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Africa Arbitration Academy

Model Bilateral Investment Treaty for African States

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Introduction

Recognising the growing importance of foreign direct investment in Africa and the desire of African states to promote an attractive investment climate that enhances sustainable development, the Africa Arbitration Academy Model Bilateral Investment Treaty (AAA Model BIT) has been developed to promote these objectives. The AAA Model BIT sets out the investment policy framework for the promotion of foreign direct investments in Africa. It considers the asymmetries in the existing investment policy framework in many African states. The AAA Model BIT recognises the right of state parties to regulate and to introduce new measures relating to investments in their territories in order to meet national policy objectives in accordance with established principles of international law.

The AAA Model BIT thus provides a unique approach to balancing the relationship between investment promotion and sustainable development. It serves as a source of cohesion for African states in relation to their ISDS reform strategies and promotes the codification of African states' investment policies and laws. The AAA Model BIT has been developed as a comprehensive document comprised of uniform texts which African states may adopt as a basis for developing their specific model investment treaties, and also for non-African states when seeking to negotiate and conclude BITs with African states. Even if a state does not have a model investment treaty, this AAA Model BIT will be useful in considering how obligations are drafted. It provides insights into different drafting approaches.

The AAA Model BIT is not intended to be and is not a legally binding document but a model instrument, the adoption of which would depend largely on negotiations, domestic context, and adaptability by African states. Consequently, the adoption of some or all the texts of this document and the result of any particular investment treaty negotiation are the responsibility of each African state.

The main objective of the Model BIT is to promote, encourage and increase investments, and enhance sustainable development in Africa. To support this objective, each article of the AAA Model BIT is accompanied by an explanatory note, which forms an integral part of the final product. The explanatory note serves as an informative tool for African and non-African states' officials when drafting and negotiating investment treaties involving African states. It provides guidance on the application of each of the provisions contained herein.

The preparation of the AAA Model BIT has been undertaken through an interactive and in-depth research process by a drafting committee and technical review committee consisting of seasoned arbitration and investment law experts drawn from different African states and the international arbitration and investment law community.

Drafting Committee

Abayomi Okubote - Chair

Visiting Professor, Bowen University, Nigeria
Managing Partner, Pensbury Attorneys & Solicitors
abayomi@pensburylaw.com

Name, Position and Organization *(in alphabetical order of surname)*	Email
Laura Alakija *Managing Partner,* *Primera Africa Legal*	**lAlakija@primeraal.com**
Dr. Ademola Bamgbose *International Arbitration Lawyer,* *Hogan Lovells*	**ademola.bamgbose@hoganlovells.com**
Omonigho Oyoma Brown *Head of Contract Management,* *Julius Berger Nigeria Plc*	**omonigho.brown@julius-berger.com**
Manuela Dieng *Legal Counsel* *African Legal Support Facility* *Abidjan – Côte d'Ivoire*	**m.dieng@afdb.org**
Solomon Ebere *Counsel, Omnia Strategy LLP, London*	**sebere@omniastrategy.com**
Ahmed Elfar *Associate, Three Crowns LLP*	**ahmed.Elfar@threecrownsllp.com**
Mahmoud Elsaman *SJD Candidate, Central European University* *Visiting Scholar, American University* *Washington College of Law*	**melsaman90@gmail.com**
Jackwell Feris *Director (Partner),* *Cliffe Dekker Hofmeyr Inc*	**jackwell.feris@cdhlegal.com**
Femi Gbede *Investment Funds Attorney,* *Fried, Frank, Harris, Shriver and* *Jacobson LLP, New York*	**femigbede@gmail.com**

Name, Position and Organization	Email
Ilham Kabbouri *Associate, Vinson & Elkins LLP*	**ikabbouri@velaw.com**
Madeline Kimei *Founder & Principal Director,* *IRESOLVE Limited, Tanzania*	**madeline@iresolve.co.tz**
Sulaiman Koroma *Sulaiman Koroma & Co* *Freetown, Sierra Leone*	**eskaykay2003@yahoo.com**
Ronald Mutasa *Partner, DLA Piper Africa Zimbabwe* *(Manokore Attorneys)*	**rmutasa@manokore.com**
Anita Omonuwa Ogbalu *Corporate Counsel,* *MTN Nigeria*	**anita_omonuwa@hotmail.co.uk**
Kenneth Ohene-Manu *Lecturer, UPSA Law School and* *Legal Consultants*	**kenneth.ohene-manu@upsamail.edu.gh**
Kate Okoh-Kpina *Advisor, Rule of Law & Gender Focal person, Police Programme Africa,* *Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) GmbH*	**kate.kpina@giz.de**
Ngo-Martins Okonmah *Senior Associate, Aluko & Oyebode*	**ngo-martins.okonmah@aluko-oyebode.com**
Folake Sadiq *Head of Legal/Company Secretary,* *Lagos bus Services Limited (LBSL)*	**folakesadiq@yahoo.com**
Thierno OLORY-TOGBE *Chief Legal Counsel* *African Legal Support Facility* *Abidjan – Côte d'Ivoire*	**t.olory-togbe@afdb.org**

Technical Review Committee

Prof. Dr. Mohamed Abdel Wahab - Chair

Professor of Law, Cairo University & Founding Partner and Head of Arbitration, Zulficar & Partners Law Firm
MSW@zulficarpartners.com

Name, Position and Organization *(in alphabetical order of surname)*	Email
Prof. George Bermann *Professor of Law at Columbia Law School*	gbermann@law.columbia.edu
Prof. Stavros Brekoulakis *Professor in International Arbitration at Queen Mary University of London*	s.brekoulakis@qmul.ac.uk
Dr. Khrushchev Ekwueme *Partner, Olaniwun Ajayi LP*	k.ekwueme@olaniwunajayi.net
Mr. Babatunde Fagbohunlu, SAN *Partner, Aluko & Oyebode*	Tunde.Fagbohunlu@aluko-oyebode.com
Ms. Judith Gill, QC *Independent Arbitrator at Gill Arbitration, Singapore*	jgill@judithgill.com
Ms. Samaa Haridi *Global Disputes Partner, King & Spalding*	sharidi@kslaw.com
Ms. Paula Hodges QC *Head of Global Arbitration Practice, Herbert Smith Freehills*	Paula.Hodges@hsf.com

Name, Position and Organization	Email
Ms. Ndanga Kamau *International Lawyer & Founder, Ndanga Kamau Law*	**ndanga@ndangakamau.com**
Prof. Joshua Karton *Associate Professor/Associate Dean Queen's University, Canada*	**joshua.karton@queensu.ca**
Prof. Makane Mbengue *Professor of Law and Director of the Department of International Law, University of Geneva*	**Makane.Mbengue@unige.ch**
Prof. Chrispas Nyombi *Associate Professor of International Commercial Arbitration, University of Derby*	**chrispas.nyombi@canterbury.ac.uk**
Prof. Emilia Onyema *Professor, SOAS University of London*	**eo3@soas.ac.uk**
Dr. Michele Potestà *Partner at Lévy Kaufmann-Kohler*	**Michele.Potesta@lk-k.com**
Prof. Dr. Maxi Scherer *Special Counsel of the Litigation/ Controversy Department and Member of the International Arbitration Practice Group at WilmerHale*	**Maxi.Scherer@wilmerhale.com**
Mr. Audley Sheppard QC *Partner, Clifford Chance LLP*	**Audley.Sheppard@CliffordChance.com**

Disclaimer

This Model BIT presents a modest contribution to the ISDS discourse and is an intellectual work product of the Africa Arbitration Academy. The provisions, content and commentaries included in this Model BIT do not purport to reflect the personal and professional individual opinions of the members of the Drafting and Technical Review Committees or any of the institutions, firms or organizations with which they are affiliated. The fact that the names of the members of the Drafting and Technical Review Committees appear on this Model BIT does not imply the expression of any opinion of whatsoever nature on the part of any individual member regarding the text of the Model BIT.

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Preamble

UNDERSTANDING the need to promote and accelerate social, economic and intra-African growth through direct, conscious and concerted efforts to eliminate barriers to trade and investment while promoting the free movement of labour, goods and services across African states;

UNDERSTANDING the importance of the trade and investment opportunities emanating from the African Continental Free Trade Agreement which provides useful guidance to African governments and institutions involved in the negotiation of bilateral investment treaties or international investment agreements by seeking to balance the rights and obligations among State parties and investors;

RECOGNIZING that the promotion and protection of investments by investors of one party in the territory of the other party will be conducive to the stimulation of mutually beneficial business activities, to the development of economic co-operation, and to the promotion of sustainable development;

ACKNOWLEDGING the importance of encouraging investment promotion activities that are more accessible to underrepresented groups, including the specific investments of women, indigenous peoples, and micro, small or medium-sized enterprises;

REAFFIRMING the importance of promoting responsible business conduct, cultural identity and diversity, environmental protection and conservation, gender equality, the rights of indigenous peoples, labour rights, inclusive trade, sustainable development and traditional knowledge, as well as the importance of preserving the host state's right to regulate for the interest of the public;

EMBRACING the spirit of mutual community and upholding the principles of human dignity, equality and connectivity by stimulating economic activity across all communities, rich and poor;

PRESERVING and harnessing the knowledge, tradition, expressions of culture and genetic resources of all indigenous peoples for the benefit of their local and ethnic communities of origin;

IT IS HEREBY agreed as follows:

ARTICLE 1

Overriding Treaty Principle

1. In so far as it is not incompatible with Host State's domestic laws, the interpretation, performance and enforcement of this Agreement shall be in line with the principle of Ubuntu, which accords respect to human dignity and equality to any person irrespective of status in a communitarian sense. The principle recognises that a person has an inborn corresponding duty to accord respect to human dignity and equality to other members of the community within which such person operates.

2. For the purpose of this Agreement, an Investor:
   - (a) is considered as part of the larger community of the Host State;
   - (b) undertakes to apply the principle of Ubuntu in its dealings with, amongst others:
     - (i) the indigenous communities in the Territory of the Host State where the Investment is located/operated.
     - (ii) the nationals of the Host State throughout the tenure of the Investment within the Territory of the Host State.
     - (iii) any third-party state or nationals of such third-party state that neighbours or are affected by the Investment of the Investor in the Territory of the Host State.

Explanatory Notes

Given the general acceptability of African concepts in dealing with the peculiar transnational and communal issues within Africa, it was deemed appropriate to include the concept of Ubuntu (as defined in the definition section) as the overarching philosophy for the interpretation, performance and enforcement of the substantive provisions of the BIT.

ARTICLE 2

Definitions

1. For the purposes of this Agreement:

"**Contracting Party**" means a state that is party to this Agreement.

"**Contracting Parties**" means the states that are parties to this Agreement.

"**Control**" of an Investment means control in fact, determined after an examination of the circumstances in each situation. In any such examination, all relevant factors should be considered, including the Investor's:

(a) financial interest, including equity interest, in the Investment;
(b) ability to exercise substantial influence over the management and operation of the Investment;
(c) ability to exercise substantial influence over the selection of members of the board of directors or any other managing body; and
(d) ability to influence any changes in the purpose, structure and existence of the Investment.

Where there is doubt as to whether an Investor controls, directly or indirectly, an Investment, a Disputing Party claiming such control has the burden to prove that such control exists.

"**Disputing Party**" means an Investor or a Contracting Party who is a party to a dispute initiated pursuant to this Agreement.

"**Enterprise**" means any legal entity whether or not for profit, and whether privately or governmentally owned or controlled, including any company, corporation, limited liability partnership or a joint venture and a branch of any such entity, that is constituted, established, or organised, and/or that operates or carries out business activities in the Territory of a Contracting Party, in compliance with the law of that Contracting Party.

"**Host State**" means the Contracting Party in whose Territory an Investment is established.

