

# IISD Model International Agreement on Investment for Sustainable Development

Negotiators'  
Handbook  
Second Edition

By  
Howard Mann  
Konrad von Moltke  
Luke Eric Peterson  
Aaron Cosby

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Sustainable  
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Written – April 2005

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## **IISD Model International Agreement on Investment for Sustainable Development**

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The International Institute for Sustainable Development contributes to sustainable development by advancing policy recommendations on international trade and investment, economic policy, climate change, measurement and assessment, and natural resources management. Through the Internet, we report on international negotiations and share knowledge gained through collaborative projects with global partners, resulting in more rigorous research, capacity building in developing countries and better dialogue between North and South.

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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.

This effort could not have been undertaken without the initial support for IISD's investment work from the Ford Foundation and Mott Foundation, the latter of which has given us annual support. Specific funding for the Model Agreement project has come from several donors whose support we gratefully acknowledge:

- the Netherlands Ministry of Spatial Planning, Housing and the Environment;
- the Swiss Agency for Development and Cooperation (SDC); and
- the Danish International Development Agency (DANIDA).

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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.

Finally, the authors would like to thank those within the IISD family whose support has been unwavering, and contributions immense.

## IISD Model International Agreement on Investment for Sustainable Development

Mark Halle is IISD's European Representative and Director of the institute's Trade and Investment Program. The two projects were developed under his guidance, and with his magical fundraising skills to see them through. Pernille Fenger has been project manager for both projects, responsible for the innumerable details needed for four international meetings; arrangements with all of the funders and regional partners; and the continued meddling of the authors in all of it. These projects would not have come to fruition without their enormous contributions.

David Runnalls, President of IISD, has been unwavering in his support. The Board of Directors of IISD has provided timely and enthusiastic support that encouraged us greatly in our work. We wish to express our appreciation of David and the Board.

Stu Slayen has worked his own brand of magic in editing and polishing our words over the years, and turning them into publications that are readable by others. He has been supported throughout by Dennis Cunningham and Don Berg, our designer. To this extraordinary team, we extend our sincere thanks.

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.

Howard Mann  
Konrad von Moltke  
Luke Peterson  
Aaron Cosbey

April 2005

## Introduction to the Second Edition

IISD has been overwhelmed by the enthusiastic reception its Model International Agreement on Investment for Sustainable Development has received since being launched in April 2005. It has become a useful tool for governments, civil society groups, academics and others interested in the present and future of international law relating to foreign investment. The Model Agreement has sparked debate on the current approaches to a number of investment treaty issues, and demonstrated that alternatives exist, both in terms of overall conception and in relation to specific issues.

This second edition has not seen many changes. Indeed, almost all of them are minute grammatical corrections. The only substantive change is in relation to Articles 13, 22 and 32. These deal with anticorruption

obligations for investors, host governments and home governments. In each case, a potential loophole has been filled by including language that confirms that paying bribes or otherwise seeking to corrupt the family members or other close associates of a government official is covered, as opposed to simply paying the official him or herself. This is consistent with the original intent, and seeks to remove any doubt as to the scope of the prohibited acts.

This second edition is dedicated to Konrad von Moltke, one of the original co-authors. Konrad passed away shortly after the original publication. He is deeply missed.

Howard Mann

April, 2006

## Dedicated to Konrad von Moltke



This volume is dedicated to the memory of co-author Konrad von Moltke. Konrad, a treasured colleague for almost 15 years, died of cancer in May of 2005.

Konrad had been involved in the debates about international rules for investment since he first joined IISD's China trade team in 1997. On a visit to Beijing, he learned from our Chinese colleagues about the talks in Paris which were being conducted under OECD auspices on the establishment of a Multilateral Agreement on Investment. Upon his return to Washington, he alerted colleagues in the U.S. environmental community about these developments. Throughout the subsequent debate about the MAI, Konrad was a calm voice, stressing the need for transparency and dialogue amongst the participants, while stressing the need for a set of rules which contained obligations, as well as rights, for investors.

Konrad remained a keen observer of the trends in international investment policy, and particularly the rise in the number of Bilateral Investment Treaties. Intrigued by his work with Howard Mann on NAFTA's Chapter 11, he became convinced of the need for a set of international rules which would protect investors, promote transparency and sustainable development, and provide developing countries with the protection of a rules-based multilateral regime to counteract the imbalances inherent in the bilateral relationships.

Konrad felt that IISD could only earn its spurs in the investment debate if it could produce high quality draft language which could stand up to examination by top rank international lawyers and other experts. Accordingly, he chaired a meeting in The Hague at the beginning of 2005 where the text was first unveiled. Afterward, he told me with great enthusiasm that it was the best meeting he had ever attended. This from a serial meeting attender. A few months later he was gone, just a couple of weeks after this fruit of his labour in the investment field was first presented to the public.

This Model Agreement has subsequently been discussed in numerous fora in both developed and developing countries. It is today being used as a reference for investment negotiations by several dozen developing countries. It has received widespread acclaim in the academic community. It has redirected many civil society groups to a positive agenda for globalization in the area of investment, instead of just a narrow, reactive and negative message.

It is reprinted here in response to this wave of interest. Konrad would be pleased.

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

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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](http://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,

## **IISD Model International Agreement on Investment for Sustainable Development**

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.

### **The Role of the Negotiators' Handbook**

This publication provides both the text of the model agreement and 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. This will also seek 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.

**Text of the  
Model Agreement  
and Commentary**

**International Institute  
for Sustainable Development**

## 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:

## Commentary

The preamble to an international agreement—any international agreement—plays an important role in setting negotiating goals. It is also important, and sometimes critically important, in guiding its interpretation by the Parties and by others affected by the agreement, including in dispute settlement processes.

For example, in the past few years, several investment arbitrations have focussed on preambular or objective provisions that highlight the goal of protecting investors and investments. They have drawn on this language to emphasize this single element in interpreting and applying several existing IIAs. Hence, a new approach requires that the preamble clearly states the broader goals that are encompassed, where development, sustainability and investment protection are all relevant.

Finally, the text suggested here tries to reflect the recent development of two trends. One is the concept of sustainable development, and its balancing of development and sustainability concerns. The second is the global evolution that is occurring on the complex relationship between investors, host states and local communities. The reference to the UN Norms for Transnational Corporations in the preamble is forward looking and based on an assumption, which may not materialize, that a final text will be adopted by the UN. This places the Model Agreement in its real evolutionary context, rather than within the static model of existing IIAs.

Article 1: Objective

Article 2: Definitions

Article 3: Scope of coverage

Article 4: Denial of benefits



## 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 1 Commentary

An objectives article has many precedents, including in trade as well as environmental agreements. It is used here to provide a single statement of the reason for the Agreement. The article would also help in setting an interpretational context that is clearly different from the current “investor rights” context used in many arbitrations to date.

The uncomplicated nature of this text is critical. Efforts in this type of article to include a reflection of all the elements relevant to an agreement will render it confusing, and likely of little meaning.

### 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) there is a significant<sup>1</sup> physical presence of the investment in the host state;
- c) the investment in the host state is made in accordance with the laws of that host state;

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.

Part 1: General Provisions

- d) the investment is part or all of a business or commercial operation;<sup>2</sup> and
- e) the investment is made by an investor as defined herein.



For greater certainty, an investment is not constituted by goodwill 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" means 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;
- (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,<sup>3</sup> 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 have no substantial business activities in the territory of the Party under whose law it is constituted or organized.

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

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.

## IISD Model International Agreement on Investment for Sustainable Development

- 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.<sup>4</sup>



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

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

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

### Article 2 Commentary

The scope of coverage of a treaty is critical to understand. Here it is addressed in two articles: “definitions” and “scope of coverage.”

The definitions are one step in setting the scope. Here, we have sought primarily to clarify what constitutes an investment. The objective has been to define an investment as either a direct subsidiary or owned company, or shares or other forms of ownership instruments in such a company, or in relation to other significant rights relating to its actual operation or undertaking in the host state. The definition is broad on this count, reflecting different commercial and legal practices, but it is narrowed on other counts.

The limits flow from arbitrations that have identified market share or very minimal investment, like a sales office, as sufficient to qualify as an investment. It is suggested here that such levels of investment should not qualify for purposes of the protections of the treaty. In other words, the goal is to extend coverage to investments that are physically present and operating in the host state, not just empty shells of one form or another or minimal levels of investments for the purpose, for example, of generating foreign-based sales of goods or services. We recognize that some of these activities may be sufficient to qualify under the General Agreement on Trade in Services (GATS). The GATS, however, deals with trade in services and provides limited rights in the area of investment, none of which are directly exercisable by investors. There is no need for the definitions of this Agreement and the GATS to coincide, since they pursue different objectives.

Portfolio investment is also excluded from coverage here. This is a difficult issue, but in the end we believe that the absence of a direct management role and interest, a key element of portfolio investment, as well as the impractical nature of potentially millions of portfolio investors to follow the other obligations of a covered investor or the notice requirements set out, make it impracticable for the relatively small benefits that would accrue. If portfolio investment were included, one might limit the capacity for resort to the investor-state process set out below for portfolio investors to reduce opportunities for multiple cases and other mischief. In addition, one would have to include special provisions for foreign currency safeguards and other potential fiscal crises.

The suggested text also excludes intellectual property rights (IPRs) *per se* as an investment. This does not mean that an investment that has IPRs among its assets would not have these protected by the Agreement in appropriate cases. What it does mean is that simply holding an IPR in a foreign country does not trigger the rights or obligations of the Agreement. This is in keeping with the precept that investments should have a significant operational presence in the host state, not just a market share of some form or another. The definitions define what constitutes an investment, not the bundle of rights an investment would have protected.





ous paragraph, it means that the pre-existing investments are covered, but only government acts subsequent to the entry into force are covered.

Paragraph (C) addresses the responsibilities of all levels of government to comply with the obligations in the Agreement. As many federal government structures leave much jurisdiction to state level or local governments, this is a practical necessity to ensure investor rights have meaning.

