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Preface

The primary goal of the ILO is to contribute, with member States, to achieve full and productive employment and decent work for all, including women and young people, a goal embedded in the ILO Declaration 2008 on *Social Justice for a Fair Globalization*,[1] and which has now been widely adopted by the international community. The integrated approach to do this was further reaffirmed by the 2010 Resolution concerning the recurrent discussion on employment[2].

In order to support member States and the social partners to reach this goal, the ILO pursues a Decent Work Agenda which comprises four interrelated areas: Respect for fundamental worker's rights and international labour standards, employment promotion, social protection and social dialogue. Explanations and elaborations of this integrated approach and related challenges are contained in a number of key documents: in those explaining the concept of decent work,[3] in the Employment Policy Convention, 1964 (No. 122), in the Global Employment Agenda and, as applied to crisis response, in the Global Jobs Pact adopted by the 2009 ILC in the aftermath of the 2008 global economic crisis.

The Employment Sector is fully engaged in supporting countries placing employment at the centre of their economic and social policies, using these complementary frameworks, and is doing so through a large range of technical support and capacity building activities, policy advisory services and policy research. As part of its research and publications programme, the Employment Sector promotes knowledge-generation around key policy issues and topics conforming to the core elements of the Global Employment Agenda and the Decent Work Agenda. The Sector's publications consist of books, monographs, working papers, employment reports and policy briefs.[4]

The *Employment Working Papers* series is designed to disseminate the main findings of research initiatives undertaken by the various departments and programmes of the Sector. The working papers are intended to encourage exchange of ideas and to stimulate debate. The views expressed are the responsibility of the author(s) and do not necessarily represent those of the ILO.

José Manuel Salazar-Xirinachs
Executive Director
Employment Sector

[1] See http://www.ilo.org/public/english/bureau/dgo/download/dg_announce_en.pdf
[2] See http://www.ilo.org/public/libdoc/ilo/2010/110B09_108_engl.pdf
[3] See the successive Reports of the Director-General to the International Labour Conference: *Decent work* (1999); *Reducing the decent work deficit: A global challenge* (2001); *Working out of poverty* (2003).
[4] See http://www.ilo.org/employment.

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Abstract

Today's international investment law is characterized by significant fragmentation. Different disciplines of investment regulation have grown over time in form of separate treaty regimes and address different aspects of international investment matters. This paper provides an overview over the main treaties and regulatory aspects from the perspective of relevance for labour issues. To this end, the paper gives an overview over main labour related provisions in WTO Law (the GATS and the TRIMs Agreement), and in bilateral and preferential trade and investment agreements. The picture gained by the overview reveals considerable diversity. Partly, diversity is driven by the distinct regulatory intent of different agreements. In particular, it appears to make a difference whether agreements target investment protection, investment liberalization or both. Overall, the analysis of labour issues across the range of different regimes suggests that there is scope for innovation to deal with labour in a more coherent and more effective manner in the context of international economic regulation.

1. Introduction

Both international labour law and international investment law have shaped important international rules in their respective fields. The treatment of labour issues in international fora and by means of international conventions dates back at least to the coming into operation of the International Labour Organization (ILO) in 1919. The emergence of today's legal frame for international foreign direct investment (FDI) took mostly part post World War II, when the end of colonialism and gun-boat diplomacy required capital exporting countries to develop new, legal instruments to protect their assets invested overseas. The historical coexistence of different sets of rules on labour and foreign direct investment persists by far and large until today.

An increasing interest in the relationship of FDI and labour issues can be noted with accelerating international economic globalization over the past two decades. Noteworthy, the discussion of labour and FDI has not primarily emerged in the legal sphere, but is rather triggered by development economists analyzing FDI flows and patterns and their possible development effects, including effects on labour markets and employment.

As a result, there is an increased interest today to understand better how labour matters are dealt with in international investment rules. The question raised has several dimensions that need to be distinguished. First, a difference exists between labour rights issues and employment. While labour rights and employment have a certain interrelation, the rather 'moral' angle of labour rights (part of a human rights canon) and the more 'economic' angle of employment is the reason that a differentiation is regularly helpful.

Second, a clear distinction is needed between the question of the substantive coverage of labour issues in international economic law, and the impact of (certain provisions of) IIAs on labour / employment issues. This paper engages in a discussion on the first question and is therefore of a distinctly legal nature. It provides an overview over relevant types of IIAs and the treatment of labour issues therein. This paper does not deal with the second question that would require an analysis of an economic nature.

Third, the analysis is challenged by the strong fragmentation of today's international investment law. Different provisions are spread out in a large range of bilateral and multilateral agreements, including Bilateral Investment Treaties (BITs), WTO law and, Preferential Trade Agreements (PTAs). While some of these agreements deliberately deal with labour issues, other agreements may rather implicitly cover labour related questions as part of a treatment of economic questions.

The paper proceeds by addressing the main aspects of international investment law respectively: The following Chapter 2 addresses main aspects of labour issues in multilateral agreements, i.e. the relevant agreements that are part of WTO law. Chapter 3 looks at Bilateral Investment Treaties (BITs), and gives some consideration to the labour / investment interface in Preferential Trade Agreements (PTAs).

2. Multilateral Agreements (WTO Law)

Although the WTO Agreement is in its core a trade agreement and the comprehensive treatment of investment under the auspices of the WTO has been repeatedly denied, the close interrelation of trade and investment is the reason that several aspects of WTO law

have relevance for investment matters as well[1]. Whenever trade law covers behind the border issues, the interrelation with investment topics is eye-catching. In particular, the General Agreement on Trade in Services (covering questions of establishment), the Agreement on Trade Related Investment Measures (TRIMs, covering measures to be applied to investment having a trade relevance) the Agreement on Trade-related Aspects of Intellectual Property Rights (TRIPS Agreement), and the Plurilateral Agreement on Government Procurement can be considered as both trade and investment agreements. A discussion of investment agreements and labour issues will see how these agreements relate to labour and employment questions. The following two subchapters look at the GATS and the TRIMs Agreement in more detail.

2.1. The General Agreement on Trade in Services (GATS)

The GATS entered into force in 1995 when the closure of the Uruguay Round resulted in the conclusion of the WTO Agreement. The special characteristic of the GATS to be both a 'trade' and an 'investment' agreement derives from the particularities of services trade. Unlike trade in goods which is by its nature cross-border, services may be delivered through four different modes of supply. The GATS defines these modes as 'cross border trade' (mode 1), 'consumption abroad' (mode 2), 'commercial presence' (mode 3), and trade through 'presence of natural persons' (mode 4)[2]. Amongst the four modes of supply, mode 3 and mode 4 have certain relevance for investment. Mode 3, the commercial presence in a host country, equals an investment in services. Mode 4 is relevant for investment matters since trade in services under mode 3 – investments – regularly requires the presence of key personnel in a host country in order to establish or administer the relevant investment[3].

Due to this overlap, the GATS is not only an agreement to regulate trade in services, but can also be considered to contain elements of an investment agreement. Indeed, in light of the fact that no other comprehensive multilateral agreement on investment has been concluded until today, the GATS may be seen as the most advanced, multilateral agreement to regulate investment issues on a nearly global scale.

2.1.1. The GATS and Labour Issues

The GATS does as such not aim at regulating labour matters. It proposes – according to its preamble – liberalization and sectorial opening to foster economic growth and the development of developing countries[4]. On the same token, the GATS recognizes explicitly the right of WTO Members to issue domestic regulation (Art. VI.2 GATS), and the particular needs of developing countries (inter alia, Art. IV GATS).

The framework of rules under the GATS is twofold: A number of common trade rules apply, such as MFN treatment, applying generally to all measures affecting WTO Members' trade in services (Art. II GATS). Second, market access (Art. XVI GATS) and national treatment (Art. XVII GATS) only apply to the extent WTO Members have made specific commitments. Commitments are made via inscription into dedicated schedules of commitments. These schedules are structured by modes of supply and list any reservations in terms of market access and national treatment. The system therefore consists generally of commitments Members can make in different sectors, complemented by the possibility to list reservations for all commitments. The GATS' built-in agenda suggests ongoing

[1] Particularly, 'investment' is one of the 'Singapore Issues', i.e. a topic WTO Members decided to focus on during the 1996 Singapore Ministerial Conference. In light of lack of negotiation progress on other, more urgent issues during the Doha Round, investment was subsequently dropped from the Doha Round's negotiation agenda in August 2004. See the webpage of the WTO, at: http://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm

[2] Art. I GATS.

[3] Compare Weiss, "Trade and Investment," 193, 194; OECD, *Relationships between International Investment Agreements*, Working Papers on International Investment, May 2004, 6 ff.

[4] See the Preamble of the GATS.

negotiations to achieve increasingly higher levels of liberalization in trade in services through increasingly more far-reaching commitments to be made by Members in their schedules.

The limitations of market access and national treatment to specific commitments allows for a gradual market opening in services industries[5]. This market opening can generally be relevant for employment matters. Foreign investors in services can offer new jobs in a country, although a job effect is not guaranteed. The questions arising in the context of the GATS and labour matters are therefore primarily matters of employment, in contrast to labour rights questions. Does the structure and functioning of the GATS allow WTO members to shape their commitments and reservations in ways that they have a positive impact on employment creation?

A look at the reservations made by WTO Members in their schedules of commitments demonstrates that a considerable amount of countries have chosen to inscribe employment related conditionalities in their schedules of commitments. The following will therefore review these reservations in more detail. It should at this stage be noted that by the time Members made these commitments, they may possibly not have applied any determined development or employment strategy through these reservations. According to anecdotal evidence, many Members rather aimed at committing as little as possible and at making most far-reaching reservations as possible, in order to limit their commitments and to reserve as much flexibility for any future policy measures. Also, it is not clear to which extent commitments and detailed reservations are of practical relevance today.

Still, it is noteworthy that a substantial number of WTO members have chosen to make explicit reference to employment and training issues in their GATS schedules of commitments. The reservations expressed in the schedules reserve host states the right to mandate investors to provide domestic training and employment. A possible employment impact to be achieved through these reservations may therefore be worth a more detailed reflection.

2.1.2. GATS Mode 3 and Mode 4 Commitments and Employment

The WTO Members that have made relevant stipulations in their schedules of commitments include Cambodia, Cameroon, Cote d'Ivoire, Cyprus, Dominican Republic, Egypt, Fiji, Gambia, Ghana, Guatemala, Honduras, Lesotho, Malaysia, Nicaragua, Niger, Norway, Panama, Papua New Guinea, Paraguay, Solomon Islands, Tunisia, Vietnam, Zambia[6]. Overall, stipulated reservations to market access and national treatment focus on economic development of the country, often by focusing on domestic education and employment. Beyond this, there is significant difference on how the relevant reservations are formulated in the respective schedules of commitments.

Given that seemingly no coordinated approach has driven the preparation of these stipulations, the following lists some key aspects to give an overview over relevant commitments / reservations, without however categorizing the relevant issues in a way that would suggest a logic that WTO members may not have had in mind when preparing their schedules of commitments.

[5] Part IV, particularly Art. XIX.

[6] The following analysis is mostly based on a computerized full-text search of WTO Members' GATS schedules undertaken by the author. Analysis does not claim to be fully exhaustive, but should provide a good overview over the range of different commitments by WTO Members, and the different legal technical means with which WTO Members attempt to secure employment benefits for their economies derived from investments in services.
An overview over all commitments is annexed to this paper.

