

Time for a New Chapter to Forge and Leverage International S&T Agreements

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I. WANTED! Enhanced International Cooperation on Commercially Oriented Pre-Competitive R&D

Democratic market-oriented developed nations around the world fundamentally engage in international commerce according to a wealth of common economic principles, pursue similar objectives for enhancing growth, distribution of domestic gains and quality of life stemming from the functioning of their economies, and abide by many of the same rules-based institutions governing how the various constituents of their economies interact with another at home and abroad.

Of course, there always has been heterogeneity among such countries, whether in terms of specific policies, institutional structures, cultures and norms. In recent years, however, some of these differences—most notably in the character and functioning of the nation-state research and development (R&D) enterprise and mechanisms for commercialization—have become not only more evident, but are also engendering significant risks to the ability of a growing number of these states to compete effectively in the global economy. In some dimensions, threats to national security have greatly intensified. This is probably most evident among the G7 countries.

This turn of events stems from the fact that like much of the rest of the world, the economic fortunes of these countries increasingly have become tethered to China, which is the most populous nation on the planet, and one that is neither democratic nor operating according to market principles or widely accepted rules-based global institutions. Much is at stake to mitigate these risks.

As is true on so many other fronts when dealing with large, complex transboundary challenges such as that posed by China, the most meaningful and durable solutions will require collective action. In this case, action needs to focus on concrete, practical ways in which democratic market-oriented developed nations can collaborate and bridge certain aspects of the heterogeneity in their national R&D enterprise systems in order harnessing what are the best elements of them.

The overarching goal should be to develop a robust mechanism through which the governments of these like-minded countries can formulate agreements that systematically guide the international coordination of well-defined investment activities undertaken by the principal domestic constituencies of the R&D enterprise—companies, universities, laboratories etc.—in order capitalize on *new opportunities* to

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both enhance the countries' collective international competitiveness and to better capture the value of the investments they undertake.

In this context, much of the current debate swirling about the undue concentration of advanced countries' production located in, or supply chains emanating from, China is focused on the wisdom of, or even the ability for, instituting government-mandates to force foreign companies to "decouple" from China, which is increasingly referred to as "the world's factory."

Putting aside the dearth of understanding by proponents of decoupling about how foreign firms operating in China actually function, at its core, the objective they are pursuing is one of *defense*, not *offense*. In addition, their focus is centered more on incumbent or legacy products, processes and technologies than on R&D investments that will not only drive the *next generation* of them but also enhance firms' ability to enhance the "*value capture*" of such investments.

It is the latter area on which fresh collective efforts for devising international sovereign-to-sovereign agreements to coordinate R&D investment activities among the advanced democracies must focus and do so in a proactive mode.

To this end, this paper provides an overview assessment of three existing mechanisms utilized for the negotiation and oversight of international agreements among sovereigns highly relevant to cross-country collaboration in R&D investment activity—international science and technology (S&T) agreements, international trade agreements, and bilateral investment treaties (BITs).

Owing to the nature of the specific activities they regulate the three regimes differ from one another in varying degrees in terms of objectives, architecture, processes for negotiation, and governance. Of course, this is to be expected. Importantly, however, the analysis distills key lessons from the trade and investment sides that can inform efforts that might be taken to launch a new initiative to enhance cooperation in commercially oriented R&D activities among the advanced democratic economies.

Moreover, although it is obvious that the three regimes interact with one another in shaping the stance and composition of countries' industrial policies, such linkages are rarely made explicit. Developing mechanisms to better drive such interactions constitutes a critical opportunity, the capitalization of which should be placed high on the policy agenda.

II. Summary and Key Findings

Many, if not all, of the advanced democracies have entered into a sizeable number of multiple *international S&T agreements* with one another to foster various forms of cross-country cooperation in R&D activities.

The enterprise has created a substantial network between these countries, engendering extensive collaboration among scientists, largely, but not exclusively, from academia and government. However, these efforts are, regrettably, best characterized as "*science diplomacy*."

That is the term conventionally used by most negotiators of such agreements. I know this firsthand: Earlier in my career, as U.S. Assistant Trade Representative, among my other responsibilities—leading US negotiations of international trade agreements and international Bilateral Investment Treaties (BITs), I co-led US negotiations for international S&T agreements with a cohort from the U.S. Department of State.

Other than my agency, which sat (and still does) within the Executive Office of the President, other *agencies* (e.g., economic- or science-oriented) were not heavily involved.

The process of negotiating and evaluating outcomes of international S&T agreements is significantly different from that of negotiating international trade agreements and investment treaties (especially so in the US). The former is not nearly as inclusive or systematic with respect to *involving external stakeholders* as the two latter regimes.

For trade and investment agreements there is an elaborate—and remarkably efficient—superstructure in which business, labor, and NGOs (environmental groups, research entities, think tanks, and universities) are routinely and extensively involved both in the front-end of negotiations as well as at the evaluation stage. In the case of international S&T agreements, these elements of stakeholder participation rarely exist as standard practice.

To the uninitiated, bringing together stakeholders for such activities may seem to be unduly *process-oriented*. For international trade and investment agreements it is not: the focus is often extraordinarily keyed to defining not only which *tangible* goals and outcomes should be sought (think, lowering specific tariffs or opening up certain sectors for foreign investment), but also *how* should negotiators go about seeking them (think, where is there the most leverage and on what specific foreign products or service markets do domestic constituencies place the highest value). There should be no shortage of defining analogous elements in the case of S&T agreements. The current practice of international scientific data-sharing arrangements is an important example in this regard.

Moreover, in the case of international trade and investment agreements, the process is often cleverly used as a way to help achieve national consensus about salient policy parameters. Epitomizing this is the fashioning of “model agreements,” which serve as the starting point for international negotiations with other sovereigns. The most obvious example is the process of crafting a country’s model BIT (which is done every several years). This, too, can be a lesson for the regime governing S&T agreements.

At the bedrock of international trade agreements and investment treaties are two long-standing principles: “reciprocity” and “national treatment.” Adherence to these strictures by participating sovereigns is the *sine qua non* of international trade and investment agreements. They are what makes such agreements so meaningful. So much so, that violations of them lie at the core of cross-country trade and investment disputes.

Relatively few international S&T agreements embody such terms; and for those that do, the provisions are largely viewed as lip-service. Not surprisingly, little if any enforcement of S&T agreements is carried out; indeed there do not exist meaningful disciplines embodied in such agreements with which to exact remedies when there are violations or disputes. Without such strictures, international cooperation in commercially oriented, precompetitive R&D activity among sovereigns will not be meaningful.

There is a powerful message here: there is only a nominal focus (and sometimes none at all) on like-minded countries *collectively* advancing pre-competitive, *commercially-oriented* objectives that harness the application of the fruits of these international S&T agreements—objectives that if fulfilled can drive economic growth and international competitiveness of the participating countries.

Rather, those types of goals are, for the most part, still pursued by cohort countries *individually*. The result? Missing the ability to capitalize on important S&T opportunities that could significantly enlarge

economic advances *for all*, over and above what can be accomplished at the individual country level.

At present such objectives are only sought by *groups of countries* where there are strong *pre-existing* institutions structured at the multi-country level focused on advancing economic growth, most notably common approaches to boosting cross-country trade and investment flows.

This speaks to the importance for advanced democracies interested in boosting S&T cooperation to do so in ways that *dovetail* with fulfilling their collective economic objectives with respect to trade and investment—especially in enhancing and re-orientating the location of “value capture”. In fact, while the three regimes of international agreements interact with one another in shaping the stance and composition of countries’ industrial policies, such linkages are rarely made explicit. Thus, moving forward, a key item on the G7’s agenda should be the development of mechanisms to better drive such interactions.

III. Architecture of International S&T, Trade and Investment Agreements: Bilateral, Plurilateral, Multilateral

Typically, international S&T agreements are structured on a bilateral basis. Worldwide, there is only a small number of plurilateral (e.g., regional) S&T agreements. These generally capitalize on existing economic structures, such as Free Trade Areas/Economic Communities, e.g., the European Union (EU). There is no global regime for multilateral international S&T agreements.

This architecture of cross-country S&T cooperation is in stark contrast to *international trade agreements*, where there are bilateral, plurilateral, and multilateral agreements.

The latter is by dint of the fact that since 1947 there has been an independent *multilateral* organization (initially the General Agreement on Trade and Tariffs (GATT) and subsequently the present-day World Trade Organization (WTO)) focused on rules fostering trade, protecting intellectual property and reducing barriers to the international exchange of goods and services among the globe’s economies. Today there are 164 member states that comprise the WTO.

In the case of *international investment agreements (or treaties)*, there are mainly bilateral agreements and a few plurilateral agreements (e.g., the US-Mexico-Canada free trade area). There are no multilateral investment agreements, although there was an initiative to develop one (the Energy Charter) a number of years ago. It failed to launch for a number of reasons; the most important of which was that negotiations were carried out in secret without involving a wide range of affected interest groups around the world.

IV. Scale and Focus of International Agreements

S&T Agreements. A snapshot of the structural relationships defined by international S&T agreements among the advanced democracies reveals a complex web of accords among the same parties, often with a wide variety of focus areas.

A definitive global count of the total number of international S&T agreements in force is not known with sufficient accuracy. Tallies of such agreements for specific countries or groups of countries are available on a case-by-case basis.

For example, the EU has 20 bilateral international S&T agreements in force at the Union level. These

do not include such agreements among the 27 individual countries currently comprising the EU nor bilateral S&T agreements each EU member might have with states outside the EU; e.g., the U.K. has a bilateral S&T agreement with the U.S.

Of the 20 EU international S&T agreements, 15 (75%) are with emerging markets. The remaining five pertain to advanced countries with which the EU has bilateral S&T agreements: Australia, Canada, Japan, New Zealand, and the U.S. Presumably with Brexit, the U.K. and the EU will negotiate a separate agreement.

