

IISD Model International Agreement on Investment for Sustainable Development

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Acknowledgements

The development of the International Institute for Sustainable Development's (IISD) Model International Agreement on Investment for Sustainable Development began with our initial work on the legal and policy dimensions of international investment and sustainable development in 1997 and 1998. By 2002, it became apparent that the direction of international investment negotiations, and the arbitrations that their outcomes produced, were wholly disconnected from any of the global development and sustainable development objectives that are said to underpin international economic negotiations.

In 2003, IISD launched the two intertwined projects that have led to this publication. One was the Southern Agenda on Investment (SAI), whose policy-based results form a major input into this text. The second was the model agreement initiative designed to take the debate on policy and translate it into the legal form of a model international agreement.

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In January 2005, IISD sponsored a workshop in The Hague attended by over 30 people from around the world, and representing all points of the political and legal spectrum. The participants spent three days discussing, in fine detail, a preliminary discussion draft of the Model Agreement. The fact that we can't name them all here does not diminish our gratitude to them for the effort they made in coming to The Hague and engaging in a fascinating discussion from which we have benefitted significantly. We are sincerely grateful. We are also grateful for the numerous comments on the discussion draft we received by e-mail. All have been carefully reviewed and considered. We look forward to continuing our dialogue in this way, as well as through the dissemination efforts planned for the next year.

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Finally, we must absolve all those who have contributed to this product of any responsibility for its failings. We are most grateful for their efforts, but we alone are responsible for its final content and the flaws or errors it may contain.

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Introduction

International investment plays an increasingly important role in many economies. Perhaps more critically, it is an essential component of a sound global strategy for sustainable development. The International Institute for Sustainable Development (IISD) recognizes the close linkages between investment flows and sustainable development. The move from unsustainable practices in agriculture, energy, water use, resource harvesting, industry and other sectors towards more sustainable practices requires investment at national and international levels.

Because of the importance of foreign investment for sustainable development, IISD has for more than eight years been studying the nature and evolution of international investment agreements (IIAs). During that time, we have seen IIAs evolve to take on an expanded role and new meaning in international economic law, as well as in the practice of states, investors and international institutions. Indeed, the experience over the past several years has shown that IIAs are now an important part of the legal and policy mechanisms that underpin the economic processes of globalization today. Simply stated, IIAs are about governance for globalization.

Since their beginning in 1959, these agreements have provided significant rights for investors. IISD has, however, become increasingly skeptical of their broader impacts. The current model for investment agreements was developed in the political context of the 1950s and 1960s—a period characterized by fear of the spread of communism and concern for the impacts of decolonization on business interests in newly independent developing countries. Given this origin, the initial agreements were singularly focussed on just one aspect of the investment process: the protection of foreign capital and investments.

In addition, because the agreements grew on a bilateral basis between home and host states, no institutional home ever emerged, and no process for analyzing the success or failures of the agreements was developed. Assumptions that the signing of investment agreements would in itself be an act that attracted investment (a common refrain through the 1990s) have proven to be unfounded. Moreover, the arbitration process developed to address disputes under the agreements—with the primary focus on investor-state arbitrations—turned out in recent years to be rife with conflicts of interest, and has failed to meet the same basic criteria of legitimacy, transparency and accountability applied to the national dispute settlement processes it now routinely displaces.

Whatever its merits at the time, the model for IIAs developed 50 years ago no longer meets the needs of the global economy in the 21st century. Many observers, especially from civil society groups around the world, believe that the current international investment regime is so inherently flawed as to be beyond repair or reform. They argue for the complete dissolution of the regime, and for the construction of an alternative regime specifically focussed on the obligations of transnational actors. While IISD shares many of the concerns, we have taken a different tack in response to them. We believe the time is ripe to propose a new model for IIAs, a new direction that is consistent with the goals and requirements of sustainable development and the global economy of the 21st century.

Over the past 20 years, three attempts to negotiate binding multilateral rules for investment have failed—in the United Nations, in the Organisation for Economic Co-operation and Development (OECD) and, most recently, in the World Trade Organization (WTO).

IISD believes that these failures are not cause to abandon the search for multilateral rules. Rather, it is an indication of their importance and of the fact that governments have not yet identified an appropriate negotiating agenda. IISD believes it is, therefore, time for a new approach that responds to rapid globalization and to the need to promote sustainable development.

Towards this end, IISD has undertaken several projects to analyze the basis for such a new approach to international investment negotiations. We have worked on our own and with partners to identify the shortcomings of existing agreements and to explore the interests of developing countries in these negotiations. Above all, we have begun the process of developing a positive negotiating agenda that:

- recognizes that an investment agreement is fundamentally about good governance, and applies a standard of good governance to the agreement itself;
- ensures that investor rights and public goods are protected in a manner that is legitimate, transparent and accountable;
- establishes the aspirations of developing countries and the promotion of global sustainable development as a clear purpose for the international agreement;
- contains provisions that balance investor rights with a novel mix of voluntary and binding investor responsibilities, and with both host and home state rights and obligations;
- sets out specific proposals to establish a dispute settlement process that fixes what is currently a broken investor-state arbitration process;
- develops an understanding of the need for appropriate funding; and
- sets out an institutional framework that allows the regime to evolve based on its successes and failures.

Investment, both domestic and international in varying mixes for different states, is central to any attempt to promote sustainable development, but the current models are divorced from this reality and do little to promote such investments. We believe that the new approach we are proposing will set an agenda to improve the international investment climate, to place development at the heart of the process and to advance sustainable development.

Development of the Text: Past, Present and Future

The analytical work that underpins this project is found at www.iisd.org/investment. The full process for this specific project is also described there. In brief, this project evolved with a sister project to understand a Southern Agenda on Investment. We sought to understand what issues are currently on the agenda of developing countries—or should be, in their view—and what lessons can be learned from the recent explosion in the use and interpretation of existing bilateral and regional investment agreements. This brought us into contact with many researchers, analysts and civil society, business and government representatives, and has fueled much of what is found in this document. In addition, our own analysis has suggested the need for new directions to be established, that are expressly supportive of the role investment must play in a sustainable development context. In the absence of any models that could support what we viewed as essential, we undertook the preparation of a first consultation draft of this text. That document was the basis of intensive and detailed discussion at a workshop in The Hague in January 2005. Participants included experts in international law from several different perspectives, members of the international arbitration bar, arbitrators, economists, development experts and others. We also received important feedback on the consultation draft once it was made available for comment on the Internet.

The discussions at The Hague meeting and the comments received from others have been reviewed, leading to the revised text now being published. IISD is grateful to all those who took the time to participate, who expressed their views, concerns and criticisms.

The Model Agreement set out below should be seen as a living text. It provides an agenda for future negotiations, and a comprehensive, consistent view of the linkages between investment and sustainable development. The text is intended to be adaptable to bilateral, regional and multilateral negotiations, though differences will occur between each, and between different negotiating partners.

Viewed as a multilateral approach, the Model Agreement also provides a single window approach to addressing the defects in the now over 2,000 bilateral and regional agreements, all of which more or less share the same type of model. Thus, IISD believes that a multilateral approach offers significant advantages over further proliferation of bilateral agreements and regional agreements. IISD also believes that the opportunities for a coherent developing country approach to negotiating investment agreements will generate additional significant benefits for the development of a new model IIA.

Negotiators' Version Also Available

We have also published the IISD Model International Agreement on Investment for Sustainable Development: Negotiators' Handbook, an enhanced product designed for international investment negotiators.

The negotiators' version provides both the text of the model agreement that you see here as well as a commentary on each article. The goals of the commentary are:

- to elucidate key elements of the text from a policy or legal perspective; and
- to provide a sense of the options or alternative approaches to issues raised by the text. The commentary also seeks to explain why we chose the article as presented.

It is hoped that this will be a useful tool for negotiators, especially from developing countries. But it is also intended for academic use; for non-expert observers in civil society and in elected offices or parliaments at all levels of government; those who are experts and seeking a different level of analysis and those who are otherwise involved in the debate on the future of international investment agreements.

The objective has been to make this a user-friendly publication, with space for the reader's own notes. It can be a tool in preparing for negotiations and an aid in participating in them. The negotiators' version is available for free download at http://www.iisd.org/investment/model_agreement.asp.

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*The electronic version of this document can be found at
http://www.iisd.org/investment/model_agreement.asp. IISD welcomes your comments on this
Model Agreement. Please send them to modelagreement@iisd.ca*

PREAMBLE

The Parties,

Seeking to promote sustainable development at the national, regional and global levels;

Understanding sustainable development as being development that meets the needs of the present without compromising the ability of future generations to meet their own needs, and recognizing the contribution of the 1992 Rio Declaration on Environment and Development, the 2002 World Summit on Sustainable Development and the Millennium Development Goals to our understanding of sustainable development;

Recognizing that the promotion of sustainable investments is critical for the further development of national and global economies, as well as for the pursuit of national and global objectives for sustainable development;

Understanding further that the promotion of such investments requires cooperative efforts of investors, host governments and home governments;

Recognizing the development of protections for foreign investors in international law to date;

Affirming the progressive development of international law and policy on the relationships between multinational enterprises and host governments as seen in such international instruments as the ILO Tripartite Declaration on Multinational Enterprises and Social Policy; the OECD Guidelines for Multinational Enterprises; and the United Nations' *Norms and Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights*;

Seeking an overall balance of rights and obligations in international investment between investors, host countries and home countries; and

Recognizing that an international investment agreement should reflect the basic principles of transparency, accountability and legitimacy for all participants in foreign investment processes,

Have agreed as follows:

PART 1: GENERAL PROVISIONS

Article 1: Objective

The objective of this Agreement is to promote foreign investment that supports sustainable development, in particular in developing and least-developed countries.

