

A COMPARATIVE ANALYSIS OF SELECTED PROVISIONS IN FREE TRADE AGREEMENTS

Commissioned by DG TRADE

undertaken by

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TABLE OF CONTENTS

<i>Section number and title</i>	<i>Page number</i>
0. Executive Summary.	4
1. Overview and methodology of the report.	10
2. FTA provisions on labour standards.	21
3. FTA provisions on policies relating to the environment.	59
4. FTA provisions on government procurement practices.	95
5. FTA provisions on non-tariff barriers.	130
6. FTA provisions on competition policy and state aid.	165
7. Concluding remarks.	206
Annex 1. List of FTAs examined in-depth for this study.	208
Annex 2. Bibliography for the comparative legal analyses of selected FTA provisions, organised by provision.	209
Annex 3. Documents supplied by members of European civil society to authors of this report.	212

LIST OF TABLES IN THIS REPORT

<i>Table number.</i>	<i>Title.</i>	<i>Page.</i>
1.	Selected aspects of labour provisions in FTAs.	39
2.	Papers relating to labour provisions in FTAs.	44
3.	Comments on the effects of labour provisions in FTAs and other remarks of potential interest.	45
4.	Summary of civil society comments on FTA provisions on labour standards.	53
5.	Environmental provisions of selected FTAs.	72
6.	Papers relating to environmental provisions in FTAs.	80
7.	Comments on the effects of environmental provisions in FTAs and other remarks of potential interest.	81
8.	Summary of civil society comments on FTA provisions on the environment.	89
9.	Public procurement provisions of selected FTAs.	114
10.	Papers relating to public procurement provisions in FTAs.	119
11.	Comments on the effects of procurement provisions in FTAs and other remarks of potential interest.	120
12.	Summary of civil society comments on FTA provisions on government procurement practices.	125
13.	Papers relating to non-tariff barrier provisions in FTAs.	151
14.	Comments on the effects of non-tariff provisions in FTAs and other remarks of potential interest.	152
15.	Summary of civil society comments on FTA provisions on non-tariff barriers.	157
16.	Competition and state aid provisions of selected FTAs.	184
17.	Papers relating to competition and state aid provisions in FTAs.	190
18.	Comments on the effects of competition and state aid-related provisions in FTAs and other remarks of potential interest.	192
19.	Summary of civil society comments on FTA provisions on competition and state aid.	200

0. Executive Summary

This report contains a comparative legal analysis of the contents of 27 free trade agreements (FTAs) selected by the European Commission (EC) along with a summary of the available empirical evidence on the effects of the FTA provisions relating to: social and labour standards, environmental policies, government procurement policies and practices, five specific non-tariff barriers, and competition and state aid policies. In addition, a summary of interviews with selected European civil society organisations on various aspects of these potential FTA provisions is provided. The purpose of this report is to identify potential better practices and other interesting findings that "could feed into the EU's reflection process on the contents of future FTAs."²

The study revealed a number of general and provision-specific findings. Broad families of similar FTA provisions could be found in each of the five areas studied. Concerning evidence on the effectiveness of these FTA provisions much of the extant literature is qualitative in nature. The number of quantitative studies of the effects of specific FTA provisions on outcomes of interest (such as exports, adherence to core labour standards, etc.) can be counted on the fingers of one hand, preventing a broad-ranging empirical assessment of the effectiveness of each FTA provision examined here. This latter, disappointing finding was confirmed in a number of interviews with representatives of leading European civil society organisations. Those interviews also revealed a divergence of firmly-held views about the wisdom of including in future EU FTAs the five types of provision considered here. Those views appear to be based on the conjectured impact of such FTA provisions on the development prospects of signatories, their interviewee's assessment of the EC's proper priorities for its FTA negotiations, and fears that the European Commission may trade-off market access benefits to en-

2 Quoted from the terms of reference for this study ("Terms of reference for Comparative analysis of selected provisions in FTAs").

courage FTA partners to sign up to the labour, environment, and competition policy and state aid provisions.

The remainder of this Executive Summary provides an overview provision-by-provision of the main findings of this study. When assessing this report it should be borne in mind that our task was not to recommend whether any broad class of provisions (such provisions on the environmental policies of signatories) should be included in the next generation of the EU's FTAs. With respect to this important normative matter, however, as noted above we do report the often-conflicting views of leading members of European civil society and statements about the effectiveness of such provisions in the extant literature. Moreover, in our view the empirical evidence on the specific matter of the effectiveness of the five FTA provisions considered here does not support any conclusive assessment as to the merits or otherwise of including such provisions in future FTAs.

Even so, the materials and sources examined for this study revealed much useful information about the possible contents of the five FTA provisions, assuming that any given type of provision is to be included in a FTA and the motive for doing so is not merely window-dressing. Many of the FTAs examined included provisions on the subjects studied here on a rather a piecemeal basis. One possible alternative could be to develop a more comprehensive approach which "mainstreams" a given provision throughout future FTAs. Such mainstreaming might involve identifying all of the legal obligations that could be added to each relevant chapter of a FTA so as to further the objectives in hand. For example, if a goal is to strengthen the content and enforcement of national labour laws, then in addition to a separate chapter on labour policy, related enforcement provisions might be added to the procurement chapter of a FTA to make sure that firms which bid for state contracts do not respond to greater competitive pressures by degrading or failing to observe employee protections. Moreover, mainstreaming might include treating such provisions on a par with the more traditional FTA provisions and, consequently, making the former subject to the dispute set-

tlement provisions of the FTA. However, it is appropriate to reiterate that, like their piecemeal alternatives, one cannot assert that there is a large body of prior experience that bears out the utility of such a comprehensive approach.

With respect to labour provisions in FTAs, over half of the FTAs studied omitted provisions on this matter. FTAs with Canada or the United States as signatories accounted for most of recently negotiated labour provisions. In FTAs concluded in the past 10 years a few distinct models can be identified, but all have been criticised for their ineffectiveness because their basic reference point is a commitment by the parties to enforce existing domestic labour law only. A more effective model would be to mainstream labour standards which explicitly reference ILO standards throughout the FTA. This would include reference to desired international standards within the preamble and the investment chapter, for example, as well as within a chapter dealing solely with labour regulation setting out the scope, institutions, technical assistance and capacity building provisions. These commitments would also fall under the general dispute settlement system of the FTA in question. On this logic, some form of independent oversight would also be desirable to ensure the effective and impartial implementation of the provisions.

Currently, the only trade-related scheme on labour standards to be recognised as having worked was not part of a FTA *per se* (the US-Cambodia textile agreement). This scheme, along with the credible threat of losing GSP benefits, are said to have created the incentives necessary for developing countries to improve their labour policies and enforcement practices. An incentive-based approach found some support among representatives of European civil society organisations, although it must be admitted that the strongest preference was to omit these provisions from FTAs altogether. Having said that, the latter was followed by a preference for including provisions on labour standards and making the associated commitments enforceable by trade sanctions.

Many of the (not necessarily positive) lessons for the design of environmental provisions come from FTAs signed by the United States or by Canada. Again, our analysis revealed that if these provisions are to be mainstreamed and accorded the same priority as the trade commitments, important choices have to be made. From the outset there is the question as whether to include environmental provisions within the FTA or resort to a side agreement, the latter possibly with its own dispute settlement system. If the objectives and obligations relating to the environment go beyond the existing multilateral disciplines and multilateral environmental agreements, the conflict clause which sets out the hierarchy of given to parties' different treaty obligations ought to privilege these environmental policies. Mainstreaming would also require that the nature of any sanctions for non-compliance and the form and duration of capacity building and technical assistance programmes must support the objectives of the environmental provisions. On this view, in addition to clarifying the objectives of the environmental provisions, steps would be taken to ensure the coherence across the provisions in different FTA chapters that could have a direct or indirect environmental impact. Some have argued that more straightforward technical assistance measures, such as the training of environmental enforcement personnel from developing countries, have been effective as it not only strengthens enforcement capacity but also reinforces a group of officials that tends to support further environmental improvements. European civil society's views on these provisions mirrored their stated positions on labour provisions.

With respect to potential provisions on government procurement practices, a review of recently concluded FTAs suggests that the EC will have to decide whether future FTA provisions meet the standards of the WTO's Government Procurement Agreement (GPA) or go beyond those standards and, if so, in what respects. Given that most of the EC's prospective FTA partners are developing countries, in particular larger developing countries many of which have explicit or implicit policies towards national champions or set-aside policies for favoured sectors or groups, then the scope of any public procurement provisions is likely to be

a contentious matter. A related developing country concern is likely to be the cost of implementing any FTA provisions on government procurement practices; many WTO members are said to have refused to join the plurilateral GPA precisely because of these costs. Another important design choice is the domestic bid challenge procedures that the EC might seek for aggrieved bidders for state contracts. In principle, these challenge procedures could operate faster than traditional state-to-state dispute settlement mechanisms and to the extent that the former are successful they may take pressure off the latter.

There were strong demands from the representatives of European business associations that non-tariff barriers be a leading negotiating objective of the EC; of the five types of potential FTA provisions discussed in this report support among the business community for including NTB provisions in future EU FTAs was by far the strongest. Recently concluded FTAs have tended to blend stronger horizontal (cross-sectoral) disciplines on NTBs with sector-specific initiatives. Given the large number and diversity of NTBs identified by European business representatives in the EU's potential FTA partners, it would appear to be a significant challenge to devise a set of horizontal disciplines that addresses each current concern. Consequently, proposals to complement horizontal disciplines with certain sector-specific provisions would appear to have some merit. Provisions to foster dialogue between FTA signatories before regulations are put in place and to encourage mutual recognition of standards (where appropriate) were recommended too and precedents can be found in other recently concluded FTAs.