The complexity of the structural relationships defined by global network of bilateral S&T agreements arises across several dimensions.

First, signatory pair countries often each have a distinct *set—indeed often a multiple number—of* bilateral S&T agreements with each other. Thus, it is not uncommon for partnering governments to have a single ‘umbrella agreement,’ which defines overarching goals and principles, *coupled with* several sector- or thematic-specific agreements and/or well-defined areas for cooperation.

In the latter case, worldwide there are a number of areas covered on an agreement-by-agreement basis. To take some examples, there are separate bilateral S&T agreements on: food/agricultural; marine and water; space; nanoscience; transportation; health; the environment; non-nuclear energy; and research in the social sciences and humanities.

For the U.S., there are nearly 60 bilateral “umbrella” and “thematic” S&T agreements in force. In addition, there are more than 2,000 sub-agreements.

As an illustration, S&T cooperation between the U.S. and Germany is carried out within a highly decentralized structure. The primary actors, who tend to operate quite independently, are public and academic research organizations as well as individual researchers. The U.S.-German framework is defined by more than 50 bilateral cooperation agreements.

Second, bilateral S&T agreements *do not always pertain to only two individual countries*. For example, although the US and Japan each have bilateral S&T agreements with Germany and the UK, they also have such agreements with the EU, which is, of course, a plurilateral entity of which Germany is a part, and the U.K. was also up until recently.

Third, international S&T agreements are almost always seen as tools to carry out “science diplomacy” among sovereigns. Indeed, that is the official lexicon employed—at least among the democratic advanced countries.

Not surprisingly, therefore, in many instances the agencies that lead the negotiation and oversight of international S&T agreements are *foreign ministries*, with economic and/or science/R&D focused governmental entities taking on more of an advisory role.

From my own past professional experience, this was largely case, with one exception. In my role as U.S. Assistant Trade Representative, where my core responsibilities were leading U.S. negotiations of international trade agreements (pertaining to all the services sectors of the economy) as well as U.S. negotiations of bilateral investment treaties (BITs), I also co-led U.S. negotiations for international S&T agreements with a similar ranked official from the U.S. Department of State. Other than my agency, which

sat (and still does) within the Executive Office of the President, other *agencies* (e.g., economic- or science-oriented) were not heavily involved.

In today's intense globally contested economic environment of international rivalry in which the advanced democracies are operating, such a regime is inadequate for advancing cross-country cooperation in commercially oriented, pre-competitive R&D.

Fourth, independent of whatever broad objective is being pursued, both the design and execution of international S&T agreements among advanced democracies are too often *not* specified in an *integrated, systematic or centralized* fashion even though there are obvious knowledge synergies to be exploited. Instead, they tend to operate in silos.

For example, two countries might have one bilateral S&T agreement on environmental research and a separate bilateral S&T agreement on research on water resources, two areas of inquiry that surely have significant natural overlaps. It is not inconceivable that whereas the former might have as a goal to increase R&D funding patterns, the latter may focus on ways to raise the number of scientists engaged (that is, enlarging human capital).

Such a framework puts at risk the ability to capitalize on economies of scale—particularly if, as is usually the case, it would be wisest to get as much productivity out of fixed budgets as possible.

The fact of the matter is that at present the *objectives* for establishing international S&T agreements and the *expected benefits* engendered therefrom are too often ambiguous. While official reasons for signing them might be clear, such as to “increase cooperation in science and technology”, there is little doubt there are—or *at least there should be*—clearly articulated specific reasons for establishing such regimes.

By the same token, as is routine in some international economic agreements, assessing the *impacts* of international S&T agreements would greatly benefit from inclusion of detailed *key performance indicators (KPIs)* against which progress can be assessed on a regular basis over the life of such agreements.

Finally, customarily international S&T agreements in and of themselves do not establish mechanisms or budget allocations for partnering governments to *jointly fund R&D activities*. Rather such arrangements usually are captured by *separately* signed agreements.

All other things equal—unless there are not readily apparent, meritorious reasons for this practice—one would expect these two initiatives to be integrated with one another to form a cohesive whole. The result is an approach that is more opportunistic rather than strategic.

In the case of the U.S., most such joint funding initiatives are with emerging markets, for example, India, Pakistan, Egypt, and Israel, rather than with advanced countries.

The stated objectives for collaboration under these programs are to promote R&D for diplomatic purposes. Moreover, the focus is not on commercially oriented R&D but on non-profit activities.

In contrast with international S&T agreements, the participants developing and overseeing these Joint Funding initiatives typically are from science-related agencies of the governments in question as well as academic experts.

Trade Agreements. The origins of today's international trade agreements arose from the Great Depression, whose genesis was significant erosion of confidence in U.S. economic leadership, first manifested in a dramatic fall in share prices on the U.S. stock exchange, but then significantly exacerbated by U.S. imposition of import tariffs (which in turn prompted other countries to do the same).

The outgrowth of that crisis was the establishment in the late 1940s of a set of *multilateral* rules (initially the GATT and now the WTO) that set out not only *how* member countries are to engage in international trade with each other so as to promote global economic growth, but also what *penalties may be imposed* on member countries who do not abide by such rules. The process for determining if such penalties are justified, and if so, what form and magnitude they can take, is administered through an independent dispute settlement system.

Importantly, becoming a member in such a regime, subscribing to its rules, and enjoying the economic benefits arising therefrom are *wholly voluntary* decisions taken by sovereigns. (At present only a few countries have either chosen to not become members of the WTO or their governments are unwilling to make the necessary reforms to liberalise their countries' posture to engage openly in international trade with other nations.)

Equally important, the WTO makes decisions solely on the basis of *consensus* of its 164 member states. (This fact escapes the knowledge of some observers around the world, who believe the staff of the WTO secretariat in Geneva operate the organization according to their own agendas as if they constituted a "deep state.")

The current multilateral trade regime under the WTO goes significantly beyond tariffs and covers multiple policy areas that affect trade and investment in goods and services, including behind-the-border regulations such as competition policy, government procurement rules, and intellectual property rights.

At the bedrock of the multilateral trade regime are the principles of "reciprocity" and "national treatment" for trade in *merchandise*. Adherence to these strictures by participating sovereigns is the sine qua non of international trade agreements covering the exchange of goods and is what makes such agreements so meaningful. So much so, that violations of them lie at the core of trade disputes.

How these two principles apply to *trade in services* under the WTO is different from goods and this is where there is an intersection of international trade rules and R&D.

With the inclusion of the General Agreement on Trade in Services (GATS) into the multilateral trading system in 1995, countries' commitments to "national treatment" and "reciprocity" is discretionary. For many services sectors, countries' made commitments to such principles.

However, most countries chose *not* to commit to such principles with respect to government-provided support, whether subsidies or public funding, for *commercial* R&D activities undertaken by private entities. In other words, WTO members today generally have reserved the right to treat foreign firms less favorably than domestic firms when public funding or subsidies are provided for such R&D.

Of course, this means under the WTO, governments are *not* prevented to from according national treatment to foreign entities in the application of a country's public support of R&D activities; under their WTO commitments they simply are *not required* to do so.

Thus, for example, in the case of the United States, the federal government and individual states generally do accord foreign firms conducting commercial R&D *within the United States* the same treatment as domestic firms.

Several distinctions should be highlighted, however. First, the policy focus on the means of government support on this matter is twofold: provision of (i) subsidies—resources provided by government that could be with or without the direct outlay of funds but done so on below-market-rate terms and (ii) direct financing through publicly provided funds. Although the two channels are distinct, they may or may not be mutually exclusive. An example of the latter would be a public university providing support to a private entity but only at market-determined rates. An example of the former would be the use of tax credits for R&D activities.

Second, these commitments pertain to commercial R&D. The issue of adhering to the principle of national treatment with respect to *pre-commercial R&D* has not been fully addressed in trade agreements *per se*.

In the past few decades there has been an explosion of trade agreements forged at both the *plurilateral (or regional)* and *bilateral* levels—some governing only trade in goods, and some covering *both* trade in goods and trade in services.

Under WTO strictures, member governments entering into either of these forms of trade agreements must notify the WTO. Why? Because fundamentally these free trade agreements (FTAs) necessarily do not accord reciprocity and national treatment for the WTO members who are *not* party to such agreements.

As of 20 September 2020, 306 regional trade agreements were in force worldwide. Importantly, regional agreements are increasing in number and changing their nature. Fifty such trade agreements were in force in 1990.

Examples of current regional trade agreements include the European Union (EU); the USMCA (superseding North American Free Trade Agreement (NAFTA)); and the Asia-Pacific Economic Cooperation (APEC). An African Continental Free Trade Agreement (AFCFTA) is under negotiation; if it is established, it will be the largest such agreement (in terms of population coverage).

Worldwide, 39 individual countries are party to *bilateral* trade agreements. Most of these states have multiple such agreements. For example, the United States has signed bilateral trade agreements with the following individual countries: Israel (1985), Jordan (2001), Australia, Chile, Singapore (2004), Bahrain, Morocco, Oman (2006), Peru (2007), and with Panama, Colombia, South Korea (2012).

Country groupings also have bilateral trade agreements, sometimes with individual countries and sometimes with *other* regional groups. An example of the former is the US has a bilateral free trade agreement with a number of Central American countries: El Salvador, Dominican Republic, Guatemala, Costa Rica, Nicaragua, and Honduras. An example of the latter is the EU has concluded or is in the process of finalizing FTAs with several groupings of African states: Southern Africa; Eastern Africa; and Western Africa.

Investment Treaties. As indicated earlier, the most common form of international investment agreements or treaties are *bilateral*, although the number of *plurilateral* (or regional) investment agreements has been growing in recent years. There is no *multilateral* agreement on investment.

It is important to note, however, that in some cases—whether bilateral, plurilateral or multilateral—trade agreements have been begun to incorporate provisions related to cross-border investment (which is not surprising given the close interrelationship between trade and investment flows). In such cases, there may or may not be self-standing investment between existing parties to trade agreements.