The exclusions limit the above general propositions or otherwise remove specified measures from coverage of the Agreement. Paragraph (D) precludes a retroactive application of the obligations and responsibilities of an investor. As no previous IIA has included such direct obligations, and no other international treaty establishes such direct obligations, this is a basic element of fairness in our view. As non-compliance with the obligations has potential consequences, it is important to demonstrate such basic fairness.

Paragraph (E) addresses an absolutely critical issue, whether or how an agreement should extend to create a right of establishment for foreign investors into a host state. Several current model agreements and negotiating demands seek to do this. IISD takes the view that creating a right of entry for foreign investors is inappropriate and unnecessary from a developing country perspective. Further, it creates significant risks to the ability of states to ensure the sustainable development of resources and national development benefits from them. The alternative suggested here is what might be called an “advertisement” of investment opportunities under each state’s domestic law. It allows Parties to indicate which sectors are more open for foreign investment than others, and the associated conditions. But it also allows each Party to amend its list unilaterally, as long as this does not impact any investor rights or obligations for investments already made or in progress under the pre-amended list.

In practice, this means that once an investment has been made by a foreign investor, for example a sector has been privatized and a foreign investor has entered the sector, that specific investment must be allowed to continue in accordance with the permit, licence, etc. it received, including any time periods specified therein. Reversing the rights of existing investors would otherwise, in most cases, be subject to the provisions on expropriation or otherwise constrained, and thus subject to appropriate compensation under the Agreement. However, future policy choices will not be precluded by the Agreement as set out here.

IISD believes that this approach allows governments to set their national investment and development plans, modify them when needed, and to do so without the unnecessary dimension of permanent commitments or rights for foreign investors. The footnote clarifies that limitations and conditions on a listed sector can be broad and include exclusions of articles of the Agreement at the pre-establishment stage.

It is important to permit significant flexibility in listing and removing sectors. Many negotiations occur under severely unequal conditions, where one Party may pressure another to make binding and effectively permanent commitments without adequate understanding of the possible ramifications.

When a sector is listed by a State Party, investors have a reasonable expectation that they will be dealt with in accordance with the standards set out in the Agreement, and Paragraph (E) makes this expectation legally grounded.

Paragraph (F) sets out the broader types of limits found in most IIAs today for the period after an investment is established. As the investments must be made according to local laws, and such laws should conform to the Agreement as well, limits on the post-establishment operation of an investment should be clear and easily understood in our view. For this reason, and given the issues of rights of establishment are dealt with through a positive list approach only, IISD suggests a negative list of excluded sectors here. Once an investment has been given permission in one form or another and is

## IISD Model International Agreement on Investment for Sustainable Development

underway, limits under the Agreement should be minimized. (There are also no performance requirement prohibitions in this proposed text, which allows greater leeway for the present purposes.)

As well, Paragraph (F) sets out the approach of a negative list for existing non-conforming measures to be excluded from coverage of the Agreement, such that decisions made pursuant to them would be excluded as a basis of claim under the Agreement. The option chosen here is again a specific list of such measures. Amendments to such measures are also covered here. There is a broad exclusion, through a “deemed” listing, of all pre-existing municipal measures to prevent the need for a comprehensive review of all municipal laws, regulations, policies, etc. in a Party. This is consistent with several international agreements.

The Paragraph also makes it clear, however, that if anything in the listings in Paragraph F reduces the protections of an investor under a prior IIA, those rights will be preserved in accordance with any extinguishment period in such an agreement. (The “extinguishment” period is defined in the footnote.) This ensures a smooth transition process between the current bilateral and multilateral agreements and the move to a new model as proposed here.

### 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.

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### Article 4 Commentary

This is a more technical provision in its language, but has the impact of allowing the Parties to deny the application of the Agreement to investors and their investments when they may be established as a company in a “home state,” but in reality those companies are shell corporations in turn owned either by residents or companies in the host state or in third states that do not have diplomatic relations with the actual home state where effective control lies. This complements the definition of investor and choice of home state rules, which seek to accomplish similar ends, and provides an additional safeguard.

Article 5: National treatment

Article 6: Most-favoured-nation treatment

Article 7: Minimum international standards

Article 8: Expropriation

Article 9: Senior management and  
boards of directors

Article 10: Transfers of assets





## Part 2: Standards of Treatment of Foreign Investors

- e) the regulatory process generally applied in relation to the measure concerned; and
- f) other factors directly related to the investment of investor in relation to the measure concerned.



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

### Article 5 Commentary

Some arguments have been made that there is some form of general or customary international law right to national treatment for foreign investors. This is simply not so. The national treatment rights are those that are set out in investment agreements. It is, therefore, important to get them right, so that they are meaningful for investors while maintaining the appropriate ability of governments to regulate and to participate in the management of their economies.

The proposal here is for a fairly standard articulation of the national treatment rule. Paragraph (A) addresses treatment of the foreign investor, and Paragraph (B) treatment of the investment itself. Both cover the post-establishment phase of an investment. Paragraph (A) also covers the pre-establishment phase, but only to the extent it is granted under domestic law. Although it does not require national treatment at the pre-establishment phase, consistent with the listing approach for Annex E of the Agreement, this still has a legal impact in making governmental compliance with its domestic law in this field an international legal obligation.

Paragraph (C) sets out a specific exclusion which may not be strictly needed but which adds certainty. This is an exclusion that ensures government can use government procurement measures to promote domestic businesses or domestic content requirements.

Paragraph (D) is a standard reference today to how the provision will apply to the decisions on non-national levels of government. It means that the conduct or measures of a non-federal government must be compared to other conduct and measures of that same government if a concern arises, and not how other governments at that level may act. The matter may seem obvious, but it has been challenged in some arbitrations.

The essence of this Article is that more than a simple comparison of foreign and domestic investors is required. Rather, they must be foreign and domestic investors “in like circumstances.” Some arbitral panels have held that only very general tests must be met here, such as: are they both exporters?; or, are they in the same production sector? IISD believes this approach is wrong and has led to inappropriate results. Investments must be understood as multi-faceted and living things, not simply products crossing a border. Investments have multiple and different types of connections to national, state level and local governments. Rarely will two investments have the same regulatory package for all of their operations, though some elements may be the same. Therefore, Paragraph (E) sets out a more comprehensive test that interpreters of the Agreement will be bound to apply. It requires all potentially relevant factors to be included, and precludes a simple reliance on one factor, such as being an exporter.

The list also expressly requires consideration of the aims of the measure that is of concern, ensuring that not just the effects of the measure are part of the test.

This express approach to the like circumstances issue is a response, in part, to some of the arbitrations and some writings that have followed a historical but no longer applicable view of how trade law approaches the “like products” test used to assess its national treatment tests. The reliance under trade law on the competitive products test as the sole measure has been reversed in recent trade cases. Expressly ensuring the aims of a measure are considered here, along with all the other factors listed,

will prevent any further efforts to eliminate the purpose of a measure from due consideration under investment agreements, or to focus only on the most general of comparisons as determinative.

The footnote addresses a specific environmental concern for cumulative impacts on the environment or human health, such that if ambient pollution levels are met, not allowing a foreign investor to establish itself will not be a breach of any national treatment rights, though not allowing a foreign investor when a domestic investor is allowed might create concerns.

## 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 provisions<sup>8</sup> 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 in Article 5.
- (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.

<sup>8</sup> 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 6 Commentary

The most-favoured-nation (MFN) rule has long been associated with international investment agreements, but has recently become very controversial. Some arbitrations have allowed investors to essentially “cherry-pick” from any and all international investment rules or domestic laws





## Part 2: Standards of Treatment of Foreign Investors

- (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.<sup>9</sup>



<sup>9</sup> 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 8 Commentary

The inclusion of a provision prohibiting expropriation without compensation is standard fare. It must be noted that expropriation is not prohibited, but requires specific conditions to be fulfilled, including being non-discriminatory, and compensation to be paid. This is seen in Paragraph (A).

Paragraph B sets out the rule on the evaluation of expropriated property for compensation purposes. It follows the general principle of fair market value, but adds that investor conduct contributing to damages or to non-mitigation of damages may be considered. This is a reflection of fairly widely understood factors in assessing damages for an expropriation.

Subsequent Paragraphs (C)–(F) ensure that compensation is made in a manner that is prompt and effective for the investor being paid.

Paragraphs (G) and (H) set out common understandings of governmental acts that are not considered as expropriations. These are specific carve-outs from the content of the Article.

Paragraph (I) deals with a central issue of concern. Where there is a full taking of property, expropriation provisions are generally not problematic today, although some governments and analysts maintain that the expropriation of foreign-owned property may, in some cases, not be compensable. This position is not adopted here, given the evolution of international law in the last several years.

Three harder issues arise where there is something less than a complete taking of title to property. One is called measures tantamount to expropriation, i.e., measures that have the same effect but accomplish this through a less direct manner. Where the effect is the same, most analysts have agreed that the fact it is not a direct legal taking is not determinative. This is reflected here. The second issue is creeping expropriation, where a series of measures are used instead of one measure to accomplish the same thing. Again, where the effect is the same, that several measures are used to create a full taking of all rights to property, analysts generally support the view this is an expropriation.

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The main issue is where regulations are claimed to create an expropriation because they have a significant economic impact on the investor. This has arisen as an issue in several arbitrations, some of which are pending. Although only one case has so far turned on this issue, ongoing concerns have been expressed by many, and several newer agreements adopt language that ensures normal government regulations cannot be considered an expropriation.

The formulation intended to do this in Paragraph (I) takes a very clear line: a measure taken to protect or enhance basic public welfare interests shall not be considered as an expropriation. This is stronger language than in the U.S. model BIT, which states that this shall normally be the case, and is closer to the new Canadian model agreement.