Level of detail

Some WTO Members make reservations allowing a very wide discretion regarding the admission of investments (mode 3) in their countries, and stipulate that the value of an investment in terms of domestic job creation will be assessed as a basis for market access. As an example, the schedules of commitments of Cameroon (for all sectors, regarding mode 3, limitation to market access) stipulate: *"Enterprises must meet the requirements concerning the creation of jobs for Cameroonians in the framework of each individual Certificate of Approval (at least one job to be created for every 5 million or fraction thereof to be invested in the enterprise concerned). Additional requirements concerning training and jobs may be issued by regulation."*[7]

In contrast to this comprehensive stipulation, most WTO Members do not explicitly refer to employment issues in their schedules of GATS commitments. Some limit the stipulations to certain sectors. As an example, the schedules of commitments of Niger stipulate as a limitation to national treatment of mode 3 trade that foreign investors in this service line are under the *"obligation to provide training programme[s]"*[8]. This applies to hotel and restaurant services, only. Tunisia and Vietnam both feature a noteworthy limitation to mode 1 trade. Regarding the liberalization of telecommunication services, Tunisia requires any telecommunications services supplier – amongst others – to *"contribute to the national training and research endeavour in the telecommunications field"*[9]. For Road Transport Services, Vietnam generally lists 'unbound', and notes that the criteria taken into account for services trade liberalization are – amongst others – the '*creation of new jobs'*, and '*professional training for Vietnamese workers'*[10].

Economic needs test

Most commonly, if WTO Members decide to make reservations as regards market access or national treatment of investors, they stipulate the need for investors to making certain contributions to the economic development of the country as identified under an economic needs test. The Chilean schedules note for general market access (mode 3) that *"Authorization to deliver services through a commercial presence may take into account the following criteria: a) The effect of the commercial presence on economic activity, including the effect on employment, on the use of parts, components and services produced in Chile and on exports of services; […]"*[11].

The GATS schedules of Papua New Guinea stipulate for mode 3 an economic needs test regarding market access, and an obligation to provide for training of domestic employees regarding limitations in national treatment. The schedules provide regarding market access: *"(a) Normal government approval and registration is required for all foreign investors by the Department of Finance and Planning. For such approval, the following criteria are, in general, applied: […] (iv) implications for employment in Papua New Guinea."* Concerning limitations to national treatment, the schedules note: *"Foreign employees are required to provide on-the-job training to local employees."*[12]

Noteworthy, the application of an economic needs test is not limited to developing countries. Even the European Community applies in several sectors an economic needs test

[7] GATS Schedules of Commitments of Cameroon.
[8] GATS Schedules of Commitments of Niger.
[9] GATS Schedules of Commitments of Tunisia.
[10] GATS Schedules of Commitments of Vietnam.
[11] GATS Schedules of Commitments of Chile.
[12] A very similar stipulation is in the schedules of the Solomon Islands. For further examples, refer to the schedules of Cameroon or Cyprus.

to determine the value of a certain mode 3 investment in a certain services sector and conditions establishment by the outcome of the test.[13]

Relationship Mode 3 and Mode 4

An interesting aspect relates to the correlation of mode 3 and mode 4 commitments. Mode 3 is the relevant mode for investments (commercial presences), but mode 4 (presence of natural persons) regularly complements or reinforces mode 3. Without the possibility for staff of a corporate investor to enter a host country and help install and operate the business undertaking, the investment will regularly not be possible.

This brings up the question how WTO Members deal with the interface of mode 3 and mode 4 when considering subjecting their scheduled commitments to employment issues. Here, different approaches may be noted. Several WTO Members treat labour related issues under mode 3 and mode 4 in one context, i.e. without strong differentiation. Examples for such an approach may arguably be the schedules of commitments of Honduras and Norway. Norway treats generally mode 3 and mode 4 issues together. Honduras subjects market access for mode 3 to an economic needs test, and requires natural persons (mode 4) to *"contribute to the training of Honduran personnel in the specialized fields of activity concerned"*[14].

In contrast, the scheduled commitments of the Dominican Republic possibly make an intentional differentiation between mode 3 and mode 4 issues. The Republic does not list any employment relevant limitations to market access or national treatment regarding mode 3, but states for mode 4 *"unbound, except for senior and specialized staff associated with commercial presence who must contribute to the training of Dominican personnel in the areas of specialization concerned"*[15].

Finally, for some WTO Members' scheduled commitments, the differentiation between mode 3 and mode 4 commitments seems slightly unclear, since they make under the mode 4 commitments reference to mode 3 issues, such as by referring to corporate investors. As example, the schedules for market access limitations under mode 4 of Gambia stipulate: *"Enterprises must also provide for training in higher skills for Gambian nationals to enable them as assume specialized roles."*[16]

Relationship market access and national treatment

Next to the interface of mode 3 and mode 4 commitments, it is interesting to compare commitments in terms of (limitations to) market access and (limitations to) national treatment. Some countries such as Egypt make a clear differentiation between these two, hardly restricting mode 3, but strongly requiring training of domestic staff by foreign investors as a deviation to national treatment. Egypt's services schedules repeatedly state as a limitation to national treatment training obligations, such as *"foreign service suppliers, in the context of JVBs are required to offer on-the-job training for national employees"*[17].

Other countries, such as Honduras, Malaysia, or Nicaragua do not seem to make such a strong differentiation and rather include employment related requirements in their schedules of commitments no matter the stage of the investment, pre- or post-establishment.

[13] For details, refer to the annexed overview over the relevant provisions in the schedules of commitments.
[14] GATS Schedules of Commitments of Honduras. Compare also the commitments of Chile, Guatemala and Nicaragua.
[15] GATS Schedules of Commitments of Dominican Republic.
[16] GATS Schedules of Commitments of Gambia. Similar stipulations are in the GATS schedules of Ghana and Lesotho.
[17] GATS Schedules of Commitments of Egypt.

Summary

A number of WTO Members have found it useful to make reference to employment related issues as part of their reservations to market access or national treatment in their GATS schedules of commitments. These WTO Members are from a wide international distribution. While mostly developing countries, a few developed countries have also made stipulations in their schedules of commitments. Further analysis may be required to understand better how relevant these reservations are today, or which scope may exist in the area of services trade (GATS commitments and reservations) to influence patterns of employment through strategic commitments and reservations in WTO Members schedules of commitments.

2.2. The Agreement on Trade-Related Investment Measures (TRIMS)

Performance requirements are 'stipulations, imposed on investors, requiring them to meet certain specified goals with respect to their operations in the host country.'[18] Performance requirements are therefore a theoretically unlimited amount of measures to which a host country may possibly submit an investment of an investors. Performance requirements can be applied, amongst others, at the point of entry of an investment or to investments in the post-establishment phase. They can apply to an extension of an existing investment or in combination with investment promotion measures.[19]

Different areas of international investment law stipulate provisions on performance requirements. Their scope varies, but their intent is similar. They aim at limiting the general domestic freedom to regulate investments by imposing prohibitions or limitation on the use of certain performance requirements.

The WTO's Agreement on Trade Related Investment Measures (TRIMS) is one of the most relevant contributions to the international legal framework on performance requirements. In terms of scope, the TRIMS Agreement's regulatory ambit is limited to deal with those performances requirements that are considered having a strongly negative effect on trade in goods. Without explicitly defining these performance requirements (such as by stipulating a clear definition) the TRIMS Agreement prohibits these measures as in violation of Article III of the GATT 1994 (national treatment) and Article XI of the GATT 1994 (prohibition of quantitative restrictions). To clarify, it sets out an illustrative list of prohibited, trade-related performance requirements[20]. The type of performance requirements the TRIMS Agreement prohibits are generally understood as including: local content requirements, trade-balancing requirements, foreign exchange restrictions related to the foreign-exchange inflows attributable to an enterprise, and export controls[21].

While the relevance of a certain performance requirement measure for employment will much depend on the individual case, i.e. the nature of the measure as well as the broader regulatory context in the host country, there are at least a few general observations possible regarding the relevant stipulations of performance requirements and their relevance for labour matters.

First, the nature of prohibited performance requirements under the TRIMS Agreement as being trade related does not mean that these measures could not possibly have an effect on investment and employment matters. Amongst the above noted prohibited measures, particularly local content requirements could possibly help stimulate the business

[18] UNCTAD, *Foreign Direct Investment and Performance Requirements: New Evidence from Selected Countries*, UNCTAD/ITE/IIA/2003/7 (New York and Geneva: United Nations, 2003), 2, http://www.unctad.org/en/docs/iteiit20052_en.pdf.
[19] Ibid.
[20] See the Annex of this paper for the list.
[21] Ibid, 3.

environment in the supply chain of an investor, and have thus positive effects on employment.

At the same time, performance requirements will raise duties for investors by shifting certain burdens on their shoulders. These burdens may be justified from a viewpoint of development goals of a country and the understandable interest that investors should make a fair contribution to these development goals. They can however render an investment destination less attractive, as investors will be hesitating to invest in a host country where their business undertaking will be restricted or hindered through an overregulated business environment. This is particularly true when the input performance requirements request (local content, local employment) are difficult to satisfy due to supply side constraints in the host country.

The precise relevance of a performance requirement for employment – and the effect of a prohibition of such a performance requirement – are therefore difficult to assess, and will in any case need to be analyzed on a case by case basis. It much depends on the precise character of the measure, the costs it creates for investors, the overall attractiveness of the investment location, the development context of the country, and the interplay of the investment measure with other regulatory measures applied.

There is, however, some indication that performance requirements play a larger role in developing countries FDI strategies than the stipulations of the WTO TRIMS Agreement suggest. Some doubts have been expressed if there is strict compliance with TRIMS disciplines amongst WTO Members[22]. Investigating TRIMS compliance of China, Chaisse finds that certain domestic investment regulation and investment incentives may at least de facto amount to investment measures as prohibited by the TRIMS Agreement. While most TRIMS inconsistent investment measures have been cleared away with WTO accession, the Wholly Foreign Owned Enterprise Law (WFEL) and various investment guidelines seem to still promote export performance of foreign investors[23].

This finding is in line with recent discussions at the WTO's Committee on Trade-Related Investment Measures. The Committee addressed at an October 2011 meeting complaints regarding various local content requirements. These complaints were mostly brought forward by Western countries (USA, EU, Canada, Japan), and include the following cases:

- Mandatory local content requirements of India's Jawaharlal Nehru National Solar Mission, allegedly requiring that all projects use modules manufactured in India.

- Local content measures allegedly contained in the Nigerian "Act to provide for the development of Nigerian content in the Nigeria oil and gas industry"

- Alleged local content requirements in investment in the Indonesian telecommunications sector and energy sector.

- Different concerns expressed about technology transfer and local content issues across sectors in China, particularly in new-energy vehicles production and the steel's sector.[24]

[22] Quillin notes that the TRIMS Agreement has not developed its intended effect in terms of investment protection. See Scott S. Quillin, "The World Trade Organization and Its Protection of Foreign Direct Investment: The Efficacy of the Agreement on Trade-Related Investment Measures," *Oklahoma City University Law Review*, no. 28 Okla. City U. L. Rev. 875 (Summer / Fall 2003).

[23] Julien Chaisse, "The Regulation of Trade-distorting Restrictions in Foreign Investment Law: An Investigation of China's TRIMs Compliance", European Yearbook of International Economic Law. (Springer, 2012).

[24] See the homepage of the WTO, at http://www.wto.org/english/news_e/news11_e/trim_03oct11_e.htm

While there is therefore discussion on performance requirements in the institutionalized context of the WTO, it may not be forgotten that rules / prohibitions of performance requirements may also be stipulated in other international legal arrangements outside the WTO's trade context. Bilateral and preferential trade and investment agreements occasionally also include prohibitions of performance requirements. Further insights are offered in the following chapter.

3. Bilateral and Preferential Agreements

Next to their multilateral commitments, most countries have entered in bilateral and preferential trade and investment agreements. A clear distinction needs to be made between the so-called Bilateral Investment Treaties (BITs) and preferential trade and investment agreements. BITs usually have a very limited regulatory scope, focusing on investment protection disciplines. They have been concluded in overall comparable manner since the end of the 1950s, and they are therefore today arguably the oldest source of international investment law of relevance today. Preferential trade and investment agreements, often taking the form of Free Trade Agreements (FTAs) have boomed particularly in recent years, when the lack of progress at the WTO's multilateral trade negotiations was the reason that many countries pursued their foreign economic agendas through preferential arrangements.

