manifestly excessive, non-

discriminatory measures of a Contracting Party that are designed and applied in good faith to protect legitimate public interests, such as the protection of public health, safety, environment or public morals, social or consumer protection or promotion and protection of cultural diversity, do not constitute indirect expropriations.

9. This Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights, to the extent that such issuance is consistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights in Annex 1C to the WTO Agreements.

Article 13
Compensation for losses

1. Investors of a Contracting Party who suffer losses in respect of their investments owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection or riot in the territory of the other Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favorable than that accorded by that Contracting Party to its own investors or to investors of any third State, whichever is more favorable to the investor concerned.

2. Without prejudice to paragraph 1 of this Article, investors of a Contracting Party who, in any of the situations referred to in that paragraph, suffer losses in the territory of the other Contracting Party resulting from:

   (a) requisitioning of their investment or a part thereof by the latter's armed forces or authorities; or
   (b) destruction of their investment or a part thereof by the latter's armed forces or authorities, which was not required by the necessity of the situation;

   shall be accorded prompt, adequate and effective restitution or compensation by the other Party. The amount of such compensation shall be determined in accordance with the provisions of Article 12.

Article 14
Subrogation

If the investment of an investor of a Contracting Party is insured against non-commercial risks or otherwise give rise to payment of indemnification in respect of such investment under a system established by law, regulation or government contract, any subrogation of the insurer or re-insurer or agency designated by that

Contracting Party to the rights of the said investor pursuant to the terms of such insurance or under any other indemnity given shall be recognized by the other Contracting Party.

Section 5: Settlement of Disputes between an investor of a Contracting Party and the other Contracting Party

Article 15
Multilateral investment court

1. Upon the entry into force between the Contracting Parties of an international agreement providing for a multilateral investment court applicable to disputes under this Agreement, the relevant provisions set out in this Section shall cease to apply.

2. The Contracting Parties shall, if necessary, adopt transitional arrangements taking into account the legitimate expectations of investors in ongoing disputes under the procedures set out under this Section.

Article 16
Scope of application

1. This Section shall apply to a dispute between, on the one hand, an investor of one Contracting Party and, on the other hand, the other Contracting Party concerning treatment alleged to be a breach of a provision in Section 4 of this Agreement, which breach allegedly causes loss or damage to the investor or its investment(s).

2. An investor may not submit a claim under this Section if the investment has been made through fraudulent misrepresentation, concealment, corruption, or similar bad faith conduct amounting to an abuse of process.

3. The responding Contracting Party may deny the benefits of this Section to an investor within the meaning of Article 1(b) of this Agreement, which has changed its corporate structure with a main purpose to gain the protection of this Agreement at a point in time where a dispute had arisen or was foreseeable. This particularly includes situations where an investor has changed its corporate structure with a main purpose to submit a claim to its original home state.

Article 17
Alternative dispute resolution

Any dispute should, as far as possible, be settled amicably through negotiations, conciliation or mediation. Such settlement may be agreed at any time, including after proceedings under this Section have been commenced. A disputing party shall give favorable consideration to a request for negotiations, conciliation or mediation by the other disputing party.

Article 18
Consultations

1. Where a dispute has not been resolved in a manner as provided for under Article 17, an investor of a Contracting Party alleging a breach of a provision in Section 4 of this Agreement, may submit a written request for consultations to the other Contracting Party. During these consultations, the disputing parties may use non-binding third party procedures, such as good offices, conciliation or mediation.

2. A request for consultations within the meaning of this Article shall contain the following information:

(a) the name and address of the investor and, where such request is submitted on behalf of a locally established company, the name, address and place of incorporation of the locally established company;
(b) the provision(s) in Section 4 of this Agreement, alleged to have been breached;
(c) the legal and factual basis for the claim, including the treatment alleged to be inconsistent with the provision(s) in Section 4 of this Agreement;
(d) the relief sought and the estimated amount of damages claimed; and
(e) evidence establishing that the claimant is an investor of the other Party and that it owns or controls the investment and, where it acts on behalf of a locally established company, that it owns or controls the locally established company.

Where a request for consultations is submitted by more than one investor or on behalf of more than one locally established company, the information in (a) and (e) shall be submitted for each investor or each locally established company, as the case may be.

3. Unless the disputing parties agree to a longer period, consultations shall be held within 60 days of the submission of the request for consultations under paragraph 2.

4. The request for consultations must be submitted within:

(a) five years of the date on which the investor first acquired, or should have first acquired, knowledge of the treatment alleged to be inconsistent with a provision in Section 4 of this Agreement, and of the loss or damage alleged to have been incurred thereby; or
(b) two years of the date on which the investor or, as applicable, the locally established company, exhausts or ceases to pursue claims or proceedings before a tribunal or court under the domestic law of a Contracting Party; and, in any event, no later than ten years after the date on which the investor first acquired, or should have first acquired knowledge, of the treatment alleged to be inconsistent with a provision in Section 4 of this Agreement, and of the loss or damage alleged to have been incurred thereby.

5. In the event that the claimant has not submitted a claim pursuant to Article 19 of this Agreement within eighteen months of submitting the request for consultations, the investor shall be deemed to have withdrawn its request for consultations. This period may be extended by agreement between the parties involved in the consultations.

6. The time periods in paragraphs 4 and 5 shall not render a claim inadmissible where the investor can demonstrate that the failure to request consultations or submit a claim is due to the investor's inability to act as a result of actions taken by the other disputing party, provided that the investor acts as soon as reasonably possible after it is able to act.

Article 19
Submission of a claim

1. If a request for consultations has been submitted according to the procedures laid down in Article 18 and where such consultations do not result in a resolution of the claim within six months from the date of the written request for consultations, the investor may submit a claim under one of the following sets of rules on dispute settlement:
   a. the Convention on the Settlement of Investment Disputes between States and Nationals of Other States of 18 March 1965 (ICSID Convention) or in accordance with the Rules on the Additional Facility for the Administration of Proceedings by the Secretariat of the Centre (ICSID Additional Facility), where the conditions for proceedings pursuant to the ICSID Convention do not apply;
   b. the arbitration rules of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules), with the understanding that the Permanent Court of Arbitration (PCA) shall administer the proceedings;

The rules on dispute settlement according to which a claim has been submitted, shall apply subject to the rules in this Section and the other relevant procedures laid down in this Agreement.

2. All the claims identified by the investor in the submission of its claim pursuant to this Article must be related to treatment identified in its request for consultations pursuant to Article 18, paragraph 2 of this Agreement, or to treatment that occurred after the request for consultations was submitted.

3. The responding Contracting Party hereby unconditionally consents to the submission of a claim as provided under this Section.

4. The consent under paragraph 3 of this Article and the submission of a claim under paragraph 1 of this Article shall be deemed to satisfy the requirements of:
   a) Article 25 of the ICSID Convention or the ICSID Additional Facility Rules for written consent of the parties to the dispute; and
   b) Article I of the New York Convention for “arising out of a commercial relationship”.
   c) Article II of the New York Convention for an “agreement in writing”.

5. A claim may only be referred to a Tribunal pursuant to paragraph 1 of this Article if the investor withdraws or discontinues any existing proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim and waives its right to initiate any claim or proceeding before a tribunal or court under domestic or international law with respect to a measure alleged to constitute a breach referred to in its claim.

6. A claim with respect to restructuring of debt issued by a Contracting Party may only be submitted under this Section in accordance with the Protocol on public debt.

7. If 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 events or circumstances, the claimants may seek a consolidation order at a Tribunal. After giving all disputing parties the opportunity to be heard, the Tribunal shall in principle accept such request for consolidation, especially where the claimants are small and medium sized enterprises.

8. The claimant shall disclose to the other disputing party and to the Tribunal the name and address of a third party funder. The disclosure shall be made at the time

of the submission of a claim, or as soon as possible if the funding has been granted after the submission of a claim.

Article 20
Constitution and functioning of the Tribunal

1. All Members of the Tribunal under this Agreement shall be appointed by an appointing authority. In the event that the claimant chooses arbitration pursuant to the ICSID Convention or the Additional Facility in accordance with Article 19, paragraph 1, subparagraph a, the Secretary-General of ICSID shall serve as appointing authority for arbitration under this Agreement. In the event that the claimant chooses arbitration pursuant to the UNCITRAL Arbitration Rules in accordance with Article 19, paragraph 1, subparagraph b, the Secretary-General of the Permanent Court of Arbitration shall serve as appointing authority for arbitration under this Agreement.

2. The appointing authority shall appoint Members of the Tribunal that fulfill the conditions set out in paragraphs 5 and 6 of this Article, after thoroughly consulting the disputing parties. For greater certainty, in making appointments the Secretary General of ICSID is not limited to the Panel of Arbitrators.

3. The Tribunal shall be composed of three Members. After consulting the disputing parties, the appointing authority may decide that the Tribunal consists of one Member taking into account the complexity of the case, the amount of damages claimed and the desirability of keeping the costs of the procedure as low as possible, especially for small and medium sized enterprises.

4. The appointing institution shall publish the composition of each Tribunal on its website together with the date of the constitution of the Tribunal, the name of the disputing parties, the legal basis for the claim, and the relief sought.

5. The Members of the Tribunal shall possess the qualifications required in their respective countries for appointment to judicial office, or be jurists of recognized competence. The appointing authority shall make every effort to ensure that the members of the Tribunal, either individually or together, possess the necessary expertise in public international law, international investment and international trade law as well as in the resolution of disputes arising under international agreements. In addition, Members of the Tribunal shall not act as legal counsel or shall not have acted as legal counsel for the last five years in investment disputes under this or any other international agreement.

6. Arbitrators and their staff shall be independent of, and not be affiliated with or take instructions from, either disputing party or Contracting Party with regard to matters related to the dispute. They shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest. Arbitrators shall comply with the International Bar Association Guidelines on Conflicts of Interest in International Arbitration and any supplemental rules agreed upon by the Contracting Parties.

7. The fees and expenses of Members of the Tribunal as well as of witnesses and experts involved in the procedure shall be governed by ICSID Administrative and Financial Regulation 14.

8. The Tribunal shall determine whether the treatment subject to the claim is inconsistent with the provisions in Section 4 of this Agreement. In making its determination, the Tribunal shall apply the provisions of this Agreement and other rules of international law applicable between the Contracting Parties. It shall interpret this Agreement in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties.

9. Without prejudice to preliminary objections raised in accordance with Article 21 of this Agreement and absent a different agreement between the disputing parties, the arbitral proceedings shall, in the interest of an expeditious resolution of the dispute and in order to prevent unnecessary bifurcation of the proceedings, in general consider issues of jurisdiction and merits together.

10. The Tribunal shall not have jurisdiction to determine the legality of a measure, alleged to constitute a breach of this Agreement, under the domestic law of the disputing Contracting Party. In determining the consistency of a measure with this Agreement, the Tribunal may consider, as appropriate, the domestic law of the disputing Party as a matter of fact. In doing so, the Tribunal shall follow the prevailing interpretation given to the domestic law by the court or authorities of that Contracting Party and any meaning given to domestic law by the Tribunal shall not be binding upon the courts or the authorities of that Contracting Party.

11. The “UNCITRAL Transparency Rules” shall apply to disputes under this Section. The Tribunal and the disputing parties shall give positive consideration to a request from a third party to submit as an amicus curiae oral or written submissions in accordance with Article 4 of these Rules.

Article 21
Preliminary objections

1. Any objection that the dispute or any ancillary claim is not within the jurisdiction of the Tribunal shall be made as early as possible. The respondent shall file the objection no later than the expiration of the time limit fixed for the filing of the counter-memorial, or, if the objection relates to an ancillary claim, for the filing of the rejoinder – unless the facts on which the objection is based are unknown to the respondent at that time.

2. The respondent may, no later than 30 days after the constitution of the division of the Tribunal, and in any event before its first session, file an objection that a claim is manifestly without legal merit. The respondent shall specify as precisely as possible the basis for the objection. On receipt of such an objection the Tribunal shall suspend the proceedings on the merits and establish a schedule for considering such an objection consistent with its schedule for considering any other preliminary question. The Tribunal, after giving the disputing parties an opportunity to present their observations, shall at its first session of promptly thereafter, issue a decision or award stating the grounds therefor. In doing so, the Tribunal shall assume the alleged facts to be true. This paragraph is without prejudice to the Tribunal's authority to address other objections as a preliminary question or to the right of the respondent to object, in the course of the proceeding, that a claim lacks legal merit.

Article 22
Final award

1. The Tribunal and the disputing parties shall make every effort to ensure that the dispute settlement process is carried out in a timely manner. The Tribunal shall endeavor to issue its final award within 24 months of the date the claim is submitted pursuant to Article 19 of this Agreement. If the Tribunal requires additional time to issue its final award, it shall provide the disputing parties the reasons for the delay.

2. An award issued by a Tribunal pursuant to this Agreement shall be final and binding between the disputing parties and in respect of that particular case. The respondent shall comply with the award with undue delay.

3. An award can only result in compensation, unless the disputing parties agree on restitution. Monetary compensation shall include the applicable interest, determined in a manner consistent with Article 12, paragraph 6, of this Agreement.

4. The Tribunal shall not award punitive damages. Monetary damages shall not be greater than the loss suffered by the investor, reduced by any prior damages or compensation already provided. For the calculation of monetary damages, the

Tribunal shall also reduce the damages to take into account any restitution of property or repeal or modification of the measure.

5. The Tribunal shall order that reasonable costs incurred by the successful disputing party shall be borne by the unsuccessful disputing party, unless the Tribunal determines that such allocation is unreasonable in the circumstances of the case. Such a determination may take into account whether the successful disputing party has acted improperly, for example by raising manifestly frivolous objections or improperly invoking preliminary objections, and whether the unsuccessful disputing party is a small or medium sized enterprise. If only some parts of the claims have been successful the costs shall be adjusted, proportionately, to the number or extent of the successful parts of the claims.

Article 23
Behavior of the investor

Without prejudice to national administrative or criminal law procedures, a Tribunal may, in deciding on the amount of compensation, take into account non-compliance by the investor with its commitments under the UN Guiding Principles on Businesses and Human Rights, and the OECD Guidelines for Multinational Enterprises.

Section 6: Consultations and Dispute Settlement between the Contracting Parties

Article 24
Consultations of Contracting Parties

1. Either Contracting Party may propose to the other Contracting Party that consultations be held on any matter concerning the interpretation or application of this Agreement. The other Contracting Party shall accord sympathetic consideration to the proposal and shall afford adequate opportunity for such consultations. Such consultations shall be held at a place and at a time agreed upon through diplomatic channels by the Contracting Parties.

2. A joint interpretative declaration adopted as result of consultations by the Contracting Parties shall be binding on a Tribunal established under Section 5 of this Agreement.

Such joint interpretative declaration is not applicable in cases where a Tribunal was already established.

Article 25
Settlement of Disputes between the Contracting Parties

1. Any dispute between the Contracting Parties concerning the interpretation or application of this Agreement, which cannot be settled within a reasonable amount of time by means of diplomatic negotiations, shall, unless the Contracting Parties have otherwise agreed, be submitted, at the request of either Contracting Party, to an arbitral tribunal, composed of three members. Each Contracting Party shall appoint one arbitrator and the two arbitrators thus appointed shall together appoint a third arbitrator as their chairman who is not a national of either Contracting Party and who is a national of a third State that has diplomatic relations with both Contracting Parties.