The rule here is absolute, subject to the test of the regulatory measure being “*bona fide*,” which can be assessed by an arbitral tribunal. *Bona fide* is defined in the Oxford English Dictionary as “with good faith (acting or done in good faith; sincerely; genuinely),” or as “Good Faith, freedom from intent to deceive.” Black’s Law Dictionary (5th edition) defines *bona fide* as “in or with good faith, honestly, openly and sincerely; without deceit or fraud; truly, actually without simulation or pretense”; and other similar formulations.” The essence here is the good faith behind the measure, that it not be for deceitful or for ulterior motives.

This test is very different, and quite deliberately so, from the trade law test of “necessary” that is often used in relation to regulatory measures. That test has a long jurisprudence which IISD believes should not be incorporated here, including tests of proportionality, least trade restrictiveness and others that have little place here. IISD believes the standard of *bona fide*, used in its plain meaning, is more appropriate and useful here.

Some formulations, such as “would not normally be,” have been applied to this issue instead of the absolute test set out here. IISD believes that this issue must also be seen in the light of other remedies available under the Agreement for illicit regulatory measures, for example under the minimum international standards or national treatment rules. Certainty for governments is seen as a higher value here than additional remedies for investors on regulatory measures under the expropriation heading. The language makes it clear, however, that it is indirect expropriation, not direct expropriation, that is covered by this carve-out. The reference to the “police powers” rule buttresses this Paragraph through its reference to customary international law in this area.

The formulation also ensures, contrary to some arbitral decisions, that the purposes of the measure must be included in the analysis. This is an essential element in understanding and applying the customary international law rule on the exercise of police powers, and should be an important part of a final text.

Finally, this text creates what in legal terms is known as a carve-out from the rules on expropriation: by definition such a regulatory measure is not an expropriation. An investor would have to show that the measure is not *bona fide*, for example that it has a disguised purpose; that it is irrelevant for the stated purposes; that it is adopted through corruption; etc. This is very different from the idea of a regulatory “exception” which would have regulations defined as expropriations unless the host state could show they fit into an exception category. A carve-out keeps the burden of proof on the investor, where it should be in such a case.

### 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.

## Part 2: Standards of Treatment of Foreign Investors

- (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.




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### Article 9 Commentary

This is a fairly standard kind of provision. It assures investors that they will be able to have the management officers they wish to manage the investment, with some exception that allows host states to ensure a minimal level of representation on a Board. This provision is generally not problematic. The use of the term “investment” is based on the definition section, and thus only covers foreign investments.

### 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.

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**Article 10 Commentary**

This Article assures investors of their ability to move their assets from the place of the investment to the home state. It does not prevent the imposition of taxes or other normal government fees, royalties, etc. The provision is buttressed by a balance of payments exception in Article 51 that allows governments to manage all currency flows in the event of such a crisis without being in breach of the Agreement. Some form of such an exception is essential today, given the likelihood of more currency and balance of payment crises in the future.

Article 11: General obligations

Article 12: Pre-establishment  
impact assessment

Article 13: Anti-corruption

Article 14: Post-establishment obligations

Article 15: Corporate governance  
and practices

Article 16: Corporate social responsibility

Article 17: Investor liability

Article 18: Relation of this Part  
to dispute settlement

## 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 11 Commentary

Article 11 establishes a basic understanding that foreign investments are subject to the laws of the host state that they enter. This is a statement of existing law, not new law or principle.

Paragraph (A) sets out the general rule. Paragraph (B) ensures the rule clearly applies to the entry of a foreign investor into a host state. Neither is especially exceptional, but it does help set the legal balance between rights and obligations that the Agreement seeks to establish.

Paragraph (C) adds a general duty of investors to contribute to the host state and local community in a manner consistent with its development objectives. The reference to management policies and practices takes the matter beyond simply providing jobs, which is of course important, to including consideration of host state development objectives and planning, as well as potentially broader instruments such as the Millennium Development Goals. However, it is in language that is one of effort, not result. This sets a tone and expectation but it removes all but the most egregious of situations from any real dispute settlement context. This is a largely aspirational provision.

Paragraph (D) requires an investor to disclose to a Party making decisions about an investment all information it may require for that purpose, or for statistical purposes. This helps to ensure that decisions made by host states are as informed as possible. Confidential business information must, however, remain protected by a receiving state. Such protection is routine today.

### Article 12: Pre-establishment impact assessment



- A) Investors or the investment shall comply with environmental assessment screening criteria<sup>10</sup> and assessment processes applicable to their

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.

## Part 3: Obligations and Duties of Investors and Investments

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.<sup>11</sup> The application of the precautionary principle by investors and investments shall be described in the environmental impact assessment they undertake.

<sup>11</sup> The precautionary principle is defined in Article 15 of the Rio Declaration on Environment and Development as follows: "In order to protect the environment, the precautionary approach shall be widely applied by States according to their capabilities. Where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation."

### Article 12 Commentary

This Article takes a concrete step towards ensuring investments contribute to sustainable development by establishing a minimum obligation for investors, subject to screening criteria applied in all assessment processes, to undertake an environmental and social impact assessment of the proposed investment. Paragraph (A) requires the more rigorous of the relevant home state or host state assessment rules to be applied. Paragraph (A) also calls for a minimum standard for such a process to be agreed to by the Parties, to buttress any situation where no process exists or they are weak. Paragraph (B) is less specific in relation to social impacts of an investment due to the fact that far fewer governments have established social impact assessment processes in law. Thus, it will rely more upon the Parties establishing a process for this purpose at the first meeting of the Parties.

The notion of using the first meeting of the Parties to adopt key minimum standards on environmental impact assessment and social impact assessment derives from many precedents in multilateral environmental agreements. It is especially important here, to ensure that the minimum standards are developed with the developing country Parties at the table. This is a key element to ensure fairness, the absence of "green conditionality" and the acceptability of such processes by all stakeholders.

Requiring this to be done at the first meeting of the Parties sets a clear timetable that reflects the importance of the issue. An alternative approach is to adopt a currently existing standard or process, such as that used by the International Finance Corporation. This was the initial direction of IISD's thinking, but we believe the approach set out above provides better interim clarity and a better opportunity for acceptance of this responsibility, based on the laws of the home state that will be well known to an investor, or the laws it will have to apply as a matter of course in

## IISD Model International Agreement on Investment for Sustainable Development

the host state. Finally, we note the most recent acceptance of this type of approach in the Cartagena Protocol on Biosafety, which entered into force in 2004. There, the absence of a domestic process to assess the impacts of genetically modified organisms, or the presence of a weak process for this purpose, is shorn up by the establishment of minimum requirements in the Protocol that States can require a potential importer or exporter of such products to apply. The same principle is being followed here.

Paragraph (C) provides a minimum rule that the information gathered and assessed must be made public and accessible to affected interests in the local community where the investment will be made, and before any final decisions are taken by the host state to allow the investment. Under generally applicable screening criteria, when no assessment is required this obligation would be inapplicable as well. This minimum obligation ensures that communities will be adequately informed about potential activities in its local area, and that communities will generally have a chance to respond if needed. This initial provision of information is a foundation element of strong community/investor relations in our view. Paragraph (C) does not require public hearings or other procedures for public participation that are widely accepted as good practice. It is, however, likely that such provisions will be found either in the host state or in the home state assessment requirements. The Conference of the Parties can also take up this issue as part of its creating minimum standards.

The inclusion of a direct statement on the application of the precautionary principle, as defined in the 1992 Rio Declaration, sets an important part of the assessment and subsequent decision-making process in place. The principle itself does not determine a specific outcome from any given assessment, but it does require full consideration of preventive measures when a proposed investment may create environmental damages. Putting in place such measures at the initial stages of an investment is widely recognized as more effective, cheaper and more beneficial to the investment, the local community, the host state and the environment. The business case, as well as the host state case, for this is overwhelming, as acknowledged in the work of organizations such as the World Business Council for Sustainable Development and the Ten Principles set out in the Global Compact.

### 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, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties, in order to achieve any favour in relation to a proposed investment or any licences, permits, contracts or other rights in relation to an investment.

The second edition has added the words "or a member of an official's family or business associate or other person in close proximity to an official" to the original text. This closes a potential loophole in current legal texts at the national and international level that do not seem to include bribes given to an official's family directly, or to other close associates, within the scope of covered illegal activity. The added words leave no such uncertainty or ambiguity. Similar language is added to the complementary articles on anti-corruption, Articles 22 and 32.

(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.

## Part 3: Obligations and Duties of Investors and Investments

### Article 13 Commentary

This obligation takes its terms from the 2003 United Nations Convention Against Corruption and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business, which entered into force in 1999. The terminology is meant to ensure the range of conduct covered is comprehensive and effective. The goal is simple—to make corruptive practices unacceptable as business practice. This obligation is to be enforced through related obligations on host and home states, and through a provision that allows for the abrogation of the rights of investors or investments under this Agreement if they have not complied with this rule.

### 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, in areas of resource exploitation and 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.<sup>12</sup>
- (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 by 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.<sup>13</sup>
- (D) Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental,<sup>14</sup> 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 14 Commentary

These post-establishment obligations contain no new or untested principles. Rather, they make the application of known tools or legal standards of conduct a requirement for investors through the Agreement.

The first is environmental management. This is a reflection of what is required by good practice globally today, and is consistent with the approach in the ISO 14000 series and other comparable standards. It is recognized that certification capacity may not be present in all countries or all regions, and that this may hamper compliance. Our approach here is to look to the good faith effort of an investor to overcome such lack of capacity, as opposed to use this to justify perma-

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ment non-compliance. The number of employees to be used as a cut-off for mandatory certification should be agreed during the negotiations.

The second is an obligation to act consistently with human rights norms. The relationship between private parties and human rights continues to evolve in international law. Most international human rights instruments direct themselves to states, and to the need for domestic law to implement them. This proposal goes further, in keeping with such recent developments as the OECD Guidelines, the Global Compact and the ongoing development of the UN Norms on Responsibilities of Transnational Corporations cited in the Preamble text. It requires corporations to behave in a way that is consistent with basic human rights, and not to act in a manner that assists others in breaching such norms. Related obligations for host and home states are dealt with separately.

