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International Investment Law:
Understanding Concepts and Tracking Innovations

Chapter 3

International Investment Agreements: A survey of Environmental, Labour and Anti-corruption Issues*

This paper surveys the societal dimension of 296 international investment agreements (IIAs) signed by the 30 member countries and of by the 9 non-member countries that participate formally in OECD investment work. Annex 3.A1 to the paper looks at the same issues for 131 IIAs signed by 15 developing countries (including China and India) that are not part of the OECD sample. The survey finds that, in practice, the societal dimension covers mainly environment and labour issues, but some (usually) more recent agreements contain language on human rights and anti-corruption. More generally, however, the survey shows that few of the countries in both the OECD and non-OECD samples include language on societal issues in their IIAs – 16 of the 39 countries in the OECD-related sample and 6 out of the 15 countries in the non-OECD sample include such language in any of their IIAs. The others never include societal language in their IIAs, although they emphasise that this does not diminish the importance that they attach to such issues. For the countries in the OECD sample that do include such language, the most common approach is to include a short text in the preamble; however, Canada, Mexico and the United States include lengthy texts in preambles, articles and annexes. While the OECD texts focus on such issues as upholding internationally agreed principles, right to regulate and not lowering standards, the issue most frequently encountered in the non-OECD sample is exceptions to most favoured nations in relation to benefits stemming from regional co-operation in the economic, social or labour fields. The survey of recent arbitration decisions revealed several claims dealing with environmental permits and regulation and two cases involving corruption allegations. One observation is that arbitration panels in some of these cases refer to broader international instruments in the environmental and anti-corruption fields when making their decisions, even if these instruments are not explicitly cited in the IIA under which the case has been brought.

* This survey was prepared by Kathryn Gordon, Investment Division, OECD Directorate for Financial and Enterprise Affairs, with the contribution of Monica Bose working as a consultant to the Investment Division. This document, as a factual survey, does not necessarily reflect the views of the OECD or those of its member governments. It cannot be construed as prejudging ongoing or future negotiations or disputes pertaining to international investment agreements.

Executive summary

This scoping paper looks at the "societal" dimension of international investment agreements (defined as bilateral investment treaties and regional trading agreements with an investment chapter). It reviews environmental, labour and anti-corruption texts in a sample of 296 agreements signed by the 30 OECD member countries or by the 9 non-member countries that adhere to the OECD Declaration on International Investment and Multinational Enterprises. The paper also reviews investor-state arbitration decisions dealing with the same issues. The aim of the paper is to provide institutional information and to propose topics for discussion within the Investment Committee on the role (if any), nature and scope of language in investment agreements relating to certain societal issues.

The paper's key findings are:

- *Incidence of language in investment agreements*. Twenty-four countries do not include any language on societal issues in their agreements. Among the 16 countries that have included such language in one or more agreements, the language covers mainly environmental and labour issues. More recently, anti-corruption issues have been mentioned in a few treaties. Treatment of these issues varies from language in the Preambles of some agreements (*e.g.* Finland and the Netherlands) to language including texts in preambles as well as substantive and procedural language in provisions, annexes and side agreements (*e.g.* many North American agreements).
- *Changes in coverage of issues over time*. Over the past two decades, more countries have been including such language in their investment agreements. In the sample of treaties surveyed for this paper, the first agreement covering such issues was the 1990 Polish-US bilateral investment treaty (BIT). Since the mid-1990s, Canada, Mexico and the United States have accumulated a large stock of agreements that include language on environmental and labour issues. More recently, other countries (Belgium, Finland, Japan) and regional organisations (European Union and European Free Trade Area) have included environmental and labour language in agreements. Anti-corruption language is a more recent innovation – it appears in four US agreements in the sample as well as in three co-operation and partnership agreements (Japan-Philippines and EU-Russia and the Cotonou Cooperation Agreement between the EU and the Africa, Caribbean and Pacific (ACP) countries).

- *Variation and harmonisation in treatment of issues.* The survey shows that some countries routinely include labour and environmental texts (anti-corruption texts are much less common) and that the treatment of these issues varies considerably from one agreement to the other. However, some treaties appear to have been influenced by broader international initiatives and that some explicitly refer to relevant international instruments (*e.g.* Universal Declaration of Human Rights). The sample texts also show that *innovations* in language in one agreement are often adopted by other countries for use in their own agreements and that this process of mutual influence has resulted in partial harmonisation of texts (for example, NAFTA-like environmental and labour language on performance requirements appears in the 2005 Korea-Singapore agreement).
- *Arbitration decisions.* The review of arbitration decisions shows that claims dealing with environmental permits and regulation have frequently been brought to arbitration panels. Two recent decisions have also dealt with allegations of corruption. Two points emerge with respect to these decisions: 1) the decisions dealing with environmental matters shed little direct light on the role of explicit environmental language in influencing arbitration panels (as opposed, for example, to provisions on "fair and equitable" treatment), either because the agreement's environmental provisions are not referred to directly in the arbitration decision or because the agreement in question does not contain environmental language; 2) arbitration panels refer to broader international instruments (*e.g.* conventions) in the environmental and anti-corruption fields.
- *Relationship to broader international policy goals.* The environmental, labour and anti-corruption content of investment agreements occurs in a context of rapid development of related international norms and of active involvement of national governments in the development of these norms and in setting the international policy agenda. For example, international initiatives in the environmental, labour and anti-corruption fields have produced a rich array of international instruments (conventions, declarations and protocols). In anti-corruption, for example, six major conventions or protocols have been signed since 1996. Several hundred international environmental agreements have been signed since the Stockholm Conference of 1972 and the International Labour Organisation has been active in the development and promotion of labour norms.

I. Introduction

The core mission of the OECD Investment Committee is to promote investment for growth and sustainable development worldwide. The

Committee's work on international investment agreements helps it achieve this mission by enhancing understanding of emerging legal and policy issues.[1]

This scoping paper looks at the inclusion – if any – of language addressing "societal issues" in a sample of 296 international investment agreements (defined as bilateral investment treaties plus regional trade agreements with an investment chapter). In practice, this language deals with three main issue areas: environment, labour and anti-corruption. The paper aims to support dialogue in the Investment Committee about these texts' purpose and impacts. It also looks at decisions arising from investor-state arbitration in relation to these issues. Finally, it provides background material relevant for understanding how these issues relate to the broader aims of international investment agreements and how they fit into the existing framework of international initiatives in the environmental, labour and anti-corruption fields.

The paper provides factual background and proposes issues for discussion in the following sections:

- Section II. What are the major initiatives for international co-operation in the environmental, labour and anti-corruption fields? How do international investment agreements and related institutions interact with these other processes of international co-operation?
- Section III. Which international investment agreements contain texts on environmental, labour and anti-corruption issues? What do these texts say?
- Section IV. How have arbitration tribunals dealt with environmental and anti-corruption issues (no disputes involving labour issues were found in the survey of arbitration cases)?

II. IIAs and International Co-operation on Environment, Labour and Anti-corruption Policies

While nearly all OECD and non-OECD governments can be assumed to be committed to sustainable development objectives, most do not use international investment agreements as a mechanism for achieving these objectives.[2] Indeed, governments use many policy instruments and processes

1. The present paper aims to provide a factual basis for discussing the treatment of environmental, social and anti-corruption issues in international investment agreements and by related institutions. It takes previous OECD work on international investment agreements as given. This work has looked at: Relationships between international investment agreements; most-favoured nation treatment in international investment law; fair and equitable treatment standard in international investment law; indirect expropriation and the right to regulate in international investment law; transparency; third party participation in investor state dispute settlement; the umbrella clause; consolidation of claims; interaction between the investment and trade in services chapter of regional trade agreements. For more information on this work, see *www.oecd.org/daf/investment/agreements*.

in order to achieve them. In addition to domestic policy instruments and processes, governments participate in a wide array of international co-operation processes (*e.g.* in the International Labour Organisation and the United Nations Environment Programme) and cooperate internationally in law making and law enforcement (*e.g.* the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, pursuant to which the Parties have agreed to outlaw foreign bribery, and monitoring process of the OECD Working Group on Bribery, which ensures effective enforcement of the laws).

As will be seen in the next section, most of the governments whose agreements are studied in this survey focus their efforts on these international and domestic policy processes and do not use international investment agreements as a means for pursuing their environmental, labour and anti-corruption objectives. This practice of focusing investment agreements on a fairly standard set of issues – investment promotion and protection and economic co-operation and development – can be seen in many of the preambles in the sample. Other countries include explicit references in one or more of their agreements to sustainable development or to related issues or refer to international instruments in the environmental and labour fields. The survey shows that some international investment agreements explicitly cite international co-operation processes in the environmental, labour and anti-corruption fields and that some of these instruments are also cited in several arbitration decisions.[3] Thus, the international framework provides concepts and principles that interact with international investment agreements in at least three ways. First, it influences investment via its effects on domestic and international laws and practices and therefore constitutes a central pillar of the broader legal context in which investment agreements evolve. Second, it provides a source of concepts and principles that are directly integrated into the texts of these agreements. Third, it is sometimes used as guidance in decision making by investor-state arbitration panels.

Over the past several decades, significant progress has been made in developing international norms in all three fields. Concerted work on labour

2. Annex 3.A1 to this paper presents the results of a fact-finding study looking at the environmental, labour and anti-corruption language contain in investment agreements signed between non-OECD member countries. It finds a pattern of inclusion of such language with is similar to the pattern found in this study – most countries do not include such language, but some do. Moreover, the language that is included in the non-OECD agreements shows some common patterns, but also wide variations in subjects covered and in treatment of issues.
3. For further discussion of this issue, see also Moshe Hirsch, "Interactions between Investment and Non-Investment Obligations in International Investment Law," *International Law Forum*, the Hebrew University of Jerusalem (November 2006).

norms can be dated from at least the early twentieth century, with the creation of the International Labour Organisation. Since its creation in 1972, of the United Nations Environment Programme has extended work on environmental agreements and greatly expanded international environmental co-operation. The rapid development of anti-corruption conventions is a more recent phenomenon, but six major initiatives have been undertaken since the mid-1990s. This sub-section briefly reviews these developments.

Labour

Most work on international labour standards takes place in the International Labour Organisation (ILO). Since its creation in 1919, the ILO has sought *inter alia* to define and guarantee labour rights and improve conditions for working people by building a system of international labour standards expressed in the form of Conventions, Recommendations and Codes of Practice. The ILO has adopted more than 180 ILO Conventions and 190 Recommendations covering all aspects of working life. A supervisory process helps to ensure that standards ratified by individual member States are applied and the ILO provides advice in the drafting of national labour laws. With the adoption of the Declaration on Fundamental Principles and Rights at Work in 1998, ILO member States decided to uphold a set of core labour standards that are relevant for all members regardless of whether they had ratified the relevant conventions.[4]

Environment

The framework of environmental treaties has been developing progressively throughout the twentieth century. The birth date of modern international environmental law is often given as 1972, when countries gathered for the United Nations Stockholm Conference on the Human Environment and the United Nations Environment Programme was established.[5] The Conference gave currency to an all-embracing concept of the biosphere' … [i]t approached not sectorally but holistically the earth's seas and atmosphere, outer space, non-renewable resources, biogenetic diversity and much else.[6] Since then, hundreds of international environmental agreements have been concluded (including bilateral, regional and global instruments and

4. This description of the history of ILO standards-setting is taken from page 4 of The ILO at a Glance, which can be found at: *www.ilo.org/public/english/download/glance.pdf* (no date provided in publication).
5. Edith Brown Weiss, "*International Environmental Law: Contemporary Issues and the Emergence of a New World Order*", *Georgetown Law Journal* number 81, volume 675. March 1993.
6. Thomas M. Franck, *Fairness in International Law and Institutions*; Oxford University Press, 1995, p. 358.

both binding and non-binding agreements).[7] These cover such areas as biodiversity, climate change and protection of the ozone layer. The agreements' implementation mechanisms vary with their subject matters, but implementation often includes information exchange, research, monitoring and efforts to meet specific targets.

Anti-corruption

Global and regional initiatives in the anti-corruption field have evolved rapidly over the past decade. The OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which came into force in 1999, is the first and so far the only international instrument specifically aimed at the supply side of bribery of foreign public officials. The United Nations Convention against Corruption, which was adopted in 2003 and came into force in 2005, addresses various forms of corruption, including the active and passive bribery of domestic and foreign public officials as well as bribery in the private sector. The Organisation of American States Inter-American Convention against Corruption, signed in 1996, was the first major regional initiative. Other regional initiatives include those of the African Union,[8] the Council of Europe[9] and the Southern African Development Community.[10] All of these initiatives involve processes of global or regional co-operation that are designed to help the parties to the agreement to implement their anti-corruption commitments more effectively. For example, Parties to the OECD Convention on Bribery of Foreign Public Officials participate in a two-phase peer-review monitoring process. In the first Phase, the Working Group on Bribery assesses Parties' national enabling legislation and, in Phase 2, the Group assesses how effectively Parties are enforcing relevant legislation.

III. Environmental, labour and anti-corruption issues in IIAs

Overview

This section reviews the language dealing with environmental, labour and anti-corruption issues in a sample of 296 international investment agreements (IIAs). The sample consists of 269 bilateral investment treaties[11] (BITs) signed by the thirty OECD member countries or by the nine non-

7. See *www.unep.org* for a discussion of the major environmental instruments housed in the UN system.
8. African Union Convention on Preventing and Combating Corruption, 2002.
9. Council of Europe Criminal Law Convention on Corruption, 1999 and the Civil Law Convention of Corruption, 1999.
10. The Southern African Development Community Protocol on Corruption, 2001.
11. Also included are the model treaties of: Belgium, Canada, Estonia, Finland, France, Germany, Greece, Netherlands, Portugal, Slovakia, Slovenia, Sweden, United Kingdom, and United States.

member adherents to the OECD Declaration on International Investment and Multinational Enterprises.[12] The sample also includes the NAFTA and 25 free trade, co-operation or partnership agreements signed by Australia, Canada, Chile, Japan, Korea, Mexico, the United States, the European Union, and the European Free Trade Area. Only agreements including explicit investment agreements were included in the sample. These agreements may also contain independent chapters or side letters concerning environmental, labour and anti-corruption issues. For example, the EU-Russia Partnership Agreement contains independent articles[13] that deal with co-operation on all three issues, but these issues are not referred to in Article 58 (on "Investment promotion and protection"). Annex 3.A1 describes the methodology and lists the investments agreements included in the sample. Annex 3.A2 contains an inventory of the texts found in the sample of agreements.

Table 3.1 summarises the findings for the 39 countries covered in the survey. It shows that 16 countries include texts dealing with environmental, labour or anti-corruption issues in at least one of their investment agreements. While such language was found in relatively few of the bilateral investment treaties, the Free Trade Agreements (FTAs) in the sample almost always include language on environmental and labour issues and, in many cases, such language is detailed and, often, is found in independent chapters or side letters that are separate from the investment text.[14]

Based on the survey of BIT and FTA language, countries' policies in this area can be categorised as follows:

1. ***No language is included.*** Twenty three of the 39 countries covered in the survey do not deal with these issues in any of the international investment agreements in the sample (Table 3.1).
2. ***Countries with a policy of including such language.*** Eleven of the countries shown in Table 3.1 appear to have a policy of including such language in

12. The nine non-member adherents are: Argentina, Brazil, Chile, Estonia, Israel, Latvia, Lithuania, Romania and Slovenia.
13. These are Article 69 on the "Environment", Article 74 on "Social Cooperation" (which covers co-operation on many aspects of labour market regulation) and Article 84 on "Cooperation on the Prevention of Ilegal Activities" (which specifically cites corruption).
14. This finding echoes a similar finding reported in the Joint Working Party on Trade and Environment's study Regional Trade Agreements and Environment. The study finds that [...] the number of RTAs including significiant environmental provisions remains small and also documents variability in the scope and detail of treatment of environmental issues. However, the study also finds, in contrast to the results reported here, that RTAs negotiated by most OECD members include some type of environmental provisions. Pages 7-8 COM/ENV(2006)47. See also Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities Working Paper No. 95, International Labour Office Geneva.

Table 3.1. **Environmental, labour and anti-corruption texts in the sample of International Investment Agreements**

	Texts in at least one IIA surveyed?	IIAs in sample that contain such texts
OECD countries		
Australia	Yes	FTA with the United States
Austria	No	
Belgium-Luxembourg	Yes	Covered in many recent agreements (starting in 2004)
Canada	Yes	Covered in many agreements (starting in 1994)
Czech Republic	No	
Denmark	No	
Finland	Yes	Preambles of Finland's Model BIT and of its most recent BITs (starting in 2000)
France	No	
Germany	No*	
Greece	No	
Hungary	No	
Iceland	No	
Ireland	No	
Italy	No	
Japan	Yes	Japan's BITs with Korea and Vietnam; Cooperation agreement with the Philippines
Korea	Yes	Bilateral treaties with Belgium, Japan, FTA with Chile and Singapore
Mexico	Yes	Covered in many agreements
Netherlands	Yes	Preamble of 2004 Model BIT
New Zealand	No	
Norway	No	
Poland	Yes	Bilateral treaty with the United States
Portugal	No	
Slovak Republic	No	
Spain	No	
Sweden	Yes	Preamble of 2003 Model BIT and bilateral treaty with Russia
Switzerland	Yes	Bilateral treaty with Mexico
Turkey	No	
United Kingdom	No	
United States	Yes	Covered in many agreements (starting in 1994)
Non-member adherents		
Argentina	No	
Brazil	No	
Chile	Yes	Covered in FTAs with China, Korea, Panama and Peru
Estonia	No	
Israel	No	
Latvia	Yes	Preamble of Model BIT
Lithuania	No	
Romania	No	
Slovenia	No	
Regional Parties		
European Union	Yes	EU-Russia and EU-ACP (Cotonou) Partnership Agreements
EFTA	Yes	EFTA-Singapore Agreement
NAFTA members	Yes	North American Free Trade Agreement

* The German BITs indicated with asterisks in Annex 3.A1 list public health measures as exceptions to national treatment.

their international investment agreements (Belgium, Canada, Finland, Japan, Luxembourg, Mexico, Netherlands, Sweden, United States, Chile and Latvia). Evidence that countries have such a policy is of two types: 1) such language appears in their model agreements; and/or 2) they have two or more agreements containing similar or identical environmental and/or labour texts. Within this group there are substantial variations in: 1) the extent of the language on environmental and labour issues; 2) the number of agreements; and 3) the length of time such language has appeared in the agreements. Some countries (*e.g.* Canada, Mexico and the United States) have included such language since the early 1990s and are parties to many agreements with environmental and labour texts. The earliest example in the sample is the labour texts contained in the 1990 United States-Poland BIT. The NAFTA addresses these issues in its preamble, provisions and side agreements. All of the Canadian and US BITs signed in 1994 and after contain some environmental and/or labour language. Mexico systematically includes such language in agreements signed with Latin American and North American countries, but not with European countries. Other countries have adopted such language in more recent agreements or have included it in their model BITs (*e.g.* Belgium, Finland, Japan, the Netherlands and Sweden).[15]

3. ***Other cases.*** Some countries are party to agreements containing environmental and/or labour texts, but do not appear to have a set policy on whether or not such language should be included and, if so, on the type of language that should be used. For example, Australia's 2004 FTA with the United States contains environmental and labour language that resembles language found in other US agreements in the sample, but that is not duplicated in other Australian agreements.[16] Likewise, Korea's agreement with Japan uses environmental and labour language found in other Japanese treaties (*e.g.* with Vietnam), but not in other Korean treaties. Korea's agreements with Singapore and Chile contain NAFTA-like language[17] on performance requirements that is not found in other Korean agreements. In other cases, the inclusion of environmental and/or labour language appears to be related to the idiosyncrasies of the negotiations – for example, the 1995 treaty between Russia and Sweden contains a text dealing with exceptions to national treatment and the environment (see Annex 3.A1 section 1.8) which is found only in this agreement.

15. Japan's two most recent treaties – with Korean (2002) and Vietnam (2003) – contain identical environmental texts (see Annex 3.A2, section 1.4), but the earlier 9 treaties in the sample (signed between 1988 and 1998) do not.
16. See list for Australian BITs in Annex 3.A1.
17. In Annex 3.A2, compare language in NAFTA section 2.3 (Investment Chapter under Article 1106) with performance requirements language in section 4.5.

Extent of text

Countries adopt different approaches to environmental, labour and anti-corruption issues in their international investment agreements. In some cases, this language appears only in the Preamble, which may offer a broad picture of the relationship between the agreement and the promotion of labour standards and protection of the environment. Examples of such preamble language can be found in the recent BITs for Finland and in the Finnish and Latvian Model BITs (see also, in Annex 3.A2 section 1.7, the preambular language in the Netherlands Model BIT, which contains very similar language):

> *RECOGNISING that the development of economic and business ties can promote respect for internationally recognised labour rights;*
>
> *AGREEING that these objectives can be achieved without relaxing health, safety and environmental measures of general application…*

In other cases, the treatment of these issues is lengthier. For example, NAFTA (signed 1992) contains language on environmental and labour issues in the preamble, the investment chapter (which contains environmental articles), and in separate side agreements dealing with labour and the environment (see Annex 3.A2, section 2).[18]

Set of issues addressed

The environmental, labour and anti-corruption texts in the sample cover many of the issues already discussed by the Investment Committee in a variety of other contexts. For example, the various texts address: right to regulate, not lowering standards, indirect expropriation, promoting sustainable development,[19] performance requirements, and consultation.

The environmental and/or labour texts most often take the form of language addressing on "not lowering standards" and "right to regulate".

18. NAFTA contains texts on *inter alia*: promotion of respect for internationally-recognised standards, co-operation among Parties, transparency, right to regulate, continuous improvement of domestic policy frameworks; creation of institutions in support of co-operation and consultation in the labour and environment fields; resolution of disputes; creation of institutions for promoting public participation and raising public awareness.
19. See, for example, NAFTA (Annex 3.A2, section 2.1) and Annex 3.A2 section 3 for the following FTAs: Canada-Chile, Canada-Costa Rica, Chile-China, Chile-Panama and all US FTAs.