2. If one of the Contracting Parties fails to appoint an arbitrator and has not proceeded to do so within two months after an invitation from the other Contracting Party to make such appointment, the latter Contracting Party may invite the President of the International Court of Justice to make the necessary appointment. The President shall consult both Parties which consultations shall not take no longer than one month.

3. If the two core arbitrators are unable to agree on the chair person in the two months following their appointment, either Contracting Party may invite the President of the International Court of Justice to make the necessary appointment.

4. If, in the cases provided for in the paragraphs 2 and 3 of this Article, the President of the International Court of Justice is prevented from discharging the said function or is a national of either Contracting Party, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is prevented from discharging the said function or is a national of either Contracting Party, the most senior member of the Court available who is not a national of either Contracting Party shall be invited to make the necessary appointments.

5. In making its determination the Tribunal shall decide the dispute in accordance with customary rules of interpretation of public international law, as codified in the Vienna Convention on the Law of Treaties. Before the Tribunal decides, it may at any stage of the proceedings propose to the Contracting Parties to settle the dispute amicably. The foregoing provisions shall not prejudice settlement of the dispute ex aequo et bono if the Contracting Parties so agree.

6. Unless the Contracting Parties decide otherwise, the Tribunal shall determine its own procedure.

7. The Tribunal shall reach its decision by a majority of votes. Such decision shall be final and binding on the Contracting Parties.

8. Each Contracting Party shall bear the costs of its appointed member of the Tribunal and of its representation in the arbitration proceedings and half of the costs of the chairman and the remaining costs. The Tribunal may, however, in its decision direct that a higher proportion of the costs shall be borne by one of the two Contracting Parties. Such decision shall be binding on both Contracting Parties.

Section 7: Final provisions

Article 26
Entry into Force, Duration and Termination

1. The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that their constitutionally required procedures have been complied with, and shall remain in force for a period of fifteen years.

2. Unless notice of termination has been given by either Contracting Party at least six months before the date of its expiry, the present Agreement shall be extended tacitly for periods of five years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.

3. In respect of investments made before the date of the termination of the present Agreement, this Agreement shall continue to be in effect for a further period of fifteen years from that date.

4. Subject to the period mentioned in paragraph 2 of this Article, the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom of the Netherlands.

Article 27
Territorial Application

As regards the Kingdom of the Netherlands, the present Agreement shall apply to the European part of the Netherlands, to Aruba, Curaçao, Sint Maarten and the Caribbean part of

the Netherlands (the islands of Bonaire, Sint Eustatius and Saba), unless the notification provided for in Article 26, paragraph 1 provides otherwise.

IN WITNESS WHEREOF, the undersigned representatives, duly authorized thereto, have signed the present Agreement.

DONE in two originals at , on ,
in the …, Netherlands and English languages, the […] texts being authentic.

In case of difference of interpretation, the English text shall prevail.

For ….

For the Kingdom of the Netherlands:

Protocol on public debt

On the signing of the Agreement on reciprocal encouragement and protection of investments between […] and the Kingdom of the Netherlands, the undersigned representatives have agreed on the following provisions, which constitute an integral part of the Agreement:

1. No claim that a restructuring of public debt of a Contracting Party breaches an obligation of this Agreement may be submitted to, or if already submitted, be pursued under Article 19 of this Agreement if the restructuring is a negotiated restructuring at the time of submission, or becomes a negotiated restructuring after such submission.

2. Subject to paragraph 1 of this Protocol, an investor may not submit a claim under Article 19 of this Agreement that a restructuring of debt of a Contracting Party breaches the provisions of this Agreement, unless 270 days have elapsed from the date of submission by the claimant of the written request for consultations pursuant to Article 18 of this Agreement.

3. A breach of Article 8, paragraph 1, does not occur merely by virtue of a different treatment provided by a Contracting Party to certain categories of investors or investments on grounds of a different macroeconomic impact, for instance to avoid systemic risks or spillover effects, or on grounds of eligibility for debt restructuring.

For the purposes of this Protocol:

a) ‘negotiated restructuring’ means the restructuring or rescheduling of debt of a Contracting Party that has been effected through:
(i) a modification or amendment of debt instruments, as provided for under their terms, including their governing law, or
(ii) a debt exchange or other similar process in which the holders of no less than 66% of the aggregate principal amount of the outstanding debt subject to restructuring, excluding debt held by that Contracting Party or by entities owned or controlled by it, have consented to such debt exchange or other process.

b) "governing law" of a debt instrument means a Contracting Party’s legal and regulatory framework applicable to that debt instrument.

Model Text for the Indian Bilateral Investment Treaty

BILATERAL INVESTMENT TREATY

BETWEEN

THE GOVERNMENT OF THE REPUBLIC OF

INDIA

AND

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Preamble

TheGovernment of the Republic of India and the Government of the Republic of -------------------- (hereinafter referred to as "**theParty**" individually or "**theParties**" collectively);

Desiring to promote bilateral cooperation between the Parties with respect to foreign investments; and

Reaffirming the right of Parties to regulate Investments in their territory in accordance with their Law and policy objectives including the right to change the conditions applicable to such Investments; and

Seeking to align the objectives of Investment with sustainable development and inclusive growth of the Parties;

Have agreed as follows:

Chapter I – Preliminary
Article 1: Definitions

For the purposes of this Treaty:

1.1 "**Designated Representative**" means:
- (i) for India, Secretary, Department of Economic Affairs, Ministry of Finance, Government of India.
- (ii) for -------------

1.2 "**Enterprise**" means:
- (i) any legal entity constituted, organised and operated in compliance with the Law of the Host State, including any company, corporation, limited liability partnership or a joint venture; and
- (ii) having its management and real and substantial business operations in the territory of the Host State.

1.2.1 For greater certainty, "real and substantial business operations" for the purposes of this definition requires an Enterprise to have, without exception, all the following elements:
- (i) made a substantial and long term commitment of capital in the Host State;
- (ii) engaged a substantial number of employees in the territory of the Host State;
- (iii) assumed entrepreneurial risk;
- (iv) made a substantial contribution to the development of the Host State through its operations alongwith transfer of technological knowhow, where applicable; and
- (v) carried out all its operations in accordance with the Law of the Host State.

1.2.2 "**Real and substantial business operations**" do not include:
- (i) objectives/strategies/arrangements, the main purpose or one of the main purposes of which is to avoid tax liabilities;
- (ii) the passive holding of stock, securities, land, or other property; or
- (iii) the ownership or leasing of real or personal property used in a trade or business.

1.3 "**Government**" means:
- (i) only the Central Government and State Governments in the case of India.
- (ii) ---------- in case of -----------

1.4 "**Home State**" means the Party of which the Investor is a national or in which the Investor is organised, constituted or incorporated.

1.5 "**Host State**" means the Party where the Investment is located.

1.6 "**Investment**" means an Enterprise in the Host State, constituted, organised and operated in compliance with the Law of the Host State and owned or controlled in good faith by an Investor:

(i) in accordance with this Treaty; and

(ii) that is at all times in compliance with the obligations in Articles 9, 10, 11 and 12 of Chapter III of this Treaty.

1.6.1 For the purposes of this Treaty, an Enterprise will be considered as:

(i) "**Controlled**" by the Investor, if such Investor has the right to appoint a majority of the directors or senior management officials or to control the management or policy decisions of such Enterprise, including by virtue of their shareholding, management, partnership or other legal rights or by virtue of shareholders agreements or voting agreements or partnership agreements or any other agreements of similar nature.

(ii) "**Owned**", by the Investor, if more than 50% of the capital or funds or contribution in the Enterprise is directly or beneficially owned by such Investor, or by other companies or entities which are ultimately owned and controlled by the Investor.

1.7 For greater clarity, Investment does not include the following assets of an Enterprise:

(i) any interest in debt securities issued by a government or government- owned or controlled enterprise, or loans to a government or government owned or controlled enterprise;

(ii) any pre-operational expenditure relating to admission, establishment, acquisition or expansion of the Enterprise that is incurred before the commencement of substantial and real business operations of the Enterprise in the Host State;

(iii) portfolio investments;

(iv) claims to money that arise solely from commercial contracts for the sale of goods or services;

(v) Goodwill, brand value, market share or similar intangible rights;

(vi) claims to money that arise solely from the extension of credit in connection with any commercial transaction referred to in (v) above;

(vii) an order or judgment sought or entered in any judicial, regulatory, administrative, or arbitral proceeding;

(viii) any other claims to money that do not involve the kind of interests or operations set out in the definition of Investment in this Treaty.

1.8 For the purposes of this Treaty, a holding company or an investment company shall not be considered an Investment nor shall such companies be considered as protected assets of an Investment.

1.9 "**Investor**" means:

(i) A legal entity constituted, organized and operated in compliance with the Law of the Home State, owned or controlled by a Natural Person or a legal entity of the Home State and conducting real and substantial business operations in the Home State; or

(ii) A Natural Person in the Home State,

that/who has made and owns or controls an Investment in the Host State.

1.10 "**Law**"includes:

(i) the Constitution, legislation, subordinate/delegated legislation, laws & bylaws, rules & regulations, ordinance, notifications, policies, guidelines, procedures, administrative measures/executive actions at all levels of government, as amended, interpreted or modified from time to time;

(ii) decisions, judgments, orders and decrees by Courts, regulatory authorities, judicial and administrative institutions having the force of Law within the territory of a Party.

1.11 "**Measure**" means any form of legally binding action by the Government that is applied directly to an Investment.

1.12 "**Natural Person**" means a national of the Home State in accordance with its Law. A Natural Person who is a dual national shall be deemed to be exclusively a national of the State of her or his dominant and effective nationality,where she/he ordinarily resides.

1.13 "**Non-disputing Party**" means the Party to this Treaty which is not a party to an Investment Dispute under Article 14.

1.14 The term "**Pre-investment activity**" includes any activities undertaken by the Investor or its Investment prior to the establishment of the Investment in accordance with the Law of the Host State. Any activity undertaken by the Investor or its Investment pursuant to compliance with sectoral limitations on foreign equity, and other limits and conditions applicable under any Law relating to the admission of investments in the Host State in specific sectors falls within the meaning of "**Pre-investment activity**".

1.15 "**Regional Government**" means a State Government or a Union Territory in case of India; and ----- in case of ------

1.16 "**State Enterprises**" and "**Public Sector Undertakings**" means companies owned or controlled by the Government.

1.17 "**Territory**" means:

(i) In respect of India: the territory of the Republic of India in accordance with the Constitution of India, including its territorial waters and the airspace above it and other maritime zones including the Exclusive Economic Zone and continental shelf over which the Republic of India has sovereignty, sovereign rights, or exclusive jurisdiction in accordance with its Law and the 1982 United Nations Convention on the Law of the Sea and international law.

(ii) In respect of --------

1.18 The Annexures, Provisos and Footnotes in this Treaty constitute an integral part of this Treaty and are to be accorded the same effect as other provisions in this Treaty.

1.19 If a term is not defined in this Treaty, it shall have the meaning ascribed to it under the Law of the Host State.

Article 2: Scope and General Provisions

2.1 This Treaty applies to Investments in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter that have been admitted by a

Party in accordance with its Laws applicable from time to time. Nothing in this Treaty shall apply to either Party in relation to any act or Measure or Law that existed before the date of entry into force of this Treaty or any subsequent modifications thereof.

2.2 Subject to the provisions of Chapter III of this Treaty, nothing in this Treaty shall extend to any Pre-investment activity related to establishment, acquisition or expansion of any Enterprise or Investment, or to any Law or Measure related to such Pre-investment activities, including terms and conditions under such Law or Measure which continue to apply post-investment to the management, conduct, operation, sale or other disposition of such Investments.

2.3 This Treaty shall not impose any obligations on the Parties other than that which are explicitly set forth herein. For avoidance of doubt, the Parties retain their rights to supplement, modify or amend this Treaty and its operation at any time in accordance with Articles 14.9, 21 and 22.

2.4 Nothing in this Treaty shall be interpreted to restrict the rights of either Party to formulate, modify, amend, apply or revoke its Law in good faith. Each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, including discretion regarding allocation of resources and establishment of penalties.

2.5 This Treaty shall not apply to claims arising out of events which occurred, or claims which have been raised prior to the entry into force of this Treaty.

2.6 This Treaty shall not apply to:

(i) government procurement.

(ii) subsidies or grants provided by a Party.

(iii) services supplied in the exercise of governmental authority by the relevant body or authority of a Party. For the purposes of this Treaty, a service supplied in the exercise of governmental authority means any service which is supplied neither on a commercial basis nor in competition with one or more service suppliers.

(iv) any taxation Measure. Where a Host State asserts as a defence that conduct alleged to be a breach of its obligations under this Treaty is a subject matter of taxation which is excluded by this Article from the scope under this Treaty, any decision of the Host State, whether before or after the commencement of arbitral proceedings, shall be non-justiciable and it shall not be open to any arbitration tribunal to review any such decision.

(v) the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with the Law of the Host State.

(vi) any commercial contract or agreement between a Party and an Investment or an Investor with respect to its Investment. Any dispute arising under such contract or agreement shall only be resolved in accordance with the dispute settlement procedure specified in such contract or agreement and if no such procedure is specified, the

applicable Law of the Host State. Such disputes shall not be brought before a tribunal under Article 14 or Article 15 of this Treaty under any circumstance.

Chapter II: Obligations of Parties

Article 3: Standard of Treatment

3.1 Each Party shall not subject Investments of Investors of the other Party to Measures which constitute:

(i) Denial of justice under customary international law[1];

(ii) Un-remedied and egregious violations of due process; or

(iii)Manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment.

3.2 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.

Article 4: National Treatment

4.1 Each Party shall not apply to Investments, Measures that accord less favourable treatment than that it accords, in like circumstances,[2] to domestic investments with respect to the management, conduct, operation, sale or other disposition of Investments in its territory.

4.2 A breach of Article 4.1 will only occur if the challenged Measure constitutes intentional and unlawful discrimination against the Investment on the basis of nationality.

4.3 This Article shall not apply to any Law or Measure of a Regional or local Government.

4.4 Exercises of discretion, including decisions regarding whether, when and how to enforce or not enforce a Law shall not constitute a violation of this Article provided such decisions are taken in furtherance of the Law of the Host State.

4.5 Extension of financial assistance or Measures taken by a Party in favour of its investors and their investments in pursuit of legitimate public purpose including the protection of public health, safety and the environment shall not be considered as a violation of this Article.

Article 5: Expropriation

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[1] For greater certainty, it is clarified that "customary international law" only results from a general and consistent practice of States that they follow from a sense of legal obligation.

[2] The requirement of "like circumstances" recognizes that States may have various legitimate reasons for distinguishing between investments including, but not limited to, (a) the goods or services consumed or produced by the Investment; (b) the actual and potential impact of the Investment on third persons, the local community, or the environment, (c) whether the Investment is public, private, or state-owned or controlled, and (d) the practical challenges of regulating the Investment. The factors and determinations used by the Host State to distinguish between Investors and Investments are to be given substantial deference by any tribunal constituted under Article 14.5 or Article 15.2.

