

PART II  
*Chapter 6*

**Novel Features in Recent OECD Bilateral  
Investment Treaties\***

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## Introduction

For over forty years bilateral investment treaties (BITs) have been used as a tool for protecting international investment and ensuring a more predictable and fair treatment of investors. By last count, an estimated 1,700 BITs have come into force worldwide, about 80% of which involving OECD countries.<sup>1</sup>

To secure a degree of consistency in their commitments the governments of many OECD countries have formulated Bilateral Investment Treaty “models”, which have been used as a template, or a starting point, for formulating new agreements. The models have been subject to occasional reviews and improvements. The last few years saw a fresh outbreak of interest among OECD country governments in updating their BIT models. The purpose of the present article is to illustrate recent trends in the BITs and BIT models of OECD members.

Half of the models have been revised in the last four years. Canada’s Foreign Investment Protection and Promotion Model Agreement (FIPA) and United States Model BIT have undergone a major face-lift 2004. The Czech Republic, France, Germany and Spain have also released new Models in the first half of 2005.

Increased exposure<sup>2</sup> and broader experience with their implementation, together with the rise of investment disputes may explain the increased attention being paid to such model agreements. For instance, the Canadian government has stated that its new FIPA Model “reflects the lessons learned from its experience with the implementation and operation of the investment chapter of NAFTA”.<sup>3</sup> The US Administration has also indicated that “the new model BIT” contains provisions... to address the investment negotiating objectives of the Bipartisan Trade Promotion Authority Act of 2002.<sup>4</sup>

There may be other reasons for the changes as well. Countries part of the last wave of EU enlargement had to eliminate incompatibilities between their BITs and the EU treaty prior to their accession to the Union. Some EU members (Austria, Denmark, Finland and Sweden) have also recently been invited to take appropriate steps to eliminate existing incompatibilities between the EU Treaty and the BITs they signed prior to joining the European Union.<sup>5</sup>

BIT models, however, serve only as a template for discussions between partner countries. Their provisions remain subject to negotiation and further refinement by negotiating parties to a given agreement. Thus, although BITs models are helpful in ensuring consistency between agreements entered by individual countries, it remains necessary to look at individual clauses to assess the impact of an agreement.

The remainder of the article carries out a more detailed analysis of OECD BITs following the most commonly used categorisation of the substantive and procedural provisions found in these agreements. The main findings are summarised in the last section. An overview of the main substantive and procedural provisions of recent BITs and BIT models is moreover provided in Tables 6.1-6.3.

## 1. Objectives, purposes and scope

### 1.1. Preamble

Investment treaties' preambles normally serve the purpose of outlining the objectives pursued by the substantive and procedural provisions of the agreements. This is an important function since they provide a "context" for interpreting individual treaty clauses, notably by arbitration tribunals to investment disputes.<sup>6</sup> Preambles may also signal core or novel features in the agreements.

Beyond the general goal of strengthening economic co-operation, BITs traditionally stress the importance of creating favourable conditions for investments and/or investors of both parties and underline the benefits that may flow from the reciprocal promotion and protection of such investments and/or investors. Interesting additions or clarifications may nevertheless be observed in the preambles of recent agreements.

### 1.2. Scope and coverage<sup>7</sup>

Absent an explicit "scope and coverage" article, the scope and coverage of BITs are determined by their objects and the measures which apply to those objects. The new BIT generation appears to follow a *broad approach*. For example, all recent OECD BITs seem to have chosen a *broad asset-based definition* of "investment" (as opposed to an enterprise-based definition) covering investments directly or indirectly controlled by investors of either Party. Furthermore, the list of covered assets is an open one except for the new Canadian Model FIPA which, in this respect, continues to use the NAFTA approach which is a broad yet closed asset definition.<sup>8</sup>

Likewise, recent BITs also seem to have opted for a *broad definition* of "investor", encompassing both nationals and companies of the parties and, as in the case of the United States, branches. "Applicable measures" usually refers to laws, regulations, procedures, requirements or practices. The agreements generally apply to investments made before or after the coming into force of the agreements.<sup>9</sup> The contracting parties' responsibilities can also extend to acts and/or omissions of sub-sovereign entities or sub-federal entities or sovereign rights under international law (such as maritime areas) of each Contracting Party, hereafter defined as the exclusive economic zone and

Table 6.1. **BIT models in OECD countries and non-member adherents to the Declaration**<sup>1</sup>

	Previous model	Last model
<b>OECD countries</b>		
Australia	Draft model 1980	Draft model 1995
Austria	Draft model 1997	In process of updating
Belgium-Luxembourg	Draft model 2002	In process of updating
Canada	No	Model 2004
Czech Republic	Draft model 1999	Draft model 2005
Denmark	Draft model 2000	In process of updating
Finland	Draft model 2001	Draft model 2004
France	Draft model updated in 1998 and 2000	Draft model 2005
Germany	Model 1991	Model 2005
Greece	Draft model 1999	Draft model 2001
Hungary		In process of updating
Iceland	No	No
Ireland	No	No
Italy		Draft model 2003
Japan	No	No
Korea	No	No
Mexico	No	No
Netherlands	Draft model 1990	Draft model 1997
New Zealand	No	No
Norway		
Poland		
Portugal	Draft model 1992	Draft model 2002
Slovak Republic		Draft model 2004
Spain		Draft model 2005
Sweden		Draft model 2002
Switzerland	Draft model 1986/1995	In process of updating
Turkey	Draft model 2000	Draft model 2005
United Kingdom	Draft model 1991	Draft model 2005
United States	Model 1994	Model 2004
<b>Other adherents to the Declaration</b>		
Argentina		
Brazil	No	No
Chile		Draft model 1994
Estonia		Draft model 2000
Israel	Draft model 2003	Current model (2003) under revision
Latvia		Draft model 2005
Lithuania		
Romania		
Slovenia		Draft model 2003

1. "Declaration" refers to the OECD Declaration on International Investment and Multinational Enterprises ([www.oecd.org/daf/investment/instruments](http://www.oecd.org/daf/investment/instruments)).

Table 6.2. **Substantive provisions in recent BITs**

	Definitions/scope/coverage				Umbrella clause	Admission			Post admission			Investment protection			
	Asset based		Investment			NT	MFN	Performance requirements	NT	MFN	Performance requirements	Standard of treatment	Transfers	Expropriation	
	Open list	Closed list	Direct	Indirect										Direct	Indirect
German Model	+				+				+	+			+	+	
French Model	+		+	+					+	+			+	+	
Belgium-Luxembourg Model	+		+	+	+				+	+			+	+	
Canadian Model		+	+	+		+	+	+	+	+	+		+	+	
US Model	+		+	+		+	+	+	+	+	+		+	+	
Germany-China BIT	+		+	+	+				+	+			+	+	
Germany-India BIT	+				+				+	+			+	+	
Japan-Korea BIT	+		+	+		+	+	+	+	+	+		+	+	
Mexico-Korea BIT	+								+	+			+	+	
	Key personnel	Transparency	Exceptions					Financial services	Taxation	Environment	Labour	Investment facilitation	CR		
			EIA <sup>1</sup>	General exceptions	Security interests	Prudential measures	Country exceptions								
German Model	+		+						+						
French Model	+		+				2		+						
Belgium-Luxembourg Model	+		+		+				+	+					
Canadian Model	+	+		+		+	+	+	+	+					
US Model	+	+			+		+	+	+	+					
Germany-China BIT	+		+						+						
Germany- India BIT	+		+	+	+				+						
Japan-Korea BIT	+	+	+	+	+		+ <sup>3</sup>	+	+	+					
Mexico-Korea BIT			+				4		+						

1. Economic Integration Agreements (i.e. membership or association with a custom or economic union, a common market or a free trade area).

2. Article on BOP (Balance of Payment) safeguards.

3. The same article also includes a BOP Clause.

4. BOP Clause provided in the Protocol.

Source: OECD Investment Division.

the continental shelf outwards the territorial sea of each Contracting Party over which they have, in accordance with International Law, sovereign rights and a jurisdiction with a view to prospecting, exploiting and preserving natural resources (French Model).

### 1.2.1. Defining “investment”

“Every kind of asset” is normally used as the leading formula to a non-exhaustive definition of investment. Such definition may include traditional property rights, interests in companies (“*share of companies or other kinds of interest in companies*”), claims to money used to create an economic value and titles to performance having an economic value (“*rights to money and any performance under contract having a financial value*”), intellectual property rights and business concessions under public law, including concessions to search for, extract and exploit natural resources (“*business concessions conferred by law or under contract, including concessions for mining and oil exploitation*”).<sup>10</sup> There are some noticeable differences either in the coverage or language used, however. For example:

The **2004 US Model BIT** departs from NAFTA’s closed definition of investment in favour of the open-ended definition of the 1994 Model. Furthermore the definition is more detailed and accompanied by explanatory footnotes. Article 1 defines “investment” as “*every asset... that has the characteristic of an investment...*”. Footnote 1 gives examples of forms of debt that are more likely to have the characteristics of an investment as well as of other forms that are less likely to have such characteristics. Footnote 2 provides indications as to whether or not a particular type of license, authorisation, permit or similar instrument has the characteristics of an investment. Footnote 3 clarifies that the term “investment” does not include an order or judgment entered in a judicial or administrative action.