"**Investment**" means an enterprise constituted, organised and operated in good faith by an Investor in accordance with the law and policies of the Host State, which taken together with the assets of the enterprise, has the characteristics of an investment such as the commitment of capital or other resources, certain duration, the expectation of gain or profit, the assumption of risk and a significant contribution to the Host State's sustainable (or economic) development. The following assets of an enterprise may constitute an investment:

(a) shares, stocks and other forms of equity instruments of the enterprise or in another enterprise;
(b) a debt instrument or security of another enterprise;
(c) a loan to another enterprise (i) where the enterprise is an affiliate of the

Investor, or (ii) where the original maturity of the loan is at least three (3) years;

(d) licenses, permits, authorisations or similar rights conferred in accordance with the laws of a Contracting Party;

(e) rights conferred by contracts of a long-term nature such as those to cultivate, extract or exploit natural resources in accordance with the laws of a Contracting Party;

(f) contracts involving the presence of an Investor's property in the Territory of a Contracting Party, including turnkey or construction contracts, or concessions;

(g) copyrights, know-how and intellectual property rights such as patents, trademarks, industrial designs, and trade names, to the extent they are recognized under the laws of a Contracting Party;

(h) moveable or immovable property and related rights; and

(i) any other interests of the enterprise which involve substantial economic activity and out of which the enterprise derives significant financial value.

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

(j) Portfolio Investments of the enterprise or in another enterprise;

(k) debt securities issued by a government or government-owned or controlled enterprise, or loans to a government or government-owned or controlled enterprise;

(l) any pre-operational expenditure relating to admission, establishment, acquisition or expansion of the enterprise incurred before the commencement of substantial business operations of the enterprise in the Territory of the Contracting Party where the Investment is made;

(m) claims to money that arise solely from:

  i. commercial contracts for the sale of goods or services by a national or enterprise in the Territory of a Contracting Party to an enterprise in the Territory of another Contracting Party;

  ii. the extension of credit in connection with any commercial transaction;

(n) goodwill, brand value, market share or similar intangible rights;

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

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

"**Investor**" means a National or an enterprise of a Contracting Party, that has made an investment in the Territory of the other Contracting Party. For the purpose of this definition, "enterprise of a Contracting Party" means:

(a) an enterprise that is constituted or organized under the law of that Contracting Party and that has substantial business activities in the Territory of that Contracting Party. A determination of whether an enterprise has substantial business activities in the Territory of a Contracting Party requires a case-by-case, fact-based inquiry; or

(b) an enterprise that is constituted or organised under the law of that Contracting Party, and is directly or indirectly owned or controlled by a national of that Contracting Party or by an enterprise mentioned under subparagraph (a).

"**Measure**" means any action by a Contracting Party directly relating to or affecting any Investment within the Territory of that Contracting Party, whether in the form of laws, regulations, rules, procedures, decisions, and administrative actions or practice, which

is made, adopted or maintained, by:

(a) central, regional or local government authorities;
(b) non-governmental bodies in the exercise of powers delegated by central, regional or local government authorities; or
(c) non-governmental bodies, without an instrument of delegation but acting under the direction or control of the Contracting Party or whose action has been adopted by the Contracting Party.

"**National of a Contracting Party**" means any natural person having the nationality of a Contracting Party and in the case of dual nationality, is deemed to be exclusively a natural person of the Contracting Party of his or her dominant and effective nationality.

"**Portfolio Investment**" means investment of a purely financial character, where the investor remains passive and does not control the management of the investment and which does not lead to technology transfer, training of local employees and other benefits associated with direct investment.

"**Substantial Business Activity**" in the Territory of a Contracting Party means: the presence of a registered office or head office, or production facility and/or research laboratory established in the Territory of the Contracting Party and having an administration or management together with the number of employees, and generating a minimum turnover as may be agreed by the Contracting Parties or specified in the domestic laws or regulations of the Host State.

"**Territory**" means the land territory, internal waters, the territorial sea and the airspace above them, as well as the maritime areas over which a Contracting State has sovereign rights or jurisdiction for the purpose of exploration, exploitation and preservation of natural resources whether living or non–living, pursuant to international laws.

"**Third-State**" means a State other than the Contracting Parties.

"**Third-Party Funding**" means any funding provided by a natural or legal person who is not a party to a dispute arising from this Agreement, but who enters into an agreement with a Disputing Party in order to finance part or all of the cost of the proceedings either through a donation or grant, or in return for reimbursement dependent on the outcome of the dispute.

"**Traditional Knowledge**" means the knowledge, skills, know-how, innovations and practices of indigenous peoples and local/ethnic communities of a Contracting Party, that are developed from experience gained over time, adapted to the local culture and environment, sustained and transmitted from generation to generation within a community, and often, *inter alia*, forming part of the cultural or spiritual identity of that community. Traditional Knowledge may be found in varying contexts including but not limited to scientific, technical, medicinal, ecological, agricultural and biotechnological. Traditional Knowledge may also relate to biodiversity and plant genetic resources, as well as knowledge, technology or practices developed from or relating to Traditional Cultural Expressions.

Note: Governments may consider setting a benchmark, for example 10% of ordinary shares, to distinguish between direct and portfolio investments.

"**Traditional Cultural Expressions**" means the know-how, skills and form in which indigenous peoples and local/ethnic communities of a Contracting Party express their traditional culture, identity, heritage, core values, social practices and beliefs, that are developed from experience gained over time, adapted to the local culture and environment, and passed down and sustained from generation to generation. Traditional Cultural Expressions may take the form of stories, folklore, proverbs, narratives, music, dance, arts, festive events, designs, names, signs and symbols, architectural forms, rituals, traditional craftsmanship, community laws, local language or many other artistic, cultural or social expressions.

"**Ubuntu**" The principle of Ubuntu was derived from popular African idiom *"Umuntu ngumuntu nga bantu"* literally translated as "a person is a person because of what other members of the community have done for him".

"**UNCITRAL Arbitration Rules**" means the arbitration rules of the United Nations Commission on International Trade Law in effect as of the date of entry into force of this Agreement or as may be amended from time to time.

"**ICSID Rules**" means the rules of the International Centre for Settlement of Investment Dispute in effect as of the date of entry into force of this Agreement or as may be amended from time to time.

Explanatory Notes

Definition of Investment

Of all the definitions, "Investment" is perhaps the most controversial and critical given that the definition will determine which foreign capital flows will be covered by the Agreement. The scope of the definition of an Investment is also important in treaty drafting and negotiation because it determines whether an Investor can commence binding arbitration against host states in the event of a dispute.

Based on the current policy direction of African Governments to promote investments that are supportive of sustainable development, through the development of policies to allow entry of businesses that brings constructive economic and social benefits, this Model BIT adopts an enterprise-based approach to the definition of Investment. It requires the establishment or acquisition of an enterprise, as one classically associated with foreign direct investment. The assets of the enterprise are then included among the covered assets of the investor. The illustrative list of assets that follows the opening paragraph is not the test of an investment but highlights the types of assets an investment covered under the BIT may own or control.

Definition of Measures

Measures are set up to accommodate different levels of government. Drafters and negotiators of BITs should determine what levels of government should be covered. Note also that a judicial decision would be included in the list of measures proposed. This is commonly understood to be within the scope of investment treaties for the purpose of avoiding 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 on it.

Definition of Traditional Knowledge and Traditional Cultural Expression
The protection of the rights of indigenous peoples and Local/Ethnic Communities from undue use and exploitation by Investors is critical and thus forms part of the internationally recognised global protection standards for international investments. These rights include amongst others, Traditional Knowledge and Traditional Cultural Expressions. While there is yet to be a globally acceptable definition of Traditional Knowledge and Traditional Cultural Expressions, the definitions provided under this Agreement have been largely drawn from the definitions adopted by World Intellectual Property Organization (WIPO) and the United Nations Educational, Scientific and Cultural Organization (UNESCO).

ARTICLE 3

Promotion of Investments

1. Each Contracting Party shall promote economic cooperation and encourage and support the creation of favourable conditions for Investments in its Territory.

2. Each Contracting Party shall admit foreign investments favourable to it from the other Contracting Party in accordance with its laws and regulations.

3. The Contracting Parties shall strengthen the promotion and facilitation of Investments by exploring various opportunities and incentives that contribute to sustainable development, including but not limited to regular consultations between their respective investment promotion agencies and the exchange of information regarding investment opportunities.

Explanatory Notes

Most investment treaties are often styled as investment promotion and protection treaties with little or no provisions relating to the promotion of investments. This article sets out a mutual obligation for the Contracting Parties to promote investments, 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.

ARTICLE 4

Non-Discrimination Standards

A. Most-Favoured-Nation Treatment

1. Each Contracting Party shall accord to Investors of the other Contracting Party and to their Investments, treatment no less favourable than it accords, in like circumstances, to investors of any Third State and to their investments with respect to the management, conduct, operation, expansion, sale or other disposition of Investments within its Territory.
2. In considering the "treatment" of an Investor and/or Investment of an Investor, the following applies:
   (a) Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment', and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Contracting Party pursuant to those obligations in like circumstances.
   (b) The "treatment", referred to in paragraph 1 above, does not include dispute settlement procedures provided for in other investment agreements and/or trade agreements.

B. National Treatment

Each Contracting Party shall accord to Investors of the other Contracting Party and the Investments of an Investor from the other Contracting Party, treatment no less favourable than it accords, in like circumstances, to its own investors and their investments with respect to the management, conduct, operation, expansion and sale or other disposition of Investments within its Territory.

C. The concept of "in like circumstances"

1 In applying the concept of "in like circumstances" in respect of Most-Favoured-Nation Treatment and National Treatment, an overall assessment on a case-by-case basis of all the circumstances of the Investment are required, including but not limited to the:
   (a) effect of the Investment on the Contracting Party, with the cumulative effects of all Investments;
   (b) sector(s) that the Investments are established in;
   (c) aim of the Measure(s) relating to the Investment;
   (d) objective factors relating to the Investment with respect to any Measure(s) concerned;
   (e) effect of the Investment on third persons and the local community;
   (f) effect of the Investment on employment and sustainable development; and
   (g) direct and indirect effect of the Investment on the environment, the health of the populations, or on the global commons.

2. The assessment of the factors set out above shall not be limited to or be biased towards any one factor.

D. Exceptions

1. Subject to the requirement that such Measures are applied in an arbitrary manner, nothing in this Article shall be construed to prevent the adoption or enforcement by a Contracting Party of a Measure:
   (a) that is designed and applied to protect or enhance a legitimate public welfare

objective, such as public health, safety and the environment, labour rights, human rights, consumer rights and social welfare.

(b) taken for reasons of national security, public interest, public health, or public morals.

2. The Most-Favoured-Nation Treatment principle does not:

(a) apply to the specific sectors in a Contracting Party's List of Sectors Excluded from the Most Favoured Nation Treatment under Annex 1.

(b) does not oblige a Contracting Party to extend to the Investors of another Contracting Party or of a third State the benefit of any treatment, preference or privilege contained in:

(i) any existing or future free trade area, customs union, common market agreement or any international or regional arrangement to which the Investor's home State is not a Party, or

(ii) any international or regional agreement or domestic legislation relating wholly or mainly to taxation.

3. The National Treatment principle does not apply:

(a) to subsidies or grants provided to a government or a State enterprise, including government-supported loans, guarantees and insurance; or

(b) to taxation Measures aimed at ensuring the effective collection of taxes, except where this results in arbitrary discrimination.

(c) where the Contracting Party, in accordance with national laws and regulations, accords more favourable treatment to address the internal needs of designated disadvantaged persons, groups or regions.

Explanatory Notes

Both the Most Favoured Nation Treatment ("MFN") principle and the National Treatment principle are largely premised on the policy position that has been espoused by African Union member states in the Draft Pan African Investment Code. There are however divergent views in the different Regional Economic Communities ("RECs") in Africa as to the continued need or relevance of including MFN in investment treaties. The Southern African Development Community ("SADC") is a strong proponent for the exclusion of MFN. It is important to reference the view of the Drafting Committee of the SADC Model BIT. The SADC Drafting Committee noted that MFN:

"should not be included in 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."

We acknowledge the concerns raised by the SADC Drafting Committee, however, from a continental level, MFN is still being endorsed as an important post-establishment investment protection measure for investors. For that reason, we have included MFN, but attempted to provide a balanced provision that excludes unintended consequence such as the potential importation of dispute resolution provisions from other treaties.

Nonetheless, for African states that still maintain the position that MFN should be excluded altogether in bilateral investment treaties, we propose that the MFN provision may be excluded, but that at a minimum, National Treatment being one of the two non-discrimination provisions important for post-establishment investment protection, should be retained.