The formulation used here does not, for example, make corporations liable to build schools to achieve a child's right to education. It does not encompass such proactive requirements, which are noted in Article 16 on corporate social responsibility. Rather, the Article prohibits acts of commission or omission in breach of human rights, either directly by a company (for example, paying individuals or groups to break up a union meeting, discriminating in pay against indigenous women) or in supporting in some manner others who are engaged in acts that breach human rights obligations. Article 44 provides an initial short process for any tribunals under this Agreement to address any issue brought before it, with more detailed procedures to be established by the Conference of the Parties. Matters related to a breach of these obligations would fall within that.

The language of this Paragraph is derived from the OECD and UN instruments on bribery and corruption and the introductory words of Principles 1 and 2 of the Global Compact. Requiring acts of investors for a breach to take place adds some precision and certainty for investors, who cannot be held responsible for acts committed by others in their host state.

The provision calling for greater precision to be added by the Parties at their first meeting will assist all stakeholders in clarifying the full reach of this provision.

Compliance with the globally accepted ILO core labour principles should be non-controversial, given the acceptance of this instrument by almost all countries of the world in the tri-partite ILO structure (labour, business, governments). The Article incorporates this by direct reference and thus supports this instrument rather than seek an alternative route to these issues.

Paragraph (D) is different from the others in that it seeks to ensure that investors do not seek new places to invest to avoid or circumvent international norms applicable in their home states. The principle is simple, that investors should not go looking for safe havens for otherwise inappropriate or illegal operations. However, one must also recognize that in some fields international agreements apply differentiated obligations, and that some states legitimately choose not to participate in certain international agreements.

### 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

## Part 3: Obligations and Duties of Investors and Investments

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.

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### Article 15 Commentary

Article 15 addresses another emerging issue, that of corporate governance. In the absence of comprehensive international standards, this one is more difficult to deal with. Nonetheless, some minimum standards can be adduced for disclosure of information and transparency, deriving from several related processes in this field. These basic elements give additional means to combat corruption inside a company as well as in its relations with others.

Paragraph (D) recognizes that a sufficient breadth of standards does not yet exist in this area, and that many standards which do exist may not have been developed with a broad base of participation. This Paragraph allows the Conference of the Parties established by the Agreement to take the actions it deems necessary to address this concern.

### 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.

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### Article 16 Commentary

This Article sets out the beyond compliance aspirations of corporate social responsibility as it is most widely understood. Investment negotiations to date, to the extent they have addressed any investor responsibilities, have done so in a non-binding way only. This Model begins with minimum legal obligations in the preceding articles and then supplements them with the CSR approach.

When moving beyond specific legal obligations, there are an increasing number of sources and resources for investors to draw upon to establish appropriate social policies for interaction with the local communities. Through reference to the two existing broad-based instruments on corporate responsibility for multinational companies, a broad-brush approach is established. By including a reference to sectoral standards, it establishes the OECD and ILO texts as minimum standards for con-



sideration by investor and investments. The indicative list of issues of concern found in Annex F should be understood, for present purposes, as a very preliminary list for further development.

## 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.

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### Article 17 Commentary

The issue of investor liability is an important one today, given the growth in foreign investment, in particular in sectors where significant impacts from accidents, negligence or risk management choices can arise. Mining, chemicals, forestry, heavy manufactures are but some of the sectors where foreign investments have had major incidents in recent years. The Bhopal disaster of 1984 is, of course, the best known. But it is far from the only such situation.

This Article addresses the liability of the investor in such circumstances. It is a simple article in principle, but can be more difficult in practice. This is a companion article to one found in Part 6 on home state obligations, which is actually necessary to give this statement of legal principle effect. This is because many judicial systems have rules today that prevent legal actions being taken for damages that occur in another jurisdiction, regardless of where decisions leading to the damages may have been taken. This Article, combined with the later one, will set the principle that courts in the home state will have jurisdiction to hear a case for civil damages against an investor for acts or decisions taken with respect to the investment in question. There is no automatic liability, and there is no statement of the standard of liability—due diligence, strict or absolute—in this Article. That is a matter that is left for the civil liability rules in the state in question.

The Article reverses one of the great asymmetries of international law today: that foreign investors, on the one hand, have special rights because they are foreign investors, while at the same time they have no liability in the host or home state for the same reason: because they are foreign investors beyond the scope of host state courts and not subject to home state jurisdiction for damages occurring elsewhere. This approach, which is consistent with new European rules, will reverse that asymmetry and ensure rights are accompanied by liabilities.

## 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 the 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.

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## Part 3: Obligations and Duties of Investors and Investments

- (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 award 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.




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### Article 18 Commentary

Article 18 provides specific avenues for enforcement of the obligations of an investor and investment. Different approaches are used here for different purposes, reflecting a scale of opportunity for a state to respond effectively to such breaches, and the contextual importance of a breach.

These responses are tied to the use of the dispute settlement system by an investor. For any breach of the anti-corruption obligation of an investor or investment, the right to use the investor-state dispute settlement process can be vitiated by a tribunal. This is a clear and simple line in the sand. We believe this is now necessary to help end the scourge that corruption has become. It is worth noting that different tribunals under other investment agreements have come to different conclusions as to how to address corruption, with some either ignoring the issue or downplaying it as part of business practices in some cases. We believe that any respite or tolerance for such practices must be clearly removed from the system.

Other breaches, however, do not automatically lead to a termination of the right to take proceedings. Rather, for persistent failures to comply with the Agreement, an investor or investment may be notified that its rights to initiate a proceeding will be challenged before a tribunal, and may be formally abrogated in that fashion. A short procedure for this is set out in Part 9.

The third element in the approach is for host states or third party interveners to be able to raise a breach of the obligations as a factor to be considered, if proven, on the merits or damages phases of a proceeding. The final element is for host states to be able to counterclaim for damages due to an alleged breach of the obligations in the event an investor has initiated a claim under Part 9.

As the inclusion of investor obligations is new to this area of law, inclusion of mechanisms to enforce them is also new. Alternatives considered for this purpose included:

- A full barrier to any investor-state claim if there was any demonstrable breach of an obligation. This was seen, ultimately, as too harsh and extreme, and open to abuse, allowing any small immaterial breach to vitiate a potentially legitimate claim. Fairness to investors, and certainty in terms of available remedies, demanded more than a one-size-fits-all response to compliance.

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- Allowing states or third parties to initiate claims against investors under the dispute settlement system in the Agreement for damages resulting from an alleged breach. There is a certain instinctive attractiveness to such a tit-for-tat approach, but in the end we believe it fosters reliance on the international system at the expense of building domestic legal and judicial processes. Thus, the next option was chosen to supplement the remedies set out in the present Article.
- An additional alternative that is included in the Agreement is allowing, and in some cases requiring, recourse to the criminal and civil law in the host state for breaches of the Agreement or for damages resulting from a breach. The obligation on host states to reflect some of the investor/investment obligations in their criminal laws is set out for host states, as is the right to enact a civil law liability by incorporation of the obligations in this Agreement into domestic law.

Article 19: Procedural fairness

Article 20: Maintenance of environmental  
and other standards

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

Article 22: Anti-corruption

Article 23: Publication of information

Article 24: Subsidies

## 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.<sup>15</sup>
- (B) Hosts states shall act in a manner that does not create a denial of justice in judicial and administrative proceedings.<sup>16</sup>
- (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.

<sup>15</sup> For example, criminal investigations may require that no notice be given to anyone.

<sup>16</sup> The fact that an investor or investment does not achieve a desired result does not constitute a denial of justice.

### Article 19 Commentary

This Article sets out expectations of host states derived from the text of Article 7, Minimum International Standards. The elements included here are derived from a number of arbitral decisions and the texts of newer agreements in the field. They reflect core elements of the minimum international standards rules, in particular on fair and equitable treatment.

The critical tests are stated in Paragraph (A) and (B): investors and investments should be dealt with in a manner that is not arbitrary, that does not deny fairness and that does not create a denial of justice. The language is phrased in the negative: they shall not act in a manner that is arbitrary or denies fairness. This puts a legal focus on how an individual situation is dealt with, as opposed to the precise design of a host state's procedures at a broader level (though the design of the process may be relevant in any given instance). Paragraph (C), however, does require at least one systemic element to be present, requiring at least some form of administrative appeal for administrative decisions that will be able to meet these tests.

## Part 4: Host State Obligations

Paragraph (D) is important in this context, or alternatively in the context of Article 7 itself. It addresses a trend in some arbitration decisions to disregard the level of development of a host state as a factor in assessing the standard of procedural fairness the investor should expect. Other arbitrations have held, expressly, that the level of development and political history of a state are relevant factors in assessing the level or quality of process an investor should understand is present in a host state and thus should legally be entitled to. Paragraph (D) makes a clear policy choice here in support of this second line of decisions, and against a one-size-fits-all international standard.

At the same time, the Article then goes on to make it clear that all states should try to improve the standards they provide in this area. Public access to judicial and administrative processes is set out here, as well as to the decisions they produce.

Overall, this Article seeks to give some detail to the rights of investments and investors to minimum international standards of treatment, while ensuring states are not confronted with overly expansive obligations that may simply be beyond their capacity to attain.

*NB: “Umbrella Clause”* Many international investment agreements include what has become known as an “umbrella clause.” With some variation on the theme, an umbrella clause is one that says a host state must comply with all the obligations or agreements it has entered into with an investor. This very broad language has now been interpreted to make any breach of a contract, agreement, licence, permit, etc. by a host state a matter of international law under the Agreement in question.