The new **Canadian Model** has replaced the 1994 FIPA Model’s non exhaustive asset-based definition with the finite but more comprehensive definition of investments based on NAFTA’s Article 1139 definition.

In Article 1.2 of the **Belgium-Luxembourg Model (2002)**, investment is defined as “*any kind of asset and any direct or indirect contribution in cash, in kind or in services, invested or reinvested in any sector of economic activity*”.

Article 1.2 of the **Japan/Korea BIT (2003)** provides a straightforward definition of investment that includes namely “*... an enterprise;... shares, stocks or forms of equity participation... bonds, debentures, loans and other forms of debt, including rights derived there from,... rights under contracts,... claims to money and to any performance under contract having a financial value, intellectual property rights,... any other tangible and intangible... property*”. In addition, the term investment includes “*the amounts yielded by investment, in particular profit, interest, capital gains, dividends, royalties and fees*”.

While Article 1 of the **Mexico/Korea BIT (2002)** explicitly provides for a non-exhaustive definition of investment, it also provides a negative definition of investment “... but investment does not include, a payment obligation from, or the granting of a credit to a Contracting Party or to a state enterprise... but investment does not mean, claims to money that arise... from: i) commercial contracts for the sale of goods or services by an investor in the territory of a Contracting Party to a company or a business of the other Contracting Part, or ii) the extension of credit in connection with commercial transaction... iii) any other claims to money that do not involve the kinds of interests set out in subparagraphs a) through e)”.

### 1.2.2. Defining “investor”

The definition of investors may rely on one, or any combination of, the following three criteria, namely that of incorporation, that of seat and that of control. Although this would not appear to be the general rule, some recent BITs may also continue to offer two definitions, one relating to one Party and the other relating to the second Party. In particular:

**Germany** provides an example of two definitions of investors. For instance, in the **Germany-China BIT**, the definition of a German investor covers: 1) in general “any natural person who is national of Germany under its applicable law”; and 2) “any judicial person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the federal Republic of Germany, irrespective of whether or not its activities are directed at profit” (Article 1.3 of the 2005 German Model and Article 1.2.a of the 2003 Germany-China BIT). Chinese investors are defined as: 1) “nationals/ individuals – natural persons”; and 2) “economic entities, including companies, corporations, associations, partnerships and other organisations, incorporated and constituted under the laws and regulations of and with their seats in the People’s Republic of China, irrespective of whether or not for profit and whether their liabilities are limited or not” (Article 1.2.b). The **Germany-India BIT** generally includes under the term investors “nationals or companies of a Contracting Party who have effected or are effecting investment in the territory of the other Contracting Party” (Article 1.c following the 2003 Indian Model, Article 1).<sup>11</sup>

The **French Model (2005)** sets forth for a single definition of investors which applies to both contracting parties. It also relies on a combination of three criteria to define investors, namely the concept of incorporation (“any legal person constituted on the territory of one Contracting Party”), the concept of seat (*siège social*) and the concept of control (“any legal person controlled directly or indirectly by nationals of one Contracting Party or by legal persons having their head office in the territory of one Contracting Party and constituted in accordance with the legislation of that Party”) (Article 1.3).

The same approach is followed by the **Belgium-Luxembourg Model (2002)** although it combines two concepts to define the nationality of companies, the concept of incorporation (“*any legal person constituted in accordance to the legislation...*”) and the concept of seat (“*... and having its registered office in the territory...*”). No references are made to the situations of the legal persons controlled directly or indirectly (such as for example the case of affiliates/subsidiaries) (Article 1.1).

In the **Mexico/Korea BIT**, investors which are juridical persons are defined as any entity “*incorporated or constituted in accordance with the laws and regulations of that Contracting Party, including an enterprise that is owned or controlled by the former Contracting Party*” (Article 1.3.b). This definition relies on the concepts of incorporation and control.

The same approach is followed by the **Korea/Japan BIT**. The definition of an investor includes “*a legal person or any other entity constituted or organised under the applicable laws and regulations of a Contracting Party, whether or not for profit, and whether private or government-owned or-controlled, and includes a company, corporation, trust, partnership, sole proprietorship, branch, joint venture, association or organisation*” (Article 1.b).

Following the NAFTA precedent, both the **Canadian and US Models** have a definition for an “investor of a Party” and an “investor of a non-Party”. The definitions are very similar. In the US Model, an “investor of a Party” means “*a Party or state enterprise thereof, or a national or an enterprise of a Party that attempts to make, is making, or has made an investment in the territory of the other Party*”... Investor of a non-Party, means, with respect to a Party, “*an investor that attempts to make, is making, or has made an investment in the territory of that Party, which is not an investor of either Party*”. The terms “enterprise” and “enterprise of a Party” are also broadly defined. “Enterprise” means “*any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust...; and a branch of an enterprise*” while an enterprise of a Party means “*an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there*” (Article 1).

It should also be noted that both the **Canadian and US Models** have a “scope and coverage” article (Article 2) which immediately follows the definitions article. This article makes it clear that the treaty applies to “*measures adopted or maintained by a Party relating to... investors of the other Party*” and “*covered investments*”.<sup>12</sup> It also makes it clear that the substantive obligations of the Parties apply to a state enterprise or other person when it exercises any regulatory, administrative or other delegated governmental authority as well as to political subdivisions of that Party. In addition, under Article 17 of the US Model BIT and Article 18 of the



Canadian Model, “a Party may deny the benefits” of the BIT to an enterprise of the other Party if “... the enterprise has no substantial business activities in the territory of the other Party” and investors or persons of a non-Party “own or control the enterprise”.

## 2. Treatment of investor and investment

Foreign investors may encounter restrictions of a regulatory nature when they attempt to enter a market, are in process of making an investment or are already established in a home country. The restrictions may apply to all of these phases or alternatively to some of them. Issues related to Most-Favoured-Nation treatment and National Treatment (see below) lie at the heart of these measures. Other issues include whether investors are being guaranteed an absolute standard of treatment (fair and equitable treatment standard and full protection and security), are subject to performance requirements or are allowed to employ foreign key personnel. In addition, foreign investors are looking for transparent and predictable rules in carrying out their activities.

These are also among the most important substantive issues dealt with by BIT negotiators and differences stand out as to the way they have handled these over the years. For instance, the treatment provisions of Canadian and US BITs apply to both the pre-establishment and post-establishment phases where European BITs have traditionally covered only the second phase. Another major distinction is that Canadian and US BITs contain disciplines on the imposition of a number of performance requirements while European BITs usually do not.<sup>13</sup> These differences appear to have been carried over in recent BITs. This situation can be contrasted with that of other OECD BITs, notably some which are reviewed here (Japan and Korea) and which contain innovations of their own.

### 2.1. Most-Favoured Nation and National Treatment

The principle that foreign investors are not discriminated against relative to other foreign investors (Most-Favoured-Nation treatment, or MFN) or domestic counterparts (National Treatment) is central to investor protection. Based on recent developments, the following observations can be made:

The newly released **French and German Model BITs** continue to provide in a leading article (Article 2 in both cases) a best endeavour undertaking as regards the promotion and admission of investment by investors of the other party with the qualification “in accordance with its legislation and the provisions of this Agreement” (French Model) or “in accordance with its laws and regulations” (German Model). This is followed by a NT/MFN treatment article which subjects investments “in its territory” owned or controlled by investors of the other Party, and to investors of the other Party as regards activities

relating to such investment, to treatment no less favourable than it accords to investment of its own investors/its own investors or to investments/investors of any third State. The language may vary somewhat without extending the coverage of these provisions to pre-establishment. For instance, in the **Germany-India BIT** (1998), the NT/MFN treatment provisions (Article 4) refers to the treatment accorded to investments of investors of the other Party, “including their operation, management, maintenance, use, enjoyment or disposal by such investors”.<sup>14</sup> In the **Germany-China BIT** (signed in 2003), the language used is “Each... Party shall accord to investments and activities associated with such investments... treatment no less favourable than that accorded to investments... by its own investors... or by investors of any third State” (Article 3).

The new **Canadian and US Models** are similar to NAFTA Articles 1102 and 1103 and apply to “the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory”. Both Models now include a clause which requires sub-national governments (Article 3.3 of the Canadian Model) or regional level of government (Article 3.3 of the US Model) to accord National treatment as defined by the Model. The Canadian Model contains in addition a footnote to the MFN treatment clause (Article 4) stating that “for greater certainty, the treatment accorded by a Party under this Article means, with respect to sub-national government, treatment accorded, in like circumstances, by that sub-national government to investors, and to investments of a non-Party”.

The BITs concluded by **Japan with Korea** (2003) and **Vietnam** (2005) cover both the pre and post-establishment phases. The National Treatment provision (Article 2.1) provides “treatment no less favourable than the treatment it accords in like circumstances to its own investors and their investments respect to the establishment, acquisition, expansion, operation, management, maintenance, use, enjoyment, and sale or other disposal of investment...”. A similar language is used for the MFN treatment clause (Article 2.2). Article 3 provides, in addition, for “no less favourable treatment... in like circumstance with respect to access to the courts of justice and administrative tribunals and agencies in all degrees of jurisdiction, both in pursuit and in defence of such investors’ rights”. These provisions may be contrasted with the **Japan-Pakistan BIT** (2002) where the National Treatment and MFN treatment clauses state that “Investors of either Contracting Party shall within the territory of the other Contracting Party be accorded treatment no less favourable than accorded to investors of such other Contracting Party or any third country in respect to investments, returns and business activities in connection with the investment” (Article 3.1 and 3.2). Article 4 of this agreement is almost identical to Article 3 of Japan-Korea and Japan-Vietnam BIT except for the additional phrase “in like circumstances”.

