

East African Community, African Regional Bodies

## East African Community Model Investment Treaty

Legislation as at 1 February 2016

FRBR URI: /akn/aa-eac/act/treaty/2016/model-investment/eng@2016-02-01

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East African Community

# East African Community Model Investment Treaty

Published

**Not commenced**

*[This is the version of this document at 1 February 2016.]*

## 1.0 Introduction

The EAC has elaborated a draft EAC Model Investment Treaty pursuant to directives of the Sectoral Council on Trade, Industry, Finance and Investment made on 30<sup>th</sup> May 2014 and on 22<sup>nd</sup> May 2015.

The aim of the EAC Model Investment Treaty is to serve as:

- (i) as a template for investment negotiations of the EAC and/or individual EAC Partner States with third countries or a bloc of countries;
- (ii) or as an instrument to help guide the EAC's negotiating position with a third country when it accepts the third country's negotiating text as the basis of negotiations.

The EAC Model Investment Treaty is not intended to be and is not a legally binding document. Rather it provides guidelines for the Partner States in any negotiations they enter into relating to an investment treaty.

The preparation of the EAC Model Investment Treaty has been undertaken in an interactive process by EAC Experts from the Partner States. For the most part, the EAC Model Investment Treaty draws from the approaches set out in the 2012 Model Bilateral Investment Treaty Template of the Southern African Development Community (the SADC Model BIT), the COMESA Common Investment Area Agreement and the Model Text for the Indian Bilateral Investment Treaty (Indian Model BIT). The International Institute for Sustainable Development (IISD) also provided input towards the development of the EAC Model Investment Treaty. The EAC Secretariat facilitated the process of development of the Model Investment Treaty.

## 2.0 Content of the draft EAC Model Investment Treaty

Commentary:The preamble introduces the objectives and intentions of the Treaty, and serves as guidance for its application and interpretation. The preamble highlights the importance of cooperation between the Parties and their desire to encourage investment, in view of its potential contribution to sustainable development, while preserving the states' right to regulate, and strike a balance between rights and obligations of investors and states.

The Government[s] of \_\_\_\_\_ and the Government of \_\_\_\_\_,

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

**Desiring to intensify** economic cooperation for the mutual benefit of both State Parties;

**Recognizing** the important contribution investment can make to the sustainable development of the State Parties, including the reduction of poverty, increase of productive capacity, economic growth, the transfer of technology, and the furtherance of human development and human rights particularly in light of EAC Partner States commitments to international conventions in that respect

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

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

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

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

**Agreeing** that the objectives of this Treaty can be achieved without compromising public interest such as health, safety and environmental measures;

Have agreed as follows:

## Part 1 – Common provisions

### Article 1 – Objective

Commentary:

This article outlines the main objective of the Model Investment Treaty: to encourage and increase foreign investment between the state parties, but not any type of foreign investment only those investments that effectively support the sustainable development of both parties, particularly the host state party.

The main objective of this Treaty is to promote, facilitate, protect and increase investments between investors of one State Party into the territory of the other State Party that supports: employment generation, increased production and productivity, technology and skills transfer for local value addition, synergies with local firms and ultimately contribute to poverty reduction in the host State in a sustainable way.

### Article 2 – Definitions

For the purpose of this Treaty, unless the context otherwise requires:

*Force Majeure* means act of God beyond the Parties' control;

Home State means, in relation to

- a. a natural person, the State Party of nationality or predominant residence of the investor in accordance with the laws of that State Party
- b. a legal or juridical person, the State Party of incorporation or registration of the investor in accordance with the laws of that State Party

and declared as the Home State at the time of registration where required under the law of the Host State.

Host State means the State Party where the investment is located.

ICSID means the International Centre for Settlement of Investment Disputes, established under the Convention on the Settlement of Investment Disputes between States and Nationals of Other States as amended to date.

Commentary:

The definition of "investment" determines the scope of the treaty's protection, defining which foreign assets and persons can benefit from the rights granted in the treaty, including the right to initiate arbitration against the host state.

Investment means an enterprise within the territory of one State Party established, acquired or expanded by an investor of the other State Party, including through the constitution, maintenance or acquisition of a juridical person or the acquisition of shares, debentures or other ownership instruments of such an enterprise, provided that the enterprise is established or acquired in accordance with the laws of the Host State; and [registered] [approved][recognized] in accordance with the legal requirements of the Host State]. An enterprise may possess assets such as:

- a. Shares, stocks, debentures and other equity instruments of the enterprise or another enterprise
- b. A debt security of another enterprise
- c. Loans to an enterprise
- d. Movable or immovable property and other property rights such as mortgages, liens or pledges

*[Please note: numbering as in original.]*

- f. Copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State
- g. Rights conferred by law or under contract, including licenses to cultivate, extract or exploit natural resources

For greater certainty, Investment does not include:

- (i) Debt securities issued by a government or loans to a government
- (ii) Portfolio investments
- (iii) Claims to money that arise solely from commercial contracts for the sale of goods or services by a national or enterprise in the territory of a Party to an enterprise in the territory of another Party, or the extension of credit in connection with a commercial transaction, or any other claims to money that do not involve the kind of interests set out in subparagraphs (a) through (g) above.

Investment authorization means any government permit, authorization, licence, registration certificate or similar legal instrument that entitles an investor to establish, expand, acquire, own or operate an investment.

Investor means a natural person or a juridical person of the Home State Party making an investment into the territory of the Host State Party, provided that:

- 1) the natural person, if a dual citizen, is predominantly a resident of the Home State[, and in any event is not a national of the Host State Party as well]
- 2) for a juridical person, [it is a legally incorporated enterprise under the laws of the Home State.] [it is a legally incorporated enterprise under the laws of the Home State and is effectively owned or controlled by a natural or juridical person of the Home State Party.][it is a legally incorporated enterprise under the laws of the Home State.] [it is a legally incorporated enterprise under the laws of the Home State, is effectively owned or controlled by a natural or juridical person of the Home State Party].

Optional addition: The provisions of this Treaty shall not apply to investments owned or controlled by State-owned enterprises or sovereign wealth funds.

Measure means any form of legally binding governmental act [directly affecting] [that is applied directly to] an investor or its investment, and includes any law, regulation, procedure, requirement, final judicial decision,

or binding executive decision [subject to the exclusion of measures of a [state][provincial] [municipal] level government].

Portfolio investment means investment that constitutes less than 10 per cent of the shares of the company or otherwise does not give the portfolio investor the possibility to exercise effective management or influence on the management of the investment.

Senior Management means a group of high level executives that actively participate in the daily supervision, planning and administrative processes required by a business to help meet its objectives.

State Party or Party means a State that is party to this Treaty.