Table 3.2 reviews the coverage of environmental and labour issues for all countries whose bilateral treaties contain such content. These are:

Table 3.2. **Environmental and labour texts in selected bilateral investment treaties**

	US model BIT 2004	Belgium/ Luxembourg model BIT	Canadian model BIT 2004	Japan's BITs with Korean and Vietnam	Netherlands model	Finland/ Latvia model BITs	Swedish model BIT
Preamble							
Labour issues (*e.g.* promotion of labour rights)	Yes	No preamble	No preamble	Yes	Yes	Yes	Yes
Not lowering environmental standards		No preamble	No preamble	Yes	Yes	Yes	Yes
Not lowering labour standards		No preamble	No preamble				
Promoting sustainable development		No preamble	No preamble				
Environmental protection and promotion of international standards	Yes	No preamble	No preamble				
Provisions[1]							
Environment							
Not lowering standards	Yes	Yes	Yes	Yes			
Right to regulate	Yes	Yes	Yes				
Indirect expropriation	Yes		Yes				
Environmental exception for rules on performance requirements	Yes		Yes				
State to state consultation	Yes	Yes	Yes				
Labour							
Not lowering standards	Yes	Yes	Yes				
Right to regulate	Yes	Yes					
Labour exception for rules on performance requirements	Yes		Yes (employment creation and training)				
State to state consultation	Yes	Yes	Yes				

1. Provisions cover language in chapters, articles, annexes and protocols.

Other issues appear less often in the sample of agreements. For example:

- *Anti-corruption*. References in the sample to this issue were found in agreements signed by Japan, the United States, by the European Union. They can be found in US FTAs with Oman (2005), Morocco (2004) and Singapore (2003) (see Annex 3.A2, section 3.3) and the preamble of the US-Peru agreement, in which the Parties agree to "*promote transparency and prevent and combat corruption, including bribery, in international trade and investment*". Article 8 of the "General Provisions" Chapter of the Japan-Philippines Economic

Partnership Agreement (2006) contains the following text: "*Each Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations.*" The EU-Russia Cooperation and Partnership Agreement states that: "*The Parties shall establish* co-operation *aimed at preventing illegal activities such as: […] illegal activities in the sphere of economics, including corruption.*"

- *Human rights* are explicitly cited in two of the sample agreements: The EU-Russia Agreement and the Agreement between the EFTA States and Singapore. The EU-Russia Agreement commits the Parties to cooperating on "*matters pertaining to the observance of the principles of democracy and human rights, and hold consultations, if necessary, on matters related to their due implementation*". The EFTA-Singapore Agreement reaffirms the Parties' commitment to the *Universal Declaration of Human Rights*.

Differences and similarities in treaty language

Among the 16 countries whose agreements contain language on environmental, labour and corruption matters, the texts show both similarities and differences. Sometimes similarities appear to arise from countries adopting each other's language, a process that gives rise to a partial harmonisation of texts. For example:

- The Netherlands' and the Finnish/Latvian Model BITs contain very similar language on promoting internationally-recognised labour rights and on not compromising or relaxing "health, safety and environmental measures of general application".
- In some cases, alignment of texts appears to be a matter of deliberate policy of harmonisation: the recently-signed agreements or the Model BITS of Canada, Mexico and the United States show similar or identical language in such areas as performance requirements, right to regulate and not lowering standards. This language also appears in the Chile/Korea FTA and (for performance requirements) in the Korea-Singapore Agreement. Likewise, Chile, the United States and Canada have similar or (in some cases) identical Annex language relating to indirect expropriation and non-discriminatory regulatory measures designed to protect public health, safety, and the environment.
- Other similarities texts can be found in the preamble language on "promoting sustainable development", protecting "basic workers' rights" in the Chile/Panama FTA and in US and Canadian FTA preambles with Chile.
- As shown in the Box 3.1, the 2004 US Model BIT and the 2006 Japanese-Philippines Partnership Agreement contain identical lists of "internationally-recognised labour rights".

Box 3.1. **Lists of labour rights in the ILO Declaration and selected IIAs**

List of fundamental labour rights from Article 2 of the ILO Declaration on Fundamental Principles and Rights at Work

2. Declares that all members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organisation to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely:

a) freedom of association and the effective recognition of the right to collective bargaining;

b) the elimination of all forms of forced or compulsory labour;

c) the effective abolition of child labour; and

d) the elimination of discrimination in respect of employment and occupation.

List of core labour standards from the Belgian model BIT

The terms "labour legislation" shall mean legislation of the Kingdom of Belgium, of the Grand-Duchy of Luxembourg or of XXX, or provisions thereof, that are directly related to the following internationally recognised labour rights:

a) the right of association;

b) the right to organise and bargain collectively;

c) a prohibition on the use of any form of forced or compulsory labour;

d) a minimum age for the employment of children;

e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

List of core labour standards from the 2004 US Model BIT and the 2006 Japan-Philippines Economic Partnership Agreement:

For purposes of this Article, "labour laws" means each Party's statutes or regulations,or provisions thereof, that are directly related to the following internationally recognised labour rights:

a) the right of association;

b) the right to organise and bargain collectively;

c) a prohibition on the use of any form of forced or compulsory labour;

d) labour 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 labour; and

e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

The differences in textual approaches include:

- *Location of text*. Table 3.2 shows that BITs differ in terms of where these issues are treated. Some place them in the preamble whereas others include texts in both the preamble and in the main body of the agreement or in annexes).

- *Lists of labour rights.* The Box 3.1 reproduces the lists of five "internationally recognised labour rights" contained in the Belgian and US Model BITS and in the Japanese-Philippines Economic Partnership Agreement). The language is identical for four of the five rights, but Belgium differs in relation to child labour. The Belgian text mentions "*a minimum age for the employment of children*" and the US and Japan text additionally cites "*labour protections for children and young people*" and "*prohibition and elimination of the worst forms of child labour*".
- *Cooperative relationships between labour and management.* The Japanese BIT preamble language (which recognises "the importance of the cooperative relationship between labour and management in promoting investment") stresses the importance of promoting harmonious labour relations and of labour and management working toward shared goals. All other countries whose preambles cite labour issues couch these issues in terms of internationally recognised labour rights or standards (*e.g.* Netherlands, Finland, Latvia, the United States and Japan in its Partnership Agreement with the Philippines).
- *How investment issues are linked with environmental, labour and anti-corruption issues.* Some agreements make explicit the links between environmental and labour issues and investment issues – for example, most of the BITs in Table 3.2 discuss environmental issues in relation to right to regulate, indirect expropriation and not lowering standards. In contrast, the EU-Russia Partnership and Cooperation Agreement contains lengthy texts on co-operation in relation to *inter alia* investment, environment, labour/societal security issues and law enforcement/anti-corruption. For the most part, though, the Agreement deals with these matters in parallel and as part of an ambitious blueprint for policy co-operation and economic integration with Russia. Nevertheless, the Agreement's blueprint for co-operation in the environment, labour and anti-corruption fields, if fully realised, can be expected to have major impacts on investment processes.

References to other international instruments

Generally, the investment agreements do not discuss in detail the relationship between the agreement and other international commitments in the environmental, labour and anti-corruption fields. However, several US Agreements in the sample (with Australia, Chile, Morocco, Oman, Peru, Singapore and CAFTA) discuss the "relationship to environmental agreements": For example, Article 19.8 of the US-Australia FTA states: "*The Parties recognise that multilateral environmental agreements to which they are both party play an important role, globally and domestically, in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, the Parties shall*

continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are both party and international trade agreements to which they are both party. The Parties shall consult regularly with respect to negotiations in the WTO regarding multilateral environmental agreements."

Nevertheless, the language used in some IIAs has clearly been influenced by international conventions, declarations and protocols and, in some cases, these are explicitly cited. For example:

- The Belgian Model BIT and the Labour Chapters of US FTAs explicitly cite the ILO Declaration on Fundamental Principles and Rights at Work.
- The NAFTA preamble cites the Convention on International Trade in Endangered Species; the Montreal Protocol on Substances that Deplete the Ozone Layer, the Basel Convention on the Control of Trans-boundary Movement of Hazardous Wastes and their Disposal.
- The EU-Russia Partnership and Cooperation Agreement refers to the European Energy Charter, the Declaration of the Lucerne Conference of 1993, the Basel Convention and the Espoo Convention on Environmental Impact Assessment in a Trans-boundary Context.
- The EFTA-Singapore Agreement reaffirms, in its preamble, the Parties' "*commitment to the principles set out in the United Nations Charter and the Universal Declaration of Human Rights*".

In some cases, international instruments appear to have influenced the content of investment agreements, even though they are not explicitly cited in the agreement. For example, the anti-corruption texts found in the US FTAs with Oman and Morocco deal *inter alia* with criminalisation of "active bribery." These treaties define active bribery using language that is very similar to that used in Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The US-Morocco FTA definition is as follows: "*To offer, promise, or give any undue pecuniary or other advantage, directly or indirectly, to a foreign official, for that official or for another person, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.*"[20]

Thus, some of the environmental and labour texts in international investment agreements promote or have been influenced by the framework of

20. Under Article 1 of the OECD Convention on Combating Bribery of Foreign Public Officials, each Party must establish that it is a criminal offence "*for any persona intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official or for a third party, in order that the official act or refrain from acting in relation to the perform of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business*".

international norms. However, these texts also occasionally differ from internationally-recognised standards. For example, the lists of internationally-recognised labour rights found in Belgian, Japanese and US agreements (see Box 3.1) differ not only from each other, but also from the list of "fundamental rights" set forth in the ILO Declaration (the ILO's list of fundamental rights is also produced in the Box 3.1). In particular, they do not mention "elimination of discrimination in respect of employment and occupation" (one of the ILO's four fundamental rights). In addition, the Belgian and US texts mention "acceptable conditions of work with respect to minimum wages, hours of work and occupational health and safety" (all of which are covered by other ILO instruments, but are not included in the ILO list of fundamental rights).

Only one treaty in the sample – the 2001 Mexican-Switzerland BIT – refers to OECD Investment Instruments. It states:

> *The Parties recognise that the entry and the expansion of investments in their territory by investors of the other Party shall be subject to relevant instruments of the Organisation for Economic Cooperation and Development (OECD) in the field of international investments.*

Adaptation and innovation in treaty language

The environmental and labour texts in the sample agreements show evidence of both innovation and progressive dissemination of innovations. The inclusion of environmental and labour language is, in itself, an innovation. As noted earlier, the chronological listing provided in Annex 3.A1 shows that the earliest environmental and labour texts in this sample of agreements are to be found in the 1990 Poland-US BIT, in NAFTA (signed in 1992) and in two bilateral treaties signed by the United States in 1992. Canada and the United States systematically included such language in all agreements in the sample after 1994. In 1995, Mexico signed a BIT[21] with Switzerland containing such language and has since signed many FTAs (particularly with other Latin American countries) containing environmental and/or labour texts. Thus, the initial impetus for the inclusion of such language appears to have originated in North America. The policy of including such language was later taken up by other member countries (*e.g.* Belgium, Finland, Japan).

21. The Mexican-Swiss text uses language on "not lowering standards" and on consultation that is identical to a passage in NAFTA; compare texts in Annex 3.A2 section I.6 and Annex 3.A2, section 2.6)

Several factors appear to be driving innovations in this field:

- *Learning from experience*. For countries that have the longest history of including such language in their agreements, innovation may reflect learning from experience. One example of such an innovation might be the language on indirect expropriation listed above,[22] several variants of which exist in recent Canadian, Chilean and US agreements and in the Canadian and US Model BITs. Such language appears to be designed to lower the risks that arbitration under the agreements will be used in ways that were not intended by the parties to the agreements.
- *Emerging international priorities*. Other innovations in environmental, labour and anti-corruption language appear to reflect the dynamic nature of priority-setting in international economic policy. For example, the relatively recent inclusion of anti-corruption language in Japanese, US and EU agreements may reflect growing recognition that corruption is a major international policy issue.

Comparison of the older and more recent agreements in the sample shows that innovations in investment-treaty language are not reflected quickly into a country's entire stock of international investment agreements. Once a country adopts an innovation, it does not immediately go back to older treaties to incorporate the innovation in all of its other agreements (presumably because of the high costs of treaty renegotiation). For countries that are actively innovating with treaty language (as is the case of the environmental, labour and corruption language), this gives rise to distinct "vintage" effects in the stock of treaties – that is, older treaties contain language that differs from the language found in newer treaties.

IV. Arbitration decisions

BITs and FTAs typically provide that certain disputes between an investor and a state that are not settled through negotiations may be submitted to arbitration. The following discussion is based on a review of a sample of recent publicly-available decisions. Because treaties of some countries contain environmental and labour language in the preamble only, the paper first looks at the role of preambular language in arbitral tribunals' interpretation of treaties. Next, it examines a few recent decisions that address environmental and anti-corruption issues.

22. An example of this language is: *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.*

Preamble language in arbitration cases

The interpretation of any treaty begins with Article 31(1) of the Vienna Convention on the Law of Treaties, which states that a treaty "shall be interpreted in good faith in accordance with the ordinary meaning to be given the terms of the treaty in their context and in light of its object and purpose". In interpreting an investment treaty, arbitration tribunals may, as part of its analysis, be "guided by the purpose of the Treaty as expressed in its title and preamble".[23] In interpreting the Germany-Argentina BIT, the preamble of which speaks about economic co-operation and protection of investments, a tribunal found that it was intended to "create favourable conditions for investments and to stimulate private initiative".[24] Another tribunal noted that where the preamble of a treaty speaks to maintaining favourable conditions for investment, "[i]t is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments".[25] By contrast, another tribunal called "for a balanced approach to the interpretation of the [Netherlands-Czech Republic BIT's] substantive provisions for the protection of investments, since an interpretation which exaggerates the protection to be accorded to foreign investments may serve to dissuade host States from admitting foreign investments and so undermine the overall aim of extending and intensifying the parties' mutual economic relations".[26]

In interpreting NAFTA, the *S.D. Myers* tribunal considered the environmental language in NAFTA's preamble as well as its companion, the North American Agreement on Environmental Cooperation ("NAAEC"), to conclude that the provisions of NAFTA should be interpreted in light of several principles, including that the parties "have a right to establish high levels of environmental protection," and "are not obliged to compromise their standards merely to satisfy the political or economic interests of other states", and that "environmental protection and economic development can and should be mutually supportive".[27]

23. *Siemens AG v. the Argentine Republic*, ICSID Case No. ARB/02/08, Decision on Jurisdiction, 3 Aug. 2004, para. 81, available at *www.worldbank.org/icsid/cases/cases.htm*.
24. *Idem.*, para. 81.
25. *SGS Société Générale de Surveillance S.A. v. Republic of the Philippines*, ISCID Case No. ARB/02/06, 29 Jan. 2004, para. 116, available at *www.worldbank.org/icsid/cases/cases.htm*.
26. *Saluka Investments B.V. v. The Czech Republic*, Partial Award, 17 Mar. 2006, para. 300, available at *www.investmentclaims.com/decisions/Saluka-CzechRep-Partial_Award.pdf*.
27. *S.D. Myers, Inc. v. Canada*, UNICTRAL/NAFTA case, Partial Award, 13 Nov. 2000, para. 220, available at *www.naftalaw.org/disputes_canada_sdmyers.htm*.

Environmental and anti-corruption issues in investor-state arbitrations

Environmental and anti-corruption issues have arisen in a number of arbitrations under NAFTA and under BITs. Before describing these cases, it is worth noting some issues which do not appear to have been addressed by any arbitral tribunals. No decisions were found that address: 1) labour issues; 2) provisions relating to expropriation contained in recent US and Canadian treaties; 3) the environmental, labour, and anti-corruption provisions found in the articles[28] and side agreements of many of the North American investment agreements. Thus, the impact of treaty language dealing with these issues on resolution of disputes cannot be ascertained by looking at arbitration decisions.

This section reviews several recent publicly-available decisions dealing with environmental issues or corruption.[29] While there are other decisions that discuss environment or corruption, the cases below were chosen because they are recent decisions that contain significant analysis of the issues and provide useful examples of how disputes on these issues have been resolved by certain tribunals. Some of the cases involve investment agreements that contain no language on any of the societal issues addressed in this paper.

Denial of permits for projects with environmental impacts

Investors that have been denied permits on alleged environmental grounds have prevailed in a number of arbitrations, including *Metalclad Corporation v. Mexico*, *Tecnica Mediambientales* v. *Mexico,* and *MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile*.[30] In *Metalclad*, a tribunal interpreting the investment chapter of NAFTA found that the denial of a municipal construction permit to a hazardous waste landfill amounted to indirect expropriation[31] and a violation of the "fair and equitable treatment" requirement of NAFTA[32] where the federal government of Mexico had granted

28. For examples of such language, see Annex 3.A2. For language in bilateral investment treaties, see section 1.2 (Canada); 1.6 (Mexico) and 1.9 (United States). See also Annex 3.A2, section 2 (NAFTA), section 2.3 (which deals with environmental language in NAFTA's Chapter 11 (the Investment Chapter).
29. To locate relevant decisions, all published final awards available on the ICSID website were reviewed. In addition, recent decisions on environmental and social issues that have been in publications were reviewed. There are some pending arbitration claims that might implicate human rights issues, but they are not discussed here because no final decision has been rendered. See, for example, Suez, Sociedad General de Aquas de Barcelona, SA and Vivendi Universal SA *v.* the Argentine Republic (ICSID Case No. ARB/03/19).
30. *Metalclad Corporation v. Mexico*, ICSID Case No. ARB (AF)/97/1, Award, 30 Aug. 2000; *Tecnica Mediambientales Tecmed* S.A. *v. United Mexican States*, ISCID Case No. l ARB (AF)/00/2, Award, 29 May 2003; and *MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/07, Award, 25 May 2004; all available at *www.worldbank.org/icsid/cases/cases.htm*.

federal permits for the project and assured Metalclad, a US-based company, that municipal permits were not needed. Public opposition to the landfill appeared to have been a factor in the municipality's decision making. The tribunal noted that: 1) Metalclad had been assured by federal officials that municipal permits would not be required; and 2) Metalclad was not notified of the town meeting where the municipal permit was denied. The tribunal observed that NAFTA's statement of principles and rules gives prominence to "transparency," which the tribunal reasoned must include provision of clear information regarding the legal requirements for an investment.[33] The tribunal also ruled that a subsequent Ecological Decree issued by the municipality that prevented operation of the landfill was "a further ground for a finding of expropriation".[34]

The *Metalclad* tribunal's decision was partially set aside by the British Columbia Supreme Court in Canada, which has jurisdiction to review arbitration decisions when the legal seat of arbitration is in British Columbia. *United Mexican States* v. *Metalclad*, 2001 BCSC 664, Supreme Court of British Columbia, Reasons for the Judgment (2 May 2001). The court ruled that the tribunal had improperly imposed a requirement of "transparency" into Chapter 11 of NAFTA. Because the "transparency" rationale was used by the tribunal to find that the denial of the municipal permit constituted an expropriation and a violation of the fair and equitable standard, the court set aside that portion of the decision.[35] However, the court did not set aside the tribunal's separate finding that the Ecological Decree was an expropriation.

In another landfill dispute, the Spanish investor Tecnica Mediambientales challenged, under the Spain-Mexico BIT, the Mexican federal government's denial of the renewal of a permit to operate a hazardous waste landfill. Again, the principal impetus for the non-renewal of the permit was substantial public opposition to the landfill, which was located eight kilometres from an urban centre. The Spanish investor claimed that the resolution denying renewal of the permit constituted indirect expropriation.

31. For a discussion of indirect expropriation and the right to regulate, see Indirect Expropriation and the Right to Regulate in International Investment Law, Chapter 2 in *International Investment Law: A Changing Landscape*, OECD (2005).
32. For a discussion of the "fair and equitable" standard see "Fair and Equitable Treatment Standard in International Investment Law", Chapter 3 in *International Investment Law: A Changing Landscape*, OECD (2005).
33. *Metalclad Corporation* v. *Mexico*, ICSID, Case No. ARB (AF)/97/1, Award, 30 Aug. 2000, para. 76.
34. *Idem*, para. 109.
35. NAFTA allows investors to arbitrate only issues under Chapter 11, the Investment Chapter. The court reasoned that the "Transparency" provisions are in Chapter 18. By contrast, Chapter 11 does contain the most-favoured-nation standard and the minimum treatment standard (including "fair and equitable" treatment).

The tribunal considered the environmental reasons proffered by Mexico for the decision, and found that there were no significant environmental concerns that justified non-renewal of the permit,[36] but that the decision was made principally to put an end to the political problems – defined as community pressure' – caused by the Landfill.[37] On the question of a state's right to regulate, the Tribunal reasoned: we find no principle stating that regulatory administrative actions are *per se* excluded from the scope of [the expropriation provision in the Spain-Mexico BIT], even if they are beneficial to society as a whole – such as environmental protection – particularly if the negative impact of such actions on the financial position of the investor is sufficient to neutralise in full the value, or economic or commercial use of its investment without receiving any compensation whatsoever.[38] The Spain-Mexico BIT does not have any environmental language.

Similarly, a Malaysian investor that signed a Foreign Investment Contract ("FIC") with the government of Chile to develop a model township in the Pirque Metropolitan Region prevailed in an arbitration against Chile for failure to grant the necessary permits. The municipal government rejected the zoning modifications required for the project as well as the Environmental Impact Statement for the project, concluding that the proposal conflicted with existing urban development policy. While the tribunal agreed that Chile "has a right to decide its urban policies and legislation," it concluded that Chile's "approval of an investment by the FIC for a project that is against the urban policy of the Government is a breach of the obligation to treat an investor fairly and equitably".[39] The tribunal held that the fair and equitable treatment standard of the Chile-Malaysia BIT would be breached "by failing to grant the necessary permits to carry out an investment already authorised".[40] Notably, however, the tribunal substantially reduced the award to the investor, finding that a large portion of its losses resulted from other business risks that are properly borne by the investor. The Chile-Malaysia BIT does not have any environmental language.