With respect to provisions in FTAs on competition policy and state aid, an important finding is that before the EC's late 1990s moratorium on launching FTAs it regularly obtained commitments of wider scope than in most of the FTAs examined in this study. The US has a very different model for competition provisions in its FTAs that typically include measures on procedural matters and on anti-competitive conduct by state-owned enterprises and in the telecommunications sector and selected measures on state aid. FTAs where Japan is a signa-

tory tend to focus on procedural commitments, but not on a substantive commitment to enact a competition law in the first place. Both the US and Japanese approaches fall short of what the EC has previously sought. One option available to the EC is to combine substantive obligations with procedural commitments (concerning the nature of any law enforcement and international cooperation on enforcement matters) and binding dispute settlement. An alternative to the latter is an elaborate consultation clause, similar to that found in the Canada-Costa Rica FTA. Having said this, no representative of European civil society interviewed for this study was keen on including competition provisions in FTAs. Some felt these matters were the preserve of domestic policy; others want to allow developing countries to discriminate in favour of their own nascent industries. Only one interviewee saw a case for FTA provisions to prohibit state aid or at least to notify a trading partner when such aid are given.

1. Introduction to the report and methodologies employed.

In October 2006 the European Commission (EC) proposed a new trade policy for the European Union in a Communication titled "Global Europe". Part of this trade policy initiative included the negotiation of state-of-the-art free trade agreements (FTAs) with selected trading partners, including India, Korea, certain members of the ASEAN group of nations, and Central American countries. Revitalising FTA negotiations with the GCC members and with MERCOSUR was also said to be a priority. In addition to securing greater market access for European manufacturers and service sector firms, the European Commission has committed itself to including provisions on a number of other policy matters in these FTAs.

It has been argued³ that these new EU FTAs could serve two purposes: first, by fostering liberalisation beyond previously-agreed multilateral trade commitments and associated reforms and, second, by making progress on matters that to date have not been subject to multilateral disciplines. Recognising that there has been a substantial number of FTAs signed in the past 10 years by Europe's trading partners, 27 concluded FTAs⁴ were selected by the EC for in-depth analysis with the ultimate goal of identifying significant findings and potential recommendations that could feed into the EU's deliberations on the contents of its next generation of FTAs.

The remainder of this section describes the content and organisation of this report (section 1.1), the methodology applied in the legal analysis undertaken for this report (section 1.2), the approach taken in the economic research for this report (section 1.3), and the matters discussed in the interviews with representatives of leading European civil society organisations (section 1.4).

3 See the Terms of Reference for this study.

4 The list of FTAs selected by the EC for in-depth examination is given in Annex 1.

1.1. Content and organisation of the report.

Drawing upon the legal texts of the 27 FTAs selected for study, the available extant literature, and information gleaned from interviews with representatives of leading European civil society organisations, with specific reference to FTA provisions on social and environmental law and policies, public procurement policies and practices, five specified non-tariff barriers⁵, and competition law and policy (including state aid and subsidies) this report is to address the following questions:

- What matters are addressed in the relevant legal provisions in these FTAs?
- What is the nature and scope of commitments taken in these legal provisions?
- What are the resourced-based implications (human, financial, and other) associated with implementing and enforcing these legal provisions?
- For a type of legal provision can state-of-the-art approaches or so-called "work-horse models" be identified?

In addition to answering these questions, the study will propose, for each of the five types of legal provision identified above:

- A typology of legal commitments will be developed for the 27 FTAs studied.
- A summary of the extant economic literature on the estimates of the effects of these provisions will be provided.
- A summary of the interviews with representatives of leading European civil society organisations concerning the potential negotiating objectives for the EC and other pertinent matters.

In the light of the foregoing remarks it should not be a surprise that a variety of analyses were conducted for this report. Legal analyses were complemented by extensive searches for economic and empirical literature, summaries and assessments of the relevant literature, and in-

⁵ These being non-tariff barriers affecting the following sectors: alcoholic beverages, automobiles, electronic goods, chemicals (including pharmaceuticals), and textiles. The EC chose these sectors.

interviews. Comments received from DG Trade on earlier drafts of this report were also incorporated into this final report.

This report is organised into seven sections and three annexes. The remainder of this section describes the methodologies employed during the legal and economic research for this report. Then, each of the five types of FTA provision selected for study is discussed in a section that follows this one (ie. sections 2 through 6). Concluding remarks are presented in section seven. Three annexes contain other information and facts pertinent to the study.

1.2. Methodology employed in the comparative legal analysis of FTA provisions.

As far as the legal analysis conducted for this report is concerned, it was a principally comparative legal analysis of the legal provisions in the FTAs selected by the EC. The ultimate purpose of this legal methodology was to answer the first four questions identified in section 1.1., namely,

- What matters are addressed in the relevant legal provisions in these FTAs?
- What is the nature and scope of commitments taken in these legal provisions?
- What are the resourced-based implications (human, financial, and other) associated with implementing and enforcing these legal provisions?
- For a type of legal provision can state-of-the-art approaches or so-called "work-horse models" be identified?

Where possible, this analysis also examined the effects of the selected provisions would have on the domestic regimes or the trade of the parties.

The report systematically assesses the following facets of each FTA:

1.2.1. The agreements' preambles and objectives.

This section identifies whether the subject matter under analysis is explicitly related to the trade obligations of the regional members, or not.

The preamble to an FTA does not contain any binding obligations upon the parties. The statements contained in preambles are not intended to be *operative* provisions in the sense of creating specific rights or obligations. Rather, the preamble statements offer a context for the signatories' overall objectives by introducing the agreement, setting out the motives of the contracting parties and the objectives to be accomplished by the provisions of the statutes.

Nevertheless, a preamble is designed to establish a definitive record of the intention or purpose of the parties in entering into the agreement, and this can inform or 'colour' the interpretation of a treaty provision. Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides that the preamble forms part of the treaty text and, as such, part of the terms and 'context' of the treaty for purposes of interpretation.⁶ The preamble of a treaty may therefore be used as a source of interpretative guidance by government officials and judges in the process of implementation and dispute settlement.

1.2.2. The scope of obligations for the subject area.

When the countries that are party to the agreement negotiate the obligations they will undertake on a particular regulatory subject, they address the types of rights to be covered and whether these rights will be based on national or international standards.

6 Article 31 of the Vienna Convention on the Law of Treaties (VCLT) provides in relevant part:

1. A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose.
2. The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes:⁷

Article 32 of the VCLT provides:

'Recourse may be had to supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion, in order to confirm the meaning resulting from the application of article 31, or to determine the meaning when the interpretation according to article 31: (a) leaves the meaning ambiguous or obscure; or (b) leads to a result which is manifestly absurd or unreasonable.'

This assessment identifies how wide or narrow the agreement's obligations are, along with the standards the provisions are seeking to apply:

1. whether the subject matter references other bodies of international law,
2. whether it establishes an independent regional law, and,
3. whether it is seeking to have domestic laws enforced.

1.2.3. Institutions and agencies.

This assessment identifies whether the agreement provides for any institutions to deal with the matters raised in the legal provisions?

1. Is a special committee or commission created to monitor and further develop the issue; or,
2. Is there only a textual reference in the agreement without further action, development or oversight intended?

1.2.4. The Dispute Settlement Mechanism (DSM).

In the event of a dispute between the parties of the agreement arising from their interpretation and application of their commitments under the agreement, this section identifies whether the provisions include the following obligations:

1. Is there redress for either of the parties, if the commitments are not fulfilled?
2. Are rights of action given to state parties and private parties?
3. Is there an independent body for complaints?
4. Are actions or enforcement activities limited to the domestic legal order?
5. Does the DSM extend beyond 'good offices' and 'conciliation' to cover independent report and recommendations or directives for remedial action?
6. What are the final remedies possible?
7. Is it possible to invoke a safeguard or suspend a trade concession?
8. If a party fails to remedy, is there a right of countervailing action in the agreement, or is the only action possible that of withdrawing from the agreement overall.
9. Who can be made the beneficiary of a remedy, only the states involved, or also private parties, producers or consumers?

For the labour and environment policies there was enough material found to include a section commenting on the operational history of the regulation described, assessing the significant benefits offered by the provisions and identifying operational caveats where they exist.

Taxonomies were provided for all of the provisions selected for study except the specific non-tariff barrier provisions. The latter sector-specific provisions defied intelligent classification, varying as they do so much from FTA to FTA.

Applying this systematic approach to all subject areas and sectors produces some comparative conclusions on the character and strength of regional or bilateral regulation being applied to a particular domestic issue or sector.

1.3. Methodology employed in the assessment of the economic effects of selected FTA provisions.

As noted in section 1.1, one objective of the research undertaken for this report was to examine what, if any, empirical evidence on the impact of selected FTA provisions has been published or made widely available (through working paper series, the internet, etc.) in recent years. At this point it is worth making a number of preliminary comments concerning the scope of the research undertaken for this part of the report. These comments indicate the factors shaping the research strategy and go some way to account for the weight given to different papers in this report. First, studies of the economic impact of FTA provisions typically take the presence of the latter as given, and do not examine whether two or more trading partners were more likely to negotiate and sign such an agreement in the first place.⁷ This is important because signatories may have decided to include tough-looking provisions on the enforcement of environmental policies in their FTA precisely because they already have good environmental compliance records. In this case it would be wrong to attribute the higher level of environmental compliance to the inclusion of the FTA provision as the former came before the latter. Getting the direction of causality right is a real challenge especially for studies that only examine the post-FTA implementation period.