The **Korea-Mexico BIT** (2002) has two separate provisions on NT/MFN treatment. One (Article 3.1), provides that each Party “shall in its territory accord to investment and returns of investors (*underlined added*), of the other... Party treatment no less favourable than that which it accords to investments and returns of its own investors or investments and returns of investors of any third State, which ever is more favourable to investors”. Article 3(2) provides that each Party shall provide to investors of the other Party “as regards the operation, management, maintenance, use, enjoyment or disposal of their investments (*underlined added*), treatment no less favourable than that which it accords to its own investors or to investors of any third State...”. These provisions therefore do not apply to pre-establishment even if some of the terms used appear to have been influenced by NAFTA.

## 2.2. Transparency

It can be inferred from the BITs reviewed that only a few in the new generation of BITs include transparency requirements. For example, the new German, French or Belgium-Luxembourg Model BIT do not have provisions in this respect. There are, however, some interesting developments in the Canadian, Finnish and US Models and in the Japanese-Korea BIT. In particular:

Both the **Canadian** and **US Models** reproduce NAFTA Chapter 18 provisions regarding the prompt publication of “laws, regulations, procedures and administrative rulings of general application” as they relate to any matter covered by BITs.<sup>15</sup> Article 10 of the US Model extends the obligation to “adjudicatory decisions” consistent with the 1994 Model. The new US Model contains, in addition, a transparency article (Article 11) which reflects the marriage of the 1994 US Model BIT and transparency chapters of US FTAs. This article concerns the designation of contact points to facilitate communication between the Parties, the publication in advance, to the extent possible, of new measures, enquiries and administrative proceedings. No investor may have recourse to dispute settlement under Article 11 however (as in the case of the transparency article of the Canadian Model).

Both the **Japan-Korea BIT** (Article 7) and the **Finland Model** (Article 15) state that each Party “shall promptly publish, or otherwise make publicly available, its laws, regulations, administrative rulings and judicial decisions of general application as well as international agreements which pertain to or affect investment and business activities” as well as, “upon request, respond to specific questions on these matters”. This cannot to be construed as obliging any Party to disclose confidential information however.

### 2.3. Performance requirements

As the 1967 OECD Model did not establish any provision precluding the Party's ability to impose performance requirements and as the Trade-Related Investment Measures (TRIMs) Agreement came into force only in 1995, the inclusion of performance requirements clauses in BITs has not emerged as a generalised practice. Those BITs which do contain such clauses either replicate the TRIMs Agreement obligations or are largely based on NAFTA.

The **2004 Canada Model FIPA** and the **2004 US Model BIT** are inspired by the article on performance requirements established in NAFTA. They are different from both the Canadian and the American 1994 BIT Models since they establish separately the preclusion to “*impose or enforce*” a requirement or “*enforce any commitment or undertaking*” from the preclusion of the imposition of requirements as a condition for “*the receipt or continued receipt of an advantage*”. [Article 7(3) of Canada Model FIPA and Article 8(2) of the 2004 US Model BIT]. Both models refer to the same type of performance requirements and also add the prohibition “*to supply exclusively from the territory of the Party the goods it produces or the services it supplies to a specific regional market or to the world market*”.

The new models also add several provisions that establish exceptions to the preclusion of imposing performance requirements in certain cases. Hence, parties are not prohibited from conditioning the receipt of an advantage “*on compliance with a requirement to locate production, provide a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory*”. Other exceptions apply in cases related to the export promotion and foreign aid programmes, procurement by a Party or State enterprise, and to the contents of goods necessary to qualify for preferential tariffs or preferential quotas. In the case of the US, the Article on Performance Requirements adds exceptions related to the authority of a Party to adopt or maintain measures, including environmental measures, in order to secure compliance with laws and regulations; necessary to protect human, animal or plant life or health; and related to the conservation of living or non-living exhaustible natural resources. The Canadian Model addresses such measures in Article 10(1).

Regarding the preclusion of the imposition of requirements related to the transfer of technology, a production process or other propriety knowledge, the **US Model** states that it does not apply “*when a Party authorizes use of intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of propriety information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement...*” and when the requirement is imposed or enforced by a court, administrative tribunal, or competition authority. In the same regard, the **Canadian Model** states

that “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...” the prohibition of imposing requirements on technology transfer. The **Japan-Korea BIT** contains a reference to TRIPS Agreement stating that “... while providing that the Parties shall not impose requirements such as... f) to transfer technology, a production process or other proprietary knowledge to a natural or legal person or any other entity in its territory, except when the requirement: i) is imposed or enforced by a court, administrative tribunal or competition authority to remedy an alleged violation of competition laws; or ii) concerns the transfer of intellectual property and is undertaken in a manner not inconsistent with the Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakech Agreement Establishing the World Trade Organization”.

The **2004 US Model BIT** provides that the Article on Performance Requirements “does not preclude the enforcement of any commitment, undertaking, or requirement between private parties, where the Party did not impose or require the commitment, undertaking or requirement”.

#### 2.4. Key personnel

Several BITs require the host country to give favourable consideration to investor’s applications for licences, sojourn of personnel, entry of employees, working permits, etc. This might be explained because foreign investors may generally expect to bring into the host country expatriates for positions requiring special skills. In particular:

The **Germany-China BIT** provides that: “Subject to its laws and regulations, either Contracting Party shall give sympathetic consideration to applications for obtaining visas and working permits to nationals of other contracting Party engaging in activity associated with investments made in the territory of the Contracting Party” (Article 2.3). The **2005 German Model** contains such provision in the Protocol (Article 3.c). In different terms, the **Germany-India BIT** provides that “Neither contracting Party shall place any constraints on the international movement of goods or persons directly connected with an investment being transported subject to bilateral or international agreements governing such transports, which are in force between the contracting Parties”.

The **French Model** in its Article 4 requires each Contracting Party to give favourable considerations to applications for entry/residence/work/travel of nationals of one Contracting Party in relation to an investment made in the territory/maritime areas of the other Contracting Party. Article 5 also provides that expatriates (“... nationals authorized to work...”) may enjoy the material facilities relevant to the exercise of their professional activities.

The **Belgium-Luxembourg Model** in its Article 2.2 requires each Contracting Party to authorise the conclusion and the fulfilment of license contracts and commercial, administrative or technical assistance agreements, as far as these activities are in connection with such investment. References to sojourn and entry of personnel in relation with the investments as well as to the grant of material facilities relevant to the exercise of professional activities of nationals authorized to work in the territory of one Contracting Party are not explicitly contained in the article. It might be considered that these aspects are acknowledged in the Article 2.2.

Key personnel provisions are included in the **2004 Canadian Model**. Article 6.3 provides that “Subject to its laws, regulations and policies to the entry of aliens, each Party shall grant temporary entry to nationals of other Party, employed by an investor of the other Party, who seeks to render services to an investment of that investor in the territory of the Party, in a capacity that is managerial or executive or requires specialized knowledge”. Following the approach of several FTAs, the Canadian Model contains provisions on senior management and boards of directors.<sup>16</sup>

Like the Canadian Model, the **2004 US Model BIT** contains very similar provisions on senior management and boards of directors (Article 9). It differs from the 1994 Model, in which provisions on senior management and boards of directors are included in Article VII, on the entry/sojourn of aliens, a subject that is not included in the 2004 US Model.<sup>17</sup>

The **Korea-Japan BIT** also includes provisions on key personnel. Article 8.1 states that “Subject to its laws relating to entry, stay and authorisation to work, each Contracting Party shall grant temporary entry, stay and authorisation to work to investors of the other Contracting Party for the purpose of establishing, developing, administering or advising on the operation in the territory of the former Contracting Party of an investment to which they, or an enterprise of that Contracting Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources, so long as they continue to meet the requirements of this Article”. The treaty also contains a provision on senior management and boards of directors. Its Article 8.2 provides that “Neither Contracting Party shall require that an enterprise of that Contracting Party that is an investment of an investor of the other Contracting Party appoint, as executives, managers or members of boards of directors, individuals of any particularly nationality”.

## 2.5. Environment and labour

As a general rule, OECD countries' BITs do not include special provisions bearing on the protection of the environment and labour market rights. However, a few exceptions bear mentioning:

With two separate articles on environment and labour, the **Belgium-Luxembourg Model** stands out as a major exception to the general practice of EU member countries BITs. Article 5 and 6 of this Model specifically recognise that each Party has the right to establish its "own levels of domestic protection" in these policy areas, that it "shall strive to ensure that its legislation provide for high levels of environmental protection" or "labour standards consistent with internationally recognised labour rights", and that "it is inappropriate to encourage investment by relaxing domestic environmental and labour legislation". The Parties must also agree to fulfil their international commitments (including those of the ILO Declaration on Fundamental Principles and Rights at Work) in these fields.

These striking features of the Belgium-Luxembourg Model are also among the most innovative provisions of features of the new **US Model BIT**, which contains two new articles on Investment and the Environment (Article 13) and Investment and Labour (Article 13) borrowed from NAFTA and more recent FTAs. One such principle is that "it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental or labour laws". Consultations may be requested by a party which considers that such an encouragement has been offered. The Canadian Model BIT also contains an article on Health, Safety and Environmental Measures (Article 11) that is similar to Article 12(1) of the US Model. The other principle reflected in the US Model, which is unique to the Environment Article, is that "Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns". These articles are not subject to any dispute settlement recourse however.

