SADC MODEL BILATERAL INVESTMENT TREATY WITH COMMENTARY

The Government of ____ and the Government of _____,

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

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

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

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

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

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

Have agreed as follows:

The preamble of an international agreement of any type provides an introduction to the goals and thinking of the drafters of the agreement. It also provides an introduction for those who may interpret and apply the treaty at a later date. Of primary significance from this perspective is the role arbitrators may look to a preamble to play as they interpret and apply the treaty in an arbitration context between an investor and a State.

In these circumstances, there have been several instances where arbitral tribunals have examined the preamble of a given treaty and found only references to the promotion of investment and the provision of investor rights under the treaty. As a result, the preamble has been held to establish a presumption that the sole purpose of the treaty is the protection of the investor in order, presumably, to attract higher levels of investment. This has led to several instances where arbitrators have specifically held that this creates a presumption in favour of broader over narrower rights for the investor, fewer and more limited rights for government regulatory activity in relation to an investment, and an overall presumption of investor-friendly interpretations.

Although there are several arbitrations that have rejected this approach and it has been the subject of much academic and other professional criticism, it continues to be used in some instances. This includes in decisions made as recently as in 2010 and 2011. As a result, the preamble set out above is crafted to:

Be balanced, as between development objectives and investor interests, so as to preclude unintended expansive interpretation of substantive provisions in favour of investors on the basis of the intent to protect investors expressed in the preamble, as seen in several arbitrations.

Be focused on key issues and not become a listing of all of the issues reflected in the final text.

The paragraph on the right to regulate and the recognition of asymmetry issues, with modification for the broader subject matter here, is drawn from the World Trade Organization's (WTO) General Agreement on Trade in Services (GATS), which of course has all developed countries as State Parties. This should enhance its acceptability in a north-south negotiating context. At least in some measure, asymmetry is part of the policy mix for developing State's development policy building. This preamble recognizes such asymmetries as part of this mix for international investment law purposes, which overlaps with Mode 3 of the GATS. Hence there is a strong correlation between the two, and the proposed text can be seen as derived from the already agreed upon GATS.

Part 1. COMMON PROVISIONS

Article 1. Objective

The main objective of this Agreement is to encourage and increase investments [between investors of one State Party into

the territory of the other State Party] that support the sustainable development of each Party, and in particular the Host State where an investment is to be located.

Many treaties include an objective article to highlight, in a succinct manner within the substantive text, the treaty's main goal. This gives added weight to the objective as an interpretational guide, beyond that which is normally attributed to the preamble. The link between foreign direct investment (FDI} and the promotion of sustainable development is recognized in the Finance and Investment Protocol (FIP) and other SADC instruments. It is used here to support the key objective of the SADC Member States: for FDI to contribute to the development objectives of each State and the region as a whole, rather than simply being an end in itself.
The bracketed text reflects simply a stylistic choice: its inclusion is technically correct and appropriate, but the text reads more directly and succinctly without the bracketed language.

Article 2. Definitions

For the purposes of this Agreement:

Home State means, in relation to

1. a natural person, the State Party of nationality or predominant residence of the investor in accordance with the laws of that State Party

2. a legal or juridical person, the State Party of incorporation or registration of the investor in accordance with the laws of that State Party

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

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

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

SPECIAL NOTE: The definition of investment is very critical and still very controversial. Three options are included here in full: an enterprise-based definition, a closed-list asset-based approach, and an open-list asset-based approach. These are presented in order from the least to the most expansive in terms of what they cover. The pros and cons of each will be fully explained in the final commentary of Article 2.

ENTERPRISE-BASED DEFINITION

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

1. Shares, stocks, debentures and other equity instruments of the enterprise or another enterprise

2. A debt security of another enterprise

3. Loans to an enterprise

4. Movable or immovable property and other property rights such as mortgages, liens or pledges

5. Claims to money or to any performance under contract having a financial value

6. Copyrights, know-how, goodwill and industrial property rights such as patents, trademarks, industrial designs and trade names, to the extent they are recognized under the law of the Host State

7. Rights conferred by law or under contract, including licences to cultivate, extract or exploit natural resources

For greater certainty, Investment does not include:

1. Debt securities issued by a government or loans to a government

2. Portfolio investments

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

ASSET-BASED OPTION 1: CLOSED-LIST, EXHAUSTIVE TEST (BASED ON CANADIAN MODEL BIT)

Investment means the following assets admitted or established in accordance with the laws and regulations of the Party in whose territory the investment is made:

1. Anenterprise

2. Anequity security of an enterprise

3. A debt security of an enterprise (a) where the enterprise is an affiliate of the investor, or

(b) where the original maturity of the debt security is at least three years, but does not include a debt security, regardless of original maturity, of a State or State enterprise

4. A loan to an enterprise

(a) where the enterprise is an affiliate of the investor, or

(b) where the original maturity of the loan is at least three years, but does not include a loan, regardless of original maturity, to a State enterprise

5. An interest in an enterprise that entitles the owner to share in income or profits of the enterprise

6. An interest in an enterprise that entitles the owner to share in the assets of that enterprise on dissolution, other than a debt security or a loan excluded from subparagraphs (3) or (4) of this Article

7. Real estate or other property, tangible or intangible, acquired in the expectation or used for the purpose of economic benefit or other business purposes

8. Interests arising from the commitment of capital or other resources in the territory of a Party to economic activity in such territory, such as under

(a) contracts involving the presence of an investor's property in the territory of the Party, including turnkey or construction contracts, or concessions, or

(b) contracts where remuneration depends substantially on the production, revenues or profits of an enterprise

9. For greater certainty, an investment for the purposes of this Agreement does not include assets that are solely in the nature of portfolio investments; goodwill; market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods or services to or from the territory of a Party to the territory of the other Party, or a loan to a Party or to a State enterprise; a bank letter of credit; the extension of credit in connection with a commercial transaction, such as trade financing; or a loan to, or debt security issued by a State Party or a State enterprise thereof.

10. In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and significance for the Host Stateâs development.

OR

Ill. ASSET-BASED OPTION 2: NON-EXHAUSTIVE ASSET-BASED TEST (BASED ON U.S. MODEL TEXT)

Investment means assets admitted or established in accordance with the laws and regulations of the Party in whose territory the investment is made, and includes:

1. Movable and immovable property and other related property rights such as mortgages, liens and pledges

2. Claims to money, goods, services or other performance having economic value

3. Stocks, shares and debentures of enterprises and interest in the property of such enterprises

4. Intellectual property rights, technical processes, know-how, goodwill and other benefits or advantages associated with a

business operating in the territory of the Party in which the investment is made

5. Business concessions conferred by law or under contract, including

(a) contracts to build, operate, own/transfer, rehabilitate, expand, restructure and/or improve infrastructure, and

(b) concessions to search for, cultivate, extract or exploit natural resources

6. For greater certainty, an investment for the purposes of this Agreement does not include assets that are solely in the nature of portfolio investment; goodwill; market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods or services to or from the territory of a Party to the territory of the other Party, or a loan to a Party or to a State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing.

7. In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and significance for the Host Stateâs development.

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

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

1. the natural person, if a dual citizen, is predominantly a resident of the Home State[, and in any event is not a national of the Host State Party as well]

2. fora juridical person, [itis alegally 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.]Lit is a legally incorporated enterprise under the laws of the Home State, and conducts [substantial] [substantive] business activity in the Home State Party.] Litis a legally incorporated enterprise under the laws of the Home State, is effectively owned or controlled by a natural or juridical person of the Home State Party and conducts [substantial] [substantive] business activity in the Home State Party.]