The National Treatment principle, subject to specific exclusion, is generally more acceptable for states to adopt. These exclusions generally attempt to balance the sovereign right of the state to regulate in its national interest in relation to various economic and/or developmental objectives and the right of investor not to be treated less favourably. The language in this Article is limited to activities in the post-establishment phases, i.e. the management, operation, expansion and disposition of investments. Pre-establishment rights such as establishment and acquisition have been excluded given that their inclusion would extend this Article to pre-establishment rights of national treatment for investors.

Notably, for consistency between the MFN and National Treatment clauses, "expansion" has been included in this Article. We note the debate as to whether "expansion" of an existing business should be considered a pre-establishment or post-establishment activity, particularly, when it is the actual expansion of productive capacity and not expansion through a merger or acquisition. What is contemplated by this article is post-establishment expansion activities, subject to domestic competition laws and consumer protection practices.

ARTICLE 5

Minimum Standard of Treatment

A. Fair and Equitable Treatment

1. A Contracting Party shall ensure that Investors and/or their Investments are accorded fair and equitable treatment in accordance with the minimum standard of treatment under customary international law.

2. For the avoidance of doubt:
   (a) the minimum standard of treatment under customary international law does not require treatment in addition to or beyond its standard requirements and does not create additional substantive rights for Investors.

   (b) A Contracting Party breaches the obligation of fair and equitable treatment where a Measure or series of Measures constitute any one of the following:
      (i) a denial of justice in criminal, civil or administrative proceedings;
      (ii) a fundamental violation of due process, including a fundamental violation of transparency in judicial proceedings and administrative proceedings;
      (iii) conduct that is manifestly arbitrary or manifestly capricious;
      (iv) conduct that is targeted or discriminatory (whether direct or indirect) on manifestly unjustified grounds.
   (c) A violation of another provision of this Agreement or any other international agreement by a Contracting Party does not constitute a violation of this Article.

   (d) A violation of domestic law by a Contracting Party does not, in and of itself, establish a violation of this Article.

B. Full Protection and Security

1. A Contracting Party shall accord Investments of Investors of the other Contracting Party protection and security no less favourable than that which it accords to investments of its own investors or of any Third State. For the avoidance of doubt, protection and security under this article only refers to the physical security of an Investor and/or Investment of such Investor and specifically excludes legal and/or economic security.

2. Investors of one Contracting Party whose Investments in the Territory of the other Contracting Party suffer losses as a result of a violation of paragraph B(1) above, in particular owing to war or other armed conflict, revolution, revolt, national disturbances, insurrection, civil disturbances or riot or other similar events in the Territory of a Contracting Party shall be accorded by the Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the Contracting Party accords to investors of any third State or to its own investors, whichever is more favourable to the Investors.

3. The protection and security to be provided by a Contracting Party to Investments of Investors shall be in accordance with the minimum standard under customary

international law.

C Customary International Law

Contracting Parties share a common understanding that 'customary international law' generally and as specifically referenced in Article 5 (minimum standard of treatment) results from a general and consistent practice of States that they follow from sense of legal obligation. The customary international law minimum standard of treatment of alien refers to all customary international law rules and principles that protect the investments of aliens.

Explanatory Notes

The policy position espoused by African governments in draft investment instruments such as the Draft Pan African Investment Code (PAIC) and regional investment instruments such as the Southern African Development Community Protocol on Finance and Investment, as amended in 2017 ("SADC Protocol") is for the fair and equitable treatment ("FET") standard to be abandoned in its entirety. The reason most African states appear to be in favour of the abandonment of the FET standard is, amongst others:

- The overly broad meaning which tribunals have given to the FET standard. This also follows into the controversial debate of whether the FET standard is independent from customary international law minimum standard of treatment or a mere reflection of it. A variety of interpretations have been adopted, in that regard:
  - Some tribunals have held that the FET standard is treaty based, autonomous and independent *(Biwater Gauff Ltd v Tanzania)*.
  - With others holding that the FET standard requires a treatment higher than required by customary international law minimum standard of treatment *(CMS Gas Transmission Company v Argentina)*.
- The perceived unpredictability of the FET standard based on decision of tribunals.
- The FET standard holding the most risk for States to be found to have violated a treaty, also being the most frequently invoked standard of investment protection.

However, despite the policy position in the Draft PAIC and regional investment instruments, several bilateral investment treaties signed (not yet ratified) by African states from about 2016 to date still contain the FET standard in one or another form. In that regard:

- The Federal Republic of Nigeria and the Kingdom of Morocco BIT concluded in 2016 includes the minimum standard of treatment under customary international law with reference to FET.
- The Republic of Rwanda and United Arab Emirates BIT concluded in 2017 includes an FET standard in article 4 thereof.
- The Morocco and Japan BIT concluded in January 2020 includes the minimum standard of treatment under customary international law with reference to FET.

As an alternative to the traditional FET standard or the minimum standard of treatment, the concept of fair administrative treatment ("**FAT**") has also been developed in the SADC Model BIT as a potential replacement for FET. Despite the proposed adoption of FAT in the SADC Model BIT there does not appear to be a general endorsement of FAT. One of the only BITs that refers to FAT as a standard is the BIT (unratified) between the Federal Democratic Republic of Ethiopia and the State of Qatar dated 14 November 2017 ("**Qatar-Ethiopia BIT**"). The Qatar-Ethiopia BIT appears to have adopted this standard from the SADC Model BIT, as the wording in the article is nearly identical to what is contained in the SADC Model BIT. This standard in-turn was proposed and developed by South Africa as an alternative to the broad scope of FET and for there at least to be replacement of FET with some form of treatment standard for investors. The Protection of Investment Act of South Africa, 2017, also refers to the concept of FAT. Although the proposed FAT standard attempts to provide some form of treatment standard with which the broader FET standard could be replaced, it does not provide a holistic standard of protection to investors. The FAT standard is focused on procedural fairness of the state conduct and not substantive fairness and equity. The proposed FAT standard also fundamentally excludes executive actions of the state, as the focus is on "*administrative, legislative and judicial actions.*" In most common law African States, administrative actions are fundamentally different from executive actions taken by a State.

A holistic standard which ensures both procedural and substantive fairness and equity is important to provide investors with tangible protection. Accordingly the drafters of the AAA Model BIT view the adoption of the customary international law minimum standard of treatment with clear guidelines as to what the minimum standard of treatment entails.

The use of the customary international law minimum standard of treatment with clear interpretational guidelines for tribunals appears to provide the best middle ground by providing protection for procedural and substantive rights for investors, without simultaneously creating additional or uncertain onerous obligations for the State. The customary international law minimum standard, although very difficult to define with precision, has been described as:

"*a norm of customary international law which governs the treatment of aliens, by providing for a minimum set of principles which States, regardless of their domestic legislation and practice, must respect when dealing with foreign nationals and their property. While the principle of national treatment foresees that aliens can only expect equality of treatment with nationals, the international minimum standard sets a number of basic rights established by international law that States must grant aliens, independent of the treatment accorded to their own citizens. Violation of this norm engenders the international responsibility of the host State and may open the way for international action on behalf of the injured alien has exhausted local remedies.*" [OECD, *Fair and Equitable Standard in International Investment Law*, 8 note 32 (Working Papers on International Investment, 2004/3, 2004)].

The concept of full protection and security limited to physical security has also been included as a standalone standard of protection. This is in line with how tribunals have perceived Full Protection and Security, as a distinct protection standard from FET.

ARTICLE 6

Expropriation and Compensation

1. A Contacting Party shall not expropriate and/or nationalise Investments of Investors within its Territory whether directly or indirectly, except:
   (a) for a public purpose or in the public interest;
   (b) on a non-discriminatory basis;
   (c) in accordance with the due process of law; and
   (d) subject to prompt payment of fair and adequate compensation.

   An act of expropriation or nationalisation includes Measures equivalent to expropriation or nationalisation.

2. Compensation for expropriation shall:
   (a) Be assessed in relation to the fair market value of the expropriated Investment immediately before the expropriation took place ("date of expropriation"), and may be adjusted to reflect aggravating conduct of an Investor or conduct that does not seek to mitigate loss or damages;
   (b) Be paid without delay, unless making such payments will be significantly burdensome on a Contracting Party. If burdensome, the Contracting Party may pay the compensation yearly over a three-year period or such other period as may be agreed between that Contracting Party and the Investor, subject to payment of interest at the interbank offer rate of that Contracting Party;
   (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
   (d) be fully realisable and freely transferable.

3. 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 domestic and international laws of the Contracting Party.

4. A Measure of general application by a Contracting Party that is designed and applied to protect or enhance public welfare objectives, such as public health, safety and the environment, labour rights, human rights, social welfare and consumer rights shall not constitute indirect expropriation, subject to such Measure being:
   (a) for a public purpose or in the public interest;
   (b) applied on a non-discriminatory basis, and
   in accordance with the due process of the law.

5. General Understanding of this Article by the Contracting Parties
   This Article 6 addresses two situations:
   (a) direct expropriation, in which an Investment is expropriated through formal transfer of title or outright seizure, and
   (b) indirect expropriation, in which an action or series of actions by a Contracting Party has an effect equivalent to direct expropriation.

6. The determination of whether an action or series of actions by a Contracting Party, in a specific factual situation, constitutes an indirect expropriation, requires a case-by-case,

fact-based inquiry that considers, among other factors:

(a) interference with a tangible or intangible property right or proprietary interest in an Investment;

(b) the economic impact of the Contracting Party's government action, although the fact that an action or series of actions by a Contracting Party has an adverse effect on the economic value of an Investment, standing alone, does not establish that indirect expropriation has occurred;

(c) the extent to which the Contracting Party's government action interferes with distinct, reasonable Investment-backed expectations;

(d) the duration of the Measure or series of Measures of a Contracting Party; and

(e) the character of the Measure, particularly the object, context and intent of such action.

7. Special Exception to Expropriation of Land

Notwithstanding the obligation under Article 6(3), any Measure of direct expropriation relating to land of an Investor within the Territory of a Contracting Party shall be for a public purpose and upon payment of compensation at market value in accordance with domestic legislation of the Contracting Party.

Explanatory Notes

The Draft PAIC and regional investment instruments such as the SADC Protocol do not clearly distinguish between direct and indirect expropriation. The intention of the drafters of the AAA Model BIT to make this article is provide clear standards that any tribunal must take into account when assessing an expropriation claim, including the particular exceptions. The article thus includes a definition for both direct and indirect expropriation and, in respect of indirect expropriation, provides further guidance on the factors that must be assessed on a case-by-case basis.

The article also contains some carve-outs for expropriation relating to land. It is important to have carve-outs like these because expropriation is sometimes necessitated to ensure that land ownership that is based on past racially discriminatory laws/practises or colonial legislation is not perpetuated in Africa. If one considers the South African Constitution, it contains a specific provision to deal with compensation for land reform purposes. Likewise, the constitutions and laws of other African jurisdictions acknowledge the scars of colonialism that need to be remedied and, in such instances, market related compensation may not be just compensation. For that reason, deference must be made to the domestic legislation.

This is similar to the approach adopted by Singapore and Vietnam with reference to the ASEAN Comprehensive Investment Agreement, where the compensation requirement for land is carved out and linked to domestic law.

The Model Indian BIT has a similar carve-out, where it provides as follows:

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

States must still comply with the other requirements for lawful expropriation.

ARTICLE 7

Essential Security Measures

1. Nothing in this Agreement shall be construed to prevent any Contracting Party from taking any action which is necessary for the protection of its essential security interests:
   (a) relating to criminal or penal offences;
   (b) relating to traffic in arms, ammunition and implements of war and transactions in other goods, materials, services and technology undertaken directly or indirectly for the purpose of supplying a military or other security establishment;
   (c) taken in time of war, pandemics or other emergencies in international relations;
   (d) taken so as to protect critical public infrastructure, including communication, power, and water infrastructure, from deliberate attempts intended to disable or degrade such infrastructure;
   (e) relating to the implementation of national policies or international agreements respecting the non-proliferation of nuclear weapons or other nuclear explosive devices; or
   (f) in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security.

2. A Contracting Party may request information on the reasons for the measures taken under Paragraph 1 above. The Contracting Party taking such measures shall respond to the request for information within ninety days from the date of receipt of such request.