Article 2: Definitions

- (A) “company” means any entity constituted or organized under the applicable law of the home or host state, whether or not for profit, and whether privately or governmentally owned or controlled;
- (B) “national” of a Party means a natural person who is a national of that Party under its applicable law;
- (C) “investment” means:
 - i) a company;
 - ii) shares, stock and other forms of equity participation in a company, and bonds, debentures and other forms of debt interests in a company;
 - iii) contractual rights, such as under turnkey, construction or management contracts, production or revenue-sharing contracts, concessions or other similar contracts;
 - iv) tangible property, including real property; and intangible property, including rights, such as leases, mortgages, hypothecs, liens and pledges on real property;
 - v) rights conferred pursuant to law, such as licences and permits

provided that

- a) such investments are not in the nature of portfolio investments which shall not be covered by this Agreement;
- b) that there is a significant¹ physical presence of the investment in the host state;
- c) that the investment in the host state is made in accordance with the laws of that host state;
- d) the investment is part or all of a business or commercial operation;² and
- e) the investment is made by an investor as defined herein.

For greater certainty, an investment does not include: market share, whether or not it is based on foreign-origin trade; claims to money deriving solely from commercial contracts for the sale of goods and services to or from the territory of a Party to the territory of another country, 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.

- (D) “investor” is a national or company of a home State Party that makes, or is making, an investment into the territory of another Party;
- (E) “international investment agreements” means any bilateral or regional Agreement in force that contains provisions for the protection of foreign investment or provisions that also set out rights and responsibilities of foreign investors, host states and/or home states relating to foreign investment; and includes parts, chapters or sections of integrated trade and investment agreements;
- (F) “ICSID Convention” means the Convention on the Settlement of Investment Disputes between States and Nationals of Other States, done at Washington, March 18, 1965;

1 A significant physical presence would not include, for example, sales offices without other operational facilities, post office box-based businesses, Internet-based business or other types of business with very limited physical presence in the host state. As an example of a contrasting situation, a turnkey operation would normally involve significant capital investment, construction equipment, real property interests and other physical presences.

2 The Parties understand that not-for-profit operations, for example research institutes and non-governmental organizations, may fall within this Paragraph.

- (G) “Centre” means the International Centre for Settlement of Investment Disputes established by the ICSID Convention;
- (H) “measures” includes any legal, administrative, legislative, judicial or policy decision that is taken by the host state, directly relating to and affecting an investment in the territory of the host state, but does not include measures in draft form;
- (I) “home state” means the state declared by the investor and accepted by the host state as such in accordance with the following rules:
 - i) A foreign investor shall promptly choose its home state based on its principal place of business or a major centre of effective and sustained links with the home state economy and from where effective control over the investment is exercised,³ and shall notify the host state of its home state.
 - ii) Where an investor changes in relation to an investment, it shall so notify the host state and identify the home state of the new investor, based on its principal place of business or a major centre of actual operations closely related to the investment.
 - iii) Subject to prior notification and consultation with the investor at the time notice is received, a Party may, within 90 days of such notice, deny the benefits of this Agreement to an investor of another Party that does not meet the requirements of Paragraphs A or B, or if investors of a non-Party own or control the enterprise and has no substantial business activities in the territory of the Party under whose law it is constituted or organized.
 - iv. For greater certainty, an investor may not declare its home state to be a Party where it is an enterprise of such Party but where it has no substantial business activities in the territory of that Party and persons of a non-Party, or of the putative host state own or control the enterprise.
 - v. Where an investor has its corporate headquarters or its principal place of business in a State Party to this Agreement, that state shall be deemed to be the home state for purposes of this Agreement where the preceding paragraphs have not led to another accepted choice.⁴

The selection of home state is for the purposes of this Agreement only.

- (I) “host state” is the state where the investment is located.

3 Shell corporations, off-shore tax haven registrations and incorporations, and other forms of incorporation or location shall not be determinative of the formal place of location of home state. Effective control of the investment is the central issue here, commensurate with the capacity of home state liability to be effectively pursued if appropriate, in accordance with Article 17.

4 Footnote 3 applies here, *mutatis, mutandis*.

Article 3: Scope of coverage

- (A) Subject to Paragraphs (D)–(F), this Agreement applies to all investments by an investor, whether the investment is made before or after the entry into force of this Agreement.
- (B) Subject to Paragraphs (D)–(F), this Agreement applies to any measure adopted or maintained by a Party after the entry into force of this Agreement by a governmental authority of the host state.
- (C) Subject to Paragraphs (D)–(F), this Agreement applies to measures taken by government authorities at the national, state, provincial or municipal level of government of a Party.
- (D) This Agreement does not create retroactive obligations or responsibilities for investors. Investors who are not in compliance with ongoing obligations and responsibilities shall seek to enter into compliance as soon as possible, and within 12 months of the entry into force of this Agreement.
- (E) Pre-establishment rights
 - i) Notwithstanding any other provision, nothing in this Agreement should be interpreted so as to create a right of establishment for potential investors in a potential home state.

- ii) Parties wishing to list sectors in which they have, under their domestic law, removed barriers to foreign investors, including in services sectors, may list these in Annex E to this Agreement. Any conditions or limitations on the right to establishment of foreign investors in the listed sectors shall be listed at the same time.⁵
 - iii) Investors in sectors listed in Annex E, or otherwise seeking to make an investment they have a legal right to make, shall, subject to the limitations or conditions also set out in Annex E or in domestic law, then be covered by the provisions of this Agreement for acts related to the establishment or acquisition of an investment.
 - iv) States may amend their lists in Annex E, including any conditions, at their discretion, subject to the preservation of rights for an investor pursuant to this Agreement who has commenced the process of establishing an investment or who has established an investment.
- (F) Notwithstanding any other provision of this Agreement, this Agreement does not apply to any investments that are made before or after the entry into force of this Agreement, or to measures adopted or maintained by a Party, as follows:
- i) Sectors: For investments in any economic sectors in a host state listed in Annex C, including service sectors, and the Articles listed in Annex C with that list.
 - ii) Non-conforming measures: The application of any measures, or specific provisions of measures, including at a non-national level, not conforming to this Agreement that are listed in Annex D. All municipal measures in effect at the entry into force of this Agreement shall be deemed to be included in Annex D by reference to this Paragraph.
 - iii) Non-conforming measures amendments: The continuation of, or any amendments or other alterations to, measures or specific provisions of measures listed in Annex D, providing that such continuation, amendment or alteration shall not create any greater degree of non-conformity than the measure presently exhibits.

except that the vested rights of pre-existing investors and their investments pursuant to prior international investment agreements, and arising in any sector or in relation to any measure falling within this Paragraph, shall continue to apply for the duration of the extinguishment period in such agreements,⁶ and providing that Article 8 of this Agreement shall apply to all investments.

⁵ The Parties understand that such limitations or conditions can include quantitative restrictions on overall investment, for example in the natural resources harvesting sectors or in relation to setting of ambient or specific pollution loads. They may also include limitations on the application of specific articles of this Agreement.

⁶ International investment agreements may include a provision that extends the rights of protection of an investor for a specific period of time after the agreement is terminated. This is the “extinguishment” period referred to in this Paragraph.

Article 4: Denial of benefits

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

PART 2: STANDARDS OF TREATMENT OF FOREIGN INVESTORS

Part 2 begins the articulation of the six categories of rights and obligations set out in this text: investor rights and obligations; host state rights and obligations; and home state rights and obligations. The investor rights are a refinement of the ongoing development of international law in this field. Host state obligations are, similarly, a refinement of ongoing developments. Host state rights, investor obligations, and home state rights and obligations have rarely seen any articulation in existing investment agreements, but some precedent is drawn on from broader economic cooperation agreements. Part 2 addresses investor rights, Parts 3–6 cover the remaining sets of complementary rights and obligations. They are NOT hierarchical in nature, however, all Parts having to be read in a manner that creates consistency among them as opposed to a hierarchy.

It can be argued that an actual treaty might not be drafted in such a structured format, which does necessitate some duplication. However, IISD believes it is better left this way for present purposes so that the issues and approaches can be fully understood.

Article 5: National treatment

- (A) 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 management, conduct, operation, expansion and sale or other disposition of investments. Where a foreign investor may, under domestic law, establish an investment, this Article shall apply to the extent it is not inconsistent with such domestic law relating to the establishment or acquisition of investments.
- (B) Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of its own investors with respect to the, management, conduct, operation, expansion and sale or other disposition of investments.
- (C) Measures taken in accordance with government procurement policies specifically for the purchase of goods or services by any level of government shall not be considered a breach of this Article.
- (D) The treatment accorded by a Party under Paragraphs (A) and (B) means, with respect to a non-national level of government, treatment no less favourable than that government accords, in like circumstances, to investors and to investments within the jurisdiction of the government in question.
- (E) For greater certainty, the concept of “in like circumstances” 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 upon the local, regional or national environment, or the global commons;⁷
 - c) the sector the investor is in;
 - d) the aim of a measure of concern;
 - e) the regulatory process generally applied in relation to a measure of concern; and
 - f) other factors directly relating to the investment or investor in relation to the measure of concern.