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

Measure means any form of legally binding governmental act directly affecting an investor or its investment, and includes any law, regulation, procedure, requirement, final judicial decision, or binding executive decision [subject to the exclusion of measures of a [state][provincial] [municipal] level government].

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

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

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

Transfers means international payments and transactions in cash or electronic form.

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

For many definitions, such as "investor" and "investment," perfect solutions are illusive. One should focus, therefore, on drafting good definitions that are clear and consistent, rather than seeking perfect definitions that will fit every possible "what if" question.
Additional definitions will be added at the completion of drafting when it is determined that they are needed. Below are some commentaries on the key issues raised in the draft definitions above.
Investment is perhaps the most controversial and critical issue to define. The definition will determine which foreign capital flows will be covered by the Agreement.

- Three options are presented here, in order from the most specific and narrowly drafted to the most open-ended and broadly drafted. Option 1 adopts an enterprise-based approach. It requires the establishment or acquisition of an enterprise, as one classically associates with FDI. The assets of the enterprise are then included among the covered assets of the investor. The language used is taken in significant part from the GATS definition of commercial presence, which requires the establishment of an operating enterprise in the Host State. The illustrative list of assets that follows the opening paragraph in Option 1 is not the test of an investment, but illustrates the types of assets an investment covered under the treaty may own or possess.
- Option 2 is a closed-list, asset-based definition, drawing on the Canadian Model BIT of 2004 and subsequent treaties entered into by Canada. The list starts from an enterprise approach, but expands this to include such assets as intellectual property rights, whether or not they are associated with an existing enterprise in the Host State. This mixed approach is broader than an enterprise-based approach, but has the virtue of setting out a defined and limited list. Thus it is a middle ground between Options 1 and 3 in terms of scope of coverage, but should not be seen as an "easy" compromise text as it goes outside the enterprise-based approach. Many of the listed items can be interpreted in a very expansive manner by tribunals.
- Option 3 is the most expansive approach, an open-ended asset-based test that allows most assets to be claimed as covered investments. This is the most favourable to investors, and least predictable for Host States. Many of the texts that adopt this approach use language such as "every asset," allowing tribunals to read it just in that way, with no limitations. This is the approach in most existing SADC BITs and it is recommended that this be rejected for all future treaties in favour of Option 1 in particular.
- The choice of options should, we believe, also be considered in light of the overall objective, which is being formulated here from a developing country perspective, to promote investment that is supportive of sustainable development, which development policy suggests means business that brings constructive economic and social benefits.
- It should be noted that a failure to include a broader definition does not mean other assets cannot be owned by foreign investors or foreign citizens. That question then becomes a matter for each State to determine. Rather, it simply means they will be protected through domestic law processes and not through international treaties.
- The so-called Salini test: If Option 2 or Option 3 is used, it is strongly recommended that the test of the relationship of the investment to the Host economy be added. This test arises from arbitrations that have looked at what qualifies as an investment under the ICSID Convention, concluding that, as seen in the Salini arbitration award, "In order to qualify as an investment under this Agreement, an asset must have the characteristics of an investment, such as the [substantial] commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, and a significance for the Host State's development". This text appears above as paragraph 10 in the second option above, and as paragraph 7 in the final option. It is not likely it is needed in the first option because it starts from the enterprise-based approach, but could be included for greater certainty.

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

Investor addresses the critical issues to prevent dual nationals from using the treaty to invest back into his or her Home State, and to preclude "treaty shopping". This occurs when investors adopt locational choices as their Home State, where no substantive business is actually done, for the sole purpose of taking advantage of investment and/or taxation treaties. The provisions of the text seek to forestall this practice.
- The proposed text suggests options to preclude this, including possible requirements that the investment be legally owned or controlled by a person or business from the Home State and/or conduct substantive business in the Home State in order to qualify as an investor under the treaty.
- Not all governments may wish to foreclose all flexibility for foreign investments. Under the Common Market for Eastern and Southern Africa (COMESA) agreement, for instance, the substantial business test is adopted, but not the requirement for effective ownership and control.
- The terms [substantial][substantive] are both used in the text in this regard. Substantial has become the more common term in investment treaties, including in the FIP. Substantive is used in the SADC Services protocol and the GATS. There is not likely to be a significant difference in how these two terms are interpreted in this context, and both will be seen in context relative to the nature of the enterprise at issue. Both would ensure that, for example, simply being incorporated in a State with no actual business activity would not suffice to meet the test of being an investor for treaty protection purposes.
- Afinal issue is reflected in the âoptionalâ paragraph in the proposed definition of investor, relating to an exclusion of State-owned enterprises. This is a highly debated issue. One can treat them the same as a private investor, which will be done by saying nothing specific in the text, removing them from coverage with a text such as that set out above. An additional option, so far untested, is to include a reference to the Santiago Principles on the operation of sovereign wealth funds and State-owned enterprises to establish a minimum expected standard of conduct and transparency of such enterprises, and penalizing a failure to meet these standards with a withdrawal of coverage under the treaty. As this is a new area of debate, the reference here can be seen as a placeholder to allow for debate on this issue between the negotiating parties.

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

- "directly affecting" as used in the definition means the measure must have a direct impact on or relation to the investment, not simply lead to some tangential or indirect impact upon it. This is seen in several arbitrations.
UNCITRAL rules definition adjusts for the pending negotiation on specific rules for investor-State arbitration now underway at UNCITRAL and would automatically include any resulting updated versions.

Article 3. Admission of Investments of Investors of the other Party

SPECIAL NOTE: this Article Replaces Any other Possible Article on Investment Liberalization.