36. While the record showed a few relatively minor past violations of environmental requirements by the facility, the government of Mexico conceded that the facility was generally in compliance with environmental laws and that the site met all applicable criteria for the siting of a hazardous waste disposal facility.
37. *Tecnica Mediambientales Tecmed S.A. v. United Mexican States*, ISCID, Case No. l ARB (AF)/00/2, Award, 29 May 2003, para. 129.
38. *Tecnica Mediambientales Tecmed S.A. v. United Mexican States*, ISCID, Case No. l ARB (AF)/00/2, 29 May 2003, para. 121.
39. *MTD Equity Sdn. Bhd and MTD Chile S.A. v. Republic of Chile*, ICSID Case No. ARB/01/07, Award, 25 May 2004, paras. 104 and 166.
40. *Idem,* paras. 104 and 105. This quoted language is found in the Chile-Croatia Treaty and not in Chile's BIT with Malaysia. Under the Most Favoured Nation Clause of the Malaysia-Chile BIT, the tribunal agreed to include within the scope of the BIT the more favourable language on granting of permits contained in Chile's treaty with Croatia.

Challenges to environmental regulation

A recent NAFTA decision, *Methanex* v. *United States*,[41] sheds light on the right to regulate in the environmental context. Methanex, a Canadian investor and the world's largest producer of methanol, which is feedstock for the gasoline additive "MTBE" (methyl tertiary-butyl ether), brought a claim against the United States challenging the state of California's ban on the sale and use of MTBE in gasoline.[42] Methanex argued that the California law violated national treatment, was inconsistent with the fair and equitable treatment article, and constituted indirect expropriation. The tribunal held that national treatment was not violated because the law applied equally to all MTBE manufacturers, whether domestic or foreign. In so ruling, the tribunal rejected Methanex's argument that the relevant comparison should be to manufacturers of all gasoline additives. Further, the tribunal did not find any evidence of intentional discrimination, concluding that "the scientific and administrative record establishes clearly that Governor Davis and the California agencies acted with a view to protecting the environmental interests of the citizens of California, and not with the intent to harm foreign methanol producers".[43] After reviewing at length the scientific studies and other information that formed the basis for the law as well as the expert scientific testimony proffered as part of the arbitration, the tribunal found that California's legislation was a reasonable response to the widespread MTBE contamination of its water resources. The tribunal found no violation of the fair and equitable treatment article. Finally, the tribunal found that there was no indirect expropriation, reasoning:

> [A]s a matter of general international law, a non-discriminatory regulation for a public purpose, which is enacted in accordance with due process and which affects, *inter alios*, a foreign investor or investment is

41. *Methanex Corporation v. United States of America*, UNCITRAL/NAFTA, Final Award of the Tribunal on Jurisdiction and Merits, 3 Aug. 2005, available at *www.state.gov/documents/ organisation/51052.pdf*.
42. The first NAFTA arbitration was also a challenge to the ban of a gasoline additive. Ethyl Corporation challenged Canada's adoption of legislation that banned the import of another gasoline additive known as "MMT" (methylcyclopentadienyl manganese tricarbonyl). *Ethyl Corporation* v. *Canada*, UNCITRAL/NAFTA, Award on Jurisdiction, 24 June 1998, available at *www.investmentclaims.com/oa1.html*. *Ethyl*, a US-based manufacturer and distributor of MMT, challenged the law on a number of grounds, including that it violated national treatment, was an unlawful performance requirement, and amounted to expropriation. After the tribunal rejected Canada's challenge to jurisdiction and a separate domestic adjudicatory body found that the Act was inconsistent with Canada's Agreement on Internal Trade, Canada moved to resolve other challenges to the legislation and settled the case for USD 13 million. The *Ethyl* case attracted significant attention, though the tribunal never reached a decision on the merits.
43. *Methanex*, Part IV, Chapter E, para. 20.

> not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.[44]

The exception for "specific commitments" given by the government echoes the reasoning in the *Metalclad* case. In finding that no promises were made regarding future regulation of MTBE, the tribunal noted that "Methanex entered a political economy in which it was widely known, if not notorious, that governmental environmental and health protection institutions at the federal and state level, [...] continuously monitored the use and impact of chemical compounds and commonly prohibited or restricted the use of some of those compounds for environmental and/or health reasons".[45]

Another NAFTA challenge to environmental regulation is *S.D. Myers v. Canada,* where Canada's regulation imposing a temporary ban on the export of PCB waste was held to violate the national treatment and the fair and equitable treatment provisions of NAFTA. Because the export ban was found to favour the use of Canadian companies for disposal of the waste and because the government of Canada conceded that there were environmental benefits to allowing export of the waste,[46] the tribunal found that the Canadian measure was discriminatory in intent. Noting the preamble language in NAFTA and the NAAEC, the tribunal clearly recognised that states have the "right to establish high levels of environmental protection" and that "environmental protection and economic development can and should be mutually supportive." However, in this case, it found that there was "no legitimate environmental reason" for Canada's export ban.[47] The tribunal also found that the type of measure at issue did not constitute a "performance requirement" because no "requirements'" were imposed on S.D. Myers. Finally, the measure was not tantamount to expropriation because the ban was only temporary and only resulted in a delayed opportunity for S.D. Myers.[48]

Arbitration cases involving allegations of corruption

The issue of corruption in connection with foreign investment has arisen in some recent investor-state disputes, where international arbitration tribunals have considered allegations of corruption, reviewed evidence

44. *Idem*, Part IV, Chapter D, para. 7.
45. *Idem*, Part IV, Chapter D, para. 9.
46. Canada's PCB wastes were located in closer proximity to the waste disposal sites in the US than to domestic disposal options.
47. *S.D. Myers, Inc. v. Canada*, UNICTRAL/NAFTA case, Partial Award, 13 Nov. 2000, paras. 220 and 195.

presented, including circumstantial evidence, and made inferences from the evidence to decide whether corruption took place.[49]

In the *Methanex* case (discussed above), Methanex made allegations of improper payments against California's then governor, Gray Davis. Methanex claimed that Archer Daniels Midland ("ADM"), a US-based ethanol producer, made large campaign contributions to Governor Davis' reelection campaign and in return was able to secure California's ban on MTBE. Methanex claimed that concerns about MTBE's effect on water were a mere pretext for the ban, and that it was really motivated by a desire to help ADM and others in the domestic ethanol industry and hurt foreign methanol producers like Methanex. The tribunal carefully considered the evidence put forward by Methanex and agreed that a "connect the dots" approach could be used to consider the evidence, *i.e.,* that circumstantial evidence and reasonable inferences from the evidence could be considered by a tribunal in determining whether corruption took place.[50]

The tribunal rejected Methanex's allegation because the campaign contributions were not unlawful and because the circumstantial evidence did not lead to an inference of a "*quiproquo*," *i.e.,* that the contributions were given in return for enactment of the MTBE ban. The tribunal noted that the timing of the payments did not support an inference that they helped gain passage of the ban because 1) at the time of the first ADM contribution to Davis, the California legislature had already required a study on the effects of MTBE and had already passed legislation requiring the Governor to take all appropriate action to protect the public based on the future results of the study; 2) the second campaign contribution came long after Governor Davis had already

48. The *S.D. Myers* tribunal was also called upon to determine whether Canada's actions did not violate *NAFTA* because they were authorized by the US-Canada bilateral Transboundary Agreement on Hazardous Waste or the Basel Convention on Transboundary Movement of Hazardous Waste. The tribunal reasoned that while NAFTA's Article 104 states that obligations under the Basel Convention shall prevail in the event of inconsistency with NAFTA, it also requires that parties should choose such means of compliance with the other treaty obligations that are least inconsistent with NAFTA. Both the bilateral agreement and the Basel Convention permit the export of hazardous waste if certain conditions for safe management of the waste are met. Based on the language of the waste treaties and the evidence that Canada was motivated by protectionism, the tribunal concluded that NAFTA had been violated. For a further discussion of the relationship between other international obligations and IIAs, see Moshe Hirsch, "Interactions between Investment and Non-Investment Obligations in International Investment Law", International Law Forum, the Hebrew University of Jerusalem (November 2006).
49. Many more arbitrations involving corruption in foreign investment have arisen in disputes between private companies. See Martin, Timothy, "International Arbitration and Corruption: An Evolving Standard," in *Transnational Dispute* Management, Vol. I, Issue No. 2 (May 2004).
50. *Methanex*, Part III, Chapter B, paras. 2-3.

signed an Executive Order banning MTBE, which was later codified into a statute; and 3) California, during this same time period, had also sought a waiver from the federal government's oxygenate requirement which, had it been granted, would have harmed ADM.[51]

Another recent decision, *World Duty Free Limited v. The Republic of Kenya*,[52] addresses the issue of corruption raised as a defence by the government.[53] World Duty Free, a UK company, contended that, through a series of actions, the government of Kenya expropriated its investment in a duty free shop which had been established pursuant to an investment contract with the Kenyan authorities. Kenya argued in defence that the investment contract was unenforceable because it was procured by payment of a bribe of USD 2 million to the then President of Kenya, Daniel arap Moi. The claimant conceded that the payment had been made, but argued that it saw the payment not as a bribe but as "a gift of protocol or a personal donation made to the President to be used for public purposes within the framework of the Kenyan system of Harambee".[54] Based on the claimant's statement that the payments were concealed (given in cash and "left in a brown briefcase by the wall") and that claimant perceived that the payments were required to secure the investment contract, the tribunal determined that the payments "must be regarded as a bribe made in order to obtain the conclusion of the 1989 Agreement".[55]

As to the consequences of the bribe, the tribunal reviewed the international conventions on corruption, including the OAS, OECD, and African Union conventions, the domestic laws criminalising corruption in Kenya and elsewhere, as well a number of court and arbitral decisions considering corruption, to conclude that "bribery is contrary to the international public policy of most, if not all, States or, to use another formula, to trans-national public policy" and therefore "claims based on contracts of corruption or on contracts obtained by corruption cannot be upheld by this Arbitral Tribunal".[56] Moreover, the fact that the President of Kenya had sought

51. The tribunal also noted that the contributions were not a substantial portion of Davis's re-election funds and that domestic methanol producers also contributed to Davis's campaign (showing that campaign contributions came not just from Methanex's competitors in the ethanol industry).
52. *World Duty Free Company Limited v. the Republic of Kenya*, ICSID Case No. Arb./00/7, Award, 5 Sep. 2006 (provisional copy), available at *www.investmentclaims.com/oa1.html*.
53. Although the decision focuses on the investment contract rather than a BIT, we discuss the decision because the same claims could have been raised under a BIT.
54. *Idem*, para. 133. "Harambee" is explained by the tribunal as follows: "[T]he concept of Harambee had its root in the African culture where societies made collective contribution toward individual or communal activities and this practice became popularized by President Kenyatta just after Kenyan independence." *Idem*, para. 134.
55. *Idem,* para. 136.
56. *Idem*., para. 157.

the bribe did not prevent the State of Kenya from raising the bribe as a defence. The tribunal reasoned that the President held elected office under the Constitution, was subject to the rule of law, and was separate from the State. The tribunal held that the claimant was not legally entitled to maintain any of its pleaded claims, but that the arbitration clause of the agreement remained valid and gave the tribunal jurisdiction.

ANNEX 3.A1

Methodology and List of IIAs Included in Survey

Methodology

This survey is based on a sample of 296 international investment agreements signed by the 30 OECD member countries or by the 9 non-member adherents to the OECD Declaration on International Investment and Multinational Enterprises. The sample contains 269 bilateral treaties (including 14 model treaties) and of 25 free trade agreements with investment provisions. The relevant texts of NAFTA are also reviewed.

For BITs, the "population" of treaties is that available on the UNCTAD website at *www.unctadxi.org/templates/DocSearch____779.aspx*. For Free Trade Agreements, it is those listed on the US Treasury and OAS websites (*www.ustr.gov/Trade_Agreements/SEction_Induex.html*) and *www.sice.oas.org/Trade*). The only exception to this are four treaties signed by Belgium (with the Democratic Republic of Congo, Korea, the People's Republic of China and the United Arab Emirates, which were provided directly by Belgium. The research was conducted in December 2006. Because of the time lag between signature of treaties and their inclusion on the internet, some recent treaties might not be included in this survey.

The survey uses a flexible sampling methodology – more emphasis was put on countries with many investment agreements and with significant environmental, labour or anti-corruption texts. Treaties that were not available electronically or that were not available in English, French or Spanish were not considered. The sample was also selected so as to give a time dimension to the survey results. While more effort was spent in examining recent agreements, older treaties were also examined. In particular, the oldest treaty still in force and available electronically was read and, where relevant, several treaties from the early nineties were selected.

The intent of the survey methodology was to produce a comprehensive inventory of the international investment agreements' treatment of societal issues (mainly, labour, environment and anti-corruption). However, because the survey is based on a sample and not the complete set of all treaties, some relevant texts may be missing.

The BITs were reviewed to see whether any texts (including the preamble, articles and annexes) discussed the environment, human rights, labour rights or corruption. Where the texts were searchable, searches were made for the following terms: "environment", "societal", "human", "labour", "labor", "worker", and "corruption".

Annex Table 3.A1.1. **Bilateral investment treaties**

Country	Treaty	Environment	Labour
Australia	Sri Lanka 2002	no	no
	Egypt 2001	no	no
	Uruguay 2001	no	no
	India 1999	no	no
	Lithuania 1998	no	no
	Argentina 1995	no	no
	Indonesia 1995	no	no
	Chile 1996	no	no
	Hong Kong 1993	no	no
	Czech Republic 1993	no	no
	Hungary 1991	no	no
	China 1988	no	no
Austria	Philippines 2002	no	no
	Slovenia 2001	no	no
	Mongolia 2001	no	no
	Saudi Arabia 2001	no	no
	Armenia 2001	no	no
	Egypt 2001	no	no
	Mexico 1998	no	no
	Chile 1997	no	no
	Korea 1991	no	no
	Malaysia 1985	no	no
Belgium/Luxembourg	Model BIT	yes	yes
	Korea 2006	yes	yes
	People's Republic of China	yes (MOA)	yes (MOA)
	Uganda 2005	no	no
	Democratic Republic of Congo 2005	yes	yes
	United Arab Emirates 2004	yes	yes
	Costa Rica 2002	no	no
	Thailand 2002	no	no
	Benin 2001	no	no
	Burkina Faso 2001	no	no
	Estonia 1996	no	no
	Mexico 1996	no	no
	Czech Republic 1989	no	no
	Sri Lanka 1982	no	no
	Indonesia 1970	no	no
Canada	Model BIT	yes	yes
	El Salvador 1999	yes	no
	Costa Rica 1998	yes	no
	Uruguay 1997	yes	no
	Croatia 1997	yes	no
	Thailand 1997	yes	no
	Lebanon 1997	yes	no

Annex Table 3.A1.1. **Bilateral investment treaties** *(cont.)*

Country	Treaty	Environment	Labour
	Armenia 1997	yes	no
	Barbados 1996	yes	no
	Egypt 1996	yes	no
	Ecuador 1996	yes	no
	Panama 1996	yes	no
	Venezuela 1996	yes	no
	Romania 1996	yes	no
	South Africa 1995	yes	no
	Philippines 1995	yes	no
	Latvia 1995	yes	no
	Trinidad and Tobago 1995	yes	no
	Ukraine 1994	yes	no
	Slovakia 1992	no	no
	Hungary 1991	no	no
	Argentina 1991	no	no
	Czech Republic 1990	no	no
	Poland 1990	no	no
	Russian Federation 1989	no	no
Czech Republic	Model BIT 2005	no	no
	Bosnia and Herzegovina 2002	no	no
	Nicaragua 2002	no	no
	Mexico 2002	no	no
	Lithuania 1994	no	no
	Ireland 1996	no	no
	Israel 1997	no	no
	Turkey 1992	no	no
	Australia 1993	no	no
	Greece	no	no
	United States 1991	no	yes
	Canada 1990	no	no
	Finland 1990	no	no
	Belgium and Luxembourg 1989	no	no
Denmark	Ethiopia 2001	no	no
	Kuwait 2001	no	no
	Uganda 2001	no	no
	Slovenia 1999	no	no
	Estonia 1991	no	no
	Poland 1990	no	no
	Hungary 1988	no	no
	Indonesia 1968	no	no
Finland	Model BIT	yes	Yes
	Armenia 2004	yes	yes
	Uruguay 2005	yes	yes
	Nicaragua 2003	yes	yes

Annex Table 3.A1.1. **Bilateral investment treaties** *(cont.)*

Country	Treaty	Environment	Labour
	Kyrgyzstan 2003	yes	yes
	Tanzania 2001	yes	yes
	Bosnia and Herzegovina 2000	yes	yes
	Croatia 1999	no	No
	Slovenia 1998	no	no
	Poland 1996	no	no
	Brazil 1995	no	no
	Argentina 1993	no	no
	Turkey 1993	no	no
	Czech Republic 1990	no	no
France	Model BIT	no	No
	Iran 2003	no	No
	Madagascar 2003	no	No
	Cambodia 2000	no	No
	Slovenia 1998	no	No
	Mexico 1998	no	No
	Brazil 1995	no	No
	Hong Kong 1995	no	No
	Romania 1995	no	No
	Chile 1992	no	no
	Lithuania 1992+B98	no	no
	Estonia 1992	no	no
	China 1984	no	no
	Korea 1977	no	no
	Dem. Republic of the Congo 1972	no	no
Germany	Model BIT 2005	no*	no
	China 2003	no*	no
	Thailand 2002	no*	no
	Sri Lanka 2000	no*	no
	Mexico 1998	no*	no
	Romania 1996	no	no
	Poland 1989	no*	no
	Russian Federation 1989	no	no
	Yemen 1974	no	no
	Ethiopia 1964	no	no
	Indonesia 1968	no	no
	Malaysia 1960	no	no
Greece	Model BIT	no	no
	Azerbaijan 2004	no	no
	Kazakhstan 2002	no	no
	Turkey 2000	no	no
	Mexico 2000	no	no
	Slovenia 1997	no	no
	Chile 1996	no	no

Annex Table 3.A1.1. **Bilateral investment treaties** *(cont.)*

Country	Treaty	Environment	Labour
	Korea 1995	no	no
	Estonia 1994	no	no
	Egypt 1993	no	no
	Czech and Slovak Republics 1991	no	no
Hungary	Yemen 2004	no	no
	India 2003	no	no
	Latvia 1999	no	no
	Romania 1993	no	no
	Australia 1991	no	no
	Israel 1991	no	no
	Norway 1991	no	no
	Canada 1991	no	no
	Denmark 1990	no	no
Iceland	Lebanon 2004	no	no
	China 1994	no	no
	Chile 2003	no	no
Ireland	Czech Republic 1996	no	no
Italy	Nicaragua 2004	no	no
	Jordan 2001	no	no
	Tanzania 2001	no	no
	Korea 1989	no	no
Japan	Vietnam 2003	yes	yes
	Korea 2002	yes	yes
	Bangladesh 1998	no	no
	Russian Federation 1998	no	no
	Turkey 1992	no	no
	Egypt 1977	no	no
Korea	Dem. Republic of the Congo 2005	no	no
	Mauritania 2005	no	no
	Slovakia 2005	no	no
	Albania 2003	no	no
	Japan 2002	yes	no
	Mexico 2000	no	no
	Greece 1995	no	no
	Austria 1991	no	no
	Romania 1990	no	no
	Russian Federation 1990	no	no
	Italy 1989	no	no
	France 1977	no	no
Mexico	Czech Republic 2002	no	no
	Cuba 2001	yes	no
	Sweden 2000	No	no
	Korea 2000	No	no
	Greece 2000	No	no

Annex Table 3.A1.1. **Bilateral investment treaties** *(cont.)*

Country	Treaty	Environment	Labour
	Austria 1998	No	no
	France 1998	No	no
	Germany 1998	No	no
	Spain 1998	No	no
	Netherlands 1998	No	no
	Belgium/Luxembourg 1996	no	no
	Switzerland 1995	yes	no
Netherlands	Model BIT	yes	yes
	Cambodia 2003	no	no
	Laos 2003	no	no
	Zambia 2003	no	no
	Malawi 2003	no	no
	Belize 2002	no	no
	Tajikistan 2002	no	no
	Kazakhstan 2002	no	no
	Brazil 1998	no	no
	Mexico 1998	no	no
	Venezuela 1991	no	no
	Russian Federation 1989	no	no
	Turkey 1986	no	no
	Yemen 1985	no	no
New Zealand	Argentina 1999	no	no
	Chile 1999	no	no
	Hong Kong 1995	no	no
	China 1988	no	no
Norway	Russian Federation 1998	no	no
	Peru 1995	no	no
	Hungary 1991	no	no
	Malaysia 1984	no	no
Poland	United States 1990/2004	no	yes
	Jordan 1997	no	no
	Finland 1996	no	no
	Canada 1990	no	no
	Denmark	no	no
	Germany 1989	no*	no
Portugal	Model Bit	no	no
	Turkey 2002	no	no
	Bosnia and Herzegovina 2002	no	no
	Philippines 2002	no	no
	India 2000	no	no
	Romania 1993	no	no
Slovakia	Model BIT	no	no
	Korea 2005	no	no
	Israel 1999	no	no
	Turkey 1992	no	no