Second, the emphasis here is not on the general impact of international commerce on certain socio-economic indicators of interest, such as the level of pollution of a particular chemical. Leaving aside the obvious concerns about estimating the linkages between one endogenous variable (say trade) on another endogenous variable (say pollution), the goal here is to better understand the direct quantitative impact of selected FTA provisions, which are the relevant policy instruments.⁸

Third, the focus here is explicitly on the impact of selected FTA provisions and not on the effect of any existing multilateral provisions. To the extent that a FTA provision affirms

7 Economists and econometricians will recognise this as the classic "selection problem."

8 This point is important for, as will become clear in the sections that follow, there are some policy areas where there are precious few studies of the impact of FTA-related policy instruments on a given indicator of interest, but plenty of studies of the impact of trade on the variable of interest. The literature on trade and the environment is a case in point.

an existing multilateral provision then one is inclined to question whether the former has had an independent effect. In contrast, in some cases (such as competition and state aid policy) there may be no comparable multilateral provision whose effects might shed light on the impact of a similar FTA provision.

Fourth, the focus of the research for this report was in the first instance on the quantitative impact of the selected FTA provisions. As will become clear, a number of qualitative claims have been advanced about the impact of some provisions in certain FTAs. Arguably, the latter are of some interest but such information (in many cases "evidence" may be too strong a word) has typically not been subject to the same degree of rigorous evaluation as is the norm in well executed econometric analyses. Nevertheless, it must be conceded that sometimes qualitative information confirming the implementation of a given FTA provision is, in fact, a pre-requisite for that FTA provision having an impact on socio-economic indicators of interest. Where the latter appears to be the case, mention is made of it in what follows.

Fifth, in the research for this report a broad view was taken of the possible effects of the selected FTA provisions. That is, the existing literature was searched for an evidence of effects of a wide range of economic and social indicators. Attention was, therefore, not confined to trade- or investment-related effects of FTA provisions. Finally, in the research for this report all possible types of empirical strategies were considered. That is, there was no prejudice applied in favour of papers using any one approach to empirical research (such as favouring econometric studies over those of computable general equilibrium models.)

The research done on the economic effects of such FTA provisions for this report was undertaken in a number of stages. First, a long list of electronic databases and other sources (including libraries) that are likely to include papers on the effects of the selected FTA provisions was assembled. This included the following databases: Econlit, JSTOR, the working paper series of SSRN, CEPR, NBER, the World Bank, the IMF, and the OECD, and ABI/Inform (a database of legal, business, and economic journal publications). Second,

searches of these databases were conducted for recent (that is, papers, books, or book chapters issued in the past 10 years) on each of the selected FTA provisions noted earlier.

Third, the resulting papers were read and those that contained statements or evidence on the effects of actual FTA provisions in the selected policy domains were set aside. It is important to stress that in many of the policy domains considered for this study there are numerous papers on the general relationship between trade or trade agreements and a given type of FTA provision, however the focus here is on those papers that speak directly to the impact of the FTA provision in question. Having said that some other papers, often those cited by many persons, were set aside also (as they may provide benchmarks and the like). Fourth, for each of the different types of selected FTA provisions, the papers set aside were re-read and the specific comments made about the relevant FTA provisions noted in tables. Fifth, a comparison of the evidence available for each relevant FTA provision was made. The findings from this five-step procedure were then written up using tables and text and presented in the sections that follow.

1.4. Procedures followed for the interviews with representatives of European civil society organisations.

The original purpose of conducting these interviews was to solicit from leading European civil society organisations, representing business, development, and social concerns, their views on the negotiating priorities for the EC as they relate to the five types of FTA provision selected for study here. The interviews also provided an opportunity for the report's authors to check whether there were interesting provisions in specific FTAs that civil society representatives thought were worth particular attention and whether there any empirical studies that they regarded as compelling evidence concerning the effectiveness of a given FTA provision. In these latter two respects, then, the interviews with civil society performed a use-

ful function in checking that the legal and economic research undertaken for this report had not overlooked any major points or findings. (As it turned out, this was not the case.)

The authors of this report compiled a list of European civil society organisations that might be interesting to interview. That list was augmented by suggestions from DG Trade and a total of 13 civil society organisations were contacted for interviews. In the event 9 interviews were conducted. Four such organisations did not respond either to the request for an interview or to a reminder email to that effect. It is not claimed that the list of civil society organisations chosen are a scientific or representative sample. Nevertheless, a wide range of views were expressed in the interviews.

The interviews took place over the telephone. The purpose of the interview and this report was explained, as was the fact that DG Trade was commissioning the report. In each interview the following three questions were asked about all five FTA provisions under study here:

- In forthcoming FTA negotiations with trading partners what should be the EC's negotiating objectives with respect to a given provision?
- Could any model provisions be identified that the EC should emulate in its future FTA negotiations? Alternatively, were there types of FTA provision that the EC should avoid?
- What, if any, compelling evidence about the effectiveness of a given FTA provision was known to the interviewee?

Not every interviewee felt comfortable answering questions about each of the five types of FTA identified for study in this report. The responses of the interviewees were collated in tables organised by FTA provision and are reported in the sections that follow. Some interviewees sent to the interviewer by electronic mail additional documentation. The documentation received was reviewed and listed in Annex 2 of this report. Each interview took

between 30-45 minutes to complete. Several of the interviewees expressed their gratitude that the EC had asked for these interviews to be conducted.

2. FTA provisions on labour standards.

2.1. Rationale and potential impact of FTA provisions on labour standards.

Few matters are more controversial in international trade circles than including labour-related provisions in trade agreements, be they bilateral, regional, or multilateral. By and large most international trade economists oppose the inclusion of labour provisions in trade agreements, and for good reasons.⁹ Moreover, as recent developments in the United States have demonstrated, the inclusion of labour standards in FTAs remains controversial in industrialised countries as well as developing countries.¹⁰ Without endorsing the positions that follow, the goal here is to briefly summarise some of the arguments made in favour of labour standards in FTAs and to identify their potential effects.

Flanagan¹¹ offers the following summary of one set of proponents' arguments in favour of including labour standards in trade agreements:

"One camp sees the adoption of labor standards proposed by the ILO¹² as an important mechanism for improving the condition of labor, particularly in developing countries, but at least implicitly acknowledges that such standards may raise production costs. This group therefore argues that countries that fail to adopt key labor standards acquire international competitive advantage over countries that ratify ILO standards and proposes WTO actions to curb purported advantages" (page 1).

If this view is accepted, and one is prepared to accept that a FTA with a major trading partner (such as the EU) could induce a developing country to adopt the ILO's labour standards, then a connection between labour provisions and adoption can in principle be estab-

9 See, for example, the careful surveys of the literature by Keith Maskus and Nirvikar Singh; Keith Maskus *Should Core Labor Standards be Imposed through International Trade Policy*, prepared for the World Bank, 1997 and Nirvikar Singh *The Impact of International Labor Standards: A Survey of Economic Theory*, Department of Economics, University of Santa Cruz, November 2001, and references contained therein (in particular the writings of T.N. Srinivasan.)

10 In May 2007 the US Administration came to an agreement with leaders of both parties in the US Congress that sought to facilitate the Congressional approval of two recently-negotiated US FTAs (with Peru and Panama.) As part of this agreement the US FTA with Peru would have to be renegotiated or amended so as to include stronger provisions on labour standards. Some have argued that the May 2007 will become the template for future US FTA provisions on labour, environment, and a number of other provisions.

11 R. J. Flanagan *Labor Standards and International Competitive Advantage*, Graduate School of Business, Stanford University. May 2002.

12 International Labour Organisation.

lished. Verifying that such a relationship existed, however, would require first careful study of the propensity to adopt ILO standards and, for a more comprehensive perspective, the propensity to adhere to those standards. Of course, implicit in this line of argument is the assumption that adherence to ILO standards will enhance labour market outcomes in developing countries. (This, of course, begs the question as to whether labour provisions in FTAs might directly target certain labour market outcomes of interest, such as the level of child labour, rather than focus on indirect indicators, such as ILO standards.)

Related to arguments about the apparent cost advantages from the non-adoption and non-compliance with ILO standards are those that emphasise the potential for a so-called race to the bottom in which a nation may feel competitive pressure to lower its labour standards in response to the labour standards adopted by trading partners. Much ink has been spilt by scholars and those interested in public policymaking on this hypothesis. It should be noted that, even though this hypothesis has been contested as an empirical and as a theoretical matter (see Singh's survey mentioned in footnote 9 above), this concern persists.

The presence of cross-border spillovers are typically necessary to motivate some form of international collective action and in the field of labour standards there are two types: consumption-related (consumers may be willing to pay less for products--and in the limit may potentially refuse to buy goods---not made using "acceptable" labour standards) or moral-related. Richard Freeman, in a series of writings, has considered the implications of consumption-related spillovers for the case for product labelling and for labour provisions in trade agreements.¹³ In contrast, Dani Rodrik has considered certain morals-related arguments. His arguments have been summarised as follows:

"that international labour standards are justified, based on cross-border externalities such as those associated with moral considerations. His argument is as follows. He notes that citizens of developed countries have agreed, as expressed in their countries' legislation, that certain production technologies are unacceptable domestically, because workers' rights or employment conditions

13 See, for example, Richard Freeman "A Hard-Headed Look at Labor Standards," US Department of Labor.

associated with those technologies are unacceptable. This proscription typically extends to all technologies within a country's jurisdictions, even if they involve noncitizens. Rodrik argues that importing goods from countries with unacceptably low labor standards is equivalent to importing foreign workers and allowing them to work under unacceptable conditions" (see Singh 2001; pp. 65 for commentary on the pros and cons of Rodrik's argument).