Territory in relation to a State means the total land area of that State Party and, in relation to (a coastal State), includes, in addition, the territorial sea and any maritime area situated beyond the territorial sea that has been designated, or that may in future be designated, under the law of and in accordance with international law, as an area over which may exercise rights with regard to the sea bed, subsoil or natural resources.

Transfers means international payments and transactions in electronic or any other form.

UNCITRAL Arbitration Rules means the arbitration rules of the United Nations Commission on International Trade Law as approved at the time an arbitration is commenced pursuant to the submission of a notice of arbitration under such Rules, including any rules or annexes specific to investor-State arbitration processes and, in particular, the UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration.

### Article 3 – Scope and coverage

Commentary:

This Article offers a generally acceptable way to outline the scope and coverage of the treaty

- 3.1 This Treaty applies to measures adopted or maintained by a Party relating to:
  - a. investors of the other Party; and
  - b. investments in the Territory of the Party of investors of the other Party [in existence as of the date of entry into force of this Treaty or established, acquired or expanded thereafter] [established, acquired or expanded as of the date of entry into force of this Treaty].
- 3.2 A Party's obligations under Part 2 shall apply to:
  - a. a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party;<sup>[1]</sup>and
  - b. the political subdivisions of that Party.
- 3.3 For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.
- 3.4 Each Party shall admit the entry of investment made by Investors of the other Party pursuant to its applicable laws and regulations and in line with their national development and social goals

[1]

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



## Part 2 – Substantive provisions

### Article 4 – National treatment

#### Commentary:

National Treatment requires non-discrimination as between domestic and foreign investors.

This article does not extend National Treatment to investors and investments during the pre-establishment phase, by not including the words "establishment, acquisition, expansion", and by covering only "the management, operation and disposition" of investments. This would allow EAC Partner States to preserve their policy space and to open or close sectors to investment in accordance to their development strategies.

Paragraph 4.3 (a), refers to separate schedules that allow for each party to submit lists of measures and sectors permanently excluded from the scope of the post establishment non-discrimination obligations under the treaty. This is in line with most advanced investment agreements, which allow for many exceptions to post establishment National Treatment coverage. In turn, paragraph 4.3(b) grandfathers all existing non-conforming measures, reducing the burden of listing all existing measures and the risk of forgetting to list some.

- 4.1 Subject to paragraphs 4.3 - 4.5, each State Party shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, in like circumstances, to its own investors and their investments..
- 4.2 For greater certainty, references to "like circumstances" in paragraph 4.1 requires an overall examination on a case-by-case basis of all the circumstances of an Investment including, *inter alia*:
- a. its effects on third persons and the local community;
  - b. its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;
  - c. the sector the Investor is in;
  - d. the aim of the measure concerned;
  - e. the regulatory process generally applied in relation to the measure concerned; and
  - f. other factors directly relating to the Investment or Investor in relation to the measure concerned.
- The examination referred to in this paragraph shall not be limited to or be biased toward any one factor.
- 4.3 Non-conforming measures and excluded sectors:
- a. This Article shall not apply to future measures or to sectors and activities set out in the Schedules to this Treaty.  
  
NOTE: The Schedules will include, to be listed on a State-by-State basis:
    - Measures, including all government measures that the government intends to enact that would be non-conforming, future amendments to same, and other possible areas, including performance requirements.
    - Sectors or subsectors to be excluded from post-establishment national treatment obligations.
  - b. Paragraph 4.1 shall not apply to nonconforming measures, if any, existing at the date of entry into force of this Treaty maintained by each State Party under its laws and regulations or any

amendment or modification to such measures, provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification. Subject to paragraph 4.3(a), treatment granted to investment once admitted shall in no case be less favourable than that granted at the time when the original investment was made.

#### 4.4 Exception for formalities

Nothing in this Article shall be construed to prevent a State Party from adopting or maintaining a measure that prescribes special formalities in connection with the Investments of Investors, such as a requirement that their Investments be legally constituted under the laws or regulations of the State Party, provided that such formalities do not materially impair the protections afforded by a State Party to Investors of the other State Party and their Investments pursuant to this Treaty.

#### 4.5 Application to Treaty

This Article shall constitute the definition and scope of all references to non-discrimination or national treatment or Most Favoured Nation treatment for all purposes under this Treaty. Any reference to any such term elsewhere in this Treaty shall be applied and interpreted in accordance with this Article.

### Article 5 – Most favoured nation treatment

#### Commentary:

Most Favoured Nation Treatment (MFN) requires the non-discrimination between foreign investors of different nationalities.

The MFN clause (under paragraph 5.1) (1) does not include pre-establishment commitments (as expressions establishment, acquisition, expansion" are not included), (2) the term "in like circumstances" is clarified under paragraph 4.2, and (3) treatment promised under other treaties is appropriately excluded from MFN coverage under paragraph 4.7.

In addition to the schedules, the article also provides for exclusions.

Paragraph 5.2 excludes the application of MFN to the advantages given to investors under other international agreements.

- 5.1 Subject to Article 4, each State Party shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, in like circumstances, to investors of any other State and their investments with respect to the management, operation and disposition of Investments in its Territory.
- 5.2 Notwithstanding any other provision of this Treaty, the provisions of this Article shall not apply to concessions, advantages, exemptions or other measures that may result from:
- (i) bilateral investment treaty or free trade agreement that entered into force prior to this Treaty; or
  - (ii) any multilateral or regional agreement relating to investment or economic integration in which a State Party is participating or may participate.
- 5.3 For greater certainty, the "treatment" referred to in Paragraph 5.1 and 5.2 does not include dispute settlement procedures provided for in other treaties, including those provided for in other investment treaties. Substantive obligations in other treaties, including other investment treaties, do not in themselves constitute "treatment", and thus cannot give rise to a breach of this article.

## Article 6 – Treatment of investors and investments

### Commentary:

The language in this article adopts a more restricted formulation which is less likely to lead to expansive interpretations, unlike the traditional FET provisions common to many BITs. It changes the focus from investor rights to governance standards, narrows the scope and coverage of FET.

An alternative approach has been included, based on the approach of the Indian Model BIT.

- 6.1 The State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice][due process] to investors of the other State Party or their investments taking into consideration the level of development of the State Party.
- 6.2 Investors or their Investments, as required by the circumstances, shall be notified in a timely manner of administrative or judicial proceedings directly affecting the Investment(s), unless, due to exceptional circumstances, such notice is contrary to domestic law.
- 6.3 Administrative decision-making processes shall include the right of administrative review, appeal of decisions, commensurate with the level of development and available resources at the disposal of State Parties.
- 6.4 The Investor or Investment shall have access to government-held information in a timely fashion and in accordance with domestic law, and subject to the limitations on access to information under the applicable domestic law.
- 6.5 State Parties will progressively strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes in accordance with their respective domestic laws and regulations.
- 6.6 A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

## Article 7 – Expropriation

- 7.1. Neither Party may nationalize or expropriate an Investment (hereinafter "expropriate"), or take Measures having an effect equivalent to expropriation, except for reasons of:
  - i. public purpose or interest,
  - ii. in accordance with due process of the Law,
  - iii. on a non-discriminatory manner, and
  - iv. on payment of just and adequate compensation.

