Harnessing Freedom of Investment for Green Growth

Expert Consultation: 3 February - 2 March 2011

Organisation for Economic Co-operation and Development
Investment Division, Directorate for Financial and Enterprise Affairs
Paris, France

Context

The OECD-hosted Freedom of Investment (FOI) Roundtable is an intergovernmental forum that brings together some 50 governments from around the globe at regular meetings. It helps governments design better policies to reconcile openness to international investment with legitimate regulation in the public interest.

At its October 2010 meeting, the FOI Roundtable discussed important aspects of the role of international investment in supporting the realisation of countries' green growth objectives. Based on those discussions, the OECD Secretariat has prepared a draft statement for comment. The Roundtable is now seeking expert input prior to resuming its discussion in March 2011. After considering contributions received and finalising the statement, governments participating in the FOI Roundtable expect to provide it to the OECD Green Growth Strategy for the attention of the May 2011 OECD Ministerial meeting, which brings together Heads of Government and Ministers from OECD and major emerging economies. The statement should aid in formulating government policies as well as future initiatives in this area both at the OECD and in other international organisations.

Three background papers on green growth and investment are included with the draft statement. Earlier versions of the first two papers and aspects of the third paper were considered by the Roundtable at its October 2010 meeting and comments received on the background papers will also be taken into account by Roundtable delegates in the context of finalising the draft statement.

Invitation to contribute

The draft statement and background papers are being circulated to experts, civil society representatives and FOI participants. Experts are invited to comment on the draft statement and the related documents by 2 March 2011. For convenience in making comments, page, paragraph and footnote numbers run sequentially through the statement and background papers.

What happens to the expert contributions?

Subject to compliance with OECD web content rules, comments received will be posted on the consultation website unless the participant requests otherwise.

Status of this draft

This document is a draft prepared by the OECD Secretariat for consultation purposes. It does not necessarily reflect the views of the OECD or those of its member governments or other government participants in the FOI process. It cannot be construed as prejudging ongoing or future negotiations or disputes arising under international investment agreements.

Comments and questions

Contact for comments and questions: David Gaukrodger, Senior Legal Consultant, OECD, david.gaukrodger@oecd.org.

TABLE OF CONTENTS

DRAFT STATEMENT

BACKGROUND PAPERS

Harnessing Freedom of Investment for Green Growth

Freedom of Investment Roundtable

1. International investment is a vital source of finance and a powerful vector of innovation and technology transfer as countries address the effects of climate change and seek to promote green growth. Recognising this, the Freedom of Investment (FOI) Roundtable hosted by the OECD has discussed important aspects of the role of international investment in supporting the realisation of countries' green growth objectives.

2. The FOI Roundtable has explored in particular the issue of green investment protectionism and the interaction of international environmental and investment law. It also appreciates that greening the economy can be an important source of growth, as emphasised by work of the OECD Investment Committee and the OECD Environmental Policy Committee on enhancing business' contribution to greening the economy and unlocking green foreign direct investment (FDI).[1]

3. This statement sets forth proposed findings on the role of international investment in supporting the realisation of countries' green growth objectives; specifically it underlines the importance of (i) support for effective international environmental law; (ii) vigilance against green investment protectionism; (iii) updating investment treaty practices; (iv) ensuring the integrity and competence, and improving the transparency of investor-state dispute settlement; (v) strengthening compliance with international investment law through prior review of proposed environmental policies and measures; (vi) encouraging business' contribution to greening the economy; and (vii) spurring green growth through FDI. The statement reflects extensive analysis and discussion in the Roundtable.

4. The statement is being circulated for comment to experts, civil society representatives and FOI participants. After considering comments received, governments participating in the FOI Roundtable expect to finalise the statement and provide it to the OECD Green Growth Strategy for the attention of the 2011 OECD Ministerial meeting.

Support for effective international environmental law

5. The international investment policy community has a strong interest in effective policy frameworks that clarify environmental responsibilities and sharpen incentives for governments and businesses to live up to these responsibilities. Improvements in international environmental law allow the international investment policy community to pursue with greater confidence its agenda of investment liberalisation, promotion and protection, in support of sustainable development.

> *Investment policy makers welcome efforts to provide improved and clearer standards, addressed to both governments and investors, for international environmental responsibilities and policy.*

[1] See www.oecd.org/daf/investment/cc.

Vigilance against green protectionism

6. Many countries have expressed concern that the green-growth policy agenda could be captured by protectionist interests. However, OECD policy monitoring suggests that to date investment protectionism associated with green growth policies is not a major problem. None of the 42 countries that report regularly to the OECD about investment measures have reported measures involving overt discrimination against non-resident or foreign investors in relation to environmental policy. Participating countries have also not to date reported serious concerns about measures by other countries.

7. Nonetheless, vigilance is necessary. Environmental policy measures that appear to be neutral may involve *de facto* discrimination. In addition, environment-related state aids (such as grants, loan guarantees or capital injections for individual firms), now widely used including as part of emergency investment measures in the wake of the financial crisis, may pose serious risks to competition.

> *Governments should reject investment protectionism associated with green growth policies. They should ensure that measures taken to pursue green growth are consistent with their international investment law obligations. They should regularly monitor environmental measures, including state aid, for protectionist intent or effects, including as part of ongoing policy monitoring at the Freedom of Investment Roundtable hosted by the OECD.*

Updating investment treaty practices regarding the environment

8. A stocktaking exercise has shown that specific references to the environment are included in only about 8 per cent of investment agreements. However, states are increasingly concluding broader free trade agreements (FTAs) that incorporate investment provisions rather than stand-alone bilateral investment treaties; practically all such FTAs contain environmental clauses. Governments participating in FOI Roundtables that have been respondents in investor-state cases challenging environmental policies now tend to address environmental issues specifically on a systematic basis in investment treaties. Other governments are interested in learning from this experience (as well as in finding other ways to provide additional guidance to arbitrators in investor-state disputes).

> *Governments should examine whether their investment treaty practices are up-to-date with regard to environmental concerns and consider including language in investment treaties or environmental treaties to provide guidance about how environmental and investment law goals are to be reconciled.*

Investor-state dispute settlement and the environment

9. The investor-state dispute settlement (ISDS) system frequently considers environmental measures and may impose substantial liability on governments where such measures are found to be inconsistent with their international investment law obligations. It is essential to ensure the integrity and competence of investor-state arbitration tribunals. The current status of dispute resolution systems – with very active investor-state tribunals and a limited role for environmental dispute resolution fora – could tend to give some primacy to investment treaty concerns over international environmental law considerations in cases of overlapping or conflicting norms. In this context, it is important for policy makers to consider possible measures to enhance effective integration of environmental and investment interests. One such measure would be to enhance transparency of ISDS, in order to increase awareness of environmental considerations in investment arbitration. There has been significant progress in improving transparency of ISDS since 2005 when the OECD Investment Committee adopted a Statement supporting greater transparency in ISDS. Nonetheless, there are still important limitations on transparency in environmental cases and indeed some such cases can remain entirely unknown to the public.

Governments should seek to ensure that, where relevant, the ISDS system adequately integrates and balances the goals of international environmental and investment law. To the greatest extent possible, governments should strive to ensure that the ISDS system adequately addresses the application of investment law to environmental measures in a transparent and publicly-accountable manner that allows, where appropriate, participation by interested third parties. In order to ensure a consistent treatment of this issue, governments should consider including provisions on transparency of ISDS in their investment agreements.

Conflict prevention through prior internal review of proposed environmental measures for investment law compliance

10. It is important that new environmental measures respect key investment law disciplines such as non-discrimination and national treatment (creating a level playing field for domestic and international investors). This process is most effective and efficient if it is integrated into policy design at an early stage: policies are better-designed and expensive conflicts are avoided. Consistent treaty practice and consistent interpretations by investment tribunals about the meaning of typical investment treaty provisions relevant to environmental policy would strengthen the effectiveness of prior review.

Governments should take appropriate measures to review their relevant proposed environmental laws and measures at both national and sub-national levels for compliance with investment law disciplines.

Enhancing business' contribution to greening the economy

11. Businesses and investors have a key role to play in the transition to a green economy. More companies are responding to the challenges and opportunities of moving towards a low-carbon economy, developing new environmentally-friendly products and services, and reporting on and reducing their greenhouse gas emissions. Stronger government policies are needed to encourage more companies to take such action and to encourage companies to go further and adopt more ambitious measures - reducing waste, adopting low-carbon technologies and shifting to renewable energies.

Governments should incentivise and encourage the positive contribution of companies to green growth.

Spurring green growth through FDI

12. Foreign direct investment undoubtedly contributes to transfers of technology, management processes and capital that improve the environment. However, lack of comparable data between countries obscures both FDI's contribution and the obstacles to it. A better understanding of FDI in support of green growth would help governments use scarce public resources to lever private investment, assess policy performance in providing a positive framework for investment in support of green growth, and identify and lower the hurdles to such investment.

Governments should contribute to efforts to identify FDI flows in support of green growth, recognise and address hurdles faced by such flows, and assess policy performance in providing a framework to encourage green investment.

GREEN-INVESTMENT PROTECTIONISM: WHAT IS IT AND HOW PREVALENT IS IT[2]

> *The transition to a "green economy" should not lead to conditionalities, parameters or standards which might generate unjustified or unilateral restrictions in the areas of trade, financing, ODA or other forms of international assistance. Illegitimate barriers to trade – tariff and non-tariff – could emerge if the discussions are geared towards or captured by protectionist interests, which might ultimately lead to "green protectionism" proposals that would run counter to the multilateral trading system*
>
> - Statement on behalf of the Group of 77 and China by H.E. Ambassador Abduallah Alsaidi, Permanent Representative to the United Nations, Chairman of the Group of 77 at the first Preparatory Committee Meeting of the UN Conference on Sustainable Development, on a Green Economy in the Context of Sustainable Development and Poverty Eradication (New York, 18 May 2010)[3]

I. Introduction

13. In the quote above, the Chairman of the Group of 77 communicates developing countries' concerns that the green-growth policy agenda could be captured by protectionist interests. The quote stresses the trade dimension of green protectionism, but green-investment protectionism is also a subject of interest, especially to capital-exporting countries and to countries that might want to attract green investments.

14. Seen from an investment-policy perspective, the challenges for designing and implementing green-growth policy frameworks include:

- *Responsible management of public policy*, including observance of countries' international green-growth commitments,[4] while also respecting other international commitments, including under international investment law.

---

2 This paper was prepared by Kathryn Gordon, Senior Economist in the OECD Investment Division. This paper does not necessarily reflect the views of the OECD or those of its member governments or other government participants in the FOI process. It cannot be construed as prejudging ongoing or future negotiations or disputes arising under international investment agreements.

3 In separate statements, Argentina, Brazil, Indonesia, Nigeria and Venezuela associated themselves with the G77 statement. www.un.org/esa/dsd/rio20/resources/perpcomm1_statements_17may.shtml. See also Shyam Saran, India's special climate envoy, March 24, 2009 remarks in a Reuters article entitled "India warns against green protectionism".

4 These commitments are contained in various international instruments, including 1538 bilateral environmental agreements, 1039 multilateral environmental agreements and 259 other environmental

- *Freedom of inward investment*. When implementing green-growth policies, governments need to treat foreign investors fairly so as to consolidate their countries' positions as attractive destinations for international investment.

- *Freedom of outward investment*. Domestic companies need to be free to export capital so as to be able to implement their green business strategies on a global scale.

15. This note aims to help governments define and recognize green-investment protectionism so that they can design and implement green-growth policies that are pro-competitive and observe core investment values such as openness and non-discrimination (Section I). The paper also looks at how prevalent green-investment protectionism is in the investment policies of the 49 countries followed in OECD-hosted investment policy monitoring (Section II.). Section II shows that green investment protectionism is not yet a major feature of the investment-policy landscape among these countries, but suggests that vigilance will be required to keep it that way. Section III looks at "green" subsidy policies (e.g. grants, loan guarantees) for individual companies. These may not, strictly speaking, be 'protectionist' because they discriminate against all non-subsidised competitors, both domestic and foreign, of subsidised companies. Such policies may nevertheless pose concerns for body the investment policy community because they distort competitive processes, including those operating through international investment. Section IV proposes issues for discussion.

II. What is "green investment protectionism"?

16. Investment protectionism occurs when government policies and practices restrict the free flow of capital across the global economy and when such restrictions do not have a solid justification in safeguarding essential security interests and public order. Green investment protectionism occurs when environmental policies have this same effect and when the restrictions cannot be justified as advancing well-founded public-policy goals.

17. The OECD houses the world's only comprehensive body of commitments and review procedures for the progressive removal of restrictions on international capital movements. The OECD investment instruments enshrine concepts and principles that help countries define and avoid investment protectionism. The instruments promote principles of openness, non-discrimination (or national treatment and most favoured nation treatment), procedural transparency for investors, and co-operation and transparency in international fora for discussing investment matters. The instruments also allow governments, to adopt discriminatory measures to safeguard a country's essential security interests and public order.

The investment principles of most direct relevance to green-investment protectionism are:

- *Openness.* Unless they are justified by security-related concerns (see bullet point three below), restrictions on inward and outward investments are to be avoided and are to be progressively liberalised. For inward investment, this means that conditions for establishment should not discriminate against non-resident investors – that is, the rules and procedures that they must follow to establish an investment are similar to those that apply to resident investors in like circumstances. Likewise, restrictions on outward investment – discriminatory rules or procedures that would cause resident investors to favour domestic destinations over foreign destinations – are to be lifted. Environmental policies that restrict outward investment flows, erect special barriers to establishment for non-resident investors or that treat established foreign investors less well than similar domestic

---

agreements. Data from Ronald B. Mitchell. 2002-2010. *International Environmental Agreements Database Project (Version 2010.2)*.Available at: iea.uoregon.edu/. Date accessed: 30 August 2010.

investors are considered to be protectionist. Green-investment protectionism would include environmental rules and administrative or enforcement procedures that create *de jure* restrictions on inward or outward capital flows, as well as domestic arrangements that, although not *de jure* discriminatory, create *de facto* restrictions. This would include the adoption of environmental standards that engender *de facto* discrimination against non-resident investors or against foreign-investment destinations that cannot be justified on the basis of essential security interests and public order.[5]

- *National treatment for established investors*. Established foreign investors (that is, those that are already resident in the country) are to receive treatment from the host government that is no less favourable than that accorded to domestic investors in like circumstances. This means that policies or administrative procedures that discriminate against foreign investors are to be avoided and are, barring exceptions for "national security and public order"(see next bullet point), considered as protectionist. The OECD's Green Growth Strategy Interim Report[6] highlights the importance of policies that treat all market actors in similar ways. For example, the OECD Interim Report states (page 2) that "reforming environmentally harmful subsidies, correct pricing of pollution or use of scarce resources through taxes, natural resource charges or tradable permit systems should be a central element of the policy mix." Thus, in order to meet efficiently green-growth objectives, green-growth policies should be designed to be as neutral as possible among market actors, including foreign-controlled investors. With respect to expropriation and regulatory takings for environmental purposes (issues that several investment arbitration panels have been asked to consider) national treatment means that compensation rules applied to foreign investments must be at least as favourable as those applied to domestic investments.[7] Any environmental policy or practice that results in *de jure* or *de facto* discrimination against foreign investors is protectionist.

- *Exceptions for essential security interests and public order*. The OECD investment instruments recognise that governments may need to take steps to protect their citizens in exceptional circumstances where international investment poses genuine threats to public order and security. According to this text, a country is not prevented from taking measures it considers necessary for the "protection of public health … and safety" or for "fulfilment of its obligations relating to international peace and security". This text may be applicable to some environmental policies, especially those that seek to manage environmental risks that pose major risks to human health, safety and security (e.g. nuclear power generation; operation of production processes that pose large-scale risks to the natural environment or to people).[8]

---

5 One of the roles of multilateral environmental agreements is to shed light on what the international community sees as being legitimate public policy objectives and risk management practices in the environmental field.

6 Green Growth Strategy Interim Report: Implementing our Commitment for a Sustainable Future 27-28 May 2010, www.oecd.org/dataoecd/38/40/45194631.pdf

7 National treatment may provide a lower level of guarantee for compensation than that provided by some international investment agreements. For example, in language that resembles that used in other agreements, the Energy Charter Treaty states: investments "shall not be nationalized, expropriated or subjected to a measure or measures having effect equivalent to nationalization or expropriation … except where such Expropriation is: …. (d) accompanied by the payment of prompt, adequate and effective compensation." This "prompt, adequate and effective compensation" may or may not be available to domestic investors and this possibly lower compensation standard sets the minimum standard under national treatment. www.encharter.org/fileadmin/user_upload/document/EN.pdf

8 A May 2009 report prepared in support of discussions at the Freedom of Investment Roundtables entitled "A review of security related terms in international investment law and in national security plans" shows

18. Thus, OECD investment instruments establish an exception for discriminatory or restrictive policies that aim to safeguard public order and security. However, it is recognised that such policies can be used to disguise protectionism and, in order to discourage such use, these policies are subject to special transparency and peer-review disciplines. These include, for countries that formally adhere to the OECD investment instruments, an obligation to notify such policies; these policies may, in turn, be subjected to peer-review. Participants at the *Freedom of Investment Roundtables* have agreed on guidelines for international investment policies related to national security that help governments ensure that these policies are effective in their intended purpose and, at the same time, to preserve the country's reputation for fair treatment of international investors.[9] Among other things, the text urges that discriminatory policies related to national security be adopted only as a last resort, when other measures of general application cannot be used to address security-related concerns. FOI Roundtable participants use these guidelines as the basis of peer review of security-related investment policies.

III. How prevalent is green investment protectionism?

19. Investment restrictions related to green-growth policies are, at least for the time being, not a major feature of the policy landscape for the 50 economies followed in OECD-hosted investment policy monitoring. Only a few of the recent policy measures are found to contain an environmental dimension. None of these policies with an investment dimension involved restrictions to establishment or to outward capital flows; nor did any involve blatant discrimination against foreign-controlled investors. Instead, all of the environmental-investment policies found involve categories of public monopolies (which pose competition concerns for domestic and foreign investors alike) or policies (state aids to build green production capacity) that are *de jure* open to foreigners, but for which discretion in the application of the policy may allow *de facto* discrimination against foreigners.