3.1. The Treatment of Labour Issues in Bilateral Investment Treaties

The development of BITs since end of the 1950s shows the following main features and developments[25]:

The number of treaties concluded globally has over time continuously increased. The ongoing proliferation has overall led to an atomization of the treaty landscape. Efforts to halt proliferation by pursuing multilateral paths for international investment regulation failed repeatedly[26]. Proliferation and atomization led over the years to an increasing fragmentation of international investment law based on BITs. While the different agreements are similar in structure and main contents, significant differences exist in detail, with important legal implications regarding procedural and substantive provisions.

BITs were originally a tool of capital exporting developed countries, and the agreements were therefore regularly concluded in a North-South direction (North-South BITs). With increasing reciprocity of international investment flows, South-South BITs have been seen as a major phenomenon during the 1990s[27]. Today, first investment protection disciplines (in BITs and as part of broader types of agreements) have also been

[25] Being main trends, all major text books on international investment law will discuss in one way or the other these characteristics. Indeed, it is difficult to treat issues of international investment law without an understanding of these trends as main driving factors for the development of this area of law. For a more in-depth discussion of these trends, ongoing monitoring work by UNCTAD provides a good overview, such as UNCTAD, *International Investment Rule-Making: Stocktaking, Challenges and the Way Forward*, UNCTAD Series on International Investment Policies for Development UNCTAD/ITE/IIT/2007/3 (New York and Geneva, 2008), http://www.unctad.org/en/docs/iteiit20073_en.pdf; UNCTAD, *Bilateral Investment Treaties 1995–2006: Trends in Investment Rulemaking*, UNCTAD/ITE/IIT/2006/5 (New York and Geneva: UNCTAD, 2007), http://www.unctad.org/en/docs/iteiia20065_en.pdf..

[26] Note the failed effort to negotiate a Multilateral Agreement on Investment (MAI) at the OECD and unsuccessful attempts to include comprehensive investment disciplines in the legal frame of the WTO.

[27] UNCTAD, *South-South Cooperation in International Investment Arrangements*, International Investment Policies for Development. UNCTAD/ITE/IIT/2005/3 (New York and Geneva: United Nations, 2005), http://www.unctad.org/en/docs/iteiit20053_en.pdf.

noted on a North-North level. This may be an indication that investment protection is increasingly becoming a global standard[28].

BITs regularly feature a unique dispute settlement system, normally referred to as Investor-State Dispute Settlement (ISDS). This system is modeled on commercial arbitration procedures. It allows the investor, subject to certain procedural qualifications, to sue the host country before an international investment arbitration tribunal. ISDS is meant to provide safeguards against prohibited interference of the host country with the ownership rights of an investor, such as through expropriation. ISDS may be based on different procedural set-ups. The most common disciplines are those provided by the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), by UNCITRAL, or ad-hoc arrangements. Dispute settlement has led to roughly 400 known cases, most of them concluded during the 1990s. Figures of newly registered disputes remain high.

3.1.1. Traditional Approach

The key body of today's international investment law, i.e. the ~2700 BITs in force today, does not provide for explicit standards on labour matters. Its main substantive provisions are a set of treatment guarantees to investors, aiming at guaranteeing the security and protection of the investors' asset invested in the host state. The contracting parties regularly guarantee to treat the investments of the other contracting party's investors at least according to the following, main treatment standards:

- fair and equitably treatment;
- guarantee to provide at all times 'full protection and security' for the investment;
- MFN treatment regarding most aspects of the BITs;
- often, national treatment for the post-establishment phase of the investment;
- guarantee to refrain from (unrestricted) expropriation.

The focus of the BITs system on investment protection disciplines is historic. Since World War II, newly established developing countries took for a long time a critical perspective on foreign investments into their countries, fearing an undue interference with their newly gained sovereignty. The conclusion of BITs must be seen as a direct reaction to these uncertainties. Capital exporting countries developed BITs as a legal instrument to provide for efficient and effective protection of investors' property rights. Next to the mentioned, main treatment standards, the agreements were mostly characterized by their distinctive investor-state dispute settlement system (ISDS), which was meant to create a depoliticized, rules-based approach to deal with host states' possible violations of treaty guarantees. Side-stepping domestic legal procedures, international tribunals would deal in efficient manner with claims raised by foreign investors.

Labour matters – including employment – have in light of the described rationale of BITs not played any direct role in the development of BITs, neither at the outset of the agreements nor over several decades of their operation. Two aspects of the development of the traditional BITs system seem to be noteworthy, though from a perspective of labour / employment.

First, when FDI flows saw globally an increasing appreciation as a source of capital and knowledge, developing countries explored in the 1970s and 1980s opportunities to

[28] Note that this does not mean that the trend to negotiate and conclude BITs would be guaranteed. Already today, some countries discuss the value of the 'BITs System', particularly its investor state dispute settlement system. Venezuela has withdrawn from ICSID.

make better use of FDI flows for their development. In this situation, performance requirements were tested as mandatory rules of behaviors for investors, aiming at a deep integration (local content, local employment) of foreign investments with the local economy[29]. In reaction, some BITs started to introduce treaty language prohibiting performance requirements, and the debate also influenced the later conclusion of the WTO's TRIMs agreement (as discussed above, Chapter 2.2.). Performance requirements remain an interesting and debated policy tool until today, and some recent model BITs offer new approaches[30].

Second, in the 1980s (i.e. considerably before the negotiation of the GATS and its Mode 4 commitments), a certain need was perceived to ensure that investments were enabled by a guarantee to permit entry into the host countries for the investors' key managerial staff needed for purposes relating to an investment. Relevant provisions were introduced in some BITs, including agreements by the US, Canada and Australia[31]. An example is the Australia-China BIT (1988) (Box 1)[32]. Noteworthy, these provisions do not aim at regulating labour as such, but seek to remove investment hinders in form of disturbing limitations to the entry and sojourn of personnel.

Box 1: Australia-China BIT (1988)

Article IV

Entry and sojourn of personnel

1. A Contracting Party shall, subject to its law and policies applicable from time to time relating to the entry and sojourn of non-citizens, permit natural persons who are nationals of the other Contracting Party and personnel employed by companies of that other Contracting Party to enter and remain in its territory for the purpose of engaging in activities associated with investments.

2. Subject to paragraph 1 of this Article, nationals of one Contracting Party, who have made investments in the territory of the other Contracting Party, shall be permitted by that other Contracting Party to engage within its territory key technical and managerial personnel of their choice regardless of citizenship.

3.1.2. New Approaches

BITs, as noted above, did historically not aim at regulating labour or employment matters, and they equally do not aim at dealing with labour issues today. Over the last years, however, calls for a better alignment of BITs' investment related standards with other matters of concern relating to international investment flows, including labour and employment matters have been raised.

Particularly Western governments face increasing demands to streamline their foreign policy in order to apply in more consistent manner defined, societal values across the different fields of foreign policy action[33]. One implication is that recognized standards in

[29] Compare UNCTAD, *Host Country Operational Measures*, UNCTAD Series on issues in international investment agreements UNCTAD/ITE/IIT/26 (New York and Geneva: United Nations, 2001), 7, http://www.unctad.org/en/docs/iteiit20052_en.pdf.

[30] For a more in-depth discussion, see below Subchapter 3.2.

[31] As reported by Bonnie Penfold, Nearly 60 US, Canadian and Australian BITs concluded between 1991 and 2001 contain such a clause. Bonnie Penfold, *Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities*, Working Paper No. 95 (International Labour Office, n.d.), 3.

[32] Compare again Penfold, p.2 ff.

[33] This idea is *inter alia* expressed in documentary material explaining the rationale of the proposed (and meanwhile withdrawn) 2007 Norway BIT, stating: "*It is not irresponsible Norwegian investments that are the target group for the protection to be afforded by future investment agreements.*" See Commentary 2.5. and

terms of human rights (including labour rights) and other societal values will also find entry in appropriate form in international economic regulation, including investment regulation[34].

Consequently, a recent tendency can be noted that new approaches in BITs make reference to non-economic societal concerns in treaty provisions in more concrete manner. In the early 1990s, the US entered new ground including wording into its investment treaties relating to international recognized labour rights, in non-binding preambular language. Since then, a considerable amount of experimentation has been seen and the trend has gained increasing strength in the new millennium. New provisions are today mostly found in Model BITs, but also in a few agreements in force today negotiated on the basis of the relevant template[35]. The usefulness and feasibility of the new approach is currently still debated and no generally agreeable formula has so far been found.

The following will discuss some aspects of innovation as most relevant from a labour / employment perspective. Next to the analysis of the model agreements, a brief look will also be taken at agreements concluded by relevant countries on the basis of their model agreements, to see if the novelties proposed in model agreements have found entry into the treaty practice[36].

The analysis will focus on four particularly innovative model BITs, being the recent models developed by the US (2012), Canada (2004), Austria (2008) and Belgium/Luxemburg (2002). On the basis of these model BITs, the countries have so far concluded the following treaties[37]:

- The United States have since the development of their new Model BIT in 2012 not concluded any BITs, yet. They have, however, concluded BITs since the introduction of the 2004 Model BIT with Uruguay (2005) and Rwanda (2008). (The 2004 US Model BIT already included relevant, labour and employment related treaty language).

- Canada has since the development of its new Model FIPA in 2004 concluded BITs with Romania (2009), Slovakia (2010), Peru (2006), Latvia (2009), Jordan (2009), and the Czech Republic (2009).

- Austria has since the development of its new Model BIT in 2008 concluded two BITs (with Kazakhstan (2010) and Tajikistan (2010)). None of the two agreements are currently available in the UNCTAD database.

- Belgium and Luxemburg have since the development of their new Model BIT in 2002 concluded a large amount of BITs, including with Azerbaijan (2004), Bahrain (2006), Barbados (2009), Belarus (2002), Bosnia and Herzegovina (2004), Botswana (2006), China (2005), Democratic Republic of Congo (2005), Costa Rica (2002), Ethiopia (2006), Guatemala (2005), Republic of Korea (2006), Libya (2004), Madagascar (2005), Mauritius (2005), Montenegro (2010), Mozambique (2006), Nicaragua (2005), Oman (2008), Panama (2009), Peru (2005), Qatar (2007), Rwanda (2007), Serbia

Commentary 4.6.3, of the See Commentary 2.5. and Commentary 4.6.3, of the "Commentary to the Norway 2007 Model BIT" (Ministry of Trade and Industry, Norway, December 19, 2007).

[34] A key example of this development towards a more politicized foreign economic policy is currently taking place in the EU, where the December 2009 Treaty of Lisbon made the EU's investment policy part of the Union's Common Commercial Policy.

[35] Model BITs are model treaties, i.e. templates developed by countries formulating their respective treaty ideal they wish to negotiate with other contracting parties. Model BITs give a very good idea about the policies, concepts and treaty language individual countries aim at achieving. They are thus the right reference to look at to assess possible, future reform of treaty language.

[36] According to the UNCTAD IIA database.

[37] All references to BITs based on the UNCTAD IIA database.

(2004), Sudan (2005), Tajikistan (2009), Thailand (2002), Togo (2009), Uganda (2005), and the United Arab Emirates (2004).

Preambular Language

The introduction of references to non-economic social values including labour issues in the preamble of investment agreements is arguably the softest form of including labor standards in BITs. Preambles do not contain any operational provisions. The relevance of the preambular language lies in its importance for the interpretation of the agreements.

Arguably, the introduction of labour related provisions in preambles of BITs may be seen as particularly important, since it indicates a clear deviation from earlier treaty practice and may therefore signal contracting parties' clear intent to conclude the relevant treaty on a value fundament that is distinct from their earlier treaty practice or even the international mainstream.

Model agreements that include today references to labour issues in their preambles have suggested different approaches. As the weakest form, some model agreements will not mention labour rights explicitly, but broaden the value fundament of the agreements from mere economic cooperation to a more inclusive approach. They recognize that the agreements shall be 'conducive to the promotion of sustainable development' (Canadian 2004 FIPA Model), or will 'increase prosperity and welfare' (2002 Belgium Model BIT). These formulations do not embrace labour rights directly, but make it clear that the purpose of the agreement is not limited to economic matters, and investment contradicting these non-economic values is not what is aimed at with the conclusion of the agreement.