Even if there is a case for including labour standards in free trade agreements many have concerned themselves with how those standards might be enforced. Fears have been expressed that any sanctions-levying mechanism devoted to labour standards would be "captured" by protectionist influences (including potentially import-competing firms and the workers associated with them). Interestingly, there is some evidence that this fear may have been overblown, at least as far as the United States is concerned.¹⁴

Having described some of the motivations for including labour provisions in FTAs, the discussion now turns to the nature of such legal provisions and what is known about their empirical effects.

2.2. Comparative legal analysis of FTA provisions on labour standards.

The following legal analysis of FTA provisions on labour standards follows the methodology described in section 1.2.

2.2.1. The Preamble.¹⁵

The range of models identified within the FTAs surveyed includes both those without any statements on labour in the agreement's preamble and those with a preamble dedicated to labour in a side agreement on labour, such as in the NAFTA's NAALC, the Canada-Chile and Canada-Costa Rica FTAs. Those FTAs *between* Australia, NZ, Singapore, Japan, Malaysia,

¹⁴ See chapter 4 of *Can Labor Standards Improve Under Globalization?* by Kimberly Ann Elliott and Richard Freeman. Institute for International Economics. 2003. This particular chapter can be read online (but not downloaded) at http://www.petersoninstitute.org/publications/chapters_preview/338/4iie3322.pdf

Mexico, Korea, Philippines and EFTA do not have any statements on labour in the preamble. However, these countries include such statements when negotiating agreements with the US.

All agreements signed with the US have at least one reference to labour standards in the preamble. The weakest statements are those which link labour, environmental and social development issues together in one general statement (US-Singapore and US-Australia). The former does not mention enforcement of labour laws or levels of labour rights, while the US-Australia model refers to existing commitments to high standards of labour, without specifying what these are. The US-Morocco FTA goes slightly further than this, in both identifying ‘basic’ workers’ rights in addition to law enforcement.

<p>US-Singapore preamble: <i>Recognizing that economic development, social development, and environmental protection are interdependent and mutually reinforcing components of sustainable development, and that an open and non-discriminatory multilateral trading system can play a major role in achieving sustainable development.</i></p> <p>US-Australia preamble: <i>Implement this Agreement in a manner consistent with their commitment to high labour standards, sustainable development, and environmental protection.</i></p> <p>The US-Morocco preamble: <i>Desiring to strengthen the development and enforcement of labor and environmental laws and policies, promote basic workers’ rights and sustainable development, and implement this Agreement in a manner consistent with environmental protection and conservation.</i></p>

The preamble of the typical US FTA model includes one or more statements directed solely towards improving labour conditions. These statements can be weak, such as the US-Peru FTA which simply agrees to ‘improve’ labour conditions, without specifying standards or rights. The US-Bahrain and US-Oman agreements use identical language to underline their commitment to enforce basic workers’ rights and to strengthen labour law enforcement. The US-CAFTA-DR model has two separate statements on labour standards, including the enhancement and enforcement of ‘basic’ workers’ rights and conditions, as well as introducing an agreement to strengthen cooperation between the parties on labour matters.

15 See Table 1.

The strongest US preamble statements are put forward in the US-Jordan and the US-Chile agreements. These cover commitments to international labour standards and domestic labour law, in addition to increased cooperation in the effort to enhance of basic workers' rights, within the general agreement's preamble.

The other distinctive model is identified in those FTAs with a separate side agreement on labour (NAFTA, Canada-Chile and Canada-Costa Rica). These FTAs also contain statements on improving working conditions and enhancing cooperation on labour issues within the preamble to the general agreement. The text of the preamble in these three FTAs follows the statement on enforcing basic workers' rights set out in the NAFTA.

As with the general FTA preambles, the FTAs with dedicated labour side agreements that have preambles also mention increasing domestic labour rights and standards, in addition to respecting commitments to international labour standards and domestic law enforcement mechanisms. Nevertheless, while they are more detailed than the other FTAs, the statements' intentions go no further than those statements set out in the US-Chile FTA.

2.2.2. The scope of the labour provisions.

For most labour rights, a country is only obligated to observe the ILO standard if it has actually ratified the particular convention. Nevertheless, certain rights have been identified by the 1998 ILO Declaration on Fundamental Principles and Rights at Work (*ILO Declaration*) as 'fundamental rights' of all people; specifically,

- freedom of association,
- the right to organise and bargain collectively,
- non-discrimination in employment,
- freedom from forced labour,
- a minimum age of employment for children, and,
- eliminating the worst forms of child labour.

Each country must observe these fundamental rights, regardless of whether its government has ratified the relevant conventions and regardless of whether any FTA it enters into sets out these commitments. This must be borne in mind when assessing those FTAs that do not contain any provisions concerned with labour or working conditions (all EFTA bilaterals, Singapore-India, Japan-Malaysia, Korea-Singapore, NZ-Singapore, Australia-Thailand and Australia-Singapore). These FTAs without labour provisions are the same in this respect as those FTAs set out above without any labour statements in the preamble.

The set of labour provisions with the narrowest scope of application can be found in the Japan-Philippines FTA. This FTA subsumes labour issues within an investment and labour provision,¹⁶ which focuses solely on ‘not weakening’ domestic labour laws to encourage investment:

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

The use of the word *shall* is interpreted by courts to be stronger than the term *should*. This article is therefore legally binding and compels the parties to maintain their labour laws. Furthermore, these labour laws are defined within the agreement with specific reference to an ‘exhaustive’ list of internationally recognised labour standards; specifically,

- the right of association;
- the right to organise and bargain collectively;
- a prohibition on the use of any form of forced or compulsory labour;

16 Japan-Philippines Article 103.

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

The labour standards provisions of the EC-Chile FTA is incorporated within one general provision on social cooperation. Article 44:1 expresses commitment to relevant ILO conventions and topics including, but not limited to:

- 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.

The article states that the parties shall give priority to domestic measures aimed at *developing and modernising labour relations, working conditions, social welfare and employment security*.¹⁷ However, there are no further details or stipulations on how to promote or monitor these activities.

The scope of the US-Jordan FTA labour commitments is unusual. The relevant provisions are all incorporated into one article, which reaffirms the parties' commitment to the ILO Declaration and to ensure that these internationally recognised principles and labour rights are recognised and protected by domestic law. However, the obligations go further in stating (Article 6:4(a)), that:

A Party shall not fail to effectively enforce its domestic labour laws in a manner affecting trade between the Parties.

The use of the word *shall* gives the parties an obligation to enforce domestic labour laws which are based on international principles and standards. It also potentially links those

¹⁷ EC-Chile Article 44:4(c).

standards to an ‘affecting trade’ test within the agreement. As discussed below, this obligation is covered by the agreement’s general dispute settlement mechanism (DSM), should either of the parties fail to enforce its domestic commitments.

The most commonly used model (US-Australia, US-Bahrain, US-Oman, US-Chile, US-Peru and US-CAFTA-DR) incorporates labour provisions into the FTA within a separate chapter concerned only with labour. The scope of the provisions focus on implementing existing domestic labour laws, while explicitly reaffirming commitments to ensuring that these reflect the principles and rights recognised in the ILO Declaration noted above.

The final model that can be identified characterising the scope of application is the FTA with a separate side agreement on labour (NAFTA/NAALC, Canada – Chile/CCALC). However, the basic reference point for this model is also a commitment by the parties to enforce domestic labour law. The NAALC, for example, states that each party shall promote compliance with and effectively enforce its labour law through appropriate government action. Article 3 affirms the right of each party not only to establish its own domestic labour standards, but also to adopt or modify accordingly its labour laws and regulations.

The NAALC does explicitly recognise certain labour principles which are not included in the ILO Declaration, such as:

- prevention of occupational injuries and illnesses;
- compensation in cases of occupational injuries and illnesses; and
- protection of migrant workers.

The Canada-Costa Rica and the Canada-Chile FTAs replicate these principles, with the exception of the omission in the latter’s side agreement on the protection of migrant workers.

This assessment of the scope of the labour commitments can be usefully compared to the fundamental labour rights of the ILO noted above, which include as a fundamental right: the freedom from discrimination in employment based on race, gender, age or other character-

istics. The US FTAs do not contain labour provisions with such extensive non-discrimination rights. However, the US labour provisions do include additional rights with respect to minimum wages, hours, and health and safety, migrant workers' rights, and compensation for workplace injuries (also included in the NAALC and the CCALC). These rights are embedded into the US trade legislation and are a congressionally-mandated negotiating objective.

2.2.3. Labour institutions and agencies.

The institutions created to deal with the procedural issues related to the implementation of the agreements' labour commitments range from the incorporation model (found in the US-Singapore, US-Oman and US-Jordan FTAs) that subsumes labour regulation issues within the general supranational institution set up under the FTA - typically a Joint Committee - which administrates the entire agreement to a minimalist model consisting of an individual government official acting as a national contact point.