Worldwide, there are more than 2930 bilateral investment treaties (BITs) in force, indicating many governments engage in negotiating such agreements.

Three well-known examples of plurilateral investment agreements are embodied as integral components of: the EU (most EU states terminated their BITs with each other and instead now rely on investment agreements that operate at the Union level); the countries that comprise MERCOSUR, (the acronym for “Southern Common Market”) Argentina, Brazil, Paraguay and Uruguay); and the ASEAN Comprehensive Investment Agreement (ACIA).

Over the last century, the U.S. has set the pace for the number and geographic diversity of, as well as the standards embodied in, BITs signed globally.

As is the intent for most countries’ BITs, the basic objectives of the U.S. BIT program is to reduce barriers to U.S. private investment overseas, ensure such investments are protected from adverse policy changes by host governments, and promote U.S. exports (which are usually attendant to foreign direct investment).

Like the regime of international trade agreements, the core principles embodied in countries’ BITs are *reciprocity* and *national treatment*. Accordingly, the negotiated provisions of BITs spell out in detail what are the rights and obligations of the signatory countries with respect to these two principles.

Typically, the agreements set limits on the ability of host governments to expropriate BIT-covered foreign investments, and if expropriation occurs, define the course of compensation to the investor; ensure full transferability at market rates of investment-related funds into and out of a host country; and restrict host countries’ imposition of regulations that would diminish the value of covered investments.

V. Agreement Templates

The Significance of Model Templates. An important innovation in recent years to facilitate fashioning various types of international agreements—whether focused on S&T, trade or investment—among sovereigns is the creation by governments of “model” text templates. These are the vehicles from which a government enters into negotiations with other governments. The significance of this device is too easily either overlooked or discounted.

There are three reasons why it is critical for governments to devise their own model templates.

First, such templates will reflect the *core principles, rationales and specific* objectives that a sovereign deems foundational to its international cooperation with its counterparts.

Second, the *process* of devising model templates will necessitate a critical inter-ministerial debate for: setting the country's *priorities*; shedding light on areas of governmental expertise that need to be enhanced; and deciding which entities within the government will have responsibility and "ownership" for conducting negotiations, acting as a liaison with the private sector and other external stakeholders and carrying out monitoring and evaluation.

Third, it obviates the self-defeating, if not deleterious, practice that has occurred too often in the past of officials copying portions of other countries' agreements to their own. The obvious problem with this approach is it bypasses a fulsome evaluation of the extent to which the provisions being copied in fact are the most appropriate in the context of a specific agreement being negotiated, and most importantly, in line with the true interests of the country's stakeholders and population as a whole.

Model S&T Agreements. Worldwide, including in the advanced democracies, generally there is no "model" *international S&T agreement* that countries utilize to negotiate the contours of their R&D cooperation with other countries.

This is all the more critical since in many country settings the negotiation of S&T agreements often are led by foreign affairs ministries, with only subsidiary participation by science and economic agencies. Hence why international S&T agreements are often classified as "science diplomacy."

Pursuit of the objective of developing modern international S&T agreements that focus on enhancing cross-country cooperation in commercially oriented, pre-competitive R&D among advanced democracies will be best advanced if governments of these countries begin to craft model international S&T agreement templates—where the process necessarily involves inputs from relevant science and economic ministries as well as from external stakeholders in industry, labor, academia, and relevant NGOs.

Framers of model international S&T templates would do well to capitalize on the hard-won lessons learned from the history of structuring international trade agreements and international investment treaties. In particular, key elements of such templates should focus on the critical principles of *reciprocity* and *national treatment* among S&T agreement signatories.

Some international S&T agreements today embody these non-discriminatory and equal treatment principles in a number of areas; but it is hardly a universal practice. The most important areas include: mobility and exchange of professional scientists and other relevant personnel; access to the national and sub-national R&D infrastructure, including universities and laboratories; reciprocal participation in workshops; joint establishment of new R&D institutions; jointly conducting R&D activities; sharing/exchanging of equipment; and treatment of intellectual property (IP).

On this last point, only relatively few of today's international S&T agreements specify who owns the IP coming out of joint R&D activity, the treatment of confidential business information, the process for the joint commercialization of such assets, and how disputes in this area are settled. Nevertheless, such IP provisions are rarely specified at the project level; rather they are often only generic clauses included in umbrella agreements.

To this end, it is worth examining one of the more recent international S&T agreements that the U.S. has signed with an advanced democracy: the 2017 *U.S.-UK Agreement on Science and Technological Cooperation*, which is contained in Annex 1. Conceivably, the guts of an agreement like this might serve as

the basis for the U.S. to construct a model international S&T agreement with systematic input from relevant government agencies as well as external stakeholders.

Model International Trade Agreement Templates. The absence of using model international S&T agreements is different from the practice pursued for *international trade agreements*.

For international trade agreements, although there are not formal model templates employed, the existence of the WTO (and earlier the GATT) has resulted in universally recognized principles and agreement texts that have been labored over for 70-plus years on the basis of *consensus* of more than 150 governments. Consequently, these agreements provide, in effect, a global open-access repository of texts and a lexicon that generally serve as a uniform framework among the organization's members for new trade agreements that are negotiated.

Indeed, taking a snapshot of many existing trade agreements on a global basis, there is far more commonality than differences. For example, although there are certainly distinctions in the specific content of the recent (July 2020) trilateral *US-Mexico-Canada Agreement* (USMCA) and the bilateral *US-Korea Free Trade Agreement* (KORUS FTA), which came into force in 2012, the concepts, mechanisms, and objectives contained in the texts of the two are quite similar. The text of the USMCA is contained in Annex 2.

Model Investment Treaties. *International investment agreements* are the standard-bearers for the use of model templates as the jumping off point for negotiations. A large number of advanced democratic countries have model bilateral investment treaties (BITs). This includes the U.S., France, and Germany, Spain, Belgium, The Netherlands, Norway, the UK, Austria, Italy, Israel, Sweden, Greece, Finland, Switzerland, and Denmark. The model U.S. BIT is contained in Annex 3.

It is not only the advanced countries that utilize model BITs. Large emerging markets, such as China, India, Russia, Brazil, and South Africa all have such templates. However, this is the case for even many small emerging markets. To cite just a few of numerous examples, states as disparate as Burkina Faso, Guatemala, Macedonia and Mongolia have model BITs.

VI. Negotiation Processes.

The process for negotiating these three types of international agreements should be comprised of a number of key criteria and steps, including decisions on:

- what are the key national objectives (e.g., alleviating constraints; seizing opportunities) to be placed on a *rolling* negotiating agenda within a well-defined sequence over a number of years;
- what should be specific country targets (perhaps phased in over time);
- which specific items (e.g., sectoral focus, new initiatives) are the highest priority;
- what is a reasonable timetable for:
 - (i) honing the specific objectives sought by dint of a process of stakeholder consultations;
 - (ii) initiating and concluding actual negotiations, incorporating sufficient time for liaising with external stakeholders, including a country's legislators, throughout the process;
 - (iii) concluding ratification among the various national parties; and
 - (iv) establishing a process for monitoring and evaluating outcomes over time as new agreements are implemented.
- what resources—both human and financial—will be needed for successful completion of the

various stages outlined here.

International S&T Agreements. There is considerable variation among advanced democracies in systematically carrying out such steps illustrated above. Good cross-country data on this are not readily available (arguably, it is an important item to be placed on a research agenda). The EU seems to be more advance on this score than other countries.

Speaking from experience with respect to U.S. negotiation of international S&T agreements, a number of these steps are implemented, but are done far more in an implicit rather than an explicit fashion. Moreover, the overall approach taken by the U.S. is less systematic than it should be, especially regarding outreach with external stakeholders—both within and outside government.

International Investment Agreements. The existence of model BITs among many advanced democracies, is a huge advantage to be able to engage in an efficient negotiation process in the area of international investment.

The preponderance of the decisions to be made in this regard center on which new country partners should be engaged with either to conclude a first-time BIT or to renegotiate an existing BIT (which is often not a very frequent occurrence). Indeed, as noted above, given the sheer number of BITs already in force across the world, negotiation of either new or replacement BITs is not a hotbed of activity.

Still, when BITs are negotiated (or re-negotiated) there is generally a considerable process of outreach and consultation both among different agencies of a government as well as with external stakeholder. This is certainly true in the case of the advanced democracies, including the US.

Generally, there are only two types of occasions where there is considerable activity in BIT negotiations. First, when new states are formed. Thus, when the Soviet Union collapsed into its constituent parts in the early 1990s, the new republics were eager to negotiate BITs, especially with advanced countries. (This is the period in which I led all U.S. negotiations of BITs.)

The second is when governments previously reluctant to complete the BIT process re-open the dialogue. The U.S.-Russia BIT is the most well-known example. The negotiation of the BIT text between the two governments was concluded in 1992, but as of 2020, the treaty has not been duly ratified by the governments. Although China and the US have discussed the notion of establishing a BIT, no formal negotiations have taken place as of 2020.

Although not a negotiation with other sovereigns, from time to time governments may decide to update their model BITs. That process usually entails not only in-country discussions with various government agencies but also consultations with external stakeholders. The current US model bit was approved in 2012, superseding the earlier model BIT of 2004. The conclusion of the 2012 process followed three years of extensive reviews and consultations.

International Trade Agreements. The process and structure of negotiations of international trade agreements are the most comprehensive and mature among the three types of agreements. This is largely driven of course by the long-standing existence of the WTO (and the GATT before it) and the extensive history of trade negotiations of one sort or another by every country in the world.

It is safe to say the advanced democracies—which are the largest trading partners on the globe (except China)—have the most sophisticated and well-oiled processes and mechanisms toward trade negotiations, including agenda-setting, timetables and consultation.