Box 2: Preambular language in relevant model BITs
Belgium Model BIT (2002)
"Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiatives and will **increase prosperity and welfare** in the Contracting Parties,"
Canadian FIPA Model (2004)
"Recognizing that the promotion and the protection of investments of investors of one Party in the territory of the other Party will be conducive to the stimulation of mutually beneficial business activity, to the development of economic cooperation between them and to the **promotion of sustainable development"**
US Model BIT (2012)
" *Desiring* to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the **promotion of internationally recognized labor rights**;"
Austrian Model BIT (2008)
"RECOGNISING that agreement upon the treatment to be accorded to investors and their investments will contribute to the efficient utilisation of economic resources, the **creation of employment opportunities and the improvement of living standards**; REAFFIRMING the commitments under the 2006 Ministerial declaration of the UN Economic and Social Council of **Full Employment and Decent Work**, COMMITTED to achieving these objectives in a manner consistent with the protection of health, safety, and the environment, and the **promotion of internationally recognised labour standards**; ACKNOWLEDGING that investment agreements and multilateral agreements on the protection of environment, human rights or **labour rights** are meant to foster global sustainable development and that any possible inconsistencies there out should be resolved without relaxation of standards of protection."

A second, stronger type of reference to labour issues in the preambular language of model BITs can be found in the 2012 US Model BIT. The US Model BIT puts forward a number of core economic motivations, which should be achieved in a manner consistent with – inter alia – the promotion of internationally recognized labour rights. Overall, labour rights are therefore not part of the core regulatory intent of the agreement, but recognized as important elements of the agreements value fundament.

The 2008 Austria Model BIT suggests comprehensive novelties: Next to recognizing the relevance of internationally recognized labour rights, it introduces 'employment' in the preamble, and thus adds a new perspective regarding the intent of the agreement. The agreement effectively stipulates that the accord of contracting parties over the treatment of investors in their respective countries will 'contribute to the efficient utilization of economic resources', the 'creation of employment opportunities' and the 'improvement of living standards'[38].

[38] The meaning of this statement remains arguably vague. Since the Austrian Model BIT continues to be in its scope a rather traditional investment protection agreement, it does not seem evident on the basis of which evidence it can be assumed with certainty that the agreement over the treatment to be accorded to investors (regarding the

Subsequently, the Austrian Model BIT reaffirms parties' commitments under the 2006 Ministerial declaration of the UN Economic and Social Council of Full Employment and Decent Work. It therefore reiterates again both labour rights and employment matters. The Agreement then takes up the formula known under the US Model BIT, but strengthens it by replacing the earlier 'desire' of contracting parties to achieve the treaties' objective in a manner consistent with labour rights, by a firmer 'commitment'.

The Austria Model BIT finally makes it clear that the ultimate regulatory objective of both investment agreements and multilateral agreements on the protection of environment, human rights and labour rights is not rooted in the respective agreements themselves, but is rather directed towards fostering 'global sustainable development' as an overarching goal. This is, however, not meant to weaken protection levels. With these novelties in the preamble of the agreement, the Austria Model BIT deviates in important form from earlier treaty practice[39].

A look at recent, US, Canadian, Belgium and Austrian BITs as concluded after the respective dates of issuance of the model agreements suggests that the formulations suggested in the model agreements are progressively being implemented in new agreements. The US Agreements with Uruguay and Rwanda contain relevant references to labour standards in the preamble (building on the 2004 US Model BIT). The Canadian Agreements concluded usually feature a short preamble, occasionally referring to 'the promotion of sustainable development' (Jordan, Peru). If the novelties suggested by the Austrian Model BIT will find entry into the treaty practice remains to be seen.

Non-lowering of Standards Clauses in Labour Matters

While preambular language underlines the relevance of labour rights as values to guide the agreement, non-lowering of standard clauses can give expression to these values in a more operational manner. Non-lowering of standards clauses generally declare that it is illegitimate to lower standards in labour matters (just as in environmental or other matters) for the encouragement, attraction, or retention of an investment. The clauses therefore in principle do not make any statement as to the appropriate level of labour rights, but merely take a comparative approach: The given level of protection shall not be lowered by the contracting parties or their regulatory bodies when dealing with investors and their investments.

The 2012 US Model BIT, the 2002 Belgium Model BIT, the 2008 Austria Model BIT all include non-lowering of standards clauses[40].

A few differences need to be noted amongst the different approaches taken. First, the question arises if the non-lowering of standards clause applies absolute, or in relation to any international standard. The Belgium Model BIT notes that it is *'inappropriate to encourage investment by relaxing domestic labour legislation'*. Differently, the US Model BIT and the Austrian Model BIT apply the non-lowering of standards clause to the domestic context, but add a reference to 'internationally recognized labour right'. Parties are called upon to ensure that they do not '*waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor [rights]'*.

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protection of their investments) should automatically lead to an efficient utilization of economic resources and the creation of employment opportunities.

[39] The agreement therefore uses its preamble to give a comparably precise indication on how it wishes the operational provisions to be weighted and balanced. It remains open if the found formula contributes to legal certainty.

[40] Only the Canadian Model FIPA takes a different approach, making reference to health, safety and environmental measures (Art. 11) and stipulating an exception clause modelled on Article XX GATT (Art. 10).

Box 3: Provisions relating to non-lowering of standards in relevant model BITs

US Model BIT (2012)

Article 13
Investment and Labor
[…]
2. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall ensure that it does not waive or otherwise derogate from or offer to waive or otherwise derogate from its labor laws where the waiver or derogation would be inconsistent with the labor rights referred to in subparagraphs (a) through (e) of paragraph 3, or fail to effectively enforce its labor laws through a sustained or recurring course of action or inaction, as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

3. For purposes of this Article, "labor laws" means each Party's statutes or regulations, or provisions thereof, that are directly related to the following:
(a) freedom of association;
(b) the effective recognition of the right to collective bargaining;
(c) the elimination of all forms of forced or compulsory labor;
(d) the effective abolition of child labor and a prohibition on the worst forms of child labor;
(e) the elimination of discrimination in respect of employment and occupation; and
(f) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.
4. A Party may make a written request for consultations with the other Party regarding any matter arising under this Article. The other Party shall respond to a request for consultations within thirty days of receipt of such request. Thereafter, the Parties shall consult and endeavor to reach a mutually satisfactory resolution.

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

Canadian FIPA Model (2004)

Reference to Health, Safety and Environmental Measures (Art. 11), as well as stipulation of an exception clause modelled on Article XX GATT (Art. 10). No direct reference to labour issues.

Belgium Model BIT (2002)

ARTICLE 6
LABOUR.
[…]
2. The Contracting Parties recognise that it is inappropriate to encourage investment by **relaxing domestic labour legislation**. Accordingly, each Contracting Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such legislation as an encouragement for the establishment, maintenance or expansion in its territory of an investment.

Austrian Model BIT (2008)

ARTICLE 5
Investment and Labour

(1) The Parties recognize that it is inappropriate to encourage investment by **weakening or reducing the protections afforded in domestic labour laws**. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the **internationally recognized labour rights** referred to in paragraph 2 as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.

(2) **For the purposes of this Article, „labour laws" means each Party's statutes or regulations, that are directly related to the following internationally recognized labour rights:**
(a) the right of association;
(b) the right to organize and to bargain collectively;
(c) a prohibition on the use of any form of forced or compulsory labour;
(d) labour protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labour, and
(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

The Austrian Model BIT does not mention the ILO standards directly, but effectively references to them by integrating them as 'internationally recognized labour rights' into the treaty text of the model agreements. This does not automatically mean that all core labour standards mentioned in the ILO's 1998 Declaration are embraced. Specifically, 'non-discrimination at the work place' seems to be missing, while 'acceptable conditions at work' has been included, a standard that is not defined by ILO instruments[41].

Questions arise as to the enforceability of the non-lowering of standards clause. The US Model BIT refers to bilateral consultations to be held ad hoc, with the aim to avoid any lowering of standards. The Belgium practice occasionally refers to 'expert consultations'[42]. The Austrian Model BIT leaves this question open.

A look at recent, US, Canadian, Belgium and Austrian BITs as concluded after the respective dates of issuance of the model agreements suggests that non-lowering of standards clauses may develop into standard features in BITs. The two US Agreements looked at (Uruguay and Rwanda) both contain relevant non-lowering of standards clauses (building on the 2004 US Model BIT). Most of the Canadian BITs concluded since the introduction of the 2004 FIPA Model contain non-lowering of standards clauses, albeit not mentioning labour issues specifically[43]. Belgium / Luxembourg have concluded a large amount of new agreements over the last years. Most of the recent ones include non-lowering of standards clauses, such as the BITs concluded with Barbados, Congo, Ethiopia, Guatemala, Lybia, Madagascar, Mauritius, Nicaragua, Peru, Panama (featuring an older type of formulation), Serbia and Montenegro, Sudan, Tajikistan, Togo, and the UAE (using an older type of formulation).

Treaty Language on Labour Standards

Direct reference to internationally recognized labour standards / core labour standards is a last and most far-reaching option to deal with labour issues in BITs. Compared to non-lowering of standards clauses such a reference does not merely address a change of standards, but aims at stipulating in concrete form a defined labour standard. Stipulations of labour standards in BITs or Model BITs are today rare.

Addressing core labour standards in a binding form would alter the scope of BITs in considerable manner, and possibly turn the known investment protection agreements into agreements that take an active regulatory intent in other areas, such as on labour issues. Further, the current regulatory design of BITs constitutes a challenge for the introduction of substantive labour standards in BITs. BITs in their current form are concluded between states but mostly provide substantive rights in terms of guarantees to private party investors. Agreements typically do not provide for obligations for the private party investors.

In light of this, only a few Model Agreements decide to stipulate concrete labour rights standards (Box. 4). The 2012 US Model BIT makes reference to the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up.

[41] The US Model mentions the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up explicitly, see below.*
[42] See for example the Belgium- Nicaragua BIT.
[43] Referring instead to 'domestic health, safety or environmental measures.

Box 4: Treaty language on labour standards in relevant model BITs

US Model BIT (2012)

Article 13
Investment and Labor
1. The Parties reaffirm their respective obligations as members of the International Labor Organization ("ILO") and their commitments under the *ILO Declaration on Fundamental Principles and Rights at Work and its Follow-Up*.
[…]

Canadian FIPA Model (2004)

– – –

Belgium Model BIT (2002)

ARTICLE 6
LABOUR.
1. Recognising the right of each Contracting Party to establish its own domestic labour standards, and to adopt or modify accordingly its labour legislation, each Contracting Party shall strive to ensure that its legislation provides for **labour standards consistent with the international labour standards** set forth in paragraph 6 of Article 1 and shall strive to improve those standards in that light.

[…]

3. The Contracting Parties reaffirm their **obligations as members of the International Labour Organisation** and their commitments under the International Labour Organisation Declaration on Fundamental Principles and Rights at Work and its Follow-up. The Contracting Parties shall strive to ensure that such labour principles and the international labour standards set forth in paragraph 6 of Article 1 are recognised and protected by domestic legislation.

ARTICLE 1
6. The term "labour legislation" shall mean legislation of the Contracting Parties, or provisions thereof, that purport to give effect to the following **international labour standards as defined by the International Labour Organisation**:
a) the right of association;
b) the right to organise and bargain collectively;
c) a prohibition on the use of any form of forced or compulsory labour;
d) a minimum age for the employment of children;
e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

Austrian Model BIT (2008)

Reference to labour issues only in form of a non-lowering of standards clause, see above.

The Belgium Model BIT gives even more emphasis to labour issues, but it avoids addressing labour issues in a way that would have direct consequences for private party investors. Rather, the model agreement strengthens the state-state dimension of the agreements by providing treaty language substantiating the obligations of states under the agreement.