The weakest model identified is in the US-Morocco FTA. This includes a commitment from both parties to designate a domestic contact point at a national level within the labour ministry to implement the labour provisions attached to the agreement. Beyond this, there is little more than a voluntary option to convene a national labour advisory committee and to publish relevant reports 'where appropriate.' The US-Chile and US-CAFTA-DR FTAs, on the other hand, create a specific supranational labour affairs council or labour commission within the labour chapter to attend to the implementation of labour provisions contained in the agreement. This body should be recruited from cabinet level or equivalent. All decisions must be taken by consensus and should be made public along with any labour reports.

In both of the Canadian FTAs a supranational 'Ministerial Council,' comprised of the labour affairs ministers, was established to oversee and promote the implementation of the side agreement. The council is assisted by the National Secretariat of each party, which in turn may set up National Advisory committees. The Canada-Costa Rica agreement does not set out

a specific requirement for this Council to meet. NAFTA's NAALC sets out the most elaborate supranational structure in the Commission,¹⁸ which consists of a Ministerial Council and a Secretariat, aided by a National Administrative Office belonging to each party. The Council, comprised of labour ministers of the parties or their designees, must convene at least once a year in addition to special sessions requested by any of the parties

2.2.4. Dispute Settlement Mechanism.

The enforceability of labour provisions in the FTAs surveyed can also be arranged along a continuum. At one extreme the labour obligations are covered under the general dispute settlement mechanism and can therefore be viewed in the same light (and with the same level of enforceability) as the trade obligations in the agreement. At the other extreme the parties simply desire to comply with their domestic labour laws and policies, without any enforcement mechanisms to promote these objectives beyond this hortatory commitment. Between these extremes there is a model which provides for a set of remedies including fines and trade sanctions, but only in the event that a party persistently fails to comply with its domestic labour obligations.

A minimal but effective model of DSM covering labour regulation is set out in the Japan-Philippines FTA, discussed above. This incorporates labour issues under its investment provisions. If one party considers that the other has weakened its labour laws to encourage investment, it can request consultations with the other party with a view to avoiding any 'race to the bottom' in labour standards. A dispute arising under the labour and investment provision may be brought to the general dispute settlement mechanism (established under Chapter 15: 'Dispute Avoidance and Settlement'). An arbitral tribunal composed of an arbitrator from each party, who must both propose and agree to a third arbitrator to be the chair of the arbitral

18 NAALC Article 8.

tribunal. This chair cannot be a national of either party, nor have residence in either party, nor be employed by either party.

Should an arbitral tribunal confirm that a party has failed to comply with its obligations, the agreement provides that ultimately one party may temporarily, and subject to certain procedural restrictions, suspend its obligations to the other party arising under the agreement. This suspension must, where possible, be restricted to the same sector or sectors to which the impairment relates; in effect, only those where foreign direct investment has been sought.

The most common type of DSM is where the domestic labour laws set out in the FTAs studied here (and found in the US-Singapore, US-Morocco, US-Oman, US-Chile, US-Peru, US-CAFTA-DR FTAs) are subject to the agreement's general dispute settlement mechanism if they are:

'not effectively enforced, through a sustained or recurring action or inaction, and in a manner affecting trade between the Parties.'

Within this model, only governments can invoke the DSM; a party cannot provide private rights of action under its domestic law against the other party on the ground that a measure of the other party is inconsistent with this Agreement. These FTAs all include similar procedural guarantees within the labour chapter, which require that each party provides 'remedies' to the other party to ensure the enforcement of their rights under its labour laws. That is, each party ensures that the other parties implement their labour commitments or face various penalties. These are listed as remedies and include: orders, fines, penalties, or temporary workplace closures, depending on whether they are already provided for in the party's domestic laws. A specific provision is included concerning 'non-implementation in certain disputes', which states that if a resolution is not reached the complaining party may request that a panel is reconvened to impose an annual monetary assessment not exceeding 15 million US dollars annually. These monetary assessments are to be paid into a fund established by the Joint Committee for 'appropriate labour initiatives' such as efforts to improve or enhance law enforcement in the territory of the party complained against, consistent with its law. If the

complaining party cannot obtain the funds from the other party after a given time frame, ultimate measures include suspending tariff benefits under the agreement as is necessary only to collect the assessment.

The FTAs with separate labour side agreements (Canada-Chile, Canada-Costa Rica and NAFTA) also follow the general pattern of prohibiting a party from enforcing labour law in the territory of the other party. Similarly, private rights of action are not provided for under one party's domestic law against the other party on the grounds that it has not fulfilled its commitments under the labour agreement. The monetary enforcement assessment in the Canada-Chile agreement can be no larger than 10 million US dollars and must also be paid into a fund to improve or enhance the labour law enforcement in the party complained against. The amount of the fine must depend on factors including:

- the pervasiveness of the persistent pattern of failure to effectively enforce its labour standards,
- the level of enforcement reasonably be expected of a party given its resource constraints,
- the reasons provided for not fully implementing an action plan, and
- efforts made to remedy the pattern of non-enforcement since the final panel report.

The Canada-Costa Rica FTA is distinct because does not allow for monetary remedies or any measure affecting trade (Article 23.5). Instead, the complaining party may modify their cooperative activities listed in Article 12 to encourage the other party to remedy the persistent pattern of non-enforcement of labour laws. Some indicative cooperative activities include supporting seminars, conferences and training sessions, joint research projects, technical assistance.

The NAALC dispute settlement provisions provide the greatest rights of action by ensuring that anyone with a 'legally-recognized interest' should have access to tribunals for the enforcement of the party's domestic labour law (Article 4). The National Administrative Of-

fices (NAO) in each signatory's labour department receive and process submissions concerning non-enforcement of labour law in either of the two other countries. The NAOs are obliged to provide information, if requested, from any of the other NAOs and if necessary request ministerial consultations.

For complaints or disagreements involving the freedom of association, the right to bargain collectively, and the right to strike dispute settlement is confined to diplomatic avenues. That is, if diplomacy cannot resolve the dispute, no further action can be taken under the agreement. In cases of child labour; minimum employment standards and occupational safety and health, an ad hoc Evaluation Committee of Experts (ECE) appointed by the ministerial council (Article 23) can produce a report and recommendations for review by the ministerial council and if necessary appoint an arbitration tribunal. A persistent pattern of non-enforcement can ultimately result in fines to be paid into a fund to improve enforcement of labour law in the offending country. If these fines are not paid trade sanctions may be imposed. There is a cap set on fines and trade sanctions (the lower of either: 0.007% of the volume of trade between the two countries or 20 million US dollars). The procedural guarantees provision sets out a more extensive list of remedies including: orders, compliance agreements, fines, penalties, imprisonment, and injunctions or emergency workplace closures. The transparency provisions are also stronger, allowing third parties with a recognised interest to participate in consultations, while Council recommendations may be made public.

The US-Jordan FTA labour provision falls under the agreement's general DSM. This is potentially stronger than the other DSMs covered because ultimately it can allow for an independent supranational dispute settlement mechanism (Article 17.4(c)). Again, if the arbitral panel finds a failure, the complaining party may withdraw trade benefits or take other appropriate measures until the non-conforming party comes into compliance with its labour commitments.

2.2.5. Operational history and analysis.

This sub-section focuses on the functioning of these provisions as seen from a legal perspective. It therefore identifies potential and actual legislative and operational caveats.

In those FTAs with labour objectives or provisions, some create supranational agencies to monitor and implement the FTA's labour provisions. However, a significant caveat is that in all of these agreements, each party enforces the commitment to protect the agreed-upon labour rights in its own territory. None of the agreements creates a right of enforcement by one party within another party's territory.

This model of enforcement reflects the prevailing assumption of US negotiators that the primary challenge to be faced in the field of labour regulation is the enforcement, rather than the creation of domestic labour law. For example, the labour laws and constitutions of the CAFTA-DR countries are comparable to ILO core labour standards but governments have lacked the capacity to enforce their labour laws due to financial constraints. This has resulted in some beneficial legislative developments, such as the US FTAs placing more emphasis on capacity building and technical assistance in their agreements. For example, US Congress committed itself to contributing 20 million US dollars from the Fiscal Year 2005 Foreign Operations appropriations bill towards capacity building labour and environmental law enforcement in the CAFTA-DR countries.

As the first FTA to incorporate labour regulation issues in FTA negotiations, the NAFTA's labour side agreement (NAALC) was seen as a very positive regulatory development. It is now widely viewed to contain significant caveats. The NAALC is limited because it does not establish a set of international labour rights and standards but commits the signatories to enforce their national labour law. Nevertheless, as noted above, in some respects the NAALC labour principles go beyond the core labour rights embodied in the 1998 ILO Declaration and the NAALC calls on all three governments to improve performance regarding all these rights and standards. However, there is no enforceable obligation to do so. During the

NAFTA NAALC negotiations, the Mexican and Canadian parties refused to agree to any commitment to international standards. In Canada this was seen as a constitutional issue because most labour law is provincial. In Mexico, it has been argued that dominant labour unions lobbied successfully to protect their position against independent unions.

The NAALC also provides that a party does not violate its obligation to enforce its labour (and environmental) legislation if this represents a *bona fide* decision to allocate resources to other labour or environmental matters respectively.¹⁹ This provision is vague. Nevertheless it unequivocally applies to both the ‘setting’ of environmental and labour legislation as well as to its enforcement. This is a significant caveat because potentially, this provision could serve as a loophole to the agreement’s other obligations.