## 3. Investment protection

BITs have traditionally included three important provisions to protect foreign investors, namely: a) fair and equitable standard and full protection and security; b) guarantees of investors' property rights, for instance through compensation provisions that can be invoked should an investment be expropriated by the host state; and c) an obligation to provide for the free transfer, conversion and liquidation of any form of capital, proceeds, payments, profits

and others without restraints.<sup>18</sup> These are “absolute” and “non-contingent” obligations since they limit a State’s ability to impose measures on foreign investors even if these measures are applied equally to that State’s own investors.

### 3.1. Fair and equitable treatment and full protection and security

A major survey has recently been conducted under the OECD Investment Committee’s auspices on the fair and equitable standard in international investment law.<sup>19</sup> One new development is the change in the minimum standard of treatment provision of the Canadian and US models. Following are some illustrations:

The new **German Model BIT** now regroups under a single article the three standards but the language previously used in the 1991 Model remains unchanged: “Each Contracting State shall...accord fair and equitable standard as well as full protection under the Treaty” (Article 2.2) and “Neither Contracting Party shall in any way impair by arbitrary or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of investors of the other Contracting State” (Article 2.3). These obligations follow a best endeavour undertaking “to promote as far as possible investments by investors of the other Contracting State and admit such investments in accordance with its legislation” (Article 2.1). The three standards appear in the Germany-China BIT (Article 2) in the Germany-India BIT.

In the most recent **French Model**, the fair and equitable standard is covered by a stand-alone article which provides that each Party “shall extend fair and equitable standard in accordance with the principle of international law... and shall ensure that the exercise of this right shall not be hindered by law or in practice” (Article 4). The standard of “full and complete protection and safety” provision appears as the leading paragraph of Article 6 on Dispossession and indemnification.

In the **Belgium-Luxemburg Model BIT**, Article 3 on Protection of Investments provides for the three standards but the exclusion of any unjustified or discriminatory measure is part of the standard of continuous protection and security. The article reads:

*“Except for measures required to maintain public order, such investments shall enjoy continuous protection and security, i.e. excluding any unjustified or discriminatory measure which could hinder, either in law or in practice, the management, maintenance, use, possession or liquidation thereof”.*

In the **Japan-Korea BIT**, the obligation to accord fair and equitable standard and full and constant protection and security is combined with the provisions on expropriation (Article 10). There is no provision on the non-discriminatory principle.



In the **Korea-Mexico BIT**, all the three principles are combined into a single paragraph of the article on the Promotion and Protection of the Investments (Article 2).

In terms of recent developments, the US and Canada Model BITs stand out. Contrary to the 1994 Model, where contingent and non-contingent standards were prescribed in a single article, the **2004 US Model BIT** contains a separate article devoted only to Minimum Standard of Treatment (Article 5). This article provides that:

*“1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.*

*For greater certainty, paragraph 1 prescribes the customary international minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of ‘fair and equitable treatment’ and ‘full protection and security’ do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:*

*a) ‘fair and equitable treatment’ includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and*

*b) ‘full protection and security’ requires each Party to provide the level of police protection required under customary international law.*

*2. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.*

*3. Notwithstanding Article 14 [Non-Conforming Measures] (5)(b) [subsidies and grants], each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating losses suffered by investments in its territory owing to armed conflict or civil strife.*

*4. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:*

*a) requisitioning of its covered investment or part thereof by the latter’s forces or authorities; or*

*b) destruction of its covered investment as part thereof by the latter’s forces or authorities, which has not been required by the necessity of the situation,*

*the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective...”*

An additional interpretative provision in Annex A states the parties' shared understanding of the meaning of "customary international law" as "a general and consistent practice of States that they follow from a sense of legal obligation"... "the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens".

**Canada's new FIPA Model**<sup>20</sup> also links in its Article 5 the obligations regarding "fair and equitable treatment" and "full protection and security" to the minimum standard. According to its article:

- "1. Each Party shall accord to covered investments treatment in accordance with customary international law minimum standard of treatment of aliens, including fair and equitable and full protection and security.
2. The concepts of 'fair and equitable treatment' and 'full protection and security' in paragraph 1 do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article."

### 3.2. Expropriation and compensation

Virtually all BITs contain clauses describing the conditions under which a lawful expropriation may be made and a standard for compensation of the expropriated property.<sup>21, 22</sup> They also usually cover both direct and indirect expropriation. Only recently, however, has the distinction between compensable and non-compensable regulatory actions been addressed.<sup>23</sup> This is the case for the new Canadian and US Models BITs which include criteria articulating the difference between indirect expropriation and non-compensable regulation. A major survey has recently been conducted under the Committee's auspices on indirect expropriation and the right to regulate.<sup>24</sup>

Following are some illustrations of the manner in which these various issues relating to expropriation have been handled in recent BITs.

Article 4 of the **German Model** provides that "investments by investors of either Contracting State shall not be directly or indirectly expropriated, nationalised or subjected to any other measure the effects of which would be tantamount to expropriation... except for the public benefit and against compensation". It also incorporates a provision on most-favoured nation treatment: "Investors of either Contracting State shall enjoy most-favoured-nation treatment in the territory of the other Contracting State in respect of the matters provided for in this article". Concerning the amount of compensation, the Model provides that it "shall be the equivalent to the value of the expropriated investment immediately before

the date on which the actual or threatened expropriation... has become publicly known". Furthermore such compensation "be fully realizable, freely transferable and without delay". Finally, Article 4 stipulates the availability of judicial review as a separate requirement.<sup>25</sup>

In the **French Model**, expropriation provisions are contained in a short article on "Dispossession and indemnification" (Article 6). This article states that "Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of nationals or companies of the other Contracting Party of their investments on its territory and in its maritime area, except in the public interest and provided that these measures are neither discriminatory nor contrary to a specific commitment" (underlined added). Any measure of dispossession shall give rise to "prompt and adequate compensation" the amount of which shall "be equal to the real value of the investments concerned and shall be set in accordance with the normal economic situation prevailing prior to any threat of dispossession". Compensation shall also be "fully realizable, freely transferable and without delay".

The provisions are largely the same in the **Japan-Korea BIT**. Article 10.2 stresses that investments by investors of either Contracting State shall not be directly or indirectly expropriated except for the public purpose, on a non-discriminatory basis, against prompt, adequate and effective compensation and in accordance with the due process of law. Concerning the amount of compensation, it shall be equal to the fair market value of the expropriated investments immediately before expropriation occurred. This fair market value shall not reflect changes in value occurring because the expropriation became publicly known earlier (Article 10.3). Such compensation shall be effectively realizable, freely convertible and transferable and shall be made without delay (Article 10.2). Investors have also "the right to access to the courts of justice or administrative tribunals or agencies of the Contracting Party making the expropriation for a review of the investor's case and of the amount of compensation".

Article 5 of the **Korea-Mexico BIT** opts for a more general formula stating that investments by investors of either Contracting State shall not be directly or indirectly expropriated except for the public purpose and against just compensation. It also adds that the expropriation shall be carried out on a non-discriminatory basis in accordance with legal procedures (Article 5.1). Concerning the amount of compensation, it shall be equal to the fair market value of the expropriated investments immediately before expropriation was taken or before impending expropriation became public knowledge, whichever is the earlier, shall include interest at the applicable commercial rate from the date of expropriation until the date of payment... (Article 5.2.) Such compensation shall be effectively realizable, freely convertible and transferable and shall be made without undue delay (Article 5.2).

Both the Expropriation article of the **Canadian** and **US Models** (Article 13 and Article 6 respectively) largely reproduce NAFTA Article 1110 language – which itself embodied Canada’s and US BIT practice at the time. There are some differences however. For example, indirect expropriation is being referred to as “measures having an effect equivalent” (and not tantamount) to... expropriation. The **US Model BIT** contains detailed provisions on the determination of market value in the cases of a freely and non-freely usable currency. Both Models now contain a special provision on compulsory licenses.<sup>26</sup> However the most innovative features are the inclusion of annexes containing clarifications on how the provisions on direct and indirect expropriation should be interpreted. Annex B<sup>27</sup> of the US Model BIT specifically provides that:

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

Annex B.13 of the updated **Canadian Model** contains a similar definition of indirect expropriation. Paragraph (a) stipulates that “indirect expropriation results from a measure or series of measures ...that have an effect equivalent to direct expropriation. Paragraph (b) provides criteria to be considered on a case-by-case basis to determine what may constitute an expropriation. Paragraph (c) provides, in addition to the clarification of paragraph 4(b) of the US Model, an example of the ‘rare circumstances’ where non-discriminatory measures” could be compensated. This would be the case “when a measure or series of measures are so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith”.