Explanatory Notes

The need to balance the obligation to protect investors and their investments, and the right to regulate for the purpose of protecting States' interests has been a subject of global discourse and is paramount for African States. It is against this backdrop that this Article empowers Contracting States to adopt measures aimed at safeguarding their essential security interests and protecting critical public infrastructure. These exceptions are in tandem with those contained in many international investment agreements, model agreements and regional investment codes including the Pan African Investment Code (PAIC), the SADC Model Bilateral Investment Treaty Template; ECOWAS Common Investment Code (ECOWIC), the Investment Agreement for the COMESA Common Investment Area, to mention a few.

A Contracting Party may however request the reasons for the measures taken under this Article and the Contracting Party taking such measures shall respond to the request for information within ninety days from the date of receipt of such request. The duty on Contracting Party to respond to request for information is not an obligation to provide reasons for measures taken, as some measures may impact national security and disclosure of the underlying reasons may be restricted by the Government of that Contracting Party.

ARTICLE 8

Transfer and Repatriation of Funds

1. A Contracting Party shall permit an Investor of the other Contracting Party to transfer freely, without delay and on a non-discriminatory basis, all funds relating to an Investment in its Territory, and earnings or other remuneration of personnel engaged from Third States in connection with that Investment.

2. Such funds shall include:
   (a) the initial capital plus any additional amount used to maintain or increase the Investment;
   (b) returns, dividends, profit after taxes, interest and professional fees;
   (c) fees, including payments and royalties in connection with intellectual and industrial property rights;
   (d) proceeds of sale or liquidation of whole or any part of the Investment;
   (e) funds pursuant to the repayment of loans;
   (f) proceeds from the sale of shares;
   (g) the amount made of compensation in the case of expropriation under Article 6 (Expropriation) or made under Article 5.B.2 (Full Protection and Security);
   (h) salaries, wages and other remunerations received by the nationals of the Investor and foreign personnel working in connection with an Investment of theInvestor;
   (i) payment for the acquisition of production equipment and materials, raw materials, consumables, packages, semi-finished or finished products; and
   (j) judgment debts.

3. The transfer of such funds and the earnings of the personnel in subparagraph 2(h) above shall be permitted in a freely convertible currency and shall be made at the exchange rate applicable on the date of transfer.

4. Each Contracting Party may prevent transfer of funds in a non-discriminatory manner, in accordance with its laws relating to:
   (a) bankruptcy, insolvency or other legal proceedings to protect the rights of creditors;
   (b) anti-money laundering and counter terrorism financing;
   (c) issuing, trading or dealing in securities, features, options or derivatives;
   (d) criminal or administrative violations and the recovery of the proceeds of crime;
   (e) ensuring the satisfaction of judgments in adjudicatory proceedings;
   (f) financial reporting or record keeping or transfers when necessary to assist law enforcement or financial regulatory authorities;
   (g) labour obligations, taxation and environmental protection;
   (h) social security, public retirement, severance entitlements
   (i) saving schemes including provident funds, employees' insurance programs and retirement gratuity programs;
   (j) the requirement to register and satisfy other formalities imposed by the Central Bank and other relevant authorities of a Contracting Party;
   (k) ensuring compliance with the Articles of Agreement and/or request(s) of the International Monetary Fund.

Explanatory Notes

This Article grants Investors the rights to freely transfer and repatriate funds and earnings from their investments albeit subject to the circumstances listed in paragraph 4 under which a Contracting Party may prevent such transfer or repatriation in a non-discriminatory manner and in accordance with its laws. The Article, which is consistent with the texts of several global and regional investment agreements, went a step further to list compliance with the Articles of Agreement and request of the International Monetary Fund (IMF) as part of the grounds for restricting/preventing free transfer/repatriation of funds and earnings by an Investor. This is necessitated by the fact that African States form part of the 190 Members States of the IMF and they are required to adhere to the IMF Articles of Agreement and requests of the IMF for the purpose of addressing balance of payment concerns.

ARTICLE 9

Environment

1. Investors and/or their Investments shall comply with the environmental and social assessment screening criteria and assessment processes applicable, in accordance with the laws of the Host State regarding such an investment.

2. Host States shall ensure that the domestic regulatory and/or legislative framework applicable to Investments of Investors requires Investors to undertake the environmental and social assessment screening criteria required under paragraph (1) of this Article, including assessments of the impacts on the human rights of the persons in the areas likely to be impacted by the Investment(s), including the progressive realization of human rights in those areas as required under the International Covenant on Economic, Social and Cultural Rights.

3. Nothing in this Agreement shall be construed as preventing a Contracting Party from adopting maintaining, or enforcing, in a non-arbitrary and non-discriminatory manner, any Measure that it considers appropriate to ensure that any investment activity in its Territory is undertaken in a manner sensitive to environmental concerns.

4. The Contracting Parties shall not lower the levels of protection afforded by domestic environmental laws in order to encourage investment.

Explanatory Notes

This Article reflects good global practice in environmental management. Environmental management systems can assist in ensuring that domestic environmental laws are in fact complied with, but they go beyond this to require assessment, 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.

Paragraph 4 of the article limits this by providing for contracting parties' understanding that it is inappropriate to lower the threshold of protection afforded by domestic environmental laws in order to encourage investment.

Notably, the reference to "progressive realization" of human rights stems from the requirement under the International Covenant on Economic, Social and Cultural Rights (ICESCR). Explicit reference to the instrument has been made in order to inform interpretation of this Article.

ARTICLE 10

Labour, Human Rights Protection and Gender Equality

1. Investors and their Investments shall respect human rights in the Host State including in the workplace and the wider community. Investors and their Investments shall not undertake or cause to be undertaken acts that breach such human rights.

2. Investors and their Investments shall not assist or be complicit in the violation of the human rights by others in the Host State, including by public authorities or during civil strife.

3. Investors and their Investments shall not manage or operate in a manner that is inconsistent with international labour and human rights obligations binding on the Host State or on their home State, whichever obligations are higher.

4. Each Contracting Party shall ensure that its laws and regulations provide for labour and human rights protection, in accordance with international standards, appropriate to its economic and social situation and shall commit to the continuous improvement of these laws and regulations.

5. The Contracting Parties recognise the role of gender equality as a crucial factor to the achievement of economic growth and development and should ensure that the implementation of this Agreement does not create a barrier that could impede the ability of women and other disadvantaged groups to effectively participate in relevant economies. Consequently, each Contracting Party reserves the right to invoke reservations, waivers, exemptions or other policy or regulatory interventions which explicitly address gender equality concerns or favour women including:
   (a) incentives for Investments by women or Investment in businesses/industries that benefit women employees and business actors;
   (b) encouraging Investors to implement gender-responsive diversity programs and gender-responsive procurement procedures;

   Provided that the provisions of this Article 10(5) shall not be implemented arbitrarily or in a manner that gives rise to unjustifiable discrimination or restrictions to Investment between the Contracting Parties.

Explanatory Notes

This Article imposes an obligation (corporate duty) on Investors to respect human rights and avoid complicity 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. For labour standards, the International Labour Organisation (ILO) Declaration sets out obligations that are considered as the minimum global standards. Almost all States have subscribed to these minimum standards. There is no evident rationale for any investor to operate in a manner that denies these standards. Investors and their investments are required to manage or operate in a manner that is consistent with international labour and human rights

obligations binding on the Host State or the Home State, whichever obligations are higher. These labour and human rights standards are easily identifiable, even if not fully incorporated into domestic laws. These are not open-ended obligations but derive expressly from the act or ratification of an agreement by the Host State or Home State in certain circumstances.

New provisions on gender equality have been added to this Article to recognise the role of gender parity as a crucial factor for achieving economic growth and development. It is important that African governments establish policies, incentives and structures that ensure that the implementation of BITs in their respective States does not create a barrier that could impede women's effective participation in their economies. Thus, it is imperative for each Contracting Party to this Agreement to [where appropriate] invoke reservations, waivers, exemptions or other policy or regulatory interventions which explicitly address gender equality concerns or favour women and other disadvantaged groups.

ARTICLE 11

Intellectual Property, and Indigenous Peoples/ Communities' Rights and Resources

A. Protection of Intellectual Property Rights

1. Each Contracting Party, in furtherance of the promotion of Investment activities, shall provide adequate and effective protection of intellectual property rights and ensure efficiency and transparency in the intellectual property protection system recognised by and in accordance with its laws, the Trade Related Aspects of Intellectual Property Rights (TRIPS) Agreement, the agreements concluded and administered under the auspices of the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), the Convention on Biological Diversity, the International Agreement on Plant Genetic Resources, and other relevant international instruments, whether currently in force or that may come into force in the future.

2. Each Contracting Party may adopt Measures that provide exceptions to the exclusive rights conferred by an intellectual property right and allow for its use by the Contracting Party or third parties authorized by the Contracting Party for any of the following reasons:
   (a) in the case of a national emergency or other circumstances of extreme urgency or in cases of public non-commercial use;
   (b) to protect and enhance public welfare objectives such as public health and nutrition, safety and the environment, labour rights, human rights, social welfare and consumer rights;
   (c) to prevent holders of intellectual property rights from engaging in practices that are capable of unreasonably restraining trade, fair use of descriptive terms or adversely affecting international transfer of technology; or
   (d) to preserve public order.

3. Nothing in this Agreement shall affect the rights and obligations of the Contracting Parties under multilateral agreements in respect of the protection of intellectual property rights to which the Contracting Parties are parties.

B. Protection of Indigenous Peoples and Local/Ethnic Communities' Rights and Resources

1. Each Contracting Party shall, in accordance with its laws, relevant international instruments and generally accepted international legal standards and best practices, adopt Measures to protect:
   (a) the collective intellectual property rights, Traditional Knowledge and Traditional Cultural Expressions of indigenous peoples and local/ethnic communities in which any of their creations are used or exploited commercially by an Investor and/or Investment of an Investor; and
   (b) the conservation, access to and sustainable use of indigenous peoples and local/ethnic communities' biological resources (including genetic resources such as plant and animal genetic resources) biological

diversity, genetic material, plant variety and the Traditional Knowledge developed by the indigenous peoples and local/ethnic communities regarding the use of such biological resources, biological diversity, genetic material and plant variety, while recognizing fair and equitable participation in the benefits derived from such access and use.

Such protection may be accomplished through a special system of registering, promoting, and marketing the rights of indigenous peoples and local/ethnic communities, with a view to recognizing and preserving the autochthonous sociological and cultural values of the indigenous people and the local/ethnic communities, and to promote and bring them social justice in a manner that treats men and women equitably.

2. Each Contracting Party shall recognize that the cultural heritage of indigenous peoples and local/ethnic communities is not subject to any type of exclusivity by third parties applying an intellectual property system. The indigenous peoples and local/ethnic communities may authorize third parties to make use of such cultural heritage, in the understanding that this shall not be an exclusive right.

3. Where an Investor seeks to access, use or exploit the intellectual property rights, Traditional Knowledge, Traditional Cultural Expressions, biological resources, biological diversity, plant variety and/or genetic materials owned or developed by the indigenous peoples and local/ethnic communities of a Contracting Party, the Investor undertakes to protect such intellectual property rights, Traditional Knowledge, Traditional Cultural Expressions, biological resources, biological diversity and/or genetic materials under the Host State's laws, relevant international instruments and generally accepted international legal standards and best practices.

4. In this Article, "international legal standards" include but are not limited to:
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(a) In relation to intellectual property rights, exploitation of biological resources and related rights under this Article, the TRIPS, the agreements concluded and administered under the auspices of the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), the Convention on Biological Diversity, the International Agreement on Plant Genetic Resources, the UNESCO Convention on the Diversity of Cultural Expression, and other international instruments against undue infringement.

(b) In relation to rights to land and other resources under this Article, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Convention on Biological Diversity (CBD).

Explanatory Notes

This Article imposes an obligation on each Contracting Party to have an efficient and transparent system of protecting intellectual property, rights recognised by and in accordance with its national laws, TRIPS, the agreements concluded and administered

under the auspices of the World Intellectual Property Organization (WIPO) and the World Trade Organization (WTO), the Convention on Biological Diversity, the International Agreement on Plant Genetic Resources and other international instruments against undue infringement. Protection of intellectual property rights of investors and other third parties as may be necessary, form part of the internationally recognised global protection standards for international investments. However, under certain exceptions, a Contracting Party may be constrained to deviate from adhering strictly to its obligation to protect. This may result in the Contracting Party's use of the intellectual property right or its authorization of a third party's use of the rights. These exceptions are consistent with the those contained in the above-listed international instruments and include circumstances that are necessary for advancing public welfare objectives, maintaining public order, and advancing socio-economic and technological development.