The examination shall not be limited to or biased toward any one factor.

⁷ The Parties understand that such considerations can include the cumulative impacts of all investments within a jurisdiction, for example in the natural resources harvesting sectors or in relation to setting of ambient or specific pollution loads. Many jurisdictions do not allow new investments that will cause applicable environmental or human health tolerances to be exceeded.

Article 6: Most-favoured-nation treatment

- (A) This Article applies to:
- a) all measures of a Party covered by the Agreement, and
 - a) to the substantive provisions⁸ of other international agreements relating to investment that enter into force after this Agreement has entered into force.
- (B) Each Party shall accord to investors of another Party treatment no less favourable than that it accords, in like circumstances, to investors of any other Party or of a non-Party with respect to the management, conduct, operation, expansion, sale or other disposition of investments. Where a foreign investor of a Party or non-Party may, under domestic law, establish an investment, this provision shall apply to the extent it is not inconsistent with such domestic law relating to the establishment or acquisition of investments.
- (C) Each Party shall accord to investments of investors of another Party treatment no less favourable than that it accords, in like circumstances, to investments of investors of any other Party or of a non-Party with respect to the management, conduct, operation, expansion, sale or other disposition of investments.
- (D) Each Party shall accord to investors of another Party, and to investments of investors of another Party, the better of the treatment required by this Article and the national treatment obligation.
- (E) Paragraphs (B)–(D) do not oblige one Party to extend to the investors of another Party the benefit of any treatment, preference or privilege contained in
- i) any existing or future customs union, free trade area, common market, any international environmental agreement to which the investor's home state is not a Party, or
 - ii) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.
- (F) Paragraphs (C)–(E) of Article 5 apply, *mutatis mutandis*, to the present Article.

⁸ This Article does not apply to procedural, institutional or dispute settlement provisions of other international agreements relating to investment that enter into force after this Agreement.

Article 7: Minimum international standards

- (A) Each Party shall accord to investors or their investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security. This obligation shall be understood to be consistent with the obligation of host states, in particular under Article 19 of this Agreement.
- (B) Paragraph (A) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments. The concepts of “fair and equitable treatment” and “full protection and security” are included within this standard, and do not create additional substantive rights.
- (C) Each Party shall accord to investors and investments non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
- (D) Notwithstanding Paragraph (C), if an investor of a Party, in the situations referred to in that Paragraph, suffers a loss in the territory of the other Party resulting from:
- i) requisitioning of its investment or part thereof by the latter's forces or authorities; or
 - ii) destruction of its investment or part thereof by the latter's forces or authorities,

which was not required by the necessity of the situation, the latter Party shall provide the investor restitution or compensation, which in either case shall be prompt, adequate and effective, and, with respect to compensation, shall be in readily convertible form.

Article 8: Expropriation

- (A) No Party may directly or indirectly nationalize or expropriate an investment in its territory (“expropriation”), except:
 - i) for a public purpose;
 - ii) on a nondiscriminatory basis;
 - iii) in accordance with due process of law; and
 - iv) on payment of compensation in accordance with Paragraphs (B)–(F).
- (B) Appropriate compensation shall normally be equivalent 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. Valuation criteria shall include going concern value, asset value including declared tax value of tangible property, and other criteria, as appropriate, to determine fair market value. Compensation may be adjusted to reflect aggravating conduct by an investor or conduct that does not seek to mitigate damages.
- (C) Compensation shall be paid without delay and be fully realizable.
- (D) If payment is made in a G7 currency, compensation shall include interest at a commercially reasonable rate for that currency from the date of expropriation until the date of actual payment.
- (E) If a Party elects to pay in a currency other than a G7 currency, the amount paid on the date of payment, if converted into a G7 currency at the market rate of exchange prevailing on that date, shall be no less than if the amount of compensation owed on the date of expropriation had been converted into that G7 currency at the market rate of exchange prevailing on that date, and interest had accrued at a commercially reasonable rate for that G7 currency from the date of expropriation until the date of payment.
- (F) On payment, compensation shall be freely transferable. Awards that are significantly burdensome on a host state may be paid yearly over a period of three years or such other period as agreed by the Parties, subject to interest at the rate established by agreement of the disputants or by a tribunal.
- (G) This Article does 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.
- (H) 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.
- (I) Consistent with the right of states to regulate and the customary international law principles on police powers, *bona fide*, non-discriminatory regulatory measures taken by a Party that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an indirect expropriation under this Article.⁹

⁹ By contrast, a measure in the form of legislation or a regulation that takes title to property would not fall under the indirect expropriation formulation.

Article 9: Senior management and boards of directors

- (A) No Party may require that an investment appoint to senior management positions individuals of any particular nationality.
- (B) A 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 Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.
- (C) Subject to generally applicable rules of entry, no Party may unduly restrict or prevent the cross-border movement of senior management and members of the boards of directors of an investment.

Article 10: Transfers of assets

- (A) Each Party shall permit all transfers relating to an investment to be made freely and without delay. Such transfers include:
- i) profits, dividends, interest, capital gains, royalty payments, management fees, technical assistance and other fees, returns in kind, physical assets and other amounts derived from the investment;
 - ii) proceeds from the sale of all or any part of the investment or from the partial or complete liquidation of the investment;
 - iii) payments made under a contract entered into by the investor, or its investment, including payments made pursuant to a loan agreement;
 - iv) payments made pursuant to Article 8; and
 - v) payments arising under any dispute settlement process.
- (B) Each Party shall permit transfers to be made in a freely usable currency at the market rate of exchange prevailing on the date of transfer with respect to spot transactions in the currency to be transferred.
- (C) Notwithstanding Paragraphs (A) and (B), a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:
- i) bankruptcy, insolvency or the protection of the rights of creditors;
 - ii) issuing, trading or dealing in securities;
 - iii) criminal or penal offenses;
 - iv) reports of transfers of currency or other monetary instruments; or
 - v) ensuring the satisfaction of judgments in adjudicatory proceedings.
- (D) Notwithstanding Paragraph (B), a Party may restrict transfers or returns in kind in circumstances where it could otherwise restrict such transfers under this Agreement.

PART 3: OBLIGATIONS AND DUTIES OF INVESTORS AND INVESTMENTS

Article 11: General obligations

- (A) Investments are subject to the laws and regulations of the host state.
- (B) Investors and investments must comply with the host state measures prescribing the formalities of establishing an investment, and accept host state jurisdiction with respect to the investment.
- (C) Investors and investments shall strive, through their management policies and practices, to contribute to the development objectives of the host states and the local levels of government where the investment is located.
- (D) An investor shall provide such information to a potential host State Party as that Party may require concerning the investment in question for purposes of decision-making in relation to that investment or solely for statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the 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 domestic law.

Article 12: Pre-establishment impact assessment

- A) Investors or the investment shall comply with environmental assessment screening criteria¹⁰ 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, whichever is more rigorous in relation to the investment in question. On all occasions, the investor or investment shall comply with the minimum standards on environmental impact assessment and screening that the Parties shall adopt at the first meeting of the Parties, to the extent these are applicable to the investment in question.
- (B) Investors or the investment shall conduct a social impact assessment of the potential investment. The Parties shall adopt standards for this purpose at the first meeting of the Conference of the Parties.
- (C) Investors or the investment shall make the environmental and social impact assessments public and accessible in the local community and to affected interests in the host state where the investment is intended to be made prior to the completion of the host state measures prescribing the formalities for establishing an investment.
- (D) Investors, their investment and host state authorities shall apply the precautionary principle 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.¹¹ The application of the precautionary principle by investors and investments shall be described in the environmental impact assessment they undertake.

10 Screening criteria include issues related to the size of an enterprise, its inputs and its outputs, each of which impact the scope of an assessment that may be required. These will normally exempt small enterprises and many service-related enterprises from the application of any assessment process. By contrast, resource-related projects will rarely be exempted.

11 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 a reason for postponing cost-effective measures to prevent environmental degradation."

Article 13: Anti-corruption

- (A) 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, 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.
- (B) Investors and their investments shall not be complicit in any act described in Paragraph (A), including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.

Article 14: Post-establishment obligations

- (A) Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies with over [250][500] employees, or in areas of resource exploitation or high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard. Emergency response and decommissioning plans shall be included in the environmental management system process.¹²
- (B) Investors and investments should uphold human rights in the workplace and in the state and community in which they are located. Investors shall not undertake or cause to be undertaken, acts that breach such human rights. Investors and investments shall not be complicit with, or assist in, the violation of the human rights by others in the host state, including public authorities or during civil strife. The Parties shall, at their first meeting, adopt a list of international human rights and human rights instruments to assist investors in complying with this Provision.
- (C) Investors and investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.¹³
- (D) Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental,¹⁴ labour and human rights obligations to which the host state and/or home state are Parties.

12 The ability to maintain a current certification may be hampered by lack of qualified certification bodies in some regions. This may be seen as a temporary problem when alternatives are being pursued in good faith by an investment.

13 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.