5.1 Neither Party may nationalize or expropriate an Investment (hereinafter "**expropriate**"), or take Measures having an effect equivalent to expropriation, except for reasons of public purpose[3], in accordance with the procedure established by Law, and on payment of adequate compensation.

5.2 The determination of whether a Measure or a series of Measures have an effect equivalent to expropriation requires a case-by-case, fact-based inquiry, and usually requires evidence that there has been:

(i) permanent and complete or near complete deprivation of the value of Investment; and

(ii) permanent and complete or near complete deprivation of the Investor's right of management and control over the Investment[4]; and

(iii) an appropriation of the Investment by the Host State which results in transfer of the complete or near complete value of the Investment to that Party or to an agency or instrumentality of the Party or a third party;

5.3 For the avoidance of doubt, the Parties agree that an action taken by a Party in its commercial capacity shall not constitute expropriation or any other measure having similar effect.

5.4 For the avoidance of doubt, the parties also agree that, 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 shall not constitute expropriation.

5.5 If an Investor alleges that its Investment:- (a) has been expropriated, (b) payment of compensation has not been awarded, or (c) payment of compensation awarded is not adequate in violation of Article 5.1, it may submit a claim for determination of those issues and an award of adequate compensation pursuant to and in accordance with the terms of Article 14. However, a tribunal constituted under Article 14 or 15 shall not have authority to review the Host State's determination of whether a Measure was taken for a public purpose or in compliance with its Law.

5.6 Compensation provided under this Article shall be adequate and reflect the fair market value of the expropriated Investment, as reduced after application of relevant Mitigating Factors. The amount of compensation shall not vary based on whether an expropriation has complied with the criteria of Article 5.1.

5.7 Mitigating Factors under Article 5.6 include:- (a) current and past use of the Investment, including the history of its acquisition and purpose; (b) the duration of the Investment and previous profits made by the Investment; (c) compensation or

[3] For the avoidance of doubt, where India is the expropriating Party, any Measure of expropriation relating to land shall be for the purposes as set out in its Law relating to land acquisition and any questions as to "public purpose" and compensation shall be determined in accordance with the procedure specified in such Law.

[4] This does not prohibit a Party from regulating the management or control of an Investmentwhen done in compliance with the Law of the Party where the Investment is made. This would cover, for example, requirements under the financial laws and regulations or insolvency laws of the Party in question or a law requiring that nationals of a Party hold certain senior management positions in sensitive industries that it considers necessary.

insurance payouts received by the Investor or Investment from other sources; (d) the value of property that remains subject to the Investor or Investment's disposition or control, (e) options available to the Investor or Investment to mitigate its losses, including reasonable efforts made by the Investor or Investor towards such mitigation, if any; (f) conduct of the Investor that contributed to its damage; (g) any obligation the Investor or its Investment is relieved of due to the expropriation, (h)liabilities owed in the Host State to the government as a result of the Investment's activities, (i) any harm or damage that the Investor or its Investment has caused to the environment or local community that have not been remedied by the Investor or the Investment, and (j) any other relevant considerations regarding the need to balance the public interest and the interests of the Investment.

Explanation I: The computation of the fair market value of the property shall exclude any consequential or exemplary losses or speculative or windfall profits claimed by the Investor, including those relating to moral damages or loss of goodwill.

Explanation II: The valuation date for computation of compensation shall be the day immediately before the expropriation takes place. In no event the valuation date shall be moved to any future date.

5.8 Any payment of compensation shall be made in a freely convertible currency. Interest on payment of compensation, if any, shall be paid in simple interest at the LIBOR rate from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable in accordance with Article 6.

Article 6: Transfers

6.1 Subject to the Law of the Host State, each Party shall permit all funds of an Investor of the other Party related to an Investment in its territory to be freely transferred and on a non-discriminatory basis. Such funds may include:

(i) contributions to capital;

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

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

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

(v) payments made pursuant to Article 3 [Standard of Treatment] and Article 5 [Expropriation]; and

(vi) payments arising out of a dispute.

6.2 Unless otherwise agreed to between the Parties, currency transfer under Article 6.1 shall be permitted in the currency of the original Investment or any other convertible currency. Such transfer shall be made at the prevailing market rate of exchange on the date of transfer.

6.3 Nothing in this Treaty shall prevent a Party from conditioning or preventing a transfer through a good faith application of its Law, including actions relating to:

i. bankruptcy, insolvency or the protection of the rights of the creditors;

ii. compliance with judicial, arbitral or administrative decisions and awards;
iii. compliance with labour obligations;
iv. financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities;
v. issuing, trading or dealing in securities, futures, options, or derivatives;
vi. compliance with Laws on taxation;
vii. criminal or penal offences and the recovery of the proceeds of crime;
viii. social security, public retirement, or compulsorysavings schemes, including provident funds, retirement gratuity programmes and employees insurance programmes;
ix. severance entitlements of employees;
x. requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Party; and
xi. in the case of India, requirements to lock-in initial capital investments, as provided in India's Foreign Direct Investment (FDI) Policy, where applicable, provided that, any new Measure which would require a lock-in period for Investments should not apply to existing Investments.

6.4 The Parties share the understanding that, notwithstanding anything in Article 6.1 and 6.2 to the contrary, the Parties may temporarily restrict transfers in the event of serious balance-of-payments difficulties or threat thereof, or in cases where, in exceptional circumstances, movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies.

Article 7: Entry and Sojourn of Personnel

7.1 Each Party shall, subject to its Law relating to the entry and sojourn of non-citizens and on the basis of reciprocity, permit natural persons of the other Party and personnel employed by the Investor or Investmentto enter and remain in its territory for the purpose of engaging in activities connected with Investments.

Chapter III – Investor, Investment and Home State Obligations

Article 8: Scope of this Chapter

8.1 The objective of this Chapter is to ensure that the conduct, management and operations of Investors and their Investments are consistent with the Law of the Host State, and enhance the contribution of Investments to inclusive growth and sustainable development of the Host State.

8.2 The Parties agree that this Chapter prescribes the minimum obligations for Investors and their Investments for responsible businessconduct.

8.3 The Parties further agree that compliance with Articles 9, 10, 11 and 12 of this Chapter is compulsory and is fundamental to the operation of this Treaty. Investors and their Investments must comply with the obligations in Articles 9, 10, 11, and 12 to benefit from the provisions of this Treaty.

8.4 A breach by Investors and their Investments of the obligations set forth in Articles 9, 10, 11 and 12 shall entitle the Party, at its sole discretion and in accordance with its Law and Article 14 to seek suitable enforcement, regulatory or other legal action in response to that breach.

Article 9: Obligation against Corruption

9.1 Investors and their Investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.

9.2 Except as otherwise allowed under the Law of the Host State, Investors and their Investments shall not engage any individual or firm to intercede, facilitate or in any way recommend to any public servant or official of the Host State, whether officially or unofficially, the award of a contract or a particular right under the Law of the Host State to such Investors and their Investments by mechanisms such as payment of any amount or promise of payment of any amount to any such individual or firm in respect of any such intercession, facilitation or recommendation.

9.3 Investors and their Investments shall not make illegal contributions to candidates for public office or to political parties or to other political organisations. Any political contributions and disclosures of those contributions must fully comply with the Host State's Law.

9.4 Investors and their Investments shall not be complicit in any actdescribed in this Article, including inciting, aiding, abetting, conspiring to commit, or authorizing such acts.

Article 10: Disclosures

10.1 Investors and Investments must timely comply with the requirements of the Law of the Host State to disclose true and complete information regarding their activities, structure, financial situation, performance, relationships with affiliates, ownership, governance, or other matters.

10.2 Where required, Investors must also disclose the source and channel of their funds in the Home State or Host State by submitting appropriate documentary evidence establishing the legitimacy of such funds. This disclosure, if requested, shall include any changes in the form or ownership of the enterprise or other entity located in the Home State and the Host State.

10.3 The Investment shall maintain true and complete copies of the records, books of account and current financial statements for the Investment that may be necessary to compute and substantiate compensation for any alleged breach of this Treaty or Host and Home State Laws, including:

(i) Governance structures;

(ii) records documenting the Investment, its shareholders, directors and employees;

(iii) remuneration of directors and key managerial personnel;
(iv) annual balance sheets;
(v) annual statements of income, retained earnings, cash flow, changes in financial position, and related footnotes; and
(vi) pro-forma financial statements.

10.4 Accounting records shall be maintained and financial statements prepared in currency of the Host State in accordance with principles of accounting generally accepted in the Host State.

10.5 The Investment shall retain accounting records for 10 years; provided that, if an Investment Dispute arises, it must retain those records for 3 years after the termination of any arbitration under Article 14.

10.6 Without prejudice to any other disclosures required by Law of the Host State, the disclosures required under this Article shall be made to the Designated Representative of each Party on demand until otherwise notified by a Party. Even where not required to do so by Law of the Host State, Investors and Investments should develop and comply with policies to ensure timely and accurate disclosure of material information relating, but not limited to, the following matters:

(i) the financial and operating results of the Investment;
(ii) objectives of the Investment;
(iii) major share ownership and voting rights, including the structure of a group of Enterprises and intra-group relations, as well as control enhancing mechanisms;
(iv) governance structures and policies, in particular, the content of any corporate governance code or policy and its implementation process;
(v) remuneration policy for members of the board and key executives, and information about board members, including qualifications, the selection process, other corporate directorships and whether each board member is regarded as independent by the board;
(vi) related party transactions;
(vii) foreseeable risk factors;
(viii) issues regarding employees and other stakeholders;
(ix) environmental impacts and management systems;
(x) policies and other codes of conduct to which the Investment subscribes, their date of adoption and the countries and entities to which such statements apply;
(xi) its performance in relation to these statements and codes; and
(xii) information on internal audit, risk management and legal compliance systems.

Article 11: Taxation

11.1 Investors and their Investments must comply with the provisions of Host State's Law on taxation including timely payment of their tax liabilities in accordance with the Law of the Host State.

Article 12: Compliance with Law of Host State

12.1 Investors and their Investments shall be subject to and comply with the Law of the Host State. This includes, but is not limited to, the following:

(i) Law concerning payment of wages and minimum wages, employment of contract labour, prohibition on child labour, special conditions of work, social security and benefit and insurance schemes applicable to employees;

(ii) information sharing requirements of the Host State concerning the Investment in question and the corporate history and practices of the Investment or Investor, for purposes of decision making in relation to that Investment or for other purposes;

(iii) environmental Law applicable to the Investment and its business operations;

(iv) Law relating to conservation of natural resources;

(v) Law relating to human rights;

(vi) Law of consumer protection and fair competition; and

(vii) relevant national and internationally accepted standards of corporate governance and accounting practices.

12.2 Investors and their Investments shall strive, through their management policies and practices, to contribute to the development objectives of the Host State. In particular, Investors and their Investments should recognise the rights, traditions and customs of local communities and indigenous peoples of the Host State and carry out their operations with respect and regard for such rights, traditions and customs.

Article 13: Home State Obligations

13.1 Without prejudice to the jurisdiction of the Courts located in the Host State, Investors and its 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.

13.2 The Home State 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 their domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investments or Investors in relation to their Investments in the territory of the Host State.

Chapter IV - Dispute Settlement
Article 14: Settlement of Disputes between an Investor and a Party

14.1 Purpose

Without prejudice to the rights and obligations of the Parties under Article 15, this Article establishes a mechanism for the settlement of Investment Disputes. An Investor shall not use or threaten to use this Article in order to obtain money, property, or any other thing of value from the Host State, or otherwise compel the Host State to act or refrain from acting.

14.2 Scope

(i) This Article shall only apply to:

a. a dispute arising between a Party and an Investor of the other Party arising out of an alleged breach of an obligation of a Party under Chapter II of this Treaty with respect to an Investment made by an Investor in the territory of the Host State (an "**InvestmentDispute**"); and

b. a counterclaim brought by a Party against an Investor or the Investment in an Investment Dispute pursuant to Article 14.11.

(ii) In addition to other limits on its jurisdiction, a tribunal constituted under this Article shall not have the jurisdiction to:

a. re-examine any legal issue which has been finally settled by any judicial authority of the Host State between the Investor party to the Investment Dispute (the "**Disputing Investor**") and the Party to the Investment Dispute ("**Respondent Party**"), or between the Disputing Investor, Investment or any other natural/legal person having a common right or interest in the Investment and a Respondent Party or a third party;

b. review the merits of a decision made by a judicial authority of the Host State;

c. accept jurisdiction over any claim that is or has been subject of an arbitration under Article 15; or

d. review the applicability of the exceptions under Article 16.1 (ii) and (iii) or Article 17 of this Treaty.

(iii) A dispute between an Investor and a Party shall proceed sequentially in accordance with this Article.

14.3 Exhaustion of Local Remedies, Notice and Consultation

(i) The Investor or Investment must first submit its claim before the relevant domestic courts or administrative bodies of the Host State for the purpose of pursuing domestic remedies. Such claim must be submitted within one (1) year from the date on which the Investor or Investment first acquired, or should have first acquired, knowledge of the Measure in question and knowledge that the Investment, or the Investor with respect to its Investment, had incurred loss or damage as a result.

(ii) If

a. after exhausting all judicial and administrative remedies relating to the Measure underlying the claim, no resolution has been reached satisfactory to the Investor or Investment; or

b. having diligently pursued domestic remedies, the Investor or Investment has determined and can establish that continued pursuit of domestic relief would be futile because (1) there are no reasonably available domestic legal remedies capable of providing any relief for the dispute concerning the underlying Measure, or (2) that the process for obtaining legal relief provides no reasonable possibility of such relief in a reasonable period of time,

the Investor may commence a proceeding under this Article by transmitting a Notice of Dispute ("**Notice of Dispute**") to the Respondent Party.

(iii) The Notice of Dispute shall:

a. contain a self-certified statement (1) providing the name and address of the Investor and the Investment; (2) setting forth the legal and factual bases of the claim and the provisions of the Treaty alleged to have been violated; (3) demonstrating compliance with Article 14.3(i) and (ii); (4) demonstrating compliance with Articles 9, 10, 11 and 12 of this Treaty; (5) stating the relief sought and amount of damages claimed; and (6) providing information in a self-certified form that is sufficient to establish that it is, and at all relevant times has been, an Investor with an Investment entitled to protection under the Treaty; and

b. be transmitted to the Designated Representative of the Respondent Party.

(iv) For no less than one year after receipt of the Notice of Dispute, the Disputing Investor and Respondent Party shall, consistent with the Law of the Host State, use their best efforts to try to resolve the dispute amicably through meaningful consultation, negotiation or continued pursuit of any available domestic remedies or solutions.

(v) The Parties agree that the requirements under this Article regarding exhaustion of domestic remedies, providing a proper Notice of Dispute, and the use of best efforts to resolve the dispute amicably are mandatory and conditions precedent to the submission of the dispute to arbitration. Non-compliance with any subparagraph of Article 14.3 bars the Disputing Investor from taking subsequent steps to pursue arbitration under Article 14.