Protection of Indigenous peoples' rights to land and other resources, have been articulated under international law through, inter alia, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and the Convention on Biological Diversity (CBD). At the regional level in Africa, the African human rights system has played an essential role in the protection of indigenous peoples' rights. Notably, indigenous peoples' rights to lands and resources are inextricably linked to traditional knowledge, which falls within the broader framework of intangible indigenous rights.

Article 31 of the UNDRIP recognises indigenous peoples' right to:
"maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts".

The protection of traditional knowledge involves taking measures to ensure that unauthorised parties do not unfairly acquire intellectual property rights over indigenous peoples' knowledge, innovations, and practices. Despite the protection of traditional knowledge existing at the international level, it has been observed that these rights are often violated by States and the private sector by creating intellectual property rights over indigenous peoples' knowledge, innovations, and practices without equitably sharing the benefits.

The UN Special Rapporteur on the Rights of Indigenous Peoples issued a report in 2016, noting the negative impact of the current IIA regime on indigenous peoples, given that projects under most IIAs can infringe upon indigenous peoples' land and resources. Some States attempt to accommodate indigenous rights and interests in their free trade agreements. For example, New Zealand includes in its Free Trade Agreements (FTAs) a Treaty of Waitangi exclusion, which enables the government to take measures to give effect to its obligations to Māori under the Treaty of Waitangi, even if the measures are incompatible with New Zealand's obligations under the FTAs. Many Canadian treaties also include similar provisions. The Canada-U.S.-Mexico Agreement (CUSMA) includes protections of indigenous rights. While there is no substantive Chapter in CUSMA on indigenous rights, the inclusion of an exception, which carves out measures adopted or maintained by states to fulfil the State's legal obligations to indigenous peoples, is a significant development. There is also a recognition of the importance of indigenous rights and traditional knowledge in the

preamble to the Comprehensive & Progressive Agreement for Trans-Pacific Partnership (CPTPP) – a free trade agreement between Canada and 10 other countries in the Asia-Pacific.

African BITs and dispute settlement mechanisms in FTAs do not contain standard clauses providing protection for traditional knowledge. This has meant that such agreements have on occasion been used to support the appropriation of indigenous knowledge, innovations, and practices about medicinal, cultural, cosmetic, domestic, or other value and use of bioresources without attribution or compensation.

In recognition of the significance of the protection of traditional knowledge in the investment law context, this Article further imposes an obligation on Contracting Parties and Investors to act in accordance with national laws, relevant international instruments and generally accepted international legal standards and best practices to protect Indigenous Peoples' and Local/Ethnic Communities' rights and resources. Contracting Parties are to recognise and device systems for registering, promoting, and marketing the rights and resources of Indigenous Peoples and Local/Ethnic Communities in a manner that prevents undue exploitation and guarantees gender equitable social justice to the Indigenous Peoples and Local/Ethnic Communities.

Protection of these rights by Contracting Parties are to be in accordance with generally accepted international legal standards and best practices, particularly the standards set out under the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), the Convention on Biological Diversity (CBD) and the UNESCO Convention on the Diversity of Cultural Expression.

ARTICLE 12

Anti-Corruption, Anti-Money Laundering and Counter-Terrorism Financing

1. Each Contracting Party shall in accordance with its laws and regulations and relevant international instruments, adopt Measures to prevent and fight corruption, money laundering and terrorism financing with respect to the Investments of Investors within its Territory.

2. Nothing in this Agreement shall require any Contracting Party to protect Investments made with capital or assets with illicit origin or Investments in the establishment or operation of which illegal acts have been demonstrated to occur and for which national legislation provides asset forfeiture due to such illegal acts.

3. Investors and their Investments shall not, prior to, during or after the establishment of their Investments:

   (a) offer, promise or give any unlawful or undue pecuniary or other advantage or present, whether directly or through intermediaries, to a public official of a Contracting Party or to a member of a Contracting Party's official's family or business associate or other person in order that the official or other person may act or refrain from acting in relation to the performance of official duties or to secure any favour in relation to a proposed Investment, or any licenses, permits, contracts or other rights in relation to an Investment;

   (b) by any means, directly or indirectly, unlawfully or wilfully provide or collect funds with the intention of or in the knowledge that they are to be used, in full or in part, to cause death or serious bodily injury to any civilian or any other person not taking an active part in the hostilities in a situation of armed conflict, whether the purpose of such act, by its nature or context, is to intimidate a population or to compel a government or international organisation to do or to abstain from doing any act;

   (c) participate in, associate with or conspire to, attempt to or aid or abet or facilitate the use, transfer, conversion or investment of any property for the purpose of concealing or disguising the illicit origin of such property, or assisting any person who is involved in the commission of an act to evade the legal consequences of his action.

4. An Investor shall also not aid and abet or conspire to commit or authorize acts of bribery. Investors and their Investments shall not be complicit in any act described in this Article, including incitement, aiding and abetting, and conspiracy to commit or authorization of such acts.

5. A breach of any provision under this Article 12 by an Investor or an Investment is deemed to constitute a breach of the domestic laws of the Host State concerning the establishment and operation of an Investment.

Explanatory Notes

This Article imposes a positive obligation on Host States to adopt measures aimed at preventing and combating corruption, money laundering and terrorist financing activities by Investors and their Investments. This obligation is supported by various regional and international instruments like the African Union Convention on Preventing and Combating Corruption, the UN Convention Against Corruption, the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, the International Convention for the Suppression of the Financing of Terrorism, to mention a few. The Article also imposes direct obligations on investors and their investments at various stages. Breach of any or all of the obligations constitutes a breach of the Host State's laws and relieves the Host State from all protection obligations it owes to the investor and investments under the Agreement. Thus, as recognised under the applicable regional and international instruments, enforcement and prosecutorial powers rests with the Host States.

ARTICLE 13

Corporate Governance and Practices

1. Investments shall meet or exceed accepted standards of corporate governance for the sector in which the Investment is made, particularly for transparency and accounting practices.

2. Investors shall:
   (a) ensure the equitable treatment of all shareholders, in accordance with the laws of the Host State;
   (b) encourage active cooperation between corporations and stakeholders relevant to the Investment, that creates wealth, jobs, sustainable and financially sound enterprises;
   (c) ensure that timely and accurate disclosure is made on all material matters regarding a corporation, including the financial situation, performance, ownership, and governance of the corporation, risks related to environmental liabilities, and any other matters in accordance with the relevant laws and regulations of the Host State;
   (d) provide information relating to human resource policies, such as programs for human resource development in accordance with the laws of the Host State;
   (e) adhere to the financial reporting, disclosure, accounting, and audit practices satisfying the requirements of the Host State.

3. The obligations created by this Article shall be in accordance with the laws of the Host State, however, where the laws of the Host State are silent or unclear, or where relevant internationally accepted standards provide better requirements and practices for achieving transparency and accounting practices, the internationally accepted standards shall apply.

Explanatory Notes

This Article seeks to ensure that Investors in relation to their investments in Host States adopt efficient, effective and sustainable corporate governance practices that take into consideration the interest of not just the Shareholders of an Investor, but also the interest of the customers, relevant stakeholders, the host communities and the public at large, in order to promote improved corporate accountability and transparency. Investors are to abide by the domestic laws and regulations of the Host State, however, where internationally accepted standards, exceed the requirements of the Host State, Investors are obliged to abide by such standards and apply the international best practices.

ARTICLE 14

Entry and Exit of Foreign Nationals

1. Contracting Parties may develop policies, adopt or encourage Measures that ease the entry of employees, consultants, and advisors of Investors into its Territory where such persons are visiting for matters related to the Investment(s) of such Investors in the Territory of the Contracting Party. Such Measures may include expedited visa processes, sufficient visa validity periods, expedient visa renewals and other visa considerations.

2. Where an established Investments require Investors or their employee(s) to remain in the Territory of a Contracting Party for extended periods of time and for reasons directly related to the Investments, the Contracting Party may provide such Investors or employee(s) with residency permits or other permits that will allow a long-term presence in the Territory of the Contracting Party.

3. Investors shall adhere to all the laws of the Contracting Party regarding the requirements of visas, permits or similar documents.

Explanatory Notes

This Article is aimed at improving the ease of doing business in Contracting Parties' Territories by allowing seamless entry and exit of Foreign Nationals. The aim is not to provide preferential treatment but to promote Investment and the Foreign Nationals will still be expected to act within the confines of the Laws of the Contracting Parties.

ARTICLE 15

Compliance with Domestic Laws

Investors and their Investments shall comply with all laws, regulations, administrative guidelines, and policies of a Contracting Party concerning the establishment, acquisition, management, operation, expansion and disposition of Investments.

Explanatory Notes

The Investors and their Investment are expected to adhere to the Domestic Laws of the Contracting Party. Except where expressly stated, being a Foreign National or Entity does not exempt the application of Domestic Laws. In other words, this article was introduced by the drafters with the aim of finding a balance between the Contracting Parties' goals of attracting good investments, protecting those investments and other worthy public policy goals which may include the protection of the environment, revenue generation and the protection of minority groups among others.

ARTICLE 16

Denial of Benefits

Each Contracting Party reserves the right to deny an Investor the benefits of this Agreement and/or afford preferential treatment to an Investor and/or Investment, where:

(a) the Investor does not have Substantial Business Activities in the Contracting Party's Territory or is owned or controlled by Investors of a Third State;
(b) the Investor has established or restructured its Investment with the primary purpose of gaining access to the dispute resolution mechanisms provided in this Agreement; or
(c) the Investor does not comply with domestic laws of the Contracting Party.

Explanatory Notes

While the drafters appreciate the fact that Investments and ownership of investment may be structured in different ways and subject to different Laws, this Article seeks to prevent the exploitation of the Agreement by persons or entities that have either not made substantial investments and are merely seeking to take advantage of the benefits of the Agreement or who seek to rely on the threat of an arbitration and the potential burden of liability that comes with it or the other protective measures in this Agreement to compel Host States to alter or abandon important policy decisions.

ARTICLE 17

Right of States to Regulate

1. A Contracting Party retains its right to regulate in the public interest and to adopt, maintain or enforce any Measure(s) that it considers appropriate to ensure that Investment activities are undertaken in a manner that is sensitive to health, safety or environmental concerns, and that promotes and protects the Contracting Party's sustainable development objectives and cultural diversity.

2. The exercise of a Contracting Party's right under this Article, which negatively affects an Investment or interferes with an Investor's expectations or financial projections does not amount to a breach of an obligation under this Agreement and shall be deemed a legitimate exercise of sovereign power by such Contracting Party.

3. The exercise of the Contracting Party's rights under this Article shall not be arbitrary or discriminatory or constitute unlawful expropriation.

Explanatory Notes

This Article recognizes the right of Contracting Parties to adopt measures or make changes to the status quo for reasons of public interest. However, it is expected that the Contracting Parties shall act in the interest of the Public and not in a manner that is arbitrary or discriminatory. Where possible, the Contracting Parties and investors are to endeavor to take measures that may mitigate or reduce the adverse effects of the exercise of the right under this Article.

ARTICLE 18

Corporate Social Responsibility

1. Investors shall:
   (a) contribute to the sustainable development of the Host State and the local community in which their Investment is established;
   (b) adopt high degrees of socially responsible practices in accordance with the Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises.

2. Corporate Social Responsibility interventions made in the areas prescribed under the laws of the Host State may attract the corresponding rewards outlined therein. The Contracting Parties may choose to adopt suitable principles other than the OECD Guidelines for multinational enterprises.

Explanatory Notes

This Article seeks to encourage Investors to positively contribute to the growth and development of the local community or Host State where their Investment is situated. While the implementation of this Article is strongly encouraged, it remains voluntary, except otherwise stated by the Laws of the Contracting Parties. For clarity, the purpose of this Article is to treat Corporate Social Responsibility (CSR) as both an investment and a duty, hence the recommendation for adoption of the OECD Guidelines for Multinational Enterprises or other suitable principles and the introduction of a reward system, which though voluntary, is designed to provide positive reinforcement and incentives for projects focused on development of local host communities, if implemented.