The U.S. framework is emblematic of that followed by cohort countries, if for no other reason than—except for present period of the Trump Administration—the US has been the global champion of the establishment, functioning and agenda-setting of both the GATT and WTO.

The consultation process the Executive Branch in Washington follows for the trade negotiations it carries out is elaborate, not only with respect to the Congress—which has the formal authority under the US Constitution to approve international trade agreements—but also external stakeholders.

Indeed, the Office of the US Trade Representative (USTR) has a statutory responsibility to seek the advice not of only other Executive Branch agencies but also a wide swath of interest groups outside government. In 1974, the Congress created an advisory committee system, which is comprised of 26 entities, whose focus covers well-defined business issues (defined by sector), labor unions, environmental groups, consumer groups, universities, state level governments, among many others.

VII. Governance

International S&T Agreements. It is rare for cross-country S&T agreements to incorporate formal *independent* mechanisms at the *international level* that provide for (i) mutually agreed rules for the governance of such regimes, including settlement of disputes; (ii) a repository of “best practices” for the structuring of S&T agreements; and (iii) fostering cross-border R&D cooperation. This is in stark contrast to international trade agreements, where the WTO currently serves these functions.

Instead, these types of mechanisms *may* be enshrined at the agreement level. However, even here, it is not a common practice. For example, the U.S.-Germany bilateral S&T cooperative program noted earlier is not overseen by an agreement-specific steering committee.

This certainly is in keeping with its decentralized structure, but it begs the question whether the absence of a governance mechanism results in the failure to capture important cross-thematic or –sectoral synergies produced by the various joint R&D initiatives undertaken. In addition, it may mean an inability to exploit opportunities to achieve economies of scale or scope or various other economic efficiencies.

The result is a limited ability for like-minded countries to capitalize fully on the benefits from such cooperation. This is particularly ironic given that spillovers from R&D—unlike virtually any other activity in which humans engage—can be huge. Inasmuch as R&D is the core driver of economic growth and of improvement of life on our planet, capturing them would seem to be of the highest priority.

There are two exceptions to this point. One is that such mechanisms may be available in S&T agreements involving sovereigns where there are pre-existing country groupings defined by agreements for engendering common international investment and trade activities and the institutions designed for the governance of them. The EU is an obvious example.

The other is the treatment of disputes over IP. Again, generally it is not because of provisions within the S&T agreements themselves. Rather the settlement of disputes over IP generated by dint of S&T agreements cannot be in contradiction to the WTO’s provisions on IP or of the World Intellectual Property

Organization (WIPO), a United Nations agency, of which more than 190 states are members.

The result is that when IP disputes arise that fall outside the bounds of the WTO IP strictures, since most international S&T agreements do not incorporate sufficient IP-related provisions, the only resort the parties have is to bring their issues before the WIPO or one of the arbitral entities like the United Nations Commission on International Trade Law (UNCITRAL). These can be long drawn out—and expensive—processes, which become viable only to the extent the parties believe the monetary value of the IP in dispute is sufficiently greater than the costs expended to settle the dispute.

International Trade Agreements. In the case of international trade agreements, whether bilateral, plurilateral or multilateral, governance mechanisms are integral to the agreements themselves and generally have worked in a satisfactory matter.

Thus, for example the USMCA has its own well-defined dispute settlement regime. In addition, at the multilateral level, that function is served by the WTO via a well-trodden process for the filing of disputes, assembling tribunals to render judgements, and then potentially structuring independent appeals panels if the parties believe the judgments in the first round are not meritorious. The current highly public back and forth between the EU and the US over aircraft manufacturing subsidies epitomizes the point.

Of course, certain trading parties from time to time have concluded the WTO dispute resolution process does not work well; this is particularly so if they are unhappy about the outcomes in cases in which they are a litigant or about judgements rendered in other cases.

The Trump administration has made no secret about its dissatisfaction with the process—so much so that it has blocked the appointment of the full complement of seven judges to arbitral appellate panel, which, like the rest of the WTO's operations, is decided based on consensus of the WTO's 164 members. The result is that without a functioning appeals panel, the complete WTO dispute resolution process has become seriously handicapped. (The irony is the US has won more than 85% of WTO dispute cases in which it was a party.

International Investment Treaties. For international investment treaties, akin to the role of the WTO, there are a number of international conventions setting out rules and procedures for the independent arbitration of investment disputes. Such disputes are mediated under the auspices of an international network of third party arbitration facilities and a roster of qualified arbiters from across the globe.

The procedures governing international investment arbitration vary from treaty to treaty. Today, about half of the investment treaties in force specify that disputes will be subject to the arbitration rules set out by the International Center for Settlement of Investment Disputes (ICSID), which is part of, and funded by, the World Bank. UNCITRAL accounts for about one-third of the disputes heard. Other venues for ISDS arbitration are located in London, Hong Kong, Paris, Stockholm, and Sydney.

Equally important, like the WTO, but in contrast to S&T agreement, there are a number of independent global and regional bodies that track international investment agreements and provide best-practice advice for designing and evaluating them. The work of the OECD figures prominently in this regard.

VIII. Conclusion and An Action Agenda

Most advanced democracies have entered into a number of international S&T agreements with one

another with the objective to foster cross-country R&D cooperation. This is surely epitomized among the G7 economies.

Despite the creation of this elaborate superstructure, the central outcome has been extensive collaboration among scientists from academia and government, but little focus on cross-country collaboration on commercially oriented, precompetitive R&D in which industry and economic-oriented stakeholders are deeply involved. Only by broadening this enterprise will these countries be able to systemically raise their international competitiveness and challenge China on a global scale. Efforts focused on “science diplomacy” will not produce the results needed.

The process of negotiating and evaluating outcomes of international S&T agreements is significantly different from that of negotiating international trade and international investment agreements. The former is not nearly as inclusive or systematic with respect to involving external stakeholders as the two latter regimes, which systematically capitalize on the buy-in and power of business, labor, and NGOs (environmental groups, S&T entities, thinktanks, and universities).

It is crucial for advanced democracies interested in boosting S&T cooperation to do so in ways that dovetail with fulfilling their collective trade and investment objectives to boost international competitiveness and the greater capture of economic value.

To this end, moving forward, efforts should concentrate in several dimensions.

First, the regime of international *S&T agreements can learn much from international trade and investment agreements*, the bedrock of which are the principles of reciprocity and national treatment.

With relatively few exceptions—for example with respect to data-sharing—the architecture and content of international S&T agreements among the G7 do not universally embody such terms. Some of the most important gaps in this regard pertain to: access to the national and sub-national R&D infrastructure, including universities and laboratories; joint establishment of new R&D institutions; jointly conducting R&D activities; access to funding; and treatment of intellectual property. Without such strictures, international cooperation in commercially oriented, scaling up precompetitive R&D activity among these economies will not meet the global challenges at hand.

Similarly, the negotiation and execution of international S&T agreements also can learn much from the process undergirding the fashioning of trade and investment regimes in terms of devising model templates for S&T agreements.

Second, *it is equally important to move forward in such a way that the three regimes interact with one another in shaping the stance and composition of countries’ industrial policies*. At present, such linkages are rarely made explicit. Thus, developing mechanisms to better drive such interactions constitutes a critical opportunity, the capitalization of which should be placed high on an agenda for action.

Specific steps to foster fulfilment of these tasks might best proceed in the following two phased manner, initially exclusively among U.S. stakeholders and subsequently involving stakeholders from both the U.S. and the other G7 countries:

First Phase

- Establishment of a high-level forum of U.S. S&T stakeholders (government officials, businesses, national labs, universities, thinktanks etc.) to discuss and debate the findings and recommendations contained in this study to help formalize an action agenda
- One principal item on that agenda would be a proposal for a meeting of analogous G7 S&T stakeholders to discuss the formation of a *standing* G7 S&T working group (similar to the standing B7 (“business 7”))
- Another agenda item would be to lay the groundwork for U.S. international S&T agreement negotiators to commence an on-going process involving relevant U.S. stakeholders for the development of a “model U.S. S&T agreement” (which, analogous to model investment treaties, would undergo revisions from time to time)

Second Phase

- Establishment of trilateral forum of U.S. stakeholders from the S&T, trade and investment communities to seek agreement about devising strategic approaches and mechanisms that provide for mutually reinforcing negotiations and execution of international S&T, trade and investment agreements

Annex 1: UK-US Science and Technology Agreement (2017)



Treaty Series No. 25 (2017)

**Agreement between the
Government of the United Kingdom of Great Britain and Northern Ireland
and the Government of the United States of America
on Scientific and Technological Cooperation**

Washington, 20 September 2017

[The Agreement entered into force on 20 September 2017]

Presented to Parliament

by the Secretary of State for Foreign and Commonwealth Affairs by Command of Her Majesty

November 2017

Cm 9545



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**AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED KINGDOM OF GREAT BRITAIN
AND NORTHERN IRELAND AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA
ON SCIENTIFIC AND TECHNOLOGICAL COOPERATION**

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United States of America (hereinafter referred to as “the Parties”);

Convinced that elevating international cooperation across scientific research, technology and innovation will strengthen the bonds of friendship and understanding between their peoples and will advance both countries;

Recognizing the successful scientific research cooperation which has developed over many years between the two countries;

Recognizing the value of open data for scientific research, technological cooperation, and evidence-based decision-making;

Committing to make every effort to create inclusive scientific research communities that promote under-represented groups such as women and ethnic minorities;

Considering scientific research and technological cooperation is an important condition for the development of national economies and a basis for expanded trade, and

Intending to strengthen their economic cooperation through specific and advanced technology applications;

Have reached the following agreement:

ARTICLE 1

1. The Parties shall develop, support, and facilitate cooperation across scientific research (for the avoidance of doubt scientific research includes research concerning the Social Sciences and the Arts & Humanities and all subsequent references to scientific research in this Agreement should be interpreted accordingly) and technological cooperation between their two countries on the basis of the principles of equality, reciprocity, and mutual benefit. Such cooperation may include basic research, applied research, innovation, engineering, higher education, and scientific human resource capacity, as well as other scientific research and technological areas in which they may subsequently decide to co-operate.