14.4 Additional Conditions Precedent for Submission of Dispute to Arbitration

(i) In the event that the Investment Dispute cannot be settled amicably pursuant to Article 14.3 (iv), a Disputing Investor may submit a claim to arbitration pursuant to this Treaty, but only if the following conditions are satisfied:

A. No more than

a. three (3) years have elapsed from the date on which the Investor or Investment first acquired, or should have first acquired, knowledge of the Measure in question and knowledge that the Investment, or the Investor with respect to its Investment, had incurred loss or damage as a result; or

b. Eighteen (18) months have elapsed from the conclusion of domestic proceedings pursuant to Article 14.3(ii)(a); or abandonment of proceedings pursuant to Article 14.3(ii)(b),

whichever is later.

B. At least 90 days before submitting any claim to arbitration, the Disputing Investor has transmitted to the Designated Representative of the Respondent Party a written notice of its intention to submit the claim to arbitration ("**Notice of Arbitration**"). The Notice of Arbitration shall:

a. attach the Notice of Dispute and record of its transmission to the Disputing Party;
b. demonstrate compliance with Article 14.3(iv) and 14.4(i)(A);
c. identify, for each claim, the provision of the Treaty alleged to have been breached, the legal and factual basis of the claim, and the relief sought;
d. indicate the amount of damages claimed and the basis for calculation of such amount;
e. provide the Investor's and the Investment's consent to arbitration in accordance with this Treaty; and
f. include the Investor's and the Investment's written waivers of any right to initiate or continue before any administrative tribunal or court under the Law of the Host State, or other applicable dispute settlement procedures with respect to any Measure alleged to constitute a breach of the obligations under this Treaty. Provided, however, that the Investment's written waiver is not required if the Investor can establish that the Investment's failure or refusal to provide such waiver is due to the Host State's expropriation of or interference with the management or control of the Investment.

(ii) In the event the Investment Dispute cannot be settled amicably, and provided there has been full compliance with the conditions set forth in Article 14.3 and 14.4 (i), including written consent for the submission of the claim to arbitration by the Parties, the Investor, on behalf of an Investment that the Investor directly owns or controls, may submit to arbitration under this Article a claim ("**Claim**"):

a. that the Respondent Party has breached an obligation under Chapter II of this Treaty; and
b. that the Investment, or Investor, with respect to its Investment, has suffered actual and non-speculative damages as a direct and foreseeable result of such breach by the Respondent Party.

14.5 Appointment of Arbitrators

(i) The arbitral tribunal shall consist of three arbitrators with relevant expertise or experience in public international law, international trade and international investment law, or the resolution of disputes arising under international trade or international investment agreements. One arbitrator shall be appointed by each of the disputing parties and the third arbitrator ("**Presiding Arbitrator**") shall be appointed by agreement of the co-arbitrators and the Parties.

(ii) If a tribunal has not been constituted within one hundred twenty days (*120*)days from the date that a Claim is submitted to arbitration under this Article, the appointing authority under this Article shall be in the following order: the President, the Vice-President or the next most senior Judge of the International

Court of Justice, such that the appointing authority remains a non-national of either Party or is otherwise not prevented from making the appointments.

(iii) The appointing authority shall appoint in her/his discretion and after consultation with the parties to the Investment Dispute, the arbitrator or arbitrators not yet appointed.

14.6 Prevention of Conflict of Interest of Arbitrators and Challenges

(i) Every arbitrator appointed to resolve disputes under this Treaty shall during the entire arbitration proceedings be impartial, independent and free of any actual or potential conflict of interest.

(ii) Upon nomination and, if appointed, every arbitrator shall, on an ongoing basis, disclose in writing any circumstances that may, in the eyes of the Parties, give rise to doubts as to her/his independence, impartiality, or freedom from conflicts of interest. This includes any items listed in Article 14.6 (x) and any other relevant circumstances pertaining to the subject matter of the dispute, and to existing or past, direct or indirect, financial, personal, business, or professional relationships with any of the parties, legal counsel, representatives, witnesses, or co-arbitrators. Such disclosure shall be made immediately upon the arbitrator acquiring knowledge of such circumstances, and shall be made to the co-arbitrators, the parties to the arbitration and the appointing authority, if any, making an appointment. Neither the ability of those individuals or entities to access this information independently, nor the availability of that information in the public domain, will relieve any arbitrator of his or her affirmative duty to make these disclosures. Doubts regarding whether disclosure is required shall be resolved in favor of such disclosure.

(iii) A party to the Investment Dispute may challenge an arbitrator appointed under this Treaty:

a. if facts or circumstances exist that may, in the eyes of the parties, give rise to justifiable doubts as to the arbitrator's independence, impartiality or freedom from conflicts of interest; or

b. in the event that an arbitrator fails to act or in the event of the de jure or de facto impossibility of the arbitrator performing his or her functions,

provided that no such challenge may be initiated after fifteen days of that party: (i) becoming aware of the constitution of the arbitral tribunal, (ii) learning of the relevant facts or circumstances through a disclosure made under Article 14.6 (ii) by the arbitrator, or (iii) otherwise becoming aware of the relevant facts or circumstances relevant to a challenge under Article 14.6 (iii) (a) or (b), whichever is later.

(iv) The notice of challenge shall be communicated to the other party to the Investment Dispute, to the arbitrator who is challenged, to the other arbitrators and to the

appointing authority under Article 14.5 (ii), if any. The notice of challenge shall state the reasons for the challenge.

(v) When an arbitrator has been challenged by a party, all parties may agree to the challenge. The arbitrator may also, after the challenge, withdraw from his or her office. In neither case does this imply acceptance of the validity of the grounds for the challenge.

(vi) If, within 15 days from the date of the notice of challenge, all parties do not agree to the challenge or the challenged arbitrator does not withdraw, the party making the challenge may elect to pursue it. In that case, within 30 days from the date of the notice of challenge, it shall seek a decision on the challenge by the appointing authority.

(vii) The appointing authority shall accept the challenge made under Article 14.6 (iii) if, even in the absence of actual bias, there are circumstances that would give rise to justifiable doubts as to the arbitrator's lack of independence, impartiality, freedom from conflicts of interest, or ability to perform his or her role, in the eyes of an objective third party.

(viii) In any event where an arbitrator has to be replaced during the course of the arbitral proceedings, a substitute arbitrator shall be appointed or chosen pursuant to the procedure provided for in the Treaty and the arbitration rules that were applicable to the appointment or choice of the arbitrator being replaced. This procedure shall apply even if during the process of appointing the arbitrator to be replaced, a party to the arbitration had failed to exercise its right to appoint or to participate in the appointment.

(ix) If an arbitrator is replaced, the proceedings may resume at the stage where the arbitrator who was replaced ceased to perform his or her functions unless otherwise agreed by the disputing parties.

(x) A justifiable doubt as to an arbitrator's independence or impartiality or freedom from conflicts of interest shall be deemed to exist if:

a. The arbitrator or her/his associates or relatives have an interest in the outcome of the particular arbitration;
b. The arbitrator is or has been a legal representative/advisor of the appointing party or an affiliate of the appointing party in the preceding three (*3*) years prior to the commencement of arbitration;
c. The arbitrator is a lawyer in the same law firm as the counsel to one of the parties;
d. The arbitrator is acting concurrently with the lawyer or law firm of one of the parties in another dispute;
e. The arbitrator's law firm is currently rendering or has rendered services to one of the parties or to an affiliate of one of the parties out of which such law firm derives significant financial interest;

f. The arbitrator has received a full briefing of the merits or procedural aspects of the dispute from the appointing party or her/his counsel prior to her/his appointment;

g. The arbitrator is a manager, director or member of the governing body, or has a similar controlling influence by virtue of shareholding or otherwise in one of the parties;

h. The arbitrator has publicly advocated a fixed position regarding an issue on the case that is being arbitrated.

14.7 Conduct of Arbitral Proceedings

Applicable rules

(i) The arbitration shall be conducted under the Arbitration Rules of the United Nations Commission on International Trade Law in force at the time of the commencement of the dispute or any other rules agreed to between the parties in writing prior to the commencement of arbitration, and as modified by this Treaty.

Seat and Location

(ii) The parties to the arbitration may agree on the seat and location of arbitration under the arbitral rules applicable, provided that if the parties do not agree on the seat and location of arbitration, the tribunal must give special consideration to a seat and location within the Host State including, in particular, the capital city of the Host State.

Preliminary Objections

(iii) Without prejudice to a tribunal's authority to address other objections, a tribunal shall address and decide as a preliminary question any objection by the Respondent Party that a Claim submitted by the Investor is (a) not within the scope of the tribunal's jurisdiction, or (b) without any basis in law.

(iv) 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 Party to submit its counter-memorial. 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 decide on an expedited basis an objection under Article 14.7 that the dispute is not within the tribunal's competence under the Treaty or is without any basis in law.

(v) The Respondent Party does not waive any objection as to competence or any argument on the merits merely because the Respondent Party did or did not raise an objection or make use of the expedited procedure set out Article 14.7 (iii).

(vi) When it decides on a Respondent Party's preliminary objection under Article 14.7 (iii) and (iv), the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorneys' fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the Disputing Investor's Claim or the Respondent Party's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

Production of documents and evidence

(vii) When considering matters of evidence or production of documents, the tribunal shall not have any powers to compel production of documents which the Respondent Party claims are protected from disclosure under the rules on confidentiality or privilege under the Law of the Host State.

14.8 Transparency in arbitral proceedings

(i) Subject to applicable Law regarding protection of confidential information, the Respondent Party shall make available to the public the following documents relating to Investment Disputes:

a. The Notice of Arbitration;

b. Pleadings and other written submissions on jurisdiction and the merits submitted to the tribunal, including submissions by a Non-disputing Party to the dispute under Article 14.8 (iv);

c. Transcripts of hearings, if available; and

d. Decisions, orders and awards issued by the tribunal;

(ii) Hearings for the presentation of evidence or for oral argument ("**hearings**") shall be made public in accordance with the following provisions:

a. Where there is a need to protect confidential information or protect the safety of participants in the proceedings, the arbitral tribunal shall make arrangements to hold in private that part of the hearing requiring such protection.

b. The arbitral tribunal shall make logistical arrangements to facilitate public access to hearings, including by organizing attendance through video links or such other means as it deems appropriate. However, the arbitral tribunal may, after consultation with the disputing parties, decide to hold all or part of the hearings in private where this becomes necessary for logistical reasons, such as when the circumstances render any original arrangement for public access to a hearing infeasible.

(iii) An award of a Tribunal rendered under this Article shall be publicly available, subject to the redaction of confidential information. Where a disputing Contracting Party determines that it is in the public interest to do so and notifies the Tribunal of that determination, all other documents submitted to, or issued by, the Tribunal shall also be publicly available, subject to the redaction of confidential information.

(iv) The Non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.

14.9 Burden of Proof and Governing Law

(i) This Treaty shall be interpreted in the context of the high level of deference that international law accords to States with regard to their development and implementation of domestic policies.

(ii) The Investor at all times bears the burden of establishing: (a) jurisdiction, (b) the existence of an obligation under Chapter II of this Treaty, (c) a breach of that obligation, (d) that the Investment, or the Investor with respect to the Investment, has suffered actual and non-speculative losses as a result of the breach, and (e) that those losses were foreseeable and directly caused by the breach.

(iii) The governing law for interpretation of this Treaty by a tribunal constituted under this Article shall be: (a) this Treaty, (b) the general principles of public international law relating to the interpretation of treaties, including the presumption of consistency between international treaties to which the Parties are party, and (c) for matters relating to domestic law, the Law of the Host State.

(iv) Interpretations of specific provisions and decisions on application of this Treaty issued subsequently by the Parties in accordance with this Treaty shall be binding on tribunals established under this Article upon issuance of such interpretations or decisions.

(v) In accordance with the Vienna Convention of the Law of Treaties, 1969 and customary international law, other evidence of the Parties subsequent agreement and practice regarding interpretation or application of this Treaty shall constitute authoritative interpretations of this Treaty and must be taken into account by tribunals under Article 14.

14.10 Award

(i) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both parties to the arbitration. Any award shall state the legal basis and the reasons for its decisions.

(ii) Subject to Article 14.11, a tribunal can only award monetary compensation for a breach of the obligations under Chapter II of the Treaty. In awarding any compensation under this Treaty, a tribunal constituted under this Article shall take into account any breach of the obligations contained in Articles 9, 10, 11 and 12 of Chapter III of this Treaty by the Investor and its Investment.

(iii) A tribunal may not award punitive or moral damages or any injunctive relief against either of the Parties under any circumstance.

(iv) An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case and the tribunal must clearly state those limitations in the text of the award.

(v) The enforcement of an award shall be in accordance with the Law of the Party where the award is sought to be enforced.

14.11 Counterclaims by Parties

(i) A Party may initiate a counterclaim against the Investor or Investment for a breach of the obligations set out under Articles 9, 10, 11 and 12 of Chapter III of this Treaty before a tribunal established under this Article and seek as a remedy suitable declaratory relief, enforcement action or monetary compensation.

(ii) In assessing the monetary compensation to be paid to a Party under this Article, the tribunal can take into consideration the following:

a. whether the breach justifies an award of damages; and

b. whether that Party has taken steps to mitigate its losses.

(iii) The Parties agree that a counterclaim made in accordance with this Article 14.11 shall not preclude or operate as a *res judicata* against applicable legal, enforcement or regulatory action in accordance with the Law of the Host State or in any other proceedings before judicial bodies or institutions of the Host State.

(iv) An initiation of a counterclaim by a Party shall not be deemed to be a waiver of that Respondent Party's objection to the tribunal's jurisdiction over an Investment Dispute.

14.12 Costs

(i) Subject to Article 14.12 (ii), the parties to the arbitration shall share the costs of the arbitration, with arbitrator fees, expenses, allowances and other administrative costs. Each party shall bear the cost of its representation in the arbitral proceedings. The tribunal may, however, in its discretion direct that the entire costs or a higher proportion of costs shall be borne by one of the two disputing parties and this determination shall be binding on both disputing parties.

(ii) Notwithstanding Article 14.12 (i), the tribunal shall award all costs and may award damages in favour of the Respondent Party if it finds that the Investor brought the action in violation of Article 14.1.

14.13 Diplomatic Exchange between Parties

(i) If a Disputing Investor has commenced an Investment Dispute against a Respondent Host State under this Article, the non-disputing Party shall not give diplomatic protection, or bring an international claim, in respect of that Investment Dispute between one of its Investors and the Respondent Host State, unless the Respondent Party has failed to abide by and comply with an award or the decisions of its courts, as the case may be, in accordance with Article 14 and other applicable law regarding recognition and enforcement of foreign judgments and arbitral awards.

(ii) Nothing in Article 14 precludes a Respondent Party from requesting consultations or seeking agreement with the other Party on issues of interpretation or application of the Treaty. In response to such a request, the other Party shall engage in good faith consultations on the matters requested.

Article 15: Disputes between Parties

15.1 Disputes between the Parties concerning:

(i) the interpretation or application of this Treaty, or

(ii) whether there has been compliance with obligations to consult in good faith under Articles 14.13 or 21,

should, as far as possible, be settled through consultation or negotiation, which may include the use of non binding third-party mediation or other mechanisms.