This finding is based on the following observations:

- *Openness*. None of the reservations listed for the countries adhering to the Codes of Liberalisation (relating to the restrictions on establishment by non-residents and to restrictions on outward capital flows) refer to environmental policies (though some do concern sectors – e.g. power generation and transport – in which policies may *inter alia* address environmental considerations).

- *Exceptions to national treatment*. None of the exceptions to national treatment notified by the 42 countries adhering to the OECD Declaration on International Investment and Multinational Enterprises relate directly to environmental policies.[10]

- *Security-related investment measures and other policies that may create barriers to investment*. As noted above, security-related investment measures are subject, under OECD procedures, to special notification requirements for transparency purposes; such measures are not automatically considered to be protectionist, but are subject to special scrutiny.[11] None of the notifications about security-related measures cites the environment or "green growth" as a consideration. Also subject to OECD notification requirements are policies that raise competition concerns for both domestic and foreign

---

that the term *national security plans* frequently mention risks that are of direct or indirect relevance to the environment (e.g. those related to climate change and man-made disasters). See Table 2 at www.oecd.org/dataoecd/50/33/42701587.pdf.

9 This Guidelines may be found at www.oecd.org/dataoecd/11/35/43384486.pdf

10 See www.oecd.org/dataoecd/32/21/1954854.pdf for full list of exceptions by country.

11 See www.oecd.org/dataoecd/57/46/38273182.pdf for a full list of measures reported for transparency purposes.

investors (e.g. public monopolies) and discriminatory policies at the sub-national level. Only two of the country notifications refer to the environment (Israel and Switzerland). Both countries have public monopolies that provide environmental services (protection of national parks and hazardous waste disposal in Israel, and cantonal monopolies for environmental services such as waste management and potable water supply in Switzerland). These public monopolies are not protectionist in the sense used here because they limit the investment opportunities of both domestic and foreign investors alike – i.e., they raise barriers for both types of investor.

20. Although green protectionism is not currently a prominent feature of investment policy in the countries covered by OECD notification requirement and reporting, governments will have to remain vigilant to ensure that the greening of their economies is an open process that benefits fully from the innovations and green capital accumulation that international investment can bring.

IV. Other environmental policies that influence investment patterns: Protectionist? Distorting? Necessary?

21. Certain "green" policies – including grants to individual firms, loan guarantees and capital injections – may not, under OECD definitions – quality as a restrictive investment measures – that is, as green protectionism, under the definition proposed in this paper (in the sense of discriminating against foreign-controlled or non-resident investors).

22. Under crisis-response and economic stimulus policies, at least five countries (France, Germany, Italy, Spain, the United Kingdom) adopted 'green' state-aid policies. These measures, which were are notified to the European Commission and are publicly reported by the Commission, make available loan guarantees and interest-rate subsidies that are designed to help companies build up domestic production capacity in more environmentally-friendly products. These aids are *de jure* available to all resident investors, even if they are foreign-controlled. Other countries are thought to have similar policies, including under fiscal stimulus programmes adopted in response to the economic crisis. The procedures followed by the OECD Investment Secretariat do not permit full coverage of all such policies adopted by FOI participants.

23. The fact that, under these programmes, the benefits go to some companies and not to others means that such policies are not, strictly speaking, "protectionist" in the sense of discriminating against non-residents and foreign-controlled investors. The programmes put all non-subsidised competitors, be they domestic or foreign, at a competitive disadvantage relative to subsidised companies. It is for this reason, these measures' status as "green investment protectionism" is questionable. However, it is clear that such policies affect competitive processes in key "green" sectors, including competition that operates through international investment. It is for this reason that they are a matter of concern for the investment policy community.

24. Another concern for the international investment policy community is that these policies could be used to disguise protectionist intent. In effect, these policies exist in an ambiguous area where justifications based on market failure seem compelling, but where the serious risks posed by such programmes to competitive processes (including international investment) must also be acknowledged. The Interim Report on the OECD Green Growth Strategy notes this ambiguity by first describing the positive role that such policies might play in redressing market failure:

> *Both environmental and knowledge externalities may … stand in the way of moving towards economies based on greener technologies. Without public intervention, the related market failures, i.e. market prices that do not fully reflect the environmental degradation generated by economic activity, learning-by-doing and R&D spill-over effects, can … delay or even prevent*

> *the development and diffusion of clean technologies. Unleashing green innovation requires a policy response on several fronts … including, but not limited to, environmental taxes and incentive policies, such as R&D tax credits or direct subsidies to firms engaging in green activities, as well as public procurement and the funding of basic research. … (page 44)*

25. Yet the Interim Report also stresses the importance of such policies relying, to the extent possible, on market pricing: "Market-friendly approaches that avoid 'picking winners' and encourage competitive selection of investments … are likely to be the most efficient".[12]

26. Thus, these policies may not constitute green protectionism, but their potential for anti-competitive impacts, including on international investment, is evident. The investment policy community may have a role, alongside other policy communities, in ensuring that these policies pursue genuine concerns about market failure and are not used as an excuse for green investment protectionism.

[12] Both quotes from the Interim report on the OECD Green Growth Strategy appear on page 44.

Green Growth: Relations between International Environmental Law and International Investment Law[13]

I. Introduction

27. The expanding agenda of international environmental law now influences many national government policies. International efforts to protect various environmental media -- including the atmosphere (climate change, ozone depletion and air pollution), land resources, forests, and fresh and saltwater resources -- increasingly shape the many national policies that apply in these areas. International environmental law also affects the national regulation of many important economic activities that generate products and by-products of environmental concern. These include toxic chemicals and hazardous wastes (and their international trade), biotechnology and agricultural practices.

28. As governments pursue more active environmental policies that involve international commitments to green growth[14], international environmental law will play a increased role in framing national policies. This new wave of more activist international and national environmental policy is occurring in a world in which investors regularly challenge national policies under the standards of investment treaties in investor-state arbitration proceedings. In this context, it is important to evaluate how investment law can take account of international environmental commitments.

29. This paper examines the relationship between international environmental law and international investment law including how the two areas relate to one another under general international law. It examines the degree to which investment law tribunals can consider international environmental law in light of the applicable limits on those tribunals' jurisdiction and the provisions governing the applicable law in investment treaty disputes. It also reviews issues that can arise in determining what constitutes applicable international environmental law in a particular case and the principles applicable to the interpretation of overlapping international law norms.

---

13 This paper was prepared by David Gaukrodger, Senior Legal Consultant in the OECD Investment Division. This paper does not necessarily reflect the views of the OECD or those of its member governments or other government participants in the FOI process. It cannot be construed as prejudging ongoing or future negotiations or disputes arising under international investment agreements.

14 Green growth has been defined as "the means by which the current economy can make the transition to a sustainable economy. It involves promoting growth and development while reducing pollution and greenhouse gas emissions, minimising waste and inefficient use of natural resources, maintaining biodiversity, and strengthening energy security. It requires further "decoupling" of environmental impacts from economic growth, and greening of consumption and production patterns, while reducing poverty and improving health and jobs prospects. Green growth means making investment in the environment a new source of economic growth". See OECD and Green Growth (2009), http://www.oecd.org/dataoecd/42/28/44273385.pdf. As recognised by the OECD Environmental Action Programme, green growth is a shared challenge for numerous public and private sector actors, as well as for society at large. Public authorities can establish conditions that provide, or lead to the provision of appropriate market and policy incentives, adequate investment, innovation, and new knowledge and skills.

30. In most investor-state cases, it appears that international environmental commitments will likely be primarily relevant as part of the background against which the challenged government action is interpreted. For example, in a recent case, an investor-state tribunal found that international environmental law obligations were important in evaluating the application of investment law to national regulation of a pesticide. In some cases, a more intensive legal analysis may be required.

31. Ultimately, the issues raised by overlapping and conflicting norms from different regimes or areas of international law are to a substantial degree ones of interpretation and the tribunal has a critical role. Choices about the institutions for dispute resolution can therefore have fundamental consequences for the resolution of the issues.

II. International environmental law

32. International environmental law is based to a considerable degree on multilateral treaties which have proliferated especially in recent years.[15] Well-known examples include the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal (Basel Convention), the 1992 Convention on Biological Diversity (Biodiversity Convention), and the 1992 UN Framework Convention on Climate Change (1992 Climate Change Convention).[16] In addition to major multilateral treaties, there are very numerous bilateral and more limited multilateral environmental treaties.[17]

33. International environmental treaty law is characterised by distinctive institutions and by a strong scientific basis. One distinctive approach is a "three-tiered" approach to treaty-making involving (i) a general multilateral framework convention that establishes principles and key institutions; (ii) more detailed protocols on specific issues which are developed in part by the new institutions based on additional scientific work; and (iii) annexes and or appendices with more detailed scientific, technical or administrative provisions.[18] This tiered structure can assist in keeping laws and regulations flexible and open to change as scientific knowledge improves. Much of the day-to-day work in international environmental law involves using the complex procedures and institutions established by treaties to set detailed regulatory standards."[19]

34. Many environmental treaties and numerous soft law documents refer to important general principles and standards, such as the principle of sustainable development, the polluter-pays principle or

---

15 See generally, Philippe Sands, Principles of International Environmental Law (2d ed. 2003) (hereinafter Sands 2003); Daniel Bodansky, Jutta Brunnée and Ellen Hey, eds., The Oxford Handbook of International Environmental Law (2008).

16 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 U.N.T.S. 243; Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, 22 March 1989, 1673 UNTS 57; Convention on Biological Diversity, 5 June 1992, 1760 UNTS 79; United Nations Framework Convention on Climate Change. 9 May 1992, 1771 UNTS 107.

17 A database on "binding" international environmental agreements contains 1538 bilateral treaties, 1039 multilateral treaties and 159 other agreements. More than 2300 of the treaties were adopted after 1950. Treaty adoption was particularly rapid during the 1990s, but has slowed somewhat since then. See Ronald B. Mitchell, 2002-2010, *International Environmental Agreements Database Project (Version 2010.2).*Available at: http://iea.uoregon.edu/. Date accessed: 30 August 2010.

18 See Sands 2003, p. 128.

19 See Tim Stephens, "Multiple International Courts and the 'Fragmentation' of International Environmental law", University of Sydney Law School, Legal Studies Research paper No. 07/14, p. 241, available at www.ssrn.com/abstract=969569.

the precautionary principle.[20] Some principles, such as the obligation not to cause trans-boundary environmental damage, have been recognised as part of customary international law.[21] However, most of these principles have an uncertain legal status both with regard to their content and their binding nature. As noted by a recent international arbitration tribunal, "[t]here is considerable debate as to what, within the field of environmental law, constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed to the development of customary international law".[22]

35. Until recently, international environmental treaties have not generally paid much attention to investment.[23] Climate change law and policy have innovated by including important investment-related measures. The 1997 Kyoto Protocol, which implements the 1992 UN Framework Convention on Climate Change, focuses specifically on increasing investment to lower carbon emissions.[24] Most notably, the Clean Development Mechanism (CDM) allows developed countries or their entities to obtain emission credits by making low-carbon investments in developing countries.

36. This recent attention to investment is important. In many areas of environmental policy, investment is critical because of the long life-span of the installations that generate pollutants. Ideally, if major up-front investments are made, they achieve environmental benefits (which also save costs) over the life of the project. The necessary up-front investment in such cases is thus much greater than the ultimate cost of reducing pollution.[25] Investment law can play a very important role in encouraging the necessary up-front investments.

37. While the reasons are the subject of debate, it is undoubted that disputes relating to international environmental rules are only rarely subjected to international dispute resolution. This contrasts sharply with the active recourse to investor-state arbitration under international investment treaties. Most of the interaction between international environmental law and investment law in the dispute resolution context is likely to occur in investment arbitration cases rather than in fora created by environmental agreements.

---

20 Other principles include the principle of preventive action, the principle of co-operation and the principle of common but differentiated responsibility. See Sands 2003, p. 231.

21 See ICJ, *Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion*, [1996] ICJ Reports 241, para. 29. See also ICJ, *Case concerning Pulp Mills on the River Uruguay* (*Argentina v. Uruguay)* (20 April 2010) (recognizing Environmental Impact Assessments (EIA) as a practice that has attained customary international law status).

22 See Permanent Court of Arbitration: *In the Arbitration Regarding the Iron Rhine Railway (Belgium v. the Netherlands)*, Award of the Tribunal (24 May 2005) § 58; see also Sands 2003, p. 231 ("In the absence of judicial authority and in view of the conflicting interpretations under state practice, it is frequently difficult to establish the parameters or the precise international legal status of each general principle or rule.")

23 In contrast, trade is often addressed in environmental treaties. Well-known examples are the Convention on International Trade in Endangered Species of Wild Fauna and Flora, Arts. III-V Mar. 3, 1973, 993 U.N.T.S. 243 (hereinafter CITES) (restricting imports and exports of protected wildlife) and the Montreal Protocol, art. 4 (controlling the import from and export to non-parties of certain ozone-depleting substances).

24 See Kyoto Protocol to the United Nations Framework Convention on Climate Change, Arts. 6, 12, 17.

25 In the area of climate change, see, e.g., Development and Climate Change, World Bank Development Report 2010, p. 259 ("Because many clean investments have high up-front capital costs, followed later by savings in operating costs, the incremental financing requirements tend to be higher than the lifetime costs reported in mitigation models. The difference could be as much as a factor of three.").

III. Scope for consideration of international environmental law in interpreting or applying investment treaties: applicable law and jurisdiction

A. Applicable law in investment disputes

1. Applicable law in investment treaty arbitration disputes will generally include any applicable international environmental law

38. The applicable rules for resolving disputes under investment treaties frequently require the application of international law as part of the applicable law. Many investment treaties expressly provide that international law is part of the applicable law for the resolution of disputes. For example, the Energy Charter Treaty provides that the Tribunal "shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law".[26] The ICSID Convention (art. 42) also provides for the application of international law in ICSID cases in the absence of a contrary agreement by the parties.[27] As stated by an ICSID Annulment Committee in *MTD v Chile*, the tribunal was required "to apply international law as a whole to the claim, and not the provisions of the BIT in isolation".[28]

39. In addition to frequently requiring the application of international law, investment treaties are "more than usually dependent on their wider context" because they are relatively simple treaties.[29] They generally set forth the applicable general investment law standards such as for national treatment, fair and equitable treatment, or the international minimum standard of treatment. But they frequently say little about the consequences of breach (except for expropriation) or about issues such the rules for attributing acts by various state-related entities to the state in question. For these questions and others, recourse must be had to other international law.[30]

40. Such other international law notably includes general international law rules such as those on state responsibility – which governs among other things the attribution of acts to the state, the consequences of breach of an international obligation and the circumstance in which breaches may be excused by necessity -- or the rules on treaty interpretation in the Vienna Convention on the Law of Treaties (VCLT). It also includes applicable environmental law, as discussed further below.

---

26 See Energy Charter Treaty art. 26(6); NAFTA art. 1131 (Chapter 11 "tribunal shall decide the issues in dispute in accordance with this Agreement and applicable rules of international law"); 2004 Model US BIT art. 30(1) (for claims based on alleged breach of the BIT, tribunal "shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law"); Chinese Model BIT (2003) art. 9 (requiring submission of dispute to national court or ICSID arbitration; "The arbitration award shall be based upon the law of the Contracting Party to the dispute including its rules on conflict of laws, the provisions of this Agreement as well as the universally accepted principles of international law".)

27 See ICSID Convention art. 42 ("The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such rules of international law as may be applicable.")

28 *MTD Equity Sdn Bhd v Chile* (Decision on Annulment), ICSID Case No ARB/01/7 (ICSID 2007); see also Campbell McLachlan, Investment Treaties and General International Law, 57 ICLQ 361, 370 (April 2008) ("where the obligations in question are those created under international law, as in the case of [investment] treaty obligations, there is no doubt that the applicable law is potentially international law as a whole") (hereinafter McLachlan 2008).

29 Id., p. 374.

30 Other applicable law frequently includes national law for some issues "due to the private or commercial interests at the heart of" investment treaty jurisdiction. See Z. Douglas, The Hybrid Foundations of Investment Treaty Arbitration, 74 BYIL 151, 195 (2003).

41. A related development in general international law has been a resurgence of interest in art. 31(3)(c) VCLT. That provision mandates that other applicable international law be taken into account in treaty interpretation even in the absence of an applicable law clause referring to international law.[31] Article 31(3)(c) has been described as embodying a principle of "systemic integration" that recognises the link between a particular treaty and broader international law.[32] Long dormant, art. 31(3)(c) is increasingly applied by international arbitral tribunals and courts as a method of integration of a particular treaty with other applicable international law.[33] It was considered in conclusions and a detailed report by a study group established by the International Law Commission (ILC) to study the issue of the fragmentation of international law.[34]

42. Article 31(3)(c) VCLT is applicable to all treaties including investment treaties. However, applicable law provisions in investment treaties frequently appear to provide a stronger basis for the application of other international law than art. 31(3)(c) VCLT. For example, art. 31(3)(c) VCLT requires that the law-applier "take account" of other applicable international law whereas the typical applicable law clause requires that such law "apply" as part of the applicable law.

2. Identifying the applicable international environmental law can present challenges

43. One important limit on the scope of materials that a tribunal can apply is the frequent requirement that it be international "law" or "rules of international law". Issues in this regard can exist with regard to identifying which other treaties apply, what constitutes customary international law and what constitutes soft law.

a. Defining which other treaties are part of the applicable law

44. Where the other international law at issue takes the form of another international treaty (as opposed to customary international law), there is an additional consideration: identifying which treaties constitute part of the applicable international law between the parties. This in turn requires a decision about the degree of congruence required between the parties to the principal treaty and the other treaty. There are various potential approaches.[35] The issue of the necessary congruence of the treaty parties in the two

---

31 See Art. 31(3)(c) VCLT "[t]here shall be taken into account, together with the context: … (c) any relevant rules of international law applicable in the relations between the parties".

32 See Campbell McLachlan, "The Principle of Systemic Integration and Article 31(3)(c) of the Vienna Convention", 54 Intl & Comp. L.Q. 279 (hereinafter McLachlan 2005).