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

The treatment of investment liberalization provisions in an investment treaty is a highly controversial issue. In the context of investment treaties, liberalization provisions almost always come in the form of allowing foreign investors to receive national treatment, or the same treatment as domestic investors, in making an investment. The commitment is often then tailored to exclude or include certain sectors for which the commitment will apply. This is described in more detail below. This type of provision does not mean that a foreign investor is not subject to regulation, but rather that the regulation cannot be any less favourable than that applied to a domestic investor.
It is also important to note at the outset of this discussion that investment liberalization decisions take place through a State's domestic law and policy, and not, as is often suggested, in a treaty. Thus, not including a binding provision in a treaty does not in any way prevent a State from taking any and all measures to fully or partially open its investment markets, as it so wishes. However, including such provisions in a treaty can legally preclude a State from later altering its domestic law as circumstances may warrant, most notably closing a sector that is listed as open in the treaty if domestic economic needs should so require. This can entail a significant loss of domestic control over one's economy, and it is for this reason that the recommendation is not to include such a binding provision in a treaty.
While there is growing pressure to include investment liberalization guarantees into such treaties, the primary recommendation here, as noted, is not to do so. The SADC FIP does not do so, and the vast majority of existing BITS with a SADC Member State do not do so. The Drafting Committee proposal is to avoid including binding investment liberalization commitments. The present text, however, does include specific notes to assist those governments that do choose to include such a commitment. Some States are facing very heavy pressure under the EPA negotiations, for example, to include investment liberalization provisions.
The short draft provision suggested above does not entail any international law commitments on investment liberalization. However, it does entail a commitment to apply the domestic law relating to admissions of investments in good faith. This, unless excluded from dispute settlement, would create legal obligations under the treaty for how the government treats a potential investor.
For example, if two investors are competing for a mining licence and one achieves the licence by corruption, the other would have a possible claim under this provision for not acting in good faith. Damages would potentially include all the costs of seeking the investment, including possible several millions for assessments, environmental reviews, negotiating with local communities, etc., and possibly some level of lost profits. Therefore, the above draft provision does have a legal impact, though not one of mandatory investment liberalization.
The phrase "in accordance with their applicable law" in the text is understood here to include in accordance with treaty obligations that are in force for the State.
Some treaty texts include what are referred to as standstill or "no-backsliding" clauses on investment liberalization. Such a clause would require a State to not close or restrict entry into a sector once it has been opened to foreign investors of the other State. It is highly recommended that such a provision, if proposed in a negotiation, not be adopted, as it produces the same loss of future policy space as a direct liberalization commitment.
In support of the above approach, the Drafting Committee also noted that there are significant capacity constraints on developing countries to prepare and negotiate the schedules that are needed for a proper liberalization provision, thus producing significant risks of inadvertent error.
If a State does choose to adopt legally binding investment liberalization commitments, the Drafting Committee strongly recommended that it should follow the GATS "list-in" model. Thus, a schedule of liberalization commitments would be required for each party to the agreement. This stands in contrast to the North American Free Trade Agreement (NAFTA) model, which includes an open-ended provision for liberalization, subject to a schedule that excludes certain sectors or subsectors.
Establishing an investment liberalization commitment (or "pre-establishment right") does not require much drafting. Indeed, in most cases, it is simply added into the type of post-establishment national treatment provision seen in draft Article 4, below. This is done simply by including the additional words "establishment, acquisition, expansion." Thus, it is critical to watch out for the inclusion of these words in any draft text presented as part of a negotiation.
Even with a list-in approach, however, provisions for exclusion lists for certain subsectors and for inconsistent measures would need to be included. Thus, a properly constructed provision for investment liberalization would include three related elements:
- A list of sectors included for the liberalization commitment
- A list of subsectors that are excluded from the commitment
- A list of existing or future potential measures that are excluded from the scope of the treaty, at the national level, plus a clear statement on how any existing non-conforming measures at subnational levels are to be treated. This exclusion list should also note that any amendments to these measures would remain excluded as long as they are not more inconsistent than allowed by the original exclusion.

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

Two additional alternatives relating to investment liberalization may be noted:

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

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

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

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

Part 2. Investor Rights Post-Establishment

Article 4. Non-Discrimination

4.1 Subject to paragraphs 4.3-4.5, each State Party shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, in like circumstances, to its own investors and their investments with respect to the management, operation and disposition of Investments in its territory.

4.2. For greater certainty, references to "like circumstances" in paragraph 4.1 requires an overall examination on a case-by-case basis of all the circumstances of an Investment including, inter alia:

(a) its effects on third persons and the local community;

(b) its effects on the local, regional or national environment, including the cumulative effects of all investments within a jurisdiction on the environment;

(c) the sector the Investor is in;

(d) the aim of the measure concerned;

(e) the regulatory process generally applied in relation to the measure concerned; and

(f) other factors directly relating to the Investment or Investor in relation to the measure concerned.

The examination referred to in this paragraph shall not be limited to or be biased toward any one factor.

4.3. Non-conforming measures and excluded sectors:

(a) This Article shall not apply to the measures, present or future, or sectors and activities set out in the Schedules to this Agreement.

NOTE: The Schedules will include, to be listed on a State-by-State basis:

- Measures, including all existing non-conforming government measures, future amendments to same, and other possible areas, including performance requirements.

- Sectors or subsectors to be excluded from post-establishment national treatment obligations.]

(b) Unless otherwise set out in the Schedules, Paragraph 4.1 shall not apply to non- conforming measures, if any, existing at the date of entry into force of this Agreement maintained by each State Party under its laws and regulations or any amendment or modification to such measures, provided that the amendment or modification does not decrease the conformity of the measure as it existed immediately before the amendment or modification. Subject to paragraph 4.3(a), treatment granted to investment once admitted shall in no case be less favourable than that granted at the time when the original investment was made.

4.4 Notwithstanding any other provision of this Agreement, the provisions of this Article shall not apply to concessions, advantages, exemptions or other measures that may result from:

(a) a bilateral investment treaty or free trade agreement [that entered into force prior to this agreement]; or

(b) any multilateral or regional agreement relating to investment or economic integration in which a State Party is participating or may participate.

4.5. Exception for formalities

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

4.6. Application to Agreement

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

The text above is on non-discrimination. Many treaties include two elements: national treatment that requires non-discrimination as between domestic and foreign investors; and Most Favoured Nation treatment (MFN) that requires non-discrimination between different foreign investors. The Drafting Committee, as explained more below, has recommended against including an MFN provision here.
it is critical to note that the scope of coverage for post-establishment non-discrimination is just as important to set out as the scope of any pre-establishment rights in a treaty. Indeed, the most advanced agreements include many exceptions to national treatment or MFN coverage post-establishment. Such inclusions and exclusions can relate to sectors or subsectors and to existing or new measures that may be inconsistent with the non-discrimination obligations. This is similar to what is described in the commentary to Article 3 in relation to the inclusion of pre-establishment rights. The same types of exclusion lists should be created in every treaty for post-establishment rights as well. This is what is set out in paragraph 4.3, which refers to separate Schedules.
In addition to the exclusions and limits that would be included in a schedule, there are several exclusions from national treatment set out directly in the text of the article, most notably the exclusion of any advantages given to an investor due to other international agreements relating to investment. A broad approach to doing this is set out above in paragraph 4.5. (In practice, this may be more important for an MFN than a national treatment provision, but it is included here for extra certainty.)
The text above also sets out a proper basis for comparison of investors "in like circumstances." This is to ensure that a broad view is taken, rather than simply a narrow question of whether the investors are in the same or a related or competitive sector, an approach seen in a number of earlier arbitrations. This additional text, also seen in the COMESA Investment Agreement (CCIA), ensures the reasons for any measures can be fully considered, and not just their financial impacts.
The exceptions for non-conforming measures and the excluded sectors have two elements. The first is the capacity to exclude existing and future measures from coverage, as well as specified activities or sectors. Items included in the Schedules constitute a permanent exception from the non-discrimination obligation. The second element is a grandfathering clause that reduces the need for States to list all existing non-conforming measures of the central and other levels of government. This sets out an exemption for all existing non-conforming measures, including future amendments as long as the amendments are not more discriminatory in nature. This automatic exemption can then be supplemented for future measures or specific economic matters by using the Schedules option set out in the previous paragraph. This approach is drawn from the recently concluded Japan-Korea- China Investment Treaty.

The inclusion of paragraph 4.6 ensures that further references to non-discrimination in the text do not create additional or alternative, freestanding, legal obligations relating to non-discrimination. This ensures consistency and should prevent unanticipated consequences.
The language in the article is limited to the management, operation and disposition of investments. These are key terms of art relating to post-establishment phases. What is excluded are the terms referring to pre-establishment rights noted above: establishment, acquisition and expansion. The inclusion of these words would extend the article to pre-establishment rights of national treatment for investors. That said, there is some debate as to whether "expansion" of an existing business should be considered an establishment process, in particular when it is the actual expansion of productive capacity as opposed to expansion via a merger or acquisition. This may be one issue where some flexibility may be warranted, when it can be so limited, and subject to any other laws such as those relating to competition practices and consumer protection.
As noted, MFN treatment is excluded above. The Drafting Committee noted that these should be bilateral treaties and that, as such, they should not establish unintended multilateralization through the MFN provision. This is even more important should a treaty include a pre-establishment right for foreign investors. The Committee also noted that the MFN provision has been very broadly, and on several occasions unexpectedly, interpreted in arbitrations, making it very unpredictable in practice. This poses unnecessary risks for States, especially developing

countries.
Nevertheless, should a Member State choose to include an MFN provision, the Drafting Committee recommended that the Member State should insert the following paragraph into the above text as paragraph 4.2, with appropriate changes in subsequent paragraph numbering and cross references to the remaining paragraphs:
- 4.2. Most Favoured Nation Treatment: Subject to paragraphs 4.4-4.6, each State Party shall accord to Investors and their Investments treatment no less favourable than the treatment it accords, in like circumstances, to investors of any other State and their investments with respect to the management, operation and disposition of Investments in its territory.