ARTICLE 19

Taxation

Measures relating to taxation, or preventing the avoidance or evasion of tax on income and on capital or their enforcement shall be dealt with in accordance with the respective tax laws of the Contracting Parties or applicable double taxation agreements between the Contracting Parties. The enforcement of the tax laws of a Contracting Party on Investors and their Investments shall not be deemed or interpreted as an expropriation.

Explanatory Notes

This provision articulates the requirement for Investors and Investments of a Contracting Party to abide by the national tax laws and measures of the other Contracting Party, particularly where a double taxation agreement has not been concluded between the Contracting Parties. However, where the Contracting Parties have entered into a double taxation agreement, then it will take precedence over the national laws so as to avoid double taxation on Investors and their Investments. Given the importance of countries exercising control over their tax regimes, the Article further clarifies that a Contracting Party's enforcement of compliance with its national tax laws shall not be treated or interpreted as expropriation that will require the Contracting Party to compensate an Investor who may have breached the said national tax laws. Furthermore, Contracting Parties are allowed to adopt Measures aimed at preventing Investors from avoiding or evading tax.

ARTICLE 20

Dispute Prevention

1. A Joint Treaty Management Committee (JTMC) is hereby established for the management of this Agreement and with the primary responsibility for:

   (a) Creating a repository of all treaty obligations for the purpose of managing each Contracting Party's obligations under this Agreement;

   (b) Periodic review of this Agreement for the purpose of assessing operation, effectiveness and investment levels in accordance with Article 25;

   (c) Amendment and renewals of this Agreement in accordance with Article 23;

   (d) Receiving and handling Contracting Parties' or Investors' complaints as the case may be, and liaising with relevant agencies of the Contracting Parties with a view to addressing any concerns; and

   (e) Administrative review of potential disputes submitted to the JTMC by a Disputing Party, with a view to resolving same and where possible issuing a settlement report to the Disputing Parties, failing which the Disputing Parties may resort to Mediation and/or arbitration under Articles 21 and 22 of this Agreement.

2. The Structure, constitution, powers and terms of reference for the JTMC are as contained in **Annex 2.**

3. As a condition to commencing Mediation or Arbitration under Articles 21 and 22, a Disputing Party shall initiate consultation by submitting to the JTMC and the other Disputing Party, a request for consultation setting out:

   (a) name(s), address(es) and place(s) of incorporation if the complainant(s) is an enterprise;

   (b) the alleged breach together with the specific provisions of this Agreement alleged to have been breached;

   (c) the legal and the factual basis for the claim, including the Measure(s) in issue;

   (d) the relief sought and the estimated amount of damages claimed;

4. The requirements of the request for consultation set out in Paragraph 3 above shall be met with sufficient details to allow the other Disputing Party to effectively prepare for consultation. The Disputing Parties shall participate in the consultation process in good faith.

5. The request for consultation by an Investor shall contain evidence sufficient to establish that the complainant is an Investor of the other Contracting Party and that it owns or controls the Investment including, if applicable, that it owns or controls the

enterprise on whose behalf the request is submitted.

6. The consultation process shall not exceed four months from the date on which request for consultation is filed unless the Disputing Parties agree in writing to extend the four months period. Where the consultation process is not completed by the end of the four months or the extended period stated above, a Disputing Party may submit the dispute to Mediation and/or arbitration under Articles 21 and 22 of this Agreement.

7. Consultations may be held by videoconference or other means where appropriate and in accordance with the Africa Arbitration Academy Protocol on Virtual Hearings.

8. The consultation process shall end with a settlement report prepared by the JTMC and duly executed by the Disputing Parties, or after four months from the date of filing the request for consultation, or at the end of the extended period agreed in writing by the Disputing Parties.

9. The Consultations of the JTMC and all documentation, as well as steps taken in the context of the mechanism established in this Article, shall remain confidential.

Explanatory Notes

This dispute prevention article is introduced as a movement from traditional dispute resolution provisions in investment agreements. By design, it seeks to foster a spirit of compliance, cooperation, dialogue and amicable settlement should any dispute arise. One of its aims is to provide an early alert mechanism for the prevention and efficient management of potential conflicts. This approach is not entirely new to international trade and investment disputes. The WTO regime, for instance, has a Dispute Settlement Body which appoints panels that decide whether disputed trade measures breach a WTO agreement or an obligation whilst recommending measures to ensure the rules are conformed to. In addition, the United Nations Conference on Trade and Development (UNCTAD) Series on International Investment Policies for Development emphasizes dispute prevention and avoidance as involving extensive planning to minimize potential areas of conflict and reduce the number of conflicts that escalate or crystallize into actual disputes. In this regard, the AAA Model BIT article on dispute prevention has created the Joint Treaty Management Committee (JTMC) as an institutional mechanism for management of the contractual obligations of Contracting Parties, review of the agreement, periodic amendments/renewals and the settlement of disputes. In particular, the article has introduced Consultations to the JTMC as a mechanism for de-escalating and resolving any actual dispute which may arise out of the Agreement. It is only when Consultation fails that the Disputing Parties may then resort to Mediation and/or Arbitration.

ARTICLE 21

Mediation

1. The Disputing Parties may by agreement resort to Mediation at any time. Recourse to Mediation is without prejudice to the legal position or rights of the Disputing Parties under Article 22 and is governed by the rules agreed to by the Disputing Parties, including the appointment of the mediator. Where the Disputing Parties agree to have recourse to mediation, all timelines pursuant to an arbitration under Article 22 are suspended from the date on which the Disputing Parties agreed to have recourse to mediation and shall resume on the date on which either Disputing Party decides to terminate the mediation. A decision by a Disputing Party to terminate the mediation shall be transmitted by way of letter to the mediator and the other Disputing Party.

2. Where Disputing Parties cannot agree on the choice of a mediator, the JTMC shall appoint one for them [within 30 days] upon written request by either Disputing Party.

Explanatory Notes

In furtherance of the objective to settle any dispute arising between Investors and the Host State in an amicable manner, this article sets out the framework for mediation between the disputing parties with a view to facilitating a resolution of disputes. This process is however without prejudice to the legal rights of the disputing parties and timelines for any arbitration proceeding pursuant to article 22.

The provision further articulates the appointment procedures for the mediator by the JTMC should the disputing parties fail to agree on the appointment of a mediator.

ARTICLE 22

Dispute Settlement

A. Conditions for Submission of a Dispute to Arbitration

A Disputing Party may submit a dispute pursuant to the dispute settlement provisions in this Article, provided that:

1. four months have elapsed since a request for consultation was submitted to the JTMC in accordance with Article 20 above and no settlement has been reached, or the mediation proceedings commenced pursuant to Article 21 is terminated by a Disputing Party; and
2. No more than three years have elapsed from the date in which the Disputing Party first acquired knowledge of the breach alleged in the Notice of Arbitration.

For avoidance of doubt, a Contracting State shall not be deemed to have consented to arbitration under this Article until the above requirements are met.

B. Exception for Interim Relief

1. Notwithstanding Paragraph A above, a Disputing Party may initiate or continue an action that seeks interim relief before a judicial or administrative tribunal of the Contracting Party where the subject matter of the dispute is located, for the sole purpose of preserving the Disputing Party's rights and interests during the pendency of the Arbitration, and that does not involve the payment of monetary damages.
2. A Tribunal may order an interim measure of protection to preserve the rights of a Disputing Party or to ensure that the Tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a Disputing Party or to protect the Tribunal's jurisdiction.

C. Applicable Arbitration Rules and Forum

A Disputing Party may submit a Dispute:

1. under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings;
2. under the ICSID Additional Facility Rules;
3. to an *ad hoc* Arbitral Tribunal established under the UNCITRAL Arbitration Rules; or
4. to any Arbitral Institution or Regional Court located in Africa.

D. Place of Arbitration

Where the Disputing Parties agree to any forum other than ICSID, the legal place of the Arbitration shall be in a city of a State party of the African Union other than the Investor's Home State and the Host State. The venue for proceedings shall be:

1. a location to be determined by agreement of the Disputing Parties; or
2. by the Arbitral Tribunal in the absence of the agreement of the Disputing Parties at the earliest possible opportunity.

E. **Establishment of Arbitral Tribunal**

1. The Arbitral Tribunal shall comprise three Arbitrators, one Arbitrator appointed by each of the Disputing Parties and the two Arbitrators thus appointed shall select, by mutual agreement, a third Arbitrator who shall be a citizen of a Third State and who shall be the presiding Arbitrator, provided that the presiding Arbitrator shall be of African descent. Where this is not possible, other suitably qualified international professionals may be considered.

2. In establishing the Tribunal, the Disputing Parties and the party-appointed arbitrators shall strive to reflect geographical, gender and age diversity as well as representation of different legal systems and cultures.

3. The Arbitrators appointed to resolve disputes under this Agreement shall, at all times, during the Arbitration:

   (a) be persons of good standing and experience in international law, international investment law or dispute settlement under international law;
   (b) be impartial, free of actual conflicts of interest or the appearance of conflict of interest, and independent of the Disputing Parties. These duties of impartiality and independence shall apply at the time of accepting an appointment to serve and throughout the entire Arbitration proceeding; and
   (c) disclose to the Disputing Parties, any arbitration institution and other appointing authority (if any) and to the co-arbitrators, any facts or circumstances that may give rise to doubts as to the Arbitrator's impartiality, freedom from conflicts of interest and/or independence.

4. If an Arbitral Tribunal has not been constituted within 60 days from the date of submission of a claim to Arbitration under this Article, the Secretary-General of ICSID or head of the selected arbitral institution or the Secretary General of the Permanent Court of Arbitration (in the case of *ad hoc* arbitration under the UNCITRAL Rules) shall on the request of a Disputing Party, appoint, in his or her discretion, the Arbitrator or Arbitrators not yet appointed, provided always that due consideration shall be had to the appointment of Africans and/or Arbitrators who meet the other diversity criteria specified in Article 22(E)(2) above.

5. For the purposes of this Article and without prejudice to an objection to the appointment of an Arbitrator on grounds other than nationality:

   (a) The Disputing Parties agree to the appointment of each individual member of a Tribunal established under the ICSID Convention or the ICSID Additional Facility Rules; and
   (b) Either Disputing Party may submit a claim to Arbitration under the Rules of an Arbitral Institution or Regional Court located in Africa only if the other Disputing Party agrees in writing.

F. **Consent to Arbitrate**

1. Each Contracting Party consents to the submission of a claim to arbitration under Article 22 of this Agreement.

2. The consent under paragraph F(1) of this Article 22 shall also satisfy the requirements of:
   (a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the Disputing Parties to the dispute;
   (b) Article 1 of the UNCITRAL Arbitration Rules;
   (c) Article II of the New York Convention for an "agreement in writing"; or
   (d) The Rules of any other selected arbitral institution regarding consent and submission to Arbitration.

G. Counterclaim

1. A Respondent may initiate a Counterclaim for breach of the obligations set out under this Agreement before an Arbitral Tribunal established under this Article 22 and seek, as a remedy, suitable declaratory relief or monetary compensation.

2. The Parties agree that a Counterclaim made in accordance with this Article 22(G) shall not preclude or operate as *res judicata* against applicable legal, enforcement or regulatory action in accordance with the laws of the Host State or in any other proceedings before judicial bodies or institutions of the Host State.

3. An initiation of a Counterclaim by a Respondent shall not in itself constitute a waiver of an objection raised by that Respondent to the Arbitral Tribunal's jurisdiction over an Investment Dispute.

H. Security for Cost

1. The Arbitral Tribunal may order security for costs and/or claims where it has reason to believe that:

   (a) the Claimant will be unable to pay, if ordered to do so, a reasonable part of the costs awarded to the Respondent; or
   (b) the Claimant has divested assets to avoid the consequences of complying with any pecuniary award that may be made against it.

2. In determining whether to order a Disputing Party to provide security for cost, the Arbitral Tribunal shall consider all relevant circumstances, including but not limited to:

   (a) that Disputing Party's willingness and ability to comply with an adverse cost order;
   (b) the effect that providing security for cost may have on that Disputing Party's ability to pursue his claim or counter claim; and
   (c) the conduct of the Disputing Parties.

3. The Arbitral Tribunal shall consider all evidence adduced in relation to the circumstances in this Article 22(H). The existence of third-party funding may form part of such evidence but is not of itself sufficient to justify an order for security for costs.