33 See, e.g., Permanent Court of Arbitration: *In the Arbitration Regarding the Iron Rhine Railway (Belgium v. the Netherlands)*, Award of the Tribunal (24 May 2005); ICJ, *Case concerning Oil Platforms (Iran v United States of America)*, 42 ILM 1334 (2003). See also ICJ, *Case Concerning Pulp Mills on the River Uruguay (Argentina v. Uruguay)* (20 April 2010).

34 The Study Group produced 42 conclusions which are to be read together with the Group's report. See Conclusions of the work of the Study Group on the Fragmentation of International Law: Difficulties arising from the Diversification and Expansion of International Law (2006) ("Fragmentation Conclusions"); Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, Report of the Study Group of the International Law Commission (finalised by Martti Koskenniemi) (2006) ("Fragmentation Report"), both available at http://untreaty.un.org/ilc/guide/1_9.htm. See also, e.g., Tim Stephens, "Multiple International Courts and the 'Fragmentation' of International Environmental law", University of Sydney Law School, Legal Studies Research paper No. 07/14, available at www.ssrn.com/abstract=969569; McLachlan 2005.

35 The most rigorous approach requires that all of the parties to the principal treaty under interpretation also be parties to any treaties relied upon. Insofar as the other treaty is not in force between all members to the treaty under interpretation, the rule contained in it could not be considered unless it is a rule of customary

treaties can be a difficult issue where the primary treaty under interpretation is a multilateral treaty with many parties, such as the WTO. The issues are simpler in the typical investment treaty case involving a treaty between only two parties.

b. Customary international law and soft law

45. As noted above, there is considerable debate about what, within the field of environmental law, constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed to the development of customary international law.

46. The broad nature of most investment law principles and the increasing focus on the issue of the good faith basis of regulation can give tribunals latitude to consider the purposes of governmental action, and the means chosen to achieve them, in the light of international environmental goals.

47. Overall, with regard to applicable law, the frequent requirement that arbitrators apply international law in investment disputes means that applicable international environmental law will be part of the law applicable to the dispute. Even in the absence of an applicable law clause referring to international law, arbitrators will need at a minimum to take account of any applicable international environmental law under VCLT art. 31(3)(c).

48. The parties and the arbitrators will thus need to identify and address how such applicable international environmental law relates to the investment treaty provisions. Before turning to the interaction between the two bodies of law, it is important to recognise the existence of jurisdictional limitations on the role of investment tribunals. These apply to limit their role in applying international environmental law.

B. Investment arbitration tribunals have limited jurisdiction

49. It is important to distinguish between the jurisdiction of a tribunal and the issue of the applicable law. International tribunals have limited jurisdiction that gives them only the power to resolve specified types of disputes. A variety of provisions may apply to limit a tribunal's jurisdiction. Thus, for example, a tribunal's jurisdiction may be limited by the relevant treaty to claims under a particular treaty or regime. Such a tribunal does not have the power to decide claims under other treaties or under general international law (although, as noted above, it may need to consider such law as part of the applicable law).

50. In the *Mox Plant* arbitration between Ireland and the United Kingdom, which related to the potential environmental impact of operation of a nuclear reprocessing plant at Sellafield, United Kingdom, the tribunal noted the "cardinal distinction" between jurisdiction and applicable law.[36] Although the tribunal's jurisdiction under the United Nations Convention on the Law of the Sea (UNCLOS) was limited to claims under UNCLOS and did not extend to claims arising under other legal instruments, the tribunal noted that it could have regard to other legal obligations between the parties in determining the content of the applicable law in resolving the claims under UNCLOS.[37]

---

international law. A second approach would permit reference to another treaty provided that the treaty parties in dispute are also parties to the other treaty. A more flexible approach would recognise that the other treaty could be considered for some purposes even where it is not in force. See McLachlan 2005, p. 313-315.

36 See Permanent Court of Arbitration: *The Mox Plant Case (Ireland v. United Kingdom) -- Order No. 3* (24 June 2003) ¶ 19, http://www.pca-cpa.org/upload/files/MOX%20Order%20no3.pdf.

37 *Id.* ¶ 23.

51. The distinction between jurisdiction and applicable law applies to investment tribunals as elsewhere. As noted by Campbell McLachlan, whatever the limitations imposed by jurisdictional clauses on the types of claims that can be brought before an investment tribunal, they are distinct from the issue of the applicable law to resolve the claim.[38]

52. In investment treaty cases, the jurisdiction of the arbitration tribunal requires the consent of the host state as expressed in the investment treaty (and the investor's consent). Jurisdictional clauses in investment treaties vary considerably and are not always limited to claims under the investment treaty. Some provide broadly for resolution of "any dispute" between a host state and an investor; "umbrella" clauses extend jurisdiction to certain disputes involving contract claims. Other jurisdictional clauses refer more narrowly only to breaches of identified provisions of the treaty (NAFTA).

53. Investor-state tribunals have no jurisdiction to resolve claims under international environmental treaties or law. Where such law is applicable to the issues, the tribunal's role is limited to interpreting it -- including how it interacts with other applicable law -- and applying it in the context of resolving the investor-state claims over which they have jurisdiction under the investment treaty (i.e., claims of breach of provisions such as indirect expropriation, fair and equitable treatment, the international minimum standard or national treatment).

IV. Relations between international environmental law and international investment treaties

54. This section first provides a brief introduction to basic principles and general approaches that apply to the interpretation of treaties and to the relationships between treaty obligations. It describes two basic interpretive principles used to resolve conflicts between treaty provisions: the principle that later law supersedes earlier law -- *lex posterior*; and the principle that a more specific provision should prevail over one that is more general – *lex specialis*. It then considers the notion of a "special regime" – a more recent notion discussed notably in the ILC work on the fragmentation of international law -- which refers generally to a set of special rules relating to a particular subject matter. Conflicts between norms from different special regimes, such as environmental and investment treaties, can raise particular problems. The section then addresses how international tribunals frequently search to achieve a balance between competing interests though a process of interpretation and notes some relevant recent cases involving international environmental law. It concludes with a discussion of conflict clauses in treaties, which can seek to address potential conflicts by establishing a hierarchy between different treaties in the event of conflict.

A. Principles for interpreting treaties and addressing conflicts

55. The usual starting place in addressing the interpretation of international law norms is the VCLT.[39] The interpretation process is primarily governed the general rules of interpretation in article 31.[40] Article

[38] See McLachlan 2008 at 370 ("the distinction between jurisdiction and applicable law (a key distinction in both private and public international law) still remains important in investment arbitration. Investment tribunals, like many public international arbitral tribunals, do not have plenary jurisdiction. They only have as much jurisdiction as has been vouchsafed to them by the parties. Where the source of that consent on the part of the host State is an investment treaty, it will be the dispute resolution clause in the treaty itself which will delimit the extent of the matters which the tribunal is competent to decide. But that does not of course proscribe the law which the tribunal may apply to determine those issues. The requirement of Article 42 [of the ICSID Convention] to have regard to the whole of international law thus operates at the applicable law stage, whatever may be the limitation on the tribunal's jurisdiction") (footnotes omitted).

[39] Vienna Convention on the Law of Treaties (VCLT), opened for signature May 23, 1969, 1155 U.N.T.S. 331 (entered into force Jan. 27, 1980). The VCLT has not been ratified by all states, but it is frequently considered to be a codification of customary international law.

31 requires that a treaty must be "interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose"; it also provides some additional specific rules of interpretation. As noted above, art. 31(3)(c) mandates that "any relevant rules of international law applicable in the relations between the parties" be taken into account.

56. The VCLT also has some specific rules to assist in resolving conflicts between treaty norms. Article 30 VCLT provides the basic rules governing the situation where states are parties to successive treaties relating to the same subject-matter.[41] First, one of the treaties may resolve the matter expressly.[42] Second, under Article 30(3) VCLT, if all parties to earlier treaty are parties to the later treaty, the earlier treaty (if it is not terminated by the later treaty) is still applied to the extent that its provisions "are compatible" with those of the later treaty. More complicated problems arise with treaties with non-identical parties, *e.g.*, where the parties to the later treaty do not include all the parties to the earlier one.[43]

57. The principle of *lex specialis* is another generally accepted technique of interpretation and conflict resolution (although it is not reflected in the VCLT). It suggests that where two rules deals with the same subject matter, priority should be given to the one that is more specific. It can apply both within treaties and well as between different treaties.[44] The rationale is that the more specific rule likely takes account of the specific context and also probably better reflects the parties' intentions.

58. The notion of a special regime was addressed notably in the Fragmentation Conclusions and Report. It extends the notion of specialization beyond a particular provision to a subject matter or, more broadly, to a problem area. In addition to addressing a special subject matter, treaties in a regime are frequently institutionally linked. Examples are a framework treaty and its implementing protocols or the various "covered agreements" at the WTO for which the WTO Appellate Body has ultimate dispute resolution jurisdiction. Expressions such as "law of the sea", human rights law, environmental law and trade law are generally recognised as special regimes of this type. A special regime often lies in the existence of an overall unified object and purpose which should be reflected in interpretation and application of the regime.[45]

59. Like other treaties, special regimes exist against the background of general international law. Some special regimes, such as the WTO system, may be quite comprehensive in nature, but even in such cases it is generally recognized that the regime ultimately exists against the backdrop of general international law. General international law fills gaps in the special regime and provides interpretive

---

40 Article 32 provides for supplementary rules of interpretation.

41 The meaning of the limitation of art. 30 to treaties relating to the "same subject-matter" has rarely been adjudicated and has been variously interpreted.

42 See Article 30(2) VCLT ("when a treaty specifies that it is subject to, or that it is not to be considered as incompatible with, an earlier or later treaty, the provisions of that other treaty prevail".)

43 Article 30(4) VCLT distinguishes two situations: (i) As between those States that are parties to both treaties, Art. 30(3) applies as above: if the earlier treaty is not terminated, it is still applied to the extent that its provisions "are compatible" with those of the later treaty; (ii) As between a State party to both treaties and a State party to only one of the treaties, "the treaty to which both States are parties governs their mutual rights and obligations" (art. 30(4)(b)). If the treaties contain incompatible obligations, the State which is party to both treaties may also be liable to other State.

44 The focus here is on inter-treaty relationships because the VCLT applies to treaty interpretation, but the *lex specialis* principle also applies to rules from other sources such as customary international law. In practice, treaties are often considered to be *lex specialis* with regard to background customary law.

45 See Fragmentation Conclusions § 13.

direction, notably through the VCLT.[46] This does not exclude the development of a particular interpretative approach or ethos for a particular regime. Other treaties, such as investment treaties, leave significant issues unaddressed – the role for general international law is correspondingly greater.

60. It is widely recognized that the interaction between norms from different regimes gives rise to the most difficult interpretive issues. The *lex posterior* and *lex specialis* principles are generally considered to be less persuasive tools of interpretation in such cases:

> The significance of identifying such "treaty regimes" lies in the way it seems relatively less complicated to establish a relationship between two instruments *within* one such regime than between two instruments *across* different regimes. For example, the argument from *lex posterior* or *lex specialis* seems clearly more powerful between treaties within a regime than between treaties in different regimes. (§ 255)

61. *Lex specialis* and *lex posterior* are venerable principles that allow a choice of one norm over the other. In contrast, in recent years, considerable attention has been paid to increasing efforts to reconcile interests from different regimes through interpretation.

B. Increasing efforts to reconcile the interests through interpretation

62. International law frequently seeks to achieve a balance between the competing interests furthered by different regimes rather than applying only one to the detriment of the other. This search for accommodation, rather than the triumph of one norm over another, is exemplified by the opinion of ICJ Judges Higgins, Buergenthal and Kooijmans in an ICJ case considering the interaction between liability for international crimes and state immunity.[47] As noted in the Fragmentation Conclusions (§ 4), "it is a generally accepted principle that when several norms bear on a single issue they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations".

63. Leading environmental law scholars have similarly suggested that a reasonable accommodation of the competing interests is the appropriate approach to the interaction of international environmental law and international economic law.[48] A similar concept of the integration of interests is also a central aspect of the principle of sustainable development. A key element of sustainable development involves the

---

46 A related term is "self-contained regime". The Fragmentation Report considered that this term is a misnomer because it suggests a legal regime isolated from general international law. It suggested its replacement by the term special regime. The GATT system prior to 1994 was considered by some to constitute a self-contained regime, but after 1994, the WTO Appellate Body made clear in its first decision that the WTO did not exist in "clinical isolation" from general international law. See *United States – Standards of Reformulated and Conventional Gasoline* (20 May 1996) WT/DS2/AB/R, DSR 1996:1, p.16.

47 *Case concerning the Arrest Warrant of l1 April 2000 (Democratic Republic of the Congo v Belgium)* (International Court of Justice, 14 Feb 2002), Joint Separate Opinion, § 79 ("International law seeks the accommodation of this value [the preservation of unwarranted outside interference in the domestic affairs of states] with the fight against impunity, and not the triumph of one norm over another").

48 See Philippe Sands, Litigating Environmental Disputes: Courts, Tribunals and the Progressive Development of International Environmental Law (paper distributed at 2008 OECD Global Forum on International Investment) ("As issues become more inter-related it will be incumbent upon those involved in arbitrating disputes with an environmental element to strive for balance, balance between potentially competing objectives of environmental protection on one hand, and the protection of rights of foreign investors on the other hand. Neither of these important societal interests should trump the other, they should be treated in an integrated manner.").

integration of environmental concerns into economic development, and the reciprocal integration of economic and social concerns into environmental policies and obligations.[49]

64. A recent example of the integration of international environmental law with other treaties dealing with economic development is to be found in the "*Iron Rhine*" arbitration between Belgium and the Netherlands.[50] The case was decided in 2005 by five arbitrators, including three ICJ judges, and the panel was presided by Rosalyn Higgins (subsequently appointed president of the ICJ). The case addresses issues of importance to investment arbitration although it is a case between two states.

65. The case arose out of several 19th century treaties that gave Belgium rights to transit by railway through Dutch territory to link Antwerp with Germany. After the railroad had been little-used for a considerable period, Belgium sought to exercise its treaty rights in a way that corresponded to its current economic needs which involved much more intensive use of the railway line. Modernisation and expansion of the railroad was necessary for this purpose. Dutch law, however, imposed significant environmental obligations on the expansion and the responsibility for these significant costs (among others) was in dispute.

66. The arbitration agreement in *Iron Rhine* contained a clause providing for the application of international law.[51] With particular regard to international environmental law, the tribunal found that "[e]nvironmental law and the law on development stand not as alternatives but as mutually reinforcing, integral concepts" and that environmental protection must be integrated into the development process. Accordingly, the tribunal found that it is a "principle of general international law" that "where development may cause significant harm to the environment there is a duty to prevent, or at least mitigate, such harm". The tribunal explicitly sought to reconcile the interests at issue as far as possible.

67. The tribunal found that the environmental costs needed to be integrated into the development costs. With regard to the distribution of costs, the general approach adapted was that the costs of environmental protection were to be largely borne by Belgium because the reactivation of the Iron Rhine railway could not be viewed in isolation from the environmental protection measures necessitated by the intended use of the railway line.[52] This obligation was subject to set-offs for the Netherlands' use of the line and incidental benefits to the Netherlands from the environmental work.

68. The Tribunal recalled the observation of the International Court of Justice in the *Gabčíkovo-Nagymaros* case that "[t]his need to reconcile economic development with protection of the environment is aptly expressed in the concept of sustainable development" and that "new norms have to be taken into

---

49 See Sands 2003 p. 253 (as reflected in international agreements, sustainable development includes "the need to ensure that environmental considerations are integrated into economic and other development plans, programmes and projects, and that development needs are taken into account in applying environmental objectives (the principle of integration)").

50 Permanent Court of Arbitration: *In the Arbitration Regarding the Iron Rhine Railway (Belgium v. the Netherlands)*, Award of the Tribunal (24 May 2005), available at http://www.pca-cpa.org/showpage.asp?pag_id=1155.

51 Under the arbitration agreement, the Parties requested that the Arbitral Tribunal "render its decision on the basis of international law, including European law if necessary, while taking into account the Parties' obligations under article 292 of the EC Treaty." As a result, consideration of other applicable international law was required, not only by art. 31(3)(c) VCLT, but also by the applicable law clause.

52 *Iron Rhine*, §§ 223, 226.

consideration, and . . . new standards given proper weight, not only when States contemplate new activities but also when continuing with activities begun in the past".[53]

69. Investment tribunals may be increasingly confronted with similar issues in the future. It is noteworthy that in *Chemtura Corp. v. Canada*, a recently decided investor-state case, the tribunal considered the relevant international environmental commitments in evaluating, under investment law standards, government action relating to the deregistration of a pesticide.[54]

70. The investor (Chemtura) owned a Canadian subsidiary that manufactured and sold agricultural pesticide products in Canada. These included lindane-based pesticides which were allegedly among its most profitable businesses.[55] Lindane had been first registered for use in Canada in 1938. By the 1990s, lindane was used notably for canola, which was the second most important crop in Canada after wheat. Canola was grown primarily as a source for a healthy oil.

71. The investor challenged several aspects of lindane-related regulation under the international minimum standard, expropriation and most-favoured nation provisions of NAFTA, seeking over USD 78 million in damages; all of its claims were dismissed, and it was ordered to pay the arbitration costs and half of Canada's substantial legal costs.

72. The international environmental law context was primarily relevant to Chemtura's challenge to Canada's 1999 decision to re-evaluate lindane in a Special Review which ultimately led to its deregistration. As characterised by the tribunal, the investor's argument was in effect that the Special Review of lindane was improperly motivated by trade considerations rather than health and environmental concerns. The investor pointed to the fact that the review was initiated after the US – which had never formally registered lindane for use on canola but had in effect permitted imports for some time – formally decided in 1998 to ban imports of lindane-treated canola seed. The investor argued that Canada's actions to ban lindane, including its decision to engage in a Special Review, were motivated by a desire to preserve its access to the US market for canola.