Article 5. Option 1: Fair and Equitable Treatment

SPECIAL NOTE: The fair and equitable treatment provision is, again, a highly controversial provision. The Drafting Committee recommended against its inclusion in a treaty due to very broad interpretations in a number of arbitral decisions. It requested the inclusion of an alternative formulation of a provision on "Fair Administrative Treatment". Both options are now set out below.

5.1. Each State Party shall accord to Investments or Investors of the other State Party fair and equitable treatment in accordance with customary international law on the treatment of aliens.

5.2. For greater certainty, paragraph 5.1 requires the demonstration of an act or actions by the government that are an outrage, in bad faith, a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency.

Article 5. Option 2: Fair Administrative Treatment

5.1. The State Parties shall ensure that their administrative, legislative, and judicial processes do not operate in a manner that is arbitrary or that denies administrative and procedural [justice][due process] to investors of the other State Party or their investments [taking into consideration the level of development of the State Party].

5.2. Investors or their Investments, as required by the circumstances, shall be notified in a timely manner of administrative or judicial proceedings directly affecting the Investment(s), unless, due to exceptional circumstances, such notice is contrary to domestic law.

5.3. Administrative decision-making processes shall include the right of [administrative review] [appeal] of decisions, commensurate with the level of development and available resources at the disposal of State Parties.

5.4. The Investor or Investment shall have access to government-held information in a timely fashion and in accordance with domestic law, and subject to the limitations on access to information under the applicable domestic law.

5.5. State Parties will progressively strive to improve the transparency, efficiency, independence and accountability of their legislative, regulatory, administrative and judicial processes in accordance with their respective domestic laws and regulations.

Two alternatives are suggested in this text. One is based on the traditional fair and equitable treatment (FET) provision common to many BITs. The second is an alternative formulation that would be a new approach to addressing key issues in a more restricted and careful manner than the FET text.
The FET provisions in other treaties have become very broadly interpreted, leaving more recent treaties to provide interpretational guidance in the event of future disputes. The language on FET presented here is the least likely to lead to mischief through expansive interpretations by arbitrators.
The language in the first paragraph 5.2 is derived from the well-known Neer case, (1) but uses the language specifically as opposed to other more simple references to the case or to customary international law. This is to be more specific and precise in the standard to be applied. A reference to customary international law, or even the customary international law on the treatment of aliens, does not appear, as a result of some arbitral decisions and academic writings, to suffice to restrain arbitrator creativity in this regard.
Some States may find this too high a standard to be meaningful to investors today. However, it is clear that this was the intended standard when the original treaties were drafted and that the expansive interpretations since provided by some tribunals had not been anticipated.
Itis because of the large degree of unpredictability of the FET standard that the Government of South Africa has developed and proposed the formulation of a different standard on fair administrative treatment. This alternative approach seeks to avoid the most controversial elements of FET, while still addressing levels and types of actions by States toward an investor that should create a liability. The Drafting Committee was unanimous in believing this could be a constructive alternative approach.
Some key elements in the approach include changing the focus of the language from investor rights to a focus on governance standards. This

should help alter the interpretational approach in the event of an arbitration. Second, the text refers to just one part of what other texts refer to as being included in the FET concept. Thus it is expressly narrower in scope and coverage. Third, the language sets a fairly high standard of "arbitrary" conduct by a government agency, or conduct that amounts to "a denial" of procedural justice or due process. These are significant thresholds to be met, in keeping with concepts of a breach of natural justice.
Given the above, the Drafting Committee was impressed with the potential viability of Option 2 as a replacement for the FET standard. It was believed that this would still provide useful protection for investors, while limiting the risks of the expansive rulings associated with the FET standard in a number of arbitral awards.

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

Article 6. Expropriation

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

(a) in the public interest;

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

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

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

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

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

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

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

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

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

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

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

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

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

The above text also uses the fair and adequate payment standard, and requires compensation to be paid in a reasonably timely manner. This text leaves open the possibility that compensation may not always be fair market value (FMV}, depending on the option chosen for paragraph 6.2. In essence, Member States can determine if fair and adequate must always and only equal FMV, or if and when other factors may be considered. Under Option 3 on valuation of damages, FMV is the basis to use for valuation, and it is therefore the most favourable toward the investor. Under Option 2, there is a presumption FMV will be used, but the State can rebut the presumption on the basis of the equitable criteria set out in the option. The State bears the burden of doing so. This provides a more balanced approach. Under Option 1, there is no presumption but FMV would remain one of several factors to consider on an equal basis.

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

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

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

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

Article 7. Senior Management and Employees

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

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

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

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

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

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

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

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

Article 8. Repatriation of Assets

8.1. a State Party Shall Accord to Investors the Right To:
(a) repatriate the capital invested and the Investment returns;

(b) repatriate funds for repayment of loans;

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

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

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

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

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

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

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

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

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

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

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

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

f) taxation;

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

(h) severance entitlements of employees; and

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

8.4 Safeguard provision:

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

i) difficulties for balance of payment purposes,

ii) external financial difficulties, or

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

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

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

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

This article provides for the inclusion of the general right of an investor to repatriate its assets, subject to prudential measures, law enforcement, tax obligations, and a general emergency balance of payments situation. It is consistent with Canada and U.S. Model BITs, several regional examples, and the COMESA CCIA text, though with a clearer and stronger safeguards provision to ensure the ability of States to reply to emergency situations.
The language in the safeguards section, paragraph 8.4 of the Article, is broader than just balance of payments concerns, but is limited time-wise to the conditions identified in the grounds for the exception, either by reference to the conditions still being in existence or a 12-month period. The language is drawn in significant part from the Japan-Korea BIT. Examples of the circumstances in which such measures might be taken include national balance of payments crises, financial system crashes such as Argentina experienced, regional economic crises such as experienced in Asia, or responding to particular impacts of a global financial crisis.
Importantly, the safeguards provision is also self-executing. In other words, once the State taking the safeguard measure declares it to be necessary, that is the end of the matter: subject to patent abuse, the decision cannot be challenged under the arbitration process. However, in order to ensure a certain level of discipline, the State Party taking such measures is compelled to consult with the other State Party after taking such measures, or prior to their renewal if needed. This does not give a right of veto to the other State Party, but does impose a measure of accountability in the process.

Article 9. Protection and Security

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

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

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

Part 3. Rights and Obligations of Investors and State Parties

Article 10. Common Obligation Against Corruption

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

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

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

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

This article would create one common obligation on corruption for investors, Host States and Home States, instead of separate articles for each such actor. The main obligation against corruption is derived from the UN and OECD conventions on bribery, but closes a loophole that allows payments to be made to a family member or business associate instead of directly to a politician or senior official.
Implementation of the article from most enforcement and penal perspectives is through domestic law. However, and this is very important, paragraph 10.3 makes it clear that an investment achieved by corruption in breach of this article or of applicable domestic law is a breach of the treaty and domestic law related to the establishment and operation of the investment, and therefore, by virtue of the definition of an investment that requires it to be made in accordance with domestic law, it is no longer a covered investment and no longer has dispute settlement rights. This is consistent with recent arbitral decisions relating to corruption in the making of an investment that have negated investment arbitration rights as a result of a finding of corruption.