2. Cooperative activities under this Agreement may include but are not limited to coordinated programs and joint research projects, studies, and investigations, joint scientific courses, workshops, training and mobility of scientists and technical experts, conferences, and symposia, and the exchange of scientific research and technological information and documentation in the context of cooperative activities.

ARTICLE 2

Scientific and technological cooperation pursuant to this Agreement shall be subject to the applicable national laws and regulations of the Parties in accordance with the laws and regulations of each Party.

ARTICLE 3

The scientific research and technological cooperation described in Article I shall be carried out through implementing arrangements concluded between the Parties, each of which will describe the nature and extent of the respective cooperation, and any procedures to be followed, funding, allocation of costs, and other relevant matters.

ARTICLE 4

Each Party shall, in accordance with its national laws and regulations, seek to facilitate:

1. prompt and efficient entry into and exit from its territory, as well as domestic travel and work of persons participating in cooperative activities under this Agreement, and
2. prompt and efficient entry into and exit from its territory of appropriate equipment, instrumentation, research platforms, materials, supplies, samples, data, and project information directly related to cooperative activities under this Agreement.

Equipment provided by the sending Party for carrying out joint activities shall be considered scientific and not having a commercial character, and the receiving Party shall work toward obtaining duty free entry for such equipment.

ARTICLE 5

Provisions for the protection and distribution of intellectual property created, developed or furnished in the course of cooperative activities under this Agreement are set out in Annex I.

ARTICLE 6

Provisions for security of information and transfer of technology are set out in Annex II. The Annexes to this Agreement, including any which may subsequently be added to it by the Parties in accordance with paragraph 4 of Article XI below, are integral parts of this Agreement.

ARTICLE 7

1. Scientific research and technological information of a non-proprietary nature derived from the cooperative activities under this Agreement shall be made available, unless otherwise specified in writing in the respective implementing arrangement (as described in Article III above) to the world scientific community in accordance with this Agreement, and through customary channels, and, in line with the normal customs and practices of the agencies which are involved in the respective co-operation.

2. As far as reasonably practicable, and consistent with any applicable laws and policies, the Parties shall work toward facilitating the free and open exchange of data, as a result of cooperative activities under this Agreement, for the benefit of industry, and the scientific research community, and the wider public.

ARTICLE 8

Scientists, technical experts, and institutions of third countries or international organizations may be invited, jointly by the Parties, to participate in activities being carried out under this Agreement. The cost of such participation shall normally be borne by the invited third party unless specified otherwise in writing by both Parties.

ARTICLE 9

The provisions of this Agreement will not prejudice or influence any other arrangements for scientific research and technological cooperation between any cooperating agencies of the two countries which have been, or may be, put in place independently of this Agreement.

ARTICLE 10

1. Each Party shall designate an Executive Agent for the purposes of this Agreement. The Executive Agent shall be the Department of State for the United States of America, and the Department for Business, Energy and Industrial Strategy for the United Kingdom of Great Britain and Northern Ireland.

2. The Executive Agents shall collaborate closely to promote proper implementation of all activities and programs. The Executive Agent shall be responsible for coordinating the participation by its side in any implementing arrangements. After an implementing arrangement is concluded, cooperation under the respective arrangements shall be undertaken by cooperating agencies.

ARTICLE 11

1. This Agreement shall enter into force on the date of signature.
2. This Agreement shall remain in force for ten years, and it shall be automatically extended for consecutive periods of ten (10) years unless terminated in accordance with paragraph 3 below.
3. Either Party may terminate this Agreement at any time on 90 days' written notice to the other Party. Unless otherwise agreed by the Parties, the termination of this Agreement shall not affect ongoing cooperative activity undertaken under this Agreement.
4. The Parties may together at any time in writing amend or vary this Agreement through customary diplomatic channels.

IN WITNESS WHEREOF, the undersigned, being duly authorized by their respective Governments, have signed this Agreement

DONE in duplicate at Washington on the twentieth day of September in the year 2017 in English language.

**For the Government of the United
Kingdom of Great Britain and
Northern Ireland:**

JO JOHNSON

**For the Government of the
United States of America:**

JUDITH GARBER

Annex I

Intellectual Property Rights

I. General Obligation

The Parties shall ensure adequate and effective protection of intellectual property created or furnished under this Agreement and relevant implementing arrangements. Rights to such intellectual property shall be allocated as provided in this Annex.

II. Scope

- A. This Annex is applicable to all cooperative activities undertaken pursuant to this Agreement, except as otherwise specifically agreed by the Parties or their designees.
- B. For purposes of this Agreement, "intellectual property" shall mean the subject matter listed in Article 2 of the Convention Establishing the World Intellectual Property Organization, done at Stockholm, July 14, 1967 and may include other subject matter as agreed by the Parties.
- C. Each Party shall ensure, through contracts or other legal means with its own participants, if necessary, that the other Party can obtain the rights to intellectual property allocated in accordance with this Annex. This Annex does not otherwise alter or prejudice the allocation between a Party and its participants, which shall be determined by that Party's laws and practices.
- D. Except as otherwise provided in this Agreement, disputes concerning intellectual property arising under this Agreement shall be resolved through discussions between the concerned participating institutions, or, if necessary, the Parties or their designees. Upon mutual agreement of the Parties, a dispute shall be submitted to an arbitral tribunal for binding arbitration in accordance with the applicable rules of international law. Unless the Parties or their designees agree otherwise in writing, the arbitration rules of UNCITRAL shall govern.
- E. Termination or expiration of this Agreement shall not affect rights or obligations under this Annex.

III. Allocation of Rights

- A Each Party shall be entitled to a worldwide, non-exclusive, irrevocable, royalty-free license to translate, reproduce, and publicly distribute monographs, scientific and technical journal articles, reports, and books directly arising from cooperation under this Agreement. All publicly distributed copies of a copyrighted work prepared under this Agreement shall indicate the names of the authors of the work unless an author explicitly declines to be named.
- B Rights to all forms of intellectual property, other than those rights described in paragraph III.A above, shall be allocated as follows:
 - (1) Prior to participation in cooperative activities under this Agreement by a visiting researcher, the host Party or its designee and the Party or its designee employing or sponsoring the visiting researcher may discuss and determine the allocation of rights to any intellectual property created by the visiting researcher. Absent such a determination, visiting researchers shall receive rights, awards, bonuses and royalties in accordance with the policies of the host institution. For purposes of this Agreement, a visiting researcher is a researcher visiting an institution of the other Party (host institution) and engaged in work planned solely by the host institution.
 - (2)
 - (a) Any intellectual property created by persons employed or sponsored by one Party under cooperative activities other than those covered by Paragraph III.(B)(1) shall be owned by that Party. Intellectual property created by persons employed or sponsored by both Parties shall be jointly owned by the Parties. In addition, each creator shall be entitled to awards, bonuses and royalties in accordance with the policies of the institution employing or sponsoring that creator.
 - (b) Unless otherwise agreed in an implementing or other arrangement, each Party shall have within its territory a right to exploit and allow others to exploit intellectual property created in the course of the cooperative activities.
 - (c) The rights of a Party outside its territory shall be determined by mutual agreement considering the relative contributions of the Parties and their participants to the cooperative activities, the degree of commitment in obtaining legal protection and licensing of the intellectual property and such other factors deemed appropriate.

- (d) Notwithstanding paragraphs III.B(2)(a) and (b) above, if either Party believes that a particular project is likely to lead to or has led to the creation of intellectual property not protected by the laws of the other Party, the Parties shall immediately hold discussions to determine the allocation of rights to the intellectual property. If an agreement cannot be reached within three months of the date of the initiation of the discussions, cooperation on the project in question shall be terminated at the request of either Party. Creators of intellectual property shall nonetheless be entitled to awards, bonuses and royalties as provided in paragraph III.B(2)(a).
- (e) For each invention made under any cooperative activity, the Party employing or sponsoring the inventor(s) shall disclose the invention promptly to the other Party together with any documentation and information necessary to enable the other Party to establish any rights to which it may be entitled. Either Party may ask the other Party in writing to delay publication or public disclosure of such documentation or information for the purpose of protecting its rights in the invention. Unless otherwise agreed in writing, the delay shall not exceed a period of six months from the date of disclosure by the inventing Party to the other Party.

IV. Business Confidential Information

In the event that information identified in a timely fashion as business-confidential is furnished or created under this Agreement, each Party and its participants shall protect such information in accordance with applicable laws, regulations, and administrative practices. Information may be identified as "business-confidential" if a person having the information may derive an economic benefit from it or may obtain a competitive advantage over those who do not have it, and the information is not generally known or publicly available from other sources, and the owner has not previously made the information available without imposing in a timely manner an obligation to keep it confidential.

ANNEX II

Continued Security Obligations Under Each Party's Own National Laws

I. Introduction

It is the intent of both Parties to foster a collaborative research and innovation environment supportive of the free exchange of ideas. However, activities envisioned or provided for under this Agreement shall be subject to and consistent with the laws and regulations of each Party. National laws or regulations in the interest of national defense or foreign relations may, in some circumstances, limit the availability of certain information or technology requiring protection, restricted access (classification), or export controls. In cases where either Party identifies information or equipment relevant to cooperative activities under this Agreement that is subject to such protection, it shall consult the other Party with a view to determine whether the situation can be resolved to their mutual satisfaction.

II. Protection of New Information

If in the course of cooperative activities undertaken pursuant to this Agreement, information or technology that is known or believed to require special protections or restrictions under either Party's laws and regulations has been identified, it shall be brought immediately to the attention of the appropriate officials.