73. In rejecting this argument, the tribunal relied on the 1998 Aarhus Protocol on Persistent Organic Pollutants (Aarhus Protocol), which seeks to restrict and ultimately eliminate discharges of POPs to the atmosphere.[56] In the Aarhus Protocol, some 30 countries including the United States, Canada and most European countries agreed to restrict the use of lindane to six specific uses. As the tribunal noted, Annex II of the Aarhus Protocol expressly provides that "[a]ll restricted uses of lindane shall be reassessed under the Protocol no later than two years after the date of entry into force".

---

53 *Id*. § 221; see ICJ, *Gabčíkovo-Nagymaros (Hungary v. Slovakia)* (1997).

54 *Chemtura Corp. v. Canada*, (NAFTA/UNCITRAL), Award (2 August 2010), available at http://ita.law.uvic.ca/documents/ChemturaAward.pdf .

55 Lindane is a persistent organic pollutant ("POP"). While POPs can contribute to our general well-being, health and environmental concerns associated with POPs include the following: persistence for long periods in the environment; travelling long distances and depositing far away from their sources of release; accumulating in the fatty tissues of living organisms; causing complications like cancer and birth defects; triggering adverse effects on the ecosystem and biodiversity; and possibly disrupting immune and reproductive systems and even diminishing intelligence. See Secretariat of the Stockholm Convention, Factsheet on Stockholm Convention on POPs, http://chm.pops.int/Portals/0/docs/publications/sc_factsheet_004.pdf.

56 The Aarhus Protocol was adopted under the framework of the 1979 Convention on Long Range Transboundary Air Pollution Chemicals (LRTAP). These regional agreements have been supplemented by the 2001 global Stockholm Convention on Persistent Organic Pollutants (Stockholm POPs Convention), to which the tribunal also made reference.

74. The tribunal appeared to rest its determination on a mixed basis of fact and law. In addition to noting the Aarhus Protocol obligation as a legal matter, the tribunal referred to witness testimony indicating that the Special Review was prompted in part by the Aarhus commitments. The tribunal concluded that "the evidence on the record does not show bad faith or disingenuous conduct on the part of Canada. Quite the contrary, it shows that the Special Review was undertaken by the [Canadian regulatory agency] in pursuance of its mandate and as a result of Canada's international obligations."

75. In addition to the Aarhus Protocol, the tribunal took account, as part of the broader factual context, of the "fact that lindane has raised increasingly serious concerns both in other countries and at the international level since the 1970s". It quoted a long list of national and international measures to ban or limit the use of lindane that Canada had submitted to the tribunal. In this context, the tribunal noted the inclusion in May 2009 of lindane among chemicals designated for elimination under the Stockholm POPs Convention.

76. The international legal context was also found to be relevant with regard to the tribunal's rejection of the investor's claim that the scientific basis for the outcome of the review of lindane was insufficient and that the result was driven by trade concerns. The tribunal's primary ground for rejecting this argument was its view that the role of an investor-state investment tribunal "is not to second-guess the correctness of the science-based decision-making of highly specialised national regulatory agencies". But the tribunal also referred back to its decision about the reasons for the initiation of the Special Review, which as noted included international environmental law obligations, and its rejection of the bad faith claim on that basis.

77. As noted in the Fragmentation Report, "the question of the normative weight to be given to particular rights and obligations at the moment they appear to clash with other rights and obligations can only be argued on a case-by-case basis."[57] In most investor-state cases, the international environmental context will probably be primarily relevant as part of the background against which the challenged government action is interpreted. For example, international environmental law may make the policy reasons behind a particular action or the imposition of costs on investors more understandable or more legitimate. In some cases, however, more intensive legal analysis of the interaction of the applicable norms may be required.

C. The use of express conflicts clauses in treaties

78. One potential solution to uncertainty about the relationship between norms from different treaties is to address the issue expressly in one of the treaties in a conflicts clause. Conflicts clauses in treaties provide direction in the event of conflicts between the treaty and specified other treaties.[58] Although such conflict clauses are undoubtedly useful, there is a limit to what they can achieve. It is difficult for negotiators to foresee the possible conflicts between treaties (just as it would be difficult to require that national laws define in advance their relationships with other laws) and to address them in advance. Moreover, the multiplication of treaties and their increasing overlaps makes the task of resolving conflicts in advance more difficult.

79. There may also be difficulties reaching agreement about the appropriate hierarchy. Because of the salience of the trade/environment relationship, there has been a significant effort in environmental

---

57 See Fragmentation Report§ 474.

58 There are many variants of conflict clauses. The Fragmentation Report provides one typology which includes, inter alia, the following: prohibitions in the earlier treaty on the conclusion of incompatible subsequent treaties; clauses in the subsequent treaty providing that it "shall not affect" an earlier treaty, that it overrides or abrogates an earlier treaty or that it expressly maintains earlier compatible treaties.

treaties to address the relationship with trade law expressly. However, even extensive debate, as in the case of the Cartagena Protocol on Biosafety to the Convention on Biological Diversity (2000), does not necessarily lead to results that will assist those charged with resolving conflicts. Thus, the preambular clauses in the Biosafety Protocol addressing the relationship between trade and environment are largely circular:

> Recognizing that trade and environment agreements should be mutually supportive with a view to achieving sustainable development,
>
> Emphasizing that this Protocol shall not be interpreted as implying a change in the rights and obligations of a Party under any existing international agreements,
>
> Understanding that the above recital is not intended to subordinate this Protocol to other international agreements.[59]

80. As noted in the Fragmentation Report, such formulations imply a willingness to acknowledge the existence of parallel and potentially conflicting treaty obligations, and that there is no intent to create a hierarchy between the treaties at issue. But they fall short of indicating clearly what should be done in case conflicts emerge. Instead, recourse is to compromise formulas that push, as it were, the resolution of problems to the future.[60]

81. Canada and the United States are leaders in efforts to address environmental issues expressly in their investment treaties through a variety of provisions. Japan and New Zealand also have significant experience in this area. These provisions take a variety of forms, but they can provide important guidance with respect to the interaction of the treaties with other law.[61] Moreover, broader free trade agreements containing investment chapters expressly address environmental considerations in their investment provisions much more frequently than do BITs. However, despite these trends, overall few treaties directly address the environment: only about 8 per cent of the treaties in a sample of more than 1500 investment treaties contain text expressly relating to the environment. Experience with environmental provisions could usefully be analysed in more detail.

82. The relevant treaty provisions, of course, extend beyond specific environment provisions. General treaty provisions, such as the frequent limitation of the national treatment obligation to cases involving "like circumstances", apply to environmental issues as well as to other issues. For example, the determination with regard to the existence of like circumstances can allow consideration of the regulatory context, which could include, for example, the need to implement an international environmental commitment. Some question the usefulness of environment-specific clauses in investment treaties if the goal is to treat environmental goals in the same manner as other important public policy goals.

V. The role of dispute resolution institutions and rules

83. Where States provide little or no guidance in the relevant treaties about how overlaps and conflicts should be resolved, they transfer their competence to decide what should be done in the case of conflicts to the law-applier. Concerns can arise where the law-applier is associated with one regime rather than the other, as noted in the Fragmentation Report:

---

59 See Cartagena Protocol on Biosafety to the Convention on Biological Diversity, 39 ILM 1027 (2000).

60 See Fragmentation Report § 275-76.

61 Treaty provisions reflect the views of all parties so there are variations even within a single state's national practice.

> [Transferring competence to the law-applier] may work well in case the two treaties are part of the same regime. But if the conflict is between treaties across two regimes, then the solution works only if the law-applier is an impartial third party that approaches the conflicting instruments from beyond the regimes of which the treaties are a part. It might happen, however, that the law-applier will be a body or an administrator closely linked to one or another of the (conflicting) regimes. In such case, an open-ended conflict clause will come to support the primacy of the treaty that is part of the law-applier's regime. [62]

84. The Fragmentation Conclusions consider that special attention should be given to the independence of the dispute resolution system in such cases.

85. The current choice of dispute resolution systems – centred on investor-state tribunals and with a limited role for environmental dispute resolution fora -- reflects political realities. States have been reluctant to submit environmental disputes to compulsory third-party dispute resolution. States also want close scrutiny of environmental measures due to the risk of protectionism. The Fragmentation Report and Conclusions suggest, however, that these institutional arrangements could tend to give some primacy to investment treaty concerns over international environmental law considerations in cases of overlapping or conflicting norms. In this context, it is important for policy makers to consider possible measures to improve the likelihood of effective integration of the competing interests.

86. It is noteworthy that one commentator has suggested that transparency tends to increase the environmental "content" of investment law in various ways. At the level of treaty negotiation, the environmental content of treaties tends to increase with the degree of public participation in their negotiations:

> Bilateral investment treaties are less in the public eye than are multilateral negotiations; as a result, BITs are negotiated under less environmental pressure. Multilateral treaties also have a more policy and PR-oriented character, and as a result, contemporary attitudes enter more easily than in the – at least hitherto – more technical treaties where familiarity and interest is restricted to very few specialists in the ministries of the major economies.[63]

87. As noted above, free trade agreements, which are also higher-profile than BITs, similarly expressly address environmental considerations in their investment chapters much more frequently than do BITs.

88. Opportunities for public participation in disputes and public scrutiny of disputes involving environmental issues can improve the quality of decision-making and strengthen the legitimacy of the dispute resolution process. While these issues apply more generally, they can be particularly important in the environmental area. A significant concern surrounding early NAFTA environmental cases was that cases could be conducted in secret and apparently without any possibility for intervention by interested third parties.

---

62 See Fragmentation Report § 280.

63 See Thomas W. Walde, International Disciplines on National Environmental Regulation: With a Particular Focus on Multilateral Investment Treaties, in International Bureau of the Permanent Court of Arbitration (eds.), International Investments and Protection of the Environment (2001), pp, 29-71 at p. 42 n.31.

89. The NAFTA parties addressed those concerns in a number of ways. In 2001 the NAFTA Parties concluded their first Chapter 11 Note of Interpretation which affirmed that there was no presumption of confidentiality in Chapter 11 disputes. As a result, any claim of confidentiality must be based on a specific procedural order or rule of law.[64] The NAFTA parties now provide extensive access to their cases although there can remain limits notably in certain applicable arbitration rules. Amicus and third party participation is also now increasingly permitted and regulated in investor-state arbitration, with ICSID following NAFTA precedents.[65]

90. In 2005, the OECD Investment Committee supported greater transparency and third party participation in investor-state arbitration, subject to appropriate safeguards and guidelines, notably because of the legitimacy and public interest issues at stake.[66] The 2006 amendments to the ICSID Arbitration Rules expanded the scope of transparency in ICSID cases, including by requiring the disclosure of the legal reasoning of awards in all cases.

91. An increasing number of investment treaties now directly require the transparency of investment arbitration proceedings (while providing for protection of confidential information). For example, provisions requiring transparency of investment arbitration proceedings are now included in the Canada and US model BITs and in recent agreements concluded by those countries.[67] More recently, the July 2010 Communication by the European Commission, which sets forth views on international investment policy, affirmed in broad terms the importance of transparency and the opportunity for third-party participation in investor-state dispute resolution.[68]

---

64 See Meg Kinnear, Transparency and Third Party Participation in Investor-State Dispute Settlement, Symposium co-organised by ICSID, OECD and UNCTAD, Making the Most of International Investment Agreements: A Common Agenda, 12 December 2005, Paris (hereinafter Kinnear 2005), http://www.oecd.org/dataoecd/25/3/34786913.pdf.

65 In the NAFTA context, amicus participation was permitted, after considerable debate, in *Methanex v. United States* (under the UNCITRAL Rules), which involved environmental issues. See *Methanex v. United States, Decision on Amici Curiae* (15 January 2001). Guidelines for the amicus process were subsequently issued by the NAFTA Parties in 2003. See NAFTA Free Trade Commission Joint Statement, "Celebrating NAFTA at Ten" (Statement of the Free Trade Commission on Non-disputing Party Participation) (NAFTA Free Trade Commission, October 7, 2003). ICSID arbitrations have permitted amicus participation, including for environmental NGOs. See *Aguas Argentina v. Argentina, Order in Response to a Petition for Transparency and Participation as Amicus Curiae*, ICSID Case No ARB/03/19, IIC 229 (2005), available at http://www.investmentclaims.com/subscriber_article?script=yes&id=/ic/Awards/law-iic-229-2005&recno=13&letter=A. The ICSID Arbitration Rules were modified in 2006 to provide for a framework for amicus participation under which the tribunal must consult the parties, but can decide about whether to allow such participation without their consent.

66 See Transparency and Third-party Participation in Investor-State Dispute Settlement Procedures, Statement by the OECD Investment Committee (June 2005), http://www.oecd.org/dataoecd/25/3/34786913.pdf.

67 Agreement Between The Government of Canada and The Government of Romania for the Promotion and Reciprocal Protection of Investments, 8 May 2009, art. XIII & Annex C; Treaty Between The United States of America and the Oriental Republic of Uruguay Concerning the Encouragement and Reciprocal Protection of Investment, 25 October 2004, art. 29.

68 See Towards a Comprehensive European International Investment Policy, Communication from the Commission to the Council, the European Parliament, the European Economic and Social Committee and the Committee of the Regions, COM(2010)343 final (7 July 2010), p. 10 ("[i]n line with the EU's approach in the WTO, the EU should ensure that investor-state dispute settlement is conducted in a transparent manner (including requests for arbitration, submissions, open hearings, amicus curiae briefs and publication of awards)"), http://trade.ec.europa.eu/doclib/docs/2010/july/tradoc_146307.pdf .

92. Nonetheless, there remain at present significant limits to transparency and third-party participation including in cases involving international environmental issues. If the investment treaty does not address the transparency of arbitration proceedings, cases filed under certain arbitration rules, including the UNCITRAL Rules, may remain confidential. Investment treaties frequently give investors the power to choose the applicable arbitration rules and, to a significant degree, the level of transparency. For example, in *Chemtura*, the hearings about potential liability for the regulatory treatment of a pesticide remained closed to the public because the investor did not consent to public hearings. Even where the existence of confidential cases becomes public, the tenor of the case may remain unknown.

93. Third party participation can increase the costs of cases for the parties insofar as they are required to address additional submissions. At the same time, some governments that have been respondents in environment-related cases have noted that appropriate third party submissions can be a cost-effective way to provide the arbitrators with additional information. As noted above, recent measures to improve transparency and allow third party participation have sought to provide for a balanced framework. In achieving the appropriate balance, it will be important to consider the contribution of transparency and third party participation to strengthening the legitimacy and the quality of decision-making in cases involving international environmental law.

Environmental Concerns in International Investment Agreements: A Survey[69]

EXECUTIVE SUMMARY

94. This study surveys the use of references to environmental concerns in a sample of 1,623 international investment agreements (IIAs) that the 49 countries that participate in the "Freedom of Investment" process have concluded with any other country.[70] The survey assesses the extent, kind and frequency of such language in IIAs as well as the evolution of its use over time. In addition to analysing 1,593 BITs and 30 other bilateral agreements with investment chapters – mainly free trade agreements – the survey also reviews several model BITs and selected multilateral agreements with investment provisions.

95. The study updates and expands an earlier survey of environmental content in international investment agreement that the OECD Investment Committee discussed and adopted in 2007.[71] The key findings of the present study include the following:

- *Language referring to environmental concerns is rare in BITs but common in non-BIT IIAs*. In the treaty sample, 133, or 8.2%, of the IIAs contain a reference to environmental concerns. All 30 non-BIT IIAs contain such references, but only 6.5% of BITs do.
- *Country practices regarding environmental language in treaties vary*. Nineteen of the 49 countries covered in the study never use such language in their treaties. In contrast, a few countries systematically began including environmental language in treaties and such language appears in all of their treaties after a given date (Canada, Mexico and the United States since the early 1990s, and Belgium/Luxembourg more recently). Several countries appear to have no

69 This paper was prepared by Kathryn Gordon, Senior Economist and Joachim Pohl, Legal Expert in the OECD Investment Division. This paper does not necessarily reflect the views of the OECD or those of its member governments or other government participants in the FOI process. It cannot be construed as prejudging ongoing or future negotiations or disputes arising under international investment agreements.

70 Austria, Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

71 Kathryn Gordon and Monica Bose, "*International Investment Agreements: A Survey of Environmental, Labour and Anti-Corruption Issues*", http://www.oecd.org/dataoecd/3/5/40471550.pdf.

autonomous policy of including such language, but tolerate its inclusion in treaties signed with countries that have a preference for such language.

- *Inclusion of environmental language is becoming more common*. The first occurrence of such language in the IIA sample is in the 1985 China-Singapore BIT. A decade passed before environmental concerns were included in a sizeable number of BITs, and only another ten years later, in 2005, the proportion of newly concluded treaties with environmental concerns passed the threshold of 50% of new treaties.
- *Much idiosyncratic variation, limited number of policy themes addressed, but major strategic differences among countries in terms of their positioning with respect to these themes*. Although significant variance can be observed in the details of the provisions and identical language across treaties is rare, almost all these provisions are variations on a limited number of themes addressing distinct policy purposes. Nevertheless, treaties show significant variation with respect to their treatment of these themes – some include only preamble language while others feature extensive language on more specific issues such as performance requirements and indirect expropriation.
- *Environmental language addresses seven distinct policy purposes.* These include:
  - *General language in preambles* that establishes protection of the environment as a concern of the parties to the treaty; 66 treaties (4.1%) contain such language.
  - *Reserving policy space for environmental regulation* for the entire treaty; this is the most common category of language – it appears in 82 treaties (5.2%).
  - *Reserving policy space for environmental regulation for specific subject matters* (e.g. performance requirements and national treatment); this language appears in 20 treaties (1.3%), of which 16 are FTAs and only 4 BITs.
  - *Indirect expropriation*: Twelve of the treaties (0.75%) contain provisions that preclude non-discriminatory environmental regulation as a basis for claims of "indirect expropriation".
  - *Not lowering environmental standards to attract investment*: Forty-nine treaties (3.1%) contain provisions that discourage the loosening of environmental regulation for the purpose of attracting investment.
  - *Environmental matters and investor-state dispute settlement.* Sixteen treaties (1%) contain provisions related to the recourse to environmental experts by arbitration tribunals. One treaty excludes the environmental provisions as a basis for investor-state claims.
  - *General promotion of progress in environmental protection and cooperation*. Twenty treaties (1.3%) contain provisions that encourage strengthening of environmental regulation and cooperation.
- *The frequency of the use of environmental language in IIAs has generally increased over time, but this increase is not monotonic*. Over the long term, the proportion of IIAs that contain references to environmental concerns has increased. However, during the early 1990s and the early 2000s, the frequency of some approaches to include references to environmental concerns suffered a relative decline year-on-year. Recently, the use of clauses that reserve policy space for environmental regulation and references in treaty preambles has stagnated.
- *The set of environmental concerns that receive an explicit mentioning in IIAs is limited and has hardly evolved over time.* The language that characterises environmental concerns is either generic, or, where individual aspects are mentioned, dates back to the text of the 1948 General Agreement on Tariffs and Trade. More recent concerns, such as climate change and biodiversity, have not penetrated this closed set of issues, although such more recent concerns feature in the

Energy Charter treaty, a multilateral agreement. This finding suggests a limited exchange between the investment and environmental policy communities.