Article 11. Compliance with Domestic Law

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

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

Article 12. Provision of Information

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

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

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

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

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

This article carries forward the anti-corruption idea to issues of fraud and misrepresentation in the making of an investment. It is consistent with recent arbitral decisions that have found material fraud and misrepresentation by investors in the information provided to a State in the making of an investment. In essence, it sets out clearly an obligation for honesty and plain dealing in making investments.
Paragraph 12.3 establishes the same penalty for fraud and misrepresentation as for corruption, but sets a standard of "material" to avoid severe penalties for de minimus errors or inconsequential misrepresentations in the course of "selling" the investment to the government. Material is a legal standard that requires a finding that the information was relied on as part of, but not solely, in the making of relevant decisions by the government.

Article 13. Environmental and Social Impact Assessment

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

relation to the Investment in question.]

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

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

(a) public [including via the Internet] and

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

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

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

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

Where the domestic law is sufficiently developed, such supplementing will not be needed. However, where the domestic law may for some reason be insufficient, due to the nature or size of the project being new for example, gaps can be made up by reference to the International Finance Corporation's standards or the law applicable to the proposed investment were it to be located in the Home State. This is an effort to create a floor standard in the event of gaps in the domestic law in relation to a given project, in particular larger projects that may be more extensive in terms of potential impacts than previously seen in a developing country Party. It does not, however, set any restrictions on the applicable domestic law, which remains the law of first recourse.

Article 14. Environmental Management and Improvement

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

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

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

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

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

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

Article 15. Minimum Standards for Human Rights, Environment and Labour

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

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

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

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

Paragraph 15.1 begins with the concept of Prof. John Ruggie as UN Secretary-General Special Representative on Business and Human Rights on the corporate duty to respect human rights. The second sentence then makes this an obligation on the investors.
Sentence 3 of paragraph 15.1 then comes back to the Ruggie concept that investors also should not be complicit in breaches of human rights by others. Complicity is a legal standard that requires some form of direct affiliation or deliberate failure to act in the face of human rights abuses. Complicity does not generally include simply paying taxes or other compliance with law, absent specific factors that might inform the investor or investment of human rights abuses related to such acts.

For labour standards, the ILO Declaration sets out what are considered as the minimum global standards, or core labour standards. Almost all States have subscribed to these minimum standards. There is no evident rationale for any investor to operate in a manner than denies these standards, given the tripartite nature of the process by which ILO standards are adopted, as between government, industry and labour. Paragraph 15.3 broadens paragraph 15.2 by imposing a duty on investors and investments to respect the international human rights, environmental and labour standards adopted by the Host State though participation in international agreements. These are easily identifiable. It sets such international agreements as a floor for their conduct, even if not fully incorporated into domestic law. These are not open-ended obligations, but derive expressly from the act or ratification of an agreement by the Host State, or Home State in certain circumstance.

Article 16. Corporate Governance Standards

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

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

This article should not be required, but sadly the practices of many multinational companies still make it necessary. The article would set a basic level of expectation of corporate conduct and governance.
The transfer pricing issue in paragraph 16.2 is a major factor in protecting government revenues from improper internal corporate practices that reallocate costs and expenses to reduce or avoid taxes in the Host State. For developing countries, with less capacity to monitor such practices, transfer pricing can have a significant impact on tax revenues. Clarity here can establish clear expectations as well as the possibility of claims against the company when other domestic laws may not be sufficiently clear.

Article 17. Investor Liability

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

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

This article requires Home States to restrict the use of such procedural or jurisdictional constraints as seen in the forum non conveniens rule, or similar rules, that impede hearings on the merits of cases relating to investor acts or decisions. Such measures by the Home State will in turn allow persons in the Host State to sue in the Home State for the impacts of decisions made by the investor.
Alternatively, the provision could be phrased as a requirement for an investment to waive any right to claim forum non conveniens or a similar jurisdictional bar, but this may be more difficult to apply in practice than a governmental measure that prevents the use of the doctrine in the circumstances envisioned here.
The above does not in any way create a determination of any liability of the investor. It simply terminates a jurisdictional barrier invented in a different era by courts operating under very different circumstances. This would ensure that an investor can be held liable for the impacts in foreign countries of its decisions in the Home State. The legal process of the Home State, together with the standard and burden of proof, etc., would continue to apply to the proceedings. This is the same approach as is currently applied, for example, in the European Union.
The Drafting Committee recognized the need for careful attention to be paid to the national implementation of this obligation, should it be adopted. New legislation or regulation concerning access to domestic courts and/or the jurisdiction of domestic courts may be needed by Member States, depending on current jurisdictional rules in each state. Specific training for this purpose may be needed for governments in the region.

Article 18. Transparency of Contracts and Payments

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

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

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

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

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

There is a growing concern for transparency in contract negotiation that many developing countries and international organizations are now responding to. Indeed, many now see this as one of the most important ingredients in the fight against corruption. This article sets out the principle of transparency and an expectation that both investors and governments will act on this expectation.
Payments by investors to the government, which may be in the form of taxes, rents, royalties, etc., are similarly subject to increased demands for transparency. The Extractive Industry Transparency Initiative is one application of this principle. This article again adopts a pro-transparency position in this regard.

Article 19. Relation to Dispute Settlement

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

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

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

19.4. In accordance with the domestic law of the Home State, the Host State, including political subdivisions and officials

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

One issue that frequently arises in relation to including obligations on investors in BITs is their enforcement. Here, the issue is addressed in two ways. The first is making it clear that such breaches can and should be taken into account in any dispute settlement proceedings initiated under the agreement. This includes a specific provision allowing counterclaims by States, the subject of inconclusive discussions under other treaties. The second method of enforcement is by creating a monetary liability in domestic courts of the Host State for a breach of the treaty obligations by an investor. This is, arguably, the most effective method of all, as it does not rely on government officials or capacity. The initiation of a complaint against an investor does not, of course, presume its guilt, simply that the matter can be tried and damages assessed if the breach is proven.
The opening words of paragraph 19.1 ensure that consequences related to corruption and fraud remain under the direction of those specific articles.

Article 20. Right of States to Regulate

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

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

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

This article confirms that the treaty does not alter the Host Stateâs basic right to regulate, but without eliminating all the effects of the investor protections. It should be read with more specific articles that enable performance requirements to be imposed, and carefully define the non-discrimination and expropriation rules, for example. All of these provisions are intended to work together.
The broader goal is restated in paragraph 20.2, again ensuring that some of the predilections of arbitrators to view investment treaties purely as investor rights would be untenable under the present approach. In view of the broad obligations in BITs, it is useful to reaffirm the Host Stateâs right to regulate investments in the public interest.