14 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 15: Corporate governance and practices

In accordance with the size and nature of an investment,

- (A) Investments shall meet or exceed national and internationally accepted standards of corporate governance for the sector involved, in particular for transparency and accounting practices.
- (B) Investors and investments shall make available to the public any investment contract or agreement with the host state government(s) involved in the investment authorization process, subject to the redaction of confidential business information. Investors or investments shall publish all information relating to payments made to host state public authorities, including taxes, royalties, surcharges, fees and all other payments.
- (C) Investments shall establish and maintain, where appropriate, local community liaison processes, in accordance with internationally accepted standards when available.
- (D) Where relevant internationally accepted standards of the type described in this Article are not available or have been developed without the participation of developing countries, the Conference of the Parties may establish such standards.

Article 16: Corporate social responsibility

- (A) In addition to the obligation to comply with all applicable laws and regulations of the host state and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investment, and taking into account the development plans and priorities of the host state, the Millennium Development Goals and the indicative list of key responsibilities provided in Annex F, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the host state and local community through high levels of socially responsible practices.
- (B) Investors should apply the ILO Tripartite Declaration on Multinational Enterprises and Social Policy and the OECD Guidelines for Multinational Enterprises, as well as specific or sectoral standards of responsible practice where these exist.
- (C) Where standards of corporate social responsibility increase, investors should strive to apply and achieve the higher level standards.

Article 17: Investor liability

Investors shall be subject to civil actions for liability in the judicial process of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state.

Article 18: Relation of this Part to dispute settlement

- (A) Where an investor or its investment has breached Article 13 of this Agreement, neither the investor nor investment shall be entitled to initiate any dispute settlement process established under this Agreement. A host or home state may raise this as an objection to jurisdiction in any dispute under this Agreement, or in the procedure set out in Part 9 of this Agreement.
- (B) Where an investor or its investment is alleged by a host state or an intervener in a dispute settlement proceeding under this Agreement to have failed to comply with its obligation relating to pre-establishment impact assessment, 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.
- (C) Where a host state or home state believes that an investor or its investment has breached Article 13 or has persistently failed to comply with its obligations under Articles 14 or 15, and such investor or investment has been notified by the host state or home state, as appropriate, either the host state or the home state may initiate proceedings before a tribunal under Part 9 of this Agreement to have the rights of the investor or investment, as the case may be, abrogated.
- (D) Where a persistent failure to comply with Articles 14 or 15 is raised by a host state defendant or an intervener in a dispute settlement proceeding 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.
- (E) A host state may initiate a counterclaim before any tribunal established pursuant to this Agreement for damages resulting from an alleged breach of the Agreement.
- (F) In accordance with the applicable domestic law, a host state or private person or organization, may initiate actions for damages under the domestic law of the host state, or the domestic law of the home state where such an action relates to the specific conduct of the investor, for damages arising from an alleged breach of the obligations set out in this Part.

PART 4: HOST STATE OBLIGATIONS

Article 19: Procedural fairness

In accordance with the requirements of Article 7:

- (A) Host states shall ensure that their administrative, legislative and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural fairness to investors and investments. Investors or investments shall be notified in a timely fashion of administrative or judicial proceedings directly relating to them, unless such notice is contrary to domestic law on an exceptional basis.¹⁴
- (B) Hosts states shall act in a manner that does not create a denial of justice in judicial and administrative proceedings.¹⁵
- (C) Administrative decision-making processes shall include the right of administrative appeal of decisions, commensurate with the level of development of the host state. Judicial review of administrative decisions should also be available through domestic judicial review processes.
- (D) For greater certainty, the Parties understand that different Parties have different forms of administrative, legislative and judicial systems, and that states at different levels of development may not achieve the same standards or qualities for their administrative and judicial processes. Paragraphs (A)–(C) of this Article do not establish a single international standard in this context.
- (E) Host states should strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes, and shall provide review or appeal procedures to ensure that they operate in accordance with applicable domestic laws and regulations.
- (F) Judicial and administrative review processes shall be open to the public and documents shall be accessible by the public unless prohibited in accordance with domestic law. Decisions of such bodies shall be made available to the public.

¹⁴ For example, criminal investigations may require that no notice be given to anyone.

¹⁵ The fact that an investor or investment does not achieve a desired result does not constitute a denial of justice.

Article 20: Maintenance of environmental and other standards

The Parties recognize that it is inappropriate to encourage investment by relaxing domestic labour, public health, safety or environmental measures and thus shall not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in their territories, of an investment.

Article 21: Minimum standards for environmental, labour and human rights protection

- (A) Recognizing the right of each Party to establish its own level of domestic environmental protection and its own sustainable development policies and priorities, and to adopt or modify its environmental laws and regulations, each Party shall ensure that its laws and regulations provide for high levels of environmental protection and shall strive to continue to improve those laws and regulations.
- (B) Each Party shall ensure that its laws and regulations provide for high levels of labour and human rights protection appropriate to its economic and social situation, and shall strive to continue to improve these laws and regulations.
- (C) All Parties shall have, as a soon as practicable, a domestic environmental impact assessment law and social impact assessment law that meets the minimum standards adopted by the Conference of the Parties on these matters.
- (D) All Parties shall ensure that their domestic law and policies are consistent with the core labor requirements of the ILO Declaration on Fundamental Principles and Rights of Work, 1998.

- (E) All parties shall ensure that their laws, policies and actions are consistent with the international human rights agreements to which they are a Party and, at a minimum, as soon as practicable with the list of human rights obligations and agreements to be adopted by the first meeting of the Parties.

Article 22: Anti-corruption

All host states shall ensure that

- (A) the offering, solicitation or acceptance of an offer, promise or gift of any pecuniary or other nature, whether directly or through intermediaries, to any public official of the host state, 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 to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment; and
- (B) any acts complicit in any act described in Paragraph (A), including incitement, aiding and abetting, conspiracy to commit or authorization of such acts;

shall be made criminal offences in the host state and subject to appropriate criminal enforcement and sanctions. Host states shall make every effort to prosecute such activities in accordance with domestic law.

Article 23: Publication of information

Host states shall make available to the public any investment contracts or agreements with an investor or investment involved in the investment authorization process, subject to the redaction of confidential business information. Host states shall make available to the public all information relating to payments made to host state public authorities, including taxes, royalties, surcharges, fees and all other payments by investments.

Article 24: Subsidies

Potential host states should not compete for the achievement of foreign investment or investments through subsidies or other means, including tax relief, that distort international competition for investments. The Parties shall initiate negotiations on a Protocol to establish legally binding obligations in this issue, having due regard for the need for special and differential treatment of developing countries, particularly least-developed countries, in such obligations.

PART 5: HOST STATE RIGHTS

Article 25: Inherent rights of states

- (A) Host states have, in accordance with the general principles of international law, the right to pursue their own development objectives and priorities.
- (B) In accordance with customary international law and other general principles of international law, host states have the right to take regulatory or other measures to ensure that development in their territory is consistent with the goals and principles of sustainable development, and with other social and economic policy objectives.
- (C) Except where the rights of a host state are expressly stated as an exception to the obligations of this Agreement, the pursuit of these rights 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, and consistent with other norms of customary international law.
- (D) *Bona fide*, non-discriminatory, measures taken by a Party to comply with its international obligations under other treaties shall not constitute a breach of this Agreement.
- (E) Host states may, through their applicable constitutional processes, fully incorporate this Agreement into their own domestic law so as to make the provisions herein enforceable before domestic courts or other appropriate processes.

Article 26: Performance requirements

- (A) The Parties recognize their obligations regarding trade-related investment measures established in other international agreements to which they are a Party.
- (B) Subject to Paragraph (A), host states may impose performance requirements to promote domestic development benefits from investments. Measures adopted prior to the completion of the host state measures prescribing the formalities for establishing an investment shall be deemed to be in compliance with this Agreement. If such measures are taken after the completion of the host state measures prescribing the formalities for establishing an investment, they shall be subject to the provisions of this Agreement.
- (C) Measures covered by this Article include requirements:
 - i) to export a given level or percentage of goods or services;
 - ii) to achieve a given level or percentage of domestic content;
 - iii) to purchase, use or accord a preference to goods produced or services provided in its territory;
 - iv) to purchase goods or services from persons in its territory;
 - v) to relate the volume or value of imports to the volume or value of exports or to the amount of foreign exchange flows associated with such investment;
 - vi) to restrict sales of goods or services in its territory that such investment produces by relating such sales to the volume or value of its exports or foreign exchange earnings; and
 - vii) similar measures intended to promote domestic development.

Article 27: Investment promotion and facilitation

Host states may maintain and develop investment promotion and facilitation agencies and services.

Article 28: Access to investor information

- (A) Host states have the right to seek information from a potential investor or its home state about its corporate governance history and its practices as an investor, including in its home state.
- (B) Host states shall protect confidential business information they receive in this regard.
- (C) Host states may make the information provided available to the public in the community where the investment may be located, subject to the protection of confidential business information and to other applicable domestic laws.

PART 6: HOME STATE RIGHTS AND OBLIGATIONS

Article 29: Assistance and facilitation for foreign investment

- (A) Home states with the capacity to do so should assist developing and least-developed states in the promotion and facilitation of foreign investment into such states, in particular by their own investors. Such assistance shall be consistent with the development goals and priorities of the countries in question. Such assistance may include, *inter alia*:
- i) capacity building with respect to host state agencies and programs on investment promotion and facilitation;
 - ii) insurance programs based on commercial principles;
 - iii) direct financial assistance in support of the investment or of feasibility studies prior to the investment being established;
 - iv) technical or financial support for environmental and social impact assessments of a potential investment;
 - v) technology transfer; and
 - vi) periodic trade missions, support for joint business councils and other cooperative efforts to promote sustainable investments.
- (B) Home states shall inform host states of the form and extent of available assistance as appropriate for the type and size of different investments.