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

- i. permanent and complete or near complete deprivation of the value of Investment;
- ii. permanent and complete or near complete deprivation of the Investor's right of management and control over the Investment; and

- iii. an appropriation of the Investment by the Host State which results in transfer of the complete or near complete value of the Investment to that Party or to an agency or instrumentality of the Party or a third party.
- 7.2. Just and adequate compensation shall normally be assessed in relation to the fair market value of the expropriated investment immediately before the expropriation took place ("date of expropriation") and shall not reflect any change in value occurring because the intended expropriation had become known earlier. In no event shall the valuation date be moved to any future date. The computation of the fair market value of the property shall exclude any consequential or exemplary losses or speculative or windfall profits claimed by the Investor, including those relating to moral damages or loss of goodwill. However, where appropriate, the assessment of fair and adequate compensation shall be based on an equitable balance between the public interest and interest of those affected, having regard for all relevant circumstances and taking account of:
- a. current and past use of the Investment, including the history of its acquisition and purpose;
  - b. the duration of the Investment and previous profits made by the Investment;
  - c. compensation or insurance payouts received by the Investor or Investment from other sources;
  - d. the value of property that remains subject to the Investor or
  - e. options available to the Investor or Investment to mitigate its losses, including reasonable efforts made by the Investor or Investor towards such mitigation, if any;
  - f. conduct of the Investor that contributed to its damage;
  - g. any obligation the Investor or its Investment is relieved of due to the expropriation,
  - h. liabilities owed in the Host State to the government as a result of the Investment's activities,
  - i. any harm or damage that the Investor or its Investment has caused to the environment or local community that have not been remedied by the Investor or the Investment, and
  - j. any other relevant considerations regarding the need to balance the public interest and the interests of the Investment.
- 7.3. Any payment shall be made in a freely convertible currency. Payment shall include simple interest at the current commercial rate of the Host State from the date of expropriation until the date of actual payment. On payment, compensation shall be freely transferable.
- 7.4. Awards that are significantly burdensome on a Host State may be paid over a period as agreed by the parties to the arbitration, subject to interest at the rate established by agreement of the parties to the arbitration or by an arbitral tribunal failing such agreement.
- 7.5. This Article shall not apply to the issuance of compulsory licenses granted in relation to intellectual property rights, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation or creation is consistent with applicable international agreements on intellectual property.
- 7.6. A non-discriminatory measure of general application shall not be considered an expropriation of a debt security or loan covered by this Treaty solely on the ground that the measure imposes costs on the debtor that cause it to default on the debt.
- 7.7. A non-discriminatory measure of a State Party that is designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, does not constitute an indirect expropriation under this Treaty.
- 7.8. The Investor affected by the expropriation shall have a right under the law of the State Party making the expropriation to a review by a judicial or other independent authority of that State Party of his/its case and the valuation of his/its investment in accordance with the principles set out in this Article.

## Article 8 – Senior management and employees

### Commentary:

This article provides for the host state to require progressive increases in the number of senior management, executive or specialized knowledge positions for nationals of the host state to occupy, and to institute training and mentoring program.

- 8.1 A State Party shall not require an investor to appoint, to senior management positions for its investment, individuals of any particular nationality.
- 8.2 A State Party may require that some of the board of directors, or any committee thereof, of an Investment be of a particular nationality, or resident in the territory of the State Party, provided that the requirement does not materially impair the ability of the Investor to exercise control over its Investment.
- 8.3 Subject to its laws, regulations and policies relating to the entry of aliens and engagement of non-national labour or management, each State Party shall grant temporary entry to nationals of the other State Party, employed by an Investor of the other State Party, for the purpose of rendering services to an Investment of that Investor in the territory of the Host State Party, in a capacity that is senior managerial or executive or requires specialized knowledge.
- 8.4 Notwithstanding any provisions of this Treaty, a State Party may require an Investor of the other Party or its Investment, in keeping with its size and nature, to have progressive increases in the number of senior management, executive or specialized knowledge positions that nationals of the Host State occupy; institute training programs for the purposes of achieving the increases set out in the preceding paragraph and to Board of Director positions; and to establish mentoring programs for this purpose.

## Article 9 – Transfers

### Commentary:

This article provides for a general right of an investor to repatriate its assets, subject to prudential measures, law enforcement, tax obligations, and a general emergency balance of payments situation. It includes clear and strong safeguards (under paragraph 9.4) to ensure the ability of the state to reply to emergency situations.

- 9.1 A State Party shall accord to Investors the right to:
  - (a) repatriate the capital invested and the Investment returns;
  - (b) repatriate funds for repayment of loans;
  - (c) repatriate proceeds from compensation upon expropriation, the liquidation or sale of the whole or part of the Investment including an appreciation or increase of the value of the Investment capital;
  - (d) transfer payments for maintaining or developing the Investment project, such as funds for acquiring raw or auxiliary materials, semi-finished products as well as replacing capital assets;
  - (e) remit the unspent earnings of expatriate staff of the Investment project;
  - (f) any compensation to the investor paid pursuant to this Treaty; and
  - (g) make payments arising out of the settlement of a dispute by any means including adjudication, arbitration or the agreement of the State Party to the dispute.

- 9.2 Each State Party shall allow transfers in paragraph 9.1 to be made in a freely convertible currency at the market rate of exchange prevailing at the time of transfer.
- 9.3 Notwithstanding paragraphs 9.1 and 9.2, a State Party may prevent or delay a transfer through the non-discriminatory application of its law and regulations relating to:
- (a) bankruptcy, insolvency, or the protection of the rights of creditors;
  - (b) issuing, trading or dealing in securities, futures, options or derivatives;
  - (c) criminal or penal offences and the recovery of the proceeds of crime;
  - (d) financial reporting or record keeping of transactions when necessary to assist law enforcement or financial regulatory authorities;
  - (e) in case of nonfulfillment of contractual obligations between the investor and the host country investment authority;
  - (f) ensuring compliance with orders or judgments in judicial or administrative proceedings;
  - (g) tax obligations;
  - (h) social security, public retirement or compulsory savings schemes;
  - (i) severance entitlements of employees;
  - (j) the formalities required to register and satisfy the Central Bank and other relevant authorities of a State Party;
  - (k) in cases of balance of payments instability;
  - (l) in the promotion of technology transfer and food security
- 9.4 Safeguard provision:
- (a) Nothing in this Treaty shall prevent a Party from conditioning or preventing a transfer through a good faith application of its law in the event of serious balance-of-payments difficulties or if movements of capital cause or threaten to cause serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies, or if there are regional or global financial crises
  - (b) Where such measures are taken under 9.4(a)), a State Party shall enter into consultations with the other State Party at its request, with a view to review such measures and seek the minimum impact of such measures on an investor. Such measures shall be taken on a temporary basis and shall be eliminated as soon as conditions permit.
  - (c) Where, in the opinion of a State Party that has taken such measures, it is necessary to extend them for a further period due to the extended period of conditions described in paragraph 9.4(a), the State Party shall offer to enter into consultations with the other State Party with a view to seeking the minimum impact of such measures on an investor.