If a dispute between the Parties cannot be settled within six months from the time the dispute arose, it shall upon the request of either Party be submitted to an arbitral tribunal.

15.2 Such an arbitral tribunal shall be constituted for each individual case in the following way: Within two months of the receipt of the request for arbitration, each 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 Parties, shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

15.3 If within the periods specified in Article 15.2 the necessary appointment(s) have not been made, either Party may, in the absence of any other agreement, invite the

President of the International Court of Justice to make any necessary appointment(s). If the President is a national of either Party or if he or she is otherwise prevented from discharging the said function, the Vice President shall be invited to make the necessary appointment(s). If the Vice President is a national of either 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 Party shall be invited to make the necessary appointment(s).

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

15.5 The Parties to the arbitration shall share the costs of the arbitration, including the arbitrator fees, expenses, allowances and other administrative costs. Each Party shall bear the cost of its representation in the arbitral proceedings. The tribunal may, however, in its discretion direct that the entire costs or a higher proportion of costs shall be borne by one of the two disputing Parties and this determination shall be binding on both disputing Parties.

15.6 A tribunal constituted under this Article shall have the power to determine its own procedures.

Chapter V – Exceptions

Article 16: General Exceptions

16.1 Nothing in this Treaty precludes the Host State from taking actions or measures of general applicability which it considers necessary with respect to the following, including:

- (i) protecting public morals or maintaining public order;
- (ii) ensuring the integrity and stability of its financial system, banks and financial institutions;
- (iii) remedying serious balance-of-payments problems, exchange rate difficulties and external financial difficulties or threat thereof;
- (iv) ensuring public health and safety;
- (v) protecting and conserving the environment including all living and non-living natural resources;
- (vi) improving working conditions;
- (vii) securing compliance with the Law for the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract;
- (viii) protecting privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or
- (ix) protecting national treasures or monuments of artistic, cultural, historic or archaeological value.

16.2 Nothing in this Treaty shall bind either Party to protect Investments made with capital or assets derived from illegal activities.

16.3 Nothing in this Treaty shall apply to any Measure taken by a local body or authority at the district, block or village level in the case of India.For avoidance of doubt, a local body or authority shall include the Municipal Corporation, district level officers, *gram panchayats* and *GramSabha*.

Article 17: Security Exceptions

17.1 Nothing in this Treaty shall be construed:

(i) to require a Party to furnish any information, the disclosure of which it considers contrary to its essential security interests;

(ii) to prevent a Party from taking any action which it considers necessary for the protection of its essential security interests including but not limited to:

(a) action relating to fissionable and fusionable materials or the materials from which they are derived;

(b) action taken in time of war or other emergency in domestic or international relations;

(c) action relating to the traffic in arms, ammunition and implements of war and to such traffic in other goods and materials as is carried on directly or indirectly for the purpose of supplying a military establishment;

(d) action taken so as to protect critical public infrastructureincluding communication, power and water infrastructures from deliberate attempts intended to disable or degrade such infrastructure; or

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

17.2 Each Party shall inform the other Party to the fullest extent possible of Measures taken under Article 17.1 (i) and (iii) and of their termination.

17.3 Nothing in this Chapter shall be construed to require a Party to accord the benefits of this Treaty to an Investor that is a legal entity of the Home State where a Party adopts or maintains Measures in any legislation or regulations which it considers necessary for the protection of its essential security interests with respect to a non-Party or an investor of a non-Party that would be violated or circumvented if the benefits of this Chapter were accorded to such legal entities or to its Investments.

17.4 This Article shall be interpreted in accordance with the understanding of the Parties on security exceptions as set out in Annex 1, which shall form an integral part of this Treaty.

Article 18

Preliminary Determinations on General Exceptions

18.1 Subject to Article 14.2 (ii) (d), where an Investor submits a Claim to arbitration under Article 14, and the Respondent Party invokes any of the sub-paragraphs of Article 16 as a defense, the following provisions shall apply:

(i) The Respondent Party shall, within 120 days of the receipt of Notice of Arbitration under Article 14 this Treaty, submit in writing to the Designated

Representative of the other Party, a request for a joint determination of whether and to what extent Article 16 is a valid defense to the Claim because a Treaty exception applies. The Respondent Party shall also 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 (iv) of this Article.

(ii) The Designated Representative of each Party or competent authorities appointed by them shall make themselves available for consultations with each other and shall attempt in good faith to make a determination as described in subparagraph (i) of this Article. 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 and any award of the tribunal must be consistent with the Parties' joint determination.

(iii) If the representatives of both Parties, within 120 days of the date by which they have both received the Respondent Party's written request for a joint determination under subparagraph (i) of this Article, have not made a determination as described in that subparagraph, the tribunal shall decide the issue or issues left unresolved. The provisions of Article 14 shall apply, except as modified by Article 18 (iii):

(a) The tribunal shall draw no inference regarding the application of Articles 16 from the fact that no determination as described in subparagraph (i) of this Article has been made.

(b) The non-disputing Party may make oral and written submissions to the tribunal regarding whether and to what extent Article 16 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 Article 16 not inconsistent with that of the Respondent Party.

(iv) The arbitration referred to in subparagraph (i) of this Article may proceed with respect to the Claim:

(a) 10 days after the date any joint determination has been received by both the disputing parties and, if constituted, the tribunal; or

(b) 10 days after the expiration of the 120-day period provided to the competent authorities in subparagraph (iii) of this Article.

(v) On the request of the Respondent Party made within 30 days after the expiration of the 120-day period for a joint determination referred to in subparagraph (iii) of this Article, 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 as referred to in subparagraph (iii) of this Article prior to deciding the merits of the claim for which Article 16 has been invoked by the Respondent Party as a defense. Failure of the Respondent Party to make such a request is without prejudice to its right to invoke Article 16 as a defense at any appropriate phase of the arbitration.

Chapter V - Final Provisions

Article 19: Relationship with other Treaties

19.1 This Treaty or any action taken hereunder shall not affect the rights and obligations of the Parties under existing Agreements to which they are parties.

19.2 Nothing in this Treaty shall affect the rights of the Parties to enter into other treaties or international agreements not contrary to the principles, objectives and terms of this Treaty.

19.3 Any inconsistency, or question regarding the relationship between this Treaty and another bilateral agreement between the Parties, or a multilateral agreement to which both Parties are a Party, shall be resolved in accordance with the Vienna Convention on the Law of Treaties.

Article 20: Denial of Benefits

20.1 For greater certainty, the Host State may at any time, including after the institution of arbitration proceedings in accordance with Chapter IV of this Treaty, deny the benefits of this Treaty to:-

(i) an Investment or Investor owned or controlled, directly or indirectly, by persons of a non-Party or of the Host State; or

(ii) an Investment or Investor that has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanisms provided in this Treaty.

Article 21: Consultations and Periodic Review

21.1 Either Party may request, and the other Party shall promptly agree to, consultations in good faith on any issue regarding the interpretation, application, implementation, execution or any other matter including, but not limited to:

(i) reviewing the implementation of this Treaty ;

(ii) reviewing the interpretation or application of this Treaty ;

(iii) exchanging legal information; and

(iv) subject to Article 14.13, addressing Investment Disputes or other disputes arising out of investment.

21.2 Further to consultations under this Article, the Parties may take any action as they may jointly decide, including making and adopting rules supplementing the applicable arbitral rules under Articles 14 or 15 of this Treaty, issuing binding interpretations of this Treaty, and adopting joint measures in order to improve the effectiveness of this Treaty .

21.3 The Parties shall meet every five years after the entry into force of this Treaty to consult and review the operation and effectiveness of this Treaty.

Article 22: Amendments

22.1 This Treaty may be amended at any time at the request of either Party. The requesting Party must submit its request in written form explaining the grounds on which the amendment shall be made. The other Party shall consult with the requesting Party regarding the proposed amendment and must also respond to the request in writing. This Treaty will stand automatically amended at all times to the extent that the Parties agree. Any agreement to amend the treaty pursuant to this Article must be expressed in writing, whether in a single written instrument or through an exchange of diplomatic notes. These amendments shall be binding on the tribunals constituted under Articles 14 and 15 of this Treaty and a tribunal award must be consistent with all amendments to this Treaty.

Article 23: Entry into Force

23.1 This Treaty shall be subject to ratification and shall enter into force on the date of exchange of Instruments of ratification.

Article 24: Duration and Termination

24.1 This Treaty shall remain in force for a period of ten years and shall lapse thereafter unless the Parties expressly agree in writing that it shall be renewed. This Treaty may be terminated anytime after its entry into force if either Party gives to the other Party a prior notice in writing six (*6*) months in advance stating its intention to terminate the Treaty. The Treaty shall stand terminated after sixty (*60*) days from the date of receipt of such written notice.

24.2 In respect of investments made prior to the date when the termination of this Treaty becomes effective, the provisions of this Treaty shall remain in force for a period of five years.

In witness whereof the undersigned, duly authorised thereto by their respective Governments, have signed this Treaty.

Done at ____________on this ________ day of _________ in two originals each in the Hindi, English and (languages), all texts being equally authoritative.

In case of any divergence in interpretation, the English text shall prevail.

For the Government of the Republic of India

For the Government of the

Annex 1: Security Exceptions

The Parties confirm the following understanding with respect to interpretation and/or implementation of Article 17 of this Treaty:

(i) the measures referred to in Article 17.3 are measures where the intention and objective of the Host State imposing the measures is for the protection of its essential security interests. These measures shall be imposed on a non-discriminatory basis and may be found in any of its legislation or regulations:

   a. In the case of India, the applicable measures referred to in Article 17.3 are currently set out in the regulations framed under the Foreign Exchange Management Act, 1999 and the rules and regulations made thereunder. India shall, upon request by the other Party, provide information on the measures concerned;

   b. In the case of other Party ------

(ii) Where the Party asserts as a defence that conduct alleged to be a breach of its obligations under this Treaty is for the protection of its essential security interests protected by Article 17, any decision of such Party taken on such security considerations and its decision to invoke Article 17 at any time, whether before or after the commencement of arbitral proceedings shall be non-justiciable. It shall not be open to any arbitral tribunal constituted under Article 14 of 15 of this Treaty to review any such decision, even where the arbitral proceedings concern an assessment of any claim for damages and/or compensation, or an adjudication of any other issues referred to the tribunal.

COOPERATION AND FACILITATION INVESTMENT AGREEMENT BETWEEN THE FEDERATIVE REPUBLIC OF BRAZIL AND

The Federative Republic of Brazil

and

(hereinafter designated as the "Parties" or individually as "Party"),

PREAMBLE

Wishing to strengthen and to enhance the bonds of friendship and the spirit of continuous cooperation between the Parties;

Seeking to create and maintain favourable conditions for the investments of investors of a Party in the territory of the other Party;

Seeking to stimulate, streamline and support bilateral investments, thus opening new integration opportunities between the Parties;

Recognizing the essential role of investment in promoting sustainable development**;**

Considering that the establishment of a strategic partnership between the Parties in the area of investment will bring wide-ranging and mutual benefits;

Recognizing the importance of fostering a transparent and friendly environment for investments by investors of the Parties;

Reassuring their regulatory autonomy and policy space;

Wishing to encourage and strengthen contacts between the private sectors and the Governments of the two countries; and

Seeking to create a mechanism for technical dialogue and foster government initiatives that may contribute to a significant increase in mutual investment;

Agree, in good faith, to the following **Cooperation and Facilitation Investment Agreement,** hereinafter referred to as "Agreement", as follows:

PART I – Scope of the Agreement and Definitions

Article 1
Objective

1. The objective of this Agreement is to promote cooperation between the Parties in order to facilitate and encourage mutual investment, through the establishment of a an institutional framework for the management of an agenda for further investment cooperation and facilitation, as well as through mechanisms for risk mitigation and prevention of disputes, among other instruments mutually agreed on by the Parties.

Article 2
Scope and Coverage

1. This Agreement shall apply to all investments made before or after its entry into force.

2. This Agreement shall not limit the rights and benefits which an investor of a Party enjoys under national or international law in the territory of the other Party.

3. For greater certainty, the Parties reaffirm that this Agreement shall apply without prejudice to the rights and obligations derived from the Agreements of the World Trade Organization.

4. This agreement shall not prevent the adoption and implementation of new legal requirements or restrictions to investors and their investments, as long as they are consistent with this Agreement.

Article 3
Definitions

1. For the purpose of this Agreement:

1.1 Enterprise means: any entity constituted or organized under applicable law, whether or not for profit, whether privately owned or State--owned, including any corporation, trust, partnership, sole proprietorship, joint venture and entities without legal personality;

1.2 Host State means the Party where the investment is made.

1.3 Investment means a direct investment of an investor of one Party, established or acquired in accordance with the laws and regulations of the other Party, that s, directly or indirectly, allows the investor to exert control or significant degree of influence over the management of the production of goods or provision of services in the territory of the other Party, including but not limited to:

a) an enterprise;

b) shares, stocks, participations and other equity types in an enterprise;

c) movable or immovable property and other property rights such as mortgages, liens, pledges, encumbrances or similar rights and obligations;

d) concession, license or authorization granted by the Host State to the investor of the other Party;

e) loans and debt instruments to a company:

f) intellectual property rights as defined or referenced to in the Trade-Related Aspects of Intellectual Property Rights of the World Trade Organization (TRIPS)

For the purposes of this Agreement and for greater certainty, "Investment" does not include:

i) an order or judgment issued as a result of a lawsuit or an administrative process;

ii) debt securities issued by a Party or loans granted from a Party to the other Party, bonds, debentures, loans or other debt instruments of a State-owned enterprise of a Party that is considered to be public debt under the legislation of that Party;

ii) portfolio investments, i.e., those that do not allow the investor to exert a significant degree of influence in the management of the company; and

iii) claims to money that arise solely from commercial contracts for the sale of goods or services by an investor in the territory of a Party to a national or 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 sub-paragraphs (a)-(e) above.

1.4 Investor means a national, permanent resident or enterprise of a Party that has made an investment in the territory of the other Party;

1.5 Income means the values obtained by an investment, including profits, interests, capital gains, dividends or "royalties".

1.6 Measure means any measure adopted by a Party, whether in the form of law, regulation, rule, procedure, decision, administrative ruling, or any other form.

1.7 National means a natural person that has the nationality of a Party, according to its laws and regulations.

1.8 Territory means the territory, including its land and aerial spaces, the exclusive economic zone, territorial sea, seabed and subsoil within which the Party exercises its sovereign rights or jurisdiction, in accordance with international law and its internal legislation.

PART II – Regulatory Measures and Risk Mitigation

Article 4
Admission and treatment

1. Each Party shall admit and encourage investments of investors of the other Party, according to their respective laws and regulations.

2. Each Party shall grant to investments and investors of the other Party treatment according to the due process of law.

3. In line with the principles of this Agreement, each Party shall ensure that all measures that affect investment are administered in a reasonable, objective and impartial manner, in accordance with their respective laws and regulations.

Article 5
National Treatment

1. Without prejudice to the exceptions in force under its legislation on the date of entry into force of this Agreement, each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to its own investors with respect to the expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Without prejudice to the exceptions in force under its legislation on the date of entry into force of this Agreement, each Party shall accord to investments of investors of the other Party treatment no less favourable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the expansion, management, conduct, operation, and sale or other disposition of investments.