The NAALC’s DSM has a history of being an overly cumbersome, quasi-diplomatic enforcement procedure, which requires more than 30 months to reach the final stage. Notwithstanding this, the reciprocity of obligations included within this side agreement has led to complaints about US labour practices. This was unforeseen by many during the negotiations. Several NAO submissions have resulted in Ministerial Consultations. Most complaints have been allegations of failure to enforce the right to free association and organisation. It has been argued that the publicity achieved by these complaints has had positive repercussions for labour law enforcement generally in these countries.²⁰

The other FTA surveyed which is of particular interest is the US-Jordan agreement. This has stronger labour regulation because the relevant provision creates a right for either party to challenge an alleged failure by the other party to protect its’ citizens’ labour rights. Such challenges are resolved by referring the matter to a neutral, international dispute settlement panel, which determines whether the alleged failure did occur. If the panel finds a failure, the charging party may withdraw trade benefits from the delinquent party or take other

19 Article 45(1) NAAEC; Article 49(1) NAALC.

20 L. Compa. NAFTA’s Labor Side Accord: A Three-Year Accounting. NAFTA Law and Business Review of the Americas, Summer 1997.

appropriate measures until the delinquent party comes into compliance with its labour commitments, normally by improving the enforcement of its labour laws.

A significant caveat of the agreement is that it provides for a high threshold to initiate a review of labour rights issues. That is, any violation must take place ‘in a manner affecting trade between the parties.’ While third parties may not petition the governments to initiate a review of the alleged violation, they may submit relevant information, or amicus curiae briefs, during the review.

Additionally, it has been documented that the US and Jordan agreed, in an exchange of letters, that disputes concerning the labour provisions of the agreement shall not result in the imposition of sanctions.²¹

Notwithstanding this, the US-Jordan FTA states that the parties shall ‘strive to ensure’ that fundamental ILO labour rights are protected. This is more than a hortatory commitment if it is compared to the US-Chile and US-Singapore FTAs, for example. These latter agreements make a similar commitment that is subsequently explicitly excluded from the possibility of dispute settlement proceedings should a party fail to enforce that international commitment.

A number of the FTAs surveyed do not include any reference to labour standards or any regulation of labour. This group of FTAs notably include Australia, and the EFTA and Asian countries. Australia has most notably been vocal about the misuse of labour laws in FTAs for economic protectionism. The absence of labour standards or provisions need not reflect on the level of domestic labour protection of a party. For example, Australia has been a member of the ILO since 1919 and has ratified 57 conventions, the US became a member in 1934 (with a break between 1977 and 1980), and has ratified only 14 conventions.²²

In those agreements which include labour provisions, there are legal means for third parties to complain if a party has not made efforts to enforce domestic labour law. In all the

21 M. Trebilcock & R Howse. *The regulation of international trade*. Routledge 2005. p578.

22 Source: ILOLEX - 7. 3. 2007.

FTAs examined, domestic labour law has referenced the international labour principles and rights set out in the ILO Declaration. Additionally, those agreements which allow for ‘interested parties’ to have access to the DSM do not define ‘interested parties.’ This may exclude those parties without legal standing in the domestic legal system of the allegedly non-compliant party.

The chronological pattern of the US FTAs can be seen in two distinct phases. The US-Jordan FTA tends to be viewed as a “Clinton” era FTA, while the later US FTAs, such as the US-CAFTA-DR agreement are identified with the second Bush presidency. While both models are based on the domestic enforcement model, the dispute settlement mechanisms differ: within the Clinton model the labour commitments were subject to the same dispute settlement mechanism as the trade obligations. The enforcement of labour standards were therefore viewed as equivalent to investment or intellectual property commitments. The FTAs negotiated under the Bush administration, on the other hand, created a different DSM for labour provisions, which covered only one article: the obligation to enforce domestic labour laws effectively. This significantly weakens the emphasis placed on improving labour conditions. Notwithstanding this, the Bush FTA model provides workers, who believe their rights have been violated, access to an independent tribunal in addition and increases the transparency and accountability of the judicial process through open hearings, for instance. The cooperation, capacity building and technical assistance provisions are also greater under the Bush FTA model.

2.2.6. Taxonomy of labour provisions in FTAs.

Table 1 provides a taxonomy of the different types of labour provisions in the FTAs selected for this study. It is noteworthy that 13 such FTAs contain no labour-related provisions at all; signatories to these FTAs tend to include at least one nation from the Asia-Pacific. FTAs with Canada or the United States as signatories include labour provisions in

FTAs. Where obligations to enforce national labour laws are in place, they have been coupled with dispute settlement mechanisms, although as the foregoing text noted these vary markedly across FTAs, as does the nature of remedies.

Table 1: Selected aspects of Labour Provisions in FTAs.

FTA	Year	Preamble	ILO Declaration	Labour & Investment	Level of Protection	DSM	Remedies ²³	Private Access ²⁴	Agency ²⁵
Aus-Sin	2003								
Aus-Tha	2004								
Sin-NZ	2000								
Sin-Kor	2005								
Sin-Ind	2006								
Can-Chi	1996	WTO+ ²⁶	ILO+ ²⁷	✓	Domestic	✓	✓	Domestic	✓ ²⁸
Can-Cos	2002								
Chi-EU	2002		✓		Domestic				
Chi-Efta	2003								
Efta-Mex	2000								
Efta-Sin	2002								
Efta-Kor	2005								
Jap-Sin	2002								
Jap-Mex	2004								
Jap-Mal	2005								
Jap-Phil	2006		✓ ²⁹	✓ ³⁰	Domestic	✓	✓	Domestic	
NAFTA	1993	WTO+	ILO+ ³¹	✓	Domestic	✓	✓	Domestic	✓ ³²
US-Jor	2000	WTO+	✓	✓ ³³	Domestic	✓	✓	Domestic	

23 Remedies are payments or actions ordered by a court as settlement of a dispute. Remedies most commonly comprise of damages - a payment of money.

24 Private access refs to the rights of non governmental actors to access the dispute settlement mechanism.

25 This definition of ‘agency’ does not include a national contact point.

26 The GATT/WTO preamble language refers solely to raising standards of living and ensuring full employment. Thus an RTA preamble statement that refers to anything beyond this, such as strengthening labour standards, goes beyond the WTO preamble and can therefore be considered to be WTO+.

27 This agreement includes: a) minimum employment standards; b) prevention of occupational injuries and illnesses; and c) compensation in cases of occupational injuries or illnesses - in addition to the Fundamental Principles and Rights at Work included in the ILO Declaration.

28 Article 9:1: provides that: ‘There shall be a Ministerial Council that comprises Ministers responsible for labour affairs of the Parties or their designees.’

29 This agreement does not specifically mention the ILO rather: ‘internationally recognized labour rights.’

30 Japan-Philippines Article 103 states: ‘The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in paragraph 2 below as an encouragement for the establishment, acquisition, expansion or retention of an investment in its Area. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the Parties shall consult with a view to avoiding any such encouragement.’

31 In addition to the ten labour rights affirmed in the Canada-Chile Agreement, NAFTA’s NAALC also provides for equal protection for migrant workers.

32 NAALC Article 8 states that: ‘The Parties establish the Commission for Labor Cooperation, comprising of a ministerial Council and a Secretariat and assisted by the National Administrative Office of each Party.’

FTA	Year	Preamble	ILO Declaration	Labour & Investment	Level of Protection	DSM	Remedies ²³	Private Access ²⁴	Agency ²⁵
US-Sin	2003	WTO ³⁴	✓	✓ ³⁵	Domestic	✓	✓	Domestic	
US-Chi	2003	WTO+	✓	✓ ³⁶	Domestic	✓	✓	Domestic	✓ ³⁷
US-Mor	2004	WTO+	✓	✓ ³⁸	Domestic	✓	✓	Domestic	✓ ³⁹
US-Cafta-Dr	2004	WTO+	✓	✓ ⁴⁰	Domestic	✓	✓	Domestic	✓ ⁴¹
US-Aus	2004	WTO+	✓	✓ ⁴²	Domestic	✓	✓		
US-Bah	2004	WTO+	✓	✓ ⁴³	Domestic	✓	✓	Domestic	
US-	2006	WTO+	✓	✓ ⁴⁴	Domestic	✓	✓	Domestic	✓ ⁴⁵

33 Article 6.2 states that ‘The Parties recognize that it is inappropriate to encourage trade by relaxing domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws as an encouragement for trade with the other Party.’

34 Follows GATT/WTO preamble language referring solely to raising standards of living and ensuring full employment.

35 Article 17.2.2. is similar to Japan-Philippines *op cit* 3.

36 Article 18.2.2 is similar to Japan-Philippines *op cit* 3.

37 Article 18.4 *provides that* ‘The Parties hereby establish a Labor Affairs Council, comprising cabinet-level or equivalent representatives of the Parties, or their designees.’

38 Article 16.2.2. is similar to Japan-Philippines *op cit* 3. 07767336958

39 US-Morocco *Article 16.4* ‘Each Party shall designate an office within its labor ministry that shall serve as a contact point with the other Party and the public for purposes of implementing this Chapter.’