## Article 10 – Compliance with domestic law

### Commentary:

The objective of Articles 10 and 11 is to ensure that the conduct, management and operations of Investors and their Investments are consistent with the Law of the Host State, and enhance the contribution of Investments to inclusive growth and sustainable development of the Host State.

Investors and Investments shall comply with all laws, regulations, administrative guidelines and policies of the Host State. This includes, but is not limited to the following:

### **Article 11 – Obligation against corruption**

- 11.1 Investors and their investments in the Host State shall not, either prior to or after the establishment of an Investment, offer, promise, or give any undue pecuniary advantage, gratification or gift whatsoever, whether directly or indirectly, to a public servant or official of the Host State as an inducement or reward for doing or forbearing to do any official act or obtain or maintain other improper advantage.
- 11.2 Investors and their Investments shall not make illegal contributions to candidates for public office or to political parties or to other political organizations. Any political contributions and disclosures of those contributions must fully comply with the Host State's Law.
- 11.3 Investors and their Investments shall not be complicit in any act described in this Article, including inciting, aiding, abetting, conspiring to commit, or authorizing such acts.

### **Article 12 – Provision of information**

- 12.1 An investor shall provide information to Host State on the investment in question and the corporate history and practices of the Investor. Investors and Investments must comply with the requirements of the Law of the Host State to disclose true and complete information regarding their activities, structure, financial situation, performance, relationships with affiliates, ownership, governance, or other matters.
- 12.2 The Host State shall have the right to timely and accurate information in this regard. An Investor shall not commit fraud or provide false or misleading information provided in accordance with this Article.
- 12.3 A material breach of paragraph 12.2 by an Investor or an Investment is deemed to constitute a breach of the domestic law of the Host State concerning the establishment, acquisition, management, operation and disposition of Investments.
- 12.4 The Host State Party may make such information available to the public in the location where the Investment is to be located, subject to other applicable law and the redaction of confidential business information. The State Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the Investor or the Investment.
- 12.5 Where required, Investors must also disclose the source and channel of their funds in the Home State or Host State by submitting appropriate documentary evidence establishing the legitimacy of such funds. This disclosure, if requested, shall include any changes in the form or ownership of the enterprise or other entity located in the Home State and the Host State.
- 12.6 The Investment shall maintain true and complete copies of the records, books of account and current financial statements for the Investment that may be necessary to compute and substantiate compensation for any alleged breach of this Treaty or Host and Home State Laws, including:
  - (i) Governance structures;
  - (ii) records documenting the Investment, its shareholders, directors and employees.
- 12.7 Nothing in this Article shall be construed to prevent a State Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its domestic law or in connection with disputes between the Investor and the State regarding the Investment.

## Article 13 – Investor liability

### Commentary:

This article does not create a determination of liability of the investor; it merely requires home states to restrict the use of procedural or jurisdictional constraints (such as the forum non conveniens rule) to hearings on the merits of cases concerning investor acts. The article ensures that an investor can be held liable for impacts abroad of the decisions they take in their home state.

- 13.1. Investors and Investments shall be subject to civil actions for liability in the judicial process of their Home State for the acts, decisions or omissions made in the Home State in relation to the Investment where such acts, decisions or omissions lead to significant damage, personal injuries or loss of life in the Host State.
- 13.2. Home States shall ensure that their legal systems and rules allow for, or do not prevent or unduly restrict, the bringing of court actions on their merits before domestic courts relating to the civil liability of Investors and Investments for damages resulting from alleged acts, decisions or omissions made by Investors in relation to their Investments in the territory of the Host State.

## Article 14 – Transparency of contracts and payments

### Commentary:

This article aims at enhancing transparency in contract negotiations and payments by investors to the government.

- 14.1 Investors or their investments shall make public in a timely manner all contracts related to the establishment or right to operate an Investment made by the Investor or the Investment with a government in the Host State.
- 14.2 Investors or their investments shall make public in a timely manner all payments made to a government related to the establishment or right to operate of an Investment, including all taxes, royalties and similar payments.
- 14.3 Where feasible, such contracts and payments shall be made available on an Internet website freely accessible by the public.
- 14.4 The State Party that is the recipient of payments or party to an investment-related contract shall have the right to make the payments and contracts available to the public, including through an Internet site freely accessible to the public.
- 14.5 Confidential business information shall be redacted from contracts made public in accordance with this Article.



## Article 15 – Right of states to regulate

### Commentary:

This article reinforces that the treaty does not change the states' right to regulate, already affirmed in one of the preambular paragraphs. Considering the broad provisions contained in investment treaties, the significant number of investment treaty arbitrations challenging states' regulatory measures, and the risk that investment tribunals interpret the investment treaty as purely protecting the rights of investors, it is useful and important to reaffirm in the treaty text the states' right to regulate in the public interest.

- 15.1 The Host State shall have the right to take regulatory or other measures to ensure that development in its territory is consistent with the goals and principles of sustainable development and social and economic policy objectives.
- 15.2 Except where the rights of a Host State are expressly stated as an exception to the obligations of this Treaty a Host State's pursuit of its rights to regulate shall be understood as embodied within a balance of the rights and obligations of Investors and Investments and Host States, as set out in this Treaty.
- 15.3 For greater certainty, non-discriminatory measures taken by a State Party to comply with its international obligations under other treaties shall not constitute a breach of this Treaty.

## Article 16 – Right to pursue development goals

### Commentary:

This article provides exclusions from the treaty for measures taken to promote development within host states. In particular, it ensures that performance requirements may be imposed by states on foreign investors to promote the social and economic benefits of their investment in the host state. Subparagraph 15.2(b) highlights that a state may impose requirements on investors (before or) at the time of the establishment or acquisition of the investment, so that the investor can make an informed decision on establishment or acquisition, and those requirements will be applied during its operation.