96. This survey portrays statistically the characteristics of environmental language in a sample of investment treaties; it does not seek to explain the statistical findings nor does it assign legal significance to differences in state practice with regard to this language. There may be merit in further reflection on these two aspects, however, to understand better the objectives and effect of different approaches in treaty negotiation. This could inform treaty negotiators and treaty users, investors, host governments, and arbitral tribunals to enhance predictability and legitimacy of decisions in relation to investment treaties.

97. With respect to the statistical findings and the legal significance of the different approaches to treaty writing, further analysis could notably address the questions:

- Why are references to environmental concerns common in FTAs with investment chapters while they are rare in BITs?
- What factors drive or limit change in relation to state treaty writing practice?
- Does the inclusion of references to environmental concerns in IIAs bring benefits for reconciling openness to foreign investment and protection of environmental concerns?
- Which approach provides treaty partners the most controlled, versatile and dynamic expression of their views on the relationship between environmental and investment norms?

I. Introduction

98. International investment agreements define how the treaty partners balance investor protection with other public policy objectives. As environmental concerns have moved up societies' priority lists, environmental protection has also left its mark as a concern during treaty negotiations. Investment arbitration provides preliminary considerations on how environmental regulation interacts with investment treaty concepts such as national treatment, indirect expropriation and fair and equitable treatment.

99. The investment policy community at the OECD has repeatedly considered State practice in balancing openness to foreign investment with other public policy objectives.[72] In 2007, the OECD investment policy community has discussed a survey of environmental, labour and anti-corruption issues in international investment agreements.[73] The present document updates and enhances this earlier survey and focuses solely on governments' approaches to reflecting environmental concerns in their investment treaties.

100. The present survey establishes a statistical portrait of governments' investment treaty writing practice in relation to environmental concerns in a sample of 1,623 IIAs, thus covering roughly half of the global investment treaty population.[74] The sample includes all IIAs that participants in OECD-hosted investment dialogue – that is, 49 countries[75] plus the European Commission – have concluded with any other country, provided that the full text of the treaty was available on the Internet in July 2010.[76]

101. The survey restricts itself to a statistical characterisation of the extent, kind and frequency of language referring to environmental concerns and the evolution of the use of such language over time; it does not analyse the legal significance of this content, although it does provide a starting point for such analysis.

102. Broadly described, state practice can be characterised as follows:

- A large, but declining, proportion of BITs remain silent on environmental matters; in contrast, all FTAs in the sample refer to environmental concerns in an investment context.
- Most references to environmental concerns seek to define aspects of the environment/investment relationship that fall into seven categories: contextual language in preambles; not lowering environmental standards in order to attract investment; general right-to-regulate language or reserving environmental policy space; right to regulate in relation to specific treaty provisions (e.g. indirect expropriation); recourse to experts in dispute resolution; and intergovernmental consultation on environmental matters.

---

72 Several studies were dedicated to approaches to balance openness to foreign investment with national security. For the complete work accomplished in this area, visit www.oecd.org/daf/investment/foi.

73 Kathryn Gordon and Monica Bose. *op.cit.*

74 According to UNCTAD data, there were, at the end of 2009, 2750 BITs and 295 other IIAs, including several dozen free trade agreements that include provisions on investment promotion or protection. World Investment Report 2010, Chapter III.B, page 81.

75 Austria, Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

76 A description of the methodology, the sources used, and the treaties included in the sample of the study is available in Annex 1.

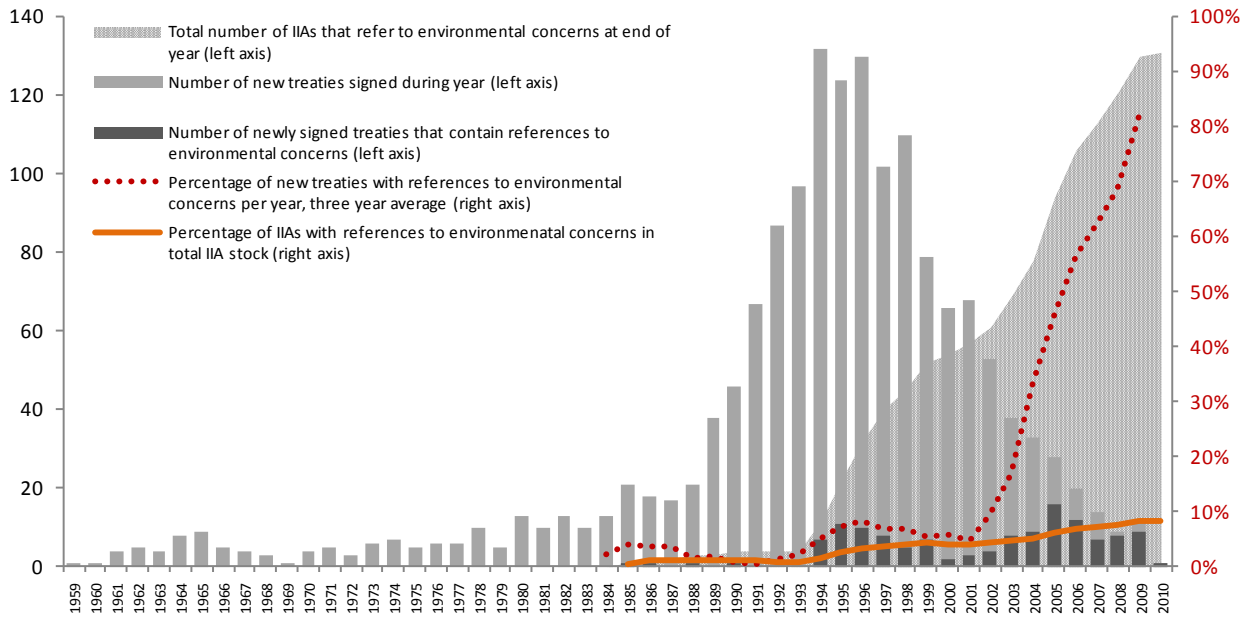
- Although environmental issues covered in investment treaties address a limited number of concerns, the treaties in the sample and the countries that are party to them vary in their approach to these issues: in some cases treatment is limited to short cross treaties and among countries with respect to their treatment of these issues is noteworthy. Some countries (and treaties) feature only short preamble texts.
- IIAs also show "idiosyncratic variation" in the language they use to describe environmental concerns. Thus, while the broad policy purpose of language is limited to the policy themes or concerns just described, even the descriptions of these themes is subject to small differences in formulations for a given category of language.

II. Patterns and trends in the use of references to environmental concerns in IIAs

103. The prevalence of environmental language in the treaty sample is low, but growing. The survey shows that 133 IIAs, or 8.2% of the sample, contain environmental language of one kind or another. Figure 1 depicts the prevalence of such language in treaties signed between 1959 and 2010 insofar as they are included in the sample. Following the first occurrence of environmental language in the 1985 China-Singapore BIT, the use of such language continued to be very rare until about the mid-1990s. Then, the proportion of newly concluded IIAs that contain environmental language began to increase moderately, and, from about 2002 onwards, steeply (dotted line, right scale), reaching a peak in 2008, when 89% of newly concluded treaties contain references to environmental concerns. This high percentage partly reflects the larger proportion of FTAs with investment chapters signed in 2008. It also should be noted, however, that the treaty sample in recent years is not complete because of lags in including treaties in online databases. The finding that recent treaties are much more likely to include such language may not prove to be robust once additional treaties from other countries are added to the sample.

104. Despite the observed increase, the stock of BITs that contain environmental language remains a small fraction of the total treaty sample (solid grey area, right scale).

Figure 1. Prevalence of Environmental Language in IIAs



105. Countries show marked differences in their propensity to include environmental language in their investment treaties. Overall, 30 of the 49 countries covered by the survey have included environmental

language in at least one of their IIAs; thus, slightly less than half of the countries covered never include such language in their IIAs (Table 1). Some countries only very occasionally include such language. For example, Egypt, the United Kingdom and Germany have just one treaty with environmental language out of 73, 98 and 122 treaties in the sample, respectively. Countries with relatively high propensities to include such language include: Canada (81% of its sample treaties); New Zealand (3 out of its 4 treaties in the sample); Japan (36% of its treaties); the United States (34%) and Finland (26%).

Figure 2. Table 1:IIA references to environmental concerns: Country summary

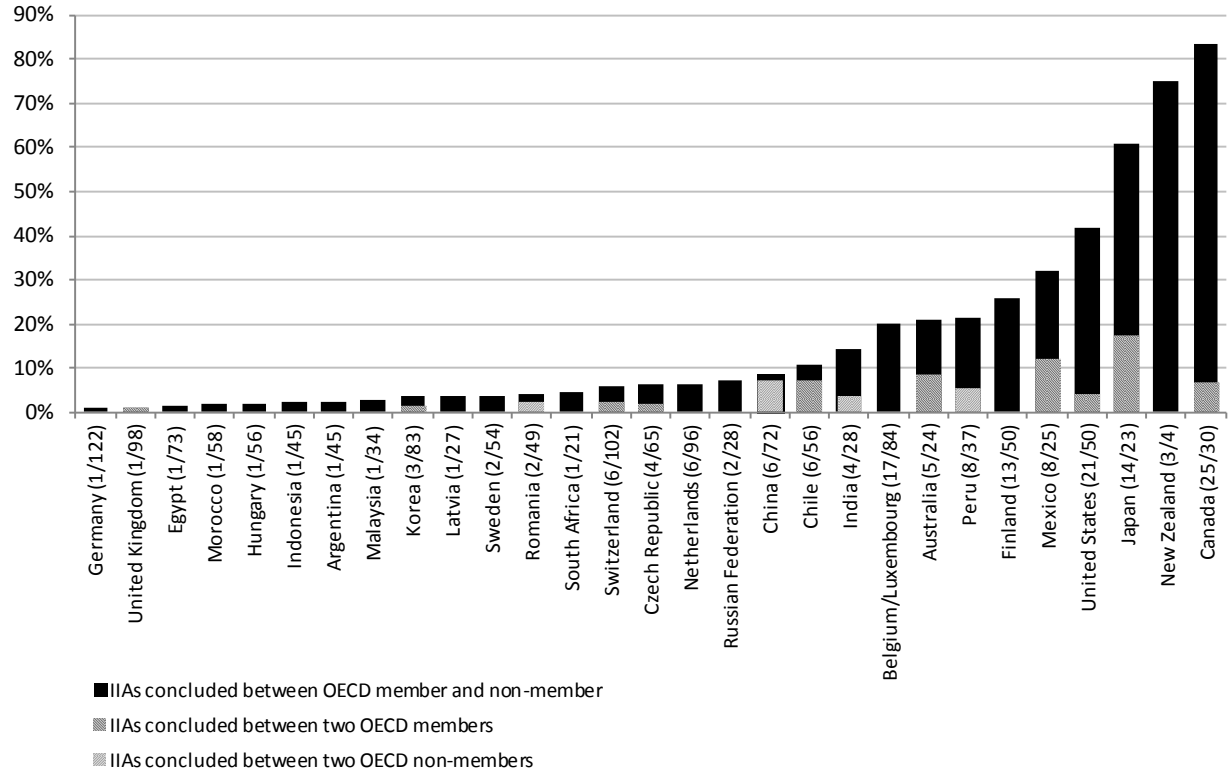
Country	Number of treaties included in sample	Number of treaties that refer to environmental concerns	Percentage of treaties that refer to environmental concerns	First occurrence in a BIT in sample
Austria	47	0	0%	—
Argentina	45	1	2%	1999
Australia	24	5	21%	1999
Belgium/Luxembourg	84	17	20%	2004
Brazil	8	0	0%	—
Canada	30	25	83%	1990
Chile	56	6	11%	1996
China	72	6	8%	1985
Czech Republic	65	4	6%	1990
Denmark	39	0	0%	—
Egypt	73	1	1%	1996
Estonia	15	0	0%	—
Finland	50	13	26%	2000
France	92	0	0%	—
Germany	122	1	1%	2006
Greece	38	0	0%	—
Hungary	56	1	2%	1995
Iceland	3	0	0%	—
India	28	4	14%	1996
Indonesia	45	1	2%	2007
Ireland	1	0	0%	—
Israel	12	0	0%	—
Italy	46	0	0%	—
Japan	23	14	61%	2002
Korea	83	3	5%	1996
Latvia	27	1	4%	2009
Lithuania	29	0	0%	—
Malaysia	34	1	3%	2005
Mexico	25	8	32%	1995
Morocco	58	1	2%	2004
Netherlands	96	6	6%	1999
New Zealand	4	3	75%	1988
Norway	15	0	0%	—
Peru	37	8	22%	2005
Poland	33	0	0%	—
Portugal	44	0	0%	—
Romania	49	2	4%	1996
Russian Federation	28	2	7%	1995
Saudi Arabia	8	0	0%	—
Slovakia	25	0	0%	—

Country	Number of treaties included in sample	Number of treaties that refer to environmental concerns	Percentage of treaties that refer to environmental concerns	First occurrence in a BIT in sample
Slovenia	18	0	0%	—
South Africa	21	1	5%	1995
Spain	59	0	0%	—
Sweden	54	2	4%	1995
Switzerland	101	5	5%	1994
Turkey	62	0	0%	—
United Kingdom	98	1	1%	2006
United States	44	15	34%	1994

106. Inclusion of environmental language in investment treaties is not a practice limited to OECD member countries. Figure 2 shows the percentage of a given country's IIAs that contain language referring to environmental issues.[77] Figure 2 also indicates the share of IIAs with environmental language that OECD Members have concluded with another OECD Member, with non-members as well as the share of IIAs that non-Members have concluded with other non-Members. Overall, 6% of the OECD-OECD IIAs contain environmental language, 3.4% of the IIAs signed between non-Members, and 9.5% of the OECD-non-OECD IIAs.

Figure 3. Proportion of IIAs with environmental language in a given country's IIA population

107.



77 Only countries that have at least one IIA with language referring to environmental concerns are listed.

III. The policy purpose of references to environmental concerns in IIAs

108. An examination of the content of environmental language in investment treaties sheds light on the policy purpose it is designed to serve. These purposes can be arranged in the following 7-part typology:[78]

- *General language in preambles* that mentions environmental concerns and establishes protection of the environment as a concern of the parties to the treaty; 66 of the treaties contain this language.
- *Reserving policy space for environmental regulation* for the entire treaty; this is the most common category of language – it appears in 82 of the treaties.
- *Reserving policy space for environmental regulation for more specific, limited subject matters* (performance requirements and national treatment); 20 treaties in the sample, predominantly FTAs, contain such language.
- *Indirect expropriation*: 12 of the treaties contain provisions that clarify the understanding of the parties that non-discriminatory environmental regulation does not constitute "indirect expropriation";
- *Not lowering environmental standards*: 49 of the treaties contain provisions that discourage the loosening of environmental regulation for the purpose of attracting investment;
- *Environmental matters and investor-state dispute settlement*: 16 treaties contain provisions related to the recourse to environmental experts by arbitration tribunals. One treaty excludes investor-state claims based on obligations undertaken in the treaty's environmental provisions.
- *General promotion of progress in environmental protection and cooperation*: 20 treaties contain provisions that encourage strengthening of environmental regulation and cooperation.

109. Annex 2 shows which treaties in the sample contain references that fall in these categories of policy purpose; only treaties that contain environmental language are listed in the table. Annex 2 shows that, while the number of environmental policy concerns addressed in the treaty sample is limited, the approaches of both individual treaties and countries to this matter varies widely. Some treaties contain only preamble language (36 of the treaties shown in Annex 2 contain only preamble environment). Others contain only one mention of other issues (36 treaties mention only preserving policy space). Still others treaties contain extensive language covering many of these policy purposes – for example, 5 of the treaties in Annex 2 cover 5 or more of the policy purposes (two with Canada as a signatory, one with Chile and two with the United States).