Article 30: Information

- (A) Home states shall, on request, and in a timely manner, provide to a potential host state such information as is requested and available for the purposes of the host state to meet its obligations and perform its duties in relation to an investor or investment under this Agreement and the host state's domestic law. Home states shall protect confidential business information in this regard.
- (B) Home states shall, on request, and in a timely manner, provide information relevant to the home state standards that might apply under like circumstances to the investment proposed by its investor, including but not limited to the home state environmental impact assessment process.

Article 31: Investor liability in home state

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 for damages resulting from alleged acts or decisions made by investors in relation to their investments in the territory of other Parties.¹⁶ The host state laws on liability shall apply to such proceedings.

¹⁶ This Article requires home states to end 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.

Article 32: Anti-corruption

- (A) All home states shall ensure that:
- i) the offer, promise or giving of any money or gift of any other nature, whether directly or through intermediaries, to any public official of the host state, 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 to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment; and
 - ii) any acts complicit in any act described in Paragraph (i), including incitement, aiding and abetting, conspiracy to commit or authorization of such acts;

Part 6: Home State Rights and Obligations

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shall be made criminal offences in the home state and subject to appropriate criminal enforcement and sanctions. Home states shall make every effort to prosecute such activities in accordance with domestic law.

- (B) All home states shall ensure that any money or other forms of benefits encompassed in Paragraph (A) shall not be recoverable or deductible in any fiscal or tax laws or policies.
- (C) Home states shall, when possible, provide all available information that might assist a dispute settlement tribunal under this Agreement in determining whether a breach of an anti-corruption obligation has occurred.

PART 7: RELATION TO OTHER AGREEMENTS

Article 33: Relation to other investment agreements and obligations

- (A) Upon the home and host states becoming Parties to this Agreement, all pre-existing international investment agreements to which they are a Party shall, as between such states, be deemed to be terminated by mutual consent and all the rights and obligations due shall be pursuant to this Agreement. Except as specified in Article 3(F), such termination shall be immediate notwithstanding any expiration period for the rights of investors or investments under such pre-existing agreements.
- (B) Where states Party to this agreement have an international investment agreement with a non-Party, they shall strive to renegotiate those agreements to make them consistent with the present Agreement or to ensure that all Parties to the other Agreement become a Party to this Agreement.
- (C) States Party to this agreement shall ensure that all future investment agreements to which they may become Party are fully consistent with the present Agreement, particularly with the balance of rights and obligations it establishes, and the principal features of the dispute settlement system. The Conference of the Parties may be called upon to assess compliance with this obligation on the request of a Party.
- (D) Notwithstanding any of the above, any disputes that have been formally initiated under prior international investment agreements shall be decided in accordance with the rights and obligations of that agreement.

Article 34: Relation to other international agreements

- (A) The Parties agree that the provisions of other international trade agreements to which they are a Party are consistent with the provisions of this Agreement. The Parties shall seek to interpret such agreements in a mutually supportive manner.
- (B) In the event of any dispute arising on this issue, the Parties shall seek to resolve such dispute within the mechanisms of this agreement as a first step.
- (C) The Parties hereby re-affirm their obligations under international environmental and human rights agreements to which they are a Party.

PART 8: INSTITUTIONS

Article 35: National Authority

- (A) Each Party shall establish a National Authority as a contact point for purposes related to the Agreement. The functions of the National Authority shall include:
- i) requesting or transmitting information from or to another Party;
 - ii) providing a contact for assistance in investment promotion and facilitation;
 - iii) maintaining statistics about inward and outward investment of the Party;
 - iv) handling enquiries in relation to the conduct of investments or investors of the Party;
 - v) investigating and seeking to resolve concerns or conflicts raised by individuals or civil society groups in relation to the conduct of investors or investments concerning their obligations under this Agreement or the additional responsibilities set out in the Agreement;
 - vi) reporting on any matters dealt with under Paragraph v; and
 - vii) any other functions the Party incorporates into its work.
- (B) The National Authority shall operate in a visible, accessible, transparent and accountable manner. It shall receive and consider information, statements of concern or other information from government officials, non-governmental groups or individuals from the State Party in which it is established, or from the host state of an investor for which it is the home state.

Article 36: Conference of the Parties

- (A) The Conference of the Parties will be the governing body of the Agreement. It shall meet within one year of the Agreement coming into force, and once every year after that.
- (B) The Conference of the Parties shall adopt at its first meeting rules of procedure and financial rules for itself and any subsidiary bodies, as well as financial provisions governing the functioning of the Conference of the Parties and the Secretariat.
- (C) All Parties shall have an equal voice on the Conference of the Parties. Decisions shall be taken by consensus. Where, after all efforts are exhausted, no consensus is deemed possible by the chair of a meeting, a decision may be taken by three-quarters of the Parties present and voting.
- (D) The Conference of the Parties shall perform the tasks assigned by the Agreement and such additional tasks as it deems appropriate for the fulfillment of the purposes of the Agreement. These tasks shall include, *inter alia*:
- i) appoint the Executive Director of the Secretariat, and instruct the Secretariat on its functions;
 - ii) adopt Protocols and Annexes to this Agreement;
 - iii) adopt the instruments or lists required of it in other Articles of this Agreement;
 - iv) promote the development of qualitative standards for sustainable investments;
 - v) establish qualitative criteria for measuring the effective contribution of investments to host state development;
 - vi) monitor the effectiveness of this Agreement, including undertaking of a three-year review of the operation and effectiveness of this Agreement and subsequent reviews every three years;
 - vii) establish a procedure for Parties to report on the implementation and effectiveness of the Agreement at the state level;
 - viii) appoint such sub-organs or committees as it determines necessary for the proper functioning of this Agreement, including an Executive Committee of regionally balanced representation to oversee the management and operation of this Agreement between meetings of the Conference of the Parties, and a review and monitoring body to assist in the monitoring of this Agreement; and

- ix) adopt interpretative statements concerning the interpretation of this Agreement.
- (E) The United Nations and its specialized agencies, the World Trade Organization, the World Bank and its component agencies, any other inter-governmental organization whose work is impacted by this Agreement, as well as any state not Party to this Convention, may be represented at meetings of the Conference of the Parties as observers. Any body or agency, whether national or international, governmental or non-governmental, qualified in matters covered by the Convention, and which has informed the Secretariat of its wish to be represented at a meeting of the Conference of the Parties as an observer, may be admitted unless at least two-thirds of the Parties present object. The admission and participation of observers shall be subject to the rules of procedure adopted by the Conference of the Parties.

Article 37: Technical Assistance Committee

A Technical Assistance Committee of the Conference of the Parties is hereby established as a Committee of the whole. This Committee shall:

- i) have special expertise in the promotion of development and sustainable investments;
- ii) organize the provision of technical assistance to the Parties relating to the implementation of this Agreement, upon their request, including in the area of development planning and investment linkages;
- iii) establish and manage a special fund for the provisions of technical assistance;
- iv) promote the transfer of technology through appropriate investments; and
- v) such other matters as the members of the Committee or the Conference of the Parties may determine.

The rules of procedure and participation applicable to the Conference of the Parties shall apply, *mutatis mutandis*, to this Committee.

Article 38: Financial mechanism

The Parties shall establish a financial mechanism with the objective of supporting institutional development and capacity building in host state developing countries and, in particular, least-developed countries. Support from this mechanism may be directed at support for the Technical Assistance Committee, investment promotion and facilitation projects, at the monitoring of the effectiveness of this agreement, and for the establishment and operation of the Legal Assistance Centre.

Article 39: Secretariat

- (A) A Secretariat to the Agreement is hereby established. The Secretariat shall be headed by an Executive Director appointed by the Conference of the Parties.
- (B) The Executive Director shall be responsible for appointing and managing an international staff capable of providing the necessary range of support for the Conference of the Parties and to meet its responsibilities.
- (C) The Secretariat shall be an independent body and undertake such tasks as may be directed by the Conference of the Parties. Such tasks may include:
 - i) making arrangements for meetings of the Conference of the Parties and its subsidiary bodies and to provide them with services as required;
 - ii) facilitating assistance to the Parties, particularly developing Parties and Parties with economies in transition, on request, in the implementation of this Agreement;
 - iii) ensuring the necessary coordination with the Secretariats of other relevant international bodies;
 - iv) entering, under the overall guidance of the Conference of the Parties, into such administrative and contractual arrangements as may be required for the effective discharge of its functions;

- v) collecting and disseminating information on the functioning of this Agreement, including the implementation of its provisions and the rates of foreign direct investment under the Agreement;
- vi) establishing a list of qualified mediators to assist Parties, investors and investments in resolving potential disputes;
- vii) performing the other Secretariat functions specified in this Convention and such other functions as may be determined by the Conference of the Parties; and
- viii) performing the tasks necessary to assist in preparing for the first meeting of the Conference of the Parties.