Annex Table 3.A1.1. **Bilateral investment treaties** *(cont.)*

Country	Treaty	Environment	Labour
Spain	Model BIT	no	no
	Chile 1991	no	no
	Albania 2003	no	no
	Jamaica 2002	no	no
	Uruguay 1992	no	no
	Syrian Republic 2003	no	no
	Namibia 2003	no	no
	Serbia and Montenegro 2002	no	no
	Iran 2002	no	no
	Mexico 1998	no	no
Sweden	Model BIT	no	no
	Romania 2002	no	no
	Uzbekistan 2001	no	no
	Mexico 2000	no	no
	Bosnia and Herzegovina 2000	no	no
	Slovenia 1999	no	no
	Russia 1995	yes	no
	China 1992	no	no
	Latvia 1992	no	no
	Estonia 1992	no	no
	Sri Lanka 1984	no	no
Switzerland	Chile 2003	no	no
	Sudan 2002	no	no
	Lebanon 2000	no	no
	Bangladesh 2000	no	no
	Mexico 1995	yes	no
	Czech and Slovak Republics 1990	no	no
Turkey	Model BIT	no	no
	Lebanon 2004	no	no
	Portugal 2002+B346	no	no
	Greece 2000	no	no
	Russian Federation 1997	no	no
	Finland 1993	no	no
	Japan 1992	no	no
	Slovakia 1992	no	no
	United Kingdom 1991	no	no
	Netherlands 1986	no	no
	United States 1985	no	no
United Kingdom	Model BIT	no	no
	Bosnia and Herzegovina 2002	no	no
	Vietnam 2002	no	no
	Hong Kong 1998	no	no
	Slovenia 1996	no	no
	Latvia 1995	no	no

Annex Table 3.A1.1. **Bilateral investment treaties** *(cont.)*

Country	Treaty	Environment	Labour
	Estonia 1994	no	no
	Czech and Slovak Republic 1994	no	no
	Turkey 1991	no	no
	Argentina 1990	no	no
	Korea 1978	no	no
United States	Model BIT 2004	yes	yes
	Uruguay 2005	yes	yes
	Bahrain 1999	yes	yes
	El Salvador 1999	yes	yes
	Mozambique 1998	yes	yes
	Bolivia 1998	yes	yes
	Jordan 1997	yes	yes
	Azerbaijan 1997	yes	yes
	Albania 1995	yes	yes
	Nicaragua 1995	yes	yes
	Honduras 1995	yes	yes
	Jamaica 1994	no	yes
	Mongolia 1994 (1992 prototype)	no	yes
	Georgia 1994	yes	yes
	Trinidad and Tobago 1994	yes	yes
	Ukraine 1994	no	yes
	Uzbekistan 1994	yes	yes
	Armenia 1992	no	yes
	Ecuador 1993	no	yes
	Lithuania 2000 (1992 prototype)	no	yes
	Kazakstan 1992	no	yes
	Argentina 1991	no	no
	Poland 1990/2004 protocol	no	yes
	Egypt	no	no
	Cameroon 1986	no	no
	Bangladesh 1986	no	no
	Turkey 1985	no	no
Argentina	Panama 2004	no	no
	Thailand 2000	no	no
	New Zealand 1999	no	no
	Australia 1995	no	no
	Finland 1993	no	no
	Canada 1991	no	no
Brazil	Netherlands 1998	no	no
	Finland 1995	no	no
	Venezuela 1995	no	no
	France 1995	no	no
	Chile 1994	no	no

Annex Table 3.A1.1. **Bilateral investment treaties** *(cont.)*

Country	Treaty	Environment	Labour
Chile	Spain 2004	no	no
	Chile 2003	no	no
	Peru 2000	no	no
	Switzerland 2003	no	no
	New Zealand 1999	no	no
	Austria 1997	no	no
	Australia 1996	no	no
	Brazil 1994	no	no
	Greece 1996	no	no
	France 1992	no	no
Estonia	Belgium 1996	no	no
	Greece 1994	no	no
	Israel 1994	no	no
	United Kingdom	no	no
	United States 1994	no	yes
	France 1992	no	no
	Denmark 1991	no	no
Israel	Model BIT	no	no
	Ethiopia 2003	no	no
	Romania 1998	no	no
	Slovakia 1999	no	no
	Czech Republic 1997	no	no
	Estonia 1994	no	no
	Hungary 1991+B109	no	no
Latvia	United States 1995	no	yes
	United Kingdom 1994	no	no
	Hungary 1999	no	no
	Canada 1995	yes	no
	Sweden 1992	no	no
Lithuania	Kuwait 2001	no	no
	Australia 1998	no	no
	France 1992	no	no
	United States 1998	no	yes
	Czech Republic 1994	no	no
Romania	Sweden 2002	no	no
	Hungary 1993	no	no
	Israel 1998	no	no
	Portugal 1993	no	no
	United States 1992	no	no
	Germany 1996	no	no
	Canada 1996	yes	no
	Korea 1990	no	no

Annex Table 3.A1.1. **Bilateral investment treaties** *(cont.)*

Country	Treaty	Environment	Labour
Slovenia	Model BIT	no	no
	Bosnia and Herzegovina	no	no
	Austria	no	no
	Finland 1998	no	no
	China 1997	no	no
	Greece 1997	no	no
	Denmark 1999	no	no

Annex Table 3.A1.2. **Free trade agreements or Cooperation/Partnership agreements with investment content**

Australia-Singapore	Mexico-Nicaragua	US-Singapore
Canada-Chile	Mexico-El Salvador-Guatemala-Honduras	CAFTA
Canada-Costa Rica	Mexico-Uruguay	Chile-China
Japan-Philippines	US-Australia	Chile-Korea
Korea-Singapore	US-Chile	Chile-Panama
Mexico-Colombia-Venezuela	US-Morocco	Chile-Peru
Mexico-Bolivia	US-Oman	EU-Russia
Mexico-Chile	US-Peru	EU-ACP (Cotonou)
Mexico-Costa Rica		EFTA-Singapore

ANNEX 3.A2

Inventory of Environmental, Labour and Anti-corruption Texts

1. Bilateral investment treaties

This section summarises the environmental, labour and anti-corruption provisions in the signed BITs and model BITs for Belgium/Luxembourg, Canada, Finland, Japan, Latvia, Mexico, the Netherlands, Sweden, and the United States.[57] In cases where the Parties to the treaty are two OECD countries (*e.g.* the bilateral investment treaty between Japan and Korea), we have listed the relevant provisions under the OECD member that has more treaties with the noted language.

1.1. *Belgium/Luxembourg*

The Belgian/People's Republic of China BIT has a "Memorandum of Agreement on Cooperation in the Field of Environment" and a "Memorandum of Agreement on Cooperation in the Field of Employment, Labour, Social Dialogue and Social Affairs".

The preamble of the Belgian/Korea BIT contains the following language:

> Recognising the right of each Contracting Party to establish its own levels of domestic environmental protection, development policies, priorities and labour standards, and to adopt or modify accordingly its environmental and labour legislation,
>
> Understanding that no Contracting Party shall change or relax its domestic environmental and labour legislation in a way that undermines internationally recognised labor rights to encourage investment, investment maintenance or the expansion of the investment that shall be made in its territory.

The "Definitions" section of the Belgian/Luxembourg Model BIT and its BITs with the Democratic Republic of Congo contain the following texts (*Note:* The Belgian-United Arab Emirates BIT contains the chapeaux of the texts

57. The summary is based on signed BITs available on the UNCTAD database as of December 2006. Many of the more recent treaties were not available in the database and therefore could not be included. Model BITs were obtained from the governments or found online.

below, but not the lists of environmental measure and internationally recognised labour rights):

5. The terms "environmental legislation" shall mean any legislation of the Contracting Parties, or provision 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:
   a) the prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
   b) the control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto;
   c) the protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Contracting Party's territory.
6. The terms "labour legislation" shall mean legislation of the Kingdom of Belgium, of the Grand-Duchy of Luxembourg or of .XXX, or provisions thereof, that are directly related to the following internationally recognised labour rights:
   a) the right of association;
   b) the right to organise and bargain collectively;
   c) a prohibition on the use of any form of forced or compulsory labour;
   d) a minimum age for the employment of children;
   e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

In addition, Article 5 of the Belgium/Luxembourg Model BIT and in the Belgian/DRC BIT contain the following environmental provisions:

1. Recognising the right of each Contracting Party to establish its own levels of domestic environmental protection and environmental development policies and priorities, and to adopt or modify accordingly its environmental legislation, each Contracting Party shall strive to ensure that its legislation provides for high levels of environmental protection and shall strive to continue to improve this legislation.
2. The Contracting Parties recognise that it is inappropriate to encourage investment by relaxing domestic environmental legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment.

3. The Contracting Parties reaffirm their commitments under the international environmental agreements, which they have accepted. They shall strive to ensure that such commitments are fully recognised and implemented by their domestic legislation.
4. The Contracting Parties recognise that co-operation between them provides enhanced opportunities to improve environmental protection standards. Upon request by either Contacting Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purpose of this Article.

The Model BIT and the Belgian DRC BIT also contain detailed labour provisions in Article 6:

1. Recognising the right of each Contracting Party to establish its own domestic labour standards, and to adopt or modify accordingly its labour legislation, each Contracting Party shall strive to ensure that its legislation provide for labour standards consistent with the internationally recognised labour rights set forth in paragraph 6 of Article 1 and shall strive to improve those standards in that light.
3. The Contracting Parties recognise that it is inappropriate to encourage investment by relaxing domestic labour legislation. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment.
4. The Contracting Parties reaffirm their obligations as members of the International Labour Organisation and their commitments under the International Labour Organisation Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Contracting Parties shall strive to ensure that such labour principles and the internationally recognised labour rights set forth in paragraph 6 of Article 1 are recognised and protected by domestic legislation.
5. The Contracting Parties recognise that co-operation between them provides enhanced opportunities to improve labour standards. Upon request by either Contacting Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purpose of this Article.

The Belgian BIT with the United Arab Emirates contains similar language to that reproduced above in its Articles 5 and 6 on the environment and labour, respectively.

1.2. Canada

Canada's most recent treaties contain language specifically addressing environmental protection. The Canada-El Salvador BIT, signed in 1999, was the most recent Canadian treaty available in the UNCTAD inventory. Annex I, Article III of this treaty contains the following provision, providing exceptions from the agreement:

> Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
>
> Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:
>
> - necessary to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;
> - necessary to protect human, animal or plant life or health; or
> - relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.

Similar language is found in Canada's BITs with the following nations: Costa Rica, signed in 1998 (Annex I, Article III); Armenia, signed in 1997 (Article XVII); Croatia, signed in 1997 (Annex I, Article III); Lebanon, signed in 1997 (Annex I, Article III); Thailand, signed in 1997 (Article XVII); Uruguay, signed in 1997 (Annex I, Article III); Venezuela, signed in 1996 (see Annex, Paragraph 2); Egypt, Ecuador, Barbados, Panama, and Romania, all signed in 1996 (Article XVII in each treaty); South Africa, the Philippines, Trinidad and Tobago, and Latvia, all signed in 1995 (Article XVII in each treaty); and with Ukraine signed in 1994 (see Article XVII). The earlier Canadian BITs reviewed did not contain any environmental, labour or anti-corruption provisions.

Canada's 2004 Model BIT[58] contains the following environmental provisions:

Article 10. General exceptions

1. Subject to the requirement that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors, or a disguised restriction on

58. Available at *http://ita.law.uvic.ca/investmenttreaties.htm/*.

international trade or investment, nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

a) to protect human, animal or plant life or health;

b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or

c) for the conservation of living or non-living exhaustible natural resources.

2. Nothing in this Agreement shall be construed to prevent a Party from adopting or maintaining reasonable measures for prudential reasons, such as:

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

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

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

Article 11. Health, safety and environmental measures

The Parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. 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.

Annex B.13(1) of the Model BIT also provides that environmental measures shall not usually be considered indirect expropriation:

c) Except in rare circumstances, such as when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Party that are designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute indirect expropriation.

There is also a provision in the Model BIT allowing an arbitration panel to use experts or environmental, health or safety issues. Article 42. The UNCTAD inventory does not include any new treaties that use as a base the new Canadian model BIT.

1.3. Finland

Finland's 2004 Model BIT and recent signed treaties contain preamble language (but no provisions in the main text) on the environment and labour issues. Finland's model treaty and its BITs with Uruguay, signed in 2005, Armenia, signed in 2004, Nicaragua and Kyrgyzstan, signed in 2003, Tanzania, signed in 2001, and Bosnia and Herzegovina, signed in 2000, all have the following relevant preamble language:

> RECOGNISING that agreement on the treatment to be accorded such investments will stimulate the flow of private capital and the economic development of the Contracting Parties;
>
> AGREEING that a stable framework for investment will contribute to maximising the effective utilisation of economic resources and improve living standards;
>
> RECOGNISING that the development of economic and business ties can promote respect for internationally recognised labour rights;
>
> AGREEING that these objectives can be achieved without relaxing health, safety and environmental measures of general application […]

The earlier Finnish BITs (before 2000) reviewed for this paper did not include such language.

1.4. Japan

Japan's most recent BITs contain environmental provisions as well as a reference to co-operation between labor and management. Japan's BIT with Vietnam, signed in 2003, and with Korea, signed in 2002, both contain the following preamble language:

> Recognising that these objectives can be achieved without relaxing health, safety and environmental measures of general application;
>
> Recognising the importance of the cooperative relationship between labour and management in promoting investment between both countries; […]

Both BITs also include an Article 21 which provides that:

> [Both contracting parties] recognise that it is inappropriate to encourage investment by investors of the other Contracting Party by relaxing environmental measures. To this effect each Contracting Party should not waive or otherwise derogate from such environmental measures as an encouragement for the establishment, acquisition or expansion in its territory of investments by investors of the other Contracting Party.

The earlier Japanese BITs reviewed for this paper did not include any environmental language.

1.5. *Latvia*

Latvia's current Model BIT contains the following environmental and labour language in the preamble:

> Agreeing that a stable framework for investments will contribute to maximising the effective utilisation of economic resources and improve living standards;
>
> Recognising that the development of economic and business ties can promote respect for internationally recognised labour rights,
>
> Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application [...]

The general exceptions section of the Model BIT has the following "right to regulate" language on environment and health:

2. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or maintaining measures, including environmental measures:

   a) necessary for the maintenance of public order;

   b) necessary to protect human, animal or plant life or health.

1.6. *Mexico*

Article 5(2) of Mexico's BIT with Cuba, signed in 2001, has the following environmental provision (in Spanish) on performance requirements:

> La medida que exija que una inversión emplee una tecnología para cumplir en lo general con requisitos aplicables a salud, seguridad o medio ambiente, no se considerará incompatible con el párrafo 1f). Para brindar mayor certeza, los Artículos 3 y 4 se aplican a la citada medida.

Ad Article 3 of Mexico's BIT with Switzerland, signed in 1995, has the following environmental provision:

> The Parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, neither Party should waive or otherwise derogate from, or offer to waive or derogate, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If either Party considers that the other Party has offered such an encouragement, it may request consultations.

In Protocol, Ad Article 3, the treaty also references the OECD's instruments:

> The Parties recognise that the entry and the expansion of investments in their territory by investors of the other Party shall be subject to relevant

> instruments of the Organisation for Economic Co-operation and Development (OECD) in the field of international investments.

However, Mexico's BITs with the Czech Republic, signed in 2002, with Sweden and Korea, signed in 2000, and with the Netherlands, signed in 1998, contain no environmental or societal provisions. As noted below, Mexico's FTAs do have environmental provisions.

1.7. Netherlands

The Netherlands' 2004 Model BIT contains the following environmental and labour language in the preamble (but no provisions in the main text):

> Recognising that the development of economic and business ties will promote internationally accepted labour standards;
>
> Considering that these objectives can be achieved without compromising health, safety and environmental measures of general application […]

1.8. Sweden

The preamble of Sweden's 2003 Model BIT contains the following text:

> Recognising that the development of economic and business ties can promote respect for internationally recognised labour rights; and
>
> Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application;

Article 2 of Sweden's BIT with the Russian Federation, signed in 1995, contains the following environmental language in the article on "Protection and Reciprocal Protection of Investments":

> 3) "Each Contracting Party may have in its legislation limited exceptions to national treatment provided for in Paragraph 2) of this Article. Any new exception will not apply to investments made in its territory by investors of the other Contracting Party before the entry into force of such an exception, except when the exception is necessitated for the purpose of the maintenance of defence, national security and public order, protection of the environment, morality and public health."

The other Swedish BITs reviewed did not contain such language. Sweden's 2002 Model BIT contains no environmental, labour or anti-corruption language.

1.9. United States

The United States' 2004 Model BIT[59] contains detailed language in the text and preamble specifically addressing environmental protection and health and labour rights, as well as other societal issues:

Preamble

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

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognised labour rights; […]

Article 8: Performance requirements

[…]

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)*, and *f)*, 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.

Article 12: Investment and environment

1. The Parties recognise that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental 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 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

59. Available at *http://ita.law.uvic.ca/investmenttreaties.htm*.

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: Investment and labour

1. The Parties recognise 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 recognised 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, or provisions thereof, that are directly related to the following internationally recognised labor rights:

a) the right of association;

b) the right to organise 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 32: Expert reports

Without prejudice to the appointment of other kinds of experts where authorised 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.

Annex B. Expropriation

The Parties confirm their shared understanding that:

[…]

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.

The UNCTAD inventory includes just one BIT, the US-Uruguay BIT signed in 2005, which was concluded after creation of the 2004 Model BIT. The US-Uruguay BIT contains the same main text language quoted above from the 2004 Model BIT. The US-Uruguay BIT has an additional phrase regarding "consumer protection" in the preamble:

> *Desiring* to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognised labor rights; […]

The United States 1994 Model BIT contained preamble language on the environment and worker rights (but no language in the main text of the treaty) and therefore a number of the treaties signed in the mid- to late 1990's contain this preamble language. For example, the US BIT with Albania, signed in 1995, provides the following preamble language:

> Agreeing that a stable framework for investment will maximise effective utilisation of economic resources and improve living standards;
>
> Recognising that the development of economic and business ties can promote respect for internationally recognised worker rights;
>
> Agreeing that these objectives can be achieved without relaxing health, safety and environmental measures of general application…

The Letter of Submittal from the United States Department of State accompanying the US-Albania BIT, has the following statement:

> *Title and Preamble*
>
> The Title and Preamble state the goals of the Treaty. Foremost is the encouragement and protection of investment. Other goals include economic co-operation on investment issues; the stimulation of economic development; higher living standards; promotion of respect for internationally-recognised worker rights; and maintenance of health, safety, and environmental measures. While the Preamble does not impose binding obligations, its statement of goals may assist in interpreting the Treaty and in defining the scope of Party-to-Party consultations pursuant to Article VIII.

Letter of Submittal, US-Albania BIT, submitted by Peter Tarnoff, US Department of State, 3 August 1995. Other US BITs signed during the mid- to late-1990's contain the same language in the preamble and the letters of submittal. Such language is included, for example, in the US BITs with Azerbaijan, signed in 1997; Bolivia, signed in 1998; El Salvador, signed in 1999; Georgia, signed in 1994; Honduras, signed in 1995; Jordan, signed in 1997; Mozambique, signed in 1998; and Uzbekisthan, signed in 1994.

The US BITs reviewed that predate the 1994 protocol did not include any environmental language but sometime included language on worker rights. For example, US BITs with Argentina, signed in 1991; Kazakstan, signed in 1992; Ecuador, signed in 1993; and Jamaica, signed in 1994, contain the following preamble language on worker rights but nothing on the environment:

> Recognising that the development of economic and business ties can contribute to the well-being of workers in both Parties and promote respect for internationally recognised worker rights;…

The 1992 treaty between the US and the Czech and Slovak Republics provides the following preamble language regarding raising living standards and worker rights:

> Convinced that private enterprise operating within free and open markets offers the best opportunities for raising living standards and the quality of life for the inhabitants of the Parties, improving the well-being of workers, and promoting overall respect for internationally recognised worker rights […].

2. NAFTA

We set forth below the environmental and societal provisions in NAFTA. We also provide a brief summary of NAFTA's side agreements on environment and labor.

2.1. Preamble and objectives

The North American Free Trade Agreement ("NAFTA"), signed in 1992 by Canada, Mexico, and the US, includes investment provisions with environmental language as well as environmental and social issues in the preamble.[60] The following relevant language is in the NAFTA preamble:

> CREATE new employment opportunities and improve working conditions and living standards in their respective territories;
>
> UNDERTAKE each of the preceding in a manner consistent with environmental protection and conservation;
>
> PRESERVE their flexibility to safeguard the public welfare;
>
> PROMOTE sustainable development;
>
> STRENGTHEN the development and enforcement of environmental laws and regulations; and
>
> PROTECT, enhance and enforce basic workers' rights […]

60. Available at *www.sice.oas.org/trade/nafta/naftatce.asp*.

NAFTA also has an "Objectives" article, which does not contain any language on environmental or social issues. It reads as follows.

1. The objectives of this Agreement, as elaborated more specifically through its principles and rules, including national treatment, most-favored-nation treatment and transparency, are to:
   a) eliminate barriers to trade in, and facilitate the cross-border movement of, goods and services between the territories of the Parties;
   b) promote conditions of fair competition in the free trade area;
   c) increase substantially investment opportunities in the territories of the Parties;
   d) provide adequate and effective protection and enforcement of intellectual property rights in each Party's territory;
   e) create effective procedures for the implementation and application of this Agreement, for its joint administration and for the resolution of disputes; and
   f) establish a framework for further trilateral, regional and multilateral co-operation to expand and enhance the benefits of this Agreement.
2. The Parties shall interpret and apply the provisions of this Agreement in the light of its objectives set out in paragraph 1 and in accordance with applicable rules of international law.

2.2. Relation to other environmental agreements

NAFTA also contains an article titled "Relation to Environmental and Conservation Agreements" which provides:

1. In the event of any inconsistency between this Agreement and the specific trade obligations set out in:
   a) the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington, 3 March 1973, as amended 22 June 1979;
   b) the *Montreal Protocol on Substances that Deplete the Ozone Layer*, done at Montreal, 16 September 1987, as amended 29 June 1990;
   c) the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel, 22 March 1989, on its entry into force for Canada, Mexico and the United States; or
   d) the agreements set out in Annex 104.1,

such obligations shall prevail to the extent of the inconsistency, provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement.

2. The Parties may agree in writing to modify Annex 104.1 to include any amendment to an agreement referred to in paragraph 1, and any other environmental or conservation agreement.