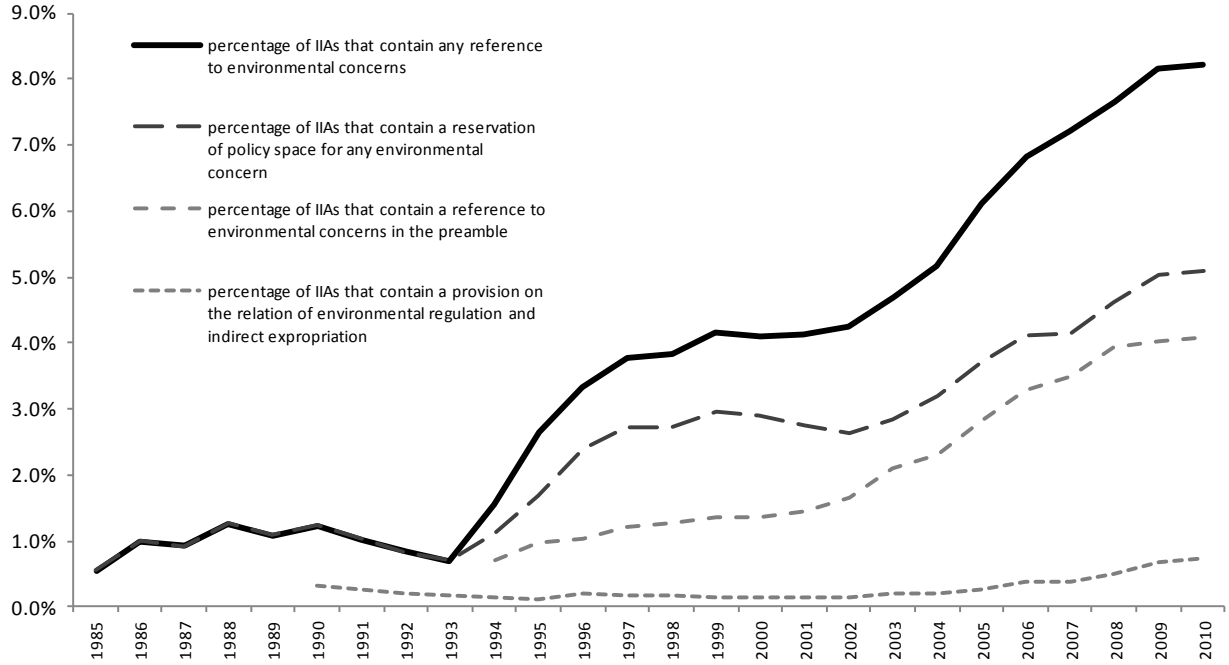
110. It is worth noting at the outset that the seven categories are not equally represented in the sample, nor is their evolution over time homogenous. Figure 3 shows the evolution of the percentage of treaties that contain references to three of the 7 categories of policy purpose in the stock of treaties in the respective years, as well as the evolution of the frequency of all forms of language combined. The most common category in the sample – with 82 treaties mentioning it – is "reserving environmental policy space". Use of this category of language began in 1985, and is therefore among the oldest categories of language. The second most common category of environmental language – with 66 treaties – is preamble language, which first appears in a 1994 BIT. Its use has grown since and remains among the most frequently observed categories of references to environmental concerns in IIAs.

111. Provisions clarifying to what extent environmental regulation constitutes "indirect expropriation" emerged as early as 1990, but were hardly ever used until 2004, when they became slightly more frequent.

[78] This categorisation necessarily implies some degree of interpretation of the clauses. This interpretation is made only to reduce the complexity of the subject matter for the purpose of this study. As the following detailed presentation shows, the lines between these categories are sometimes uncertain.

This kind of clause remains rare. These policy purposes and the language used to introduce them in the treaties are discussed in more detail in subsequent sub-sections.

Figure 4. Percentage of IIAs that contain specific categories of language referring to environmental concerns



1. General references to environmental concerns in preambles

112. In the sample, 66 IIAs and 2 model BITs contain preamble clauses on environmental concerns. The first appearances in the sample of such preamble language is in three 1994 BITs signed by the United States. A number of other countries later included such language in their preambles, including China, Finland, Germany, Japan, Korea, the Netherlands, Sweden, Switzerland, and the US. Preambular references to the environment are among the most often found in the sample, and 16 of the 49 participants in the FOI Roundtable use such references in at least one of their treaties.

113. China, Finland, Japan, Korea, Netherlands, Sweden and the US use the following phrase in the preambles of some of their BITs:

> [Agreeing[79]/ Recognising[80]/Convinced[81]] that these objectives can be achieved without **relaxing**[82] [essential security interests[83]] health, safety and environmental [measures/norms[84]] of general application;

79 China-Guyana BIT (2003); China-Trinidad and Tobago BIT; Finland-Algeria BIT (2005); Finland-Armenia BIT (2004); Finland-Belarus BIT (2006); Finland-Bosnia and Herzegovina BIT (2000); Finland-Ethiopia BIT (2006); Finland-Guatemala BIT (2005); Finland-Kyrgyzstan BIT (2003); Finland-Nicaragua BIT (2003); Finland-Nigeria BIT (2005); Finland-Serbia BIT (2005); Finland-Tanzania BIT (2001); Finland-Uruguay BIT (2005); Finland-Zambia BIT (2005); Netherlands-Burundi BIT (2007); Netherlands-Mozambique BIT (2001); Sweden-Mauritius BIT (2004); United States-Albania BIT (1995); United States-Azerbaijan BIT (1997); United States-Bahrain BIT (1999); United States-Bolivia BIT (1998); United States-Croatia BIT (1996); United States-El Salvador BIT (1999); United States-Georgia BIT (1994); United States-Honduras BIT (1995); United States-Jordan BIT (1997); United States-Mozambique

114. While some recent US BITs also contain this text, the United States Model BIT[85] contains a variation, which has so far been used twice in treaties.[86] The variation reads:

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

115. The Netherlands occasionally uses variations on the following language:

> **Considering** that these objectives can be achieved without [**compromising[87]/undermining[88]**] health, [safety[89]/social security[90]] and environmental measures of general application;[91]

116. Germany has once used a clause that differs from the frequently used model:

> Recognizing also the **increasing need** for measures to protect the environment[92]

117. The Preamble to the Australia-Chile FTA states the following:

> **Implement** this Agreement in a manner consistent with sustainable development and environmental protection and conservation;

118. The NAFTA preamble contains the following text:

> Undertake each of the preceding in a manner consistent with environmental protection and conservation; … strengthen the development and enforcement of environmental regulation.

119. The Energy Charter Treaty also refers to environmental concerns in its preamble, but uses more extensive language, which addresses more environmental concerns explicitly and which lists multilateral environmental agreements:

> Recognizing the necessity for the most **efficient exploration, production, conversion, storage, transport, distribution and use of energy**;

BIT (1998); United States-Nicaragua BIT (1995); United States-Trinidad and Tobago BIT (1994); United States-Uzbekistan BIT (1994); Finland Model BIT (2004).

80 Japan-Korea BIT (2002); Japan-Lao PDR BIT (2008); Japan-Peru BIT (2008); Japan-Uzbekistan BIT (2008); Japan-Vietnam BIT (2003).

81 Korea-Trinidad and Tobago BIT (2002); Switzerland-Mozambique BIT (2002); Switzerland-Syria BIT (2007).

82 Emphasis in this and subsequent extracts is by the authors to emphasise words relevant for the present analysis.

83 Only in Netherlands-Burundi BIT (2007) and Sweden-Mauritius BIT (2004).

84 Only in Switzerland-Syria BIT (2007).

85 US Model BIT 2004.

86 In United States-Uruguay BIT (2005) and US-Rwanda BIT (2008).

87 Netherlands-Namibia BIT (2002), Netherlands-Suriname BIT (2005).

88 Netherlands-Dominican Republic BIT (2006).

89 Netherlands-Namibia BIT (2002), Netherlands-Suriname BIT (2005).

90 Netherlands-Dominican Republic BIT (2006).

91 Netherlands Model BIT (2004).

92 Germany-Trinidad and Tobago BIT (2006). This provision resembles in part a preambular clause of ECT.

> Recalling the United Nations Framework Convention on **Climate Change**, the Convention on Long-Range Transboundary **Air Pollution** and its protocols, and other international environmental agreements with energy-related aspects; and
>
> Recognizing the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and **waste disposal**, and for internationally-agreed objectives and criteria for these purposes.

120. These clauses position environmental concerns in relation to the treaties' main purpose – investment protection. However, they stop short of defining a hierarchy between the objectives. Also, preambular texts do not establish rights and obligations between the parties but rather to provide guidance as to the "context" of the treaty for the purposes of interpretation.[93] As such, their regulatory role is different from clauses in the body of the treaty.

2. Right to regulate – reserving policy space for environmental regulation

121. A growing number of IIAs include clauses in the body of the treaty that seek to reserve policy space to regulate environmental matters. In fact, this type of reference to environmental concerns is the oldest form observed in the IIA sample; its first occurrence dates to 1985. Clauses that reserve policy space are still the most frequent form of environmental texts, with 82 occurrences in the sample. Twenty-five of the 49 countries covered use policy space clauses in at least one of their IIAs and at least two (Canada and the United States) have included them in their model BITs.

122. The scope of the environmental concern that the clauses describe varies. Many refer to "environmental concerns" in general, while some mention specific concerns such as "sanitary and phyto-sanitary" issues; "exhaustible natural resources"; or refer to an even more detailed set of issues.

123. Variations of clauses have been observed that make reference to "environmental concerns" or "regulations on environment" without specifying the scope and contents of these concepts. Canada uses in 21 of its treaties a clause on the regulation with respect to environmental matters, and the US Model BIT 2004 as well as NAFTA contain such a clause:

> Nothing in this [Agreement[94]/Treaty[95]] 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**.

124. Some other clauses that contain general reservations of policy space have been observed, including the following:

---

93 Article 31 alinea 1 and 2 of the Vienna Convention on the Law of Treaties provide as general rule of interpretation that:
1.A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes: […].

94 Canada-Armenia BIT (1997); Canada-Barbados BIT (1996); Canada-Costa Rica BIT (1998); Canada-Croatia BIT (1997); Canada-Ecuador BIT (1996); Canada-Egypt BIT (1996); Canada-El Salvador BIT (1999); Canada-Latvia BIT (2009); Canada-Lebanon BIT (1997); Canada-Panama BIT (1996); Canada-Philippines BIT (1995); Canada-Romania BIT (1996); Canada-South Africa BIT (1995); Canada-Thailand BIT (1997); Canada-Trinidad and Tobago BIT (1995); Canada-Ukraine BIT (1994); Canada-Venezuela BIT (1996).

95 United States-Rwanda BIT (2008), United States-Uruguay BIT (2005), US Model BIT 2004, Article 12 II.

> This Agreement shall not preclude the application of either Contracting Party of measures, necessary for the maintenance of defence, national security and public order, **protection of the environment**, morality and public health.[96]
>
> The provisions of this Agreement shall, from the date of entry into force thereof, apply to all investments made, whether before or after its entry into force, by investors of one Contracting Party in the territory of the other Contracting Party in accordance with the laws and regulations of the latter Contracting Party, **including its laws and regulations on labour and environment**.[97]

125. Many treaties that reserve environmental policy space elaborate on the scope that the reservation of policy space covers. A variety of definitions can be found, often mentioning the "beneficiaries" of protective norms such as human, animal and plant life or health;[98] or the protection of natural resources. Other treaties define the scope of reserved policy space with reference to the area of regulation, and mention elements such as prevention or control of the release or emission of pollutants or environmental contaminants, the control of hazardous or toxic chemicals and wastes and the protection or conservation of wild flora or fauna, and specially protected natural areas in the party's territory.

126. Language found in BITs includes the following descriptions of the scope:

> The provisions of this Agreement shall in no way limit the right of either Contracting Party to take any measures (including the destruction of plants and animals, confiscation of property or the imposition of restrictions on stock movement) necessary for the **protection of natural and physical resources** or **human health**, provided such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.[99]
>
> The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action directed to the protection of its essential security interests, or to the **protection of public health or the prevention of disease and pests in animals or plants**.[100]
>
> Nothing in this Agreement precludes the host Contracting Party from taking, in accordance with its laws applied reasonably and on a non-discriminatory basis, measures necessary for the protection of its own essential security interests or for the **prevention of diseases or pests**.[101]
>
> Provided that such measures are not applied in a discriminatory or arbitrary manner or do not constitute a disguised restriction on foreign investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting measures to maintain public order, or to protect public health and safety, **including environmental measures necessary to protect human, animal or plant life**.[102]
>
> [Subject to the requirement[103]/Provided[104]] that such measures are not applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or between investors,

96 Hungary-Russian Federation BIT (1995).

97 Netherlands-Costa Rica BIT (1999).

98 This language resembles that found in Article XX (General Exceptions) of the General Agreement on Tariffs and Trade (GATT), which came into force in January 1948.

99 Argentina-New Zealand BIT (1999).

100 China-New Zealand BIT (1988); China-Singapore BIT (1985); China-Sri Lanka BIT (1986).

101 Australia-India BIT (1999).

102 Canada-Egypt BIT (1996); Canada-El Salvador BIT (1999); Canada-Lebanon BIT (1997); Canada-Panama BIT (1996); Canada-Philippines BIT (1995); Canada-South Africa BIT (1995); Canada-Thailand BIT (1997); Canada-Trinidad and Tobago BIT (1995).

103 Canada-Czech Republic BIT (1990); Canada-Jordan BIT (2009); Canada-Latvia BIT (2009); Canada-Peru BIT (2006); Canada-Romania BIT (1996); Canada-Ukraine BIT (1994); Canada-Venezuela BIT (1996); Japan-Peru BIT (2008); Japan-Uzbekistan BIT (2008).

104 Canada-Armenia BIT (1997); Canada-Barbados BIT (1996); Canada-Costa Rica BIT (1998); Canada-Croatia BIT (1997); Canada-Ecuador BIT (1996); Canada-Egypt BIT (1996); Canada-El Salvador BIT

or a disguised restriction on international trade or investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting or enforcing measures necessary: (a)[105] […]; (b) **to protect human, animal or plant life or health; [or]** (c) **[relating to[106]/for[107]] the conservation of living or non-living exhaustible natural resources**[108] [**if such measures are made effective in conjunction with restrictions on domestic production or consumption**[109]]; [(d) imposed for the protection of national treasures of artistic, historic or archaeological value;[110]].

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action in accordance with its laws applied in good faith on a non-discriminatory basis and only to the extent and duration necessary for the protection of its essential security interests, or to the protection of **public health or the prevention of diseases and pests in animals and plants**.[111]

The provisions of this Agreement shall not in any way limit the right of either Contracting Party in cases of extreme emergency to take action in accordance with its laws applied in good faith, on a non-discriminatory basis, and only to the extent and duration necessary for the protection of its essential security interests, or to the protection of **public health or the prevention of disease and pests in animals or plants**.[112]

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply, in accordance with its laws, prohibitions or restrictions of any kind or take any other action which is directed to the protection of its essential security interests, or to the **protection of public health or the prevention of diseases and pests in animals and plants**.[113]

Nothing in this Agreement precludes the host Contracting Party from taking, in accordance with its laws applied reasonably and on a non-discriminatory basis, measures necessary for the protection of its own essential security interests or for the **prevention of diseases or pests**.[114]

Notwithstanding any other provisions in this Agreement other than the provisions of Article 11, each Contracting Party may: […] (c) take any measure necessary to protect **human, animal or plant life or health**;[115]

(1999); Canada-Lebanon BIT (1997); Canada-Panama BIT (1996); Canada-Philippines BIT (1995); Canada-South Africa BIT (1995); Canada-Thailand BIT (1997); Canada-Trinidad and Tobago BIT (1995); Finland-Zambia BIT (2005).

105 The order in which the items are listed varies among treaties.

106 Canada-Armenia BIT (1997); Canada-Egypt BIT (1996); Canada-El Salvador BIT (1999); Canada-Lebanon BIT (1997); Canada-Panama BIT (1996); Canada-Philippines BIT (1995); Canada-South Africa BIT (1995).

107 Canada-Barbados BIT (1996); Canada-Costa Rica BIT (1998); Canada-Croatia BIT (1997); Canada-Ecuador BIT (1996).

108 Canada-Ecuador BIT (1996), Canada-Egypt BIT (1996), Canada-El Salvador BIT (1999), Canada-Jordan BIT (2009), Canada-Latvia BIT (2009), Canada-Peru BIT (2009), Canada-Thailand BIT (1997), Canada-Ukraine BIT (1994), Canada-Venezuela BIT (1996). Canada-Armenia BIT (1997) and Canada Model BIT (2004). This language resembles GATS Article XIV and GATT Article XX, but also explicitly includes the specification "living and non-living" exhaustible natural resources.

109 Canada-Armenia BIT (1997); Canada-Egypt BIT (1996); Canada-El Salvador BIT (1999); Canada-Lebanon BIT (1997); Canada-Panama BIT (1996); Canada-Philippines BIT (1995); Canada-Thailand BIT (1997).