The model agreement makes reference to the ILO and lists relevant international labour standards explicitly, such as the right of association, the right to organise and bargain collectively, the prohibition on the use of any form of forced or compulsory labour, a

minimum age for the employment of children, and acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

The clear reference to the ILO and its labour standards is balanced by the introductory formula of Article 6.1., recognising '*the right of each Contracting Party to establish its own domestic labour standards, and to adopt or modify accordingly its labour legislation*'. This reference must not only be understood as limiting the meaning of Article 6 to the core labour issues as set out in Article 1, but also has a particular relevance for the context of investment protection. The Article effectively underlines the right to regulate of host countries in the area of labour regulation (outside the ambit of the listed core labour rights). This can limit the options for investors to challenge domestic labour related regulation possibly interfering with the ownerships rights by lessening the value of their investment.

A look at recent, US, Canadian, Belgium and Austrian BITs as concluded after the respective dates of issuance of the model agreements suggests that at least a slight tendency can be observed that reference to labour issues will become a more relevant aspect in future BITs. The two US BITs looked at (Uruguay and Rwanda) both feature articles on labour issues, although – as they still build on the 2004 US Model BIT – the reference to ILO labour standards is not as explicit as under the new 2012 US Model. Belgium / Luxembourg have in their recent, large amount of new agreements included stipulations on labour issues much in lines with their model agreements. Relevant examples are agreements concluded with Barbados, Congo, Ethiopia, Guatemala, Lybia, Madagascar, Mauritius, Nicaragua, Peru, Panama (featuring an older type of formulation), Serbia and Montenegro, Sudan, Tajikistan Togo UAE (older type of formulation).

Performance requirements and Employment

As mentioned above, performance requirements have gained prominence in the trade context (as part of the WTO Agreement, see above, Chapter 2.2.), but their historical roots are rather in the field of investment regulation (see above, Chapter 3.1.1.). As developing countries increasingly reviewed options to make better use of foreign investment inflows for their economic and social development through mandatory performance requirements imposed on investors, capital exporting countries considered the introduction of clauses into their investment agreements in order to prohibit those performance requirements that were seen as illegitimately interfering with investors' property rights or core interest[44].

The discussion on the usefulness of performance requirements to achieve domestic development effects, and possible prohibitions suitable to protect investors' interests has not come to an end, yet. Only a few countries eventually decided to introduce provisions prohibiting performance requirements in their investment treaty practice. Most BITs today do not explicitly deal with performance requirements. Applying a so-called investment admission clause they make it clear that investment into the country should be governed by the rules of the host state, without prohibitions as to which measures may be prohibited[45]. As an example, the German Model BIT states: '*Each Contracting State shall in its territory […] admit […] investments in accordance with its legislation.*' [46]

Yet, a few BITs deviate from this general approach. These are mostly BITs concluded by the US, Canada and Japan. These agreements stipulate explicit prohibition of performance requirements, in lines with or exceeding the trade-related prohibitions as contained in the TRIMs Agreement. Some, interesting novelties have been seen in these agreements. For example, the 2009 Canada-Romania BIT offers detailed stipulation of

[44] UNCTAD, *Host Country Operational Measures*, 7 ff.
[45] Beyond the limitations stipulated in the agreement as part of its general investment protection intent.
[46] *2008 German Model BIT.*

employment of key personnel (Box 5). The 2012 US Model BIT also contains relevant treaty language[47].

Box 5: Performance Requirements in the Canada-Romania BIT (2009)

ARTICLE V
Other Measures

1. (a) A Contracting Party may not require that an enterprise of that Contracting Party, that is an investment under this Agreement, appoint to senior management positions individuals of any particular nationality.
(b) A Contracting Party may require, in accordance with its laws and regulations, that a majority of the board of directors, or any committee thereof, of an enterprise that is an investment under this Agreement be of a particular nationality, or resident in the territory of the Contracting Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

2. Neither Contracting Party may impose any of the following requirements in connection with permitting the establishment or acquisition of an investment or enforce any of the following requirements in connection with the subsequent regulation of that investment:

(a) to export a given level or percentage of goods;
(b) to achieve a given level or percentage of domestic content;
(c) to purchase, use or accord a preference to goods produced or services provided in its territory, or to purchase goods or services from persons in its territory;
(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or
(e) to transfer technology, a production process or other proprietary knowledge to a person in its territory unaffiliated with the transferor, except when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal or competition authority, either to remedy an alleged violation of competition laws or acting in a manner not inconsistent with other provisions of this Agreement.

3.2. Preferential Trade Agreements: Investment Chapters and Labour Issues

Preferential Trade Agreements are a third, important pillar of international investment law. With the quasi halt in trade negotiations in the WTO's Doha Round over the last years, regionalism has grown as an increasingly important phenomenon in the international regulatory architecture of trade regulation. Many countries have opted to further pursue their trade objectives through preferential trade agreements. While by definition providing for WTO-plus terms, these agreements are also of distinct relevance as investment agreements. They frequently include a dedicated investment chapter (comparably to the regulatory content traditionally covered in BITs), and they may feature robust treaty content on issues that are of a shared trade and investment relevance, such as services trade, performance requirements, or intellectual property rights.

FTAs have an important innovative potential for trade, investment and consequently for any discussion on labour issues in relation to international economic exchange. The innovative potential is at least twofold. First, the fact that FTAs may cover investment issues more broadly than BITs, not limited to investment protection disciplines, offers the chance for a more holistic perspective on international investment regulation. The combined treatment of trade and investment matters in FTAs raises for long unanswered questions on the interaction of investment and trade disciplines and coherence sought when combining

[47] Please see the Annex.

these disciplines in one agreement. Particularly relevant is the question how non-economic societal values such as labour rights are treated in FTAs as agreements integrating both trade and investment disciplines. When the same values apply to both trade and investment flows, how will these values materialize in operational form in treaty language on both trade and investment disciplines?

Secondly, an important innovative potential is in the bilateral (or regional) character of trade rulemaking, in contrast to the WTO's multilateral context of negotiations. This changes the power play in trade and investment negotiations. In case of overall similar economic patterns and value fundaments in negotiating countries, progress will be easier in reach, including innovation on matters relating to non-purely economic subject matters such as labour issues. In case of negotiations between stronger economic players and weaker economic countries, the weaker party may not be protected by the multilateral negotiation context and may have to concede to (some of) the stronger party's requests. Both aspects may be inducive to innovative treaty language on labour matters in the agreements.

As the most relevant development in international economic rulemaking, FTAs are being extensively analyzed in current research, however mostly from a trade perspective. The following Subchapters 3.2.1. and 3.2.2. will focus on the investment aspects of FTAs and the possible interactions with labour matters. In light of the comprehensive scope of FTAs, the following will merely give an overview over main features of FTAs relating to investment and labour matters by looking at a few, selected agreements. Subchapter 3.2.1. will summarize the coverage of labour or employment issues in FTA disciplines such as chapters on investment protection. Subchapter 3.2.2. will then look in more detail at dedicated chapters on labour issues as existing in several FTAs concluded by various countries.

3.2.1. Overview of Relevant Issues

The **preamble** of the mostly recent agreements regularly gives indication that Western developed countries such as the US or European countries (represented by the EU) increasingly wish to give expression to their conviction that labour issues (including labour rights but also employment) must be seen as necessary elements of a complementary socio-economic development. Many, though not all, preambles of recent FTAs concluded by these countries therefore explicitly mention labour issues.

The US-CAFTA-DR, for example, underlines the contracting parties' intent to "*create new opportunities for economic and social development in the region; protect, enhance, and enforce basic workers' rights and strengthen their cooperation on labor matters; create new employment opportunities and improve working conditions and living standards in their respective territories*"[48]; The US-Singapore agreement does not mention labour issues directly. The NAFTA deals with labour issues in a dedicated side agreement.

In the EU practice, references to labour issues in preambular language are arguably slightly less concrete, but still mostly existing. The EU-South Africa FTA reaffirms parties' commitment "*to economic and social development and the respect for the fundamental rights of workers, notably by promoting the relevant International Labour Organisation (ILO) Conventions covering such topics as the freedom of association, the right to collective bargaining and non-discrimination; the abolition of forced labour and child labour*". The EU-Korea Agreement expresses similar views, without making direct reference to the ILO[49]. In the treaty practice of emerging economies and developing countries, reference to labour issues in the preamble is far less common than in practice of developed, Western economies

[48] Full text access to all agreements can be found via the regional trade agreements gateway of the WTO, at http://rtais.wto.org/UI/PublicMaintainRTAHome.aspx

[49] It must be noted, though, that various provisions of the EU-Republic of Korea FTA mention the ILO, in particular Articles 13.4.

such as the US or EU. The China-New Zealand FTA, in terms of investment disciplines arguably one of China's most innovative FTA, does not mention labour (rights) in the preamble, but employment issues. It expresses parties' desire "*to strengthen their economic partnership to bring economic and social benefits, to create new opportunities for employment and to improve the living standards of their peoples*."[50]

Mostly FTAs negotiated by Western countries do provide provisions on **investment protection** in a dedicated chapter in the agreement. This goes back to the early NAFTA (Chapter 11), and has become a consistent US treaty policy[51]. The US-Jordan FTA does not contain a chapter on investment, as an US-Jordan BIT is in place.

Regarding investment protection issues the EU must be seen as a special case, due to the traditional separation of competences over investment matters in the Union. As a result of this policy, the EU treaty practice has so far left investment protection to the BITs concluded by EU Member States. The full shift of competence over investment regulation to the Union in the year 2009 has led the Union to announce including investment protection disciplines in its future preferential agreements. A chapter on investment and trade in services is contained in the EC-CARIFORUM FTA, and first chapters on investment protection are to be expected in the EU's FTAs with Canada and Singapore[52].

At least in its recent FTA with New Zealand, China agreed to include a chapter on investment protection, showing in terms of contents some consistency with the country's current BITs practice. The decision to include investment issues into the FTA is noteworthy because it may signal China's intent to conclude increasingly broad FTAs, just as is current US practice of emerging EU practice. Last, and unsurprisingly, India is in line with its position at the WTO negative about including investment related treaty language in its trade agreements.

Prohibitions of performance requirements may or may not be included in FTAs. Individual countries' preferences on the issue seem to be overall largely in line with the above findings[53]. US treaty practice relies strongly on provisions on performance requirements. The issue seems to be considered primarily a matter of investment protection. All the NAFTA, the US-Singapore FTA and the US-CAFTA DR FTA include detailed prohibitions on performance requirements in the investment chapter of the relevant agreement. In contrast, the EU practice – maybe in current absence of investment chapters – does not seem to pursue the policy to introduce clauses on performance requirements in its current FTA practice. Last, current FTA practices in China and India seem to recognize the relevance of the prohibition of trade-related performance requirements, but do not cover other performance requirements. The China-New Zealand BIT notes: "*The Parties agree that the provisions of the WTO Agreement on Trade-Related Investment Measures are incorporated mutatis mutandis into this Agreement and shall apply with respect to all investments falling within the scope of this Chapter*."[54]

[50] Compare also the analysis by Ebert / Posthuma who find that there has been an evolution from less detailed labour provisions to more comprehensive labour provisions in the more recent FTAs, p. 13.
[51] US-Singapore, Chapter 15; US-CAFTA: Chapter 10.
[52] This has already triggered important debate on the character of the future EU investment policy. For one contribution to the debate focussing on labour issues, see Raphael Peels, *The Inclusion of Labour Provisions in EU's Bilateral Trade and Investment Agreements: What about Dialogue and Disputes?*
(Leuven: Research Institute for Work and Society, Katholieke Universiteit Leuven), http://hiva.kuleuven.be/resources/pdf/publicaties/R1377_PeelsMay2011.pdf.
[53] See above, Chapter 2.
[54] Article 140, Performance Requirements.