4. Should the Claimant fail to pay the security for costs ordered by the Arbitral Tribunal, the Tribunal may terminate the arbitral proceedings or suspend proceedings until costs are paid.

I. Third Party Funding

1. If a Third-Party Funding agreement is made, the Disputing Party benefitting from it shall give written notice to the other Disputing Party or Disputing Parties, the arbitral tribunal and, where applicable, the arbitral institution, of the name and address of the Third-Party Funder (including the ultimate funder if there are any intermediaries or should the funder subsequently sell/assign/novate their investments, rights and/or obligations under the funding contract) and such other information as the amount of funding, payment terms and/or other key terms of the funding contract/relevant information as the Tribunal may request at any time or from time to time.

2. The funded Disputing Party shall make such disclosure, in writing to the Arbitral Tribunal either as part of its first appearance or submission, or as soon as practicable after funding is provided or an arrangement to provide funding for the Arbitration is concluded.

3. If a funding arrangement is terminated before the end of the Arbitration, the funded Disputing Party shall give written notice within fifteen days of termination of the funding arrangement:
   (a) indicating that the funding arrangement has ended; and
   (b) advising the date on which the funding arrangement ended.

4. The Arbitral Tribunal shall in the event of disclosures made pursuant to this Article 22(I) have the same continuous disclosure obligations contained in Article 22(E)(3)(c) regarding any direct or indirect relationship with the third party funder or any other facts or circumstances that may now give rise to doubts as to the Arbitrator's impartiality, freedom from conflicts of interest, or independence.

J. Stand Still Period

Notwithstanding the provisions of this Article, all claims or rights to an action arising out of this Agreement shall stand automatically suspended and be unenforceable by a Disputing Party against a Contracting Party for a period of one year from the date of the execution of this Agreement or, in the case of an Investor, from the date of incorporation of the Investment in the Host State, whichever is later. Claims relating to direct or indirect expropriation shall not be suspended.

K. Submissions by Non-Disputing States and other Third Parties

1. A non-disputing Contracting Party to this Agreement may make oral and written submissions to the Tribunal regarding the interpretation of this Agreement and may be present at the oral arguments, in accordance with the directions and procedural calendar set by the Arbitral Tribunal.

2. The Tribunal shall have the discretion and authority to accept and consider amicus curiae submissions from persons or entities that are not Disputing Parties. The procedures in **Annex 3** shall apply for this purpose.

3. A sub-national group, local or ethnic community of a Contracting Party may, at the discretion of the Tribunal, provide oral or written *shawara (insight, information or other useful details)* to the Arbitral Tribunal regarding the *tarihi (history)* or *asiri (secrets)* of any aspects of Traditional Knowledge, Traditional Cultural Expression or genetic resources which form the core of the subject matter in dispute before the Tribunal.

L. **Awards**

1. Where an Arbitral Tribunal makes a final award against a Disputing Party, the Arbitral Tribunal may in addition to declaratory reliefs, award separately or in combination:
   (a) monetary damages and any applicable interest; and/or
   (b) restitution of property.

2. An Arbitral Tribunal may not award punitive or any non-consequential damages.

3. An award made by an Arbitral Tribunal shall have no binding force except between the Disputing Parties and in respect of the particular case.

4. For the purposes of Article I of the New York Convention, the Contracting Parties agree that a claim submitted to Arbitration under this Article 22 shall be presumed to arise out of a commercial relationship or transaction.

M. **Review Mechanism**

1. A Disputing Party may apply for a review of the decision of an Arbitral Tribunal:
   (a) in the case of an institutional Arbitration, in accordance with the applicable Rules of Arbitration or the review procedure in **Annex 4** to this Agreement should said rules be silent on a review mechanism; and
   (b) in the case of an ad hoc arbitration, in accordance with the review procedure in **Annex 4** of this Agreement.

2. The Disputing Parties may agree that this Paragraph M and **Annex 4** to this Agreement shall not apply to their dispute(s).

Explanatory Notes

This article sets out the full range of conditions surrounding the use of arbitration as a dispute resolution mechanism. In general, the drafters have retained a lot of the common practices in Investment Arbitration/ISDS but have taken a unique approach to some of the issues contained herein. This is especially because this Agreement is designed by the drafters bearing in mind the unique and diverse legal, economic,

2 "Shawara" is an indigenous Hausa word, connoting "insight, information or other useful details" Traditionally, Shawara submissions are made by experts with knowledge of history and traditions of indigenous people. Contracting parties may adopt similar indigenous language that works for their contract.

3 "tarihi" in Hausa language, means "history" and in the context of traditional knowledge, relates to expressions of culture or genetic resources. Contracting parties may adopt similar indigenous language that works for their contract.

4 "asiri" in Yoruba language, means any "secrets" which in the context of traditional knowledge, relates to propriety information about indigenous arts and crafts, traditional knowledge, expressions of culture or genetic resources. Contracting parties may adopt similar indigenous language that works for their contract.

cultural and investment climes that make up the African continent.

It is pertinent to start by noting that the Agreement contains a dispute prevention provision (Article 20 – which introduces a JTMC which serves the dual function of periodic treaty reviews and initial dispute management in the form of consultations with the aim of de-escalating and/or resolving any potential disputes), a mediation clause (Article 21 – which could serve as a natural next step post consultation also with a view to resolving disputes and possibly preventing recourse to arbitration) before making provision for some of the other unique principles and provisions explained below.

In particular, this Article:

1. provides a time bound dispute settlement process. As such, parties may take advantage of all avenues for dispute prevention and resolution without the dispute settlement process continuing in perpetuity. There is also a time limitation for initiating the dispute settlement process from the date of knowledge of a breach (paragraph A).

2. allows, in Paragraph B, for disputing parties, notwithstanding the dispute prevention/settlement procedures in place, to seek interim relief from the courts of the Host State or the Tribunal for preservation of the res, or the rights of a disputing party or jurisdiction of the Tribunal as the case may be. No damages can be claimed under such a measure. The intent here is merely to maintain the status quo or revert to status quo ante pending determination of the dispute.

3. provides for a legal place of arbitration in Africa and an option for the disputing parties to submit their dispute to an African institution (paragraphs C and D).

4. introduces a formal diversity requirement in the establishment of the Arbitral Tribunal (paragraph E).

5. provides that execution of this Agreement amounts to the consent to arbitrate (paragraph F).

6. makes provision for the right of the Respondent to initiate a counterclaim for breach of obligations under the Agreement (paragraph G).

7. empowers the Tribunal to make security for costs orders provided that third party funding may be taken into consideration in making such an order but may not be the sole reason for making the order (paragraph H).

8. provides for the use of third-party funding provided that there is full disclosure of the funding arrangement or termination of same (paragraph I). The approach adopted is to provide specific information that are necessary for disclosure by a funded party. This, uniquely, provides guidance to funded parties in performing the

disclosure obligation without fettering the tribunal's powers to request further information in deserving cases.

9. introduces a standstill period of 1 (one) year to allow for proper integration of the agreement or establishment of the Investment as it were before disputing parties may initiate any dispute resolution proceedings (paragraph J).

10. makes provision, in paragraph K, for oral or written submissions to the Tribunal by the non-disputing Contracting Party and other relevant stakeholders. This was first introduced in the NAFTA and has been incorporated into a number of treaties since then. It is a useful tool for both the disputants and Tribunals. Allowing a non-disputing Contracting Party, for instance, to share its understanding of the terms of the agreement serves as a safeguard against significant unexpected interpretations by tribunals when the considered views of both Contracting Parties are before them in any given instance.

Other third-party interventions such as amicus curiae submissions in investment arbitration began in the year 2000 and is now common practice. It is certainly not controversial. Amicus curiae submissions are usually made through an application to the tribunal by the person or organization that intends to make the submission.

This paragraph also introduces shawara as input which may be provided to the Tribunal for the preservation of traditional knowledge, expressions of culture, genetic resources and the rights of indigenous people by experts with knowledge of the history and traditions of the indigenous people.

11. provides for Awards and a review mechanism (paragraphs L and M) which are standard provisions in most modern investment treaties.

ARTICLE 23

Amendment

At the time of entry into force of this Agreement or at any time thereafter, the provisions of this Agreement may be amended by the joint agreement of the Contracting Parties within six (6) months of the receipt of the initial written proposal for amendment by either Contracting Party. The agreed amendments shall enter into force on the latter of the notifications by each Contracting Party to the other, in writing, confirming the completion of the procedures required in its Territory for the entry into force of the amendment(s). The amendment(s) shall constitute an integral part of this Agreement.

Explanatory Notes

This article complements the provisions of Article 20 (Dispute Prevention) by allowing for amendment of the treaty at any time at the request of either Contracting Party who initiates the process by giving written notice of its proposed amendments. The article provides a 6-month timeline for effecting any amendments from the date of notice. The main aim of this provision is to ensure flexibility such that the contracting parties' evolving preferences are continually reflected in the agreement.

ARTICLE 24

Entry into Force

1. This Agreement shall enter into force on the latter date on which either Contracting Party notifies the other that its constitutionally required procedures for the entry into force of this Agreement or its amendments have been fulfilled.

2. All Annexes are an integral part of this Agreement

Explanatory Notes

This provision clarifies when the Agreement will come into force and when the Contracting Parties become legally bound to comply with the obligations in the Agreement.

ARTICLE 25

Periodic Review

1. The Contracting Parties shall meet every five years after the entry into force of this Agreement to review its operation and effectiveness, including but not limited to the levels of Investments between the Contracting Parties. For the avoidance of doubt, if the Contracting Parties do not meet within any given five-year period, this Agreement shall nevertheless remain in full force and effect.

2. The Contracting Parties may consider JTMC recommendations for review or amendment under Article 20 of this Agreement.

3. The Contracting Parties may adopt joint strategies in order to improve the operation and effectiveness of this Agreement. Such joint strategies shall be reduced into writing and implemented as an amendment under Article 23.

Explanatory Notes

This Article seeks to give the Contracting Parties the opportunity to review and re-evaluate the effectiveness of the Agreement in practical terms and then update same with relevant strategies and initiatives that will foster its improved operations, particularly as operational realities change from time to time. The Contracting Parties should therefore be able to update the Agreement and its operational effectiveness as the need arises. Similar provisions are included in several Canadian investment treaties, the SADC Model Bilateral Investment Treaty Template and the review mechanisms in the investment chapters of trade or broader cooperation agreements.

ARTICLE 26

Duration, Termination and Sunset Provisions

1. This Agreement shall remain in force for an initial period of ten years from the date of its entry into force pursuant to Article 24. Thereafter, it shall continue in force unless a Contracting Party notifies the other Contracting Party in writing of its intention to terminate.

2. In respect of Investments established or made prior to the date of expiry or termination of this Agreement, this Agreement including all Annexes shall remain in force for a further period of five years from the date of termination.

3. Termination of this Agreement shall become effective one year after the date the other Contracting Party receives the notice of termination.

Explanatory Notes

Sudden law and policy changes can be debilitating to any business/investment interest. While recognizing and providing parties the opportunity to end their relationship if the need arises, this article also ensures that ensuing changes are spread over a reasonable period of time such that parties can review their positions and prepare themselves and other stakeholders for the exit, sale or re-structuring of investments within the Host State. Notice and sunset periods may be modified by States adapting this provision to suit the peculiarities of their respective economies and the nature of investments they wish to attract.

ANNEX 1

Sectors Excluded from Most Favoured Nation Treatment

Most Favoured Nation Treatment provided for under Article 4 of this Agreement does not extend to the following:

1. Measures to protect human, animal, plant life or health;
2. Treatment accrued under current or future treaties;
3. Current or future foreign aid programmes;
4. […..]
5. […..]
6. […..]

Explanatory Notes

Contracting Parties may adapt this list to cover other areas including specific industries or sectors of their individual or respective economies as they deem fit and/ agree on.

ANNEX 2

Structure, Composition, Responsibilities and Powers of Joint Treaty Management Committee

1. Composition and Structure

a. The Joint Treaty Management Committee ("JTMC") established under Article 20 shall be constituted within six months of the execution of this Agreement or such extended period agreed in writing by the Contracting Parties.

b. The JTMC shall be comprised of a maximum of seven (7) cabinet-level representatives of the Contracting Parties, with the Contracting Parties appointing three (3) members each and the members jointly appointing the 7th member who must be neutral and must not be a citizen, resident or in any way connected to either of the Contracting Parties.

c. Members shall appoint one person from a Contracting Party as Chairperson of the JTMC. The position of Chairperson shall alternate between the cabinet-level representatives of the Contracting Parties on an annual basis. The Chairperson shall chair proceedings of the JTMC and shall have a deciding vote in event of a deadlock.