Article 40: Dispute Settlement Body

- (A) A Dispute Settlement Body (DSB) is hereby established to manage the dispute settlement processes under this Agreement.
- (B) The Dispute Settlement Body shall be composed of a Council of the Parties open to all Parties, a panel division and an appellate division.
- (C) The Council of the Parties shall establish a Secretariat to assist the Dispute Settlement Body in its operation and the panel and appellate divisions in the management of their cases. The Secretariat shall be headed by a Director.¹⁷ This dispute settlement Secretariat shall be independent of any other body established by this Agreement.
- (D) The Council shall oversee the operation of the Dispute Settlement Body. It shall be responsible for ensuring the smooth operation of the dispute settlement processes as a whole. The Council may not interfere in any individual disputes between Parties or between an investor or investment and a Party.
- (E) There shall be a standing body of 35 panelists from which all panel members shall be drawn. The Director of the Council shall appoint all panelists on disputes on a lottery basis, and subject to:
 - i) no panelist being called to serve more than twice before all other panelists have served at least once; and
 - ii) no panelist being from a state of a disputing Party.
- (F) The panelists shall be chosen by the Council at its first meeting, with one-third then chosen at each subsequent meeting. No panelist can serve more than three terms, subject to completing any ongoing dispute settlement processes in which the panelist is engaged.
- (G) Any panelist in a position of real or apparent conflict of interest shall recuse himself or herself from the panel in question.
- (H) The appellate division shall be composed of nine individuals with recognized expertise in the matters covered by this Agreement. Appellate body members shall be appointed on a full-time basis and be free of any real or apparent conflict of interest in any case on which they sit.
- (I) Appellate division members shall be chosen by the Council for a term of seven years. The Council shall choose a replacement for any member who is incapable of continuing to fulfill their duties for the remainder of their term. Members may be re-elected one time. For the first period, the Council shall select new members or re-select existing members, after four years.
- (J) Members of the panel and appellate divisions shall be individuals of high repute with expertise in the matters covered by this Agreement. Each shall comply with a Code of Ethics that will establish the highest standards of conduct and ensure the absence of a real or apparent conflict of interest in all cases.¹⁸ No panel or appellate body member may be an advocate in any arbitration cases at the same time as being a member of either division, or affiliated with other advocates in a similar situation.

¹⁷ The Council of the Parties may designate, subject to appropriate arrangements being agreed, the Centre to act as the Secretariat for the Dispute Settlement Body if it becomes an independent body responsible only to the Council of the Parties.

¹⁸ A minimum standard to be included in the Code of Ethics shall require that no panel division member may be an advocate in any investment arbitration cases at the same time as being a member of either division, or directly affiliated with other advocates in a similar situation. (Appellate division appointments are full time and in a personal capacity, and hence encompass this rule by definition.)

Article 41: Legal Assistance Centre

- (A) A Legal Assistance Centre to assist developing country Parties, and especially least-developed states, in responding to claims by an investor or in initiating procedures permitted under this Agreement against investors, shall be established.
- (B) This Centre shall be independent of the Secretariat and function as a self-directed body. Its legal advice shall be confidential and subject to the same standards of lawyer-client protection and service as a private law firm.
- (C) The Centre may also assist in capacity building on legal issues raised in this Agreement in developing countries, or for the implementation of the Agreement under domestic law and policy.
- (D) The Legal Assistance Centre shall report to the Conference of the Parties on a yearly basis concerning its financing and a summary of its activities.
- (E) The Legal Assistance Centre shall disclose all sources of funds. It may receive funds from states Party, other States, international organizations and non-governmental organizations as long as the receipt of such funds is public and does not compromise the integrity of the Centre.

PART 9: DISPUTE PREVENTION AND SETTLEMENT

Article 42: Prevention of disputes and mediation

- (A) In the event a dispute arises between the Parties, between a State Party and an investment or investor, or between an investment or investor and a host state, the Party wishing to raise the dispute shall issue a notice of intention to initiate an arbitration under this Agreement to the other potential disputing Party or Parties.
- (B) For the purposes of this Agreement, there shall be a minimum six-month cooling-off period between the date of a notice of intention to initiate a dispute settlement process under this Agreement, and the date a Party, investment or investor, as the case may be, may formally initiate a dispute.
- (C) The Parties shall seek to resolve potential disputes through amicable means, both prior to and during the cooling-off period. Investors and investments shall similarly seek to resolve potential disputes with host states, and host states with their investors and investments, in an amicable manner, prior to and during the cooling-off period. The use of good offices, conciliation, mediation or any other agreed dispute resolution process may be applied.
- (D) Where no alternative means of dispute settlement are agreed upon, Parties, investors or investments, as the case requires, shall seek the assistance of a mediator to resolve disputes during the cooling-off period required under this Agreement between notification of a potential dispute and the initiation of dispute settlement proceedings. The potential disputants shall use a mediator from the list established by the Secretariat for this purpose, or another one of their joint choosing. Recourse to mediation does alter the minimum cooling-off period.
- (E) If no mediator is chosen by the disputing parties prior to three months before the expiration of the cooling-off period, the Director of the Council shall appoint a mediator from the Secretariat list who is not a national of a State Party or the investor. The appointment shall be binding on the disputing parties.
- (F) The Parties may also establish regionally-based mediation centres to facilitate the resolution of disputes between Parties and investors or investments, taking into account regional customs and traditions. Mediators officially appointed to such centres shall be incorporated into the Secretariat list.

Article 43: State-state disputes

- (A) In the event of a dispute between two or more Parties as to the application or interpretation of this Agreement, and such dispute has not been resolved pursuant to good faith efforts in accordance with Article 42, a Party may initiate an arbitration in accordance with the rules in this Agreement, including Annex A of this Agreement, applying them *mutatis mutandis* to the context of a state-state dispute.
- (B) Such a dispute shall, unless otherwise resolved, proceed to a panel, and may, at the discretion of a disputing Party, subsequently be taken to the appellate division.

Article 44: Procedure for abrogation of investor/investment rights

- (A) In the event of a dispute between a Party and an investor or investment relating to the abrogation of said investor's or investment's rights under Article 18 of this Agreement, and such dispute has not been resolved pursuant to good faith efforts in accordance with Article 42, a Party may initiate an arbitration in accordance with the rules in this Agreement, including Annex A of this Agreement, applying them *mutatis mutandis* to the context of a state-investor/investment dispute.
- (B) A special expedited process shall be established by the Council to ensure that a panel decision shall be rendered within six months of an arbitration being initiated. The appellate division shall decide any appeal on this issue within 90 days of its submission to them.¹⁹

¹⁹ Panels and the appellate division shall establish their own *ad hoc* procedure, in keeping with good international practice, in the event of an action under this Article prior to the Council adopting a procedure.

- (C) The panel or appellate division may, if requested, issue an interim order suspending the rights of the investor(s) or investment for the duration of the process, so long as any period of limitations that may impact the ability of the investor or investment to initiate a dispute is subsequently extended by the length of any such suspension if necessary.
- (D) A dispute under this Article may, at the discretion of a disputing party, be appealed to the appellate division.
- (E) The decision of the panel or appellate division on the abrogation of rights may be permanent or for any period over a minimum of three years it determines is appropriate, or may provide a minimum period after which the investment or investor(s) may apply for reinstatement of its rights.

Article 45: Investor/investment-state disputes

- (A) In the event of a dispute between an investor or investment and a host State Party as to the application or interpretation of this Agreement, and such dispute has not been resolved pursuant to good faith efforts in accordance with Article 42, the investment or investor may initiate an arbitration in accordance with the rules in this Agreement, including in Annex A, applying them *mutatis mutandis* to the context of an investor/investment-state dispute.
- (B) A dispute between an investor or investment and a host state may not be commenced until domestic remedies are exhausted in relation to the underlying issues pleaded in relation to a breach of the Agreement.
- (C) Where such remedies are unavailable due to the subject of the dispute or a demonstrable lack of independence or timeliness of the judicial or administrative processes²⁰ implicated in the matter in the host state, an investor may plead this in an application before a panel as a preliminary matter. The decision of a panel on this issue shall be final. This panel shall be chosen in accordance with Article 40. The Council shall establish procedures for such a pleading at its first meeting.²¹
- (D) Where a dispute under this Article proceeds to a panel, the decision may, at the discretion of a disputing Party, subsequently be taken to the appellate division.
- (E) Use of the investor-state process by an investor is subject to Article 18.

20 The Parties recognize that different processes do take different amounts of time. Thus, the key determinant should be that the procedures are moving forward in a time that is consistent with good practice and the normally anticipated timeframe for that type of procedure in the host state, and that no undue burdens or impediments are being placed on the proceedings.

21 Panels shall establish their own *ad hoc* procedure, in keeping with good international practice, in the event of an action under this Paragraph prior to the Council adopting a procedure.

Article 46: Transparency of proceedings

- (A) All documents relating to a notice of intention to arbitrate, the settlement of any dispute pursuant to Article 42, the initiation of a panel or appeal, or the pleadings, evidence and decisions in them, shall be available to the public through an Internet site.
- (B) Procedural and substantive oral hearings shall be open to the public.
- (C) A panel or appellate tribunal may take such steps as are necessary, by exception, to protect confidential business information in written form or at oral hearings.
- (D) A panel or appellate tribunal shall be open to the receipt of *amicus curiae* submissions in accordance with the process set out in Annex A.

Article 47: Enforceability of final awards

Parties shall adopt such domestic rules as are required to make final awards enforceable in domestic legal proceedings in their states.