3.2.2. Labour Chapters in Free Trade Agreements

The most relevant and most far-reaching innovation in FTAs in terms of labour related provisions are stand-alone labour chapters that have been introduced in some agreements. The existence of these chapters underlines the sincere interest contracting parties have in labour issues and the close link they perceive between matters of economic relevance and social progress. Labour chapters in FTAs have therefore attracted a considerable amount of attention in research and policy discussion[55]. Since FTAs are largely perceived as trade agreements with investment just being one, subordinate subject matter in a broad regulatory intent of the agreements, the question of relevance from an investment law perspective focuses on the relevance of the labour related stipulations for investment matters. As will become evident in the following brief review of some, recently adopted FTAs and their labour chapters, FTAs' increasingly comprehensive perspective over international economic exchange including trade and investment makes it increasingly difficult to distinguish between trade, investment, and their respective interaction with labour matters.

US Practice

The US FTA practice can by today look back on a considerable track-record to deal with labour issues in its agreements. All four agreements scrutinized in this paper provide for a dedicated chapter on labour issues. For NAFTA as the oldest amongst the agreements looked at, the labour chapter is provided as a side agreement outside the core agreement. This side agreement provides rather few operational provisions, and mostly focuses on the relevance of domestic labour laws, and means to support their effective application. The agreement provides for guidance and support aiming at ensuring the availability of domestic procedures such as due government enforcement or access of private parties to domestic judicial systems. This is meant to foster the recognized core labour rights in the contracting parties' countries.

The newer US-Peru FTA, US-CAFTA DR FTA as well as US-Singapore FTA provide for more far-reaching labour related stipulations. In addition to provisions on the relevance of domestic labour laws and effective domestic enforcement, they generally combine a non-lowering of standards clause, a good-will clause in which contracting parties declare that they will improve domestic standards in light of international recognized labour rights, and a list of those internationally recognizes standards. In terms of institutional arrangements to implement and possibly enforce the agreed stipulations, the agreements generally provide for a joint committee, which shall coordinate implementation activities and consult in case of difficulties. The US-CAFTA DR agreement provides further for a Council to be set up in case of disputes[56]. The US-Peru FTA includes a requirement to comply with the rights enshrined in the ILO's 1998 Declaration[57].

[55] See for example, the following publications: Jacques Bourgeois, Kamala Dawar, and Simon Evenett, *A Comparative Analysis of Selected Provisions in Free Trade Agreements*, October 2007; Penfold, *Labour and Employment Issues in Foreign Direct Investment: Public Support Conditionalities*; Pablo Lazo Grandi, *Trade Agreements and their Relation to Labour Standards* (Geneva: International Centre for Trade and Sustainable Development (ICTSD), November 2009).

[56] Compare Bourgeois, Dawar, and Evenett, *A Comparative Analysis of Selected Provisions in Free Trade Agreements*, 27 ff.

[57] See Ebert, Franz & Posthuma, Anne. "Labour provisions in trade arrangements: current trends and perspectives." International Labour Organization, 2011, p.9.

Box 6: US Agreements reviewed		
Name of Agreement	**Entry into force**	**Type**
US-Peru FTA	01 February 2009	Free Trade Agreement & Economic Integration Agreement
Dominican Republic - Central America - United States Free Trade Agreement (CAFTA-DR)	1 January 2009 for Costa Rica; 1 March 2007 for the Dominican Republic; 1 July 2006 for Guatemala; 1 April 2006 for Honduras and Nicaragua; 1 March 2006 for El Salvador and the United States	Free Trade Agreement & Economic Integration Agreement
US-Singapore FTA	01 January 2004	Free Trade Agreement & Economic Integration Agreement
North American Free Trade Agreement (NAFTA)	01 January 1994 for the three contracting parties (US, Canada, Mexico)	Free Trade Agreement & Economic Integration Agreement

From the perspective of investment and labour issues, the comprehensive approach of US FTAs to include both disciplines on investment and labour raises interesting questions regarding the interaction of the different aspects of the agreements, such as the stipulations of the investment chapter and the labour chapter, or a possible hierarchy of norms. This question is difficult to be answered in straight-forward manner, and may require more in-depth, future research. In principle, investment chapters in US FTAs will regularly be considered as being subordinate to other chapters. The investment chapter in the US CAFTA DR FTA, for example, stipulates at the beginning of the Chapter:

US CAFTA DR FTA (Article 10.2)

1. In the event of any inconsistency between this Chapter and another Chapter, the other Chapter shall prevail to the extent of the inconsistency.

[…]

3. This Chapter does not apply to measures adopted or maintained by a Party to the extent that they are covered by Chapter Twelve (Financial Services).

Beyond this general recognition, there is so far little evidence on interaction, as may for example be possible in an investor-state dispute settlement case over a labour issue, in the context of which the parties in dispute decide to make reference to the labour chapter inscribed in the applying FTA.

EU Practice

EU FTAs show an overall increasingly strong treaty language on labour matters. Contrary to the US treaty practice, treaty language is however regularly not part of a dedicated chapter on labour issues but spread out throughout the agreements and included at relevant places.

In the comparably early EU-South Africa FTA (2000, officially: *Agreement on Trade, Development and Cooperation*), the main feature regarding labour issues is Article 86 (Social Issues). Here, the parties agree to engage in a dialogue on social cooperation. This dialogue will *inter alia* include questions "*relating to […] poverty alleviation, unemployment, […] labour relations, public health, safety at work and population*." The contracting parties further recognize ILO standards as reference points for the development of social rights to accompany economic progress.

In terms of institutional arrangements to help implement the agreement including its labour dimension, Article 97 previews the establishment of a Cooperation Council. In addition, the parties aim at encouraging contacts between other similar institutions in South Africa and the EU, "*such as the Economic and Social Committee of the European Community and the National Economic Development and Labour Council (NEDLAC) of South Africa*."

More far-reaching clauses are stipulated in the later EC-Chile FTA (2005). Same as the agreement with South Africa, the EC-Chile FTA has a dedicated Article on Social Cooperation, but the character of the article is more precise and determined. It notes that the parties will "*give priority to the creation of employment and respect for fundamental social rights, notably by promoting the relevant conventions of the International Labour Organisation covering such topics as the freedom of association, the right to collective bargaining and non-discrimination, the abolition of forced and child labour, and equal treatment between men and women*."

Box 7: EU Agreements reviewed

Name of Agreement	Entry into force	Type
EU-Korea	01 July 2011	Free Trade Agreement & Economic Integration Agreement
EU - CARIFORUM States EPA	01-Nov-2008	Free Trade Agreement & Economic Integration Agreement
EC-Chile	01 March 2005	Free Trade Agreement & Economic Integration Agreement
EC-South Africa	01 January 2000	Free Trade Agreement

Even stronger stipulations on labour matters are stipulated in the EU-Korea FTA. First, as an objective of the agreement (Chapter One), a non-lowering of standards clause on labour (and environmental) matters is stipulated as regards the promotion of investment. Most labour-related issues are then part of Chapter Thirteen on "Trade and Sustainable Development". This chapter recognizes parties' right to regulate and to establish its own levels of protection (Article 13.3), but recognizes parties' obligations deriving from

membership of the ILO and the ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up […]. Parties underline that they "*will make continued and sustained efforts towards ratifying the fundamental ILO Conventions as well as the other Conventions that are classified as 'up-to-date' by the ILO*." (Article 13.4). According to Article 13.12, parties *will designate an office within its administration which shall serve as a contact point with the other Party to implement Chapter Thirteen*. In case of disputes, government consultations shall take place (Article 13.14), or the matter referred to a Panel of Independent Experts for consideration (Article 13.15).

Last, and importantly, the EC CARIFORUM Agreement seems to be the only EU FTA which contains a labour provision with explicit relevance for investors. Article 72 stipulates that the contracting parties will cooperate to ensure that "*investors act in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998*". This reference to the ILO Declaration is complemented with a non-lowering of standards clause (both provisions, Box. 8).

Box 8: EU-CARIFORUM, Art. 72: Behaviour of Investors

Article 72

Behaviour of investors

The EC Party and the Signatory CARIFORUM States shall cooperate and take, within their own respective territories, such measures as may be necessary, inter alia, through domestic legislation, to ensure that:

[…]

(b) Investors act in accordance with core labour standards as required by the International Labour Organization (ILO) Declaration on Fundamental Principles and Rights at Work, 1998, to which the EC Party and the Signatory CARIFORUM States are parties.

(c) Investors do not manage or operate their investments in a manner that circumvents international environmental or labour obligations arising from agreements to which the EC Party and the Signatory CARIFORUM States are parties.

(d) Investors establish and maintain, where appropriate, local community liaison processes, especially in projects involving extensive natural resource-based activities, in so far that they do not nullify or impair the benefits accruing to the other Party under the terms of a specific commitment.

Article 73

Maintenance of standards

The EC Party and the Signatory CARIFORUM States shall ensure that foreign direct investment is not encouraged by lowering domestic environmental, labour or occupational health and safety legislation and standards or by relaxing core labour standards or laws aimed at protecting and promoting cultural diversity.

The EU practice therefore overall combines different provisions on labour issues, including non-lowering of standards clauses, cooperation provisions aiming at enhancing awareness for labour issues and improving domestic application. Agreements may or may not make reference to the ILO standards. Overall, the policy applied in EU agreements seems to be of less consistency compared to the US practice.

The increasing engagement of the EU on investment issues (flowing from its increased competence to deal with 'investment' since the Treaty of Lisbon) will raise interesting questions on how to integrate the labour issues with the future investment provisions. Already today, the CARIFORUM Agreement offers very interesting novelties featuring a chapter on investment / trade in services and quite explicit treaty language focused on investor behaviour.

Practice of Emerging Economies and Developing Countries

Developing countries and emerging economies are traditionally careful when it comes to binding standards both on labour and on investment in international agreements. They regularly perceive a risk to lose their competitive advantage based on lower costs for investors and domestic business. It therefore does not come as a surprise that many developing countries' treaty practice does not feature concrete treaty language on labour or investment matters[58].

Box 9: FTAs with Investment Chapters from Developing / Emerging Economies

Name of Agreement	Entry into force	Type
China-Pakistan	10 October 2009	Free Trade Agreement & Economic Integration Agreement
China-New Zealand FTA	01 October 2008	Free Trade Agreement & Economic Integration Agreement
India-Singapore FTA	01 August 2005	Free Trade Agreement & Economic Integration Agreement

Regarding the scrutinized agreements, the India-Singapore FTA (2005) and the China-Pakistan FTA (2008) both provide for an investment chapter, providing for all standard disciplines that are today practice in BITs, including investor-state dispute settlement (ICSID). Both agreements do however not feature clauses dealing explicitly with labour issues. In preambular language, the China-Pakistan FTA notes that the Agreement "*should be implemented with a view toward raising the standard of living, creating new job opportunities, and promoting sustainable development in a manner consistent with environmental protection and conservation*". The expressed intent does not materialize itself in concrete treaty language on labour issues.

Of particular interest is the China-New Zealand FTA, which makes in its Article 177 reference to a *Memorandum of Understanding on Labour Cooperation*, through which parties shall enhance their communication and cooperation on the matter. In this Memorandum of Understanding, the contracting parties reaffirm their obligations as members of the ILO (including the commitments under the ILO Declaration on

[58] Ebert/Posthum note a trend among South-South FTAs to gradually include certain (usually promotional) labour provisions. In particular Chile as included labour provisions in numerous of its recent FTAs. See Ebert/Posthum, p. 19-20.

Fundamental Principles and Rights at Work and its Follow-up, Article 1). They also provide for a good-will non-lowering of standards clause relating to both trade and investment matters. Parties recognize "*that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic labour laws, regulations, policies and practices*" (Article 1.4). In terms of institutional arrangements, the Memorandum of Understanding provides for the appointment of coordinators to arrange for consultations and suitable activities to help discuss and reach progress regarding the expressed intents of both parties.