Article 104. Annex 104.1 sets forth the following bilateral agreements:

1. *The Agreement Between the Government of Canada and the Government of the United States of America Concerning the Transboundary Movement of Hazardous Waste*, signed at Ottawa, 28 October 1986.
2. *The Agreement Between the United States of America and the United Mexican States on Cooperation for the Protection and Improvement of the Environment in the Border Area*, signed at La Paz, Baja California Sur, 14 August 1983.

2.3. Investment Chapter

The Investment Chapter, Chapter 11, contains the following language:

Article 1114: Environmental measures

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
2. The Parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. If a Party considers that another 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.

In addition, Article 1106, which prohibits certain "performance requirements" such as export quotas or minimum domestic content requirements in products, states that *bona fide* environmental measures are not precluded and that investment incentives may be conditioned *inter alia* on requirements for employing or training workers (emphasis added in texts quoted below):

1. No Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, in connection with the establishment, acquisition, expansion, management, conduct or operation of an investment of an investor of a Party or of a non-Party in its territory:

a) to export a given level or percentage of goods or services;

b) to achieve a given level or percentage of domestic content;

c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services 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 provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

f) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws or to act in a manner not inconsistent with other provisions of this Agreement; or

g) to act as the exclusive supplier of the goods it produces or services it provides to a specific region or world market.

2. A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f). For greater certainty, Articles 1102 and 1103 apply to the measure.

3. No Party may condition 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 any of the following requirements:

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 producers 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

d) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

4. Nothing in paragraph 3 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, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

5. Paragraphs 1 and 3 do not apply to any requirement other than the requirements set out in those paragraphs.

6. **Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph 1*b)* or *c)* or 3*a)* or *b)* shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:**

   ***a)* necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;**

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

   ***c)* necessary for the conservation of living or non-living exhaustible natural resources.**

Article 1131 on "expert reports" also stipulates that experts may be appointed to provide information on environmental, health, or safety matters:

> Without prejudice to the appointment of other kinds of experts where authorised 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.

2.4. Side agreements to NAFTA

NAFTA was accompanied by separate detailed agreements on labour and environment, the North American Agreement on Labor Cooperation ("NAALC") and the North American Agreement on Environmental Cooperation ("NAAEC").[61]

2.4.1. Labour

The NAALC affirms the right of each party to establish its own labour standards, requires each party to ensure high labour standards and to enforce its labour laws. Articles 2 and 3. Each party shall provide access to persons to administrative, quasi-judicial, judicial or labour tribunals that are fair, equitable and transparent and comply with due process. Article 5. The parties shall ensure that their laws are published in advance of adoption and provide an opportunity to interested persons to comment. Article 6. The parties shall promote awareness of their labor laws. Article 7.

61. *Idem*.

The NAALC creates a Commission for Labor Cooperation comprising a ministerial Council and a Secretariat. Article 8. The Council will oversee the implementation of the NAALC and address questions and differences that may arise between the parties regarding the NAALC. Article 10. The Council is to promote co-operation among the Parties on labor issues, including by holding trainings, seminars and providing technical assistance. Article 11. A party may seek consultations with any other party on whether there has been a persistent failure to enforce occupational safety and health, child labour, or minimum wage technical labour standards. Article 27. If the matter is not resolved after consultations, it may be referred to the Council, which shall attempt to resolve the dispute through recourse to good offices, conciliation, mediation or other dispute resolution procedures. Article 28. If the matter remains unresolved it may go to an arbitral panel if the matter is trade-related and covered by mutually recognised labour laws. Article 29. The NAALC also defines "labor laws" as laws covering certain issues, including labor protections for children and young persons, the right to bargain collectively and to strike, elimination of employment discrimination, equal pay for women and men, prevention of and compensation for occupational injuries and illnesses, and protection of migrant workers. Article 49.

2.4.2. Environment

The NAAEC is structured much like the NAALC. It recognises that each government has the right to set its own levels of domestic environmental protection and priorities and requires each party to ensure high levels of environmental protection and to enforce its environmental laws and regulations. Articles 3 and 5. The parties shall ensure that their laws are published in advance of adoption and provide an opportunity to interested persons to comment. Article 4. Each party shall provide access to persons with a legally recognised interest to administrative, quasi-judicial, judicial or administrative proceedings to enforce environmental laws. Article 6. Such proceedings shall be fair, open, and equitable and comply with due process. Article 7.

The NAAEC creates a Commission for Environmental Cooperation comprising a Council, a Secretariat, and a Joint Public Advisory Committee. Article 8. The Council will oversee the implementation of the NAAEC and address questions and differences that may arise between the parties regarding the NAAEC. Article 10. The Council is to promote co-operation among the Parties on environmental issues, including establishing a process for developing recommendations on greater compatibility of environmental technical regulations, standards and conformity assessment procedures in a manner consistent with NAFTA. Article 10. The Council shall cooperate with

the NAFTA Free Trade Commission to achieve the environmental goals and objectives of NAFTA by acting as a point of inquiry and receipt for comments from NGOS and persons and by providing assistance in consultations where a Party considers that another Party is lowering or offering to lower environmental measures to encourage investment. Article 10.

The Secretariat will have an Executive Director, who will be chosen by the Council and will manage the staff of the Secretariat. Article 11. The Secretariat may consider a submission from NGOs or persons asserting that a Party is failing to effectively enforce its environmental law. Article 14. After considering certain criteria, the Secretariat may request a response from the Party, which shall submit a response to the Secretariat. If the Secretariat determines that the matter warrants developing a factual record, and if the Council agrees by a two-thirds vote, then the Secretariat shall develop a factual record for the matter. A Party may comment on the factual record and the Council may determine to make the record publicly available. Article 15.

The Joint Public Advisory Committee will have 15 members. It may provide advice to the Council on any matter under the NAAEC and provide technical and scientific information to the Secretariat including for developing a factual record under Article 15. Article 16. Each Party may also convene a national advisory committee, comprising members of its public, including representatives of NGOs and persons, to advise it on the implementation of the NAAEC. Article 17.

Any party may request a consultation with any other party regarding whether there has been a persistent pattern of failure by the other party to effectively enforce its environmental laws. Article 22. If the parties are unable to resolve the matter after consultations, the matter may be referred to the Council, which shall attempt to resolve the dispute through recourse to good offices, conciliation, mediation or other dispute resolution procedures. Article 23. If the matter remains unresolved it may go to an arbitral panel if the lack of enforcement relates to a situation involving workplaces, firms, companies or sectors that produce goods or provide services traded between the parties or that compete, in the territory of the party complained against, with goods or services produced or provided by persons of another party. Article 24.

The NAAEC defines "environmental laws" as domestic laws and regulations on protecting the environment or preventing danger to human life or health, through 1) prevention or control of the release or emission of pollutants or environmental contaminants; 2) the control of environmentally hazardous or toxic chemicals, substances, or wastes; or 3) the protection of wild flora or fauna, including endangered species and their habitat, but not including any laws directly related to worker safety or health. Article 45.

3. Free Trade Agreements with investment provisions – North and South America

We summarise below the environmental and social provisions in the FTAs signed by the US, Mexico, Canada, and Chile.

3.1. *Canada*

3.1.1 Canada-Chile FTA

Canada has entered into an FTA with investment provisions with Chile.[62] The FTA, signed in 1996, has the following environmental and social language on the environment in the Preamble:

> **CREATE** new employment opportunities and improve working conditions and living standards in their respective territories;
>
> **UNDERTAKE** each of the preceding in a manner consistent with environmental protection and conservation;
>
> **PRESERVE** their flexibility to safeguard the public welfare;
>
> **PROMOTE** sustainable development;
>
> **STRENGTHEN** the development and enforcement of environmental laws and regulations;
>
> **PROTECT**, enhance and enforce basic workers' rights […]

The FTA contains the following language on the right to regulate the environment and not lowering standards to encourage investment:

Article G-14: Environmental measures

1. Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.
2. The Parties recognise that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment of an investor. 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.

62. Available at *www.sice.oas.org/Trade/can_e.ASP*.

There is also a provision allowing tribunals to appoint experts on environmental issues. Article G-34. Canada and Chile have entered into side agreements on co-operation on environment and labour issues, similar to the NAFTA side agreements.

3.1.2 Canada-Costa-Rica FTA

Canada has an FTA with Costa Rica, signed in 2001, which contains a few investment provisions, but the substance of which refers to the existing BIT (discussed above). Its FTA with Costa Rica has the following preamble language on environmental and social issues:

> **PROMOTE** sustainable development;
>
> **UNDERTAKE** each of the preceding in a manner consistent with environmental protection and conservation;
>
> **PRESERVE** their flexibility to safeguard the public welfare;
>
> **RECOGNISE** that States have the ability to preserve, develop and implement their cultural policies for the purpose of strengthening cultural diversity; and
>
> **RECOGNISE** the increased co-operation between our countries on labour and environmental co-operation.

Canada and Costa Rica have also entered into side agreements on co-operation on environment and labour issues.

3.2. Mexico

Mexico has signed a number of bilateral and multilateral FTAs with investment provisions.[63] These FTAs contain environmental provisions, which are set forth below. The agreements were in Spanish; the following are unofficial translations.

3.2.1. Mexico-Colombia-Venezuela FTA

This FTA, signed in 1994, contains a provision prohibiting the lowering of environmental standards to attract investment:

Article 17-13: Policy measures pertaining to the environment

No Party shall eliminate domestic policy measures applicable to health, safety, or pertaining to the environment, nor undertake to exempt from the application thereof an investment by an investor from any country as a means of bringing about the establishment, procurement, expansion, or retention of said investment on said Party's territory. If one Party believes that another

63. All available at *www.sice.oas.org/Trade/mex_e.ASP*.

Party has encouraged such an investment in such a manner, the former Party may request consultations with the aforementioned other Party.

3.2.2. *Mexico-Bolivia FTA*

This FTA, signed in 1994, contains a right to regulate provision on the environment and a provision prohibiting the lowering of environmental standards to attract investment:

Article 15-14: Policy measures pertaining to the environment, health and safety

1. None of the provisions set forth in this Chapter shall be interpreted as an impediment to a Party's adoption, retention, or implementation of any measure compatible with this Chapter when said Party deems this appropriate to ensuring that investments on its territory comply with environmental laws.
2. The Parties recognise that it is inappropriate to encourage investment by means of the relaxation of domestic policy measures applicable to the environment, health and safety. Accordingly, neither Party shall eliminate such measures or undertake to exempt investors or their investments from the application thereof as a means of bringing about the establishment, procurement, expansion, or retention of said investment on said Party's territory. If one Party believes that the other Party has encouraged such an investment in such a manner, the former Party may request consultations with the latter Party.

3.2.3. *Mexico-Chile FTA*

This FTA, signed in 1998, contains an environmental exception from the definition of performance requirements, a "right to regulate" provision on the environment, a provision against lowering of environmental standards to encourage investment provision, and a provision allowing environmental experts in dispute resolution:

Article 9-07: Performance requirements

2. Provided that these measures are not applied in an arbitrary or unwarranted fashion, and provided they do not constitute a covert restraint of international investment or trade, none of the provisions set forth in Paragraph 1*b)*, 1*c)* or Paragraph 3*a)* or 3*b)* shall be interpreted as preventing a party from adopting or retaining policy measures, including environmental policy measures, if necessary to:
   a) ensure compliance with laws and regulations that are not incompatible with the provisions of this Treaty;
   b) protect human, animal, or plant life; or

c) preserve nonrenewable natural resources, whether or not living.

Article 9-15: Measures pertaining to the environment

1. None of the provisions set forth in this Chapter shall be interpreted as an impediment to a Party's adoption, retention, or implementation of any measure which is compatible with this Chapter and which said Party deems appropriate to ensuring that investment activities on its territory are carried out having due regard for environmental considerations.
2. The Parties recognise that it is inappropriate to encourage investment by means of the relaxation of domestic policy measures applicable to health, safety, or pertaining to the environment. Accordingly, no Party shall waive the implementation of or in any way abolish – nor offer to waive or abolish – the aforesaid measures as a means of bringing about the establishment, procurement, expansion, or retention of an investment by an investor on said Party's territory. If one Party believes that the Party has encouraged such an investment in such a manner, the former Party may request consultations with the latter Party and both shall work together to help prevent the use of incentives of this nature.

Article 9-34: Expert opinions

Without prejudice to the option to appoint other types of experts when applicable rules of arbitration so authorise, the Court – at the request of a litigant party, or on its own initiative unless the litigants refuse to accept this – may appoint one or more experts to issue a written opinion on any question of fact pertaining to issues relating to the environment, health, safety, or such other scientific matters as may have been raised by a party that is a litigant in a proceeding, in accordance with the terms and conditions agreed upon by the litigant parties.

3.2.4. *Mexico-Costa Rica FTA*

This FTA, signed in 1994, contains a right to regulate provision on the environment and a provision prohibiting the lowering of environmental standards to attract investment:

Article 13-15: Policy measures pertaining to the environment

1. None of the provisions set forth in this Chapter shall be interpreted as an impediment to a Party's adoption, retention, or implementation of any measure consistent with this Chapter when said Party deems this appropriate to ensuring that investments on its territory comply with said Party's ecological or environmental laws.
2. The Parties recognise that it is inappropriate to encourage investment by means of the relaxation of domestic policy measures applicable to health, safety, or pertaining to ecology or the environment. Accordingly, neither

Party shall eliminate such measures or undertake to exempt an investor's investment from the application thereof as a means of bringing about the establishment, procurement, expansion, or retention of the investment on said Party's territory. If one Party believes that the other Party has encouraged such an investment in such a manner, the former Party may engage in consultations with the latter Party.

3.2.5. *Mexico-Nicaragua FTA*

This FTA, signed in 1992, contains a right to regulate provision on the environment and a provision prohibiting the lowering of environmental standards to attract investment:

Article 16-14: Policy measures pertaining to the environment

1. None of the provisions set forth in this Chapter shall be interpreted as an impediment to a Party's adoption, retention, or implementation of any measure compatible with this Chapter when said Party deems this appropriate to ensuring that investments on its territory comply with ecological laws.
2. The Parties recognise that it is inappropriate to encourage investment by means of the relaxation of domestic policy measures applicable to health, safety, or pertaining to the environment. Accordingly, no Party shall eliminate such measures or undertake to exempt an investor's investment from the application thereof as a means of bringing about the establishment, procurement, expansion, or retention of the investment on said Party's territory. If one Party believes that the other Party has encouraged such an investment in such a manner, the former Party may engage in consultations with the latter Party.

3.2.6. *Mexico-El Salvador-Guatemala-Honduras FTA*

This FTA, signed in 2000, contains preamble text on improving working conditions, protecting and conserving the environment and promoting sustainable development as well as an environmental exception from the definition of performance requirements:

2. A policy measure which requires that an investment utilise a technology in order to comply with generally applicable health, environment, or safety requirements shall not be deemed incompatible with Paragraph 1f). For the sake of greater certainty, Article 14-04 and Article 14-05 shall apply to the aforementioned measure.

Article 14-07.

The FTA also contains provisions on the right to regulate the environment and prohibiting the lowering of environmental standards to attract investment:

Article 14-16 Policy measures pertaining to the environment

1. None of the provisions set forth in this Chapter shall be interpreted as an impediment to a Party's adoption, retention, or implementation of any measure compatible with this Chapter when said Party deems this appropriate to ensuring that investments on its territory comply with environmental laws.
2. The Parties recognise that it is inappropriate to encourage investment by means of the relaxation of domestic policy measures applicable to health, safety, or pertaining to the environment. Accordingly, no Party shall eliminate such measures or exempt an investor's investment from the application thereof as a means of bringing about the establishment, procurement, expansion, or retention of the investment on said Party's territory. If one Party believes that another Party has encouraged such an investment in such a manner, the former Party may request consultations with the aforementioned other Party.

3.2.7. *Mexico-Uruguay FTA*

This FTA, signed in 2003, contains preamble language on an environmental exception from the definition of performance requirements and a provision allowing environmental experts in dispute resolution:

Article 13-07: Performance requirements

2. A policy measure which requires that an investment utilise a technology in order to comply in general with health, safety, or environmental requirements shall not be deemed incompatible with Paragraph 1f). For the sake of greater certainty, Articles 13-03 and 13-04 shall be applicable to the aforementioned policy measure.
6. Provided that such measures are not applied in an arbitrary or unwarranted fashion and provided they do not constitute a covert restraint of international investment or trade, none of the provisions set forth in Paragraph 1*b)* or *c)* or Paragraph 3*a)* or *b)* shall be interpreted as preventing a Party from adopting or retaining measures, including measures pertaining to the environment, competition, consumer protection, or other provisions necessary to:
   a) ensure compliance with laws and regulations that are not incompatible with the provisions of this Treaty;
   b) protect human, animal, or plant life; or
   c) safeguard nonrenewable natural resources, whether or not alive.

Article 13-33: Expert opinions

Without prejudice to the option to appoint other types of experts when applicable rules of arbitration so authorise, the Court – whether at the request of a litigant party, or on its own initiative unless the litigant parties refuse to accept this – may appoint one or more experts to issue a written opinion on any question of fact pertaining to issues relating to the environment, health, safety, or such other scientific matters as may have been raised by a litigant that is a party to a proceeding, in accordance with the terms and conditions agreed upon by the litigant parties.

3.3. United States

3.3.1. Overview

The US has signed FTAs containing investment provisions with Australia, Chile, Morocco, Oman, and Singapore. In addition, in 2004, the US, Costa Rica, the Dominican Republic, El Salvador, Guatemala, Honduras, and Nicaragua signed the Central American Free Trade Agreement ("CAFTA"). The US is negotiating FTAs with many other nations. It has also signed a Trade Promotion Agreement containing investment provisions with Peru [*Note:* In November 2006, Colombia and the United States signed a Trade Promotion Agreement; this agreement is not included in the sample of agreements surveyed here]. For ease of reference, we will call CAFTA and the group of six agreements with Australia, Chile, Morocco, Oman, Peru, and Singapore the "US FTAs reviewed". All of these US FTAs reviewed have detailed language in the preamble and main text regarding the environment and worker and labor rights. The investment chapters of the US FTAs reviewed have environmental provisions that are almost the same as the language in the US 2004 Model BIT. In addition, all the US FTAs reviewed have separate chapters with detailed requirements on labor and the environment. CAFTA and the US FTAs with Morocco, Oman, and Singapore, have "anti-corruption" provisions, the first time this language appears in investment agreements.

1. Similarities among the US FTAs – Summary of the common provisions

Preambles

Each US FTA reviewed has language in the preamble on creating new employment opportunities, improving living standards and implementing the agreement in a manner that protects the environment and promotes sustainable development. With the exception of the US-Singapore FTA, each preamble contains a commitment to high labour standards. The preambles of CAFTA, and the US-Morocco, US-Oman, and US-Singapore FTAs also cover elimination of bribery.

Investment chapters

All the US FTAs reviewed have a chapter on investment and each contains the following environmental language.

First, the provision on "Performance Requirements," which prohibits certain performance requirements such as export quotas or minimum domestic content requirements in products, states that the *bona fide* environmental measures are not precluded:

> *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 investment or international trade, paragraphs 1*b*), *c*), and *f*), and 2*a*) and *b*), [*which preclude certain performance requirements*] 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 Agreement;
> >
> > *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.[64]

Second, there is a provision entitled "Investment and Environment", making it clear that a Party may take steps to ensure that investment is sensitive to the environment:

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.[65]

Third, a provision entitled "Expropriation" states that:

> *b)* Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of public health, safety, and the environment, do not constitute indirect expropriations.[66]

64. US-Australia FTA, Article 11.9; *see also* US-Chile FTA, Article 10.5(3); US-Morocco FTA, Article 10.8(3); US-Oman FTA, Article 10.8(3); US-Peru TPA, Article 10.9(3); US-Singapore FTA, Article 15.8(3); CAFTA, Article 10.9(3).
65. US-Australia FTA, Article 11.11; *see also* US-Chile FTA, Article 10.12; US-Morocco FTA, Article 10.10; US-Oman FTA, Article 10.10; US-Peru TPA, Article 10.11; US-Singapore FTA, Article 15.10; CAFTA, Article 10.11.
66. US-Australia FTA, Annex 11-B; *see also* US-Chile FTA, Annex 10-D, section 4(b); US-Morocco FTA, Annex 10-B, section 4(b); US-Oman FTA, Annex 10-B, section 4(b); US-Peru TPA, Annex 10-B, section 4(b), CAFTA, Annex 10-B, section 4(b). In the US-Singapore FTA, this expropriation language is contained in an exchange of letters between the parties, signed on 6 May 2003.

Many of the US FTAs reviewed also have a provision allowing a tribunal set up to resolve disputes to appoint experts on may appoint experts on "environmental, health, safety, or other scientific matters." See *e.g,* US-Chile FTA, Article 10.23.

Labour chapters

All the US FTAs reviewed have a labour chapter. The first two articles in the labour chapters are substantively similar in all the US FTAs reviewed.

First, the "Statement of Shared Commitment" reaffirms the parties' obligations under the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up (1998) ("ILO Declaration") and states that each Party "shall strive to ensure that" such principles in the ILO Declaration and "the internationally recognised labor rights" listed in a separate article "are recognised and protected by law". US-Australia FTA, Article 18.1; *see also* US-Chile FTA, Article 18.1; US-Morocco FTA, Article 16.1; US-Oman FTA, Article 16.1; US-Peru TPA, Article 17.1; US-Singapore FTA, Article 17.1. The first article also recognises that each party has the right to "establish its own domestic labor standards and to adopt or modify its labour laws and standards" and shall strive to improve those standards. *id*. All the US FTAs reviewed define "internationally recognised labour principles and rights" as:

a) the right of association;

b) the right to organise and bargain collectively;

c) a prohibition on the use of any form of forced or compulsory labour;

d) labour 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 labour; and

e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.[67]

The second article of the labour chapter, on enforcement of labour laws, recognises that each Party "retains the right to exercise discretion" with respect to enforcement and to allocation of resources to "labour matters determined to have higher priority," but requires that a Party shall "not fail to effectively enforce its labour laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties". US-Australia FTA, Article 18.2; *see also* US-Chile FTA, Article 18.2; US-Morocco FTA, Article 16.2; US-Oman FTA, Article 16.2; US-Peru TPA, Article 17.2;

67. US-Australia FTA, Article 18.7; *see also* US-Chile FTA, Article 18.8 [note item (d) is worded somewhat differently]; US-Morocco FTA, Article 16.7; US-Oman FTA, Article 16.7; US-Peru TPA, Article 17.7 [uses "minors" instead of "young people" in (d)]; US-Singapore FTA, Article 17.7.