IISD does NOT include such a provision in this model text. Rather, the obligations on host states are made specific and, we hope, clear. IISD believes it is inappropriate to grant to an international Dispute Settlement Body full jurisdiction to hear any type of complaint for breach of contract, or breach of a permit, etc. as a direct breach of an international agreement through the umbrella clause. We thus suggest that this type of clause not be included among the host state obligations. Unfortunately, it is not possible to predict with certainty where the text of such a clause might appear, so negotiators must understand the meaning of such language and be able to address it, whether it is part of a set of obligations or a single article.

### 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. They 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 20 Commentary

The origin of this Article goes back to the NAFTA Chapter on investment, where it related only to environmental measures. At that time it was also phrased in a non-binding manner: states “should not” waive or reduce their standards to attract or maintain investment. Here, it is proposed as a mandatory standard covering environmental, labour, public health and safety standards.

In practice it is difficult to enforce. However, both the state-state dispute settlement and the investor-state process could be used for this purpose if needed. Enforcement problems notwithstanding, it is, we believe, critical to maintain a clear and strong prohibition against lowering standards today, as environmental problems increase and competition for investment also increases. This is one of few mechanisms available to seek to maintain a level playing field for states in this regard, and to prevent a potential “race to the bottom” in environmental or other standards.



## Part 4: Host State Obligations

(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 22 Commentary

This obligation follows the language of the obligation on investors and investments not to bribe or otherwise corrupt public officials. It requires that the conduct be made criminal for all involved participants, both in the private and public sectors. A similar obligation is set out for home states as well.

### 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 23 Commentary

This Article is a corollary to the similar obligation of investors and investments to make such information public. This will ensure that information is available and will provide an avenue for ensuring its accuracy.

### 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.

### Article 24 Commentary

This Article initiates a process for addressing in a comprehensive manner the distorting influence of investment subsidies today, in particular at the expense of those states least able to afford them. The issue is extremely complex and hence what is suggested here is the initiation of a subsequent negotiation to address this, to begin within one year of the entry into force of the Agreement.

The specific impacts of subsidies on developing and least-developed countries is noted, with a goal of addressing the special needs that arise in the protocol negotiations.



# IISD Model International Agreement on Investment for Sustainable Development

Article 25: Inherent rights of states

Article 26: Performance requirements

Article 27: Investment promotion  
and facilitation

Article 28: Access to investor information

## 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 25 Commentary

A previous version of this Article was entitled “The right to development.” However, IISD believes that the additional concepts stated here broaden the scope of the Article and reflect a broader set of state rights.

Paragraphs (A) and (B) do not, therefore, restate the right to development, but address in a more simplified fashion the right of states to pursue their own development goals and objectives, and related social, economic and other policy goals. The right to regulate is included with the text of Paragraph (B). Paragraph (C) does not itself subject these measures to the Agreement nor exclude them from the scope of the Agreement, but restates the goal of a balanced assessment of rights and obligations for investors/investments and host states.

In doing so, this Article reverses the trend among many arbitrators of interpreting international investment agreements based on the single objective of protecting investor and investment rights. The affirmative approach of this Agreement, combined with the absence of language found in many other agreements to the effect that: “Nothing in this Agreement shall be construed to prevent a Party from adopting, maintaining or enforcing any measure *otherwise consistent with this Agreement...*” will prevent such an approach from continuing.

The language in quotes above is important to avoid. Such language is *not* an affirmation of a right to regulate. In legal terms, it is a mere tautology, stating only that a state can do what it is not prohibited from doing. Several governments have sought to use this type of article in investment-related arbitrations, but have found it of no legal value. The approach set out above will have legal meaning.

Paragraph (D) adds an additional element by ensuring that measures a host state takes to comply with international obligations, subject to them being *bona fide* measures, will not constitute a breach of this Agreement. “*Bona fide*” has the same meaning here as it does in Article 8, Expropriation.

Paragraph (E) is a statement of the existing prerogative of states to implement international obligations into domestic law. Some do this for every international agreement, others must make specific legislative or administrative efforts to do so, based on different constitutional models. What the Article is intended to signal, however, is the ability of states to use their own domestic courts for the enforcement of investment-related obligations under the agreement by incorporating them into domestic law. In addition, depending on the rights of access to courts in different states, local communities or individuals may have opportunities to enforce its provisions as well, or to seek damages in the event of breaches of the Agreement leading to injuries or property losses or damages. IISD believes this route is preferable to using international arbitration for this latter purpose.

**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 26 Commentary**

Article 26 addresses an issue that is highly controversial: whether investment agreements should bar so-called “performance requirements” designed to promote domestic development through linkages by a foreign investment into the host state economy. For example, should a host state be able to require a foreign investor to purchase XX per cent of its product inputs from domestic sources? Several investment agreements have prohibited such measures. Most have not.

This text suggests they should not be prohibited. One option is to simply remain silent, applying the maxim that what is not prohibited is permitted. However, because such measures are often applied on a case-by-case basis, this may create conflicts with other rules, such as the national treatment or MFN obligations. Hence, the approach here is to expressly allow such measures to

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be taken, and to exempt them from being found in breach of the Agreement through the provision deeming them to be in compliance. However, this applies only to measures taken before all the formalities or requirements to establish an investment have been completed. Afterwards, the measures will be fully subject to all the obligations of the Agreement. The reason for this is fairness: prior to an investment actually beginning to establish itself, investors have market-based options for where to place their investment. When all the conditions are known, an investor will make its choice. To this point, performance requirements and the economic shift they promote from foreign investor to local economic actors will then be part of the decision-making process. This same economic decision-making will ensure that host states act with restraint and clear purpose in this area.

Because performance requirements can impact in a significant way on the economics of an investment, to alter these after the fact would be to alter the decision underlying an investment, a decision usually taken in consultation with the host state. As the factors motivating such measures should be known prior to an investment being made, the subsequent shift in the economics of an investment towards other actors in the host state merits coverage by the Agreement in fairness to the investor. The pre-establishment and post-establishment bifurcation thus seems to reflect both the need for policy space by host states in this area and the need for fairness by the investor.

The list of measures set out here is derived from NAFTA, an investment agreement that precludes these measures.

### Article 27: Investment promotion and facilitation



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

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#### Article 27 Commentary

This Article sets out a fairly routine concept, of host states establishing investment promotion agencies. This is increasingly common practice today.

### 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.

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#### Article 28 Commentary

The purpose of this Article is to ensure that states can obtain the information needed to make an informed decision about an investment. In addition, it heightens the role of local communities in the process, though it stops short of creating an obligation to make the information public. The objective, however, is to enable a process of local community empowerment.

Article 29: Assistance and facilitation  
for foreign investment

Article 30: Information

Article 31: Investor liability in home state

Article 32: Anti-corruption



### Article 30 Commentary

This Article brings all three actors into the process of information-sharing to ensure that when new investments are authorized by a host state it is on the basis of adequate and accurate information. The record of an investor, and the regulatory context it might face at home in a similar context, provide important information in this regard.

### 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.<sup>17</sup> The host state laws on liability shall apply to such proceedings.

<sup>17</sup> 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 31 Commentary

This Article is the companion article to Article 17 on liability of investors. It seeks to remove any barriers that preclude a hearing of such a case on the merits, as discussed in the commentary on Article 17. In some states, this may require action by different governments, depending on the constitutional rules in place.

### 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, or a member of an official's family or business associate or other person in close proximity to an official, for that official or for a third party, in order that the official or third party act or refrain from acting in relation to the performance of official duties 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;
- 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.



### Article 32 Commentary

This obligation follows the language of the obligation on investors and investments not to bribe or otherwise corrupt public officials. It requires that the conduct be made criminal for all involved participants, both in the private and public sectors. A similar obligation is set out for host states as well.

The Article sets a high standard on the requirement to enforce this Article, as compared to other options that might, for example, recognize greater ranges of enforcement action that a state may have available. This is due to the particular nature of this issue, and the need, in keeping with UN, OECD and other work, to end such practices as rapidly and fully as possible.

Paragraph (B) provides an extra assurance that the activities covered by this Article cannot be seen as business deductions or expenses in the home state.

Paragraph (C) compels a home state to assist a tribunal with its obligation to determine whether a breach of the anti-corruption obligations has occurred by providing information it might have available. This is a logical extension of the seriousness with which this issue is treated in the text as a whole.

Article 33: Relation to other investment  
agreements and obligations

Article 34: Relation to other international  
agreements

## 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 33 Commentary

The relation of any new agreement, in particular a multilateral or large regional agreement, to pre-existing agreements will need to be addressed. In the approach adopted here, the general rule is that all pre-existing international investment agreements between two states that become Parties to this Agreement will be terminated, and the rights and obligations of this Agreement will automatically enter into force on entry into force of this Agreement for the two Parties. This Paragraph is intended to include a situation where any two Parties to a regional international investment agreement, but not all of them, are Party to the present Agreement.

The first exception to this is in Paragraph (A) and refers back to the very specific circumstances where a sector or measure is excluded from coverage of this Agreement by a Party, but a pre-established investment has relied upon such a measure for all or part of its operations. In those circumstances, the prior agreement remains in force for the duration of its expiration period.

The second exception is when a dispute has already been formally initiated under another Agreement. In that case, the dispute shall be decided based on the prior Agreement.

Paragraph (B) calls on all Parties to this Agreement to renegotiate any agreements they have with a non-Party to achieve the same rights and obligations set out here, as well as the principal features of the dispute settlement system. The intent is to generate a continuous process of harmonization of all international investment agreements based on this model, and subject to the dispute settlement process it establishes.

## Part 7: Relation to Other Agreements

Paragraph (C) recognizes that states may enter into other international investment agreements in the future. It requires such provisions to meet the same balance of rights and obligations as seen here, and the principal features of the dispute settlement system. Review of a conflict in this regard is left in the hands of the Conference of the Parties.

It should be recognized that some fine tuning of this approach may be needed due to the complexity or specificity of some agreements. Should this need arise, it is hoped that the principles set out here will be applied to the maximum extent.