3. For greater certainty, whether treatment is accorded in 'like circumstances' depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public interest objectives.

4. For greater certainty, this Article shall not be construed to require any Party to compensate for any inherent competitive disadvantages which result from the foreign character of the investor or investments.

Article 6
Most-Favoured-Nation Treatment

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

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

3. This Article shall not be construed to require a Party to grant to an investor of another Party or their investments the benefit of any treatment, preference or privilege arising from:

(i) provisions relating to investment dispute settlement contained in an investment agreement or an investment chapter of a commercial agreement; or

(ii) any agreement for regional economic integration, free trade area, customs union or common market, of which a Party is a member .

4. For greater certainty, whether treatment is accorded in 'like circumstances' depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.

Article 7
Expropriation

1. Each Party shall not directly nationalize or expropriate investments of investors of the other Party, except:

a) for a public purpose or necessity or when justified as social interest;

b) in a non-discriminatory manner;

c) on payment of effective compensation, according to paragraphs 2 to 4; and

d) in accordance with due process of law.

2. The compensation shall:

a) Be paid without undue delay;

b) Be equivalent to the fair market value of the expropriated investment, immediately before the expropriating measure has taken place ("expropriation date");

c) Not reflect any change in the market value due to the knowledge of the intention to expropriate, before the expropriation date; and

d) Be completely payable and transferable, according to Article 9.

3. The compensation to be paid shall not be inferior to the fair market value on the expropriation date, plus interests at a rate determined according to market criteria accrued since the expropriation date until the date of payment, according to the legislation of the Host State.

4. The Parties shall cooperate to improve the mutual knowledge of their respective national legislations regarding investment expropriation.

5. For greater certainty, this article only provides for direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or ownership rights.

Article 8
Compensation for Losses

1. The investors of a Party whose investments in the territory of the other Party suffer losses due to war or other armed conflict, revolution, state of emergency, insurrection, riot or any other similar events, shall enjoy, with regard to restitution, indemnity or other form of, compensation, the same treatment as the latter Party accords to its own investors or the treatment accorded to investors of a third party, whichever is more favourable to the affected investor.

2. Each Party shall provide the investor restitution, compensation, or both, as appropriate, in accordance with Article 6 of this Agreement, in the event that investments suffer losses in its territory in any situation referred to in paragraph 1 resulting from:

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

(b) destruction of its investment or any part thereof by the forces or authorities of the latter Party.

Article 9
Transparency

1. Each Party shall ensure that its laws, regulations, procedures and general administrative resolutions related to any matter covered by this Agreement, in particular regarding qualification, licensing and certification, are published without delay and, when possible, in electronic format, as to allow interested persons of the other Party to be aware of such information.

2. Each Party shall endeavour to allow reasonable opportunity to those stakeholders interested in expressing their opinions on the proposed measures.

3. Whenever possible, each Party shall publicize this Agreement to their respective public and private financial agents, responsible for the technical evaluation of risks and the approval of loans, credits, guarantees and related insurances for investment in the territory of the other Party.

Article 10
Transfers

1. Each Party shall allow that the transfer of funds related to an investment be made freely and without undue delay, to and from their territory. Such transfers include:

(a) the initial capital contribution or any addition thereof in relation to the maintenance or expansion of such investment;

(b) income directly related to the investment;

(c) the proceeds of sale or total or partial liquidation of the investment;

(d) the repayments of any loan, including interests thereon, relating directly to the investment;

(e) the amount of a compensation.

2. Without prejudice to paragraph 1, a Party may, in an equitable and non-discriminatory manner and in good faith, prevent a transfer if such transfer is prevented under its laws relating to:

(a)bankruptcy, insolvency or the protection of the rights of creditors;
(b)criminal infractions;
(c)financial reports or maintenance of transfers' registers when necessary to cooperate with law enforcement or with financial regulators; or
(d) the guarantee for the enforcement of decisions in judicial or administrative proceedings.

3.. Nothing in this Agreement shall be construed as to prevent a Party from adopting or maintaining temporary restrictive measures in respect of payments or transfers for current account transactions in the event of serious difficulties in the balance of payments and external financial difficulties or threat thereof.

4. Nothing in this Agreement shall be construed as to prevent a Party from adopting or maintaining temporary restrictive measures in respect of payments or transfers related to capital movements:

(a) in the case of serious difficulties in the balance of payments or external financial difficulties or threat thereof; or
(b) where, in exceptional circumstances, payments or transfers from capital movements generate or threaten to generate serious difficulties for macroeconomic management.

5. The adoption of temporary restrictive measures to transfers if there are serious difficulties in the balance of payments in the cases described in paragraphs 1 and 2, must be non-discriminatory and in accordance with the Articles of the Agreement of the International Monetary Fund.

Article 11
Tax Measures

1. No provision of this Agreement shall be interpreted as an obligation of one Party to give to an investor from the other Party, concerning his or her investments, the benefit of any treatment, preference or privilege arising out of any agreement to avoid double taxation, current or future, of which a Party to this Agreement is a party or becomes a party.

2. No provision of this Agreement shall be interpreted in a manner that prevents the adoption or implementation of any measure aimed at ensuring the equitable or effective imposition or collection of taxes, according to the Parties´ respective laws and regulations, so long as such a measure is not applied as to constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction.

Article 12
Prudential Measures

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining prudential measures, such as:

(a) the protection of investors, depositors, financial market participants, policy-holders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
(b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
(c) ensuring the integrity and stability of a Party's financial system.

2. Where such measures do not conform with the provisions of this Agreement, they shall not be used as a means of circumventing the commitments or obligations of the Party under this Agreement.

Article 13
Security Exceptions

1. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining measures aimed at preserving its national security or public order, or to apply the provisions of their criminal laws or comply with its obligations regarding the maintenance of international peace and security in accordance with the provisions of the United Nations Charter.

2. Measures adopted by a Party under paragraph 1 of this Article or the decision based on national security laws or public order that at any time prohibit or restrict the realization of an investment in its territory by an investor of another Party shall not be subject to the dispute settlement mechanism under this Agreement.

Article 14
Corporate Social Responsibility

1. Investors and their investment shall strive to achieve the highest possible level of contribution to the sustainable development of the Host State and the local community, through the adoption of a high degree of socially responsible practices, based on the voluntary principles and standards set out in this Article.

2. The investors and their investment shall endeavour to comply with the following voluntary principles and standards for a responsible business conduct and consistent with the laws adopted by the Host State receiving the investment:

a) Contribute to the economic, social and environmental progress, aiming at achieving sustainable development;

b) Respect the internationally recognized human rights of those involved in the companies' activities;

c) Encourage local capacity building through close cooperation with the local community;

d) Encourage the creation of human capital, especially by creating employment opportunities and offering professional training to workers to;

e) Refrain from seeking or accepting exemptions that are not established in the legal or regulatory framework relating to human rights, environment, health, security, work, tax system, financial incentives, or other issues;

f) Support and advocate for good corporate governance principles, and develop and apply good practices of corporate governance;

g) Develop and implement effective self-regulatory practices and management systems that foster a relationship of mutual trust between the companies and the societies in which its operations are conducted;

h) Promote the knowledge of and the adherence to, by workers, the corporate policy, through appropriate dissemination of this policy, including programs for professional training;

i) Refrain from discriminatory or disciplinary action against employees who submit grave reports to the board or, whenever appropriate, to the competent public authorities, about practices that violate the law or corporate policy;

j) Encourage, whenever possible, business associates, including service providers and outsources, to apply the principles of business conduct consistent with the principles provided for in this Article; and

k) Refrain from any undue interference in local political activities.

Article 15
Investment Measures and Combating Corruption and Illegality

1. Each Party shall adopt measures and make efforts to prevent and fight corruption, money laundering and terrorism financing with regard to matters covered by this Agreement, in accordance with its laws and regulations.

2. Nothing in this Agreement shall require any Party to protect investments made with capital or assets of illicit origin or investments in the establishment or operation of which illegal acts have been demonstrated to occur and for which national legislation provides asset forfeiture.

Article 16
Provisions on Investment and Environment, Labor Affairs and Health

1. Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure it deems appropriate to ensure that investment activity in its territory is undertaken in a manner according to labor, environmental and health legislations of that Party, provided that this measure is not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination or a disguised restriction.

2. The Parties recognize that it is inappropriate to encourage investment by lowering the standards of their labor and environmental legislation or measures of health. Therefore, each Party guarantees it shall not amend or repeal, nor offer the amendment or repeal of such legislation to encourage the establishment, maintenance or expansion of an investment in its

territory, to the extent that such amendment or repeal involves decreasing their labor, environmental or health standards. If a Party considers that another Party has offered such an encouragement, the Parties will address the issue through consultations.

PART III- Institutional Governance and Dispute Prevention

Article 17
Joint Committee for the Administration of the Agreement

1. For the purpose of this Agreement, the Parties hereby establish a Joint Committee for the administration of this Agreement (hereinafter referred as "Joint Committee").

2. This Joint Committee shall be composed of government representatives of both Parties designated by their respective Governments.

3. The Joint Committee shall meet at such times, in such places and through such means as the Parties may agree. Meetings shall be held at least once a year, with alternating chairmanships between the Parties.

4. The Joint Committee shall have the following functions and responsibilities:

   a) Supervise the implementation and execution of this Agreement;

   b) Discuss and divulge opportunities for the expansion of mutual investment;

   c) Coordinate the implementation of the mutually agreed cooperation and facilitation agendas;

   d) Consult with the private sector and civil society, when applicable, on their views on specific issues related to the work of the Joint Committee;

   e) Seek to resolve any issues or disputes concerning investments of investors of a Party in an amicable manner; and

   f) Supplement the rules for arbitral dispute settlement between the Parties.

5. The Parties may establish *ad hoc* working groups, which shall meet jointly or separately from the Joint Committee.

6. The private sector may be invited to participate in the *ad hoc* working groups, whenever authorized by the Joint Committee.

7. The Joint Committee shall establish its own rules of procedure.

Article 18
Focal Points or "Ombudsmen"

1. Each Party shall designate a National Focal Point, or "Ombudsman", which shall have as its main responsibility the support for investor from the other Party in its territory.

2. In Brazil, the "*Ombudsman"/*National Focal Point shall be within the Chamber of Foreign Trade – CAMEX[1].

3. In, the "*Ombudsman"/*National Focal Point shall be **.**

4. The National Focal Point, among other responsibilities, shall:

a) Endeavour to follow the recommendations of the Joint Committee and interact with the National Focal Point of the other Party, in accordance with this Agreement;

b) Follow up on requests and enquiries of the other Party or of investors of the other Party with the competent authorities and inform the stakeholders on the results of its actions;

c) to assess, in consultation with relevant government authorities, suggestions and complaints received from the other Party or investors of the other Party and recommend, as appropriate, actions to improve the investment environment;

d) seek to prevent differences in investment matters, in collaboration with government authorities and relevant private entities;

e) Provide timely and useful information on regulatory issues on general investment or on specific projects; and

f) Report its activities and actions to the Joint Committee, when appropriate.

5. Each Party shall determine time limits for the implementation of each of its functions and responsibilities, which will be communicated to the other Party.

6. Each Party shall designate a single agency or authority as its National Focal Point, which shall give prompt replies to notifications and requests by the Government and investors from the other Party.

Article 19
Exchange of Information between Parties

1. The Parties shall exchange information, whenever possible and relevant to reciprocal investments, concerning business opportunities, procedures, and requirements for investment, particularly through the Joint Committee and its National Focal Points.

2. For this purpose, the Party shall provide, when requested, in a timely fashion and with respect for the level of protection granted, information related, in particular, to the following items:

a) Regulatory conditions for investment;

b) Governmental programs and possible related incentives;

[1] The Chamber of Foreign Trade (CAMEX) is part of the Government Council of the Presidency of the Federative Republic of Brazil. Its main body is the Council of Ministers, which is an interministerial body.

c) Public policies and legal frameworks that may affect investment;

d) Legal framework for investment, including legislation on the establishment of companies and joint ventures;

e) Related international treaties;

f) Customs procedures and tax regimes;

g) Statistical information on the market for goods and services;

h) Available infrastructure and public services;

i) Governmental procurement and public concessions;

j) Social and labour requirements;

k) Immigration legislation;

l) Currency exchange legislation;

m) Information on legislation of specific economic sectors or segments previously identified by the Parties; and

n) Regional projects and agreements related to on investment.

3. The Parties shall also exchange information on Public-Private Partnerships (PPPs), especially through greater transparency and quick access to the information on the legislation.

Article 20
Treatment of Protected Information

1. The Parties shall respect the level of protection of information provided by the submitting Party, according to the respective national legislation on the matter.

2. None of the provisions of the Agreement shall be construed to require any Party to disclose protected information, the disclosure of which would jeopardize law enforcement or otherwise be contrary to the public interest or would violate the privacy or harm legitimate business interests. For the purposes of this paragraph, protected information includes confidential business information or information considered privileged or protected from disclosure under the applicable laws of a Party.

Article 21
Interaction with the Private Sector

Recognizing the key role played by the private sector, the Parties shall publicize, among the relevant business sectors, general information on investment, regulatory frameworks and business opportunities in the territory of the other Party.

Article 22
Cooperation between Agencies Responsible for Investment Promotion

The Parties shall promote cooperation between their investment promotion agencies in order to facilitate investment in the territory of the other Party.

Article 23
Disputes Prevention

1. The National Focal Points, or "Ombudsmen", shall act in coordination with each other and with the Joint Committee in order to prevent, manage and resolve any disputes between the Parties.

2. Before initiating an arbitration procedure, in accordance with Article 24 of this Agreement, any dispute between the Parties shall be the object of consultations and negotiations between the Parties and be previously examined by the Joint Committee.

3. A Party may submit a specific question and call a meeting of the Joint Committee according to the following rules:

a) to initiate the procedure, the interested Party must submit a written request to the other Party, specifying the name of the affected investors, the specific measure in question, and the findings of fact and law underlying the request. The Joint Committee shall meet within sixty (60) days from the date of the request;

b) The Joint Committee shall have 60 days, extendable by mutual agreement by 60 additional days, upon justification, to evaluate the relevant information about the presented case and to submit a report. The report shall include:

   i) Identification of the Party;

   ii) Identification of the affected investors, as presented by the Parties;

   iii) Description of the measure under consultation; and

   iv) Conclusions of the consultations between the Parties;.

c) In order to facilitate the search for a solution between the Parties, whenever possible, the following persons shall participate in the bilateral meeting:

   i) Representatives of the affected investors;

   ii) Representatives of the governmental or non-governmental entities involved in the measure or situation under consultation.

d) The procedure for dialogue and bilateral consultations may be concluded by any Party, after the sixty (60) days referred to in subparagraph b). The Joint Committee shall present its report in the subsequent meeting of the Joint Committee, which shall be held no later than fifteen (15) days after the date of

the submission of the request of a Party to conclude the procedure for dialogue and bilateral consultations.

e) The Joint Committee shall, whenever possible, call for special meetings to review matters that have been submitted.

f) In the event that a Party does not attend the meeting of the Joint Committee described in subparagraph (d) of this article, the dispute may be submitted to arbitration by the other Party in accordance with Article 24 of the Agreement.