- 16.1 Notwithstanding any other provision of this Treaty, a State Party may grant preferential treatment in accordance with their domestic legislation to any enterprise so qualifying under the domestic law in order to achieve national or sub-national regional development goals.
- 16.2 Notwithstanding any other provision of this Treaty, a State Party may
  - (a) support the development of local entrepreneurs, and
  - (b) seek to enhance productive capacity, increase employment, increase human resource capacity and training, research and development including of new technologies, technology transfer, innovation, and other benefits of investment through the use of specified requirements on investors made at the time of the establishment or acquisition of the investment and applied during its operation.
- 16.3 Notwithstanding any other provision of this Treaty, a State Party may take measures necessary to address historically based economic disparities suffered by identifiable ethnic or cultural groups due to discriminatory or oppressive measures against such groups prior to the signing of this Treaty.
- 16.4 With regard to environment, state parties shall not encourage investment by relaxing or waiving from domestic environmental legislation, and shall ensure that its laws and regulations provide for environmental protection and are implemented through domestic adequate laws and regulations.

Likewise, investors shall, in performing their activities, protect the environment and where the activity causes damages to the environment, they shall restore it to the extent appropriate and feasible. Investors are encouraged to develop and apply adequate new green technologies for this purpose.

- 16.5 Host states may develop national policies to guide investors in developing human capacity of the labour force. Such policy may include incentives to encourage employers to invest in training, capacity building and knowledge transfer, paying particular attention to the special needs for youth, women and other vulnerable groups.
- 16.6 Host states shall ensure that it does not waive or derogate from labour rights and such legislation as an encouragement for the establishment, maintenance or expansion of an investment in its territory. In this regard, investors may:
- i. consult with the host State authorities and national employers' and workers' organizations in order to keep manpower plans in harmony with national social development policies, making optimal use of labour available locally and within the sub region to provide substantial employment or reduce unemployment;
  - ii. give priority to the employment and promotion of the host State nationals;
  - iii. use technologies which generate employment;
  - iv. promote employment in the Member States by entering into supply contracts with local enterprises and by prioritizing, to the full extent possible, the use and processing of local raw materials;
- 16.7 Investors shall comply with international conventions and existing labour policies, and, in particular, not use child labour and shall support efforts for the elimination of all sort of child labour including forced or compulsory labour within Host states.

## Article 17 – Transparency of information by state parties

### Commentary:

This article promotes transparency of the information about the investment-making process. Publication of laws and regulations is a binding obligation, and policies and other administrative measures are under a best-endeavour obligation. However, these obligations are not subject to Investor to State Dispute Settlement.

- 17.1 Each State Party shall promptly publish, or otherwise make publicly available, its laws and regulations of general application as well as international agreements that may affect the Investments of Investors of the other State Party.
- 17.2 Each State Party shall endeavour to promptly publish, or otherwise make publicly available, its policies and administrative guidelines or procedures that may affect investment under this Treaty.
- 17.3 Nothing in this Treaty shall require a State Party to furnish or allow access to any confidential or proprietary information, including information concerning particular Investors or Investments, the disclosure of which would impede law enforcement or be contrary to its domestic laws protecting confidentiality.
- 17.4 This Article shall not be subject to the investor-State dispute settlement process.

## Article 18 – Exceptions

### Commentary:

This article provides exceptions seen in different regional and bilateral investment treaties.

- 18.1 Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination pursuant to Articles on National Treatment and Most Favoured Nation, nothing in this Treaty shall be construed to oblige a State Party to pay compensation for adopting or enforcing measures taken in good faith and designed and applied to:
- a. protect public morals and safety;
  - b. protect human, animal or plant life or health;
  - c. conserve of living or non-living exhaustible natural resources; and d. protect the environment.
- 18.2 For greater certainty, nothing in this Treaty shall be construed to oblige a State Party to pay compensation if it adopts or maintains reasonable measures for prudential reasons, such as:
- a) the protection of investors, depositors, financial market participants, policyholders, policy-claimants, or persons to whom a fiduciary duty is owed by a financial institution;
  - b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and
  - c) ensuring the integrity and stability of a State Party's financial system.
- 18.3 Nothing in this Treaty shall apply to taxation measures, subject to the continued application of Article 7 on Expropriation.
- 18.4 The necessity or appropriateness of the measure will be judged by the State invoking the measure.
- 18.5 The exceptional measures must be applied in a non-arbitrary manner and not be disguised as investment protectionism.
- 18.6 Nothing in this Treaty shall apply to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a State Party's obligations under Article 9 Transfers.
- 18.7 Nothing in this Treaty shall apply to a State Party's measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its national security interests.
- 18.8 Nothing in this Treaty requires a State Party to furnish or allow access to any information, the disclosure of which it determines to be contrary to its national security interests.
- 18.9 In the event offeree Majeure, each party will be excused from liability if some unforeseen event beyond the control of that party prevents it from performing its obligations under the Treaty. The affected party may request for re-negotiation of the Treaty if the continued performance of one party's contractual duties has become excessively onerous due to an unforeseen event beyond the control of that party.

## Article 19 – Denial of benefits

### Commentary:

This article provides for two types of situations where a state may deny an investor the benefits of the treaty, including access to dispute settlement: (1) in the lack of diplomatic relations between the host state and the home state, or when the home state is subject to economic sanctions by the host state, and (2) in the investor's lack of substantial business activity in the home state (paragraph 2 might not be needed if the definition of "investor" under Article 2 of the Draft EAC Model adopts a "substantial" or "substantive" business test, to avoid treaty-shopping).

- 19.1 A Party may at any time deny the benefits of this Treaty 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 Treaty were accorded to the enterprise or to its investments.
- 19.2 Subject to prior notification and consultation with the other State Party, a State Party may at any time deny the benefits of this Treaty to an investor of another Party that is an enterprise of such Party and to investments of such investors if investors of a non-Party own or control the enterprise and the enterprise has no substantial business activities in the territory of the Party under whose law it is constituted or organized.
- 19.3 For greater certainty, the Host State may at any time, including after the institution of arbitration proceedings in accordance with this Treaty, deny the benefits of this Treaty to:
- (i) an Investment or Investor owned or controlled, directly or indirectly, by persons of a non-Party or of the Host State; or
  - (j) an Investment or Investor that has been established or restructured with the primary purpose of gaining access to the dispute resolution mechanisms provided in this Treaty.

*[Please note: numbering as in original.]*

## Article 20 – Periodic review of this Treaty

### Commentary:

This article requires the Parties to review the Treaty every five years and adopt readjustments if needed.

- 20.1 The State Parties shall meet every five years after the entry into force of this Treaty to review its operation and effectiveness, including the levels of investment between the Parties.
- 20.2 The State Parties may adopt joint measures including regular consultations in order to improve the effectiveness of this Treaty.

## Part 3 – Dispute settlement

### Article 21 – Counter-claims by State Parties

Commentary:

This article makes clear that breaches of the Treaty by the investor can and should be taken into account in any dispute settlement proceedings, allows counterclaims by the states, and creates monetary liability in domestic courts for treaty breaches by an investor. These provisions seek to address the concerns with the enforceability of investor obligations under the treaty.