### 3.3. Transfers

As one of the core provisions in BITs, transfers articles set forth a host country’s obligation to allow free flow of all investment related transactions, guaranteeing the transfer, conversion and liquidation of any form of capital, proceeds, payments, profits and others without restraints. In general, they provide very similar provisions to the one incorporated in the **Japan-Korea BIT**, which establishes that:

- “1. Each Contracting Party shall ensure that all payments relating to an investment in its territory of an investor of the other Contracting Party may be freely transferred into and out of its territory without delay. Such transfer shall include, in particular, though not exclusively:
- a) the initial capital and additional amounts to maintain or increase an investment;
  - b) profits, interest, dividends, capital gains, royalties or fees;
  - c) payments made under a contract including a loan agreement;
  - d) proceeds of the total or partial sale or liquidation of investments;
  - e) payments made in accordance with Articles 10 and 11;
  - f) payments arising out of the settlement of a dispute under Article 15; and
  - g) earnings and remuneration of personnel engaged from the other Contracting Party in connection with an investment.
2. Neither Contracting Party shall prevent transfers from being made without delay in freely convertible currencies at the market rate of exchange existing on the date of the transfer.
3. Notwithstanding paragraphs 1 and 2 above, a Contracting Party may delay or prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:
- a) bankruptcy, insolvency or the protection of the rights of creditors;

- b) *issuing, trading or dealing in securities;*
- c) *criminal or penal offences; or*
- d) *ensuring compliance with orders or judgments in adjudicatory proceedings.”*

Although the provision on transfers generally varies little from treaty to treaty, there have been recent BITs that have included new provisions allowing safeguard measures that restrict transfers in cases of serious balance-of-payments or financial difficulties.

### 3.4. “Umbrella” clauses

An estimated 40% of the BITs in force contain an “umbrella” clause seeking to ensure that each Party to the treaty will respect specific undertakings towards nationals of the other Party. Recent jurisprudence has given greater weight to the view that these clauses can elevate contract breaches into breaches of international law. (An overview of the history and context of umbrella clauses is provided in a later article in this publication.) Switzerland, Germany and Japan provide examples of different formulations of these clauses.<sup>28</sup> In particular:

Article 10(2) of the **Swiss Model BIT** provides that “Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party”.

Article 8 of the **German Model BIT** states that “Each Contracting Party shall observe any obligation it has assumed with regard to investments in its territory by nationals or companies of the other Contracting Party/investments in its territory by investors of the other Contracting State”.

Article 2(3) of the **Japan- Hong Kong BIT 1997** reads “Each Contracting Party shall observe any obligation it may have entered into with regards to investments of investors of the other Contracting Party”. This is to be contrasted with Article 3(3) of the Japan-Russia BIT 1998 providing that “Each Contracting Party shall observe any of its obligations assumed in respect of the capital investments made by an investor of the other Contracting Party”.

In other cases however, the umbrella clause may serve as a means of qualifying the scope of application of dispute settlement to investor-state contracts. For example:

The umbrella clause in the majority of **Mexico BITs** state that “disputes arising from such obligations shall be settled under the terms of the contract underlying the obligation”.

Article 13(2) of the **German-India BIPA** “Application of other rules” provides that “Each Contracting Party shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting Party; with dispute arising from such obligations being only redressed under the terms of the contracts underlying the obligations”.

The **US Model BIT** no longer contains a “standard” umbrella clause.<sup>29</sup> However, Article 24 (1) permits investors to bring breaches of an “investment agreement” to investor-to-state dispute settlement as follows:

“... the claimant may submit to arbitration under this section a claim that the respondent has breached... c) an investment agreement”.

An “investment agreement” means:

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

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

The investor must nevertheless waive its rights to other remedies.

“No claim may be submitted to arbitration under this section unless:

... b) the notice of arbitration is accompanied

- i) for claims submitted to arbitration under Article 24(1) by the claimant’s written waiver... of any right to initiate or continue before any administrative tribunal or court under the law of either Party or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 24.”

## 4. Exceptions

The scope of the substantive obligations may also be limited by “exceptions”. There may be three types of exceptions: exceptions to National Treatment and MFN Treatment, general exceptions and country exceptions. General exceptions refer to the adoption or maintenance of measures to meet policy goals (such as the protection of human life, the conservation of exhaustible resources, national security, and prudential measures for the financial sector...). When such provisions are included in BITs, their language is often drawn from standard general clauses such as those of Article XX of GATT, Articles XIV and XIV bis of the GATS, and the GATS Annex on Financial Services. A new development is the inclusion of provisions on the relationships between investment and environment and investment and labour. Country exceptions are those which provide for the adoption or

maintenance of non-conforming measures to the substantive obligations of the agreement. The central question is whether they contain liberalisation commitments and whether they follow a bottom up or top down formulation.

#### 4.1. Exceptions to National Treatment/MFN Treatment

Exceptions related to membership of customs and economic unions, common markets and free trade areas are relatively common in BITs. They are included in the **German, French** and **Belgium-Luxembourg Models** as well as in the **Japan-Korea** and **Mexico-Korea BITs**. Some specific examples are:

Article 4.2 of the **Belgium-Luxembourg Model** provides as follows “This treatment shall not include the privileges granted by one Contracting Party to investors of a third State by virtue of its participation or association in a free trade zone, customs union, common market or any other form of regional economic organisation”. The **French Model** contains a very similar provision, but refers to nationals and companies of a third State instead of investors (Article 5). The **German Model** and **German BITs with India and China** provide such clause respectively in Articles 3.3, 3.4 and 4.2. The **Mexico-Korea BIT** in its Article 3.4 provides that the treaty “shall not be construed so as to oblige one Contracting Party to extend to the investors of the other Contracting Party the benefit of any treatment, preference or privilege resulting from its participation in any existing or future free trade area, customs, union, economic union, regional economic integration agreement or similar international agreement”.

**The Korea-Japan BIT** states that “*The provisions of paragraph 2 of Article 2 [Most-Favoured Nation Treatment] shall not be construed so as to oblige a Contracting Party to extend to investors of the other Contracting Party and their investment any preferential treatment resulting from its membership of a free trade, a customs union, an international agreement for economic integration or a similar international agreement*” (Article 22.3).

Intellectual Property Rights are included as an exception to NT/MFN treatment in the **Korea-Japan BIT**. They are contained in the definition of investment of most BITs. The Korea-Japan BIT includes them in its Article 1.f. and also provides a distinct provision. Article 6 states as follows: “*Nothing in this Agreement shall be construed so as to derogate from the rights and obligations under international agreements in respect of protection of intellectual property rights to which the Contracting Parties are parties, including the Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakech Agreement Establishing the World Trade Organization and other international agreement concluded under the auspices of the World Intellectual Property Organization*” (6.1). Paragraph 2 of the article specifies that nothing in such agreement shall be construed so as to oblige either Contracting Party to



extend to investors of other Contracting Party and their investment the treatment which is accorded to investors of any third state and their investment by virtue of international agreements regarding protection of intellectual rights to which the former Contracting Party is a party.

**The US and Canadian Models** follow a different approach (see sections on Performance Requirements and Country Exceptions).

Another group of exceptions concerns **tax matters**. The **Belgium-Luxembourg Model** provides that “*The provisions of this article (national treatment and most favoured nation treatment) do not apply to tax matters*” (Article 4.4; also Article 5 of the **French Model**). The **German Model** specifies that “*the treatment granted under this article shall not relate to advantages which either Contracting States accords to investors of third States by virtue of a double taxation agreement or other agreement regarding matters of taxation*” (Article 3.4; Article 3.4.b of the Germany-China BIT; Article 4.3 of the Germany-India BIT).

**Korea-Japan BIT** follows a similar approach (Article 19). The **Mexico-Korea BIT** in its Article 3 “Treatment of Investments” acknowledges that “*this Agreement shall not be applicable to tax measures*” and that “*Nothing in this Agreement shall affect the rights and obligations of either Contracting Party derived from any tax convention*”. It also specifies that “*In the event of any inconsistency between the provisions of this Agreement and any tax convention, the provisions of the latter shall prevail*”.

Exceptions to national treatment and MFN treatment related to tax matters are also contained in the **US** and **Canadian Models**. Article 21 of the US Model provides that, except as provided in Article 21 (which only addresses obligations on expropriation and performance requirements), nothing in Section A shall impose obligations with regard to taxation measures and in case of any inconsistency between the Model and any tax convention, that convention shall prevail to the extent of the inconsistency. The Canadian Model follows a very similar approach (Article 16). However it also adds that “*Nothing in this Agreement shall be construed to require a Party to furnish or allow access to information the disclosure of which would be contrary to the Party’s law protecting information concerning the taxation affairs of a taxpayer*” (Article 16.2).

## 4.2. General exceptions

The inclusion of general exceptions clauses in BITs is a relatively new development and would appear to be linked, in certain cases, to the rise of new concerns, especially regarding environmental and labour policies. It also appears that a larger number of agreements now contain clauses on national security or public order although this does not appear to be a general practice.

Neither the new **German, French** or **Dutch Models** contain “general” exceptions. It is true that their NT/MFN treatment clauses do not apply to

preferential treatment accorded under economic integration agreements or tax matters and that the “Definition” article of the French Model contains a general carve-out for cultural and linguistic diversity. The **Finland Model BIT** provides, on the other hand, an example of a general exception clause for actions taken for the protection of essential security interests “in time of war or armed conflict, or other emergency in international relations” as well as the maintenance of public order.

The new **US Model BIT** now contains an essential security clause (Article 18),<sup>30</sup> an exception for prudential measures relating to financial services [Article 20(1)], and certain exceptions for taxation measures (Article 21).