### 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.

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### Article 34 Commentary

Paragraphs (A) and (B) of this Article sends an important legal signal that the Parties or a dispute settlement panel should interpret this agreement to be consistent with trade agreements where there are overlapping provisions, and should interpret those provisions in trade agreements to be consistent with this agreement. It seeks a mutually supportive approach in the event of potential conflicts. The Article also gives priority to this Agreement as the forum for resolving any such disputes if they do arise.

The final Paragraph acts as a legal re-affirmation of the international environmental and human rights obligations and agreements of the Parties. This re-affirmation makes it clear that such obligations are not superseded by the present Agreement.

# IISD Model International Agreement on Investment for Sustainable Development

Article 35: National Authority

Article 36: Conference of the Parties

Article 37: Technical Assistance Committee

Article 38: Financial mechanism

Article 39: Secretariat

Article 40: Dispute Settlement Body

Article 41: Legal Assistance Centre







## IISD Model International Agreement on Investment for Sustainable Development

The functions of the CoP set out above are also quite standard, with relatively small adjustments having been made to those provisions found in other international agreements.

The most significant new element included above is the capacity to adopt interpretive statements for the Agreement. This has precedents in several other international investment agreements today. The goal of such a statement, if one is adopted, is to correct an interpretation adopted by a Party or by a tribunal or other source that can make important interpretive decisions. An interpretive statement, which is a recognized source of interpretation under the Vienna Convention on the Law of Treaties, would bind a tribunal or other body hearing an arbitration or other matter pursuant to this Agreement. It has been used in the NAFTA investment context, following a decision of a tribunal that the Parties believed inappropriately and incorrectly expanded the interpretation of a provision of NAFTA beyond the intention of the Parties. Subsequent tribunals have followed the interpretive statement issued by the Parties. This approach provides a safety valve against what might be termed rogue decisions, although it could not be used to go back and overturn a tribunal decision already taken.

Paragraph (E) is now a standard provision in multilateral environmental agreements. Its application here is thus consistent with the shift from a narrow economic law focus of prior international investment agreements to a sustainable development focus for this Agreement.

### 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 37 Commentary

This Article establishes a special Committee whose mandate is to promote, facilitate and support, through technical assistance, the attainment of sustainable investments in developing and least-developed countries. It is important to highlight this aspect of the Agreement as a significant departure from previous international investment agreements. This promotes the Agreement's goal of furthering sustainable development. This Committee would be responsible for ensuring that the tools are present to help make this happen in practice. An appropriate level of funding will have to be established for the Committee.

Several examples of such committees exist under other conventions, such as the UN Convention on Biodiversity. The critical element of capacity building also has a number of operating models





- (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.<sup>19</sup> 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.



19 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 40 Commentary

This Article does establish a radically different approach to dispute settlement compared to existing international investment agreements. However, it is fairly close in design to the WTO system. It is worth noting here that international investment agreements have, to date, already seen more cases initiated than the GATT had when it was transformed from an *ad hoc* panel process to the fully constructed WTO trade law dispute settlement process.

The establishment of a panel process and appellate body follows the WTO model. Current investment treaty arbitration lacks an appellate process. At present, the standard and process for review of initial arbitration decisions differs depending upon the arbitral rules used. Arbitrations under the ICSID rules are reviewed through a non-transparent internal process. Arbitration awards rendered under the ICSID Additional Facility rules or other commercial rules may be challenged in domestic court settings, but to a limited extent.

This, combined with the purely *ad hoc* nature of the current arbitration system and other factors, has led to diffuse interpretations of very similar provisions, and even to completely opposite decisions in relation to the same facts and circumstances. An appellate process would help to ensure consistent interpretations of the law and facts, and a definitive end to the process.

Establishing rules on independence of the arbitrators and appellate body members is another key element. In the provisions set out here, an arbitrator on a panel would not be able to participate in other cases as advocates for investors or states. Appellate division judges would be full-time appointments, unlike the situation today where any form of review within an arbitration system is undertaken by lawyers with other, and potentially conflicting, interests also at hand.

The need for an independent system is, IISD believes, well illustrated by the growing number of cases, the lack of accountability and transparency in the current process, and the growing indications of structural conflicts of interests that plague the arbitration system today. The proposed structures set out here address these deficiencies. Further elaboration of rules and procedures in Part 9 and Annex A continue the process of developing an independent dispute settlement process.

The independent Secretariats for the Dispute Settlement Body are borne from the WTO experience. There is no independent secretariat for the WTO panel process, and this has led to concerns about the lack of independence of a number of panel decisions. Many insiders now argue,

## IISD Model International Agreement on Investment for Sustainable Development

though not always publicly, that an independent dispute settlement secretariat for the panels should be one of the changes made in the current review of the WTO dispute settlement mechanism. The present Article would preclude such a concern from arising in the first place. Experienced officials at the appellate body have also argued that a separate panel and appellate process at the Secretariat level also helps ensure greater independence. This experience is therefore drawn upon as well.

The number of 35 for a standing roster of panelists is somewhat arbitrary. Given the record growth in the number of investment arbitrations over the past few years, perhaps it should be higher. However, it is a number around which flexibility can be shown and should therefore be seen more as an indicative level at this time than a definitive one.

### 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.

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### Article 41 Commentary

The idea for a Legal Assistance Centre derives from the WTO Legal Advisory Centre, created to assist developing countries in capacity building and by providing expert advice on trade law cases. Here, the proposal is for a centre to assist developing countries in responding to claims or in initiating the limited procedures that a state can undertake under the Agreement in an international dispute. As well, the Centre can provide the legal arm of many capacity building projects under the Agreement.

A key element concerning the transparency of the Centre is the annual reporting. In addition, all sources of funds must be made public, ensuring that the advisory process is open, while the advice itself remains subject to solicitor-client confidentiality.

Article 42: Prevention of disputes  
and mediation

Article 43: State-state disputes

Article 44: Procedure for abrogation of  
investor/investment rights

Article 45: Investor/investment-state disputes

Article 46: Transparency of proceedings

Article 47: Enforceability of final awards

Article 48: Governing law in disputes

## 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 potential disputing 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 not 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 42 Commentary

This Article creates a significant element of pre-arbitration dispute settlement through alternative dispute resolution, with a mandatory mediation step if another process is not agreed upon. Because the Article applies within what is now a fairly standard notion of a cooling-off period between an initial notice of a dispute and initiation of a formal arbitration process, no time is added here to the procedures. However, the time is, it is hoped, used well. It is also hoped that instituting a formal step in the process will help to raise the profile of alternative dispute resolution processes as an effective alternative. This is particularly important when it is hoped that investors, investments and host states will have long-term, positive relationships.

## Part 9: Dispute Prevention and Settlement

It might be noted that ICSID and other dispute settlement fora are looking actively at how to improve mediation and other alternative dispute settlement services. Given the fractious nature of litigation and international arbitration, this makes increasing sense.

There is no way to compel a successful outcome of a mediation or other alternative process. There is a general rule that all Parties must act in good faith under an international agreement, and this principle would apply here as well. However, at the end of the day, disputing Parties cannot be compelled to settle a dispute through mediation. They can only be compelled to make the effort.

The notion of regional mediation centres we believe represents a sound idea with significant potential. It will require more details than are set out here to become operational, but the nature of a regional process is that it must be set up in keeping with the regional customs, traditions, political situations, etc., that are involved. Thus, this should be understood as an issue worth pursuing in more detail.

### 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.

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### Article 43 Commentary

This Article enables state-state disputes between the Parties to proceed to the arbitration process set up in the Agreement. Rather than duplicate lengthy rules, a single set of rules is established to be followed by all the proceedings enabled in the Agreement.

In addition to resolving a dispute, one goal is to set out a consistent and single set of procedures that will apply to all disputes that require a formal resolution under the agreement. While additional work on some details of the procedures would be needed, the basic elements are set out and applied in a similar manner in state-state, state-investor, and investor-state disputes.

State-state disputes have been rare in international investment law, particularly with the advent of the investor-state process. Still, it remains appropriate to have a specific process set out so that issues can be resolved within the ambit of the Agreement. This enabling provision does that, and the details follow in Annex A.

### 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.

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- (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.<sup>20</sup>
- (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.



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<sup>20</sup> 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.

### Article 44 Commentary

This provision responds to the goal of many observers that the rights of investors should be conditioned on compliance with the obligations. Here, we set out the key elements of the process for abrogating the investor(s) or investment's rights, based on the concepts in Article 18 of a breach of the anti-corruption obligations or of a persistent failure to comply with the other obligations of an investor-investment. This is one remedy available under the Agreement. Damages through counter-claims, or through the offsetting of claims by a tribunal established under this Agreement, are also available, as are civil suits in domestic courts to the extent that a host state or home state has enacted the Agreement into domestic law, or the investor is otherwise in contravention of domestic law.

This process is only open to State Parties to initiate. The option of having any person, or any person in the host or home state as relevant, being able to initiate the process was also considered, and does have a certain attractiveness. However, given the seriousness of the issues and consequences, and the high burden this places on individual investors and investment, it was believed that this was too heavy-handed an approach and one too open to political gamesmanship. At the same time, non-state actors do, under the other procedures and alternatives set out in the text, have opportunities to initiate civil remedies that states can make available as well, and to intervene in proceedings. There is also the investigation process through the National Authorities.

The Article allows for multiple results, from a finding against the state initiating the action, to a temporary abrogation of rights for a minimum of three years, to a permanent loss of rights, and to a potential of a right of the investor to apply to have rights re-instated. The reason for this is to leave the capacity to rebuild relations if the situation changes, as well as to recognize that there may be gradations of breaches that still merit sanctioning, but may not merit permanent loss or rights. As a new instrument, allowing some flexibility for it to play out seems a prudent measure.

### 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

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## Part 9: Dispute Prevention and Settlement

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 processes<sup>21</sup> 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.<sup>22</sup>
- (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.