Article 21. Right to Pursue Development Goals

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

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

(a) support the development of local entrepreneurs, and

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

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

These provisions are developed in part from the existing SADC FIP and in part from other regionally based agreements. Collectively they provide a significant exclusion from the disciplines of the Agreement for measures specifically taken to promote development within the Host Stateâs economy.
Paragraph 21.1 is derived from the FIP.
Paragraph 21.2 is partly from the FIP but has been expanded to ensure that performance requirements may be imposed on foreign investors in

order to promote the social and economic benefits that are often ascribed to FDI. This provision does not impose any performance requirements, but does enable a government to require them without fear of potential claims that they are in breach of the agreement, in particular the non-discrimination provision. Combined, these articles will help reinforce the right of States to utilize performance requirement obligations when imposed at the outset of an investment.
Paragraph 3 captures the Black Economic Empowerment type of measures that are seen in many southern African States. It is derived from South African investment treaty language.

Article 22. Obligations of States on Environment and Labour Standards

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

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

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

A provision to preclude the lowering of environmental and related standards, labour standards, and human rights standards, in order to attract or maintain investments, was first included in NAFTA's Chapter 11 in 1992. However, it was done in a non-legally binding manner. The text above sets out a mandatory obligation not to lower such standards in order to attract or maintain investment. The SADC FIP includes a similar provision in mandatory language as well; hence this approach has already been adopted region-wide.
Of note, the above text includes a note suggesting the removal of this provision from the purview of an investor-State arbitration process if one is adopted. The Drafting Committee has not recommended the inclusion of an investor-State arbitration process, but recognizes that States may choose in some circumstances to do so; hence this is included to ensure attention is drawn to this question, in the event a State does choose this direction.

Part 4. General Provisions

Article 23. Cooperation In Promotion

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

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

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

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

Investment treaties are often styled as investment promotion and protection treaties. But they contain few if any provisions relating to the promotion of investment or to reviewing the effectiveness of the treaty in doing so.
This article sets out the obligation to promote investment, and proposes some specific tools that may, with the agreement of the parties, be used to do so. It is a minimal first step in this direction.
In addition, the article allows Home States to require that its investors who seek to make an investment under the treaty comply with the obligations contained herein as a condition of State financing or insuring of the investment. This gives some specific responsibility to the Home State for the conduct of its investors where governmental facilities are being used to support the investor. The concluding paragraph on assistance is intended to apply in a developed/developing State context. For a south-south context, one might consider including a sentence on the exchange of best practices in the implementation of this article instead.

Article 24. Transparency of Investment Information

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

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

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

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

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

This article aims to promote transparency for the information that should be available to investors about the investment making process. It sets out a binding obligation in relation to laws and regulations and a best efforts obligation in relation to policies and other administrative measures. This division recognizes that some forms of information may be more accessible than others on a short-term basis for implementation, while seeking to ensure that higher levels of transparency are brought into place as capacity is available.
At the same time, the obligation is removed from the investor-State dispute settlement process, if such a process is included in the treaty. If there is no investor-State provision then this paragraph can be removed.
The additional language on technical assistance recognizes that one of the State Parties may lack the technical capacity or resources to ensure this goal is achieved. When this is the case and support from the other treaty partner may be available, the text encourages this to be considered. As seen previously, the provision on assistance is intended to apply in a developed/developing State context. For a south-south context, one might consider including a sentence on the exchange of best practices in the implementation of this article instead.

Article 25. Exceptions

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

(a) to protect public morals and safety;

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

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

(d) to protect the environment.

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

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

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

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

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

25.4. Nothingin this Agreement shall apply to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a State Party's obligations under Article 8 [Repatriation of Assets].

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

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

This article combines a number of exceptions issues seen in various regional and bilateral agreements. Each is considered in order.
Paragraph 25.1 is drawn from Article XX of the GATT, and is also reflected in the COMESA CCIA and other bilateral agreements. However, it is more specifically drafted to make clear that no compensation is required to be paid to an investor for the types of measures set out therein as long as they are taken in good faith. This avoids a situation, for example, where a measure is "made legal" by virtue of paying compensation. Hence the test is not one of being a breach of the treaty or not, but a more refined and specific statement that the covered measures simply do not require compensation when taken in a bona fide manner. The addition of the last subparagraph is to ensure that the environment is clearly included, as opposed to simply implied by virtue of the other terms or by reference to WTO dispute settlement decisions. This makes the provision complete and express, rather than implied.
The role of a non-discrimination proviso {in square brackets at the beginning of the text) here is unclear, though it is always included in such formulations derived from the GATT. Yet this would negate any application of a general exception such as this to the national treatment or MFN provisions. Moreover, many measures may legitimately differentiate between investors in a region or in similar sectors. Hence, it is considered vital that if such introductory language is included, it should be made clear, again, that this is to be understood as per the article on non-discrimination and not as creating a new or different standard for non-discrimination. This, as noted previously, is done through the use of paragraph 4.6 in the text above.
We are not aware of such a general provision being used to date in an investment arbitration, and there remains some doubt as to its efficacy. Nonetheless, many agreements now contain this or similar text.
Paragraph 25.2 relates to measures to ensure the stability and integrity of the financial system. The notion of prudential measures in this text is intended to relate to the technical use of that term in relation to the financial sector only. It may be seen as complementary to the provision on safeguards measures enabling certain limitations on the export of assets by an investor.
Paragraph 25.3 concerns a broad exclusion for taxation measures. This is one approach seen in investment treaties, and is very clearly stated. Another approach is to make this subject to review by the Parties themselves in the event of an arbitration. This is used in the U.S. treaties now. It allows the Parties to the treaty to determine if a measure is a valid tax measure or not, a determination which, if agreed upon, becomes determinative. If the two State Parties do not agree, however, the issue falls back to the arbitration tribunal to determine.
Paragraph 25.4 relates to a general exception for financial and exchange rate policies, again as a complement to the safeguards provision relating to the repatriation of assets.
The exclusions relating to national security are inspired by the U.S. Model BIT and subsequent U.S. treaties. They are self-executing here, meaning that as soon as a State declares this exception, it is binding and not subject to arbitral review. This removes the review of this issue from any dispute settlement process. This self-executing approach is seen in the U.S. treaties.

Article 26. Denial of Benefits

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

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

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

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

This article has become a common feature of investment treaties. As set out here, it provides for two types of situations where a State Party may exercise its right to deny an investor the benefits of the treaty, including access to any dispute settlement benefits. The first is where a State Party does not have diplomatic relations with the Home State of the actual beneficial owner of the investor making the putative investment, or the actual beneficial owner is from a State subject to economic sanctions by the Host State Party.
The second situation is where the actual beneficial owner of the investor is from a third State not a party to the treaty and the investor does not actually carry on substantial business activity in the putative Home State. This is included here out of a sense of caution due to the multiple options set out for defining an investor under the treaty. If a substantial (or substantive} business test is adopted there, paragraph 2 above will not likely be needed. The paragraph is designed to act as a barrier to formal incorporation being the sole test of whether an investor is properly to be covered by the treaty benefits, and thus to prevent simply forum shopping to achieve the benefits of the treaty.

Article 27. Periodic Review of this Agreement

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

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

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

Part 5. Dispute Settlement

Article 28. State-State Dispute Settlement

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

portions of a session in camera.

Article 29. Investor-State Dispute Settlement

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

29.1. Amicable Settlement of Disputes

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

It is widely accepted that prior to initiating any arbitration process, investors and/or their investments should have a general obligation to resolve the dispute amicably. This paragraph sets out such a requirement.
It may be noted here that the right to initiate an arbitration, if it is given, could be exercised by the investor or the investment, which are usually two distinct legal entities. This is quite common.