Article 48: Governing law in disputes

- (A) When a claim is submitted to a panel or an appeal tribunal, it shall be decided in accordance with this Agreement, national law of the host state, and the general principles of international law.
- (B) The Interpretive Notes of the Parties attached to this Agreement shall be binding upon any tribunal established under this Agreement, and any award must be consistent with such Notes.
- (C) An Interpretive Statement adopted by the Conference of the Parties declaring its interpretation of a provision of this Agreement shall be binding upon any tribunal established under this Agreement, and any award must be consistent with such a Statement.
- (D) A decision by the appellate division on an interpretation of this Agreement shall be binding on subsequent panels and appellate tribunals, unless it is made inapplicable by virtue of an Interpretive Statement relating to the Agreement adopted by the Conference of the Parties, or an amendment to the Agreement.

PART 10: GENERAL EXCEPTIONS

Article 49: National security

Nothing in this Agreement shall be construed:

- i) to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or
- ii) to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations under the United Nations Charter with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Article 50: Rules for taxation measures

- (A) Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.
- (B) Nothing in this Agreement shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Agreement and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Agreement and that convention.
- (C) National treatment and most-favoured-nation treatment shall apply to all taxation measures, other than those on income, capital gains or on the taxable capital of corporations, taxes on estates, inheritances, gifts, and generation-skipping transfers, except that nothing in those Articles shall apply:
 - i) in the case of a most-favoured-nation obligation, with respect to an advantage accorded by a Party pursuant to a tax convention;
 - ii) to a non-conforming provision of any existing taxation measure;
 - iii) to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure;
 - iv) to an amendment to a non-conforming provision of any existing taxation measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with any of those Articles;
 - v) to the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes (as permitted by Article XIV(d) of GATS); or
 - vi) to a provision that conditions the receipt, or continued receipt, of an advantage relating to the contributions to, or income of, pension trusts or pension plans on a requirement that the Party maintain continuous jurisdiction over the pension trust or pension plan.
- (D) Article 8 shall apply to a taxation measure alleged to be an expropriation. However, no investor may invoke Article 8 as the basis of a claim where it has been determined pursuant to this Paragraph that the measure is not an expropriation. An investor that seeks to invoke Article 8 with respect to a taxation measure must refer to the Executive Director of the Secretariat at the time that it gives its notice of intention to arbitrate under Article 42 the issue of whether that taxation measure involves an expropriation. The Executive Director shall ask the competent authorities of the host state and home state whether they do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, in which case the investor may submit its claim to arbitration, if the other conditions of Article 45 have been fulfilled as well.

Article 51: General reservations and exceptions

- (A) The provisions of this Agreement, except Article 8, do not apply to any law or other measure of a host state the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by long-term historic discrimination in its territory, provided that such law or other measure is compatible with the requirements of Article 19.
- (B) State Parties may take such measures as are necessary to avoid or abate a balance of payments emergency. Such measures shall be kept in force for as short as possible to address the emergency situation. Such measures shall not be subject to this Agreement.

PART 11: FINAL PROVISIONS

Article 52: Regional cooperation

Where appropriate, the Parties shall cooperate in the negotiation of regional cooperation agreements on matters covered by this agreement, and the development of regional capacity in this field.

Article 53: Amendment

- (A) The Parties may agree on any modification of, or addition to, this Agreement, through the Conference of the Parties.
- (B) When so agreed, and approved in accordance with the applicable legal procedures of each Party, and the provisions on entry into force with the amendment, a modification or addition shall constitute an integral part of this Agreement for those Parties that become Party to the amendment.

Article 54: Annexes, Appendices and Notes

- (A) The Annexes and footnotes to this Agreement constitute an integral part of this Agreement.
- (B) The national lists in Annex E may be amended by each Party at their discretion.

Article 55: Protocols

The Parties may, at a Conference of the Parties, adopt a Protocol to this Agreement.

Article 56: Entry into force

This Agreement shall enter into force 90 days after the receipt by the depository of the 40th instrument of ratification or accession to this Agreement.

Article 57: Withdrawal

- (A) Any Party may withdraw from this Agreement by written notification to the other Parties. This Agreement shall expire for that Party 180 days after the date of such notification.
- (B) Notwithstanding Paragraph (A), the rights and obligations of investors and investments and host and home states in relation to that investment or investor, where an investment is substantially in progress of being established or has been established shall survive for a period of five years from such a withdrawal. The five-year period shall be extended to the full period of any investment contract, agreement or authorization if one is in existence at the time of the withdrawal.

Article 58: Authentic texts

The English language text of this Agreement shall be its authentic language.

Article 59: Depositary

The Depositary of this Agreement shall be the Secretary-General of the United Nations.

ANNEX A: INVESTOR-STATE DISPUTE SETTLEMENT

Article 1: Consultation and negotiation

In the event of a dispute under this Agreement, the claimant (investor/investment/State Party) and the respondent (investor/investment/State Party) shall seek to resolve the dispute in accordance with Article 42. The claimant and respondent constitute the disputing parties.

Article 2: Submission of a claim to arbitration

- (1) In the event that a disputing party considers that a dispute cannot be settled by alternative means, and all other pre-conditions for such a dispute as required by the Agreement have been fulfilled:
 - a) the investment, on its own behalf, may submit to arbitration under this Agreement a claim that the respondent host State has breached an obligation under this Agreement and that the investment has incurred loss or damage by reason of, or arising out of, that breach;
 - b) the investor, on its own or on behalf of the investment if it is the controlling investor, may submit to arbitration under this Agreement a claim that the respondent has breached an obligation under this Agreement, and that the claimant has incurred loss or damage by reason of, or arising out of, that breach;
 - c) a State Party may submit a claim to arbitration under this Agreement as claimant against another State party; and
 - d) a State Party may submit a claim to arbitration as claimant against an investor or investment.
- (2) For greater certainty, an investor or investment claimant may submit to arbitration a claim referred to in Paragraph (1) that the respondent has breached an obligation through the actions of a designated monopoly or a state enterprise exercising delegated government authority.
- (3) At least 180 days before submitting any claim to arbitration, a potential claimant shall deliver to the potential respondent a written notice of its intention to submit the claim to arbitration (“notice of intention”). The notice shall specify:
 - a) the name and address of the claimant and its legal representative and, where a claim is submitted on behalf of an investment, the name, address and place of incorporation of the investment;
 - b) for each claim, the provision(s) 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, where appropriate, the approximate amount of damages claimed.

The Council may establish a specific form for this purpose and make it available through the Internet and other means, and through the National Authorities.

- (4) Provided that at least six months have elapsed since the events giving rise to the claim, and all other pre-conditions for such a dispute as required by the Agreement have been fulfilled, a claimant may formally submit a Notice of Arbitration to the Dispute Settlement Body, panel division, established by this Agreement.
- (5) A claim shall be deemed submitted to arbitration when the claimant’s Notice of Arbitration is submitted to the Secretariat of the Dispute Settlement Body and to the respondent at its designated place of business or to its National Authority. The Council may establish a specific form for this purpose and make it available through the internet and other means, and through the National Authorities. The Notice of Arbitration shall include, at a minimum, the information required in Paragraph (3).

Article 3: Rules of Arbitration

The Council of the Dispute Settlement Body shall establish Rules of Arbitration consistent with the provisions of this Agreement. Until the adoption of such Rules, the Rules of Arbitration of the Centre in effect on the date the claim or claims were submitted to arbitration under this Agreement, shall govern the arbitration except to the extent modified by this Agreement, irrespective of whether the host and home states are parties to the ICSID Convention.

Article 4: Consent of each Party to arbitration

Each State Party consents to the submission of a claim to arbitration under this Agreement in accordance with its provisions. Each investor and investment, by virtue of establishing or continuing to operate or own an investment subject to this Agreement, consents to the submission of a claim to arbitration under this Agreement.

Article 5: Conditions and limitations on consent of each Party

- (1) No claim may be submitted to arbitration if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged in the Notice of Arbitration. This Article does not apply in the case of Article 13 of this Agreement.
- (2) No claim may be submitted to arbitration by an investor or investment unless the claimant has demonstrated that the requirement for the exhaustion of local remedies has been complied with or the claimant has been granted a request to a panel for a finding that it is not in a viable position to exhaust local remedies. In the event of the latter case, the Notice of Arbitration shall be accompanied by an express written waiver of any such rights conditional on the initiation of an arbitration.

Article 6: Selection of arbitrators

- (1) The Director shall, within 30 days of the filing of a notice of arbitration, appoint the panel members from the standing roster of panelists. No panel member shall be from the host or home state.
- (2) A panel shall be composed of three members, with one designated as President of the panel.
- (3) A disputing party may contest the nomination of an arbitrator for good cause, including real or apparent conflict of interest. Any challenges shall be decided by the remaining two designated arbitrators. Such a challenge must be brought as soon as practicable after information leading to the challenge is made known to the challenging party.

Article 7: Conduct of the arbitration

- (1) Unless otherwise agreed, the place of arbitration shall be at the Secretariat to the Dispute Settlement Body or a regional affiliate in the region of the disputing party. The disputing parties may agree on another place of arbitration within 30 days of the notice of arbitration being filed.
- (2) Any non-disputing party may make oral and written submissions to the tribunal regarding the interpretation of this Agreement.
- (3) 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 a tribunal's competence, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made. This includes an objection pursuant to Article 18(1) of the Agreement.
 - a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its first counter-memorial.
 - 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 estab-

lished for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefore.