Unlike NAFTA Chapter 11 and the new **US Model BIT**, Article 10 of the **Canadian Model** includes a modified GATT Article XX-like general exceptions provisions that apply to all obligations in the model treaty. These general exceptions cover in measures to protect human, animal or plant life or health, to ensure compliance with law and for conservation purposes. They also provide carve outs for “reasonable measures for prudential reasons”, measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange policies, actions “necessary for the protection of essential security interests” or “in pursuance of the United Nations Charter for the maintenance of international peace and security”. Paragraph 6 of the same article also provides that the agreement “shall not apply to investments in cultural industries”.

The **Japan/Korea BIT** contains a broader article (Article 16) listing various general exceptions a Party may take “which it considers necessary for the protection of its essential security interests... taken in time of war;... relating to implementation of national policies or international agreements relating to the non-proliferation of weapons;... in pursuance of its obligations under the United Nations Charter for the maintenance of international peace and security; necessary to protect human, animal or plant life or health;... for the maintenance of public order... but only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society”. When taking such measure(s) however, the Party is under the obligation “to notify” the other Party “prior to or as soon as possible” thereafter of its nature, motivation and scope application of the measure in question. Article 6 is a *suis generis* exception in respect to the protection of intellectual property rights.<sup>31</sup>

#### 4.3. Country exceptions

For those countries which “admit investment in accordance with their laws and regulations”, no special article on country exceptions is to be found in their BITs. This is the general situation for most European BITs. When the

agreements combine the pre- and post establishment phases, however, they also provide country lists which either describe the sectors or activities which the party is prepared to keep free of restrictive measure (bottom up approach) or those sectors or activities which will remain restricted (top down) after the entry into force of the agreement. Under the latter approach, new activities which may materialise in the future are also *a priori* free unless stated otherwise. The country lists may also reflect new liberalisation commitments. Consistent with OECD's approach under its instruments, it is commonly accepted that the top down approach facilitates broader coverage and provides for greater transparency.

A careful analysis of the regulatory situation prior and after the agreement is nonetheless necessary to identify where the new liberalisation commitments are. This work has not systematically been done in this phase of the stocktaking exercise. Moreover, as a large number of BITs limited to post establishment subject MFN treatment and/or National Treatment to "existing laws and regulations", it would appear that they do not contain, as a general rule, new liberalisation commitments.

Both the **Canadian** (Article 9) and **US Models** (Article 14) provide for top down lists for existing "non-conforming measures" to the obligations on NT/MFN treatment, key personnel and performance requirements (*i.e.*, transfer, expropriation, minimum standard of treatment obligations are not included). These lists mainly "grandfather" existing non-conforming measures with respect to "sectors, sub-sectors or activities" listed. The prerogative of introducing new non-conforming measures in the future is also provided in a separate list. Annex III of the Canadian Model provides that the MFN treatment obligation does not apply to treatment accorded under existing treaties, and it extends the exception to future treaties, as well, but only to certain specified types of treaties listed in the annex.<sup>32</sup> This means that foreign investors under the new Model cannot reach back and try to obtain protection afforded by previous treaties and it preserves the government room of manoeuvre in future treaties. In addition, both models contain certain derogations in respect of intellectual property rights, government procurement and subsidies and grants.

The **Japan/Korea BIT** (Article 5) also provides that a Party "may maintain any exceptional measure, which exists on the date on which this Agreement comes into force, in the sectors or with respect to the matters specified in an annex (to the Agreement)". But such measures must be notified and motivated and the Party concerned "shall endeavour to progressively reduce or eliminate" the measures notified. Another annex prevents the Parties "to adopt any new exceptional measure in the sectors or with respect to the matters specified in that annex" except, provided adequate warning and justification, "in exceptional financial, economic or economic circumstances".

## 5. Dispute settlement

In most BITs, two distinct dispute settlement mechanisms are provided: one for disputes between two contracting Parties concerning the application and interpretation of an applicable BIT and another for disputes between the host country and an injured foreign investor.

### 5.1. State-State disputes

Provisions on State-State disputes continue to be provided in all new BITs. The sample of treaties considered in this paper contains very similar provisions in this respect. Namely, any dispute between Parties concerning the interpretation or the application of the treaty has to be resolved through consultations or other diplomatic channels. If that fails, Parties may submit the dispute to arbitration for a binding decision or award by an *ad hoc* tribunal. The arbitration tribunal shall reach its decision by a majority of votes and, the decisions shall be final and legally binding upon both contracting Parties.

In addition, the Belgium-Luxembourg Draft Model provides that in the absence of a settlement through diplomatic channels, the dispute may be submitted to a joint commission consisting of representative of the two Parties. Such commission shall convene without delay at request of the first party to take action. If the commission fails to settle the dispute, then the latter shall be submitted at the request of either Contracting Party to an “arbitration court” (Article 13).

### 5.2. Investor-State disputes

Granting an investor the right to bring autonomously an action in an international tribunal against a State with regard to an investment dispute has been an early common feature of BITs. This mechanism gives practical significance to the treaties and enables them to guarantee an effective protection of investments and foreign investors. Most recent BITs provide a separate international arbitration procedure for the settlement of these disputes, and allow the investor to refer a dispute to international arbitration without requiring prior exhaustion of local remedies or establishing a “fork in the road”.

The mechanism works as follows. In the event of an investment dispute, the investor and the State must first try to resolve the conflict through consultation and negotiation. If that fails, the claimant may submit the dispute to an international arbitration, often under the auspices of the ICSID (International Centre for the Settlement of Investment Disputes).<sup>33</sup> Generally, by concluding a BIT, each Party gives the required consent to submit claims within the scope of the BIT to arbitration and to establish ICSID or other arbitral jurisdiction as set out by the applicable treaty (Article 25 of the US Model BIT, Article 28 of the Canadian Model, Article 12.2 of the Belgium-Luxembourg Model; Article 15.3 of the Japan-Korea BIT and Article 9 of the Mexico-Korea BIT).

A major survey has recently been conducted under the Committee's auspices on the issue of transparency and third party participation in investor-state dispute settlement procedures<sup>34</sup> and work is continuing on the improvement of investor-state dispute settlement mechanisms.<sup>35</sup> Table 6.3 records a few representative clauses of investor-state dispute settlement schemes in recent BITs.

### 5.2.1. Substantive claims

Article 24.1 of the **US Model BIT** permits a claimant to submit an investor-State arbitration claim on its own behalf or on behalf of an enterprise that is a juridical person that the claimant owns or controls directly or indirectly. Such claim may allege that the respondent State has breached: a) an obligation under Articles 3 through 10 (national treatment, MFN treatment, minimum standard of treatment, expropriation, transfers, performance requirements, senior management and boards of directors, publication of laws and decisions respecting investments); b) an investment authorisation; and c) an investment agreement, and that the claimant (or its enterprise, as the case may be) has incurred loss or damage by reason of, or arising out of, that breach. The Model does not authorize investor-state arbitration over breach of the provisions governing investment and environment and investment and labour. The **Canadian Model** (Articles 22-23) and the **Mexico-Korea BIT** (Article 8) follow a similar approach. The three **European Models** generally refer to "any dispute concerning investment between an investor" (or "a national or company of the other Contracting Party" for the French Model) and the other Contracting Party<sup>36</sup> and together with the **Korea-Japan BIT**, they do not distinguish between claims by an investor of a Party on its own behalf and/or on behalf of an enterprise. This **Korea-Japan BIT** in its Article 15 states that "For the purpose of this Article, an investment dispute is a dispute between a Contracting Party and an investor of the other Contracting Party that has occurred loss or damage by reason of, or arising out of, an alleged breach of any right conferred by this Agreement with respect to an investment of an investor of that Contracting Party".

### 5.2.2. Fork-in-the-road and exhaustion

The 1994 US Model in its Article IX(3) contained a fork-in-road provision specifying that investor-state arbitration under the treaty was not available if the investor had previously submitted the dispute for resolution to courts or administrative tribunals of the host country. The **2004 US Model BIT** modified this approach and provides in Article 26.2 that initiation of arbitration under the BIT forecloses the claimant investor from thereafter initiating or continuing a proceeding before local courts or administrative tribunals of the host State. However, the commencement of, or participation by, the investor in a domestic court or other dispute settlement proceeding no longer precludes



an investor from later pursuing investor-state arbitration under the BIT. Another important aspect of prior and current US BITs is that the investor is not required to exhaust host country remedies before initiating the investor-state arbitration. This approach is also followed by the **Canadian Model** and the **Mexico-Korea BIT**. The **Korea-Japan BIT** specifies in its Article 15.8 that “Nothing in this Article shall be construed so as to prevent an investor from seeking judicial or administrative settlement in the territory of the other Contracting Party in dispute”. The **Belgium-Luxembourg Model** requires that prior consent implies that both Parties waive that right to demand that all domestic administrative or judiciary remedies be exhausted (Article 12.2).

### 5.2.3. Participation and transparency

Only the **US Model BIT** and the **Canadian Model** provide that the BIT non-disputing Party will always be entitled to make oral or written submissions before an investor-state arbitral tribunal regarding the interpretation of the BIT (Article 28.2 of the former and Article 35 of the latter). Thus both Parties will be entitled to be heard by the arbitrators with regard the interpretation of the treaty. In addition to the ability to participate, a joint decision of the Parties declaring their interpretation of a provision of the BIT shall be binding on the tribunal and any decision or award issued by the tribunal must be consistent with this decision (Article 30.3 of the **US Model BIT** and Article 14.2 of the **Mexico-Korea BIT**). The **Canadian Model** follows this approach, (Article 35.1), but like the NAFTA, the Model provides for the establishment of a commission to supervise the implementation of the treaty (Article 27.2). In fact, the commission’s interpretation of a provision of the BIT is binding on the tribunal (Article 40.2 of the Canadian Model).