110 Canada-Thailand BIT (1997).

111 Czech Republic-Mauritius BIT (1999).

112 Czech Republic-India BIT (1996).

113 Czech Republic-Singapore BIT (1995).

114 Australia-India BIT (1999).

115 Japan-Korea BIT (2002).

Provided that such measures are not applied in a discriminatory or arbitrary manner or do not constitute a disguised restriction on foreign investment, nothing in this Agreement shall be construed to prevent a Contracting Party from adopting measures to maintain public order, or to protect public health and safety, including **environmental measures necessary to protect human, animal or plant life**.[116]

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions or take action in accordance with its laws normally and reasonably applied in good faith, on a non-discriminatory basis and to the extent necessary, for the **prevention of the spread of diseases and pests in animals or plants**.[117]

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to apply prohibitions or restrictions of any kind or take any other action which s directed to the protection of its essential security interest, or to the **protection of public health or the prevention of diseases in pests or animals or plants**.[118]

The provisions of this Agreement shall not in any way limit the right of either Contracting Party to take measures directed to the protection of its essential interests, or to the **protection of public health, or to the prevention of diseases and pests in animals and plants**, provided that such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination.[119]

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination against the other Contracting Party, or a disguised restriction on investments of investors of the other Contracting Party in the Area of a Contracting Party, nothing in this Agreement other than Article 12 shall be construed to prevent a Contracting Party from adopting or enforcing measures: (a) necessary to **protect human, animal or plant life or health**; […][120]

Notwithstanding any other provisions in this Agreement other than the provisions of Article 13, each Contracting Party may: […] (c) take any measure necessary to **protect human, animal or plant life or health**;[121]

Nothing in this Agreement shall be construed to prevent a Contracting Party from taking any action necessary […] for reasons of public health or the **prevention of diseases in animals and plants**.[122]

Each Contracting Party shall, in its State territory, promote as far as possible investments made by investors of the other Contracting Party and admit such investments in accordance with its national laws and regulations. However, this Agreement shall not prevent a Contracting Party from applying restrictions of any kind or taking any other action to protect its essential security interests or public health or to **prevent diseases or pests in animals or plants**.[123]

127. Switzerland uses the annex of one of its treaties to reserve policy space. The text mentions sustainable development; this is the only occurrence of this concept in the sample:

116 Finland-Zambia BIT (2005).

117 India-Korea BIT (1996).

118 India-Mauritius BIT (1998).

119 New Zealand-Hong Kong, China BIT (1995).

120 Japan-Peru BIT (2008); Japan-Uzbekistan BIT (2008).

121 Japan-Lao PDR BIT (2008); Japan-Vietnam BIT (2003).

122 Switzerland-Mauritius BIT (1998).

123 Romania-Mauritius BIT (2000).

> It is understood that, in conformity with the principles set forth in these articles [on investment promotion, protection and non-discrimination], the concepts of sustainable development and environmental protection are applicable to all investments.[124]

128. Canada and Japan include in some of their treaties a reference to

> Notwithstanding any other provisions in this Agreement other than the provisions of Article 13, each Contracting Party may: […] take any measure imposed for the protection of national treasures of artistic, historic or archaeological value.[125]

129. Belgium/Luxembourg uses a different approach to delimit its reservation of policy space for the purpose of environmental regulation. These combine the reservation of policy space with a specific definition of environmental laws. The clause reserving policy space exists in various forms:

> The Contracting Parties recognise the right of each one 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 provide for high levels of environmental protection and shall strive to continue to improve this legislation.[126]
>
> The Contracting Parties reaffirm their rights to establish levels of environmental protection and develop its own policies and priorities in this matter. It implies the right to adopt or modify accordingly its own environmental laws, in accordance with their respective domestic legislation.[127]
>
> Recognising the right of each Contracting Party to establish its own levels of [domestic/national[128]] environmental protection and environmental [(development)[129]/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 internationally agreed levels of environmental protection and shall strive to continue to improve this legislation.[130]

130. This clause is combined with a definition of the term "environmental legislation", of which several forms exist:

> [For the purpose of this Agreement:] "environmental legislation" means: any legislation of the Contracting Parties in force at the date of the signature of this Agreement or passed after the date thereof or provision of such legislation, 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

---

124 Switzerland-El Salvador BIT (1994), translation by the authors. The authentic text, in French language, reads "*Il est entendu qu'en conformité avec les principes énoncés dans ces articles, les concepts de développement durable et de protection de l'environnement sont applicables à tous les investissements.*"

125 Canada-Thailand BIT (1997); Japan-Lao PDR BIT (2008); Japan-Peru BIT (2008); Japan-Uzbekistan BIT (2008).

126 Belgium/Luxembourg-Guatemala BIT (2005).

127 Belgium/Luxembourg-Panama BIT (2009).

128 Only in Belgium/Luxembourg-Serbia BIT (2004).

129 Only in Belgium/Luxembourg-Barbados BIT (2009);

130 Belgium/Luxembourg-Barbados BIT (2009); Belgium/Luxembourg-Colombia BIT (2009); Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Serbia BIT (2004); Belgium/Luxembourg-Sudan BIT (2005); Belgium/Luxembourg-Tajikistan BIT (2009); Belgium/Luxembourg-United Arab Emirates BIT (2004).

protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas in the Contracting Party's territory.[131]

The term “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.[132]

The terms "environmental legislation" shall mean any legislation of the Contracting States, 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.[133]

3. Reserving policy space with respect to certain treaty provisions

131. A small set of treaties reserve policy space for specific, limited purposes, thus distinguishing this group from the comprehensive scope that the reservations described in the preceding subsection cover. Nineteen treaties fall in this category – 16 FTAs and only 4 BITs –, and 19 focus on performance requirements while one concerns exceptions to national treatment.

a. Performance requirements

132. Canada, Mexico and the United States occasionally include in their recent BITs language in the section on performance requirements that reserves policy space for this specific domain. Four occurrences of such clauses have been found in BITs, and 16 out of the 30 non-BIT IIAs contain such clauses. They first occur in 2001.

133. Canada’s provision reads:

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 3 and 4 apply to the measure.[134]

134. The US provisions, which are identical with NAFTA Article 1106,[135] read:

131 Belgium/Luxembourg-Barbados BIT (2009).

132 Belgium/Luxembourg-Colombia BIT (2009); Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Sudan BIT (2005); Belgium/Luxembourg-Tajikistan BIT (2009).

133 Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Panama BIT (2009); Belgium/Luxembourg-United Arab Emirates BIT (2004).

134 Canada-Peru BIT (2006). Paragraph 1(f) of the treaties prohibits the enforcement of performance requirements “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;”

135 NAFTA: “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

> 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) […]; (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.[136]

b. National treatment exceptions

135. Sweden uses in one of its BITs a clause on the applicability of exceptions to national treatment. The clause gives retroactive effect of new exceptions to national treatment included for proposes of environmental protection. This retroactive effect is an exception of the BIT's rule that the *status quo ante* applies in relation to national treatment for a specific investment. The Sweden-Russia BIT (1995) is the only treaty in the sample that contains such a clause. Its provision states:

> 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.[137]

4. Precluding non-discriminatory regulation as a basis for claims of indirect expropriation

136. Treaty provisions that preserve policy space to regulate environmental matters do not automatically preclude compensation claims based on changes of environmental regulation or similar measures. States that limit their treaty provisions to a mere reservation of policy space may thus be exposed to compensation claims for "indirect expropriation" that could discourage modifications of environmental regulation or make them onerous.

137. Ten countries have – beginning with Canada and the United States since 1990 – included in some of their treaties a clause that clarifies the conditions under which environmental regulation cannot be considered indirect expropriation. These clauses state:

> The Parties confirm their shared understanding that: […] 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.[138]

138. These clauses remain relatively rare and only 12 occurrences, plus the Canada and US model BITs, were found in the treaty sample.

---

environmental measures: (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."

136 United States-Rwanda BIT (2008); United States-Uruguay BIT (2005).

137 Russian Federation-Sweden BIT (1995), Article 3(3).

138 United States Model BIT 2004 Annex B; Canada Model BIT (2004) Annex B.13(1); Belgium/Luxembourg-Colombia BIT (2009); Canada-Czech Republic BIT (1990); Canada-Jordan BIT (2009); Canada-Latvia BIT (2009); Canada-Peru BIT (2006); Canada-Romania BIT (1996); United States-Rwanda BIT (2008); United States-Uruguay BIT (2005).

5. Environmental matters and investor-state dispute settlement

139. Some BITs involving parties of NAFTA contain procedural provisions on the consultation of experts on environmental law in arbitral tribunals. Such clauses first appear in NAFTA (1992)[139] and appear from 2004 on in a few BITs concluded by NAFTA parties Canada, Mexico and the United States.[140] Canada and the US also use these clauses in their Model BITs. Only four BITs in the sample include such clauses. The clauses read:

> Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more **experts to report to it in writing on any factual issue concerning environmental, health, safety**, or other scientific matters raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.[141]

140. One of the treaties concluded by Belgium/Luxembourg excludes the application of the treaty's dispute settlement mechanisms for the provisions regarding environmental concerns. This is the only occurrence of such a clause in the treaties analysed for this study. The clause reads:

> The dispute settlement mechanisms under articles […] of this agreement shall not apply to any obligation undertaken in accordance with this article.[142]

6. Not lowering standards – discouraging relaxation of environmental standards to attract investment

141. Some countries include in some of their IIAs a clause that discourages "lowering of standards" – that is, providing regulatory incentives to investors to the detriment of environmental protection. These clauses seek to ensure the respect of existing environmental standards and to avoid that States compete for investment by lowering environmental standards. The immediate addressees of these clauses are the States Parties themselves.

142. Such clauses appear since 1990 in BITs and 1992 in NAFTA.[143] In the sample, 49 individual IIAs include such a clause, as do the Canada and US Model BITs.

143. Language used varies quite widely, including the following:

> The [Contracting; Both Contracting] Parties recognize that it is inappropriate to encourage investment by **relaxing [domestic/national[144]] health, safety or environmental measures**. [Accordingly, a Party/To this effect 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 measures as

---

139 NAFTA (1992), Article 1133.

140 The clause has now spread to non-NAFTA parties for related types of international agreements, e.g. the Australia-Chile Free Trade Agreement (2008), art. 10.25.

141 Canada-Jordan BIT (2009); Canada-Peru BIT (2006); Mexico-United Kingdom BIT (2006); United States-Rwanda BIT (2008); United States-Uruguay BIT (2005) US Model BIT (2004), Article 32; Canada Model BIT (2004), Article 42.

142 Belgium/Luxembourg-Colombia BIT (2009), article 7(5). "This article" refers to article 7 of the treaty, which contains the provisions referring to environmental concerns.

143 Article 1114 NAFTA reads: "NAFTA Parties also recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, Parties should not waive or derogate from such environmental measures to attract investment."

144 Belgium/Luxembourg-Serbia BIT (2004) only.

an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment or an investor.[145]

The parties recognize 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, such measures as an encouragement for the establishment, acquisition, expansion or retention in its territory of an investment or an investor.[146]

The Parties recognize that it is inappropriate to encourage investment **by weakening or reducing the protections afforded in domestic environmental laws**. Accordingly, each Party shall 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.[147]

[The/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 [and of a non-Contracting Party[148]]**.[149]

[Understanding that[150]] No Contracting Party shall [change or[151]] **relax its domestic environmental** [and labour] **legislation** to encourage investment, or investment maintenance or the expansion of the investment that shall be made in its territory.[152]

144. Nuances in the purpose and effect of such clauses result from different variations of such clauses with respect to the territorial scope of the origin of an investment: Some clauses cover only inward investments originating in the respective treaty partner, while others seem to cover inward investment of any foreign origin, and the wording of again other treaties suggests that they even include domestic investment without any necessary relation to the treaty partner.[153]

145. Some of the treaties that contain a provision on the inappropriateness of relaxing environmental standards complement it with a procedural provision on the settlement of issues related to alleged relaxations:

---

145 Belgium/Luxembourg-Barbados BIT (2009); Belgium/Luxembourg-Colombia BIT (2009); Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Peru BIT (2005); Belgium/Luxembourg-Serbia BIT (2004); Belgium/Luxembourg-Sudan BIT (2005); Belgium/Luxembourg-Tajikistan BIT (2009); Belgium/Luxembourg-Togo BIT (2009); Mexico-Switzerland BIT (1995).

146 Canada-Czech Republic BIT (1990); Canada-Jordan BIT (2009); Canada-Latvia BIT (2009); Canada-Peru BIT (2006); Canada-Romania BIT (1996).

147 United States-Rwanda BIT (2008); United States-Uruguay BIT (2005); US Model BIT (2004).

148 Japan-Peru BIT (2008); Japan-Uzbekistan BIT (2008) only.

149 Japan-Korea BIT (2002), Japan-Lao PDR BIT (2008); Japan-Peru BIT (2008); Japan-Uzbekistan BIT (2008); Japan-Vietnam BIT (2003).

150 Belgium/Luxembourg-Korea BIT (2006).

151 Belgium/Luxembourg-Korea BIT (2006); Belgium/Luxembourg-United Arab Emirates BIT (2004) only.

152 Belgium/Luxembourg-Korea BIT (2006); Belgium/Luxembourg-Panama BIT (2009), Art. 5(2), Belgium/Luxembourg-United Arab Emirates BIT (2004).

153 Belgium/Luxembourg-Panama BIT (2009), Art. 5(2).

> 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[154]].[155]

146. Such a provision, that has been observed in 7 BITs signed by Canada and the United States, has first been included in a BIT in 1990 and also occurs in NAFTA.[156]

7. General promotion of progress in environmental protection and cooperation

147. Some BITs contain clauses that promote the furtherance of environmental objectives without featuring a particularly tight link to the treaties' primary purpose of investment protection or promotion. Such clauses include a general call for the strengthening of environmental standards. A number of clauses fall in this category including the following:

> […], 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.[157]

148. Some Belgium/Luxembourg BITs treaties contain additional language that makes an explicit reference to international environmental agreements:

> The Contracting Parties reaffirm their commitments under the international environmental agreements [, which they have accepted/in force in their territories[158]].[159] They shall strive to ensure that such commitments are fully recognised and implemented by their domestic legislation.[160]

149. Some treaties concluded by Belgium/Luxembourg contain a clause about general cooperation in environmental matters that is sometimes complemented by a procedural provision.

> The Contracting Parties recognise that co-operation between them provides enhanced opportunities to improve environmental protection standards.[161] [Upon request by either Contacting

---

154 Not in Mexico-Switzerland BIT (1995).

155 Canada-Czech Republic BIT (1990); Canada-Jordan BIT (2009); Canada-Latvia BIT (2009); Canada-Peru BIT (2006); Canada-Romania BIT (1996); Mexico-Switzerland BIT (1995); United States-Rwanda BIT (2008); United States-Uruguay BIT (2005); US Model BIT 2004, article 12 I.

156 NAFTA Article 1114 (2).

157 Belgium/Luxembourg-DRC BIT (2005); Belgium/Luxembourg-Colombia BIT (2009), Article 7(1).

158 Belgium/Luxembourg-Peru BIT (2005) only.

159 Belgium/Luxembourg-Barbados BIT (2009); Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Peru BIT (2005); Belgium/Luxembourg-Serbia BIT (2004); Belgium/Luxembourg-Sudan BIT (2005).

160 Belgium/Luxembourg-Barbados BIT (2009); Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Serbia BIT (2004); Belgium/Luxembourg-Sudan BIT (2005).

161 Belgium/Luxembourg-Colombia BIT (2009); Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Peru BIT (2005); Belgium/Luxembourg-Tajikistan BIT (2009); Belgium/Luxembourg-United Arab Emirates BIT (2004).

Party, the other Contracting Party shall accept to hold expert consultations on any matter falling under the purpose of this Article.[162]]

IV. IIA language on more specific environmental concerns

150. The IIAs in the sample cover environmental concerns either under the umbrella term "environment" or explicitly mention more specific concerns. This section reviews the more specific environmental concerns that are mentioned in the treaty sample and also seeks to identify environmental concerns that are absent or rare in such treaties. Multilateral investment agreements and international environmental law provide an orientation of what elements may now be considered part of the internationally agreed set of environmental concerns.

A. Environmental concerns explicitly addressed in IIAs

151. The BITs in the sample used for the present study mention a fairly limited set of environmental concerns explicitly. These are formulated as objectives of environmental protection or refer to methods of to achieve these objectives. Explicitly mentioned objectives include

- "human, animal or plant life or health"; "prevention of disease and pests in animals or plants"; or similar;
- "conservation of living or non-living exhaustible natural resources", occasionally phrased as "protection of natural and physical resources"; and
- "protection of national treasures of artistic, historic or archaeological value".

152. Some IIAs list the following methods to achieve these objectives, which in themselves refer to intermediary objectives:

- prevention, abatement or control of the release, discharge, or emission of pollutants or environmental contaminants;
- control of environmentally hazardous or toxic chemicals, substances, materials and wastes, and the dissemination of information related thereto; and
- protection or conservation of wild flora or fauna, including endangered species, their habitat, and specially protected natural areas.

153. The list of environmental objectives explicitly mentioned in IIAs is thus limited to: sanitary and phytosanitary objectives and conservational objectives. These issues cover a broad range of aspects that have occupied mankind for decades, if not centuries, albeit not necessarily under the umbrella term "environment".

B. Common environmental concerns that do not appear in IIAs

154. Internationally, thinking about environmental issues has evolved rapidly. A database on "binding" international environmental agreements contains, as of 2010, over 2700 treaties, of which 1538 were bilateral treaties, 1039 multilateral treaties and 159 other agreements. Over 2300 of these treaties were adopted after 1950, and the rate of adoption accelerated significantly during the 1990s.[163] Examples

[162] Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005); Belgium/Luxembourg-Ethiopia BIT (2006); Belgium/Luxembourg-Guatemala BIT (2005); Belgium/Luxembourg-Guinea BIT; Belgium/Luxembourg-Libya BIT (2004); Belgium/Luxembourg-Mauritius BIT (2005); Belgium/Luxembourg-Nicaragua BIT (2005); Belgium/Luxembourg-Peru BIT (2005); Belgium/Luxembourg-Tajikistan BIT (2009); Belgium/Luxembourg-United Arab Emirates BIT (2004).

[163] See Ronald B. Mitchell, 2002-2010, *International Environmental Agreements Database Project (Version 2010.2).*

of major agreements include the 1973 Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES),[164] the 1989 Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal, the 1992 Convention on Biological Diversity, and the 1992 UN Framework Convention on Climate Change.

155. As a result of all this activity, the list of environmental concerns has expanded dramatically in the past decades. Global threats such as climate change, declining biodiversity, depletion of the ozone layer and maritime waters have emerged, with some of them taking centre stage among environmental concerns. Likewise, more recent developments in environmental norms point toward a shift away from a narrow anthropocentric paradigm and from a focus on local risks to a consideration of global risk scenarios[165].

156. This survey of treaty language provides some support for the view that investment treaty negotiators are at least partially insulated from the thinking behind the broader evolution of international environmental norms. While growing awareness of environmental threats has arguably driven the increasing use of environmental language in IIAs, the set of issues that are explicitly mentioned in IIAs as well as the underlying paradigms of environmental protection appear to penetrate the investment treaty community slowly, if at all.

157. None of the bilateral IIAs in the sample have strayed away from traditional approaches to environmental protection, and none, even the very recent ones, touch explicitly upon issues that dominate the debate on environmental protection today. Only the Energy Charter Treaty (ECT) a multilateral investment agreement signed in 1994, seems to embrace an updated set of environmental concerns. The treaty's preamble contains explicit references to some of these concerns:

> Recognizing the necessity for the most **efficient exploration, production, conversion, storage, transport, distribution and use of energy**;
>
> Recalling the United Nations Framework Convention on **Climate Change**, the Convention on Long-Range Transboundary **Air Pollution** and its protocols, and other international environmental agreements with energy-related aspects; and
>
> Recognizing the increasingly urgent need for measures to protect the environment, including the decommissioning of energy installations and **waste disposal**, and for internationally-agreed objectives and criteria for these purposes, […]

158. Article 19(3)(b) of ECT mentions further aspects:

> (b) "Environmental Impact" means any effect caused by a given activity on the environment, including **human health and safety, flora, fauna, soil, air, water, climate, landscape and historical monuments** or other physical structures or the interactions among these factors; it also includes effects on cultural heritage or socio-economic conditions resulting from alterations to those factors;

159. Generic language that is often found in the treaty sample, such as references to general "environmental concerns," will arguably absorb certain emerging concepts, but more specific language may be less open to evolution of interpretation. The frequent references to "human, animal and plant life and health", even with the addition of "conservation of living or non-living exhaustible natural resources", may already prove less versatile when it comes to adapting it to regulation favouring biodiversity or attenuating climate change, for example. This being said, analysis on the effect of including any kind of

---

164 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 3 March 1973, 993 U.N.T.S. 243.

