

U.S. Model BIT (1984)	U.S. Model BIT (2004)
<p><b>Preamble</b></p> <p>Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources, and...</p>	<p><b>Preamble</b></p> <p>Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards...</p> <p>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;</p>
<p><b>Definition of Investment</b></p> <p><b>Article I</b></p> <p>(b) "Investment" means every kind of investment in the territory of one Party owned or controlled, directly or indirectly by nationals or companies of the other Party, such as equity, debt, and service and investment contracts; and includes:</p> <ul style="list-style-type: none"> <li>(i) tangible and intangible property, including rights, such as mortgages, liens and pledges;</li> <li>(ii) a company or shares of stock or other interests in a company or interests in the assets thereof;</li> <li>(iii) a claim to money or a claim to performance having economic value, and associated with an investment</li> <li>(iv) intellectual and industrial property rights, including rights with respect to copyrights, patents, trademarks, trade names, industrial designs, trade secrets and know-how, and goodwill; and</li> <li>(v) any right conferred by law or contract, and any licenses and permits pursuant to law...</li> </ul> <p>(e) "associated activities" include the organization, control, operation, maintenance and disposition of companies, branches, agencies, offices, factories or other facilities for the conduct of business; the making, performance and enforcement of contracts; the acquisition, use, protection and disposition of property of all kinds including intellectual and industrial property rights; and the borrowing of funds, the purchase and issuance of equity shares, and the purchase of foreign exchange for imports.</p>	<p><b>Definition of Investment</b></p> <p><b>Article 1</b></p> <p>"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:</p> <ul style="list-style-type: none"> <li>(a) an enterprise;</li> <li>(b) shares, stock, and other forms of equity participation in an enterprise;</li> <li>(c) bonds, debentures, other debt instruments, and loans;<sup>1</sup></li> <li>(d) futures, options, and other derivatives;</li> <li>(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;</li> <li>(f) intellectual property rights;</li> <li>(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law<sup>2, 3</sup>;</li> <li>(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.</li> </ul> <p><sup>1</sup> 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.</p> <p><sup>2</sup> 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 characteristic of an investments.</p> <p><sup>3</sup> The term "investment" does not include an order or judgment entered in a judicial or</p>

	administrative action.
<p><b>National and MFN Treatment</b></p> <p><b>Article II</b></p> <p>1. Each party shall permit and treat investment, and activities associated therewith, on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the most favorable, subject to the right of each Party to make or maintain exceptions falling within one of the sectors or matters listed in the Annex to this Treaty. Each Party agrees to notify the other Party before or on the date of entry into force of this Treaty of all such laws and regulations of which it is aware concerning the sectors or matters listed in the Annex. Moreover, each Party agrees to notify the other of any future exception with respect to the sectors or matters listed in the Annex, and to limit such exceptions to a minimum. Any future exception by either Party shall not apply to investment existing in that sector or matter at the time the exception becomes effective. The treatment accorded pursuant to any exceptions shall not be less favorable than that accorded in like situations to investments and associated activities of nationals or companies of any third country, except with respect to ownership of real property. Rights to engage in mining on the public domain shall be dependent on reciprocity.</p>	<p><b>National and MFN Treatment</b></p> <p><b>Article 3</b></p> <p>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.</p> <p><b>Article 4</b></p> <p>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.</p> <p><b>New Exceptions</b></p> <p><b>Article 14</b></p> <p>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...</p> <p>    iii. a local level of government</p> <p>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.</p> <p>5. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], and 9 [Senior Management and Boards of Directors] do not apply to:</p> <p>(a) government procurement; or</p> <p>(b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.</p>
<p><b>'Umbrella' Clause</b></p> <p><b>Article II</b></p> <p>2. Each Party shall observe any obligation it may have entered into with regard to investments.</p>	<p><b>'Umbrella' Clause</b></p> <p><i>No 'umbrella' clause is included, but breaches of investment authorizations and arguments are still subject to investor-state dispute Settlement under Art 24 (I) (see below).</i></p> <p><i>But note that under definitions (Article I), "investment contracts" are limited to some types of written contracts between investors and the host state.</i></p>