4. The meeting of the Joint Committee and all documentation, as well as steps taken in the context of the mechanism established in this Article, shall remain confidential, except for reports submitted by the Joint Committee.

Article 24
Settlement of Disputes between the Parties

1. Once the procedure under paragraph 3 of Article 23 has been exhausted and the dispute has not been resolved, either Party may submit the dispute to an ad hoc Arbitral Tribunal, in accordance with the provisions of this Article. Alternatively, the Parties may choose, by mutual agreement, to submit the dispute to a permanent arbitration institution for settlement of investment disputes. Unless the Parties decide otherwise, such institution shall apply the provisions of this Section.

2. The purpose of the arbitration is to determine the conformity with this Agreement of a measure that a Party claims to be not in conformity with the Agreement.

3. The following may not be subject to arbitration: Article 13 - Corporate Social Responsibility; Paragraph 1 of Article 14 – Investment Measures and Combating Corruption and Illegality; and paragraph 2 of Article 15 - Provisions on Investment and Environment, Labor Affairs and Health.

4. This Article shall not apply to any dispute concerning any facts which have occurred, nor any measures which have been adopted before the entry into force of this Agreement.

5. This Article shall not apply to any dispute if more than five (5) years have elapsed since the date on which the Party knew or should have known of the facts giving rise to the dispute.

6. The Arbitral Tribunal shall consist of three arbitrators. Each Party shall appoint, within three (3) months after receiving the "notice of arbitration", a member of the Arbitral Tribunal. Within three (3) months of the appointment of the second arbitrator, the two members, shall appoint a national of a third State with which both Parties maintain diplomatic relations, who, upon approval by both Parties, shall be appointed chairperson of the Arbitral Tribunal. The appointment of the Chairperson must be approved by both Parties within one (1) month from the date of his/her nomination.

7. If, within the periods specified in paragraph 6 of this Article, the necessary appointments are not concluded, either Party may invite the Secretary General of the International Court of Justice to make the necessary appointments. If the Secretary General of the International Court of Justice

is a national of one Party or is prevented from fulfilling said function, the member of the International Court of Justice who has the most seniority who is not a national of a Party will be invited to make the necessary appointments.

8. Arbitrators must:

(a) have the necessary experience or expertise in Public International Law, international investment rules or international trade, or the resolution of disputes arising in relation to international investment agreements;

(b) be independent of and not be affiliated, directly or indirectly, with any of the Parties or with the other arbitrators or potential witnesses nor take instructions from the Parties; and

(c) comply with the "Rules of conduct for the understanding on rules and procedures governing the settlement of disputes " of the World Trade Organization (WTO / DSB / RC / 1, dated December 11 1996), as applicable to the dispute, or any other standard of conduct established by the Joint Committee.

9. The "Notice of Arbitration" and other documents relating to the resolution of the dispute shall be presented at the location designated by each Party in Annex II (Delivery of Documents of a Party) or any other location that may be informed by the Parties.

10. The Arbitral Tribunal shall determine its own procedure in accordance with this Article or, alternatively, the Arbitration Rules of the United Nations Commission on International Trade Law (UNCITRAL). The Arbitral Tribunal will render its decision by majority vote and decide on the basis of the provisions of this Agreement and the applicable principles and rules of international law as recognized by both Parties. Unless otherwise agreed, the decision of the Arbitral Tribunal shall be rendered within six (6) months following the appointment of the Chairperson in accordance with paragraphs 6 and 7 of this article.

11. The decision of the Arbitral Tribunal shall be final and binding to the Parties, who shall comply with it without delay.

12. The Joint Committee shall approve the general rule for determining the arbitrators´ fees, taking into account the practices of relevant international organizations. The Parties shall bear the expenses of the arbitrators as well as other costs of the proceedings equally, unless otherwise agreed.

13. Notwithstanding paragraph 2 of this Article, the Parties may, through a specific arbitration agreement, request the arbitrators to examine the existence of damages caused by the measure in question under the obligations of this Agreement and to establish compensation for such damages through an arbitration award. In this case, in addition to the provisions of the preceding paragraphs of this Article, the following shall be observed:

(a) The arbitration agreement to examine the existence of damages shall be taken as "notice of arbitration" within the meaning of paragraph 6;
(b) This paragraph shall not be applied to a dispute concerning a particular investor which has been previously resolved and where protection of res judicata applies. If a investor had submitted claims regarding the measure at issue in the Joint Committee to local courts or an arbitration tribunal of the Host State, the arbitration to examine damages can only be initiated after the withdrawal of such claims by

the investor in local courts or an arbitration tribunal of the Host State. If after the establishment of the arbitration, the existence of claims in local courts or arbitral tribunals over the contested measure is made known to the arbitrators or the Parties, the arbitration will be suspended.
(c) If the arbitration award provides monetary compensation, the Party receiving such compensation shall transfer to the holders of the rights of the investment in question, after deducting the costs of the dispute in accordance with the internal procedures of each Party. The Party to whom restitution was granted may request the Arbitral Tribunal to order the transfer of the compensation directly to the holders of rights of the affected investment and the payment of costs to whoever has assumed them.

PART IV - Agenda for Further Investment Cooperation and Facilitation

Article 25
Agenda for Further Investment Cooperation and Facilitation

1. The Joint Committee shall develop and discuss an Agenda for Further Cooperation and Facilitation on relevant topics for the promotion and enhancement of bilateral investment. The topics that shall be initially addressed and its objectives are listed in **Annex I – "Agenda for Further Investment Cooperation and Facilitation".**

2. The agendas shall be discussed between the competent government authorities of both Parties. The Joint Committee shall invite, when applicable, additional competent government officials for both parties in the discussions of the agenda.

3. The results of such negotiations shall constitute additional protocols to this Agreement or specific legal instruments.

4. The Joint Committee shall coordinate schedules of the discussions for further investment cooperation and facilitation and the negotiation of specific commitments.

5. The Parties shall submit to the Joint Committee the names of government bodies and its official representatives involved in these negotiations.

PART V – General and Final Provisions

Article 26
General Amendments and Final Provisions

1. Neither the Joint Committee nor the Focal Points or *Ombudsmen* shall replace or impair, in any way, any other agreement or the diplomatic channels existing between the Parties.

2. Without prejudice to its regular meetings, after 10 (ten) years of entering into force of this Agreement, the Joint Committee shall undertake a general review of its implementation and make further recommendations, if necessary.

3. This Agreement shall enter into force 90 (ninety) days after the date of the receipt of the second diplomatic note indicating that all necessary internal procedures with regard to the conclusion and the entering into force of international agreements have been completed by both Parties.

4. At any time, either of the Parties may terminate this Agreement by providing written notice of termination to the other Party. The termination shall take effect on a date the Parties agree on or, if the Parties are unable to reach an agreement, 365 (three hundred and sixty-five) days after the date on which the termination notice is delivered

IN WITNESS WHEREOF the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

DONE at , on the day of in duplicate in the English and Portuguese languages, both texts being equally authentic.

FOR THE FEDERATIVE REPUBLIC OF BRAZIL	**FOR**
__________________________	__________________________

ANNEX I

AGENDA FOR FURTHER INVESTMENT COOPERATION AND FACILITATION

The agenda listed below represents an initial effort to improve investment cooperation and facilitation between the Parties and may be expanded and modified at any time by the Joint Committee.

a. Payments and transfers

i. The cooperation between the financial authorities shall aim at facilitating capital and currency remittances between the Parties.

b. Visas

i. Each Party shall seek, whenever possible and convenient, to facilitate the free movement of managers, executives and skilled employees of economic agents, entities, businesses and investors of the other Party.

ii. Respecting national legislation, immigration and labour authorities of each Party shall seek a common understanding in order to reduce time, requirements and costs to grant appropriate visas to investors of the other Party.

iii. The Parties will negotiate a mutually acceptable agreement to facilitate visas for investors with a view to extend its duration and stay.

c. Technical and environmental regulations

i. Subject to their national legislation, the Parties shall establish expeditious, transparent and agile procedures for the issuing of documents, licenses and certificates related to the prompt establishment and maintenance of the investment of the other Party.

ii. Any query from the Parties, or from their economic agents and investors concerning commercial registration, technical requirements and environmental standards shall receive diligent and timely treatment from the other Party.

d. Cooperation on Regulation and Institutional Exchange

i. The Parties shall promote institutional cooperation for the exchange of experiences on the development and management of regulatory frameworks.

ii. The Parties hereby undertake to promote technological, scientific and cultural cooperation through the implementation of actions, programs and projects for the exchange of knowledge and experience, in accordance with their mutual interests and development strategies.

iii. The Parties agree that the access and the eventual technology transfer shall be carried out, whenever possible, and be aimed at contributing with effective trade of goods, services and related investment.

iv. The Parties shall undertake to promote, foster, coordinate and implement cooperation in professional qualification through greater interaction between relevant national institutions.

v. Fora for cooperation and exchange of experiences on solidarity economy shall be created, evaluating fostering mechanisms for cooperatives, family farms and other solidary economic enterprises related to current and future investment.

vi. The Parties shall also promote institutional cooperation for greater integration of logistics and transports in order to open new air routes and increase, whenever possible and appropriate, their connections and maritime merchant fleets.

vii. The Joint Committee may identify other areas of mutual interest for cooperation in sectorial legislation and institutional exchange.

LAMPIRAN 8

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY •• JULY 2012

SADC Model Bilateral Investment Treaty Template

with Commentary

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SADC Model Bilateral Investment Treaty Template
with Commentary

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SADC Headquarters

Plot No. 54385

Central Business District

Private Bag 0095

Gaborone

Botswana

Telephone +267 395 1863

Fax +267 397 2848

www.sadc.int

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Introduction

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

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

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

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

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Preamble

The Government of ______________ and the Government of ______________ ,

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

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

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

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

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

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

Have agreed as follows:

••

Commentary

The preamble of an international agreement of any type provides an introduction to the goals and thinking of the drafters of the agreement. It also provides an introduction for those who may interpret and apply the treaty at a later date. Of primary significance from this perspective is the role arbitrators may look to a preamble to play as they interpret and apply the treaty in an arbitration context between an investor and a State.

In these circumstances, there have been several instances where arbitral tribunals have examined the preamble of a given treaty and found only references to the promotion of investment and the provision of investor rights under the treaty. As a result, the preamble has been held to establish a presumption that the sole purpose of the treaty is the protection of the investor in order, presumably, to attract higher levels of investment. This has led to several instances where arbitrators have specifically held that this creates a presumption in favour of broader over narrower rights for the investor, fewer and more limited rights for government regulatory activity in relation to an investment, and an overall presumption of investor-friendly interpretations.

Although there are several arbitrations that have rejected this approach and it has been the subject of much academic and other professional criticism, it continues to be used in some instances. This includes in decisions made as recently as in 2010 and 2011. As a result, the preamble set out above is crafted to:

- Reflect development goals of the SADC Member States, both in general terms and specifically in relation to FDI.

- Be balanced, as between development objectives and investor interests, so as to preclude unintended expansive interpretation of substantive provisions in favour of investors on the basis of the intent to protect investors expressed in the preamble, as seen in several arbitrations.
- Be focused on key issues and not become a listing of all of the issues reflected in the final text.

The paragraph on the right to regulate and the recognition of asymmetry issues, with modification for the broader subject matter here, is drawn from the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS), which of course has all developed countries as State Parties. This should enhance its acceptability in a north–south negotiating context. At least in some measure, asymmetry is part of the policy mix for developing States' development policy building. This preamble recognizes such asymmetries as part of this mix for international investment law purposes, which overlaps with Mode 3 of the GATS. Hence there is a strong correlation between the two, and the proposed text can be seen as derived from the already agreed upon GATS.

••

Part 1: Common Provisions

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ARTICLE 2 •• Definitions 8

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Part 1: Common Provisions

ARTICLE 1 •• Objective

The main objective of this Agreement is to encourage and increase investments [between investors of one State Party into the territory of the other State Party] that support the sustainable development of each Party, and in particular the Host State where an investment is to be located.

••

Commentary

Many treaties include an objective article to highlight, in a succinct manner within the substantive text, the treaty's main goal. This gives added weight to the objective as an interpretational guide, beyond that which is normally attributed to the preamble. The link between foreign direct investment (FDI) and the promotion of sustainable development is recognized in the Finance and Investment Protocol (FIP) and other SADC instruments. It is used here to support the key objective of the SADC Member States: for FDI to contribute to the development objectives of each State and the region as a whole, rather than simply being an end in itself.

The bracketed text reflects simply a stylistic choice: its inclusion is technically correct and appropriate, but the text reads more directly and succinctly without the bracketed language.

••

ARTICLE 2 •• Definitions

For the purposes of this Agreement:

Home State means, in relation to

1. a natural person, the State Party of nationality or predominant residence of the investor in accordance with the laws of that State Party
2. a legal or juridical person, the State Party of incorporation or registration of the investor in accordance with the laws of that State Party

[and declared as the Home State at the time of registration where required under the law of the Host State].

Host State means the State Party where the investment is located.

ICSID means the International Centre for Settlement of Investment Disputes, established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States.

Investment

SPECIAL NOTE: The definition of investment is very critical and still very controversial. Three options are included here in full: an enterprise-based definition, a closed-list asset-based approach, and an open-list asset-based approach. These are presented in order from the least to the most expansive in terms of what they cover. The pros and cons of each will be fully explained in the final commentary of Article 2.

I. ENTERPRISE-BASED DEFINITION

Investment means an enterprise within the territory of one State Party established, acquired or expanded by an investor of the other State Party, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise is established or acquired in accordance with the laws of the Host State[; and [registered][approved][recognized] in accordance with the legal requirements of the Host State]. An enterprise may possess assets such as:

1. Shares, stocks, debentures and other equity instruments of the enterprise or another enterprise
2. A debt security of another enterprise
3. Loans to an enterprise
4. Movable or immovable property and other property rights such as mortgages, liens or pledges
5. Claims to money or to any performance under contract having a financial value
6. Copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State
7. Rights conferred by law or under contract, including licences to cultivate, extract or exploit natural resources

For greater certainty, Investment does not include:

1. Debt securities issued by a government or loans to a government
2. Portfolio investments
3. Claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (g) above.

II. ASSET-BASED OPTION 1: CLOSED-LIST, EXHAUSTIVE TEST (BASED ON CANADIAN MODEL BIT)

Investment means the following assets admitted or established in accordance with the laws and regulations of the Party in whose territory the investment is made:

1. An enterprise
2. An equity security of an enterprise
3. A debt security of an enterprise
   (a) where the enterprise is an affiliate of the investor, or
   (b) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a State or State enterprise

4. A loan to an enterprise
   (a) where the enterprise is an affiliate of the investor, or
   (b) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a State enterprise
5. An interest in an enterprise that entitles the owner to share in income or profits of the enterprise
6. An interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (3) or (4) of this Article
7. Real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes
8. Interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under
   (a) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or
   (b) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise
9. For greater certainty, an investment for the purposes of this Agreement does not include assets that are solely in the nature of portfolio investments; goodwill; market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods or services to or from the territory of a Party to the territory of the other Party, or a loan to a Party or to a State enterprise; a bank letter of credit; the extension of credit in connection with a commercial transaction, such as trade financing; or a loan to, or debt security issued by a State Party or a State enterprise thereof.
10. In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and significance for the Host State's development.