165 For a discussion of the ethical foundations of international environmental law, see Patricia Birnie, Alan Boyle and Catherine Redgwell, *International Law and the Environment*, Oxford University Press, Chapter 1(3) and (4) "Why protect the environment?" and "The environment as a problem of international concern."

environmental language in IIAs has yet to be done and, therefore, no judgement of the merits of specific kinds of references to environmental concerns in IIAs can be made, based on this study.

V. Further considerations on the use of references to environmental concerns in IIAs

160. This survey restricts itself to a statistical analysis of the use of environmental language in IIAs – it does not seek to attribute legal significance to the differences in State treaty-writing practice. Nonetheless, the considerable variation in States' approaches to reconciling openness to foreign investment and the public policy concern of environmental regulation invites such reflection.

161. Of notable interest in this regard are the following questions:

- Does the inclusion of references to environmental concerns in IIAs bring benefits for reconciling openness to foreign investment and protection of environmental concerns?
- If so, does the approach – for example, use of references in the preamble or body of the treaty text – have an impact on the outcome of the reconciliation?
- Do certain approaches favour a dynamic adaption to the rapid evolution of environmental concerns and the thinking about environmental protection observed in this parallel policy community?

ANNEX 1: METHODOLOGY

The sample for this survey consists of 1623 IIAs, in large majority bilateral investment treaties (BITs) plus a limited number of bilateral free trade agreements with investment provisions. The sample covers the 49 countries that participate in the Freedom of investment Roundtables have concluded with any other county.[166] The sample includes bilateral investment treaties that were available in July 2010 on the UNCTAD BIT database; and free trade agreements that were available in July 2010 on other sites.[167] Treaties that are posted on these sites have been included regardless of whether they are in force, or – in a limited number of cases – whether the Parties have signed the documents.[168]

The sample contains 185 treaties signed among OECD members, 1,201 treaties signed between an OECD and a non-OECD Member and 237 treaties signed between two non-OECD Members. Some treaties signed just prior to mid-2010 may not yet be posted in these databases and thus would not be included in this survey. This is a source of potential bias; more recent treaties of countries who take longer to make treaties available to international treaty databases or to post treaties on their own websites will be absent from the sample. Where the date of signature was not available from the documents in the sources themselves, this information has been taken from the website of ICSID.

The qualitative analysis also covers some multilateral investment agreements, including NAFTA and the Energy Charter Treaty, and 19 model investment treaties drawn from publicly available sources.

The analysis sought to identify any kind of reference to environmental concerns, i.e. issues that are commonly associated with the protection of the environment. Treaties that made reference to "public health" in conjunction with "public order" and "public morals" were not included, unless other elements with a connection to environmental issues were also mentioned.

Participants in the FOI Roundtables include Austria, Argentina, Australia, Belgium, Brazil, Canada, Chile, China, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Turkey, United Kingdom, and United States.

166 The term "country" is used for linguistic ease. Its use does not imply any judgement b the OECD as to the legal or other status of any territorial entity. Belgium and Luxembourg have concluded treaties considered in this document jointly as Belgium-Luxembourg Economic Union; while they constitute a joint treaty partner, this report counts the Belgium-Luxembourg Economic Union as *two* countries.

167 These include dedicated websites of the OAS and the Australian Government, the US Government, and the legal database of Belgium.

168 The signature date of 31 treaties – less than 2% of the sample – could not be determined.

ANNEX 2: POLICY PURPOSE OF ENVIRONMENTAL LANGUAGE IN IIAS

The following list includes only treaties that contain at least one reference to environmental concerns. All treaties that a participant in the Freedom of Investment Roundtables has concluded are listed; that leads to duplicate mentioning of a certain number of treaties in the table. Treaties are sorted by alphabetical order of the treaty partner, and, in second order, by the year of signature. Shading of rows groups treaties of the same country to enhance readability.

Treaty (year of signature)	Preamble Language	Reserving Policy Space for environmental regulation	Reserving policy space for environmental regulation in relation to specific provisions of the treaty	Precluding non-discriminatory environmental regulation as a basis for claims of "indirect expropriation"	Not lowering environmental standards for the purpose of attracting investment	Environmental matters and investor-state dispute settlement	General promotion of progress in environmental protection and cooperation
Argentina-New Zealand BIT (1999)		•					
Australia-India BIT (1999)		•					
Australia-Singapore FTA (2003)	•	•					
Australia-Thailand FTA (2004)		•					
Australia-United States FTA (2004)	•		•				
Australia-Chile FTA (2008)	•	•	•	•			
Belgium/Luxembourg-Guinea BIT (?)		•			•		•
Belgium/Luxembourg-Libya BIT (2004)		•			•		•
Belgium/Luxembourg-Serbia BIT (2004)		•			•		•
Belgium/Luxembourg-United Arab Emirates BIT (2004)		•			•		•
Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005)		•			•		•
Belgium/Luxembourg-Guatemala BIT (2005)		•			•		•
Belgium/Luxembourg-Madagascar BIT (2005)		•					
Belgium/Luxembourg-Mauritius BIT (2005)		•			•		•
Belgium/Luxembourg-Nicaragua BIT (2005)		•			•		•
Belgium/Luxembourg-Peru BIT (2005)		•			•		•
Belgium/Luxembourg-Sudan BIT (2005)		•			•		•
Belgium/Luxembourg-Ethiopia BIT (2006)		•			•		•
Belgium/Luxembourg-Barbados BIT (2009)		•			•		•
Belgium/Luxembourg-Colombia BIT (2009)		•		•	•		•
Belgium/Luxembourg-Panama BIT (2009)		•			•		
Belgium/Luxembourg-Tajikistan BIT (2009)		•			•		•
Belgium/Luxembourg-Togo BIT (2009)		•			•		
Canada-Czech Republic BIT (1990)		•		•	•		
Canada-Ukraine BIT (1994)		•					
Canada-Philippines BIT (1995)		•					
Canada-South Africa BIT (1995)		•					
Canada-Trinidad and Tobago BIT (1995)		•					
Canada-Barbados BIT (1996)		•					

Treaty (year of signature)	Preamble Language	Reserving Policy Space for environmental regulation	Reserving policy space for environmental regulation in relation to specific provisions of the treaty	Precluding non-discriminatory environmental regulation as a basis for claims of "indirect expropriation"	Not lowering environmental standards for the purpose of attracting investment	Environmental matters and investor-state dispute settlement	General promotion of progress in environmental protection and cooperation
Canada-Chile FTA (1996)	•	•	•		•	•	•
Canada-Ecuador BIT (1996)		•					
Canada-Egypt BIT (1996)		•					
Canada-Panama BIT (1996)		•					
Canada-Romania BIT (1996)		•		•	•		
Canada-Venezuela BIT (1996)		•					
Canada-Armenia BIT (1997)		•					
Canada-Croatia BIT (1997)		•					
Canada-Lebanon BIT (1997)		•					
Canada-Thailand BIT (1997)		•					
Canada-Uruguay BIT (1997)		•			•		
Canada-Costa Rica BIT (1998)		•					
Canada-El Salvador BIT (1999)		•					
Canada-Peru BIT (2006)		•	•	•	•	•	
Canada-Colombia FTA (2008)	•	•	•		•	•	•
Canada-Peru FTA (2008)	•	•	•		•		•
Canada-Jordan BIT (2009)		•		•	•	•	
Canada-Latvia BIT (2009)		•		•	•		
Canada-Panama FTA (2010)	•	•	•	•	•	•	•
Chile-Canada FTA (1996)	•	•	•		•	•	•
Chile-United States FTA (2003)	•	•	•	•		•	
Chile-Colombia FTA (2006)	•	•	•		•	•	•
Chile-Peru FTA (2006)	•	•	•			•	•
Chile-Japan EPA (2007)	•				•	•	
Chile-Australia FTA (2008)	•	•	•	•			
China-Trinidad and Tobago BIT (?)	•						
China-Singapore BIT (1985)		•					
China-Sri Lanka BIT (1986)		•					
China-New Zealand BIT (1988)		•					
China-Guyana BIT (2003)	•						
China-Peru FTA (2009)	•						
Czech Republic-Canada BIT (1990)		•		•	•		
Czech Republic-Singapore BIT (1995)		•					
Czech Republic-India BIT (1996)		•					
Czech Republic-Mauritius BIT (1999)		•					
Egypt-Canada BIT (1996)		•					
Finland-Bosnia and Herzegovina BIT (2000)	•						
Finland-Tanzania BIT (2001)	•						
Finland-Kyrgyzstan BIT (2003)	•						
Finland-Nicaragua BIT (2003)	•						
Finland-Armenia BIT (2004)	•						

Treaty (year of signature)	Preamble Language	Reserving Policy Space for environmental regulation	Reserving policy space for environmental regulation in relation to specific provisions of the treaty	Precluding non-discriminatory environmental regulation as a basis for claims of "indirect expropriation"	Not lowering environmental standards for the purpose of attracting investment	Environmental matters and investor-state dispute settlement	General promotion of progress in environmental protection and cooperation
Finland-Algeria BIT (2005)	•						
Finland-Guatemala BIT (2005)	•						
Finland-Nigeria BIT (2005)	•						
Finland-Serbia BIT (2005)	•						
Finland-Uruguay BIT (2005)	•						
Finland-Zambia BIT (2005)	•	•					
Finland-Belarus BIT (2006)	•						
Finland-Ethiopia BIT (2006)	•						
Germany-Trinidad and Tobago BIT (2006)	•						
Hungary-Russian Federation BIT (1995)		•					
India-Czech Republic BIT (1996)		•					
India-Korea BIT (1996)		•					
India-Mauritius BIT (1998)		•					
India-Australia BIT (1999)		•					
Indonesia-Japan EPA (2007)					•		
Japan-Korea BIT (2002)	•				•		
Japan-Vietnam BIT (2003)	•	•			•		
Japan-Mexico EPA (2004)		•	•		•	•	
Japan-Malaysia EPA (2005)					•		
Japan-Philippines EPA (2006)		•			•		
Japan-Brunei EPA (2007)	•				•		
Japan-Chile EPA (2007)	•				•	•	
Japan-Indonesia EPA (2007)					•		
Japan-Singapore EPA (2007)		•					
Japan-Thailand EPA (2007)					•		
Japan-Lao PDR BIT (2008)	•	•			•		
Japan-Peru BIT (2008)	•	•			•		
Japan-Uzbekistan BIT (2008)	•	•			•		
Japan-Switzerland EPA (2009)	•				•		
Korea-India BIT (1996)		•					
Korea-Japan BIT (2002)	•				•		
Korea-Trinidad and Tobago BIT (2002)	•						
Latvia-Canada BIT (2009)		•		•	•		
Malaysia-Japan EPA (2005)					•		
Mexico-Bolivia FTA (1994)	•	•			•		
Mexico-Costa Rica FTA (1994)	•	•			•		
Mexico-Switzerland BIT (1995)					•		
Mexico-Nicaragua FTA (1997)	•	•			•		
Mexico-Cuba BIT (2001)		•					
Mexico-Uruguay FTA (2003)			•				
Mexico-Japan EPA (2004)		•	•		•	•	

Treaty (year of signature)	Preamble Language	Reserving Policy Space for environmental regulation	Reserving policy space for environmental regulation in relation to specific provisions of the treaty	Precluding non-discriminatory environmental regulation as a basis for claims of "indirect expropriation"	Not lowering environmental standards for the purpose of attracting investment	Environmental matters and investor-state dispute settlement	General promotion of progress in environmental protection and cooperation
Mexico-United Kingdom BIT (2006)						•	
Morocco-United States FTA (2004)	•	•				•	
Netherlands-Costa Rica BIT (1999)		•					
Netherlands-Mozambique BIT (2001)	•						
Netherlands-Namibia BIT (2002)	•						
Netherlands-Suriname BIT (2005)	•						
Netherlands-Dominican Republic BIT (2006)	•						
Netherlands-Burundi BIT (2007)	•						
New Zealand-China BIT (1988)		•					
New Zealand-Hong Kong, China BIT (1995)		•					
New Zealand-Argentina BIT (1999)		•					
Peru-Belgium/Luxembourg BIT (2005)		•			•		•
Peru-Canada BIT (2006)		•	•	•	•	•	
Peru-Chile FTA (2006)	•	•	•			•	•
Peru-United States FTA (2006)	•	•	•	•	•		
Peru-Canada FTA (2008)	•	•	•		•		•
Peru-Japan BIT (2008)	•	•			•		
Peru-Singapore FTA (2008)		•	•				
Peru-China FTA (2009)	•						
Romania-Canada BIT (1996)		•		•	•		
Romania-Mauritius BIT (2000)		•					
Russian Federation-Hungary BIT (1995)		•					
Russian Federation-Sweden BIT (1995)			•				
South Africa-Canada BIT (1995)		•					
Sweden-Russian Federation BIT (1995)			•				
Sweden-Mauritius BIT (2004)	•						
Switzerland-El Salvador BIT (1994)		•					
Switzerland-Mexico BIT (1995)					•		
Switzerland-Mauritius BIT (1998)		•					
Switzerland-Mozambique BIT (2002)	•						
Switzerland-Syria BIT (2007)	•						
Switzerland-Japan EPA (2009)	•				•		
United Kingdom-Mexico BIT (2006)						•	
United States-Georgia BIT (1994)	•						
United States-Trinidad and Tobago BIT (1994)	•						
United States-Uzbekistan BIT (1994)	•						
United States-Albania BIT (1995)	•						
United States-Honduras BIT (1995)	•						
United States-Nicaragua BIT (1995)	•						
United States-Croatia BIT (1996)	•						
United States-Azerbaijan BIT (1997)	•						

Treaty (year of signature)	Preamble Language	Reserving Policy Space for environmental regulation	Reserving policy space for environmental regulation in relation to specific provisions of the treaty	Precluding non-discriminatory environmental regulation as a basis for claims of "indirect expropriation"	Not lowering environmental standards for the purpose of attracting investment	Environmental matters and investor-state dispute settlement	General promotion of progress in environmental protection and cooperation
United States-Jordan BIT (1997)	•						
United States-Bolivia BIT (1998)	•						
United States-Mozambique BIT (1998)	•						
United States-Bahrain BIT (1999)	•						
United States-El Salvador BIT (1999)	•						
United States-Chile FTA (2003)	•	•	•	•		•	
United States-Singapore FTA (2003)	•	•	•		•	•	
United States-Australia FTA (2004)	•		•				
United States-Morocco FTA (2004)	•	•				•	
United States-Uruguay BIT (2005)	•	•	•	•	•	•	
United States-Oman FTA (2006)	•	•	•		•	•	
United States-Peru FTA (2006)	•	•	•	•	•		
United States-Rwanda BIT (2008)	•	•	•	•	•	•	

The following table contains the same information as the previous, but for non-BIT IIAs, i.e. FTAs and EPAs. Shading of rows groups treaties of the same country to enhance readability.

Treaty (year of signature)	Preamble Language	Reserving Policy Space for environmental regulation	Reserving policy space for environmental regulation in relation to specific provisions of the treaty	Precluding non-discriminatory environmental regulation as a basis for claims of "indirect expropriation"	Not lowering environmental standards for the purpose of attracting investment	Environmental matters and investor-state dispute settlement	General promotion of progress in environmental protection and cooperation
Australia-Singapore FTA (2003)	•	•					
Australia-Thailand FTA (2004)		•					
Australia-United States FTA (2004)	•		•				
Australia-Chile FTA (2008)	•	•	•	•			
Canada-Chile FTA (1996)	•	•	•		•	•	•
Canada-Colombia FTA (2008)	•	•	•		•	•	•
Canada-Peru FTA (2008)	•	•	•		•		•
Canada-Panama FTA (2010)	•	•	•	•	•	•	•
Chile-Canada FTA (1996)	•	•	•		•	•	•
Chile-United States FTA (2003)	•	•	•	•		•	
Chile-Colombia FTA (2006)	•	•	•		•	•	•

Treaty (year of signature)	Preamble Language	Reserving Policy Space for environmental regulation	Reserving policy space for environmental regulation in relation to specific provisions of the treaty	Precluding non-discriminatory environmental regulation as a basis for claims of "indirect expropriation"	Not lowering environmental standards for the purpose of attracting investment	Environmental matters and investor-state dispute settlement	General promotion of progress in environmental protection and cooperation
Chile-Peru FTA (2006)	•	•	•			•	•
Chile-Japan EPA (2007)	•				•	•	
Chile-Australia FTA (2008)	•	•	•	•			
China-Peru FTA (2009)	•						
Indonesia-Japan EPA (2007)					•		
Japan-Mexico EPA (2004)		•	•		•	•	
Japan-Malaysia EPA (2005)					•		
Japan-Philippines EPA (2006)		•			•		
Japan-Brunei EPA (2007)	•				•		
Japan-Chile EPA (2007)	•				•	•	
Japan-Indonesia EPA (2007)					•		
Japan-Singapore EPA (2007)		•					
Japan-Thailand EPA (2007)					•		
Japan-Switzerland EPA (2009)	•				•		
Malaysia-Japan EPA (2005)					•		
Mexico-Bolivia FTA (1994)	•	•			•		
Mexico-Costa Rica FTA (1994)	•	•			•		
Mexico-Nicaragua FTA (1997)	•	•			•		
Mexico-Uruguay FTA (2003)			•				
Mexico-Japan EPA (2004)		•	•		•	•	
Morocco-United States FTA (2004)	•	•				•	
Peru-Chile FTA (2006)	•	•	•			•	•
Peru-United States FTA (2006)	•	•	•	•	•		
Peru-Canada FTA (2008)	•	•	•		•		•
Peru-Singapore FTA (2008)		•	•				
Peru-China FTA (2009)	•						
Switzerland-Japan EPA (2009)	•				•		
United States-Chile FTA (2003)	•	•	•	•		•	
United States-Singapore FTA (2003)	•	•	•		•	•	
United States-Australia FTA (2004)	•		•				
United States-Morocco FTA (2004)	•	•				•	
United States-Oman FTA (2006)	•	•	•		•	•	
United States-Peru FTA (2006)	•	•	•	•	•		