US-Singapore FTA, Article 17.2. The second article also contains a provision stating that labour standards should not lowered to encourage investment:

> The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective labour 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 recognised labour principles and rights referred to in Article 18.7 as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.[68]

While the US FTAs reviewed have somewhat different language on mechanisms for public involvement and settlement of disputes between Parties, there are commonalities as well. Each of the US FTAs reviewed provides that the Parties shall ensure that interested persons have access to administrative, judicial, quasi-judicial, or labour tribunals to seek enforcement of the Party's labour standards and that such tribunals are "fair, equitable and transparent." US-Australia FTA, Article 18.3; *see also* US-Chile FTA, Article 16.3; US-Morocco FTA, Article 16.3; US-Oman FTA, Article 16.3; US-Peru FTA, Article 17.3; US-Singapore FTA, Article 17.3. Each of these provisions also provides for the Parties to increase "public awareness" of labour requirements. *Idem*.

With respect to settlement of labor disputes between Parties, four of the US FTAs reviewed (with Australia, Morocco, Oman, and Singapore) establish a Joint Committee, comprised of government officials of the Parties to oversee implementation of the FTA and to help resolve disputes between the Parties. US-Australia FTA, Chapter 21; US-Morocco FTA, Chapter 19; US-Oman FTA, Chapter 19; US-Singapore FTA, Article 20.1. These Joint Committees may establish subcommittees on labor affairs comprised of labor officials of each Party. Disputes between the parties are to be resolved by consultations, and failing that by convening a subcommittee on labor affairs, which can resolve the dispute by a variety of means, including good offices, concialition, and mediation. US-Australia FTA, Article 18.5; US-Morocco FTA, Article 16.6; US-Oman FTA, Article 16.4 and 16.6; US-Singapore FTA, Article 17.6. For disputes regarding enforcement of labor laws, the parties are to engage in consultations, and failing that to take the matter to the Joint Committee. *Idem*.

68. US-Australia FTA, Article 18.2 (2); *see also* US-Chile FTA, Article 18.2; US-Morocco FTA, Article 16.2; US-Oman FTA, Article 16.2; US-Peru TPA, Article 17.2; US-Singapore FTA, Article 17.2.

The other two FTAs (with Chile and Peru), establish a Free Trade Commission, comprised of government officials of the Parties to implement the FTA and settle disputes. US-Chile FTA, Chapter 21 and Article 18.4; US-Peru TPA, Chapter 19. These two FTAs also establish a Labor Affairs Council, comprised of senior labor officials of each party, to discuss implementation of the labor chapter and to settle disputes among parties on labor issues. US-Chile FTA, Article 18.4; US-Peru TPA, Article 17.4. Disputes on labor issues between the parties are to resolved in the first instance through consultations, next by reference to the Labor Affairs Council, and finally by the Free Trade Commission if the Labor Affairs Council is unable to resolve the matter. US-Chile FTA, Article 18.6; US-Peru TPA, Article 17.6.

All the US FTAs reviewed require that each Party designate an office within its central government to serve as the contact point on labor matters with the other party and with the public. Such office is to provide for consultations with the public including consideration of public communications on matters under the labor chapter. *See* US-Australia FTA, Article 18.5; US-Chile FTA, Article 18.4; US-Morocco FTA, Article 16.4; US-Oman FTA, Article 16.4; US-Peru FTA, Article 17.4; US-Singapore FTA, Article 17.4. Each party may also convene an advisory commission, comprising members of the public, including representatives of labor and business, to advise on implementation of the labor chapter. US-Australia FTA, Article 18.4; US-Chile FTA, Article 18.4; US-Morocco FTA, Article 16.4; US-Oman FTA, Article 16.4; US-Peru FTA, Article 17.4; US-Singapore FTA, Article 17.4.

All the US FTAs reviewed provide that the Parties agree to cooperate to further advance labor standards, and in many cases, there are side agreements that further detail labor co-operation. *See* US-Australia FTA, Article 18.5; US-Chile FTA, Article 18.5 and Annex 18.5; US-Morocco FTA, Article 16.5 and Annex 16-A; US-Oman FTA, Article 16.5 and Annex 16-A; US-Peru FTA, Article 17.5 and Annex 17A; US-Singapore FTA, Article 17.5 and Annex 17A.

Environment chapters

Each US FTA reviewed has a separate chapter on environment. Each one provides that each party has the right to regulate environmental matters pursuant to its own priorities but must ensure that its laws provide high levels of environmental protection:

Recognising the right of each Party to establish its own levels of environmental protection and environmental development priorities, and to adopt or modify accordingly its environmental laws and policies, each Party shall ensure that its laws provide for and encourage high levels of environmental protection and shall strive to continue to improve their respective levels of environmental protection, including through such environmental laws and policies.[69]

Further, recognising that each Party retains the right to exercise discretion with respect to enforcement and to allocation of resources to environmental matters of higher priorities, a "Party shall not fail to effectively enforce its environmental laws, through a sustained or recurring course of action or inaction, in a manner affecting trade between the Parties, after the date of entry into force of this Agreement." US-Australia FTA, Article 19.2; *see also* US-Chile FTA, Article 19.2; US-Morocco FTA, Article 17.2; US-Oman FTA, Article 17.2; US-Peru TPA, Article 18.2; US-Singapore FTA, Article 18.2; CAFTA, Article 17.2.

In addition, there is a provision stating that environmental standards should not be lowered to encourage investment:

> The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in their respective environmental 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 the protections afforded in those laws as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.[70]

While the US FTAs reviewed have somewhat different language on mechanisms for public involvement and settlement of disputes between Parties, there are commonalities as well. Each of the US FTAs reviewed provides that the Parties shall ensure that interested persons have access to administrative, judicial, or quasi-judicial proceedings to seek enforcement of the Party's environmental laws, and that such proceedings are "fair, equitable and transparent." US-Australia FTA, Article 19.3; US-Chile FTA, Article 19.8; US-Morocco FTA, Article 17.4; US-Oman FTA, Article 17.3; US-Peru FTA, Article 18.3; US-Singapore FTA, Article 18.3.

As noted in the labor section, with respect to settlement of disputes between Parties, four of US FTAs reviewed (with Australia, Morocco, Oman, and Singapore) establish a Joint Committee, comprised of government officials of the Parties to oversee implementation of the FTA and to help resolve disputes between the Parties. US-Australia FTA, Chapter 21; US-Morocco FTA, Chapter 19; US-Oman FTA, Chapter 19; US-Singapore FTA, Article 20.1. These Joint Committees may establish subcommittees on environmental affairs comprised of environmental officials of each Party. Disputes between the

69. US-Australia FTA, Article 19.1; *see also* US-Chile FTA, Article 19.1; US-Morocco FTA, Article 17.1; US-Oman FTA, Article 17.1; US-Peru TPA, Article 18.1; US-Singapore FTA, Article 18.1, CAFTA, Article 17.1.
70. US-Australia FTA, Article 19.2; *see also* US-Chile FTA, Article 19.2; US-Morocco FTA, Article 17.2; US-Oman FTA, Article 17.2; US-Peru TPA, Article 18.2; US-Singapore FTA, Article 18.2; CAFTA, Article 17.2.

parties are to be resolved by consultations, and failing that by convening a subcommittee on environmental affairs, which can resolve the dispute by a variety of means, including good offices, conciliation, and mediation. For disputes regarding enforcement of environmental laws, the parties are to engage in consultations, and failing that to take the matter to the Joint Committee. US-Australia FTA, Article 19.7; US-Morocco FTA, Article 16.6; US-Oman FTA, Article 17.8; US-Singapore FTA, Article 18.7.

As noted in the labor section above, the other two FTAs (with Chile and Peru), establish a Free Trade Commission, comprised of government officials of the Parties to implement the FTA and settle disputes. US-Chile FTA, Chapter 21 and Article 18.4; US-Peru TPA, Chapter 19. These two FTAs also establish an Environmental Affairs Council, comprised of senior environmental officials of each party, to discuss implementation of the environmental chapter and to settle disputes among parties on environmental issues. US-Chile FTA, Article 19.3; US-Peru TPA, Article 18.5. Disputes on environmental issues between the parties are to resolved in the first instance through consultations, next by reference to the Environmental Affairs Council, and finally by the Free Trade Commission if the Environmental Affairs Council is unable to resolve the matter. US-Chile FTA, Article 19.5; US-Peru TPA, Article 18.10.

Though level of specificity in the text varies, each of the US FTAs reviewed require that the parties provide opportunities for public participation, including receipt and consideration of public comments, on environmental matters under the chapter. US-Australia FTA, Article 19.5; US-Chile FTA, Article 19.4; US-Morocco FTA, Article 17.6; US-Oman FTA, Article 17.5; US-Peru FTA, Article 18.6; US-Singapore FTA, Article 18.5. Each party may also convene an advisory body, comprising members of the public, including representatives of business and environmental organisations, to seek advice on implementation of the labor chapter. US-Australia FTA, Article 19.5; US-Chile FTA, Article 19.4; US-Morocco FTA, Article 17.6; US-Oman FTA, Article 17.5; US-Peru FTA, Article 18.6 ("shall" convene advisory council); US-Singapore FTA, Article 18.5.

Three of the US FTAs reviewed specifically require steps to increase "public awareness" of environmental laws. US-Australia FTA, Article 19.3; US-Oman FTA, Article 16.3; US-Peru FTA, Article 18.6.

All the US FTAs reviewed provide that the Parties agree to cooperate to further advance environmental standards, and in many cases, there are side agreements that further detail environmental co-operation.

All the US FTAs reviewed also have a provision entitled "Relationship to Environmental Agreements" Recognising the importance of multilateral environmental agreements to which they are party and agree to seek means to enhance the mutual supportiveness of the multilateral environmental

agreements to which they are both party and international trade agreements to which they are both party. The exact language in such provisions varies somewhat from FTA to FTA.

Notes on each of the US FTAs

We set forth below the special features of the different US FTAs reviewed, particularly the preamble language, the provisions for co-operation on labor and environmental issues, and the language on relationship to other environmental agreements.

3.3.2. US-Australia FTA

The US-Australia FTA (signed in 2004)[71] contains the following preamble language on environmental and social issues:

> **ENCOURAGE** a closer economic partnership that will bring economic and social benefits, create new employment opportunities, and improve living standards for their people; […]
>
> **IMPLEMENT** this Agreement in a manner consistent with their commitment to high labour standards, sustainable development, and environmental protection; […]

With respect to labour co-operation, the Parties also agree to cooperate to further advance labour standards on a bilateral, regional, and multilateral basis. Article 18.5.

The Parties also agree to negotiate a United States-Australia Joint Statement on Environmental Cooperation to explore ways "to promote sustainable development in concert with strengthening bilateral trade and investment relations". Article 19.6.

The US-Australia FTA has the following provision Recognising the importance of other environmental agreements:

ARTICLE 19.8: RELATIONSHIP TO ENVIRONMENTAL AGREEMENTS

The Parties recognise that multilateral environmental agreements to which they are both party play an important role, globally and domestically, in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are both party and international trade agreements to which they

71. The full text of the FTA is available at *www.ustr.gov/Trade_Agreements/Bilateral/Australia_FTA/Final_Text/Section_Index.html*.

are both party. The Parties shall consult regularly with respect to negotiations in the WTO regarding multilateral environmental agreements.

3.3.3. *US-Chile FTA*

The US-Chile FTA (signed in 2003)[72] contains several preamble clauses that reference the environment and social issues. The parties resolve to:

> **CREATE** new employment opportunities and improve working conditions and living standards in their respective territories;
>
> **BUILD** on their respective international commitments and strengthen their co-operation on labour matters;
>
> **PROTECT**, enhance, and enforce basic workers' rights;
>
> **IMPLEMENT** this Agreement in a manner consistent with environmental protection and conservation;
>
> **PROMOTE** sustainable development;
>
> **CONSERVE**, protect, and improve the environment, including through managing natural resources in their respective territories and through multilateral environmental agreements to which they are both parties;
>
> **PRESERVE** their flexibility to safeguard the public welfare; […]

With respect to labour co-operation, the US-Chile FTA states that the Parties recognise that co-operation provides enhanced opportunities for the Parties to promote respect for the principles embodied in the ILO Declaration and the ILO Convention No. 182 Concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999) (ILO Convention 182). Article 18.5. The Parties agree to cooperate on labour issues under a Labour Cooperation Mechanism. Article 18.5 and Annex 18.5.

With respect to environmental co-operation, Annex 19.3 of the US-Chile FTA sets forth detailed provisions and further agrees to pursue additional co-operation under a US-Chile Environmental Cooperation Agreement.

The provision on "Relationship to Environmental Agreements" has slightly different language from the US-Australia FTA and reads as follows:

The Parties recognise the importance of multilateral environmental agreements, including the appropriate use of trade measures in such agreements to achieve specific environmental goals. Recognising that in paragraph 31(i) of the *Ministerial Declaration adopted on 14 November 2001 in Doha*, WTO members have agreed to negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral

72. The full text of the US-Chile FTA is set forth at *www.ustr.gov/Trade_Agreements/Bilateral/Chile_FTA/Final_Texts/Section_Index.html*.

environmental agreements, the Parties shall consult on the extent to which the outcome of the negotiations applies to this Agreement.

US-Chile FTA, Article 19.9.

3.3.4. US-Morocco FTA

The US-Morocco FTA (signed in 2004)[73] contains several preamble clauses that reference the environment and social issues, such as:

> Recognising Morocco's commitment to reform to improve the lives of its people;
>
> Desiring to raise living standards, promote economic growth and stability, create new employment opportunities, and improve the general welfare in their territories by liberalising and expanding trade and investment between them; […]
>
> Desiring to protect human, animal, and plant health conditions in the Parties' territories, enhance the Parties' implementation of the SPS Agreement, and provide a forum to address sanitary and phytosanitary matters between the Parties, thereby expanding trade opportunities;
>
> Affirming their commitment to transparency and their desire to eliminate corruption in international trade and investment; […]
>
> Desiring to strengthen the development and enforcement of labor and environmental laws and policies, promote basic workers' rights and sustainable development, and implement this Agreement in a manner consistent with environmental protection and conservation;

We note that this FTA has an explicit reference to elimination of corruption in the preamble.

Like the US-Chile FTA, the US-Morocco FTA recognises that co-operation between the parties will promote respect for core labor standards embodied in the ILO Declaration and ILO Convention 182 and establishes a Labor Cooperation Mechanism (Annex 16-A) to further advance labor standards. US-Morocco FTA, Article 16.5.

The US and Morocco agree to cooperate on environmental matters pursuant to a US-Morocco Joint Statement on Environmental Cooperation. Article 17.3. The provision on Relationship to Environmental Agreements has the same language as the provision in the US-Australia FTA, except that the last sentence in the US-Morocco provision has one additional phrase, marked in italics: The Parties shall consult regularly with respect to negotiations in the

73. Available at *www.ustr.gov/Trade_Agreements/Bilateral/Morocco_FTA/FInal_Text/Section_Index.html*.

WTO regarding multilateral environmental agreements *and on the extent to which the outcome of those negotiations may affect this Agreement*. Article 17.7.

The US-Morocco FTA has explicit anti-corruption provisions in its transparency chapter. It provides:

ARTICLE 18.5: ANTI-CORRUPTION

1. The Parties reaffirm their continuing resolve to eliminate bribery and corruption in international trade and investment.
2. Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offence under its law, in matters affecting international trade or investment, for:
   a) a public official of the Party or a person who performs public functions for the Party intentionally to solicit or accept, directly or indirectly, any article of monetary value or other benefit, such as a favour, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;
   b) any person subject to the jurisdiction of the Party intentionally to offer or grant, directly or indirectly, to a public official of the Party or a person who performs public functions for the Party any article of monetary value or other benefit, such as a favour, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;
   c) any person subject to the jurisdiction of the Party intentionally to offer, promise, or give any undue pecuniary or other advantage, directly or indirectly, to a foreign official, for that official or for another person, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business; and
   d) any person subject to the jurisdiction of the Party to aid or abet, or to conspire in, the commission of any of the offences described in subparagraphs *a)* through *c)*.
3. Each Party shall make the commission of an offense described in paragraph 2 liable to sanctions that take into account the gravity of the offense.
4. Each Party shall strive to adopt or maintain appropriate measures to protect persons who, in good faith, report acts of bribery described in paragraph 2.
5. The Parties recognise the importance of regional and multilateral initiatives to eliminate bribery and corruption in international trade and investment. The Parties shall work jointly to encourage and support appropriate initiatives in relevant international fora.

3.3.5. *US-Oman FTA*

The US-Oman FTA (signed in 2005) contains the following preamble language on environmental and social issues:

> *Desiring* to create new employment opportunities and raise the standard of living for their citizens by liberalising and expanding trade between them; […]
>
> *Affirming* their commitment to transparency and their desire to eliminate bribery and corruption in international trade and investment; […]
>
> *Desiring* to protect, enhance, and enforce basic workers' rights and to strengthen the development and enforcement of labor laws and policies;
>
> *Desiring* to strengthen the development and enforcement of environmental laws and policies, promote sustainable development, and implement this Agreement in a manner consistent with the objectives of environmental protection and conservation.

The US-Oman FTA recognises that "co-operation provides enhanced opportunities to promote respect for core labor standards embodied in" the ILO Declaration and ILO Convention 182. The Parties agree to cooperate on labor issues under a Labor Cooperation Mechanism. Article 16.5 and Annex 16-A.

The US and Oman agree to cooperate on environmental matters pursuant to a US-Oman Memorandum of Understanding on Environmental Cooperation. Article 17.7. The provision on "Relationship to Environmental Agreements" has the same language as the US-Australia FTA except for the last sentence, which reads as follows: "To this end, the Parties shall consult, as appropriate, with respect to negotiations on environmental issues of mutual interest." US-Oman FTA, Article 17.9.

The US-Oman FTA has explicit anti-corruption provisions in its transparency chapter. US-Oman FTA, Article 18.5. The provision has the same language as the anti-bribery provision in the US-Morocco FTA, with the exception of paragraph 3. In the US-Oman FTA, paragraph 3 reads: "Each Party shall adopt or maintain appropriate penalties and procedures to enforce the criminal measures that it adopts or maintains in conformity with paragraph 2." By contrast, the language in the US-Morocco paragraph 3 is: "Each Party shall make the commission of an offense described in paragraph 2 liable to sanctions that take into account the gravity of the offense."

3.3.6. US-Peru Trade Protection Agreement

The US has entered into a Trade Protection Agreement ("TPA") with Peru (signed 2006), which is similar in structure to the FTAs discussed above. The preamble contains the following language on environmental and social issues:

> **PROMOTE** broad-based economic development in order to reduce poverty and generate opportunities for sustainable economic alternatives to drug-crop production;
>
> **CREATE** new employment opportunities and improve labor conditions and living standards in their respective territories; […]
>
> **PROMOTE** transparency and prevent and combat corruption, including bribery, in international trade and investment;
>
> **PROTECT**, enhance, and enforce basic workers' rights, strengthen their co-operation on labor matters, and build on their respective international commitments on labor matters;
>
> **IMPLEMENT** this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their co-operation on environmental matters;
>
> **PRESERVE** their ability to safeguard the public welfare; […]

With respect to labor co-operation, the US-Peru TPA recognises that co-operation enhances development and advances the commitments on labor matters embodied in the ILO Declaration and ILO Convention 182. Article 17.5. The Parties agree to cooperate on labour issues under a Labour Cooperation and Capacity Building Mechanism. Article 17.5 and Annex 17.5.

The Parties agree to increase co-operation on environmental issues pursuant to an Environmental Cooperation Agreement. Article 18.9.

The TPA's provision on "Relationship to Environmental Agreements" is somewhat different in form from that provision in the FTAs discussed above, with Article 18.12. providing:

1. The Parties recognise that multilateral environmental agreements to which they are all party, play an important role globally and domestically in protecting the environment and that their respective implementation of these agreements is critical to achieving the environmental objectives thereof. The Parties further recognise that this Chapter and the ECA can contribute to realising the goals of those agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party and trade agreements to which they are all party.
2. To this end, the Parties shall consult, as appropriate, with respect to negotiations on environmental issues of mutual interest.

3. Each Party recognises the importance to it of the multilateral environmental agreements to which it is a party.

3.3.7. *US-Singapore FTA*

The US-Singapore FTA (signed in 2003)[74] contains the following preamble language on environmental and social issues:

> Recognising that economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development, and that an open and non-discriminatory multilateral trading system can play a major role in achieving sustainable development; […]
>
> Reaffirming the importance of pursuing the above in a manner consistent with the protection and enhancement of the environment, including through regional environmental cooperative activities and implementation of multilateral environmental agreements to which they are both parties; […]

The Parties recognise that "co-operation provides enhanced opportunities to promote respect for core labour standards embodied in the ILO Declaration and compliance with [ILO Convention 182]." US-Singapore FTA, Article 17.5. The Parties agree to cooperate on labour issues under a Labour Cooperation Mechanism. US-Singapore FTA, Article 17.5 and Annex 17-A.

With respect to environmental co-operation, the parties agree to engage in further cooperative activities under a separate Memorandum of Intent on Cooperation in Environmental Matters and in other fora. Article 18.6.

The US-Singapore FTA has the following provision on "Relationship to Environmental Agreements":

> The Parties recognise the critical role of multilateral environmental agreements in addressing some environmental challenges, including through the use of carefully tailored trade measures to achieve specific environmental goals and objectives. Recognising that WTO Members have agreed in paragraph 31 of the Ministerial Declaration adopted on 14 November 2001 in Doha to negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements, the Parties shall consult on the extent to which the outcome of those negotiations applies to this Agreement. Article 18.8.