- 21.1 Where an investor or its investment is alleged by a State party in a dispute settlement proceeding under this Treaty to have failed to comply with its obligations under this Treaty or other relevant rules and principles of domestic and international law, the competent body 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 offsetting effects this may have on the merits of a claim or on any damages awarded in the event of such award.
- 21.2 A State Party may initiate a counterclaim against the investor before any competent body dealing with a dispute under this Treaty for damages or other relief resulting from an alleged breach of the Treaty.
- 21.3 In accordance with its applicable domestic law, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts against the Investor or Investment for damages arising from an alleged breach of the obligations set out in this Treaty.
- 21.4 In accordance with the domestic law of the Home State, the Host State, including political subdivisions and officials thereof, private persons, or private organizations, may initiate a civil action in domestic courts of the Home State against the Investor, where such an action relates to the specific conduct of the Investor, and claims damages arising from an alleged breach of the obligations set out in this Treaty.

## Article 22 – State-State dispute settlement

### Commentary:

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

Paragraphs 22.1 and 22.2 set out a requirement to seek to resolve disputes by amicable means prior to resorting to a formal and binding dispute settlement process. This is very common. Paragraph 22.2 seeks to encourage a formal mediation process and makes it mandatory for both parties to enter into such a process if one party formally states it desires to do so. Mediation is a non-binding process; hence a solution to the potential dispute cannot be imposed during mediation without the consent of both State Parties.

Paragraph 22.3 sets out the two options for State-State dispute settlement noted above: a State acting on behalf of an investor and a State initiating the process in order to resolve a dispute directly between itself and the other State Party. States have, under customary international law, a right to make claims for damages suffered by their citizens or businesses due to breaches of international law by a State. The provisions allowing for a State Party to make a claim on behalf of an investor here reflects a concrete application of this customary law right.

Paragraph 22.4 requires the exhaustion of local remedies by an investor or investment before a State may initiate a claim on behalf of an investor. The exhaustion of local remedies clause means that before any claim can be taken under the dispute settlement process set out in the treaty, the investor or investment must have sought to resolve the dispute in the local courts or other dispute settlement processes available in the Host State. It is important to note here that the language for such a clause must be set out as domestic proceedings relating to the measures underlying the claim under this Treaty. Some treaties have phrased the condition as requiring a claim concerning the breach of the treaty to be taken in the domestic courts, if it can be so taken. However, most States do not allow claims for a breach of the treaty per se to be taken, but rather a claim that the measure taken by the government is otherwise in breach of the domestic law or constitution. This difference is important. In addition, the exhaustion of local remedies clause allows a State seeking to take a claim on behalf of an investor or investment to argue that no local remedies are available under which to challenge the underlying measure. A State making such a claim must show evidence of this in order to be entitled to go directly to the international process.

Paragraphs 22.5–22.8 are fairly standard paragraphs relating to the appointment and operation of a tribunal at the international level. They ensure that the tribunal can be appointed and become functional even if one State is recalcitrant and uncooperative.

Paragraph 22.9 sets out options that States may consider for identifying the arbitration rules that will be applied by the tribunal to the dispute. This can be made specific, or left general. It should be noted that a tribunal can utilize the ICSID arbitration rules, which are fully accessible at any time to the public, without having to utilize the ICSID process if it does not wish to. Similarly, the UNCITRAL arbitration rules can be adopted, or any other rules, without any other impacts on the organization of the arbitration.

Paragraphs 22.10–22.13 are drawn from the COMESA approach and more recent approaches to investor-State arbitration in the U.S. and Canadian treaties, as well as others. Paragraph 22.10 requires that all the key arbitral documents be made public. Posting them on a website is the easiest way to do this.

Paragraph 22.11 allows for the participation of *amicus curiae*, either organizations or individuals, with an interest in the case.

Paragraph 22.12 requires the tribunal hearings to be open to the public. Paragraph 22.13 sets out the exception to the previous few paragraphs, that the tribunal can take such steps as may be needed to protect confidential business information from being put into the public domain. For documents this can be done by

redacting any such information from the public versions. For oral hearings it may mean holding portions of a session in camera.

- 22.1 Disputes between the State-Parties concerning the interpretation or application of this Treaty shall, as far as possible, be resolved through the use of consultations, good offices, mediation, conciliation, or any other agreed dispute resolution mechanism.
- 22.2 If a dispute between the Parties cannot be settled within six months from the time the dispute arose, it shall upon the request of either Party be submitted to an arbitral tribunal.
- 22.3 Such an arbitral tribunal shall be constituted for each individual case in the following way: Within two months of the receipt of the request for arbitration, each Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who, on approval by the two Parties, shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.
- 22.4 If within the periods specified in Article 22.1 the necessary appointment(s) have not been made, either Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointment(s). If the President is a national of either Party or if he or she is otherwise prevented from discharging the said function, the Vice President shall be invited to make the necessary appointment(s). If the Vice President is a national of either Party or if he or she too is prevented from discharging the said function, the member of the International Court of Justice next in seniority who is not a national of either Party shall be invited to make the necessary appointment(s).
- 22.5 The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Parties.
- 22.6 The Parties to the arbitration shall share the costs of the arbitration, including the arbitrator fees, expenses, allowances and other administrative costs. Each Party shall bear the cost of its representation in the arbitral proceedings. The tribunal may, however, in its discretion direct that the entire costs or a higher proportion of costs shall be borne by one of the two disputing Parties and this determination shall be binding on both disputing Parties.
- 22.7 A tribunal constituted under this Article shall have the power to determine its own procedures. The tribunal shall apply the [UNCITRAL] [ICSID] Arbitration Rules in force at the time of the submission of the dispute to arbitration, in accordance with paragraph 22.5.
- 22.8 All documents relating to a notice of arbitration, the settlement or resolution of any dispute pursuant to this Article, and the pleadings, evidence and decisions in them, shall be available to the public, subject to the redaction of confidential information.
- 22.9 Amicus Curiae submissions: The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a governmental entity of either State Party. The procedures in Schedule 3 shall apply for this purpose.
- 22.10 Procedural and substantive oral hearings shall be open to the public. This may be achieved through live broadcasting of the hearings by Internet broadcast.
- 22.11 An arbitral tribunal may take such steps as are necessary, by exception, to protect confidential business information in written form or at oral hearings.
- 22.12 No claims under this provision may be commenced if more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired, knowledge of the breach alleged in the arbitration claim and knowledge that the Investor has incurred loss or damage; or one year from the conclusion of the request for local remedies initiated in the domestic courts.
- 22.13 For greater certainty, a dispute within the meaning of paragraph 22 includes instances in which one of the State Parties refuses to take a position on a matter of interpretation.