<p><b>Minimum Standard of Treatment</b></p> <p><b>Article II</b></p> <p>2. Investments shall at all times be accorded fair and equitable treatment, shall enjoy full protection and security and shall in no case be accorded treatment less than that required by international law. Neither Party shall in any way impair by arbitrary and discriminatory measures the management, operation, maintenance, use, enjoyment, acquisition, expansion, or disposal of investments.</p> <p>6. Each Party shall provide effective means of asserting claims and enforcing rights with respect to investment agreements, investment authorizations and properties.</p>	<p><b>Minimum Standard of Treatment</b></p> <p><b>Article 5</b> Minimum Standard of Treatment<sup>8</sup></p> <p>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.</p> <p>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:</p> <p>(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</p> <p>(b) “full protection and security” requires each Party to provide the level of police protection required under customary international law.</p> <p>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.</p> <p><sup>8</sup> Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.</p> <p><b>Annex A</b> <b>Customary International Law</b></p> <p>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.</p>
<p><b>Expropriation</b></p> <p><b>Article III</b></p> <p>1. Investments shall not be expropriated or nationalized either directly or indirectly through measures tantamount to expropriation or nationalization (“expropriation”) except for a public purpose; in a non-discriminatory manner; upon payment of prompt, adequate and effective compensation; and in accordance with due process of law and the general principles of treatment provided for in Article II (2). Compensation shall be equivalent to the fair market value of the expropriated investment immediately before the expropriatory action was taken or became known; include interest at a commercially</p>	<p><b>Expropriation</b></p> <p><b>Article 6</b></p> <p>1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization (“expropriation”), except:</p> <p>(a) for a public purpose;</p> <p>(b) in a non-discriminatory manner;</p> <p>(c) on payment of prompt, adequate, and effective compensation; and</p> <p>(d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).</p>

reasonable rate from the date of expropriation; be paid without delay; be fully realizable; and be freely transferable at the prevailing market rate of exchange on the date of expropriation.

#### **Article XI**

1. With respect to its tax policies, each Party should strive to accord fairness and equity in the treatment of investment of nationals and companies of the other Party.

2. Nevertheless, the provisions of this Treaty, and in particular Articles VI and VII, shall apply to matters of taxation only with respect to the following :

(a) expropriation, pursuant to Article III...

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 21**

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 authorities (footnote omitted) 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.

*Also see Annex A above.*

#### **Annex B**

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.

<p><b>Transparency</b></p> <p><b>Article II</b> 7. Each Party shall make public all laws, regulations, administrative practices and procedures, and adjudicatory decisions that pertain to or affect investments.</p>	<p><b>Transparency</b></p> <p><b>Article 10</b> 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.</p> <p>Note that Article 11 imposes additional transparency obligations on states (including provisions requiring states to provide investors rights to participate in administrative proceedings) but these provisions are not subject to investor-state arbitration under article 24(1) below.</p>
<p><b>Investor-State Dispute Settlement</b></p> <p><b>Article VI</b> 1. For Purposes of this Article, an investment dispute is defined as a dispute involving (a) the interpretation of application of an investment agreement between a Party and a national or company of the other Party; (b) the interpretation or application of any investment authorization granted by a Party's foreign investment authority to such national or company; or (c) an alleged breach of any right conferred or created by this Treaty with respect to an investment.</p> <p>2. In the event of an investment dispute between a Party and a national or company of the other Party, the parties to the dispute shall initially seek to resolve the dispute by consultation and negotiation, which may include the use of non-binding, third-party procedures. If the dispute cannot be resolved through consultation and negotiation, the dispute shall be submitted for settlement in accordance with previously agreed, applicable dispute-settlement procedures. Any dispute-settlement procedures regarding expropriation and specified in the investment agreement shall remain binding and shall be enforceable in accordance with terms of the investment agreement, relevant provisions of domestic laws, and applicable international agreements regarding enforcement of arbitral awards.</p>	<p><b>Investor-State Dispute Settlement</b></p> <p><b>Article 24</b> 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...</p> <p><i>But new requirements are imposed for 90-day advance notice of legal and factual basis of each claim to be given to host state under Article 24 (2).</i></p> <p><i>Also no claim may be submitted if more than 3 years have elapsed from date claimant acquired or should have acquired knowledge of breach (Article 26 (1)).</i></p> <p><i>The arbitral tribunal is directed to accept and consider amicus from non-disputing parties (Article 28 (3)).</i></p> <p><i>Also note other special powers granted to arbitral tribunal under Article 28-29, especially with respect to transparency.</i></p>

<p><b>General Exceptions</b></p> <p><b>Article X</b></p> <p>1. This Treaty shall not preclude the application by either Party of measures necessary in its jurisdiction for the maintenance of public order, 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.</p>	<p><b>General Exceptions</b></p> <p><b>Essential Security</b></p> <p><b>Article 18</b></p> <p>Nothing in this Treaty shall be construed:</p> <ol style="list-style-type: none"> <li>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</li> <li>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.</li> </ol> <p><b>Financial Services</b></p> <p><b>Article 20</b></p> <ol style="list-style-type: none"> <li>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<sup>14</sup> 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.</li> <li>2. 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.</li> </ol> <p><sup>14</sup> It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions.</p>
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## **Other New Provisions**

### **Article 12**

1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws (footnote omitted). Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

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

### **Article 13**

1. 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 strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in paragraph 2 as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

2. For purposes of this Article, "labor laws" means each Party's statutes or regulations, (footnote omitted) or provisions thereof, that are directly related to the following internationally recognized labor rights:

- (a) the right of association;
- (b) the right to organize and bargain collectively;
- (c) a prohibition on the use of any form of forced or compulsory labor;
- (d) labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and
- (e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

### **Article 30**

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.