40 Article 16.2.2 is similar to Japan Philippines *op cit* 3.

41 Article 16.4 is similar to the US-Morocco provision *op cit* 11.

42 Article 18.2.2 is similar to Japan Philippines *op cit* 3.

43 Article 15.2.2 is similar to Japan Philippines *op cit* 3.

FTA	Year	Preamble	ILO Declaration	Labour & Investment	Level of Protection	DSM	Remedies ²³	Private Access ²⁴	Agency ²⁵
Oman									
US-Peru	2006	WTO+	✓	✓ ⁴⁶	Domestic	✓	✓	Domestic	✓ ⁴⁷

44 Article 16.2.2 is similar to Japan Philippines *op cit* 3.

45 Article 16.4.2 is similar to US-Morocco *op cit* 14.

46 Article 17.2.2 is similar to Japan Philippines *op cit* 3.

47 Article 17.4:1 states that ‘The Parties hereby establish a Labor Affairs Council (Council) comprising cabinet-level or equivalent representatives of the Parties, who may be represented on the Council by their deputies or high-level designees.’

2.3. Overview of published assessments of the impact of FTA provisions on labour standards.

Searches of existing databases found nine papers that referred to FTA provisions in labour standards (see Table 2). Seven of those nine papers make explicit reference to the effects of the labour-related provisions of certain FTAs (see Table 3). Particular attention is given in the extant literature to assessing the effectiveness of the North American Agreement on Labor Cooperation (NAALC). In all but one case, this Agreement is found wanting and reasons for its apparent ineffectiveness are listed in Table 3. In contrast, some have argued that the combination of incentives and monitoring provided for by the US-Cambodia bilateral textile agreement has improved labour standards in the relevant sector in Cambodia and has been cost-effective. As Cambodia is a Least Developed Country this latter experience may be of interest, although questions as to whether this initiative can be "scaled up" to the national level may arise. One study argued that the implied or actual threat of GSP-withdrawal had greater effects on those developing countries with higher shares of exports to the US covered by the GSP scheme. These findings, which are not supported by traditional statistical analysis, do suggest that "trade opportunities" matter. If one were to pursue the implication of this finding for FTA negotiations then it may well imply linking or conditioning the current degree of trade opportunities given to a trading partner of the EU to various labour market indicators.

It is disturbing that not a single econometric or empirical study could be found in the research conducted for this report. Moreover, the claims reported above about the effectiveness of certain bilateral trade agreements did not cite econometric or empirical analyses in support of their conclusions. In the case of the NAALC this may not have been necessary, as the critique of its operation is principally institutional and design-specific. However, it still leaves open the interesting question as to whether labour standards improved in the NAFTA countries because of the threat of the use of the NAALC dispute provisions, at least in the early years (when it may not have been apparent that these provisions were toothless.) More-

over, in the case of the US-Cambodia bilateral textile agreement surely it is important to know if factors that had nothing to do with this agreement were responsible for an observed improvements in labour standards (or any tendency to avoid deteriorating labour standards) in the Cambodian textile sector?

Lastly, Kolben (2006) contains an informative account of the sources of the opposition in India to so-called workers' rights clauses.

Table 2: Papers relating to labour provisions in FTAs.

Author(s)	Year	Title	Source
Alston, Philip	2004	'Core Labour Standards' and the Transformation of the International Labour Rights Regime.	European Journal of International Law Vol. 15(3), 2004.
Brown, Drusilla K.	2001	Child Labour in Latin America: Policy and Evidence.	The World Economy, Vol. 24(6), June 2001.
Elliot, Kimberly Ann, and Richard Freeman.	2003	Can Labor Standards Improve Under Globalization? Chapter 4 in particular.	Institute for International Economics.
Greven, Thomas	2005	Social Standards in Bilateral and Regional Trade and Investment Agreements.	Friedrich Ebert Stiftung, Dialogue on Globalization, Occasional Papers No. 16, March 2005, Geneva.
Griego, Eric	1998	International Labor Standards and Hemispheric Integration: Evaluating the North American Experience.	Prepared for the delivery at the 1998 meeting of the Latin American Studies Association, Chicago, September 24-26, 1998.
Kolben, Kevin	2006	The New Politics of Linkage: India's Opposition to the Workers' Rights Clause.	Indiana Journal of Global Legal Studies Vol. 13(30).
OECD	2000	International Trade and Core Labour Standards.	OECD.
Polaski, Sandra.	2004	"Protecting Labor Rights Through Trade Agreements: An Analytical Guide".	<i>Journal of International Law and Policy.</i>
Tsogas, George	2000	Labour Regulation in Regional Trade Agreements: A Comparative Analysis of NAFTA and the European Union.	Management Research News Vol. 23(9/10/11)

Table 3: Comments on the effects of labour provisions in FTAs and other remarks of potential interest.

Author(s)	Year	Comments on the effects of labour provisions in FTA.	Other remarks of potential interest.
Alston, Philip	2004	<ul style="list-style-type: none"> • Provides an extensive discussion of the North American Agreement on Labor Cooperation (NAALC), arguing at first that the "basic institutional design has been challenged from the outset" (page 500). Describes reports on this Agreement's operation by Human Rights Watch (which pointed to five serious problems) and the Congressional Research Service (which argued that compliance with its provisions were voluntary) (page 501). Cites a particularly damning later (2004) Human Rights Watch report which attributed problems with the Agreement to its initial design, to lack of political will, and a refusal to engage worker representatives in discussions on pertinent matters relating to the Agreement (page 501). • Only qualitative evidence presented. 	<ul style="list-style-type: none"> • Identifies seven mistakes in the "NAFTA" approach to trade and labour standards (page 502ff). In a subsection titled "Drawing Lessons from NAFTA" he argues: <p>"The challenge for the purposes of the present analysis is to identify lessons to be drawn from this experience. There are several, and it must be conceded that they are not necessarily all compatible with one another. First, the agreement on 11 key labour standards in this context raises serious questions about the justifications invoked for including only four standards among the core group in the 1998 Declaration. This discrepancy is all the more striking given the criticism of the NAALC itself as being unduly restrictive of labour rights already recognized in other international agreements such as the Convention on the Elimination of All Forms of Discrimination against Women. Second, the extent to which safety and health issues have been raised in the NAALC context underscores the inappropriateness of excluding them from the CLS list. Third, reliance upon national law and a failure to spell out any relationship to international standards are a recipe for inaction. The NAALC's failure to spell out what is meant by the 'principles' it recognizes, or to require any changes in national laws to meet specific international standards is one of the reasons cited by most commentators for its inefficacy. Fourth, arrangements which are applied as though their essential purpose is to facilitate dialogue are highly unlikely to be very effective in the absence of a range of additional measures designed to ensure broad-based participation, and to make it worth the while for individuals and non-state actors to invest an effort in the process. Fifth, in so far as an authentic dispute mechanism is to be provided for, there is much to be said for setting up a permanent impartial tribunal which is able to rise above the self-interest of the parties in facilitating trade. Sixth, if consequences are going to attach to violations of the standards set and dialogue proves inadequate to resolve the difference, any system of sanctions needs to be embedded within a broader and more constructive set of arrangements which also includes incentives. Seventh, the inclusion of labour provisions in an entirely separate</p>

Author(s)	Year	Comments on the effects of labour provisions in FTA.	Other remarks of potential interest.
			<p>arrangement from the principal trade agreement is unlikely, in the absence of an effective and independent monitoring scheme, to lead to the imposition of any sanctions or other measures which would underscore the seriousness of the commitment to labour rights. And eighth, the involvement of non-state actors needs to be made authentic and meaningful if such procedures are to work. Reliance upon inter-state complaints, or any variation thereon, is a method of enforcement which has proved notoriously unsatisfactory in the human rights field, with important mechanisms under the International Covenant on Civil and Political Rights remaining totally dormant, and comparable procedures under the regional human rights conventions having yielded remarkably few complaints."</p> <ul style="list-style-type: none"> • Discusses the labour provisions in the US-Jordan FTA and in subsequent FTAs. Notes criticism of the former FTA's labour provisions as only applying if trade between the two parties is affected, pointing out that labour standards could fall without international commerce changing (page 503ff).
Brown, Drusilla K.	2001		<ul style="list-style-type: none"> • Provides a neat overview of the latest research findings on the determinants of child labour (section 3) and recent measures taken to reduce the use of child labour in developing countries (section 4). None of the determinants are particularly directly influenced by provisions in trade agreements (e.g. quality of schools). Argues that an interesting feature of domestic programmes to reduce child labour is that they involve incentives and are not punitive. Notes that sanctions allowed for in certain provisions of trade agreements are punitive and, by implication, less likely to be effective (page 778).
Elliott and Freeman	2003	<ul style="list-style-type: none"> • Provides a purely qualitative evaluation of the pros and 	<ul style="list-style-type: none"> • Considered the impact of GSP schemes conditionality