29.2. Notice of Intent to Arbitrate

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

(a) the name and address of the Investor;

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

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

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

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

29.3. Mediation

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

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

29.4. Conditions for Submission of a Claim to Arbitration An Investor may submit a claim to arbitration pursuant to this Agreement, provided that:

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

(b) the Investor or Investment, as appropriate,

(i) has first submitted a claim before the domestic courts of the Host State for the purpose of pursuing local remedies, after

the exhaustion of any administrative remedies, relating to the measure underlying the claim under this Agreement, and a resolution has not been reached within a reasonable period of time from its submission to a local court of the Host State; or

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

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

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

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

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

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

29.5. Exception for Interim Relief

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

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

29.6. Applicable Arbitration Rules Subject to Article 29.3, an Investor may submit an arbitration claim:

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

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

(c) under the UNCITRAL Arbitration Rules; [(d) te XX regional arbitration forum in a region of one or both State Parties,] or (d/e) if the Investor and the Host State agree, to any other arbitration institution or under any other arbitration rules.

It is very common for an investment treaty to indicate which arbitration rules the investor may draw from when initiating an arbitration. The list of options above is now fairly standard, though some States have stopped including the ICSID option. The list can be adjusted by the States negotiating to include other rules or fora such as those under the International Chamber of Commerce and the Stockholm Chamber of Commerce.
The list above also assumes that no regional forum for arbitration exists that may be able to provide the appropriate rules and, in some cases, facilities. Where such a forum exists, the Drafting Committee was of the view that it should be carefully considered for inclusion or as an exclusive option to be used.

29.7. Date of Submission of Claim

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

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

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

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

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

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

29.8 Place of Arbitration

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

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

29.9 Scope of Arbitration

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

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

This paragraph addresses the very critical issue of what types of claims can be made in the arbitration process. This is in fact a very controversial issue, and the drafting of this provision should be undertaken with great care, as much can be at stake.
The above text is specific to claims based on an alleged breach of one or more of the obligations under the treaty that are subject to arbitration. It does not, for example, say simply an alleged breach of this treaty, which may be read to override another provision that excludes an obligation from the scope of dispute settlement. This drafting avoids any such risk.
This is the narrowest possible approach and it is strongly recommended.
In paragraph 29.9(b), it is supported by a clear statement directing the tribunal to recognize and enforce any other choice of forum clause applicable between the State and the investor/investment related to the underlying measure being complained of. In particular, paragraph 29.9(b)} requires the tribunal to give full priority to any choice of forum clauses specifically agreed or accepted by the investor in a contract or investment authorization. {Investment authorization is a defined term and includes, essentially, any form of permit, authorization, licence, etc.)
This has been a very controversial issue in investment arbitration and subject to different and opposite results in various arbitrations. The drafting above resolves the issue clearly and in favour of the choice of forum clause adopted by the investor and State directly. It is important, again, that the provision relates to the underlying measure, rather than the dispute under the Agreement, for the reasons explained previously.

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

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

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

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

29.10. Selection of Investor Arbitrator The claimant shall provide with the Notice of Arbitration:

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

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

This is a simple procedural requirement.

29.11. Consent to Arbitration

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

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

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

(Ii) Article ll 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]

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

29.12. Establishment of Tribunal

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

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

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

(d) For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and

without prejudice to an objection to an arbitrator on a ground other than nationality,

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

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

The establishment of a tribunal has traditionally been done through the appointment, by each side, of its own selection and the appointment of a president of the tribunal by either the agreement of the other appointed arbitrators, the arbitrating parties, or through the intervention of the appointing authority under the selected rules of arbitration of the treaty in question. This is the approach generally described here.
However, an alternative approach has also been included here for further consideration. This is the selection by the parties to the treaty of a roster of potential arbitrators under the treaty, from which the three arbitrators must be chosen. This allows for greater certainty of the necessary qualities of an arbitrator in the selection process and less opportunity for parties to manipulate the process with arbitrators known to represent investors or States in the process. This alternative approach is gaining currency today.

29.13. Avoidance of Conflict of Interest of Arbitrators

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

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

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

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

Conflicts of interest are a growing concern in investment arbitration, and have led to a range of very controversial decisions as regard what constitutes conflict of interest for arbitrators. This provision addresses the concerns by providing clear and unequivocal language requiring arbitrators to be impartial, independent and free of any conflict of interest for the entire period of the arbitration. The language suggested extends and tightens the rules to avoid conflicts of interest by arbitrators in the UNCITRAL and ICSID processes, primarily by eliminating the âmanifestâ requirement in ICSID. It also clearly sets out the common standard of an âappearance of conflict of interestâ, incorporated into the International Bar Associationâs Guidelines on Conflicts of Interests in International Arbitration.
In addition, the final paragraph raises an issue of some debate, whether arbitrators should serve as counsel in other arbitrations at the same time. A growing number of arbitrators have said they will no longer do so due to the conflicts of interest it creates. Others have refused to recognize this as a problem. The text suggested resolves this issue in favour of ensuring no conflict can arise in this regard by disallowing arbitrators from concurrently acting as counsel in other treaty based investment arbitrations.

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

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

29.15. Amicus Curiae Submissions

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

The acceptance of amicus curiae submissions in investment arbitration began in 2000 and is now understood to be common practice. It is certainly not controversial. It is usually done now through an application to the tribunal by the person or organization that intends to make the submission. ICSID now has specific but not very detailed rules for this and UNCITRAL is in the process of negotiating such rules at this time. The

suggested Schedule 4 would set out a clear set of rules in the treaty for the State Parties, any investor, the tribunal and the would-be amicus petitioners to follow in a clear and consistent manner.

29.16. Expert Reports

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

This is an increasingly common provision in investment arbitration processes and is also similar to one found in the WTO dispute settlement process. It ensures the tribunal can engage its own technical experts on any given matter and not have to rely only upon evidence of the disputing parties.

29.17. Transparency of Proceedings

(a) Subject to paragraphs 29.17(c) and (d), the State Party that is party to the arbitration shall, after receiving the following documents, promptly make them available to the public and the non-disputing State Party:

(i) the Notice of Intent;

(ii) the Notice of Arbitration;

(iii) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted in the form of amicus submissions;

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

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

(b) The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements.

(c) Any disputing party that intends to use information designated as protected information in ahearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

(d) Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

i) Subject to subparagraph (iv), neither the disputing parties nor the tribunal shall disclose to the non-disputing State Party or to the public any protected information where the disputing State Party that provided the information clearly designates it in accordance with subparagraph (ii).

(ii) Any disputing State Party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal.

(iii) A disputing State Party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the public in accordance with paragraph 29.17(a).

(iv) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that suchinformation 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.

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

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

29.18. Consolidation of Arbitrations

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

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

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

ii) the nature of the order sought

(iii) the grounds on which the order is sought

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

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

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

(ii) one arbitrator appointed by the respondent; and

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

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

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

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

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

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

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

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

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

(i) The name and address of the claimant;

(ii) The nature of the order sought; and

(iii) The grounds on which the order is sought

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

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

(i) A tribunal established under this Article shall not have jurisdiction to decide a claim, ora 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.

The initiation of a number of arbitrations against a State all arising from the same measure and similar investment treaties is a growing phenomenon. The article above is derived from revised U.S. texts and is comprehensive on how to address the possible consolidation of such multiple claims into one process.

29.19. Awards

(a) Where a tribunal makes a final award against a Host State or against an Investor in the light of a counterclaim by a State authorized under this agreement, the tribunal may award, separately or in combination, only:

(i) monetary damages and any applicable interest;

(ii) restitution of property, in which case the award shall provide that the Host State or Investor, as the case may be, may pay monetary damages and any applicable interest in lieu of restitution.