## Article 23 – Investor-State dispute settlement

SPECIAL NOTE: the preferred option is not to include investor-State dispute settlement. Several States are opting out or looking at opting out of investor-State mechanisms, including Australia, South Africa and others.

However, if EAC decide to negotiate and include this, the text below may provide guidance for this purpose

### 23.1 Amicable settlement of disputes

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

### 23.2 Notice of Intent to arbitrate

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

- a) the name and address of the Investor;
- b) for each claim, the provision of this Treaty alleged to have been breached and any other relevant provisions;
- c) the legal and factual basis for each claim; and
- d) the relief sought and the approximate amount of damages claimed.

### 23.3 Mediation

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

### 23.4 Conditions for submission of a claim to arbitration

- (1) An Investor may submit a claim to arbitration pursuant to this Treaty, provided that:
  - a) six months have elapsed since the Notice of Intent was filed with the State Party and no solution has been reached;
  - b) the Investor or Investment, as appropriate,
    - i. has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Treaty, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State; or
    - ii. the Investor demonstrates to a tribunal established under this Treaty that there are no reasonably available legal remedies capable of providing effective remedies of the dispute concerning the underlying measure, or the legal remedies provide no reasonable possibility of such remedies in a reasonable period of time.
  - c) The Investor has provided a clear and unequivocal waiver of any right to pursue and/or to continue any claim relating to the measures underlying the claim made pursuant to this



Treaty, on behalf of both the Investor and the Investment, before local courts in the Host State or in any other dispute settlement forum.

- d) No more than three years have elapsed from the date on which the Investor first acquired, or should have first acquired, knowledge of the breach alleged in the Notice of Arbitration and knowledge that the Investor has incurred loss or damage, or one year from the conclusion of the request for local remedies initiated in the domestic courts.
- e) The Investor consents in writing to arbitration in accordance with the procedures set out in this Treaty.
- f) For the avoidance of doubt, the provisions in this Treaty relating to arbitration procedures shall prevail over those in the arbitration rules selected to govern the arbitration in the event of any inconsistency.

### 23.5 Exception for interim relief

Notwithstanding paragraph 23.4(c), the Investor may initiate or continue an action that seeks interim relief before a judicial or administrative tribunal of the State Party, for the sole purpose of preserving the Investor's rights and interests during the pendency of the arbitration, and that does not involve the payment of monetary damages.

### 23.6 Applicable arbitration rules

Subject to Article 23.3, an Investor may submit an arbitration claim:

- a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the Host State and the other State Party are parties to the ICSID Convention;
- b) under the ICSID Additional Facility Rules, provided that either the Host State or the other State Party is a party to the ICSID Convention;
- c) under the UNCITRAL Arbitration Rules; or
- d) to the East African Court of Justice

### 23.7 Date of submission of claim

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

- (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;
- (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;
- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or
- (d) referred to under any arbitral institution or arbitral rules selected under paragraph 23.6 is received by the Host State.

### 23.8 Place of arbitration

The place of arbitration shall be in a place determined by Treaty of the parties to the arbitration or in the absence of such Treaty, as determined by the tribunal as established under 23.12.

### 23.9 Scope of arbitration

- a) An arbitration under this Article shall relate to an allegation of a breach of one or more rights or obligations under this Treaty that is subject to investor-State arbitration.
- b) Where an investment authorization or a contract includes a choice of forum clause for the resolution of disputes pertaining to that investment or the authorization or contract, no arbitration

under this Treaty may be initiated by the Investor when the underlying measure in the arbitration would be covered by such a choice of forum clause.

#### 23.10 Selection of investor arbitrator

The claimant shall provide with the Notice of Arbitration:

- a) the name of the arbitrator that the claimant appoints, or
- b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

#### 23.11 Consent to arbitration

- a) Each Party consents to the submission of a claim to arbitration under this Section in accordance with this treaty.
- b) The consent under paragraph 23.11(a) and the submission of a claim to arbitration under this Section shall satisfy the requirements of:
  - (i) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and
  - (ii) Article II of the New York Convention for an "agreement in writing"; and
  - (iii) Name any other body used and reference rule on submission of an arbitration

#### 23.12 Establishment of tribunal

- a) Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
- b) All arbitrators shall be drawn from a roster of eligible arbitrators established by the State Parties within 12 months of the entry into force of this Treaty and maintained up to date by the State Parties. Said roster shall be composed of persons of good standing, independence and with experience in international law, international investment, and/or dispute settlement under international law.
- c) If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Article, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.
- d) For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality,
  - i. the State Party hereby agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules; and
  - ii. an Investor may submit a claim to arbitration under this Article, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the Investor agrees in writing to the appointment of each individual member of the tribunal.

#### 23.13 Avoidance of conflict of interest of arbitrators

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

- a) be impartial, free of actual conflicts of interest and an appearance of conflict of interest, and independent of the disputing parties at the time of accepting an appointment to serve and shall remain so during the entire arbitration proceeding until the final award has been rendered or the proceeding has otherwise finally terminated; and
- b) disclose to the parties, the arbitration institution or other appointing authority (if any, and if so required by the applicable institutional rules) and to the coarbitrators, any items that may, in the

eyes of a reasonable third person, give rise to doubts as to the arbitrator's impartiality, freedom from conflicts of interest, or independence.

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

#### 23.14 Submissions by non-disputing State Party

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

#### 23.15 Amicus curiae submissions

The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party. The procedures in Schedule 3 shall apply for this purpose.

#### 23.16 Expert reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, on its own initiative subject to the consent of the disputing parties, which consent shall not be unreasonably withheld, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

#### 23.17 Transparency of proceedings

- (a) Subject to paragraphs 23.17(c) and (d), the State Party that is party to the arbitration shall, after receiving the following documents, promptly make them available to the public and the non-disputing State Party:
  - i. the Notice of Intent;
  - ii. the Notice of Arbitration;
  - iii. pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted in the form of amicus submissions;
  - iv. minutes or transcripts of hearings of the tribunal, where available; and
  - v. orders, awards, and decisions of the tribunal.
- (b) The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.
- (c) Any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.
- (d) Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:
  - i. Subject to subparagraph (iv), neither the disputing parties nor the tribunal shall disclose to the non-disputing State Party or to the public any protected information where the disputing State Party that provided the information clearly designates it in accordance with subparagraph (ii).
  - ii. Any disputing State Party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal.
  - iii. A disputing State Party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does

not contain the information. Only the redacted version shall be provided to the public in accordance with paragraph 23.17(a).

- iv. The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may withdraw all or part of its submission containing such information, or agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (iii). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents that either remove the information withdrawn by the disputing party that first submitted the information or re-designate the information, consistent with the designation of the disputing party that first submitted the information.
- (e) The United Nations Commission on International Trade Law (UNCITRAL) Rules on Transparency in Treaty-based investor-State Arbitration shall form an integral part of this Treaty.