Since the China-Pakistan FTA and the China-New Zealand FTA have been negotiated and concluded in timely proximity, the differences in their scope are interesting. It seems that investment protection is of shared interest to all parties and generally agreeable. Labour matters may be of no such relevance to China or Pakistan that any one country would insist on relevant labour clauses. Labour matters are however to a sufficient degree agreeable between China and New Zealand. This makes the China-New Zealand a particularly interesting agreement. While the labour related provisions in the agreement are considerable weaker than those provided for in US or EU practice, it will be important to observe if China's FTA practice will build on this first example, and therefore position the country's practice increasingly closer to Western approaches to trade, investment and labour issues.

4. Conclusion

This paper aimed at providing an overview over labour-related provisions in international investment law. To this end, it identified relevant international investment law provisions in WTO law, BITs, and FTAs.

The overall picture reveals significant diversity. The unevenness of international investment law may be the main reason that the interrelations of international investment law and international labour issues in investment agreements have so far not been addressed with a singular formula. Indeed, the different aspects of investment regulation have different implications for labour issues. Investment liberalization issues (such as mostly addressed in the GATS) may interact with labour issues mostly in terms of reservations made by WTO Members as part of the GATS schedules of commitments. As noted above, some countries put certain reservations forward, but there is a need to explore in more detail to which extent and in which way reservations are in practice a relevant instrument to deal with labour and employment.

For established investments, host countries may want to apply performance requirements. International agreements may prohibit certain of these performance requirements. Prohibitions of the most directly labour related performance requirements (such as employment requirements) are rather rare, but prohibitions of other performance requirements exist and may still have a certain effect on labour matters. More in-depth analysis could assess the de facto application of performance requirements by countries, and the role prohibitions of performance requirements play in this. This may help evaluating the relevance of performance requirements for labour and employment issues, and allow drawing conclusions on the helpfulness of performance requirements for development.

Interesting recent developments regarding investment and labour take place in the context of BITs. The narrow regulatory intent of BITs focusing on investment protection was for long the reason that explicit references to non-economic social values such as labour matters were not included into the agreements. A growing conviction to better align BITs to countries' overarching foreign policy objectives can be noted, however, and experimentation with different formulas has started. This is arguably a development of high relevance for international labour matters.

Finally, a brief survey of labour issues in PTAs (mostly FTAs) as relating to investment issues shows strong innovation in terms of treaty provisions. Relevant interaction of investment and labour exists in principle across all treaty aspects relating to investment and labour, including investment protection, trade in services, performance requirements and others. While these regulatory topics are generally known from BITs practice or multilateral agreements, treaty language in FTAs is relevant as it sometimes features some of the most innovative provisions on labour issues. In addition, dedicated chapters on labour matters in FTAs are the most far-reaching effort to provide comprehensive disciplines on labour issues in international trade and investment regulation. Both underlines the high innovative potential of FTAs for investment and labour matters.

Following the initial stocktaking and analysis offered in this paper, the understanding of labour and investment issues may further be enhanced by approaching the topic through the lenses of individual regulatory issues. Some regulatory intentions may be specific to certain agreements (such as investment liberalization has a strong correlation with employment effects), but some aspects may also apply throughout the different regulatory fields of investment agreements. Core labour standards, as an example, may for their normative content possibly apply throughout all aspects of investment regulation. Approaching the topic through different aspects of interaction may therefore be a first step towards streamlining labour issues in international investment matters across the different investment agreements existing. First tendencies, such as similar clauses used in FTAs and innovative BITs, give a first taste of such a development and could be a starting point for a more conclusive approach to international investment regulation and labour issues.

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Annex

Training Requirements under WTO Members' GATS Commitments

Country	Sector or Sub-sector		Limitations on Market Access		Limitations on National Treatment
Botswana	ALL SECTORS INCLUDED IN THIS SCHEDULE	4)	Entry and residence in Botswana of foreign natural persons is subject to immigration laws, regulations, guidelines and procedures. […] **Investors are required to conform to the requirements of the localization policy. Investors are required to train citizens in order to enable them to assume senior management positions over time**. […]	4)	Professional foreign natural persons should be recognized as such and they should have rights to practise in their countries of origin. Professional natural persons should be recognized and be registered by the appropriate committee or council.
Cambodia	Investment Incentives	3)	Investors, seeking incentives under the provisions of the Law on Investment, shall have the **obligation to provide adequate and consistent training to Cambodian staff, including for promotion to senior positions.**	3)	None
	Restaurants	Notes: #5 [Unbound.] The main criteria are: **the number of and impact on** existing restaurants, historical and artistic characteristics of the location, geographic spread, impact on traffic conditions and **creation of new employment.**			
Cameroon	ALL SECTORS INCLUDED IN THIS SCHEDULE	3)	[…] **Enterprises must meet the requirements concerning the creation of jobs for Cameroonians in the framework of each individual Certificate of Approval (at least one job to be created for every 5 million or fraction thereof to be invested in the enterprise concerned). Additional requirements concerning training and jobs may be issued by regulation.**	3)	None

Chile	All sectors included in this Schedule	3)	The commitments in this Schedule extend only to suppliers of services who operate in Chile through a commercial presence, when they establish themselves as a foreign investment and comply with the rules and legal procedures on direct foreign investment in force. The commercial presence covered by this Schedule is that effected solely through the Foreign Investment Statute and financed by external capital. **Authorization to deliver services through a commercial presence may take into account the following criteria:** **a) The effect of the commercial presence on economic activity, including the effect on employment, on the use of parts, components and services produced in Chile and on exports of services;** b) The effect of the commercial presence on productivity, industrial efficiency, technological development and product innovation in Chile; c) The effect of commercial presence on competition in the sector and other sectors, on consumer protection, on the smooth functioning, integrity and stability of the market, and on the national interest; d) The contribution of the commercial presence to Chile's integration into world markets. This schedule applies only to the following types of commercial presence for foreign investors: corporations, open or closed, private-limited companies, and subsidiaries (which under Chilean legislation are the equivalent of agencies of corporations).	3)	Foreign investors may transfer abroad their capital following the elapse of three years from the date of entry. Real estate acquisitions and the performance of other legal acts in frontier zones must comply with the provisions of the relevant legislation, which is unbound for the purposes of this Schedule. The frontier zone is defined as land situated within a distance of 10 km measured from the frontier and 5 km from the coast and Arica province. As regards services that fall under the heading "professional services" at least 85% of the staff employed by a supplier of services established in Chile must be Chilean. As regards all other services listed in this Schedule, at least 85% of the staff employed by a supplier of services established in Chile must be Chilean, except in the case of enterprises with fewer than 15 employees.
		4)	Unbound, except for transfers of natural persons within a foreign enterprise established in Chile, **in accordance with (3) commercial presence**, of senior and specialized personnel who have been in the employ of the organization for a period of at least two years immediately preceding the date of their application for admission performing the same type of duties in the parent company of their country of origin. **In any case, in accordance with (3) commercial presence, foreign natural persons may not make up more than 15% of the total staff employed in Chile.** […]	4)	Unbound, except for the categories of natural persons listed under market access.

Cote d'Ivoire	e) Engineering services (excluding integrated engineering services) […] e) Technical testing and analysis services […] n) Maintenance and repair of equipment […] C. Installation and assembly work […]	3)	None	3)	Enterprises must receive government approval. The criteria to be met in order to obtain approval may include: - The preferential use of local services to the extent that they are available under conditions of quality, price and delivery equivalent to those of like products of foreign origin **- The employment and training of local executives and supervisors**
Cyprus	Foreign Investment	3)	The permission of the Central Bank is required for the participation of any non-resident in a corporate body or partnership in Cyprus. Foreign participation in all sectors/ subsectors included in the Schedule of Commitments is normally limited up to 49 per cent. The decision of the authorities to grant permission for foreign participation is based on an **economic needs test**, for which the following criteria are used in general: a) Provision of services which are new to Cyprus b) Promotion of the export orientation of the economy with development of existing and new markets c) **Transfer of modern technology, know-how and new management techniques** d) Improvement either of the productive structure of the economy or of the quality of existing products and services e) Complementary impact on existing units or activities f) Viability of proposed project **g) Creation of new job opportunities for scientists, qualitative improvement and**	3)	Entities with foreign participation must have paid up capital commensurate with their finance requirements and non-residents must finance their contribution through the importation of foreign exchange In case the non-resident participation exceeds 24 per cent, any additional financing for working capital requirements or otherwise should be raised from local and foreign sources in proportion to the participation of residents and non-residents in the entity's equity. In the case of branches of foreign companies, all capital for the initial investment must be provided from foreign sources. Borrowing from local sources is only permitted after the initial implementation of the project, for financing working capital requirements.

			training of local staff […]		
Dominican Republic	ALL SECTORS INCLUDED IN THIS SCHEDULE	4)	Unbound, except for senior and specialized staff associated with commercial presence who must contribute to the **training of Dominican personnel in the areas of specialization concerned**. Market access for foreign natural persons is subject to the requirement of a work permit and a work visa. The provision in the Dominican Republic, through the presence of natural persons, of professional services such as legal, accounting, consultancy, engineering, architectural and medical services, is subject to the fulfilment of the requirements laid down in the laws governing the exercise of such professions.	4)	Under the Tax Code, income received by foreigners in the form of payment of dividends, royalties and interest is subject to payment of the taxes provided for by law. The laws relating to labour are territorial, and apply to Dominicans and foreigners without distinction, except as otherwise provided for in international agreements. **The law recognizes as basic rights of workers, inter alia, freedom of association, vocational training and respect for physical integrity, privacy and personal dignity.**
EC (European Community)	various	Note: *22) Where establishment is subject to an economic needs test, the main criteria are: the number of and impact on existing stores, population density, geographic spread, impact on traffic conditions and creation of new employment.			
Egypt	1. Hotels and Restaurants A. Hotels and other commercial accommodations a) Hotels and motels b) Resort hotels and accommodation facilities c) Casino hotels B. Restaurants, Bars and Canteens a) Full service restaurants b) Fast food restaurants and cafeteria	3)	A licence will be given according to the requirement of **economic needs test** (main criteria: market needs and locating different categories of hotels). - Casino services can be provided only through 5 stars hotels (gambling allowed only for foreigners) - Limitations on the total number of services operations depend on the requirement of economic needs test (geographical location, increase in the number and categories of tourists) - Foreign capital equity should not exceed 49 per cent in projects to be established in Sinai	3)	**Training of Egyptian employees should be performed by the foreign natural persons within the terms of the contract.**

	2. Travel Agencies and Tour Operators a) Tour operators, packagers and wholesalers b) Travel agencies	3)	Limitations on the total number of services operations depend on the requirement of economic needs test	3)	**Training of Egyptian employees should be performed by the foreign natural persons within the terms of the contract.**
	3. Other Tourism Services A. Tourism Management Services a) Tourism Property Management b) Rental/Lease Tourism Property	3)	Bound only for representative offices. Limitations on the total number of services operations depend on the requirement of economic needs test.	3)	**Training of Egyptian employees should be performed by the foreign natural persons within the terms of the contract.**
	A. Joint-Venture Banks (JVB's): […]	3)	The share of non-Egyptians in the capital of JVB's and private banks may exceed 49 per cent of the issued capital of any bank, without ceiling. On a non-discriminatory basis, ownership of more than 10 per cent of the issued capital of any bank, except through inheritance, requires the approval of the CBE Board of Directors.	3)	**Foreign service suppliers, in the context of JVBs are required to offer on-the-job training for national employees.**
El Salvador	ALL SECTORS INCLUDED IN THIS SCHEDULE	4)	**Every employer must employ Salvadorian nationals in a proportion of at least 90 per cent of the personnel of his enterprise. In special circumstances the Ministry of Labour and Social Security may authorize the employment of more foreigners when it is difficult or impossible to replace them by nationals, but employers remain obliged to train Salvadorian personnel under the supervision and control of the Ministry within a period of not more than five years. The amount of wages to Salvadorians may not be**	4)	

			less than 85 per cent of the total wages paid. This percentage may be changed with the authorization of the above-mentioned Ministry. Foreigners may not hold the positions of administrator, director, manager or representative of a small-scale enterprise in the trade, industrial or services sector.		
Fiji	09. Tourism and Travel Related Services	4)	Normal government approval required for foreign nationals. Entry limited to key post management and time post skilled employees where these are unavailable locally. Time post appointments for skilled employees is three years initially and extension is subject to Immigration Department requirements.	4)	**Foreign managers/skilled employees required to provide locals with on-the-job training**
Gambia	ALL SERVICES INCLUDED IN THIS SCHEDULE	4)	Unbound, except for measures concerning the entry and stay of natural persons employed in Management and Experts Jobs for the implementation of foreign investment. The employment of such persons shall be agreed upon by the contracting parties and approved by the office of the President. **Enterprises must also provide for training in higher skills for Gambian nationals to enable them as assume specialized roles.** The conditions or requirements for an approval for expatriate quota/staff are: (1) Payment of payroll tax D10,000.00 (2) Minimum Investment of D1,000,000.00 (3) Unavailability of qualified Gambian for the position.	4)	**Unbound, except for measures concerning the categories of persons referred to in the market access column.**