III. Exports and Transfer of New Information or Technology

With respect to the possible need for export controls which may be foreseen regarding new technology developed under this Agreement, including any which might arise under Section II of this Annex, if either Party deems it necessary, detailed provisions for the prevention of illegal transfer or retransfer of such information or technology shall be incorporated into the respective contracts or implementing arrangements. The Parties anticipate that information and technology developed under this Agreement will normally be exportable from the territory of either Party to the territory of the other Party, subject to any applicable regulatory or other legal controls or provisions, including any envisioned or provided for under the terms of this Annex.

Annex 2: US-Mexico-Canada Agreement (2020)

OFFICE *of the* UNITED STATES TRADE REPRESENTATIVE
EXECUTIVE OFFICE OF THE PRESIDENT

Agreement between the United States of America, the United Mexican States, and Canada

7/1/20 Text

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Annex 3: US Model BIT (2012)

2012 U.S. Model Bilateral Investment Treaty

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF [Country] CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The Government of the United States of America and the Government of [Country] (hereinafter the “Parties”);

Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;

Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;

Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

SECTION A

Article 1: Definitions

For purposes of this Treaty:

“central level of government” means:

- (a) for the United States, the federal level of government; and
- (b) for [Country], [_____].

“Centre” means the International Centre for Settlement of Investment Disputes (“ICSID”) established by the ICSID Convention.

“claimant” means an investor of a Party that is a party to an investment dispute with the other Party.

“covered investment” means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.

“disputing parties” means the claimant and the respondent.

“disputing party” means either the claimant or the respondent.

“enterprise” means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.

“enterprise of a Party” means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

“existing” means in effect on the date of entry into force of this Treaty.

“freely usable currency” means “freely usable currency” as determined by the International Monetary Fund under its *Articles of Agreement*.

“GATS” means the *General Agreement on Trade in Services*, contained in Annex 1B to the WTO Agreement.

“government procurement” means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or use in the production or supply of goods or services for commercial sale or resale.

“ICSID Additional Facility Rules” means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes*.

“ICSID Convention” means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, done at Washington, March 18, 1965.

[**“Inter-American Convention”** means the *Inter-American Convention on International Commercial Arbitration*, done at Panama, January 30, 1975.]

“investment” means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

- (a) an enterprise;
- (b) shares, stock, and other forms of equity participation in an enterprise;
- (c) bonds, debentures, other debt instruments, and loans;¹
- (d) futures, options, and other derivatives;
- (e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
- (f) intellectual property rights;
- (g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;^{2, 3} and

¹ Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

² Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

- (h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

“investment agreement” means a written agreement⁴ between a national authority⁵ of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

- (a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;
- (b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or
- (c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

“investment authorization”⁶ means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party.

“investor of a non-Party” means, with respect to a Party, an investor that attempts to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party.

“investor of a Party” means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

³ The term “investment” does not include an order or judgment entered in a judicial or administrative action.

⁴ “Written agreement” refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 30[Governing Law](2). For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

⁵ For purposes of this definition, “national authority” means (a) for the United States, an authority at the central level of government; and (b) for [Country], [].

⁶ For greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.

“measure” includes any law, regulation, procedure, requirement, or practice.

“national” means:

- (a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act; and
- (b) for [Country], [_____].

“New York Convention” means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958.

“non-disputing Party” means the Party that is not a party to an investment dispute.

“person” means a natural person or an enterprise.

“person of a Party” means a national or an enterprise of a Party.

“protected information” means confidential business information or information that is privileged or otherwise protected from disclosure under a Party’s law.

“regional level of government” means:

- (a) for the United States, a state of the United States, the District of Columbia, or Puerto Rico; and
- (b) for [Country], [_____].

“respondent” means the Party that is a party to an investment dispute.

“Secretary-General” means the Secretary-General of ICSID.

“state enterprise” means an enterprise owned, or controlled through ownership interests, by a Party.

“territory” means:

- (a) with respect to the United States,
 - (i) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico;
 - (ii) the foreign trade zones located in the United States and Puerto Rico.
- (b) with respect to [Country,] [_____].

- (c) with respect to each Party, the territorial sea and any area beyond the territorial sea of the Party within which, in accordance with customary international law as reflected in the United Nations Convention on the Law of the Sea, the Party may exercise sovereign rights or jurisdiction.

“TRIPS Agreement” means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, contained in Annex 1C to the WTO Agreement.⁷

“UNCITRAL Arbitration Rules” means the arbitration rules of the United Nations Commission on International Trade Law.

“WTO Agreement” means the *Marrakesh Agreement Establishing the World Trade Organization*, done on April 15, 1994.

Article 2: Scope and Coverage

1. This Treaty applies to measures adopted or maintained by a Party relating to:
 - (a) investors of the other Party;
 - (b) covered investments; and
 - (c) with respect to Articles 8 [Performance Requirements], 12 [Investment and Environment], and 13 [Investment and Labor], all investments in the territory of the Party.
2. A Party’s obligations under Section A shall apply:
 - (a) to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party;⁸ and
 - (b) to the political subdivisions of that Party.
3. For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.

⁷ For greater certainty, “TRIPS Agreement” includes any waiver in force between the Parties of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement.

⁸ For greater certainty, government authority that has been delegated includes a legislative grant, and a government order, directive or other action transferring to the state enterprise or other person, or authorizing the exercise by the state enterprise or other person of, governmental authority.

Article 3: National Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.
3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

Article 4: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.
2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

Article 5: Minimum Standard of Treatment⁹

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of “fair and equitable treatment” and “full protection and security” do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

⁹ Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.

- (a) “fair and equitable treatment” includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
 - (b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.
- 3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.
- 4. Notwithstanding Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants], each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.
- 5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:
 - (a) requisitioning of its covered investment or part thereof by the latter’s forces or authorities; or
 - (b) destruction of its covered investment or part thereof by the latter’s forces or authorities, which was not required by the necessity of the situation, the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation](2) through (4), mutatis mutandis.
 - (c) Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 [National Treatment] but for Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants].

Article 6: Expropriation and Compensation¹⁰

- 1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:
 - (a) for a public purpose;
 - (b) in a non-discriminatory manner;
 - (c) on payment of prompt, adequate, and effective compensation; and

¹⁰ Article 6 [Expropriation] shall be interpreted in accordance with Annexes A and B.

- (d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).

2. The compensation referred to in paragraph 1(c) shall:

- (a) be paid without delay;
- (b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place (“the date of expropriation”);
- (c) not reflect any change in value occurring because the intended expropriation had become known earlier; and
- (d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

- (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus
- (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.

Article 7: Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

- (a) contributions to capital;
- (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

- (c) interest, royalty payments, management fees, and technical assistance and other fees;
 - (d) payments made under a contract, including a loan agreement;
 - (e) payments made pursuant to Article 5 [Minimum Standard of Treatment](4) and (5) and Article 6 [Expropriation and Compensation]; and
 - (f) payments arising out of a dispute.
2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.
 3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party.
 4. Notwithstanding paragraphs 1 through 3, a Party may prevent a transfer through the equitable, non-discriminatory, and good faith application of its laws relating to:
 - (a) bankruptcy, insolvency, or the protection of the rights of creditors;
 - (b) issuing, trading, or dealing in securities, futures, options, or derivatives;
 - (c) criminal or penal offenses;
 - (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
 - (e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

Article 8: Performance Requirements

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:¹¹
 - (a) to export a given level or percentage of goods or services;

¹¹ For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a “commitment or undertaking” for the purposes of paragraph 1.

- (b) to achieve a given level or percentage of domestic content;
- (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
- (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
- (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;
- (g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market; or
- (h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party¹²; or
 - (ii) that prevents the purchase or use of, or the according of a preference to, in its territory, particular technology, so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

- (a) to achieve a given level or percentage of domestic content;
- (b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
- (c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

¹² For purposes of this Article, the term “technology of the Party or of persons of the Party” includes technology that is owned by the Party or persons of the Party, and technology for which the Party holds, or persons of the Party hold, an exclusive license.

- (d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.
- 3.
- (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.
 - (b) Paragraphs 1(f) and (h) do not apply:
 - (i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or
 - (ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.¹³
 - (c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f), and (h), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:
 - (i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;
 - (ii) necessary to protect human, animal, or plant life or health; or
 - (iii) related to the conservation of living or non-living exhaustible natural resources.
 - (d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.
 - (e) Paragraphs 1(b), (c), (f), (g), and (h), and 2(a) and (b), do not apply to government procurement.

¹³ The Parties recognize that a patent does not necessarily confer market power.

- (f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.
4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.
 5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

Article 9: Senior Management and Boards of Directors

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.
2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 10: Publication of Laws and Decisions Respecting Investment

1. Each Party shall ensure that its:
 - (a) laws, regulations, procedures, and administrative rulings of general application; and
 - (b) adjudicatory decisions respecting any matter covered by this Treaty are promptly published or otherwise made publicly available.
2. For purposes of this Article, “administrative ruling of general application” means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:
 - (a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular covered investment or investor of the other Party in a specific case; or
 - (b) a ruling that adjudicates with respect to a particular act or practice.

Article 11: Transparency

1. The Parties agree to consult periodically on ways to improve the transparency practices set out in this Article, Article 10 and Article 29.

2. Publication

To the extent possible, each Party shall:

- (a) publish in advance any measure referred to in Article 10(1)(a) that it proposes to adopt; and
- (b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

3. With respect to proposed regulations of general application of its central level of government respecting any matter covered by this Treaty that are published in accordance with paragraph 2(a), each Party:

- (a) shall publish the proposed regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets;
- (b) should in most cases publish the proposed regulations not less than 60 days before the date public comments are due;
- (c) shall include in the publication an explanation of the purpose of and rationale for the proposed regulations; and
- (d) shall, at the time it adopts final regulations, address significant, substantive comments received during the comment period and explain substantive revisions that it made to the proposed regulations in its official journal or in a prominent location on a government Internet site.