(b) A tribunal established under this Agreement [shall issue an award for costs and legal representation fees for any arbitration where the jurisdiction of the tribunal is denied to the Investor, and][may][shall][shall, unless by special exception there is good reason not to do so] issue an award for costs and legal representation to the disputing party that prevails in the final award.

(c) A tribunal may not award punitive damages.

(d) An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

(e) Subject to paragraph 29.19(f) and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

(f) A disputing party may not seek enforcement of a final award until:

(i) in the case of a final award made under the ICSID Convention, (a) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award, or (b) revision or annulment proceedings have been completed;.

ii) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or any other rules selected pursuant to this Article, 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside or annul the award, or a court has dismissed or allowed an application to revise, set aside or annul the award and there is no further appeal.

(g) Each Party shall provide for the enforcement of an award in its territory.

(h) A disputing party may seek enforcement of an arbitration award [under the ICSID Convention when it is in force for both Parties] or the New York Convention.

(i) A claim that is submitted to arbitration under this Section shall be presumed to arise out of a commercial relationship or transaction for purposes of Article | of the New York Convention, unless the State Party has proven that the claim has related to a sovereign matter.

This provision addresses a number of issues relating to a final decision against a State or an investor if a counterclaim has also been initiated.

First, it ensures that only monetary damages can be awarded in most cases, as opposed, for example, to ordering a State to withdraw a measure to protect the environment that it has enacted. The restitution of property may be a possible award as well, but the losing party in such a case may elect to pay monetary damages instead.
Second, the text precludes any punitive damages being awarded (known as exemplary damages in some jurisdictions). Thus, an award can only be for the value of proven economic damages resulting from the breach of the Agreement.
Third, the text addresses the issue of costs clearly. Today, the practice is more often to not award any costs of the proceedings or legal representation to the winning party. This practice is reversed in the text, subject to some discretion for the tribunal depending on the final formulation chosen. However, where a tribunal finds it has no jurisdiction to hear a claim brought by an investor, it must, under the text, award costs in favour of the Host State.
The remaining paragraphs deal with issues of enforcement of the award and are fairly typical provisions ensuring enforceability under the New York Convention. Paragraph (i) refers to Article 1 of the New York Convention, which establishes the scope of the Convention for enforcement related matters. It requires arbitral decisions to be commercial arbitration in order for the Convention regime to apply. Paragraph (i) establishes a rebuttable presumption that arbitrations under the Agreement meet this test of being commercial arbitrations.

29.20. Appeal Mechanism

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

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

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

This provision was also used first in the NAFTA agreement and is present in the U.S. and Canadian Model BITs and treaties derived from them. A very recent UNCTAD report recommends the inclusion of such provisions today. The parties to NAFTA have in fact issued such an interpretative statement to restrict the broad interpretation of FET by arbitration tribunals ruling under that treaty.
This is a highly recommended provision as it is the only effective safety valve to preclude unintended interpretations being binding on the parties over the longer term. Implementing this provision is a much simpler and more direct process than amending the treaty, making it a very functional process.

Article 31. Governing Law In Dispute Settlement

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

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

The identification of the governing law in an agreement is increasingly important. The above provision ensures a broad purposive approach to the interpretation and application of the Agreement and again mitigates against the ability of a tribunal to focus only on the investor protection provisions as the basis of an interpretative exercise.
The text also limits the role of the governing law clause to the interpretation of the treaty and precludes the addition of new obligations from other parts of international law.

Article 32. Service of Documents

Delivery of Notices and other Documents on a State Party Shall Be Made to the Place Named for ThatState Party In Schedule C.

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

Part 6. Final Provisions

Article 33. Entry Into Force

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

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

Article 34. Period In Force and Termination

34.1. the Agreement Shall Remain In Force for Ten Years Following Its Entry Into Force.

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

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

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

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

Many existing investment treaties have minimal provisions on the minimum period for which the treaty will be in force and provisions for its renewal or for the withdrawal of a Party. This leaves the Parties free to rely upon rules from outside the treaty, in particular the Vienna Convention on the Law of Treaties, to determine these issues. The view of the Drafting Committee was that the Model Agreement should contain the needed rules on this issue.
The initial period for which the treaty would be in force is ten years. Afterwards, two options are set out. One is a requirement for the Parties to exchange letters of intent to renew the treaty. A failure of either Party to do so means the treaty would then lapse. The second option is the opposite: the treaty renews automatically at the end of ten years for a further ten years, indefinitely, unless either Party notifies the other of its wish to not have the treaty renew itself. There is no legal difference in the end result, but Option 1 requires the positive acts of renewal, while Option 2 requires steps to avoid the automatic renewal. The Drafting Committee felt it was prudent to include both of the options.
In addition, the text provides a mechanism for either Party to terminate the treaty upon 12 months notice to the other Party. This provides an additional safety valve for the Parties in the event of significant difficulties being experienced, significant differences in interpretation or application of the treaty, or other policy reasons a State may have to terminate the treaty. This specific rule would replace general rules under the Vienna Convention.
Finally, it is common for investment treaties to provide for a period of continued application of the treaty in favour of investors of the other State Party made prior to the termination of the treaty. In some instances, treaties have extended this period to between 20 and 30 years. In other instances, the period has been 10 years. The shorter period is adopted here, with an additional option to adopt only a 5-year time period. The Drafting Committee was Unanimously of the view that the time period should be kept at the shorter end.

Article 35. Amendment

This Agreement may be amended by the mutual consent of the State Parties through an exchange of notes or signing of an

amendment agreement. An amendment shall enter into force 60 days following the deposit by the last State Party of its instrument of ratification of the amendment with the other Party.

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

Article 36. Schedules and Notes Part of Treaty

The Schedules and Notes to this Agreement Form an Integral Part of this Agreement.Commentary

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

Article 37. Authentic Text

The Authentic Text of this Agreement Shall Be In [English][and French][and Portuguese].

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

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

1. SCHEDULE 1 - Excluded/Included Sectors for Investment Liberalization

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

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

- List of excluded non-conforming measures

2. SCHEDULE 2 - Excluded/Included Sectors for Post-Establishment Investor Protections

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

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

- List of excluded non-conforming measures

3. SCHEDULE 3 - List on National Authorities and Contact Points

The Official Contact Point for the purposes of this Agreement shall be: State Party A: State Party B:

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

4. SCHEDULE 4 - Procedure for Amicus Curiae Submissions

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

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

submit.

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

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

(b) be no longer than ten typed pages;

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

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

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

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

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

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

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

This provision ensures transparency by the potential amicus on who is making the Petition and why. Any relationships to either of the litigation parties must be made clear, including organizational or financial. The Petitioner must also indicate the reasons it is making the submission and what its broader interest in the outcome of the arbitration may be. This could be more local in nature, such as specific environmental impacts, or more broadly developed, such as the proper approach to interpreting the treaty due to the impact the approaches may have on other related situations the amicus is concerned with.

The submission filed by an amicus curiae shall:

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

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

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

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

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

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

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

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

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

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

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

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

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

6. The tribunal shall ensure that:

(a) any amicus curiae submission does not disrupt the proceedings; and

(b) neither disputing party is unduly burdened or unfairly prejudiced by such submissions.

This places the burden on the tribunal to manage its procedure in such a way as to be transparent and equal and fair in its treatment of the arbitrating parties in light of their interests as the primary litigants.

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

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

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

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

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

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

SOUTHERN AFRICAN DEVELOPMENT COMMUNITY