Ghana	ALL SECTORS INCLUDED IN THIS SCHEDULE	4)	Automatic entry and work permit is granted to up to 4 expatriate senior executives and specialized skill personnel in accordance with relevant provisions in the Investment Promotion Law. Approval is required for any additional expatriate workers beyond the automatic level. **Enterprises must also provide for training in higher skills for Ghanaians to enable them to assume specialized roles.**	4)	None
Guatemala		4)	Unbound, except for **higher-level and specialized personnel in connection with a commercial presence which must contribute to the training of Guatemalan personnel in the specialized fields of activity concerned.** In addition, the Labour Code provides the following: "Employers must employ 90 per cent of Guatemalan workers and pay them at least 85 per cent of total wages paid. These requirements may be modified for the following reasons: i) protection and promotion of the national economy; ii) lack of Guatemalan technical personnel for specific activities; iii) defence of Guatemalan workers who demonstrate their capabilities." The Ministry of Labour may, at its discretion, decrease these percentages by 10 per cent for a period of five years or increase them to eliminate the employment of foreign workers. **An authorization to decrease the percentage must include the requirement to train Guatemalan technical staff in the activity concerned over the same period.**	4)	**Unbound, except for the categories of persons indicated in the market access column**
	Tourism / Meals Services	4)	**Only senior and specialized personnel related**	4)	None

	/ Tourist Marina Operators		**to a commercial presence to the extent required for training Guatemalan personnel**		
Honduras	ALL SECTORS INCLUDED IN THIS SCHEDULE	3)	Authorization to establish a commercial presence may take into account the following criteria: **The effect of the commercial presence on national or local economic activity, its impact on employment, productivity, technological development, competition and market stability; and its impact on the environment** Foreign investors may not engage in small-scale industry and commerce A 40 km. belt is reserved for companies consisting wholly of Honduran partners, Hondurans by birth or State institutions for land situated in border areas or along both coastlines as well as islands, keys, reefs, breakwaters, rocks, and sand banks	3)	**The commercial presence of foreign enterprises must contribute to the training of Honduran personnel in the specialized fields of activity concerned**
		4)	Unbound, except for measures affecting the entry and temporary stay of senior and specialized personnel, associated with a commercial presence **The supply of services by suppliers not resident in Honduras must contribute to the training of Honduran personnel in the specialized fields of activity concerned** A ceiling of 10 per cent is established for the number of foreign workers in an enterprise, who must not receive more than 15 per cent of total wages paid Managers and supervisors of the enterprise must speak Spanish A limit of 10 per cent is established on the total	4)	**Unbound, except for measures related to the categories of natural persons indicated in the column on market access** In order to obtain the necessary permit, foreigners must be resident in Honduras

			number of foreigners affiliated to trade unions, and no foreigner may be a member of the governing body of a trade union		
Lesotho	ALL SECTORS INCLUDED IN THIS SCHEDULE	4)	Automatic entry and work permit is granted for up to 4 expatriate senior executives and specialized skill personnel in accordance with relevant provisions in the Laws of Lesotho. Approval is required for any additional expatriate workers beyond the automatic level. **Enterprises must also provide for training in higher skills for the locals to enable them to assume specialized roles.**	4)	None
Malaysia	ALL SECTORS INCLUDED IN THIS SCHEDULE UNLESS OTHERWISE INDICATED	4)	Unbound except for measures affecting the entry and temporary stay of natural persons defined below: 1. Intra-corporate Transferees a) senior managers being persons within an organization having proprietary information of the organization and who exercise wide latitude in decision making relating to the establishment, control and operation of the organization being directly responsible to the CEO and receive only general supervision or direction from the board of directors or partners of the organization; and b) two specialists or experts per organization being persons within the organization who possess knowledge at an advanced level of continued expertise and who possess proprietary knowledge of the organization's new service products and technology, research equipment and techniques or management. **Additional specialists or experts may be allowed subject to market test and the training of Malaysians through an acceptable training programme in**	4)	**Unbound except for the categories of natural persons referred to under market access**

			the relevant services sector or subsector: **Provided that such persons are employees of the foreign service supplier and have been in the employment of that foreign service supplier for a period of not less than one year immediately preceding the date of their application for a work permit and he is to serve in at least a similar capacity.** 2. Others a) specialists or experts being persons who possess knowledge at an advanced level of continued expertise and who possess proprietary knowledge of the organizations's products and services **subject to market test and the employment of Malaysians as counterparts and/or training of Malaysians through acceptable training programmes in the relevant services sector or subsector;** […]		
Nicaragua		4)	The supply of services by suppliers not resident in Nicaragua is limited to senior and specialized personnel **in connection with a commercial presence and it must contribute to the training of Nicaraguan personnel in the specialized field of activity concerned.** This measure applies to all sectors unless otherwise provided **Employers must employ a minimum of 75 per cent of Nicaraguan employees. In special circumstances, the Ministry of Labour may authorize the employment of a larger number of foreigners when it is difficult or impossible to replace them by nationals, in which case the employers must train Nicaraguan personnel under the supervision and control of the**	4)	**Unbound, except for the categories of persons indicated under the heading "market access"**

			Ministry for a period of not more than five years […]		
Niger	Hotel and restaurant services	3)	Prior approval of ministries concerned. The procedure is discretionary	3)	**Obligation to provide training programme**
Norway	All sectors: Establishment - General authorization procedures for acquisition			3)/4)	Foreign citizens residing in Norway who purchase or lease real property for housing, secondary residences and business activities without a concession, are subject to the condition that the real property is acquired for their own personal use **A concession can only be granted when it is not contrary to the public interest. An acquisition is normally judged on the impact it will have on future activity and employment in the company and the society as a whole.** Legislation governing acquisitions has traditionally been liberally applied. It authorizes the setting of conditions, in a large majority of the cases involving over 1/3 of foreign ownership - related to voting shares. Conditions are largely standardized. Two conditions are regarded as important and are stipulated in most cases: a majority of the board and its chairman must be Norwegian nationals and, the transactions between the Norwegian company and the foreign owner must be based on OECD's principle of arm's length prices.

Panama	(d) Architectural services (CPC 8671) including urban planning and landscape architectural services (CPC 8674) (e) Engineering services (CPC 8672) including integrated engineering services (CPC 8673)	4)	The hiring of foreign professionals in the field of engineering and architecture for purposes limited to that specialization may be permitted, provided that the Engineering and Architecture Technical Council can show that there are no Panamanian professionals suitable for providing such services. **If a foreign professional is hired for more than 12 months, the hiring entity must employ a Panamanian professional in order that he may receive the training necessary to enable him to replace the foreigner at the end of his contract.** **Authorizations to hire foreign specialists for less than 12 months may not be extended.**	4)	Unbound
Papua New Guinea	ALL SECTORS INCLUDED IN THIS SCHEDULE	3)	(a) Normal government approval and registration is required for all foreign investors by the Department of Finance and Planning. For such **approval**, the following criteria are, in general, applied: (i) provision of new services; (ii) improvement of productive structure of the economy; (iii) viability of the new project especially with respect to foreign exchange earnings or savings; **(iv) implications for employment in Papua New Guinea.** […]	3)	**Foreign employees are required to provide on-the-job training to local employees.**
Paraguay	Hotels and restaurants / travel agencies and tour operators services	4)	**Unbound, except for senior managerial personnel, with staff training programmes**	4)	**Unbound, except for senior managerial personnel, with staff training programmes**

Solomon Islands	ALL SECTORS INCLUDED IN THIS SCHEDULE	3)	(a) Normal government approval and registration is required for all foreign investors by the Foreign Investment Board. Such approval is based on an economic needs test, for which the following criteria are, in general, used: (i) provision of new services; (ii) improvement of productive structure of the economy; (iii) viability of the new project especially with respect to foreign exchange earnings or savings; **(iv) implications for employment in the Solomon Islands** […]	3)	
		4)	Unbound except for measures affecting the entry and temporary stay of natural persons in the following categories: managers and specialists who possess knowledge that is necessary for the provision of the service. Entry and temporary stay is limited to those of key importance and where employees are unavailable locally. Entry is limited to 2 years initially with any extension subject to Immigration and Labour requirements	4)	Unbound except as specified under market access. **Foreign employees are required to provide on-the-job training to local employees.**
Tunisia	02.C.o. Other Telecommunication Services (a) Point-to-point local telephone distribution (b) Packet-switched data transmission (Local service) Frame relay services (d) Telex (o) Other - Mobile telephone Digital cellular telephone	1)	Possible through the Tunisian public telecommunications network	1)	None

	- Paging - Teleconferencing				
	Additional Commitments: For the liberalization of these services, Tunisia requires any telecommunications services supplier to: - supply rural telecommunications services, - serve certain areas with telephony, - supply distress telecommunication services, - **contribute to the national training and research endeavour in the telecommunications field.**				
Vietnam	F. Road Transport Services (a) Passenger transportation (CPC 7121+7122) (b) Freight transportation (CPC 7123)	1)	Unbound.	1)	Unbound.
	Notes: #32 The criteria taken into account are among others: creation of new jobs; positive foreign currency balance; introduction of advanced technology, including management skill; reduced industrial pollution; **professional training for Vietnamese workers;** etc.				
Zambia	ALL SECTORS INCLUDED IN THIS SCHEDULE	4)	Unbound except for measures concerning the entry and temporary stay of natural persons employed in management and expert jobs for the implementation of foreign investment. The employment of such persons shall be agreed upon by the contracting parties and approved by the Ministry of Home Affairs. **Enterprises must also provide for training in higher skills for Zambians to enable them to assume specialized roles.**	4)	**Unbound except for measures concerning the categories of persons referred to in the market access column**

Illustrative List of Performance Requirements Prohibited under the TRIMS Agreement

1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:

(a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; or

(b) that an enterprise's purchases or use of imported products be limited to an amount related to the volume or value of local products that it exports.

2. TRIMs that are inconsistent with the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which restrict:

(a) the importation by an enterprise of products used in or related to its local production, generally or to an amount related to the volume or value of local production that it exports;

(b) the importation by an enterprise of products used in or related to its local production by restricting its access to foreign exchange to an amount related to the foreign exchange inflows attributable to the enterprise; or

(c) the exportation or sale for export by an enterprise of products, whether specified in terms of particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production.

Performance Requirements Prohibited under the 2012 US Model BIT

Article 8

Performance Requirements

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:

(a) to export a given level or percentage of goods or services; - 11 -

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

(c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory;

(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market; or

(h) (i) to purchase, use, or accord a preference to, in its territory, technology of the Party or of persons of the Party; or

(ii) that prevents the purchase or use of, or the according of a preference to, in its territory, particular technology,

so as to afford protection on the basis of nationality to its own investors or investments or to technology of the Party or of persons of the Party.

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

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

(b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or - 12 -

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

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

(b) Paragraphs 1(f) and (h) do not apply:

(i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party’s competition laws.

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), (f), and (h), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;

(ii) necessary to protect human, animal, or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

(d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

(e) Paragraphs 1(b), (c), (f), (g), and (h), and 2(a) and (b), do not apply to government procurement. - 13

(f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

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