74. Available at *www.ustr.gov/Trade_Agreements/Bilateral/Singapore_FTA/Final_Texts/Section_Index.htm*.l

The US-Singapore FTA also has the following anti-corruption language:

ARTICLE 21.5: ANTI-CORRUPTION

1. Each Party reaffirms its firm existing commitment to the adoption, maintenance, and enforcement of effective measures, including deterrent penalties, against bribery and corruption in international business transactions. The Parties further commit to undertake best efforts to associate themselves with appropriate international anti-corruption instruments and to encourage and support appropriate anti-corruption initiatives and activities in relevant international fora.
2. The Parties shall cooperate to strive to eliminate bribery and corruption and to promote transparency in international trade. They will look for avenues in relevant international fora to address these issues and build upon the potential anti-corruption efforts in these fora.

3.3.8. CAFTA

CAFTA was signed in 2004 and is similar in structure to the FTAs discussed above. The preamble contains the following language on environmental and social issues:

> **PROMOTE** transparency and eliminate bribery and corruption in international trade and investment;
>
> **CREATE** new opportunities for economic and social development in the region;
>
> **PROTECT**, enhance, and enforce basic workers' rights and strengthen their co-operation on labor matters;
>
> **CREATE** new employment opportunities and improve working conditions and living standards in their respective territories;
>
> **BUILD** on their respective international commitments on labor matters;
>
> **IMPLEMENT** this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their co-operation on environmental matters;
>
> **PROTECT** and preserve the environment and enhance the means for doing so, including through the conservation of natural resources in their respective territories;
>
> **PRESERVE** their flexibility to safeguard the public welfare.

CAFTA recognises that co-operation between the parties will promote respect for core labor standards embodied in the ILO Declaration and ILO Convention 182 and establishes a Labor Cooperation and Capacity Building Mechanism (Annex 16-5) to further advance labor standards. CAFTA, Article 16.5.

The CAFTA parties agree to cooperate on environmental matters pursuant to an Environmental Co-operation Agreement. Article 17.9. The provision on "Relationship to Environmental Agreements" (Article 17.12) provides:

1. The Parties recognise that multilateral environmental agreements to which they are all party play an important role in protecting the environment globally and domestically and that their respective implementation of these agreements is critical to achieving the environmental objectives of these agreements. The Parties further recognise that this Chapter and the ECA can contribute to realising the goals of those agreements. Accordingly, the Parties shall continue to seek means to enhance the mutual supportiveness of multilateral environmental agreements to which they are all party and trade agreements to which they are all party.
2. The Parties may consult, as appropriate, with respect to ongoing negotiations in the WTO regarding multilateral environmental agreements.

CAFTA's Chapter 18, Section B contains the following "Anti-Corruption" provisions:

Section B: Anti-Corruption

Article 18.7: Statement of principle

The Parties affirm their resolve to eliminate bribery and corruption in international trade and investment.

Article 18.8: Anti-corruption measures

1. Each Party shall adopt or maintain the necessary legislative or other measures to establish that it is a criminal offense under its law, in matters affecting international trade or investment, for:
   a) a public official of that Party or a person who performs public functions for that Party intentionally to solicit or accept, directly or indirectly, any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;
   b) any person subject to the jurisdiction of that Party intentionally to offer or grant, directly or indirectly, to a public official of that Party or a person who performs public functions for that Party any article of monetary value or other benefit, such as a favor, promise, or advantage, for himself or for another person, in exchange for any act or omission in the performance of his public functions;
   c) any person subject to the jurisdiction of that Party intentionally to offer, promise, or give any undue pecuniary or other advantage, directly or indirectly, to a foreign official, for that official or for another person,

in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business; and

d) any person subject to the jurisdiction of that Party to aid or abet, or to conspire in, the commission of any of the offenses described in subparagraphs *a*) through *c*).

2. Each Party shall adopt or maintain appropriate penalties and procedures to enforce the criminal measures that it adopts or maintains in conformity with paragraph 1.

3. In the event that, under the legal system of a Party, criminal responsibility is not applicable to enterprises, that Party shall ensure that enterprises shall be subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions, for any of the offenses described in paragraph 1.

4. Each Party shall endeavor to adopt or maintain appropriate measures to protect persons who, in good faith, report acts of bribery or corruption described in paragraph 1.

3.4. Chile

3.4.1. Chile-China

The 2005 Chile/China FTA (which deals with "promoting investment" in Article 112) contains the following preamble language:

> *Recognising* that this Agreement should be implemented with a view toward raising the standard of living, creating new job opportunities and promoting sustainable development in a manner consistent with environment protection and conservation.

Its Article 10 on "Labour, Social Security and Environmental Cooperation" states:

> The Parties shall enhance their communication and co-operation on labour, social security and environment through both the Memorandum of Understanding on Labour and Social Security Cooperation and the Environmental Cooperation Agreement between the Parties.

3.4.2. Chile-Korea

The 2003 Chile/Korea FTA contains the same preamble language as that reproduced above for the Chile-China agreement. It also duplicates the Chile-China language on exceptions to performance requirements, investment incentives, environmental measures, and expert reports.

3.4.3. *Chile-Panama*

The Panama-Chile FTA contains the following preamble language:

> **CREATE** new employment opportunities and improve working conditions and living standards in their respective territories;
>
> **BUILD** on their respective international commitments and strengthen their co-operation on labour matters;
>
> **PROTECT**, enhance, and enforce basic workers' rights;
>
> **IMPLEMENT** this Agreement in a manner consistent with environmental protection and conservation;
>
> **PROMOTE** economic development in a manner that is consistent with protection and conservation of the environment and also with sustainable development;
>
> **CONSERVE**, protect, and improve the environment, including through managing natural resources in their respective territories and through multilateral environmental agreements to which they are both parties;
>
> **PRESERVE** their flexibility to safeguard the public welfare; […]

3.4.4. *Chile-Peru*

In addition to Preamble language, the Chile-Peru FTA contains the following Article 11.13 on "Investment and Environment":

> Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or enforcing any measure otherwise consistent with this Agreement that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

As well as language on indirect expropriation in Annex 11.D:

> 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.

4. Other agreements with investment provisions

4.1. *Australia-Singapore*

The Australia-Singapore Free Trade Agreement was signed on 17 February 2003 and came into force on 28 July 2003. SAFTA is a comprehensive agreement covering areas such as trade in goods, trade in services, investment, telecommunication, financial services, movement of

business persons, government procurement, intellectual property rights, competition policy, e-commerce and education co-operation.

The Investment Chapter, Chapter 8 does not contain any "environmental" provision but has a general exceptions clause:

ARTICLE 12

General exceptions

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between the Parties where the same conditions prevail, or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent the adoption or enforcement by a Party of measures:

a) necessary to protect public morals;

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

c) relating to the importations or exportations of gold or silver;

d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII of the GATT 1994, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;

4.2. Japan-Philippines

Article 8 of the General Provisions chapter of the Economic Partnership Agreement between Japan and the Philippines (signed 2006) contains the following anti-corruption text:

> Each Party shall ensure that measures and efforts are undertaken to prevent and combat corruption regarding matters covered by this Agreement in accordance with its laws and regulations.

Chapter 8 contains the following environmental and labour texts:

Article 102 – Environmental measures

Each Party recognises that it is inappropriate to encourage investments by investors of the other Party by relaxing its environmental measures. To this effect each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion in its Area of investments by investors of the other Party.

Article 103 – Investment and labour

1. The Parties recognise 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 recognised labor rights referred to in paragraph 2 below as an encouragement for the establishment, acquisition, expansion or retention of an investment in its Area. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the Parties shall consult with a view to avoiding any such encouragement.

2. For purposes of this Article, "labour laws" means each Party's laws or regulations that are directly related to the following internationally recognised labour rights:

   a) the right of association;

   b) the right to organise and bargain collectively;

   c) a prohibition on the use of any form of forced or compulsory labour;

   d) labour 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 labour; and

   e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

4.3. EU-ACP Partnership Agreement (Cotonou Agreement)

The February 2000 expiration of the Lomé Convention provided an opportunity for reviewing ACP-EU relations. Negotiations of a new agreement started in September 1998 and were successfully concluded in early February 2000. The new ACP-EC agreement was signed on 23 June 2000 in Cotonou, Benin, and was concluded for a twenty-year period from March 2000 to February 2020. The agreement contains numerous references to human rights, environment, labour rights and the fight against corruption. Relevant preamble language includes:

> ASSERTING their resolve to make, through their co-operation, a significant contribution to the economic, social and cultural development of the ACP States and to the greater well-being of their population, helping them facing the challenges of globalisation and strengthening the ACP-EU Partnership in the effort to give the process of globalisation a stronger social dimension;
>
> REAFFIRMING their willingness to revitalise their special relationship and to implement a comprehensive and integrated approach for a strengthened partnership based on political dialogue, development co-operation and economic and trade relations;

ACKNOWLEDGING that a political environment guaranteeing peace, security and stability, respect for human rights, democratic principles and the rule of law, and good governance is part and parcel of long term development; acknowledging that responsibility for establishing such an environment rests primarily with the countries concerned;

ACKNOWLEDGING that sound and sustainable economic policies are prerequisites for development;

REFERRING to the principles of the Charter of the United Nations, and recalling the Universal Declaration of Human Rights, the conclusions of the 1993 Vienna Conference on Human Rights, the Covenants on Civil and Political Rights and on Economic, Social and Cultural Rights, the Convention on the Rights of the Child, the Convention on the Elimination of all forms of Discrimination against Women, the International Convention on the Elimination of all forms of Racial Discrimination, the 1949 Geneva Conventions and the other instruments of international humanitarian law, the 1954 Convention relating to the status of stateless persons, the 1951 Geneva Convention relating to the Status of Refugees and the 1967 New York Protocol relating to the Status of Refugees;

CONSIDERING the Convention for the Protection of Human Rights and Fundamental Freedoms of the Council of Europe, the African Charter on Human and Peoples' Rights and the American Convention on Human Rights as positive regional contributions to the respect of human rights in the European Union and in the ACP States;

RECALLING the Libreville and Santo Domingo declarations of the Heads of State and Government of the ACP countries at their Summits in 1997 and 1999;

CONSIDERING that the development targets and principles agreed in United Nations Conferences and the target, set by the OECD Development Assistance Committee, to reduce by one half the proportion of people living in extreme poverty by the year 2015 provide a clear vision and must underpin ACP-EU co-operation within this Agreement;

Article 75 (Investment Promotion) of Chapter 7 (Investment and Private Sector Development) of the Cotonou Agreement does not deal explicitly with societal issues, though it does note that partner countries will: *implement measures to encourage participation in their development efforts by private investors who comply with the objectives and priorities of ACP-EC development co-operation and with the appropriate laws and regulations of their respective States* […]

Many of the other Chapters contain numerous references to such issues as human rights, protection of the environment, upholding labour rights and the fight against bribery and other forms of corruption.

4.4. EU-Russia

The EU-Russia Agreement on Partnership and Cooperation, which came into force in 1997 for a period of 10 years and which, after 2007, will automatically extended on annual basis unless one of the Parties withdraws from the Agreement. The provisions of the Partnership and Cooperation Agreement cover a wide range of policy areas including political dialogue; trade in goods and services; business and investment; financial and legislative co-operation; science and technology; education and training; energy, nuclear and space co-operation; environment, transport; culture; and co-operation on the prevention of illegal activities. Rules of procedure for the dispute settlement provisions of the PCA were adopted in April 2004.

Thus, the Agreement provides a broad blueprint for co-operation in many policy areas and it contains quite lengthy texts on co-operation in the areas of environment, labour/social and anti-corruption legislation and law enforcement. The strategy of the Agreement seems to be one of setting forth broad objectives for policy co-operation in these areas, which would presumably influence investment co-operation indirectly. The investment texts appear in Title IV of the Agreement (Provisions on Business and Investment) and in some of the sectoral articles (*e.g.* energy). Title IV does not explicitly link investment co-operation and with these other forms of co-operation, though the sectoral texts do (see Article 65 on Energy). The Agreement establishes an institutional framework for regular consultations between the European Union and Russia.

TITLE II – POLITICAL DIALOGUE

Article 6

A regular political dialogue shall be established between the Parties which they intend to develop and intensify. It shall accompany and consolidate the rapprochement between the European Union and Russia, support the political and economic changes underway in Russia and contribute to the establishment of new forms of co-operation. The political dialogue:

- shall bring about an increasing convergence of positions on international issues of mutual concern thus increasing security and stability;
- shall foresee that t**he Parties endeavour to cooperate on matters pertaining to the observance of the principles of democracy and human rights,** and hold **consultations**, if necessary, on matters related to their due implementation.

TITLE VI – COMPETITION, INTELLECTUAL, INDUSTRIAL AND COMMERCIAL PROPERTY PROTECTION, LEGISLATIVE COOPERATION
(NB. Some texts have been put in bold type to call attention to them)

Article 55 – Legislative Cooperation

1. The Parties recognise that an important condition for strengthening the economic links between Russia and the Community is the approximation of legislation. Russia shall endeavour to ensure that its legislation will be gradually made compatible with that of the Community.
2. The approximation of laws shall extend to the following areas in particular: company law, banking law, company accounts and taxes, protection of workers at the workplace, financial services, rules on competition, public procurement, **protection of health and life of humans**, **animals and plants, the environment, consumer protection, indirect taxation, customs law, technical rules and standards, nuclear laws and regulations, transport.**

TITLE VII – ECONOMIC CO-OPERATION

Article 56

1. The Community and Russia shall foster economic co-operation of wide scope in order to contribute to the expansion of their respective economies, to the creation of a supportive international economic environment and to the integration between Russia and a wider area of co-operation in Europe. Such co-operation shall strengthen and develop economic links to the benefit of both Parties.
2. Policies and other measures of the Parties related to this title shall in particular be designed to bring about economic and social reforms and restructuring in Russia and shall be guided by the requirements of **sustainability and harmonious social development**; they shall also fully **incorporate environmental considerations**.
3. The co-operation shall, *inter alia*, cover:
   - development of their respective industries and transport;
   - exploration of new sources of supply and of new markets;
   - encouragement of technological and scientific progress;

Article 57 – Industrial co-operation

1. Co-operation shall aim at promoting the following in particular:
   - the development of business links between economic operators, including small and medium-size enterprises;
   - the improvement of management on enterprise level;

- the process of privatisation in the context of economic restructuring, and the strengthening of the private sector;
- efforts in both public and private sector, to restructure and modernise the industry, during the transition period leading towards a market economy and under conditions ensuring **environment protection and sustainable development;**

Article 61 – Mining and raw materials

1. The Parties shall cooperate with a view to fostering the development of the sectors of mining and raw materials. Special attention shall be paid to co-operation in the sector of nonferrous metals.
2. The co-operation shall focus in particular on the following areas:
   - exchange of information on all matters of interest to the Parties concerning the mining and raw materials sectors, including trade matters;
   - **the adoption and implementation of environmental legislation;**
   - **training.**

Article 64 – Agriculture and the agro-industrial sector

Co-operation shall aim at the modernisation, restructuring and privatisation of agriculture and the agro-industrial sector in Russia in **conditions which ensure that the environment is respected**. This co-operation shall be through, *inter alia*, developing private farms and distribution channels, methods of storage, marketing and management, modernising the rural infrastructure and improvement of agricultural land-use planning, improving productivity, quality and efficiency, and the transfer of technology and know-how. The Parties shall aim at achieving compatibility between their sanitary and phytosanitary standards.

Article 65 – Energy

1. Co-operation shall take place within the principles of the market economy and the European Energy Charter, against a background of the progressive integration of the energy markets in Europe.
2. The co-operation shall include among others the following areas:
   - […]
   - improvement in management and regulation of the energy sector in line with a market the introduction of the range of institutional, legal, fiscal and other conditions necessary to encourage increased energy **trade and investment**;
   - promotion of energy saving and energy efficiency;
   - […]

- **the environmental impact of energy production, supply and consumption, in order to prevent or minimise the environmental damage resulting from these activities**;
- […]
- management and technical **training** in the energy sector.

Article 68 – Construction

The Parties shall co-operate in the field of construction industry, particularly in the areas covered by Articles 55, 57, 60, 62, 63 and 77 of this Agreement.

This co-operation shall, *inter alia*, aim at modernising and restructuring the construction sector in Russia in line with the principles of a market economy and duly taking into account related **health, safety and environmental aspects**.

Article 69 – Environment

1. Bearing in mind the **European Energy Charter** and the **Declaration of the Lucerne Conference of 1993,** the Parties shall develop and strengthen their co-operation on environment and human health.
2. Co-operation shall aim at combating the deterioration of the environment and in particular:
   - effective monitoring of pollution levels and assessment of environment; system of information on the state of the environment;
   - combating local, regional and transboundary air and water pollution;
   - ecological restoration;
   - sustainable, efficient and environmentally effective production and use of energy; safety of industrial plants;
   - classification and safe handling of chemicals;
   - water quality;
   - waste reduction, recycling and safe disposal, implementation of the Basle Convention;
   - the environmental impact of agriculture, soil erosion, and chemical pollution;
   - the protection of forests;
   - the conservation of biodiversity, protected areas and sustainable use and management of biological resources;
   - land-use planning, including construction and urban planning;
   - use of economic and fiscal instruments;

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- global climate change;

- environmental education and awareness;
- implementation of the **Espoo Convention on Environmental Impact Assessment in a transboundary context.**

3. Co-operation shall take place particularly through:
   - disaster planning and other emergency situations;
   - exchange of information and experts, including information and experts dealing with the transfer of clean technologies and the safe and environmentally sound use of biotechnologies;
   - joint research activities;
   - improvement of laws towards Community standards;
   - co-operation at regional level, including co-operation within the framework of the European Environment Agency, established by the Community and at international level;
   - development of strategies, particularly with regard to global and climatic issues and also in view of achieving sustainable development;
   - environmental impact studies.

Article 74 – Social co-operation

1. **With regard to health and safety, the Parties shall develop co-operation between them with the aim of improving the level of protection of the health and safety of workers.** The co-operation shall include notably:
   - education and training on health and safety issues with specific attention to high risk sectors of activity;
   - development and promotion of preventive measures to combat work related diseases and other work related ailments;
   - prevention of major accident hazards and the management of toxic chemicals;
   - research to develop the knowledge base in relation to working environment and the health and safety of workers.
2. **With regard to employment, the co-operation shall include notably technical assistance to:**
   - optimisation of the labour market;
   - modernisation of the job-finding and consulting services;
   - planning and management of the restructuring programmes;
   - encouragement of local employment development; L/CE/RU/en 67;
   - exchange of information on the programmes of flexible employment, including those stimulating self-employment and promoting entrepreneurship.

3. **The Parties shall pay special attention to co-operation in the sphere of social protection which, *inter alia*, shall include co-operation in planning and implementing social protection reforms in Russia.**

These reforms shall aim to develop in Russia methods of protection intrinsic to market economies and shall comprise all directions of social security activities.

The co-operation shall also include technical assistance to the development of social insurance institutions with the aim of promoting gradual transition to a system consisting of a combination of contributory and social assistance forms of protection, as well as respective non-governmental organisations providing social services.

TITLE VIII – CO-OPERATION ON PREVENTION OF ILLEGAL ACTIVITIES

Article 84

The Parties shall establish co-operation aimed at preventing illegal activities such as:

- […]
- illegal activities in the sphere of economics, including corruption;

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- […]

The **co-operation in the abovementioned areas will be based on mutual consultations** and close interactions and will provide technical and administrative assistance including:

- drafting of national legislation in the sphere of preventing illegal activities;
- creation of information centres;
- increasing the efficiency of institutions engaged in preventing illegal activities;
- training of personnel and development of research infrastructures;
- elaboration of mutually acceptable measures impeding illegal activities.

PROTOCOL 1 ON THE ESTABLISHMENT OF A COAL AND STEEL CONTACT GROUP

4. The Contact Group exchanges all useful information on the structure of the industries concerned, the development of their production capacities, the science and research progress in the relevant fields, and the **evolution of employment. The Group also examines pollution and environmental problems.**

JOINT DECLARATION IN RELATION TO ARTICLE 6 OF PROTOCOL 2

The Parties agree to take the necessary measures in order to assist each other, as provided for in this Protocol and without delay, for the following movements of goods:

a) […] *b)* […]

c) **movement of poisonous goods as well as the substances dangerous for the environment and the public health;**

d) […]

4.5. *EFTA-Singapore*

The EFTA*-Singapore Agreement was signed on 26 June 2002. Its preamble mentions human rights and environment and article 43 covers right to regulate, including "to meet environmental concerns".

PREAMBLE

REAFFIRMING their commitment to the principles set out in the United Nations Charter and the Universal Declaration of Human Rights;

[…]

RECOGNISING that trade liberalisation should allow for the optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment;

Article 43 – Domestic regulation

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure consistent with this Chapter that is in the public interest, such as measures to meet health, safety or environmental concerns.

4.6. *Korea-Singapore*

The Korea-Singapore Agreement was signed on 4 August 2005 and came into force on 2 March 2006. It is a comprehensive agreement covering trade in goods, trade in services, investment, customs procedures, mutual recognition agreements, intellectual property rights, competition policy, government procurement and co-operation in a wide range of areas. The following language on performance requirements closely resembles NAFTA language on performance requirements (emphasis added).

Investment, Chapter 10

Article 10.7: PERFORMANCE REQUIREMENTS

1. Neither Party may impose or enforce any of the following requirements, or enforce any commitment or undertaking, 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:

a) to export a given level or percentage of goods or services;

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 purchase, use or accord a preference to services provided in its territory, or to purchase services from persons in its territory;

e) to relate 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;

f) to restrict sales of goods or services in its territory that such investment produces or provides by relating such sales to the volume or value of its exports or foreign exchange earnings;

g) to transfer technology, a production process or other proprietary knowledge to a person in its territory, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition law or to act in a manner not inconsistent with other provisions of this Agreement; or

h) to supply exclusively from the territory of the Party the goods that it produces or the services that it supplies to a specific regional market or to the world market.