### 23.18 Consolidation of arbitrations

- (a) Where two or more claims have been submitted separately to arbitration under this Article and the claims have a question of law or fact in common and arise out of the same underlying measure or measures or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 23.2 - 23.10.
- (b) A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the President of the International Court of Justice and to all the disputing parties sought to be covered by the order and shall specify in the request:
  - i. the names and addresses of all the disputing parties sought to be covered by the order;
  - ii. the nature of the order sought
  - iii. the grounds on which the order is sought
- (c) Unless the President of the International Court of Justice finds within 30 days after receiving a request under paragraph 23.18(b) that the request is manifestly unfounded, a tribunal shall be established under this Article.
- (d) Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:
  - (i) one arbitrator appointed by agreement of the claimants;
  - (ii) one arbitrator appointed by the respondent; and
  - (iii) the presiding arbitrator appointed by the [President of the International Court of Justice], provided, however, that the presiding arbitrator shall not be a national of either Party.
- (e) If, within 60 days after the President of the International Court of Justice receives a request made under paragraph 23.18(b), the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 23.18(d), the [President of the International Court of Justice, on the request of any disputing Party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the [President shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the [President] shall appoint a national of the nondisputing Party.
- (f) Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under this Treaty have a question of law or fact in common and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:
  - (i) assume jurisdiction over, and hear and determine together, all or part of the claims,

- (ii) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others, or
- (iii) instruct a tribunal previously established under Article 23 to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that
  - I. that tribunal, at the request of any Investor not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 23.18(d)(i) and (e), and
  - II. that tribunal shall decide whether any prior hearing shall be repeated.
- (g) Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under this Treaty and that has not been named in a request made under paragraph 23.18(b) may make a written request to the tribunal that it be included in any order made under paragraph 23.18(f), and shall specify in the request:
  - i. The name and address of the claimant;
  - ii. The nature of the order sought; and
  - iii. The grounds on which the order is sought the Investor shall deliver a copy of its request to the [President].
- (h) A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules in force at the time the proceedings are initiated, except as modified by this Treaty.
- (i) A tribunal established under this Article shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this paragraph has assumed jurisdiction.
- (j) On application of a disputing party, a tribunal established under this paragraph, pending its decision under subparagraph (f), may order that the proceedings of a tribunal established under this Article be stayed, unless the latter tribunal has already adjourned its proceedings.

#### 23.19 Awards

- (a) Where a tribunal makes a final award against a Host State or against an Investor in the light of a counterclaim by a State authorized under this Treaty, the tribunal may award, separately or in combination, only:
  - i. monetary damages and any applicable interest;
  - ii. restitution of property, in which case the award shall provide that the Host State or Investor, as the case may be, may pay monetary damages and any applicable interest in lieu of restitution.
- (b) A tribunal established under this Treaty [shall issue an award for costs and legal representation fees for any arbitration where the jurisdiction of the tribunal is denied to the Investor, and][may][shall] [shall, unless by special exception there is good reason not to do so] issue an award for costs and legal representation to the disputing party that prevails in the final award.
- (c) A tribunal may not award punitive damages.
- (d) An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.
- (e) Subject to paragraph 23.19(f) and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

- (f) A disputing party may not seek enforcement of a final award until:
- i. in the case of a final award made under the ICSID Convention, (a) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or (b) revision or annulment proceedings have been completed;
  - ii. in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other rules selected pursuant to this Article, 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.
- (g) Each Party shall provide for the enforcement of an award in its territory.
- (h) A disputing party may seek enforcement of an arbitration award under the ICSID Convention when it is in force for both Parties or the New York Convention.
- (i) A claim that is submitted to arbitration under this Section shall be presumed to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention, unless the State Party has proven that the claim has related to a sovereign matter.

### 23.20 Appeal mechanism

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

Within three months of the date of entry into force of this Treaty, the Parties may establish an appellate body or similar mechanism to review awards rendered by tribunals under this Chapter. Such appellate body or similar mechanism shall be designed to provide coherence to the interpretation of investment provisions in the Treaty. The Parties shall take into account the following issues, among others:

- i. the nature and composition of an appellate body or similar mechanism;
- ii. the applicable scope and standard of review;
- iii. transparency of proceedings of an appellate body or similar mechanism;
- iv. the effect of decisions by an appellate body or similar mechanism;
- v. the relationship of review by an appellate body or similar mechanism to the arbitral rules that may be selected under Articles 23.16; and
- vi. the relationship of review by an appellate body or similar mechanism to existing domestic laws and international law on the enforcement of arbitral awards.

## Article 24 – Interpretive statement of the State Parties

### Commentary:

This provision may serve as a safety valve to prevent unintended interpretations having binding force on the states, while making it easier for states to interpret the treaty without a need to amend it.

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

## Article 25 – Governing law in dispute settlement

### Commentary:

This article is aimed at ensuring a broad approach to the interpretation and application of the treaty, preventing tribunals from focusing on investment protection provisions only, and precluding the addition of obligations from other parts of international law.

- 25.1 When a claim is submitted to a tribunal under this Treaty, it shall be decided in accordance with this Treaty. The governing law for the interpretation of this Treaty shall be this Treaty and the general principles of international law relating to the interpretation of treaties, including the presumption of consistency between international treaties to which the State Parties are party. For matters related to domestic law, the national law of the Host State shall be resorted to as the governing law.
- 25.2 For greater certainty, paragraph 25.1 does not expand or alter the scope of obligations contained in this Treaty or incorporate other standards except where specifically expressed herein.

## Article 26 – Service of documents

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

## Part 4 – Final provisions

### Commentary:

The final provisions establish key aspects such as entry into force, period in force and termination, possibility of amendment, schedules and notes that form part of the Treaty, and language of the authentic texts.

## Article 27 – Entry into force

### Commentary:

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

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

## Article 28 – Period in force and termination

### Commentary:

The initial period for which the treaty would be in force is ten years. The treaty renews automatically at the end of ten years for a further ten years, indefinitely, unless either Party notifies the other of its wish to not have the treaty renew itself.

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

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

- 28.1 The Treaty shall remain in force for ten years following its entry into force.
- 28.2 This Treaty shall automatically be renewed for an additional period of ten years, unless either State Party has submitted a Notice of Intent to terminate the Treaty at the expiration of the current ten-year period at least one year prior to the renewal date.
- 28.3 Either State Party may, at any time, terminate this Treaty by giving an official notice to the other Party twelve months prior to its intended termination date, notwithstanding any prior renewal of this Treaty.
- 28.4 The rights of Investors and the State Parties shall continue in force for ten years following the expiration of the period in force for investments made during the period the Treaty was in force.

## Article 29 – Amendment

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

## Article 30 – Schedules and notes part of Treaty

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

## Article 31 – Authentic text

The authentic text of this Treaty shall be in English.