21 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.

22 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 45 Commentary

This Article enables investors or investments, subject to more definition of this right in Annex A, to initiate panel and appellate proceedings under the Agreement. The same conditions of attempts to seek an alternative resolution apply. In addition, however, there is the added requirement for an exhaustion of local remedies where these are available.

The issue of exhaustion of local remedies has become more controversial in recent years. Early in the development of international investment law it was standard practice that investors or investments must seek to resolve disputes through locally available means, administrative and judicial. In recent years, however, this has not been stated as routinely in international investment agreements, and many have moved to a so-called fork in the road, where an investor or investment may choose one direction or another. A number of arbitral decisions have also addressed this question—some of the key ones have all but totally reversed this rule—even where there is a specific choice of forum in, for example, concession or privatization contracts.

The legal theory is that a claim under an international investment agreement is on the “plane” of international law and so outside any private contract arrangement under domestic law. The result, however, is to internationalize all manner of domestic disputes for breach of contract or any other claim, a result clearly not intended when the international investment agreements began to multiply in the 1980s and 1990s. Indeed, it is this internationalization of all claims that is a critical factor in Argentina now facing some 40 different arbitration claims against it.

IISD, and many other observers, believe this trend needs to be reversed. This Article seeks to do that, in a manner that makes clear that it is not just the language of the claim that is at issue, but the underlying facts. Thus, under this language, stating a breach of contract case as a breach of the agreement will not alter the fact that the breach of contract is the key issue, and this can be

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resolved, at least notionally, at a domestic level. This provision would compel the contract claim to be brought to domestic dispute settlement before it could be taken to an investor-state claim as a breach of the treaty.

There is some concern that this will appear to make the investor-state process an appeal of domestic courts. In practice, however, it is not, although one cannot deny some sense that it could, in some cases, operate that way. In practice, what would more likely happen is that a tribunal would rule as to whether the whole result, including the fairness of the court proceedings, was consistent with the agreement. In most arbitrations to date where domestic courts have addressed the underlying issues, and where a fair judicial process that does not demonstrate elements of a denial of justice or fairness has taken place, greater deference has been shown to the resulting decisions than to the initial administrative or regulatory decisions that underlie the claims in other cases. In other words, arbitral tribunals have shown more deference to *bona fide* court processes than to administrative or regulatory processes. There are of course exceptions, but as a general rule, this has been so.

Ultimately, there is also a political issue involved here: will there be any chance of a new approach if all international remedies are removed? In our view, the answer is very little, at best. Thus, IISD has concluded that it is wiser to have a better underlying law, and a better investor-state process, than the weaker of both that is now in place. This view has helped structure the options set out.

### 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.

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### Article 46 Commentary

This Article sets out the fundamental principle that all disputes under this agreement will be open to public review. There are some states that continue to oppose transparency in arbitral proceedings, or other international remedies. But several more recent agreements have moved to ensure the same results as set out in the text above, and more will continue to do so. In addition, tribunals operating under other arbitration rules have begun to permit open hearings and documents under many agreements are now all available under newer agreements.

*Amicus curiae* have also been permitted in at least two cases, and other requests are pending, so this is building on precedent here, not creating it. Several recent investment agreements also have provisions for *amicus* participation.

One might note here that the phase of dispute settlement prior to an arbitration being commenced is not subject to the same rules of transparency. Here, just the beginning, the notice of intention to arbitrate, and the end, the settlement, must be made public. Settlement discussions are generally difficult enough. We believe the public interest is safeguarded by a requirement that the settlement be made public.

## Part 9: Dispute Prevention and Settlement

### 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 47 Commentary

It is crucial to the viability of an arbitration or other international form of dispute settlement that the awards be enforceable through domestic legal processes. This Article sets out this requirement for State Parties. The means to do so is dependent on each State's constitutional and other legal situation.

There is much experience on this issue in both international and domestic law. This experience can be brought to bear for the necessary details to ensure that this Article is successfully developed and implemented.

### 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.

#### Article 48 Commentary

The governing law of a dispute is very critical. Here, three sources of law are identified: the Agreement, the national law of the Party involved, and the general principles of international law. What is not included here is a broader range of incorporation of other international law agreements.

The reason for this is that several arbitrations have faced a question of how much international law arising from other agreements to bring into the interpretation of host state obligations. Some tribunals have hinted that the range could be very wide, allowing all types of international obligations to be directly litigated by investors in this forum. Others have taken a more limited approach. Rather than set out an open-ended provision here, several specific issues have been raised and addressed in the course of the Agreement. These provisions clarify specifically, for example, the role of international human rights and environmental agreements, as well as of trade agreements. Given the specificity of these other provisions, the risks associated with a broader statement that can be read in an expansive way appear to outweigh any potential benefits over the specific issues already addressed.

This Article also clarifies that appellate division decisions have a *stare decisis*, or binding impact. This is the mechanism to generate consistency in the law, and thus certainty for both investors

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and states. At the same time, two mechanisms for reversing an appellate division decision are set out. These allow the final authority on any provision or issue, ultimately, to rest with the Parties. One is through an Interpretive Statement; the second is through an amendment. Neither are easily achieved, but both do allow corrections to be made in the direction of the law if necessary. Both are recognized tools in the Vienna Convention on the Law of Treaties as well, and thus are not precedent-setting by their inclusion here.

Article 49: National security

Article 50: Rules for taxation measures

Article 51: General reservations  
and exceptions

## 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.

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### Article 49 Commentary

Part 10 sets out some broad exceptions from the agreement as a whole. Each of the paragraphs has some history. That concerning national security is replicated in one way or another in almost all international investment or trade agreements, at least all modern ones. It is non-controversial in terms of its inclusion, though specific instances of its use in trade law, while rare, have raised concerns. We are not aware of any disputes centring on this issue in the investment field.

### 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

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- 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.




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**Article 50 Commentary**

The exclusion of tax measures from coverage is also a common element of many recent international investment agreements. Closely tied to this is the capacity of the States Party to themselves determine key issues relating to taxation, removing these decisions from dispute settlement unless no decision is made by the Parties.

The Article enters into a number of complex issues of relationships to tax conventions between the Parties to the Agreement, very specific applications, and non-applications of the national treatment and MFN rules to taxation, and the application of the rules on expropriation to taxation. The latter, in particular, gives full discretion to the home and host state Parties to make a determination on the application of the Agreement.

Although at times very forthright in its extended powers to the Parties, the provision, subject to technical adjustments that may be needed to move it to a multilateral stage in a multi-regional context, is relatively non-controversial.

**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.

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**Article 51 Commentary**

Article 51 addresses two situations of special concern to developing countries, but may also find some applications in developed countries. The first is the situation of historic discrimination being experienced by persons or categories of persons in a state’s territory leading to significant economic disadvantages. In such circumstances—apartheid being the most discussed one in this



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context—measures taken to redress the historic discrimination and to try to establish some economic rebalancing, will not be considered a breach of the Agreement, except that the rules on expropriation shall apply. This same circumstance might also apply, for example, in relation to economic policies to support the reversal of discrimination against indigenous peoples in a wide range of countries.

The second issue is responding to a balance of payments crisis. Such crises have become a modern day hazard that cannot easily be forecast or avoided. More will occur. This provision removes impediments to emergency response measures that an agreement might otherwise create. This is essential not to distort the necessary responses or to place all of the burdens of the response on domestic investors alone. The temporary nature of the measures is one element of the exclusion here, though no specific time limit can be set out in the abstract.

Article 52: Regional cooperation

Article 53: Amendment

Article 54: Annexes, Appendices and Notes

Article 55: Protocols

Article 56: Entry into force

Article 57: Withdrawal

Article 58: Authentic texts

Article 59: Depositary

## 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.

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#### Article 52 Commentary

This short Article carries much hidden weight. In encouraging the development of regional cooperation agreements, it highlights a key development role that can be played at this level, and the legitimacy of seeking such arrangements. Combined with the idea of regional mediation already raised, and the opportunity for regional dispute settlement offices under Annex A, broader cooperation agreements can provide a sound basis for regional growth. Of course, many regions already know this and are actively engaged in such processes.

### 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.

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#### Article 53 Commentary

An agreement of this type must be seen as a living instrument, capable of adjustment as time goes on and experience builds. This provision is a simple statement enabling an amendment to be made. It is normal practice for such an amendment to include its own terms for entering into force.

### 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.

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#### Article 54 Commentary

This Article is also increasingly common, as agreements include a variety of interpretive guidance or other incorporated text. Paragraph (A) makes the annexes and footnotes of the Agreement an integral part of the text. This ensures that the interpretive elements in the footnotes must be referred to in any disputes, thus preserving the overall context of the instrument. At the same time, the capacity of states to unilaterally alter the national lists in Annex E, on the economic sectors it has set in its domestic law for liberalization programs, is clearly restated. This will prevent any potential conflict with Paragraph (A) and Article 3.

**Article 55: Protocols**

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

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**Article 55 Commentary**

One of the mechanisms to encourage a living instrument is to allow for the regime it is part of to grow. Protocols do this, as the Kyoto Protocol has done on climate change and the Biosafety Protocol has done for the Convention on Biological Diversity. By specifically enabling this, one encourages growth based on experience and need as the regime develops.

**Article 56: Entry into force**

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

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**Article 56 Commentary**

This provision is particularly relevant for a multilateral agreement. The number of 40 ratifications reflects the need for a significant number of states to participate, giving a critical mass that is functional and effective in moving from the current bilateral and regional structure to a consistent global structure. The number is, however, still random. One alternative is to establish a double trigger for entry into force, based on a certain number of ratifications by developing countries and a certain number by developed countries. An alternative is a certain number of states that also have a given percentage of global investment stocks. In our view, a single number is, however, the simplest and best choice.