- c) In deciding an objection under this Paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration, except in so far as it may relate to a breach of Article 13 issue. The tribunal may also consider any relevant facts not in dispute.
 - d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this Paragraph or make use of the expedited procedure set out in the following Paragraph.
- (4) In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under Paragraph (3) or 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 therefore, 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 of time, which may not exceed 30 days.
 - (5) A claim to loss of jurisdiction due to a breach of Article 13 shall be decided by the tribunal on the basis of a balance of probabilities on the facts adduced in evidence before it. A tribunal does not have to wait for a determination by a domestic court in the host or home state.
 - (6) When it decides a respondent's objection under Paragraph (3) or (4), 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 *inter alia* whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.
 - (7) A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.
 - (8) A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach of the relevant parts of this Agreement. The protection of the public welfare and public interests shall be considered when any interim measures are requested.

Article 8: *Amicus curiae*

- (1) 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 "submitter").
- (2) The submissions shall be provided in English or in the principal language of the host state, and shall identify the submitter and any Party, other government, person, or organization, other than the submitter, that has provided, or will provide, any financial or other assistance in preparing the submission.
- (3) The Council may establish and make available to the public a standard form for applying for status as *amicus curiae*. This may include specific criteria which will help guide a tribunal in determining whether to accept a submission in any given instance.
- (4) *Amicus curiae* submissions may relate to any matter covered by this Agreement.

Article 9: Transparency of arbitral proceedings

- (1) Subject to Paragraphs (2) and (4), the claimant and respondent shall, after sending the following documents to the other disputing party, promptly transmit them to the Secretariat of the Dispute Settlement Body which shall make them available to the public, including by Internet:
 - a) the notice of intention;

- b) any settlement agreement resulting from alternative dispute resolution processes;
 - c) the notice of arbitration;
 - d) pleadings, memorials and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to this Annex or the Rules of Arbitration;
 - e) minutes or transcripts of hearings of the tribunal, where available; and
 - f) all orders, awards, and decisions of the tribunal.
- (2) The tribunal shall conduct all hearings open to the public and shall determine, in consultation with the disputing parties and the dispute settlement Secretariat the appropriate logistical arrangements. However, any disputing party that intends to use information designated as confidential business information or information that is privileged or otherwise protected from disclosure under a party's law in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.
- (3) Nothing in this section requires a respondent to disclose confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law or to furnish or allow access to information that it may withhold in accordance with this Agreement.
- (4) Confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law shall, if such information is submitted to the tribunal, be protected from disclosure in accordance with the following procedures:
- a) subject to Sub-paragraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing party or to the public any confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law where the disputing party that provided the information clearly designates it in accordance with Sub-paragraph (b);
 - b) any disputing party claiming that certain information constitutes confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law shall clearly designate the information at the time it is submitted to the tribunal;
 - c) a disputing party shall, at the same time that it submits a document containing information claimed to be confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing party and made public in accordance with Paragraph (1); and
 - d) the tribunal shall decide any objection regarding the designation of information claimed to be confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may:
 - i) withdraw all or part of its submission containing such information; or
 - ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and Sub-paragraph (c).

In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under Sub-paragraph (d)(i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under Sub-paragraph (d)(ii) of the disputing party that first submitted the information.
- (5) Nothing in this Agreement authorizes a respondent to withhold from the public information required to be disclosed by its laws.

Article 10: Interpretation of Annexes

- (1) Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an excluded sector in Annex C or is a non-conforming measure set out in Annex D, the tribunal shall, on request of a State Party that is a disputing party request the interpretation of the home and host

state on the issue. The home and host state shall submit in writing any decision declaring its interpretation under this Article the tribunal within 60 days of delivery of the request.

- (2) A decision issued under Paragraph (A) shall be binding on the tribunal, and any award must be consistent with that decision. If the home and host state fails to issue such a decision within 60 days, the tribunal shall decide the issue.

Article 11: Expert reports

A tribunal, at the request of a disputing party or on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other matters raised in a proceeding. The tribunal shall consider any terms or conditions relating to such appointments that the disputing parties may suggest.

Article 12: Consolidation

- (1) Where two or more claims have been submitted separately to arbitration under this Agreement and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order.
- (2) A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Director and to all the disputing parties sought to be covered by the order and shall specify in the request:
 - a) the names and addresses of all the disputing parties sought to be covered by the order;
 - b) the nature of the order sought; and
 - c) the grounds on which the order is sought.
- (3) Unless the Director finds within 30 days after receiving a request under Paragraph (2) that the request is manifestly unfounded, a separate tribunal shall be established under this Article by the Director solely to consider the issue of consolidation.
- (4) Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
 - a) assume jurisdiction over, and hear and determine together, all or part of the claims;
 - b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
 - c) instruct a tribunal previously established to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that that tribunal shall decide whether any prior hearing shall be repeated.
- (5) Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration and that has not been named in a request made under Paragraph (2) may make a written request to the tribunal that it be included in any order made under Paragraph (4), and shall specify in the request:
 - a) the name and address of the claimant;
 - b) the nature of the order sought; and
 - c) the grounds on which the order is sought.
- (6) On application of a disputing party, a tribunal established under this Article, pending its decision under Paragraph (4), may order that the proceedings of another tribunal be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 13: Awards

- (1) Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:
 - a) the specific remedies allowed for in Articles 18 and 44 of this Agreement in relation to an investor or investment;
 - b) monetary damages and any applicable interest against a State Party; and
 - c) restitution of property from a State Party, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs and attorneys' fees in accordance with the applicable arbitration rules.

- (2) Subject to Paragraph (1), where a claim is submitted to arbitration on behalf of an investment:
 - a) an award of restitution of property shall provide that restitution be made to the investment; and
 - b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the investment.
- (3) A tribunal may not award punitive damages.
- (4) An award made by a panel tribunal shall have no binding force except between the disputing parties and in respect of the particular case.
- (5) Subject to Paragraph (6) and the applicable appeal procedure, a disputing party shall abide by and comply with an award without delay.
- (6) A disputing party may not seek enforcement of a final award until:
 - a) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to appeal the award; or
 - b) the appellate division has rejected an appeal.
- (7) Each Party shall provide for the enforcement of an award in its territory and make the appropriate legal proceedings available for this purpose.

Article 14: Appellate process

- (1) A disputing investor/investment or party may appeal, within 60 days, a panel decision on the basis of an error of law or a material and manifest error of fact. Such appeals shall proceed in accordance with Annex A. No other appeal or arbitration review process shall be applicable to arbitrations under this Agreement.
- (2) The appellate process shall apply, *mutatis mutandis*, the rules of procedure for the panel division, subject to such mediations as required by this Agreement.
- (3) The appeal must be filed within 60 days of the decision being appealed.
- (4) The Council of the Dispute Settlement Body shall establish, at its first meeting, the timelines for the appellate process.
- (5) The decision on appeal shall be final and binding and not subject to further appeal or judicial review. A panel decision not taken to appeal shall have the same final and binding status.

ANNEX B: List of National Authority contact points for all State Parties

This list of National Authority contact points for all State Parties would be relevant for dispute settlement purposes, exchange of information and all other matters necessary for the operation of the Agreement.

The list is to be developed by submission from each Party, to the Secretariat.

ANNEX C: National lists of excluded sectors from coverage of all or part of the Agreement

This list would be part of the end result of a negotiation.

ANNEX D: National list of grandfathered non-complying measures, from all or part of the Agreement

This list would be part of the end result of a negotiation.

ANNEX E: National list of sectors subject to establishment rights of foreign investors under domestic law

This list would initially be developed during the negotiations, but is subject to unilateral changes by each State Party.

ANNEX F: Indicative list of corporate social responsibility issues

This indicative list of issues of concern should be understood, for present purposes, as a very preliminary list for further development.

Trade Practices:

- Fair trading practices
- Ethical advertising
- Avoidance of abuse of market dominant positions and use of anti-competitive practices
- Other?

Corporate Governance:

- Regulatory compliance systems
- Board of directors integrity and independence
- Transparent reporting and accounting
- Risk management strategies
- Protection and respect of intellectual property
- Protection of whistle-blowers
- Other?

Employment and Industrial Relations:

- Equal opportunity
- Fair wages and conditions
- Reasonable disciplinary practices
- Reasonable working hours and conditions
- Protection of individual privacy
- Fair, non-discriminatory dispute and issue resolution mechanisms
- Other?

Production and Product-related Issues:

- Product stewardship
- Design for recycling/re-use
- Energy efficiency
- Non-hazardous materials and manufacturing processes
- Minimization of environmental impacts
- Product recycling
- Product disposal/waste management
- Safe working practices
- Safe working environment
- Occupational hygiene
- Control of hazardous substances and dangerous goods

- Emergency preparedness
- Fair workers' compensation, rehabilitation and return-to-work programs
- Other?

Business Relationships:

- Ethical purchasing
- Non-collusive tendering
- Avoidance of price fixing
- Other?

Environment Protection/Sustainability:

- Sustainable production
- Energy reduction
- Waste and discharge management
- Protection of flora, fauna and cultural heritage
- Protection of traditional knowledge
- Stakeholder consultation/communication
- Other?

Good Corporate Citizenship:

- Philanthropy
- Organizational accountability
- SR reporting
- Other?