4. With respect to regulations of general application that are adopted by its central level of government respecting any matter covered by this Treaty, each Party:

- (a) shall publish the regulations in a single official journal of national circulation and shall encourage their distribution through additional outlets; and
- (b) shall include in the publication an explanation of the purpose of and rationale for the regulations.

5. Provision of Information

- (a) On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure that the requesting Party considers might materially affect the operation of this Treaty or otherwise substantially affect its interests under this Treaty.

- (b) Any request or information under this paragraph shall be provided to the other Party through the relevant contact points.
- (c) Any information provided under this paragraph shall be without prejudice as to whether the measure is consistent with this Treaty.

6. Administrative Proceedings

With a view to administering in a consistent, impartial, and reasonable manner all measures referred to in Article 10(1)(a), each Party shall ensure that in its administrative proceedings applying such measures to particular covered investments or investors of the other Party in specific cases:

- (a) wherever possible, covered investments or investors of the other Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy;
- (b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and
- (c) its procedures are in accordance with domestic law.

7. Review and Appeal

- (a) Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Treaty. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.
- (b) Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:
 - (i) a reasonable opportunity to support or defend their respective positions; and
 - (ii) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.

- (c) Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.

8. Standards-Setting

- (a) Each Party shall allow persons of the other Party to participate in the development of standards and technical regulations by its central government bodies.¹⁴ Each Party shall allow persons of the other Party to participate in the development of these measures, and the development of conformity assessment procedures by its central government bodies, on terms no less favorable than those it accords to its own persons.
- (b) Each Party shall recommend that non-governmental standardizing bodies in its territory allow persons of the other Party to participate in the development of standards by those bodies. Each Party shall recommend that non-governmental standardizing bodies in its territory allow persons of the other Party to participate in the development of these standards, and the development of conformity assessment procedures by those bodies, on terms no less favorable than those they accord to persons of the Party.
- (c) Subparagraphs 8(a) and 8(b) do not apply to:
 - (i) sanitary and phytosanitary measures as defined in Annex A of the World Trade Organization (WTO) Agreement on the Application of Sanitary and Phytosanitary Measures; or
 - (ii) purchasing specifications prepared by a governmental body for its production or consumption requirements.
- (d) For purposes of subparagraphs 8(a) and 8(b), “central government body”, “standards”, “technical regulations” and “conformity assessment procedures” have the meanings assigned to those terms in Annex 1 of the WTO Agreement on Technical Barriers to Trade. Consistent with Annex 1, the three latter terms do not include standards, technical regulations or conformity assessment procedures for the supply of a service.

¹⁴ A Party may satisfy this obligation by, for example, providing interested persons a reasonable opportunity to provide comments on the measure it proposes to develop and taking those comments into account in the development of the measure.

Article 12: Investment and Environment

1. The Parties recognize that their respective environmental laws and policies, and multilateral environmental agreements to which they are both party, play an important role in protecting the environment.
2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its environmental laws¹⁵ in a manner that weakens or reduces the protections afforded in those laws, or fail to effectively enforce those laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.
3. The Parties recognize that each Party retains the right to exercise discretion with respect to regulatory, compliance, investigatory, and prosecutorial matters, and to make decisions regarding the allocation of resources to enforcement with respect to other environmental matters determined to have higher priorities. Accordingly, the Parties understand that a Party is in compliance with paragraph 2 where a course of action or inaction reflects a reasonable exercise of such discretion, or results from a *bona fide* decision regarding the allocation of resources.
4. For purposes of this Article, “environmental law” means each Party’s statutes or regulations,¹⁶ or provisions thereof, the primary purpose of which is the protection of the environment, or the prevention of a danger to human, animal, or plant life or health, through the:
 - (a) prevention, abatement, or control of the release, discharge, or emission of pollutants or environmental contaminants;
 - (b) control of environmentally hazardous or toxic chemicals, substances, materials, and wastes, and the dissemination of information related thereto; or
 - (c) protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas, in the Party’s territory, but does not include any statute or regulation, or provision thereof, directly related to worker safety or health.
5. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to

¹⁵ Paragraph 2 shall not apply where a Party waives or derogates from an environmental law pursuant to a provision in law providing for waivers or derogations.

¹⁶ For the United States, “statutes or regulations” for the purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

6. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

7. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

Article 13: Investment and Labor

1. The Parties reaffirm their respective obligations as members of the International Labor Organization (“ILO”) and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*.

2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. For purposes of this Article, “labor laws” means each Party’s statutes or regulations,¹⁷ or provisions thereof, that are directly related to the following:

- (a) freedom of association;
- (b) the effective recognition of the right to collective bargaining;
- (c) the elimination of all forms of forced or compulsory labor;
- (d) the effective abolition of child labor and a prohibition on the worst forms of child labor;
- (e) the elimination of discrimination in respect of employment and occupation; and
- (f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

¹⁷ For the United States, “statutes or regulations” for purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

4. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

5. The Parties confirm that each Party may, as appropriate, provide opportunities for public participation regarding any matter arising under this Article.

Article 14: Non-Conforming Measures

1. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to:

- (a) any existing non-conforming measure that is maintained by a Party at:
 - (i) the central level of government, as set out by that Party in its Schedule to Annex I or Annex III,
 - (ii) a regional level of government, as set out by that Party in its Schedule to Annex I or Annex III, or
 - (iii) a local level of government;
- (b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or
- (c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], or 9 [Senior Management and Boards of Directors].

2. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this Treaty and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment] do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of

the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.

5. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], and 9 [Senior Management and Boards of Directors] do not apply to:

- (a) government procurement; or
- (b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

Article 15: Special Formalities and Information Requirements

1. Nothing in Article 3 [National Treatment] shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Treaty.

2. Notwithstanding Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment], a Party may require an investor of the other Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 16: Non-Derogation

This Treaty shall not derogate from any of the following that entitle an investor of a Party or a covered investment to treatment more favorable than that accorded by this Treaty:

- 1. laws or regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party;
- 2. international legal obligations of a Party; or
- 3. obligations assumed by a Party, including those contained in an investment authorization or an investment agreement.

Article 17: Denial of Benefits

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:
 - (a) does not maintain diplomatic relations with the non-Party; or
 - (b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.
2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

Article 18: Essential Security

Nothing in this Treaty shall be construed:

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

Article 19: Disclosure of Information

Nothing in this Treaty shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 20: Financial Services

1. Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial

system.¹⁸ Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty.

2. (a) Nothing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 7 [Transfers] or Article 8 [Performance Requirements].¹⁹

(b) For purposes of this paragraph, "public entity" means a central bank or monetary authority of a Party.

3. Where a claimant submits a claim to arbitration under Section B [Investor-State Dispute Settlement], and the respondent invokes paragraph 1 or 2 as a defense, the following provisions shall apply:

(a) The respondent shall, within 120 days of the date the claim is submitted to arbitration under Section B, submit in writing to the competent financial authorities²⁰ of both Parties a request for a joint determination on the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. The respondent shall promptly provide the tribunal, if constituted, a copy of such request. The arbitration may proceed with respect to the claim only as provided in subparagraph (d).

(b) The competent financial authorities of both Parties shall make themselves available for consultations with each other and shall attempt in good faith to make a determination as described in subparagraph (a). Any such determination shall be transmitted promptly to the disputing parties and, if constituted, to the tribunal. The determination shall be binding on the tribunal.

(c) If the competent financial authorities of both Parties, within 120 days of the date by which they have both received the respondent's written request for a joint determination under subparagraph (a), have not made a determination as described in that subparagraph, the tribunal shall decide the issue or issues left

¹⁸ It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions, as well as the maintenance of the safety and financial and operational integrity of payment and clearing systems.

¹⁹ For greater certainty, measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.

²⁰ For purposes of this Article, "competent financial authorities" means, for the United States, the Department of the Treasury for banking and other financial services, and the Office of the United States Trade Representative, in coordination with the Department of Commerce and other agencies, for insurance; and for [Country], [_____].

unresolved by the competent financial authorities. The provisions of Section B shall apply, except as modified by this subparagraph.

- (i) In the appointment of all arbitrators not yet appointed to the tribunal, each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to the particular sector of financial services in which the dispute arises shall be taken into account in the appointment of the presiding arbitrator.
 - (ii) If, before the respondent submits the request for a joint determination in conformance with subparagraph (a), the presiding arbitrator has been appointed pursuant to Article 27(3), such arbitrator shall be replaced on the request of either disputing party and the tribunal shall be reconstituted consistent with subparagraph (c)(i). If, within 30 days of the date the arbitration proceedings are resumed under subparagraph (d), the disputing parties have not agreed on the appointment of a new presiding arbitrator, the Secretary-General, on the request of a disputing party, shall appoint the presiding arbitrator consistent with subparagraph (c)(i).
 - (iii) The tribunal shall draw no inference regarding the application of paragraph 1 or 2 from the fact that the competent financial authorities have not made a determination as described in subparagraph (a).
 - (iv) The non-disputing Party may make oral and written submissions to the tribunal regarding the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. Unless it makes such a submission, the non-disputing Party shall be presumed, for purposes of the arbitration, to take a position on paragraph 1 or 2 not inconsistent with that of the respondent.
- (d) The arbitration referred to in subparagraph (a) may proceed with respect to the claim:
- (i) 10 days after the date the competent financial authorities' joint determination has been received by both the disputing parties and, if constituted, the tribunal; or
 - (ii) 10 days after the expiration of the 120-day period provided to the competent financial authorities in subparagraph (c).

On the request of the respondent made within 30 days after the expiration of the 120-day period for a joint determination referred to in subparagraph (c), or, if the tribunal has not been constituted as of the expiration of the 120-day period, within 30 days after the tribunal is constituted, the tribunal shall address and decide the issue or issues left unresolved by the competent financial authorities as referred to in subparagraph (c) prior to deciding the merits of the claim for which paragraph 1 or 2 has been invoked by the respondent as a defense. Failure of the respondent to make such a request is without prejudice to the right of the respondent to invoke paragraph 1 or 2 as a defense at any appropriate phase of the arbitration.