**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.
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**Article 57 Commentary**

A withdrawal provision from an agreement is a common feature, but takes on an added twist when there are derivative rights for others. Thus, such clauses in international investment agreements have generally allowed withdrawal by a Party subject to a designated period of time, or extinguishment period, for the rights of the investors and investments covered by the agreements. These periods range from a few years to 20 years.

In our view, a five-year extinguishment period is sufficient today to protect the rights of those who may have relied upon the agreement when making their investment. This is a significant adjustment period.

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### Article 58: Authentic texts



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

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#### Article 58 Commentary

Authentic languages establish which treaty text will be used as the official one or ones in the event of a dispute. Only English is chosen here, though the forum of negotiation of a multilateral agreement will likely have an impact on this issue, and a bilateral or regional agreement will make other choices reflecting the specific parties. Thus, this is primarily a placeholder for this issue.

### Article 59: Depositary



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

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#### Article 59 Commentary

Every treaty must have an official depositary. The global nature and purpose of this Agreement suggests strongly it should be the United Nations, through the office of the Secretary-General.

Annex A: Investor-State Dispute Settlement

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

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

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

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

Annex F: Indicative list of corporate  
social responsibility issues



- 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).

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### Article 2 Commentary

This Article sets out the procedural details for initiating a claim. It makes it clear how the process must be initiated, the specific notices, and so on. It seeks to avoid unnecessary burdens, but at the same time ensure sufficient clarity to allow all parties to know what is taking place and why. The forms set out here, a notice of intention to arbitrate and notice of arbitration are a fairly standard two-step process, and are consistent with the Articles of the Agreement calling for alternative dispute resolution processes to be attempted.

### 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.

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### Article 3 Commentary

It is anticipated that the Parties to the agreement, sitting in the dispute settlement Council, will establish specific rules of arbitration. This is the normal course in such a broadly-based instrument as this is intended to be, and even in smaller regional agreements. An interim set of rules is adopted by reference to the ICSID Rules of Arbitration. This does not include the ICSID Agreement however. Detailed rules of arbitration set out things like timelines for filings, operation of a tribunal, evidentiary rules and a myriad of technical details needed to ensure the smooth running of an arbitral process.

### 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.

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## Article 4 Commentary

Arbitration under international law requires a specific statement of consent to arbitrate. This Article provides that statement for the State Parties. It is a necessary element.

## 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.

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## Article 5 Commentary

This Article sets a three-year time limit for initiating a claim, based on when knowledge of a situation is obtained. This is fairly standard today.

The second paragraph requires first that the exhaustion of local remedies condition be shown to be met by an investor or investment. Where a tribunal has issued a waiver order from this requirement under this Agreement, the claimant must then waive all domestic recourse rights. This ensures that a host state will not be subject to two proceedings over the same issues, one international and one domestic. This is a modified version of the so-called fork in the road provision that is intended to prevent a duplication of claims at different levels.

## 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.

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## Article 6 Commentary

This Article continues the process of reversing the standard arbitration practice of disputing parties appointing the arbitrators. Because the process begins with the standing panel under the approach adopted here, it can be fast as well. A 30-day period is set out here for the initial panel to be established.

A disputing party can issue a challenge for “good cause”—not a defined term. Conflict of interest, real or apparent, is the primary cause, and can only be assessed on a case-by-case basis after the fact of an appointment. Given the limited number of people to be selected to the standing roster, one must assume very few other reasons of good cause are likely to arise.

### **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(a) 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 established 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.

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- (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.



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### Article 7 Commentary

This Article begins with the place of arbitration. Normally, this is a very important issue, at it often defines how any review of an arbitration process will be done, and where. However, because this process includes an appeal and the appeal is final, the importance of the issue from a legal perspective is much diminished. Given the absence of privately appointed arbitrators and the appeal process, only the most unusual of circumstances can be foreseen that might raise an issue likely to be subject to any local jurisdiction. The remoteness of this likelihood reinforces the opportunity to seek regional centres in which arbitrations could take place. Several already exist in fact, and could be incorporated into the process here with some ease.

Paragraph (2) states what is an increasingly common right of States Party to major agreements, the right to intervene and make their views known in a case to which they are not a disputing party. This is done as a matter of right, unlike for *amicus curiae*, which requires a vetting process by a tribunal.

Paragraphs (3) to (6) set out specific rules for preliminary objections, including an objection to jurisdiction based on a breach of Article 13, on corruption. Preliminary objections are a frequent occurrence in international arbitration today, so a process for addressing them is needed. This seeks to establish a clear, and reasonably time-efficient process for this purpose.

Paragraph (7) addresses a minor issue of set-offs for insurance claims.

Paragraph (8) addresses a very important issue of interim measures. These are measures a tribunal may issue to preserve the positions of the disputing parties from further potential damage as a result of the facts or circumstances underlying a claim. There is no simple way to predict the full range of issue that can arise, but some guidance on how to address them is important. What the formulation used here adds to what one might normally expect is a specific reference to the need for tribunals to consider the public welfare or interest in any decision on interim measures. This will now be an important factor in any such decisions.

## 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.

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## Article 8 Commentary

There remains considerable controversy about the acceptance of *amicus curiae* submissions in international arbitration. IISD, as the first organization to make an *amicus curiae* submission in such arbitrations, strongly believes in them. At the same time, we fully agree that a tribunal must be able to ensure that its ability to manage its process and ensure a fair process is maintained. The concerns of a number of observers and States that *amicus* processes may add significant burdens of time and expenses to developing countries, and favours hearing the views of wealthy western NGOs over other potentially interested persons or organizations, should be managed and considered through this process. Thus, we recognize the role of a submission process whereby the tribunal decides whether or not to accept any given submissions into the record. Some specific elements for a submission are set out here, in particular those requiring full disclosure of all support for the submission. Additional criteria or formalities can be set by the Council.

## 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.

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- (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 9 Commentary

This Article gives additional detail for managing the transparency required by the Agreement. In particular, it designates the Secretariat of the Dispute Settlement Body as a primary depository of all the arbitration documents, though any other Party or organization can do so as well. The bulk of the Article deals with issues of designating materials as confidential business information, or other necessary but limited restrictions on public access to information. These provisions are largely drawn from other recent international investment agreements that address this point. Again, it is not so much a complicated point as one with a number of details to consider.

## 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.

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## Article 10 Commentary

This Article ensures that the intentions of the Parties in excluding specific sectors or non-conforming measures are fulfilled, by allowing them an opportunity to agree on whether a challenged measure or other specific issue raised in a dispute is covered by the key exclusionary annexes. This is consistent also with how other recent agreements approach a preliminary step in interpreting and applying these Annexes.

## 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.

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## Article 11 Commentary

The use of experts in arbitrations is becoming increasingly important, especially when complex areas such as human health and the environment are involved. This Article makes the authority of a tribunal to appoint such experts clear. However, it does not require such appointments.

## 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.

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- (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.




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### Article 12 Commentary

There are several recent incidents where multiple claims by investors and investments have been initiated. In one famous case, this scenario led to diametrically opposed decisions. The provision on consolidation is drawn from the text of NAFTA, one of the few agreements to address the need to consolidate cases that arise from the same facts. This is an important element in ensuring that host states, in particular, are not subject to multiple claims, and that they are able to manage any unusually high burdens arising from a similar set of facts or circumstances. It also ensures that a consistent result emerges.

## 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 13 Commentary

While this Article is lengthy, it is not very novel or complex. It sets out in detail the kind of awards a tribunal can make. These are generally limited to monetary awards against states, and the remedies set out in detail in Articles 18 and 44 of the Agreement for investors and investments. Punitive damages are expressly precluded here.

## 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.



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- (3) The appeal must be filed within 60 days of the date of the original 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.
- (6) A panel decision not taken to appeal shall have the same final and binding status as a final decision on appeal.



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### Article 14 Commentary

Paragraph (1) is the critical legal paragraph here. Once the concept of an appeal process is agreed upon, the key issue is what can be appealed. The choices are, in brief, alleged errors of law, alleged errors of fact, or both. The options developed above are any alleged error of law, but only manifest errors of fact. The first element gives wide berth, especially important in early stages of an agreement, to establish correct and consistent approaches to the agreement. It is a broad statement, but deliberately so. The appeal on facts is much more limited, with an appealing party required to show there is a high test met, a manifest error of fact.

This preserves, but subject to some limits, the traditional role of tribunals of first instance as finders of fact. A high test is appropriate to overturn this near universal standard. At the same time, the appellate division is given a wide berth to review legal decisions. The balance, it is hoped, favours a strong opportunity to develop sound and consistent interpretations of the Agreement.

The finality of the appellate decision is also restated here. It is an important contribution to certainty and to ensuring a timely end to the process. This is in the interest of all stakeholders.

## **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 with establishment rights for 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?




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### 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?

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### 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?

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### 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

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- Control of hazardous substances and dangerous goods
- Emergency preparedness
- Fair workers' compensation, rehabilitation and return-to-work programs
- Other?



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### Business Relationships:

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

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### 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?

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### Good Corporate Citizenship:

- Philanthropy
- Organizational accountability
- SR reporting
- Other?

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# IISD Model International Agreement on Investment for Sustainable Development

The current model for International Investment Agreements (IIAs) was developed 50 years ago in a political and economic context that bears little resemblance to today's, and designed for a much narrower role than such agreements now play. Many critics believe that the current international investment regime is flawed beyond repair, and argue for the complete dissolution of the regime and its replacement with a regime specifically focussed on the obligations of transnational investors. IISD shares many of the concerns, but has taken a different tack, proposing a new model for IIAs with rights and obligations for investors, home states and host states—a model consistent with the goals and requirements of sustainable development and the global economy of the 21st century.

This publication contains the full text of IISD's Model International Agreement on Investment for Sustainable Development, with an article-by-article commentary explaining in clear language the intent and nuances of the text. It is essential reading for negotiators of IIAs struggling against the current model to craft agreements that will serve their national interests. But it is also written to engage a wider audience of stakeholders concerned about the future path of international law and globalization.