OR

III. ASSET-BASED OPTION 2: NON-EXHAUSTIVE ASSET-BASED TEST (BASED ON U.S. MODEL TEXT)

Investment means assets admitted or established in accordance with the laws and regulations of the Party in whose territory the investment is made, and includes:

1. Movable and immovable property and other related property rights such as mortgages, liens and pledges
2. Claims to money, goods, services or other performance having economic value
3. Stocks, shares and debentures of enterprises and interest in the property of such enterprises
4. Intellectual property rights, technical processes, know-how, goodwill and other benefits or advantages associated with a business operating in the territory of the Party in which the investment is made

5. Business concessions conferred by law or under contract, including
   (a) contracts to build, operate, own/transfer, rehabilitate, expand, restructure and/or improve infrastructure, and
   (b) concessions to search for, cultivate, extract or exploit natural resources
6. For greater certainty, an investment for the purposes of this Agreement does not include assets that are solely in the nature of portfolio investment; goodwill; market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods or services to or from the territory of a Party to the territory of the other Party, or a loan to a Party or to a State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing.
7. In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and significance for the Host State's development.

Investment authorization means any government permit, authorization, licence, registration certificate or similar legal instrument that entitles an investor to establish, expand, acquire, own or operate an investment.

Investor means a natural person or a juridical person of the Home State Party making an investment into the territory of the Host State Party, provided that:

1. the natural person, if a dual citizen, is predominantly a resident of the Home State[, and in any event is not a national of the Host State Party as well]
2. for a juridical person, [it is a legally incorporated enterprise under the laws of the Home State.] [it is a legally incorporated enterprise under the laws of the Home State and is effectively owned or controlled by a natural or juridical person of the Home State Party.][it is a legally incorporated enterprise under the laws of the Home State, and conducts [substantial] [substantive] business activity in the Home State Party.] [it is a legally incorporated enterprise under the laws of the Home State, is effectively owned or controlled by a natural or juridical person of the Home State Party and conducts [substantial][substantive] business activity in the Home State Party.]

[**Optional addition**: The provisions of this Agreement shall not apply to investments owned or controlled by State-owned enterprises or sovereign wealth funds.]

Measure means any form of legally binding governmental act directly affecting an investor or its investment, and includes any law, regulation, procedure, requirement, final judicial decision, or binding executive decision [subject to the exclusion of measures of a [state][provincial] [municipal] level government].

Portfolio investment means investment that constitutes less than 10 per cent of the shares of the company or otherwise does not give the portfolio investor the possibility to exercise effective management or influence on the management of the investment.

State Party or Party means a State that is party to this Agreement.

Territory in relation to a State means the total land area of that State Party and, in relation to [a coastal State] ______________, includes, in addition, the territorial sea and any maritime area situated beyond the territorial sea that has been designated, or that may in future be designated, under the law of ______________ and in accordance with international law, as an area over which ______________ may exercise rights with regard to the sea bed, subsoil or natural resources.

Transfers means international payments and transactions in cash or electronic form.

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law as approved at the time an arbitration is commenced pursuant to the submission of a notice of arbitration under such Rules, including any rules or annexes specific to investor-State arbitration processes.

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Commentary

For many definitions, such as “investor” and “investment,” perfect solutions are illusive. One should focus, therefore, on drafting good definitions that are clear and consistent, rather than seeking perfect definitions that will fit every possible “what if” question.

Additional definitions will be added at the completion of drafting when it is determined that they are needed. Below are some commentaries on the key issues raised in the draft definitions above.

Investment is perhaps the most controversial and critical issue to define. The definition will determine which foreign capital flows will be covered by the Agreement.

- Three options are presented here, in order from the most specific and narrowly drafted to the most open-ended and broadly drafted. Option 1 adopts an enterprise-based approach. It requires the establishment or acquisition of an enterprise, as one classically associates with FDI. The assets of the enterprise are then included among the covered assets of the investor. The language used is taken in significant part from the GATS definition of commercial presence, which requires the establishment of an operating enterprise in the Host State. The illustrative list of assets that follows the opening paragraph in Option 1 is not the test of an investment, but illustrates the types of assets an investment covered under the treaty may own or possess.
- Option 2 is a closed-list, asset-based definition, drawing on the Canadian Model BIT of 2004 and subsequent treaties entered into by Canada. The list starts from an enterprise approach, but expands this to include such assets as intellectual property rights, whether or not they are associated with an existing enterprise in the Host State. This mixed approach is broader than an enterprise-based approach, but has the virtue of setting out a defined and limited list. Thus it is a middle ground between Options 1 and 3 in terms of scope of coverage, but should not be seen as an “easy” compromise text as it goes outside the enterprise-based approach. Many of the listed items can be interpreted in a very expansive manner by tribunals.
- Option 3 is the most expansive approach, an open-ended asset-based test that allows most assets to be claimed as covered investments. This is the most favourable to investors, and least predictable for Host States. Many of the texts that adopt this approach use language such as “every asset,” allowing tribunals to read it just in that way, with no limitations. This is the approach in most existing SADC BITs and it is recommended that

this be rejected for all future treaties in favour of Option 1 in particular.

- The choice of options should, we believe, also be considered in light of the overall objective, which is being formulated here from a developing country perspective, to promote investment that is supportive of sustainable development, which development policy suggests means business that brings constructive economic and social benefits.
- It should be noted that a failure to include a broader definition does not mean other assets cannot be owned by foreign investors or foreign citizens. That question then becomes a matter for each State to determine. Rather, it simply means they will be protected through domestic law processes and not through international treaties.
- The so-called ***Salini* test**: If Option 2 or Option 3 is used, it is strongly recommended that the test of the relationship of the investment to the Host economy be added. This test arises from arbitrations that have looked at what qualifies as an investment under the ICSID Convention, concluding that, as seen in the *Salini* arbitration award, "In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significance for the Host State's development." This text appears above as paragraph 10 in the second option above, and as paragraph 7 in the final option. It is not likely it is needed in the first option because it starts from the enterprise-based approach, but could be included for greater certainty.

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

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

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

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

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

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

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

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

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

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

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Commentary

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Two additional alternatives relating to investment liberalization may be noted:

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

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

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

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

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NOTES ••

Part 2: Investor Rights Post-Establishment

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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.

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 ••

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Part 3: Rights and Obligations of Investors and State

ARTICLE 10 •• Common Obligation against Corruption

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

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

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

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

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Commentary

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

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

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ARTICLE 11 •• Compliance with Domestic Law

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

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Commentary

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

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ARTICLE 12 •• Provision of Information

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

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

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

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

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

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Commentary

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

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

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ARTICLE 13 •• Environmental and Social Impact Assessment

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

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

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

(a) public [including via the Internet] and

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

13.4. Investors, their Investments and the Host State authorities shall apply the precautionary principle[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

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Part 4: General Provisions

ARTICLE 23 •• Cooperation in Promotion of Investment

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

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

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

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

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Commentary

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

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

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

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ARTICLE 24 •• Transparency of Investment Information

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

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

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

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

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

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Commentary

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

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

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

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ARTICLE 25 •• Exceptions

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

(a) to protect public morals and safety;

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

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

(d) to protect the environment.

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

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

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

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

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

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

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

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

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Commentary

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

Paragraph 25.1 is drawn from Article XX of the GATT, and is also reflected in the COMESA CCIA and other bilateral agreements. However, it is more specifically drafted to make clear that no compensation is required to be paid to an investor for the types of measures set out therein as long as they are taken in good faith. This avoids a situation, for example,

where a measure is “made legal” by virtue of paying compensation. Hence the test is not one of being a breach of the treaty or not, but a more refined and specific statement that the covered measures simply do not require compensation when taken in a *bona fide* manner. The addition of the last subparagraph is to ensure that the environment is clearly included, as opposed to simply implied by virtue of the other terms or by reference to WTO dispute settlement decisions. This makes the provision complete and express, rather than implied.

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

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

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

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

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

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

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ARTICLE 26 •• Denial of Benefits

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

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

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

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

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Commentary

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

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

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ARTICLE 27 •• Periodic Review of this Agreement

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

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

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Commentary

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

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NOTES ••

Part 5: Dispute Settlement

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Part 5: Dispute Settlement

ARTICLE 28 •• State-State Dispute Settlement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Commentary

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

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

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

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

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

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

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

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

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

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

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ARTICLE 29 •• Investor-State Dispute Settlement

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

29.1. Amicable Settlement of Disputes

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

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Commentary

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

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

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29.2. Notice of Intent to Arbitrate

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

(a) the name and address of the Investor;

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

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

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

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Commentary

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

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29.3. Mediation

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

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Commentary

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

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29.4. Conditions for Submission of a Claim to Arbitration

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

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

(b) the Investor or Investment, as appropriate,

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

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

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

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

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

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

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.

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.

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.

••

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.

••

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.

••

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.

••

Commentary

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

••

29.16. Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, on its own initiative subject to the consent of the disputing parties, which consent shall not be unreasonably withheld, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

••

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.

••

29.17. Transparency of Proceedings

(a) Subject to paragraphs 29.17(c) and (d), the State Party that is party to the arbitration shall, after receiving the following documents, promptly make them available to the public and the non-disputing State Party:

(i) the Notice of Intent;

(ii) the Notice of Arbitration;

(iii) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted in the form of *amicus* submissions;

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

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

(b) The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.

(c) Any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

(d) Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(i) Subject to subparagraph (iv), neither the disputing parties nor the tribunal shall disclose to the non-disputing State Party or to the public any protected information where the disputing State Party that provided the information clearly designates it in accordance with subparagraph (ii).

(ii) Any disputing State Party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal.

(iii) A disputing State Party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the public in accordance with paragraph 29.17(a).

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

Commentary

This article is within the emerging international standards on transparency for investor-State arbitration. It is seen in the COMESA 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.

29.18. Consolidation of Arbitrations

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

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

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

(ii) the nature of the order sought

(iii) the grounds on which the order is sought

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

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

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

(ii) one arbitrator appointed by the respondent; and

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

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

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

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

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

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

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

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

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

(i) The name and address of the claimant;

(ii) The nature of the order sought; and

(iii) The grounds on which the order is sought

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

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

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

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

••

Commentary

The initiation of a number of arbitrations against a State all arising from the same measure and similar investment treaties is a growing phenomenon. The article above is derived from revised U.S. texts and is comprehensive on how to address the possible consolidation of such multiple claims into one process.

••

29.19. Awards

(a) Where a tribunal makes a final award against a Host State or against an Investor in the light of a counterclaim by a State authorized under this agreement, the tribunal may award, separately or in combination, only:

(i) monetary damages and any applicable interest;

(ii) restitution of property, in which case the award shall provide that the Host State or Investor, as the case may be, may pay monetary damages and any applicable interest in lieu of restitution.

(b) A tribunal established under this Agreement [shall issue an award for costs and legal representation fees for any arbitration where the jurisdiction of the tribunal is denied to the Investor, and][may][shall][shall, unless by special exception there is good reason not to do so] issue an award for costs and legal representation to the disputing party that prevails in the final award.

(c) A tribunal may not award punitive damages.

(d) An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

(e) Subject to paragraph 29.19(f) and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

(f) A disputing party may not seek enforcement of a final award until:

(i) in the case of a final award made under the ICSID Convention, (a) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or (b) revision or annulment proceedings have been completed;.

(ii) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other rules selected pursuant to this Article, 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

(g) Each Party shall provide for the enforcement of an award in its territory.

(h) A disputing party may seek enforcement of an arbitration award [under the ICSID Convention when it is in force for both Parties] or the New York Convention.

(i) A claim that is submitted to arbitration under this Section shall be presumed to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention, unless the State Party has proven that the claim has related to a sovereign matter.

Commentary

This provision addresses a number of issues relating to a final decision against a State or an investor if a counterclaim has also been initiated.

First, it ensures that only monetary damages can be awarded in most cases, as opposed, for example, to ordering a State to withdraw a measure to protect the environment that it has enacted. The restitution of property may be a possible award as well, but the losing party in such a case may elect to pay monetary damages instead.

Second, the text precludes any punitive damages being awarded (known as exemplary damages in some jurisdictions). Thus, an award can only be for the value of proven economic damages resulting from the breach of the Agreement.

Third, the text addresses the issue of costs clearly. Today, the practice is more often to not award any costs of the proceedings or legal representation to the winning party. This practice is reversed in the text, subject to some discretion for the tribunal depending on the final formulation chosen. However, where a tribunal finds it has no jurisdiction to hear a claim brought by an investor, it must, under the text, award costs in favour of the Host State.

The remaining paragraphs deal with issues of enforcement of the award and are fairly typical provisions ensuring enforceability under the New York Convention. Paragraph (i) refers to Article 1 of the New York Convention, which establishes the scope of the Convention for enforcement related matters. It requires arbitral decisions to be commercial arbitration in order for the Convention regime to apply. Paragraph (i) establishes a rebuttable presumption that arbitrations under the Agreement meet this test of being commercial arbitrations.

••

29.20. Appeal Mechanism

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

••

Commentary

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

••

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

••

Commentary

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

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

••

ARTICLE 31 •• Governing Law in Dispute Settlement

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

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

••

Commentary

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

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

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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

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Part 6: Final Provisions

ARTICLE 33 •• Entry into Force

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

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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.

••

Commentary

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

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

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

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

••

ARTICLE 35 •• Amendment

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

••

Commentary

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

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ARTICLE 36 •• Schedules and Notes Part of Treaty

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

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Commentary

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

••

ARTICLE 37 •• Authentic Text

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

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Commentary

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

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

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

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

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

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

SCHEDULE 3 •• List on National Authorities and Contact Points

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

State Party A:

State Party B:

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

SCHEDULE 4 •• Procedure for *Amicus Curiae* Submissions

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

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Commentary

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

••

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

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

   (b) be no longer than ten typed pages;

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

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

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

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

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

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

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

••

Commentary

This provision ensures transparency by the potential amicus on who is making the Petition and why. Any relationships to either of the litigation parties must be made clear, including organizational or financial. The Petitioner must also indicate the reasons it is making the submission and what its broader interest in the outcome of the arbitration may be. This could be more local in nature, such as specific environmental impacts, or more broadly developed, such as the proper approach to interpreting the treaty due to the impact the approaches may have on other related situations the amicus is concerned with.

••

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

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

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

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

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

••

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.

••

Commentary

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

••

6. The tribunal shall ensure that:

   (a) any *amicus curiae* submission does not disrupt the proceedings; and

   (b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

••

Commentary

This places the burden on the tribunal to manage its procedure in such a way as to be transparent and equal and fair in its treatment of the arbitrating parties in light of their interests as the primary litigants.

••

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

••

Commentary

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

••

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

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Commentary

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

••

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

••

Commentary

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

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© 2012 SOUTHERN AFRICAN
DEVELOPMENT COMMUNITY

SADC Headquarters

Plot No. 54385

Central Business District

Private Bag 0095

Gaborone

Botswana

Telephone +267 395 1863

Fax +267 397 2848

www.sadc.int