Provisions to promote transparency are only provided by the **US** and **Canadian models**. Tribunals are required to conduct hearings open to the public, subject to the appropriate logistical arrangements. Respondents are required to make available to the public all filings in the arbitration, all minutes or transcriptions of the hearings and all decisions of the tribunal, subject to procedures for protected information (Articles 29 of the US Model and 34 of the Canadian Model).<sup>37</sup> The **Canadian Model** also states in its Article 38.7 that “the tribunal shall not require a Party to furnish or allow access to information the disclosure of which would impede law enforcement or would be contrary to the Party’s law protecting Cabinet confidences, personal privacy or the financial affairs and accounts of individuals customers of financial institutions, or which it determines to be contrary to its essential security interests”. Article 29.3 of the **US Model BIT** also follows this approach, but it refers to Articles 18 and 19. Under Article 18, protected material may include information about essential security interests. Under Article 19, protected material may include confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interests or the

disclosure of which would prejudice the legitimate commercial interests of a public or private enterprise. Article 29.4 of the **US Model BIT** provides that if an objection to confidentiality is raised, the arbitral tribunal has authority to determine whether or not information has been properly designated as protected information.

The **US Model BIT** moreover contains a provision concerning amicus curiae submissions: arbitrators are entitled to accept amicus curiae submissions from other interested parties (Article 28.3). The **Canadian Model** also allows submissions by a non-disputing private party. In particular, its Article 39 provides a very detailed procedure for non-disputing individuals and organisations to seek leave to file amicus curiae submission.

#### 5.2.4. Other main issues

*Monetary Awards and No punitive damages.* The **US** and **Canadian Models** as well as the **Mexico-Korea BIT** provide that an investor-state tribunal constituted under the treaty may only award monetary damages or restitution of property in the final award. If the tribunal awards restitution, its award must also provide for the possibility of pecuniary compensation in lieu thereof where restitution is not practicable. Punitive damages may not be awarded.<sup>38</sup>

*Comment period and delay of enforcement.* Under Article 28.9 of the **US Model BIT**, the tribunal is required, if requested by any disputant, to forward its proposed award to the disputants and to the non-disputing party for a sixty-day comment period. The apparent aim of this procedure is to permit corrections of errors before the finalization of the award and also to give both treaty Parties the opportunity to make their views known as to the impact of the award on an issue of public interest. Under Article 34.6, enforcement of a final award is subject to a further mandatory time period, after the expiration of which, parties are required to abide by and comply with the award without delay (also Article 15.7 of the **Mexico-Korea BIT** and Article 45.3 of the **Canadian Model**).

*Interim measures of protection.* The **Canadian Model** contains a provision regarding interim measures of protection. Article 43 provides that a tribunal may order an interim measure of protection to reserve the rights of a disputing party, or to ensure the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. The provision specifies that for the purpose of this article, an order includes a recommendation. The **US Model BIT** follows a similar approach (Article 28.8). In addition, Article 26.3 of the **US Model BIT** states that even after investor-state arbitration has commenced, "*the claimant or the enterprise... may initiate or continue an action that seek interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is*



brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration". That **Canadian Model** contains a similar provision (Article 26.1.e).

**Consolidation.** A mechanism for consolidation is provided by the **US** and **Canadian Models** and by the **Mexico-Korea BIT**. When two or more claims have been submitted separately and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek consolidation of the separate proceedings into a single proceeding by the new tribunal (Article 33 of the US Model, Article 32 of the Canadian Model and Article 11 of the Mexico-Korea BIT).

**Appellate Body.** There are no specific appellate provisions in any of the models and BITs under consideration. Provisions of the **US Model BIT** contemplate the possibility of future appellate mechanisms, however. Under Article 28.10, if a multilateral agreement creating an appellate body for investor-state arbitration comes into force, the Parties to the treaty "shall strive to reach an agreement" that this body will have appellate jurisdiction to review investor-state arbitration awards under the BIT. In addition, Annex D provides that "Within three years after the entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism".

## 6. Main findings

For over forty years bilateral investment treaties have been used as a tool for protecting international investment and ensuring a more predictable and fair treatment of investors. By last count, an estimated 1,700 BITs have come into force worldwide, about 80 per cent of which involving OECD countries. In pursuit of a consistency of approach an increasing number of countries have put in place Model BITs serving as a starting point for bilateral negotiations of investment treaties. Others have recently updated and broadened the scope of their existing models. These recent developments can be summarised below.

*The pursuit of high standards.* The pursuit of high standards in investment policy has historically been a major driving force behind OECD investment agreements. Never before, however, has this quest been so far reaching than that of the OECD agreements negotiated in recent years. This can be assessed by the gradual broadening, deepening and clarification of the scope of application of the substantive and procedural provisions of the agreements, the increased attention paid to regulatory transparency, investment promotion and investment facilitation as well as increased liberalisation. While this movement has largely been led by trade agreements with investment content, it has also spread to innovative new BITs (e.g. Japan-Korea and Germany-China).

*High standards are spreading worldwide.* Developing countries are the main partners of OECD agreements. While diversity can be observed between agreements reflecting different country situations, developing countries' growing adoption of internationally agreed standards is contributing to the propagation of these high standards worldwide. This trend is also contributing to the improvement of countries' domestic investment policies as well as their investment policy capacity.

*More public interest safeguards have been introduced.* An increasing number of agreements refer to the role of governments to pursue other policy goals. Specific provisions have been incorporated, in particular, that address governments' regulation to pursue certain objectives such as health, safety, the environment and internationally recognized labour standards. This is the case, for example, with respect to BITs recently negotiated by Belgium-Luxembourg. Often these agreements also recognise that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental or labour laws (e.g. the preambles of Japan-Korea and Japan-Vietnam BITs).

There is also an increased recourse to various sorts of general exceptions pertaining to taxation, essential security, the protection of human, animal or plant life or health, the conservation of exhaustible natural resources, prudential measures for the financial sector and culture (European BITs, Canadian Model BIT, and US Model BIT as regards essential security). Although not a general practice, greater use is also being made of safeguards affecting transfer obligations to deal with serious short-term balance of payments difficulties (French BIT Model and Japan-Korea BIT).

*From the traditional focus of investment protection towards the inclusion of more extensive liberalisation provisions.* An important impetus to a recent rise in IIAs standards has emanated from new trade agreements replicated in some BITs (e.g. Japan-Korea and Japan-Vietnam and US-Uruguay). Increased liberalisation is also promoted by the wider use of the negative list approach and the increased application of the standstill principle and ratchet effect to country exceptions – which facilitates broader coverage, progressiveness and transparency to liberalisation. Practically all IIAs contain provisions on key personnel while the prohibition of certain performance requirements appears to be less frequent (mainly limited to the US, Canada or Japan IIAs). A relatively large number of BITs covering the post-establishment phase contain regional or economic integration clauses (notably all European BITs).

*New attempts have been made to provide greater precision to the asset-based definition of "investment".* The broad asset-based definition of investment has now become the norm in recent IIAs. Because of its far reaching implications, however, there has been a move away from a totally open-ended definition so as not to cover operations which are not deemed to be "real" investments.

Different approaches have emerged. The new US Model has adopted a circular definition which defines “investment” as those assets that have the characteristics of an investment. At the other end, the 2004 Canada Model defines “investment” in terms of a finite list of categories of assets. Other BITs define investment as assets used for economic purposes.

*Key investment protection provisions have also been redefined.* The new Canadian and US Model BITs define the protection accorded under the “fair and equitable standard” (and “full protection and security”) as not going beyond the minimum standard of treatment to aliens in accordance to customary international law. Some other IIAs also link the standard with international law. But the fair and equitable standard is not included in all agreements.

*New language has been added to guide the application of the expropriation articles.* Virtually all new OECD IIAs contain clauses describing the conditions under which a lawful expropriation may be made and a standard for compensation of the expropriated property. There is a debate, however, on what degree of interference with property rights is required for a government action or a series of government actions to constitute an “indirect”, “creeping” or “*de facto*” expropriation. Provisions in the new Canadian and US Model BITs identify criteria on how to distinguish between compensable and non-compensable regulatory actions on a case-by-case basis. The inclusion of interpretative notes and clarifications is concomitant to the growing body of experience with investor/state arbitration.

*A more widely shared recognition of the values of transparency.* Until recently, transparency requirements were limited to the exchange of information between States. More agreements also include obligations on the publication of laws and decisions respecting investment. They may, in addition, contain provisions to enhance the transparency of the regulatory process and provide a reasonable opportunity to interested investors to be consulted on proposed regulatory changes and to obtain from contacts points information on matters covered by the agreement (as in the 2004 Canada and US Model BITs). These latter obligations are typically not subject to investor-state dispute settlement however, as they do not constitute substantive provisions, a breach of which would establish the proper actionable grounds for an investor-state claim. Nonetheless, the state-to-state dispute settlement procedures may be invoked to consider the proper interpretation or applications of any provision contained in the Agreements.