2. Responsibilities

a. The JTMC shall be responsible for supervising the implementation of the Agreement, including engaging in consultations with a view to ensuring amicable resolution of disputes arising between a Contracting Party and an Investor.

b. To aid in the discharge of its responsibilities, the JTMC may:
   i) establish, and delegate responsibilities to ad hoc or standing committees, working groups or expert groups;
   ii) seek the advice of non-governmental organisations, individuals or groups; and
   iii) take such other action in the exercise of its functions as the Parties may agree.

c. All persons, committees or groups engaged by the JTMC pursuant to paragraph 2(b) shall:
   i) Be of good standing, have expertise and experience in international law, international investment law, international trade law, other matters covered by the Agreement and/or the resolution of disputes under international law;
   ii) be chosen strictly on the basis of objectivity, reliability and sound judgement;
   iii) not have dealt in any capacity with any matter being considered by the JTMC;
   iv) disclose, to the JTMC, information which may give rise to potential conflict of interest; and

v) comply with the code of conduct and rules of proceedings set out by the JTMC.

3. Powers

a. The JTMC shall have power to:
   i) Review the performance of the Agreement and make proposals for amendment;
   ii) Determine any disputes brought before it pursuant to Article 20(3);
   iii) Select the appointing authority for a consolidation Tribunal in accordance with Article 22;
   iv) Appoint mediators pursuant to Article 21;
   v) Perform any acts or carry out any tasks which may be reasonably required in the performance of their duties under this Agreement.

4. Rules and Procedures

a. The JTMC shall:
   i) establish its rules and procedures, and set the time table for carrying out its responsibilities contained in the Agreement and in this Annex;

   ii) convene at least once a year in regular session. Regular sessions of the JTMC shall be chaired successively by each Contracting Party's representative;

   iii) consult the Contracting Parties regularly and provide adequate opportunities for the development of a mutually satisfactory solution to any matter brought before it for consideration.

   iv) The JTMC's proceedings shall be sufficiently flexible to ensure high-quality reports, while not unduly delaying its processes.

b. The venue for the meetings of the JTMC shall be decided by agreement between its members. If there is no agreement, the venue shall alternate between the capital cities of the Contracting Parties with the first meeting to be held in the capital city of the Contracting Party that submits a request to the JTMC pursuant to Article 20(3) of this Agreement.

c. Where necessary, the JTMC may hold its meetings and proceedings through videoconference or other means where appropriate.

d. The JTMC's meetings and consultations shall be held in closed sessions unless the Contracting Parties agree otherwise. All members of the JTMC shall treat as confidential any information and document submitted by the Contracting Parties or Disputing Parties to the JTMC for consideration.

e. All meetings and proceedings of the JTMC organised pursuant to Article 20 and this Annex 2 shall be conducted in English language or any other language agreed by the Disputing Parties.

f. Any document submitted for consideration and used by the JTMC in any

meeting of proceedings pursuant to Article 20 and this Annex 2 shall be in stated in English language or any other language agreed by the Disputing Parties. If any original document is not in the languages, a Contracting Party submitting it to the JTMC shall provide a version of the document that has been officially translated into the agreed language.

g. Unless the Contracting Parties agree otherwise:

i) each Disputing Party to a dispute shall bear the costs of its appointed JTMC members.
ii) other expenses associated with the conduct of the JTMC's meetings and proceedings shall be borne in equal parts by the Contracting Parties.

5. **Findings and Recommendations**

a) The findings and recommendations of the JTMC shall only be in relation to the provisions of this Agreement and shall be contained in a report generated for that purpose.

b) The JTMC shall make its findings by consensus. If consensus cannot be reached, the JTMC's recommendations shall be by simple majority vote.

c) The recommendation of the JTMC shall not add to or diminish the Contracting Parties' rights and obligations provided in the Agreement, and shall not be considered as an amendment to the Agreement.

d) The JTMC may recommend ways in which the Contracting Parties could implement its findings.

6. **Reports**

a) The JTMC shall draw up a settlement report or such reports and/ recommendations for any matter referred to it.

b) Copies of the report and/ recommendations shall be made available to the Contracting Parties or the Disputing Parties within 30 days of conclusion of consultations.

ANNEX 3

Procedure for *Amicus Curiae* or Written *Shawara*

1. The JTMC, Arbitral Tribunal or Review Tribunal constituted pursuant to Articles 20, 22(E) and Annex 4 of this Agreement shall have the power to invite or accept *Amicus Curiae ("Amicus")* or written *Shawara* from a person or entity that is not a party to the dispute ("non-disputing party") regarding a matter within the scope of the dispute provided that the *Amicus Curiae* or *Shawara* submissions shall be directly relevant to the factual or legal issues under consideration.

2. The application to file an *Amicus or Shawar*a submission shall:

   i) be made in writing, dated and signed by the applicant;
   ii) include the address and other contact details of the applicant;
   iii) disclose whether or not the applicant has any affiliation with or interest in, direct or indirect with any of the Disputing Parties or in the outcome of the case;
   iv) in the case of an enterprise, association or NGO, describe its legal status, the nature of its activities and any other affiliations (e.g. a parent company, subsidiary, sister company, local community, ethnic group or interested person) including whether or not the applicant is an Investor or a host community in one of the Contracting Parties.

3. In inviting or determining whether to allow the filing of an *Amicus* or *Shawara* the Tribunal shall consider, among other things, the extent to which:

   i) the *Amicus* or *Shawara* would assist the Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the Disputing Parties;
   ii) the non-disputing party has a significant interest in the outcome of the proceedings.

4. The JTMC, Tribunal or Review Tribunal shall ensure that:

   i) the *Amicus* or *Shawara* submission does not disrupt the proceedings or unduly burden or unfairly prejudice either party;
   ii) both parties are given an opportunity to present their observations on the Amicus submission;
   iii) the *Amicus* or *Shawara* submissions are included in its Report, Award or findings.

ANNEX 4

Procedure for Review Tribunal in Ad Hoc Arbitrations

1. Establishment of the Review Tribunal

a. A Review Tribunal is hereby established to review awards rendered in ad hoc arbitrations under Article 22(L) of this Agreement.

b. The Review Tribunal may uphold, modify or reverse a Tribunal's award based on:

i. manifest errors in the appreciation of the facts, including the appreciation of the applicable law or relevant domestic law;

ii. any of the grounds set out below, insofar as they are not covered by (i) above:

1. that the Tribunal was not properly constituted;
2. that there was corruption on the part of a member of the Tribunal; or
3. that the award has failed to state the reasons on which it is based.

2. Composition of the Review Tribunal

The Review Tribunal shall be constituted by the Disputing Parties on a case-by-case basis within the context of a dispute considered by the Tribunal of first instance and in the following manner:

i. the Review Tribunal shall be comprised of three (3) members, one of whom shall be appointed by each Party.

ii. the third member who shall be the chairperson of the Review Tribunal, shall be appointed by the two members appointed by the Parties within thirty (30) days of their appointment, failing which the Secretary General of ICSID shall appoint the chairperson.

3. Qualification and Disqualification

a. The members of the Review Tribunal shall:

i. have specialised knowledge of, or expertise in international investment law, international trade law, or the resolution of disputes arising under international investment or international trade agreements;

ii. be independent and not be associated with or affiliated to any of the Disputing Parties. In particular, they shall not participate in the consideration of any dispute which may give rise to conflict of interest or raise any doubts as to their independence and impartiality;

iii. The Review Tribunal shall be guided by the International Bar Association Guidelines on Conflict of Interest in International Arbitration in determining issues on conflicts of interest of any arbitrator appointed under this Agreement.

b. The following persons shall be precluded from being appointed as members of the Review Tribunal:

i. any person who has been a member of the tribunal of first instance which rendered the award being appealed;

ii. any person who is of the same nationality as any member of the tribunal of first instance; or

iii. any person who is a national of a Contracting Party or of the State whose national is a party to the dispute.

4. Review Procedure

a. A Disputing Party may request the review an award rendered pursuant to Article 22(L) to the Review Tribunal within sixty (60) days after its publication.

b. An award against which a request for review has been lodged shall not be considered final and no action for enforcement of an award may be brought until either:
   i. Ninety (90) days from the issuance of the award by the Tribunal has elapsed and no appeal has been initiated; or
   ii. the initiated request for review has been rejected (in whole or in part) or withdrawn.

c. A Disputing Party who is not satisfied with the decision of an ad hoc Tribunal, may request the review of such decision by filing a notice of request for review to the Review Tribunal constituted in under this Agreement, on one or more of the grounds provided in paragraph 2 of this section.

d. The Notice of Request for Review shall include:
   i. The name of each party;
   ii. The address for each party and their representatives (if known), including, if known, telephone and fax numbers and email address, and
   iii. A statement setting forth the part or parts of the award for which the request for review is sought and the errors alleged.

e. The party filing the Notice of Request for Review (the "Applicant") shall simultaneously provide a copy of the Notice of Request for Review the Award against which the request has been filed and the applicable arbitration agreement to other disputing party (the "Respondent")

f. The Respondent may within thirty (30) days after the Notice of Request for Review, file a cross-request for review with the Review Tribunal by sending a notice in accordance with the conditions set out in paragraphs.

5. Jurisdiction and Authority

a. The Review Tribunal shall have the power to rule on its own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement. If the Review Tribunal determines that it does not have jurisdiction to hear the request for review, the request for review shall be dismissed and the award of the tribunal of first instance shall be deemed to be final.

b. To aid in its review of the award of the tribunal of first instance, the Review Tribunal may accept written submissions from third parties that have a bearing on the issues in the request for review and may give such third parties an opportunity to be heard.

6. Findings and Decisions

a. The Review Tribunal shall render its findings and make its decision within one hundred and eighty (180) days from the date a Disputing Party files its Notice of Request for Review. If the Review Tribunal considers that it cannot issue its decision within the 180-day timeline, it shall inform the disputing parties in writing of the reasons for the delay together with an estimate of the period within which it will issue its decision. The extended period for issuing its

decision shall in any case not exceed two hundred and seventy (270) days from the date a disputing party files its Notice of Request for Review.

b. The findings and decision of the Review Tribunal may modify or reverse the legal findings and conclusions in the provisional award made by the tribunal of first instance either in whole or in part on any of the grounds set out in paragraph 1(b) of this Annex, provided that the Review Tribunal shall not undertake a de novo review of facts.

c. The findings and decisions of the Review Tribunal shall, together with details of how it was modified or how relevant findings were reversed, be referred back to the tribunal of first instance or published as the final award of the Review Tribunal and shall be:
   i. final and shall override the award of the tribunal of first instance;
   ii. be binding on the disputing parties and shall not be susceptible to application for any review including review by any of the Contracting Party's domestic courts;

d. The tribunal of first instance shall be bound by decisions and findings of the Review Tribunal and shall, where these are referred to it, revise its provisional award to bring it in compliance with the decision of the Review Tribunal. The revised award shall be published within 90 days of receipt of the decisions and findings of the Review Tribunal.

e. Where it is found that the request for review is unfounded, the Appellate Tribunal shall dismiss the request for review. Dismissal of the request for review by the Review Tribunal shall be on an expedited basis where it is clear that the appeal is manifestly unfounded.

f. If the Review Tribunal dismisses a request for review pursuant to sub-paragraph (e) above, then the award of the tribunal of first instance shall become final and binding on the disputing parties.

g. The Review Tribunal may order a disputing party bringing a request for review to provide security for the costs of appeal and any other security as the Review Tribunal may deem necessary.

7. Application of Treaty Provisions

The provisions of this Agreement relating to Third-Party Funding, applicable rules for hearing of disputes by arbitration and enforcement of arbitral awards shall apply mutatis mutandis in respect of the review procedure established pursuant to Article 22 (M).

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Africa Arbitration Academy

Model Bilateral Investment Treaty for African States

For more information, visit
www.africaarbitrationacademy.org

or contact the Academy at
info@africaarbitrationacademy.org