2. The provisions of paragraph 1 do not preclude either Party from conditioning the receipt or continued receipt of an advantage, in connection with investment and business activities in its territory of an investor of the other Party or of a non-Party, on compliance with any of the requirements set forth in paragraphs 1 *d)*, *g)* and *h)*.

3. Nothing in paragraph 1 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, provide a service, **train or employ workers,** construct or expand particular facilities, or carry out research and development, in its territory.

4. Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraphs 1*b)*, *c)* or *d)* shall

be construed to prevent a Party from adopting or maintaining measures, **including environmental measures**:

a) necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;

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

***c)* necessary for the conservation of living or non-living exhaustible natural resources.**

Article 10.18: ENVIRONMENTAL MEASURES

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Separate provision on environmental co-operation:

Article 18.9: ENVIRONMENT

Desiring to promote closer co-operation between interested organisations and industries of the Parties in the field of CNG technologies and applications to environmental protection, the Parties have concluded a Memorandum of Understanding to facilitate such co-operation.

Article 21.2: GENERAL EXCEPTIONS

2. Subparagraphs *a)*, *b)* and *c)* of Article XIV of GATS are incorporated into and made part of this Agreement, for the purposes of:

a) Chapters 3 (National Treatment and Market Access for Goods), 4 (Rules of Origin), 5 (Customs Procedures), 6 (Trade Remedies), and 14 (Electronic Commerce), to the extent that a provision of those chapters applies to services;

b) Chapter 9 (Cross Border Trade in Services);

c) Chapter 10 (Investment);

d) Chapters 11 (Telecommunication) and 12 (Financial Services); and

e) Chapter 16 (Government Procurement), to the extent that a provision applies to services.

ANNEX 3.A3

A Fact-finding Survey of the Social Content of Non-OECD International Investment Agreements

I. Introduction and summary of results

This paper presents a companion study – focused on international investment agreements concluded among non-OECD countries – to the OECD-focused survey described in "International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues". The present survey documents the treatment of "social issues" (*e.g.* labour, environment, anti-corruption and human rights) in 131 bilateral investment treaties signed between non-OECD. Comparison of the results of the two surveys allows one to ascertain whether or not there are differences between OECD and non-OECD countries in terms of their propensity to address these issues and in terms of the way they are addressed.

This comparison of findings reveals both similarities and differences:

- *Propensity to include language covering social issues*. The overall propensity to include such language is approximately the same in the OECD and non-OECD samples – about two fifths of the countries in both samples include such language in one or more of their agreements. Like for the OECD sample, the non-OECD sample is skewed toward a limited number of countries that are quite likely to include such language. In the non-OECD sample, the two countries with a high propensity are Singapore (half of its agreement contain such language) and China (17 per cent of its agreements). These two countries account for 11 of the 16 treaties in the sample found to contain such language. No country in the non-OECD sample appears to have a systematic policy of including such language in all of its investment agreements (whereas several OECD countries have such a policy).
- *Set of "societal" issues covered*. While, broadly speaking, the same set of "social" issues is covered in the OECD and on-OECD samples (*e.g.* in relation

to right to regulate in order to protect the environment, not lowering environmental or labour standards, and environmental exceptions to performance requirements), the weight placed on these issues differs. The issue most likely to be dealt with in the non-OECD sample (covered in agreements signed by China, Singapore, South Africa…) is "exceptions to most favoured nation" in relation to benefits or treatments stemming from regional co-operation in the "economic, social or labour" fields. Two issues that were often addressed in the OECD sample (not lowering standards and right to regulate) are addressed only to a limited extent in the non-OECD sample. Like the OECD sample, the non-OECD sample contains (in two agreements) language addressing a number of idiosyncratic issues – in the non-OECD sample, these are preventing fraud, protecting or advancing persons disadvantaged by unfair discrimination, protecting national treasures.

- *Placement of language*. In the OECD sample, environmental and/or labour language, if it is found at all, is most likely to be found in the Preamble. In the non-OECD sample, preambular language of this type is found only in three of China's agreements. All other non-OECD language appears in the articles of the agreements.

The non-OECD survey takes as its sample investment agreements (all of them bilateral investment treaties) of 15 non-member countries with whom the OECD Investment Committee has had recent dealings.[75] These countries are: China, Democratic Republic of Congo, Egypt, India, Indonesia, Jordan, Malaysia, Morocco, Peru, Russia, Serbia, Singapore, South Africa Vietnam and Zambia. The sample consists of 131 bilateral investment treaties having as signatories these countries and another non-OECD country.[76] These treaties were reviewed for their content with respect to a variety of social issues: environment, labour, anti-corruption (including bribery), human rights, and consumer affairs.[77] More details on the methodology (which is the same as that used for the companion survey) can be found in Annex 3.A1. The Annex also contains a list of the treaties in the sample and their dates of signature.

II. The findings of the survey of non-OECD BITs

This section provides a more detailed description of the findings of the survey of language dealing with social issues in the sample of 131 non-OECD agreements.[78] Annex Table 3.A3.1 summarises these findings.

75. Non-member countries that adhere to OECD investment instruments were included in the sample for the other paper.
76. Investment agreements having a non-member country as a signatory that is also an adherent to the OECD Declaration on International Investment and Multinational Enterprises were not included in the sample.
77. This list is derived from the list of issues that were addressed in the OECD sample.

Annex Table 3.A3.1. **Social issues in a sample of international investment agreements signed between non-OECD countries**

Non-OECD countries	No. of IIAs in sample	Texts in at least one IIA surveyed?	Details of coverage of these issue in IIAs
China	30	Yes (5 mention at least one issue)	Preamble of BIT with Brunei Darussalam recognises the importance of "human resources development"). Preamble of BITs with Guyana and Trinidad and Tobago state that parties agree that investment objectives can be achieved without "relaxing health, safety and environmental measures of general application". Article 5 (Exceptions) of the China-Singapore BIT states that Parties are not obliged to extend to the other's nationals and companies "any arrangement with a third State or States in the same geographical region designed to promote regional co-operation in the economic, social, labour […] fields within the framework of specific projects". Article 8 of Thailand-China BIT contains the same text on exceptions.
Democratic Republic of Congo	2	No	
Egypt	26	No	
India	8	No	
Indonesia	26	No	
Jordan	13	Yes (2 mention at least one issue)	The Jordan-Kuwait BIT's Article 3 contains a text on exceptions to provisions on performance requirements when these are "considered vital for public health, public order or the environment which shall be applied according to a publicly applicable legal instrument." The Jordan-Singapore BIT's Article 19 ("General Exceptions") states that nothing in the BIT prevents the Parties from taking measures necessary to secure compliance with "laws and regulations which are not inconsistent with the provisions of this treaty" and lists: "the prevention of deceptive or fraudulent practices or to deal with the effects of freau on a default of contract"; and "the protection of privacy of individuals, of confidentiality of records and accounts"; "safety"; "the protection of national treasures of artistic, historic or archaeological value" and "conservation of exhaustible natural resources".
Malaysia	14	No	
Morocco	5	No	
Peru	9	Yes (one mentions at least one issue)	The Peru-El Salvador BIT's Article 5 ("Performance requirements") states that a measure "that requires that an investment employ a technology to comply with generally applicable regulation with regulations applicable to health, safety or environment, will not be considered incompatible with paragraph 1 [a list of prohibited performance requirements]."
Russia	4	No	
Serbia	1	No	
Singapore	11	Yes (6 mention at least one issue)	Article 5 ("Exceptions") of the BIT with China (see entry above). Article 5 ("Exceptions") of Singapore's BITs with Mauritius, Mongolia, Pakistan and Vietnam contain identical language to the language on exceptions to national treatment found in the China-Singapore BIT (see entry under China above). Article 18 of Jordan Singapore BIT contains a text on right to regulate that includes references to prevention of fraud, protection of privacy, protection of national treasures, and conservation of natural resources (see entry under Jordan).

Annex Table 3.A3.1. **Social issues in a sample of international investment agreements signed between non-OECD countries** *(cont.)*

Non-OECD countries	No. of IIAs in sample	Texts in at least one IIA surveyed?	Details of coverage of these issue in IIAs
South Africa	3	Yes (one mentions at least one issue)	Article 3 ("Treatment of Investments") of South Africa-Mauritius BIT states that Parties are not obliged to extend to the other's nationals and companies "any arrangement with a third State or States in the same geographical region designed to promote regional co-operation in the economic, social, labour […] fields within the framework of specific projects". It further states that Parties are not obliged to extend treatments under laws "designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory".
Vietnam	8	Yes (one mentions at least one issue)	Article 5 ("Exceptions") if the Singapore-Vietnam BIT contain same text on MFN exceptions as in China-Singapore BIT (see entry under China above).
Zambia	1	No	

Propensity to include social language

Annex Table 3.A3.1 shows that 16 out of the 131 treaties include on one or more of these issues in one or more of their BITs and that 6 of the 15 countries in the sample include such language. These six countries are China, Jordan, Peru, Singapore, South Africa and Vietnam.[79] Singapore was the most likely to include such language in its treaties – it is included in 6 out of the eleven treaties in the sample to which it is a signatory. China is also relatively likely to include such language – it appears in 5 out of the 30 treaties in the sample signed by China. Thus, there is no equivalent in the non-OECD sample of the countries in the OECD sample that have a systematic policy of including such language. In the OECD survey, these countries include the United States and Canada (which have included such language in every agreement they have signed since the mid-1990s), Mexico (which also has a large number of treaties containing such language) as well as Belgium, Finland, Netherlands (which have included it in their model BITs).

78. This total number of treaties is corrected for double counting – thus, it is the total number of treaties given for each county in Annex Table 3.A3.1, corrected for the treaties that the countries on the list have signed with each other.
79. Note that the Framework Agreement for Establishing a Free trade Area between the Republic of India and the Kingdom of Thailand (singed 2003) contains language on environmental issues. However, its investment chapter refers back to the 200 India-Thailand BIT (which does not contain such references). The sample contains the 2000 BIT, not the Framework Agreement.

Social/Investment issues covered

The non-OECD countries' investment agreements addressed the same broad set of issues in relation to social matters as in the OECD sample, but they show differences of emphasis and approach. The survey of OECD agreements found the following set of issues in relation to labour and environment: not lowering standards, right to regulate, indirect expropriation and promoting internationally agreed standards. The first two issues are found in the non-OECD sample, whereas the latter do are not.

In addition, the OECD survey found, in five more recent agreements, some language addressing anti-corruption issues and a direct reference to "human rights" (in two recent agreements). Neither of these issues were explicitly cited in the non-OECD sample (though more specific human rights, notably freedom from discrimination in the workplace and protection of privacy) are addressed in two non-OECD agreements.

Most favoured nation

The most common "social" text in the sample of non-OECD agreements addresses the social and labour dimension of regional co-operation and creates an exception to most favoured nation (MFN) for legal arrangements that might arise from this co-operation. This language accounts is found in 7 of the 16 treaties containing social language. Thus, unlike the OECD sample (where treaties containing "social" language often refer to international instruments, standards or norms), the non-OECD sample of language is more likely to focus on regional co-operation.

The earliest use of this language on social and labour issues in regional co-operation is found first in Article 5 of China's 1985 BITs with Singapore and Thailand. It is worth noting that this is also the earliest mention of a social issue in the combined OECD and non-OECD samples. The text is as follows (identical or closely-related language appears in five other agreements; see fourth column of Annex Table 3.A3.1):

> *The provisions of this Agreement relating to the grant of treatment not less favourable than that accorded to the nationals and companies of any third State shall not be construed so as to oblige one Contracting Party to extend to the nationals and companies of the other Contracting Party the benefit of any treatment, preference or privilege resulting from […]*
>
> a) *[…]*
>
> b) *any arrangement with a third State or States in the same geographical region designed to promote regional* co-operation *in the economic, social, labour […] fields within the framework of specific projects.*

The South African-Mauritius BIT contains a text which is very similar to the one just quoted, but adds the following item (c): *any law or measure in pursuance of any law, the purpose of which is to promote the achievement of equality in its territory, or designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination in its territory.*

Exceptions to performance requirements

Environmental or other social exceptions to performance requirements are mentioned in two agreements. The Jordan-Kuwait BIT states: "[…] *investments of the host contracting country may not be subject to performance requirements* […] *unless these requirements are considered vital for public health considerations or public order or the environment which shall be applied according to a publicly applicable legal instrument*."

Article 5 ("Performance Requirements") of the Peru-El Salvador BIT contains a text on exceptions to performance requirements that resembles closely those found in agreements signed by OECD members or adherents to OECD investment instruments (*e.g.* NAFTA, the Mexico-Cuba BIT, several Mexican FTAs, the US model BIT). The Peru-El Salvador BIT states:

2. *A measure that requires an investment to use a technology to meet generally applicable health, safety or environmental requirements shall not be construed to be inconsistent with paragraph 1(f) […]*
3. *Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, nothing in paragraph* 1b) *or* c) *or* 3a) *or* b) *shall be construed to prevent any Party from adopting or maintaining measures, including environmental measures:*
    a) *necessary to secure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement;*
    b) *necessary to protect human, animal or plant life or health; or*
    c) *necessary for the conservation of living or non-living exhaustible natural resources.*

Right to regulate

While right to regulate was one of the most frequently encountered issue in the OECD sample of agreements, it is found only once in the non-OECD sample. Article 18 ("General Exceptions") of the Jordan-Singapore BIT contains the following text:

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination, […] *Nothing in*

this Treaty shall be construed to prevent the adoption or enforcement by the Party of measures:

b) *Necessary to protect human, animal or plant health;*

c) *necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Treaty including those relating to:*

i) *the prevention of deceptive and fraudulent practices or to deal with the effects of fraud on a default of contract;*

ii) *the protection of the privacy of individuals in relation to the processing and dissemination of personal date and the protection of confidentiality of individual records and accounts;*

iii) *safety;*

d) *imposed for the protection of national treasures of artistic, historic or archaeological value;*

e) *relating to the conservation of exhaustible resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.*

Placement of language in the agreement

In the OECD sample, if a country has any language on environmental and social issues, it is most likely to be a statement in the preamble (*e.g.* referring to promoting "sustainable development" or "internationally recognised labour rights". A more limited number of countries also include language in the articles of the agreement or in side agreements.

The situation is reversed in the non-OECD sample. China is the only country that includes such language in its preambles (in 3 of its 30 agreements). In the preambles of the China's BITs with Guyana and with Trinidad and Tobago, the Parties agree that their "*objectives can be achieved without relaxing health, safety and environmental measures of general application.*" In the preamble of the China-Brunei Darussalam, the Parties recognise "*the importance of the transfer of technology and human resources development arising from such investments*".

ANNEX 3.A4

Methodology and List of BITs Included in Survey

The methodology used for this study is identical to that used for the survey whose results are reported the companion study, "International Investment Agreements: A Survey of Environmental, Labour and Anti-corruption Issues." This survey reported in this paper is based on a sample of 131 bilateral investment treaties signed between countries that are not members of the OECD (note non-members that adhere to the OECD Declaration on International Investment and Multinational Enterprises are included in the companion paper). The "population" of BITs is that available on the UNCTAD website at *www.unctadxi.org/templates/DocSearch____779.aspx*. Treaties that were not available in English, French or Spanish were not considered.

The intent of the survey methodology was to produce a comprehensive inventory of non-OECD bilateral investment treaties' treatment of social issues. However, because the survey is based on a sample and not the complete set of all treaties, some relevant texts may be missing.

The BITs were reviewed to see whether any texts (including the preamble, articles and annexes) discussed the environment, human rights, labour rights or corruption. Where the texts were searchable, searches were made for the following terms: "environment,""social", "human", "labour", "labor", "worker", and "corruption".

The list of bilateral investment treaties included in the sample appears in Annex Table 3.A4.1.

Annex Table 3.A4.1. **Bilateral investment treaties included in the sample**

Country	Treaty signed with:	Year signed	Environment	Labour
China	Madagascar	2005	no	no
	Guyana	2003	yes	no
	Ivory Coast	2002	no	no
	Trinidad and Tobago	2002	yes	no
	Jordan	2001	no	no
	Botswana	2000	no	no
	Brunei Darussalam	2000	no	yes
	Costa Rica	2000	no	no
	Qatar	1999	no	no
	Swaziland	1998	no	no
	Cameroon	1997	no	no
	Cambodia	1996	no	no
	Lebanon	1996	no	no
	Cuba	1995	no	no
	Morocco	1995	no	no
	Ecuador	1994	no	no
	Egypt	1994	no	no
	Indonesia	1994	no	no
	Jamaica	1994	no	no
	Peru	1994	no	no
	Georgia	1993	no	no
	Uruguay	1993	no	no
	Bolivia	1992	no	no
	Philippines	1992	no	no
	Vietnam	1992	no	no
	Ghana	1989	no	no
	Pakistan	1989	no	no
	Kuwait	1985	no	no
	Singapore	1985	no	yes
	Thailand	1985	no	yes
Democratic Republic of Congo	Egypt	1998	no	no
	Guinea	No date given	no	no
Egypt	Serbia	2005	no	no
	Mauritius	2003	no	no
	Nigeria	2000	no	no
	Pakistan	2000	no	no
	Central African Republic	2000	no	no
	Thailand	2000	no	no
	Zambia	2000	no	no
	Georgia	1999	no	no
	Dem. Republic of Congo	1998	no	no
	Ghana	1998	no	no
	Guinea	1998	no	no
	Senegal	1998	no	no

Annex Table 3.A4.1. **Bilateral investment treaties included in the sample** *(cont.)*

Country	Treaty signed with:	Year signed	Environment	Labour
	Belarus	1997	no	no
	Malaysia	1997	no	no
	Russia	1997	no	no
	Singapore	1997	no	no
	Vietnam	1997	no	no
	Jordan	1996	no	no
	Sri Lanka	1996	no	no
	Uganda	1995	no	no
	Egypt	1994	no	no
	Indonesia	1994	no	no
	Albania	1993	no	no
	Kazakhstan	1993	no	no
	Ukraine	1992	no	no
	Togo	No date given	no	no
India	Thailand	2001	no	no
	Ghana	2000	no	no
	Indonesia	1999	no	no
	Mauritius	1998	no	no
	Egypt	1997	no	no
	Oman	1997	no	no
	Sri Lanka	1997	no	no
	Kazakhstan	1996	no	no
Indonesia	Philippines	2001	no	no
	Algeria	2000	no	no
	Singapore	2000	no	no
	Cambodia	1999	no	no
	India	1999	no	no
	Jamaica	1999	no	no
	Zimbabwe	1999	no	no
	Bangladesh	1998	no	no
	Sudan	1998	no	no
	Thailand	1998	no	no
	Yemen	1998	no	no
	Cuba	1997	no	no
	Mauritius	1997	no	no
	Morocco	1997	no	no
	Syria	1997	no	no
	Jordan	1996	no	no
	Pakistan	1996	no	no
	Sri Lanka	1996	no	no
	Ukraine	1996	no	no
	Uzbekistan	1996	no	no
	China	1994	no	no
	Egypt	1994	no	no

Annex Table 3.A4.1. **Bilateral investment treaties included in the sample** *(cont.)*

Country	Treaty signed with:	Year signed	Environment	Labour
	Laos	1994	no	no
	Malaysia	1994	no	no
	Tunisia	1992	no	no
	Vietnam	1991	no	no
Jordan	Thailand	2005	no	no
	Singapore	2004	yes	no
	Lebanon	2002	no	no
	Kuwait	2001	yes	no
	Syria	2001	no	no
	Bahrain	2000	no	no
	Sudan	2000	no	no
	Morocco	1998	no	no
	Algeria	1996	no	no
	Indonesia	1996	no	no
	Yemen	1996	no	no
	Tunisia	1995	no	no
	Malaysia	1994	no	no
Malaysia	Saudi Arabia	2000	no	no
	Ethiopia	1999	no	no
	Lebanon	1998	no	no
	Egypt	1997	no	no
	Ghana	1996	no	no
	Kazakhstan	1996	no	no
	Kyrgyzstan	1995	no	no
	Mongolia	1995	no	no
	Peru	1995	no	no
	Uruguay	1995	no	no
	Cambodia	1994	no	no
	Indonesia	1994	no	no
	Jordan	1994	no	no
	United Arab Emirates	1991	no	no
Morocco	Pakistan	2001	no	no
	Jordan	1998	no	no
	Indonesia	1997	no	no
	China	1995	no	no
	Benin	No date given	no	no
Peru	Singapore	2003	no	no
	Colombia	2001	no	no
	Ecuador	1999	no	no
	El Salvador	1996	no	yes
	Malaysia	1995	no	no
	Paraguay	1994	no	no
	Bolivia	1993	no	no
	Thailand	1991	no	no
	Cuba	1965	no	no

Annex Table 3.A4.1. **Bilateral investment treaties included in the sample** *(cont.)*

Country	Treaty signed with:	Year signed	Environment	Labour
Russia	Thailand	2002	no	no
	Ethiopia	1999	no	no
		1997	no	no
	Lebanon	No date given	no	no
Serbia	Egypt	2005	no	no
Singapore	Jordan	2004	no	no
	Peru	2003	no	no
	Mauritius	2000	no	yes
	Sri Lanka	1998	no	no
	Egypt	1997	no	no
	Cambodia	1996	no	yes
	Mongolia	1995	no	yes
	Pakistan	1995	no	yes
	Vietnam	1992	no	no
	China	1985	no	yes
	Sri Lanka	1980	no	no
South Africa	Madagascar	No date given	no	no
	Mauritius	1998	no	yes
	Iran	1997	no	no
Vietnam	Cambodia	2001	no	no
	Tajikistan	1999	no	no
	Egypt	1997	no	no
	Bulgaria	1996	no	no
	China	1992	no	no
	Madagascar	1992	no	no
	Indonesia	1991	no	no
	Thailand	1991	no	no
Zambia	Egypt	2000	no	no