*Investment promotion and facilitation is becoming an important dimension of investment agreements.* An increasing larger number of agreements provide for identification of investment opportunities and exchange of information, the establishment of mechanisms for the encouragement and promotion of investment and work towards harmonized and simplified administrative procedures.

*Investor-state dispute settlement is becoming more widely accepted. Most recent agreements provide for “prior consent” without “prior exhaustion of local remedies” or establishing a “fork on the road” foreclosing recourse to international arbitration. Furthermore, fewer exceptions are also applied to the ISDS coverage. This can represent a major shift of policy (as in the case of China in the Germany-China BIT).*

The cumulative number of known treaty-based cases brought before ICSID or other arbitration facilities under IIAs in the last ten years was estimated at approximately 174 at the end of June 2005 as compared to two at the end of 1994. Well over half of the known claims were filed within the past three years. Almost all of them were initiated by investors. Some claims have involved large sums and the arbitration proceedings costs are usually very high.

*Innovations have also been brought to the arbitration process. First, there is concern for greater predictability and control over the arbitration process by means of more detailed guidance on arbitral proceedings and binding interpretations on tribunals. The US Model BIT foresees, in addition, the possibility of creating an appeal mechanism. Second, judicial economy is encouraged by special provisions dealing with frivolous claims, multiple or parallel proceedings or consolidation of claims. Third, increased attention is being given to allowing civil society scrutiny through increased transparency of arbitral proceedings and awards, and the institutionalisation of the possibility of non-disputing parties to make their views known through “amicus curiae” briefs.*

## Notes

1. A number of 2 500 BITs has been mooted. However, it includes a number of treaties that have been negotiated but not yet ratified.
2. The MAI negotiations and discussions in the Doha Round have provided unique opportunities to reflect on the role and content of investment agreements.
3. [www.dfait-maeci.gc.ca/tna-nac/what\\_fipa-en.asp](http://www.dfait-maeci.gc.ca/tna-nac/what_fipa-en.asp).
4. Regarding foreign investment, the “2002 TPA” stated that “... The principle negotiating objectives of the US... are to reduce or eliminate artificial or trade barriers to foreign investments” and “... to secure for investors important rights comparable to those that will be available under US legal principles and practices...”.
5. In accordance with Article 307 of the EC Treaty, member States are obliged to take all appropriate steps to eliminate incompatibilities with the EC Treaty arising from international agreements they have concluded before their accession. Austria’s, Denmark’s, Finland’s and Sweden’s BITs provisions permitting the free transfer of funds relating to investments between the signatory countries. In the Commission’s view these clauses cut across the EU Council of Ministers’ exclusive powers to adopt on behalf of the EU as whole measures on the movement of capital to and from non-EU countries (by virtue of Articles 57.2, 59 and 60 of the EC Treaty). See <http://europa.eu/int:comm/secretariatgeneral/sgb/droitcom/indexen.htm>.

6. Article 31 of the Vienna Convention of the Law of the Treaties notably states: “1) A treaty shall be interpreted in good faith with the ordinary meaning to be given to the terms of the treaty in their context and in 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* (emphasis added) and annexes...”
7. This section will essentially review provisions in Definition, Scope and Coverage or Application articles.
8. The only significant change in the definition of “investment” in the new model is the exclusion of government issued debt securities.
9. This does not normally apply, however, to investment disputes concerning investments which have arisen before the entry into force of the Agreement. See in particular Article 18 of the 2002 Korea-Mexico BIT.
10. See Article 1 of the 1991 and 2005 German Model; Article 1 of the Germany-China BIT and the Germany-India BIT/Article 1 of the 2003 Indian Model.
11. This article reads: “Investors’ means any national or company of a Contracting Party”.
12. “Covered investment” means, with respect to a Party, an investment in its territory of an investor of the other Party “in existence as of the date of entry into force [of the BIT] or established, acquired, or expanded thereafter”.
13. See “*Relationships between International Investment Agreements*”, OECD Working Paper on International Investment 2004(1), [www.oecd.org/dataoecd/8/43/31784519.pdf](http://www.oecd.org/dataoecd/8/43/31784519.pdf).
14. Article 11 of that BIT also states that provided otherwise, all investments shall be governed by the laws in force in the territory of the Contracting Party in which such investment are made.
15. In the Canadian Model (Article 19), the publication is subject to the qualification “to the extent possible”.
16. Under Article 6.1, a Party may not require that an enterprise of that Party, that is a covered investment, appoint to senior management positions individuals of any particular nationality. Under Article 6.2, a Party may require that a majority of the board of directors of an enterprise that is a covered investment be of a particular nationality or resident in the territory of that Party, provided the requirement does not materially impair the ability of the investor to exercise control over its investment.
17. Article VII of the 1994 Draft Model provides as follows: “1.(a) Subject to its laws relating to the entry and sojourn of aliens, each Party shall permit to enter and to remain in its territory nationals of the other Party for the purpose of establishing, developing, administering or advising on the operation of an investment to which they, or a company of the other Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources...”
18. For further reference see the 1967 OECD BIT Model.
19. See *Fair and Equitable Standard in International Investment Law*, OECD Working Paper on International Investment 2004/3, [www.oecd.org/dataoecd/22/53/33776498.pdf](http://www.oecd.org/dataoecd/22/53/33776498.pdf).
20. For the text of the new FIPA model see [www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf](http://www.dfait-maeci.gc.ca/tna-nac/documents/2004-FIPA-model-en.pdf).
21. Dolzer and Stevens, “Bilateral Investment Treaties”, ICSID 1995, Chapter four.
22. A majority of BITs subscribe to the “Hull” formula of “prompt, adequate and effective compensation”.

23. See footnote 37, p. 7.
24. See “*Indirect Expropriation and the Right to Regulate in International Investment Law*”, OECD Working Papers on International Investment 2004(4), [www.oecd.org/dataoecd/22/54/33776546.pdf](http://www.oecd.org/dataoecd/22/54/33776546.pdf).
25. There may be variations in BITs contracted. For example, Article 5 of the Germany-India BIT uses the term for *public purpose* as the justification. The Germany-China BIT incorporates the provision on most-favoured nation treatment but not in the Germany-India BIT. The Germany-China BIT and the Germany-India BIT include an independent requirement that expropriations be subject to judicial review.
26. This provision states that: “The Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement”.
27. Annex A (Customary International Law) also refers to Annex B (Expropriation). It confirms the Parties understanding that “customary international law” ... as specified in Annex B “results from a general and consistent practice of States that they follow from a sense of legal obligation”.
28. According to Article 31 of the Vienna Convention of the Law of Treaties, the proper interpretation of an umbrella clause depends on the specific wording of the particular treaty, its ordinary meaning, context, the object and purpose of the treaty as well as on negotiating history or other indications of the parties’ intent.
29. In former Models such a clause typically reads as: “*Each Party shall observe any obligation it may have entered into with regard to investments*”.
30. This clause states that “Nothing in the treaty shall be construed to preclude a party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance of restoration of international peace or security, or the protection of its own essential security interests”.
31. It specifically provides that nothing in the agreement shall be construed so as to derogate from international rights and obligations in respect to the protection of intellectual property rights or to oblige any Party to extend treatment to third party foreseen in international agreements in respect of the protection of intellectual property rights.
32. This provision seems to prevent the treaty shopping situation which arose under the *Maffezini v. The Kingdom of Spain* (2001). See Andrew Newcome, *op. cit.*
33. For example, the Mexico-Korea BIT in its Article 8 contains a standard formula: “A disputing investor may submit the claim to arbitration under:
  - a) The Convention on the Settlement of Investments Disputes between States and Nationals of other States (ICSID Convention) provided that both the disputing Party and the Contracting Party of the investor are parties to the Convention;
  - b) the Additional Facility Rules of ICSID, provided that either the disputing Contracting Party or the Contracting Party of the Investor, but not both, is a party to the ICSID Convention; or
  - c) the Rules of arbitration of the United Nations Commission on International Trade Law (UNCITRAL Arbitration Rules).”

This formula is included in most BITs. Some treaties also adds that if the claimant and respondent agree, the dispute may be submitted to any the arbitration institution or under any other arbitration rules (for example the US Model BIT, the

Canadian Model, the Korea-Japan BIT). The Belgium-Luxembourg Model also refers to other two institutions: the Arbitral Court of the International Chamber of Commerce in Paris and the Arbitration Institute of the Chamber of Commerce in Stockholm (Article 12.3).

34. See “*Transparency and Third Party Participation in Investor-State Dispute Settlement Procedures*”, OECD Working Paper on International Investment 2005/1, [www.oecd.org/dataoecd/25/3/34786913.pdf](http://www.oecd.org/dataoecd/25/3/34786913.pdf).
35. See “*Improving the System of Investor-State Dispute Settlement: An Overview*”, OECD Working Paper on International Investment 2006/1, [www.oecd.org/dataoecd/3/59/36052284.pdf](http://www.oecd.org/dataoecd/3/59/36052284.pdf).
36. Article 11 (model I-II) of the German Model and Article 9 of the German BITs with China and India; Article 7 of the French Model; Article 12 of the Belgium-Luxembourg Model.
37. Article 34.1 of the Canadian Model refers to the “evidence that has been tendered to the Tribunal; b) copies of all pleadings filed in the arbitration; and c) the written argument of the disputing parties...”.
38. Article 34.1,4 of the US Model BIT; Article 44.1,3 of the Canadian Model; Article 15.1,4 of the Mexico-Korea BIT.