4. Where a dispute arises under Section C and the competent financial authorities of one Party provide written notice to the competent financial authorities of the other Party that the dispute involves financial services, Section C shall apply except as modified by this paragraph and paragraph 5.

- (a) The competent financial authorities of both Parties shall make themselves available for consultations with each other regarding the dispute, and shall have 180 days from the date such notice is received to transmit a report on their consultations to the Parties. A Party may submit the dispute to arbitration under Section C only after the expiration of that 180-day period.
- (b) Either Party may make any such report available to a tribunal constituted under Section C to decide the dispute referred to in this paragraph or a similar dispute, or to a tribunal constituted under Section B to decide a claim arising out of the same events or circumstances that gave rise to the dispute under Section C.

5. Where a Party submits a dispute involving financial services to arbitration under Section C in conformance with paragraph 4, and on the request of either Party within 30 days of the date the dispute is submitted to arbitration, each Party shall, in the appointment of all arbitrators not yet appointed, take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to financial services shall be taken into account in the appointment of the presiding arbitrator.

6. Notwithstanding Article 11(2)-(4) [Transparency– Publication], each Party, to the extent practicable,

- (a) shall publish in advance any regulations of general application relating to financial services that it proposes to adopt and the purpose of the regulation;
- (b) shall provide interested persons and the other Party a reasonable opportunity to comment on such proposed regulations; and
- (c) should at the time it adopts final regulations, address in writing significant substantive comments received from interested persons with respect to the proposed regulations.

7. The terms “financial service” or “financial services” shall have the same meaning as in subparagraph 5(a) of the Annex on Financial Services of the GATS.

8. For greater certainty, nothing in this Treaty shall be construed to prevent the adoption or enforcement by a party of measures relating to investors of the other Party, or covered

investments, in financial institutions that are necessary to secure compliance with laws or regulations that are not inconsistent with this Treaty, including those related to the prevention of deceptive and fraudulent practices or that deal with the effects of a default on financial services contracts, subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where like conditions prevail, or a disguised restriction on investment in financial institutions.

Article 21: Taxation

1. Except as provided in this Article, nothing in Section A shall impose obligations with respect to taxation measures.
2. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:
 - (a) the claimant has first referred to the competent tax authorities²¹ of both Parties in writing the issue of whether that taxation measure involves an expropriation; and
 - (b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.
3. Subject to paragraph 4, Article 8 [Performance Requirements] (2) through (4) shall apply to all taxation measures.
4. Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Treaty and that convention.

Article 22: Entry into Force, Duration, and Termination

1. This Treaty shall enter into force thirty days after the date the Parties exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.

²¹ For the purposes of this Article, the “competent tax authorities” means:

- (a) for the United States, the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury; and
- (b) for [Country], [____].

2. A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.
3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.

SECTION B

Article 23: Consultation and Negotiation

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

Article 24: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:
 - (a) the claimant, on its own behalf, may submit to arbitration under this Section a claim
 - (i) that the respondent has breached
 - (A) an obligation under Articles 3 through 10,
 - (B) an investment authorization, or
 - (C) an investment agreement;
- and
- (ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and
- (b) the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim
 - (i) that the respondent has breached

- (A) an obligation under Articles 3 through 10,
 - (B) an investment authorization, or
 - (C) an investment agreement; and
- (ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach, provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration (“notice of intent”). The notice shall specify:

- (a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;
- (b) for each claim, the provision of this Treaty, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;
- (c) the legal and factual basis for each claim; and
- (d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

- (a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;
- (b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;
- (c) under the UNCITRAL Arbitration Rules; or
- (d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration"):

- (a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;
- (b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;
- (c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules, are received by the respondent; or
- (d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Treaty.

6. The claimant shall provide with the notice of arbitration:

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

Article 25: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall 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 parties to the dispute; [and]
- (b) Article II of the New York Convention for an "agreement in writing[.]"[;]" and
- (c) Article I of the Inter-American Convention for an "agreement."

Article 26: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage.
2. No claim may be submitted to arbitration under this Section unless:
 - (a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Treaty; and
 - (b) the notice of arbitration is accompanied,
 - (i) for claims submitted to arbitration under Article 24(1)(a), by the claimant's written waiver, and
 - (ii) for claims submitted to arbitration under Article 24(1)(b), by the claimant's and the enterprise's written waivers of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 24.
3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 24(1)(a)) and the claimant or the enterprise (for claims brought under Article 24(1)(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

Article 27: Selection of Arbitrators

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.
2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. Subject to Article 20(3), if a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

- (a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;
- (b) a claimant referred to in Article 24(1)(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and
- (c) a claimant referred to in Article 24(1)(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

Article 28: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 24(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.

3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

4. Without prejudice to a tribunal’s authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 34.

- (a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

- (b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.
- (c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 20 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.
- (d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 24. For purposes of this paragraph, an order includes a recommendation.

9. (a) In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed decision or award, the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.
- (b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 10.

10. In the event that an appellate mechanism for reviewing awards rendered by investor-State dispute settlement tribunals is developed in the future under other institutional arrangements, the Parties shall consider whether awards rendered under Article 34 should be subject to that appellate mechanism. The Parties shall strive to ensure that any such appellate mechanism they consider adopting provides for transparency of proceedings similar to the transparency provisions established in Article 29.

Article 29: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

- (a) the notice of intent;
- (b) the notice of arbitration;
- (c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [*Amicus* Submissions] and Article 33 [Consolidation];
- (d) minutes or transcripts of hearings of the tribunal, where available; and
- (e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article].

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

- (a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);
- (b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;
- (c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and
- (d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

Article 30: Governing Law

- 1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.
- 2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 24(1)(b)(i)(B) or (C), the tribunal shall apply:
 - (a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or

- (b) if the rules of law have not been specified or otherwise agreed:
 - (i) the law of the respondent, including its rules on the conflict of laws;²² and
 - (ii) such rules of international law as may be applicable.

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

Article 31: Interpretation of Annexes

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II, or III, the tribunal shall, on request of the respondent, request the interpretation of the Parties on the issue. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 90 days of delivery of the request.

2. A joint decision issued under paragraph 1 by the Parties, each acting through its representative designated for purposes of this Article, shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that joint decision. If the Parties fail to issue such a decision within 90 days, the tribunal shall decide the issue.

Article 32: Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 33: Consolidation

1. Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

²² The “law of the respondent” means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

- (a) the names and addresses of all the disputing parties sought to be covered by the order;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

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

- (a) one arbitrator appointed by agreement of the claimants;
- (b) one arbitrator appointed by the respondent; and
- (c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the claimants fail to appoint an arbitrator, the Secretary-General shall appoint a national of the non- disputing Party.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 24(1) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

- (a) assume jurisdiction over, and hear and determine together, all or part of the claims;
- (b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or
- (c) instruct a tribunal previously established under Article 27 [Selection of Arbitrators] to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

- (i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and
- (ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 24(1) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

- (a) the name and address of the claimant;
- (b) the nature of the order sought; and
- (c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 27 [Selection of Arbitrators] shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 27 [Selection of Arbitrators] be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 34: Awards

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

- (a) monetary damages and any applicable interest; and
- (b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs and attorney's fees in accordance with this Treaty and the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 24(1)(b):
 - (a) an award of restitution of property shall provide that restitution be made to the enterprise;
 - (b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and
 - (c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.
3. A tribunal may not award punitive damages.
4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.
5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.
6. A disputing party may not seek enforcement of a final award until:
 - (a) in the case of a final award made under the ICSID Convention,
 - (i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or
 - (ii) revision or annulment proceedings have been completed; and
 - (b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 24(3)(d),
 - (i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or
 - (ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.
7. Each Party shall provide for the enforcement of an award in its territory.
8. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a tribunal shall be established under Article 37 [State-State Dispute Settlement]. Without prejudice to other remedies available under applicable rules of international law, the requesting Party may seek in such proceedings:

- (a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Treaty; and
- (b) a recommendation that the respondent abide by or comply with the final award.

9. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention [or the Inter-American Convention] regardless of whether proceedings have been taken under paragraph 8.

10. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention [and Article I of the Inter-American Convention].

Article 35: Annexes and Footnotes

The Annexes and footnotes shall form an integral part of this Treaty.

Article 36: Service of Documents

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex C.

SECTION C

Article 37: State-State Dispute Settlement

1. Subject to paragraph 5, any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the UNCITRAL Arbitration Rules shall govern, except as modified by the Parties or this Treaty.

2. Unless the Parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each Party and the third, who shall be the presiding arbitrator, appointed by agreement of the Parties. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of either Party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

3. Expenses incurred by the arbitrators, and other costs of the proceedings, shall be paid for equally by the Parties. However, the tribunal may, in its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

4. Articles 28(3) [*Amicus Curiae* Submissions], 29 [Investor-State Transparency], 30(1) and (3) [Governing Law], and 31 [Interpretation of Annexes] shall apply *mutatis mutandis* to arbitrations under this Article.

5. Paragraphs 1 through 4 shall not apply to a matter arising under Article 12 or Article 13.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at [city] this [number] day of [month, year], in the English and [foreign] languages, each text being equally authentic.

FOR THE GOVERNMENT OF
UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF THE
[Country]:

Annex A Customary International Law

The Parties confirm their shared understanding that “customary international law” generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Annex B Expropriation

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.
2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.
3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.
4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.
 - (a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:
 - (i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;
 - (ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
 - (iii) the character of the government action.
 - (b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

Annex C

Service of Documents on a Party

United States

Notices and other documents shall be served on the United States by delivery to:

Executive Director (L/EX)
Office of the Legal Adviser
Department of State Washington, D.C. 20520
United States of America

[Country]

Notices and other documents shall be served on [Country] by delivery to: [insert
place of delivery of notices and other documents for [Country]]