Author(s)	Year	Comments on the effects of labour provisions in FTA.	Other remarks of potential interest.
		<p>cons of five different approaches to linking labour and trade, four of which are directly FTA-related (page 85).</p>	<p>on measures of workers rights. Argues that the more GSP-covered trade there is between the US and a developing country the more likely the threat of GSP withdrawal will lead to improvements in worker rights (page 76).</p>
Greven, Thomas	2005	<ul style="list-style-type: none"> • Reviews the experience of labour provisions in US FTAs and bilateral initiatives and questions, with the exception of the FTA with Jordan and the bilateral textile agreement with Cambodia, "whether any true progress has been made in enforceable labor rights" (page 34). Most of the provisions are said to be aspirational and the enforcement provisions are weak (page 35). • Particularly harsh criticism of the North American Agreement on Labor Cooperation (NAALC) and notes "without exception, all studies come to fairly negative conclusions as far as tangible results of the submissions are concerned" (page 35). Notes that some German scholars have argued that this Agreement was "designed to fail" (page 36). • The author notes that labour provisions in FTAs are likely to fail unless there is a domestic constituency in each signatory that can make use of the provisions. These constituencies could include trade unions, NGOs etc. and there is no reason to suppose that such groups are absent from all developing countries. The author cites Polaski⁴⁸, who argues that the information exchange, technical assistance, cross-border workshops, public hearings, and cooperation and capacity building 	<ul style="list-style-type: none"> • In the absence of progress at the multilateral level on the linkage between trade and labour provisions, the author argues that pursuing provisions in FTAs are a second best option. Moreover, it is argued that this will improve the "quality of regional governance" (whatever that means) (page 3). • Describes and discusses the effectiveness of unilateral labour rights instruments, such as those contained in the US and EU GSP regimes, in section 3. Argues that "Even the threat of a loss of benefits for a significant part of the export sector can compel governments to act on labor rights" (page 11). Notes that the threat of withdrawal of GSP provisions was undermined by the reluctance of various US administrations to take that step. • Argues that the claims made of a race-to-the-bottom of labour standards needs to be studied further (page 46). • Argues that fears of a protectionist backlash and "isolationist right-wing extremism", along with economic arguments concerning the effect of falling wages on the level of aggregate demand, "may" convince policymakers and business people of the need to adopt in-

48 S. Polaski. "Protecting Labor Rights Through Trade Agreements: An Analytical Guide" in: Journal of International Law and Policy. 2004.

Author(s)	Year	Comments on the effects of labour provisions in FTA.	Other remarks of potential interest.
		<p>that result from allegations linked to the possibility of sanctions have improved labour conditions in Mexico, and so the NAALC "is not without its successes" (page 38). The evidence cited here refers to workers and unions have access to certain legal processes and not to improved labour market outcomes.</p> <ul style="list-style-type: none"> • Notes that the US administration of George W. Bush wrote to the Jordanian authorities after the signing of those countries' FTA to say that sanctions would not be used to enforce the labour provisions. The author argues that some have said this step undermined the very impact of the original labour provisions in the FTA (page 39). • Provides a detailed account of the incentives to maintain and improve labour standards in the Cambodian textile sector that followed from the US-Cambodia textile agreement. Notes that the US has invested US\$2m in this scheme over five year, an amount equivalent to an annual cost per worker of \$3.50. Cites an author, who argues that this programme was "arguably the best investment the United States has ever made in promoting international labor rights" (page 40). • Only qualitative arguments presented. 	<p>ternational labour standards in trade agreements (page 47).</p> <ul style="list-style-type: none"> • The author sees little value of labour provisions in FTAs if other significant provisions in those FTAs result in lower demand for labour and worsen conditions for workers (page 47). • The author proposes a model based on incentives and sanctions, like the US-Cambodia bilateral textile agreement. Also argues that non-state actors should be able to trigger disputes (page 48).
Griego, Eric	1998	<ul style="list-style-type: none"> • Paper written by a member of the secretariat of the North American Agreement on Labor Cooperation (NAALC). Reports three distinctive views of the effectiveness of this agreement and urges readers to take into account that it has taken several years to set up the appropriate international secretariat and the relevant bodies in each signatory country. 	

Author(s)	Year	Comments on the effects of labour provisions in FTA.	Other remarks of potential interest.
		<ul style="list-style-type: none"> • Only qualitative arguments presented. 	
Kolben, Kevin	2006	<ul style="list-style-type: none"> • Notes that the provisions of the North American Agreement on Labor Cooperation (NAALC), a side agreement of NAFTA, have come under "tremendous" critique. "...many now agree that its provisions are too weak, poorly designed, and do not serve as a good model for linkage" (page 8). Notes many petitions for relief under these provisions have not met with success. • "Yet despite their weaknesses in practice, bilateral and regional agreements have the advantage of being politically negotiated agreements that have the direct consent of their signatories. Because they are negotiated in a specific context, they provide an opportunity to avoid "one-size-fits-all" solutions to the linkage question, and allow for more varied and experimental approaches to protecting workers' rights" (page 8). • Only qualitative arguments presented. 	<ul style="list-style-type: none"> • Describes arguments advanced in favour of labour standards in trade agreements (not just FTAs), page 3. • Documents in section II the various sources of opposition in India to what the author refers to as workers' rights clauses. Notes there are three types of critique (page 20). • Notes that in India a high percentage of the workforce operates in the informal sector, which typically produces for the domestic market. Wonders what leverage is produced by threatening with sanctions (for any potential future workers rights violations) the 10 million or so (a small proportion of India's labour force) who work in export sectors. Argues that if the export sector alone felt compelled to comply with a workers rights clause then this "would not have a significant impact on the vast majority of Indian workers" (page 32). • Recommends that any linkage between trade and labour be based on incentives, not sanctions. Moreover, state-to-state approaches need to be complemented by monitoring by non-state bodies, such as NGOs. The ILO should be given a prominent role in devising any linkage scheme (page 34). • Cited the bilateral agreement on textiles between the USA and Cambodia as containing the appropriate balance of incentives and monitoring (page 35).

OECD	2000		<ul style="list-style-type: none"> • Well cited OECD report on the interrelationships between trade and labour standards. • Reports existing evidence on the relationship between labour standards and trade and FDI performance in part II. In one study (by Palley) freedom of association is associated with a 1.2-1.4 percent faster national economic growth rate. A study by Rodrik tends to show that adherence to labour standards do not statistically significantly influence the comparative advantage of a nation.⁴⁹ Argues (page 34) there is "no robust evidence that low-standard countries provide a haven for foreign firms". • Reviews from page 61 onwards the labour-related provisions of various FTAs, but provides no assessment of their effectiveness. (Indeed in the concluding remarks the study argues that the experience since 1996 is too recent to draw any policy recommendations). There is insufficient information presented here to provide the basis for a typology or assessment of best-practices.
Polaski, Sandra	2004	<ul style="list-style-type: none"> • Argues that the US-Cambodia Textile Agreement was successful in improving wages, working conditions, and respect for workers' rights (page 9). Argues that the nine percent annual expansions in the US quota for imports of textiles for Cambodia was the cause of this improvement but provides no evidence to support this contention. 	Analyses a number of US initiatives, including FTAs, which have labour provisions in them. Argues in the conclusion that "No one model has yet emerged as a single template for future agreements, but some approaches stand out for their achievements or compelling logic."
Tsogas, George	2000	<ul style="list-style-type: none"> • Argues that the Social Charter, adopted by EU member states, has "served its historic purpose" (page 148). "It 	

⁴⁹ Note this study does not examine the impact of labour-related trade provision.

		<p>has established a Europe-wide discussion of labour rights and social issues when such rights were under threat, all over the continent" (page 148). Also argues that a new supranational "tier" has been added to the industrial relations system within Europe (page 149).</p> <ul style="list-style-type: none">• Contrasts EU experience with that of the North American Agreement on Labor Cooperation (NAALC), arguing that it has a narrow scope and is ineffective (page 149). Overall a very negative assessment of the first few years of operation of the NAALC (page 149).• Only qualitative assessments offered.	
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2.4. Overview of civil society comments concerning various aspects of FTA provisions on labour standards.

Seven civil society organisations opined on various aspects of potential provisions on labour standards in the EU's new FTAs. Their responses are summarised in Table 4. There is a clear divergence of view as to the desirability of these provisions between organisations representing various elements of European business and other civil society organisations. While in support of international standards and obligations on labour policy matters, the former's representatives tended to regard labour standards and associated matters as domestic policy and, so the argument went, unsuitable for inclusion in FTAs. There was some support from business organisations for an incentive-based approach. The overwhelming fear, however, of these representatives was that the EC might make concessions on market access-related aspects of a FTA negotiation (in terms of coverage, exceptions, and implementation periods) in return for concessions from trading partners on labour provisions. In their view, perhaps unsurprisingly, the commercial benefits of a FTA should take priority. One representative feared that the forthcoming FTA negotiation with India might be jeopardised by any EC demands concerning the inclusion of labour provisions.

Representatives of trade unions and development-oriented civil society organisations took a markedly different view. One called for parity across provisions in FTAs, thereby arguing that any labour provisions should fall under the dispute settlement mechanism of the FTA and that trade sanctions could, in principle, be applied to a signatory. Another representative was concerned that labour standards would provide a protectionist pretext for sanctions being imposed on developing countries by the EC. To prevent this from happening while retaining the labour provision, compliance with the latter should be assessed by a body independent of the FTA signatories. (The ILO was suggested as such a body.) Some business association representatives were willing to concede that there were certain circumstances under which trade sanctions could be applied for labour standard violations.

Table 4: Summary of civil society comments on FTA provisions on labour standards.

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
<p>Mr. Michel Bricout Director, Trade & Economics European Automobiles Manufacturers' Association</p>	<ol style="list-style-type: none"> 1. Emphasised his organisation's desire to see "good behaviour" on the part of nations with respect to their labour standards. 2. Did not believe that provisions on labour standards should "pollute" the economic aspects of FTAs (which he defined as being those relating to market access.) 3. Noted that including labour provisions could jeopardise the FTA negotiations with some trading partners. 4. FTAs should not focus on political matters or internal policies. 5. When asked, he stated a preference for incentive-based approaches over sanctions-based approaches to labour standard matters. 		
<p>Dr. Guido Glania Director of International Trade Policy, Federation of German Industries (BDI)</p>	<ol style="list-style-type: none"> 1. These provisions are not a priority. They should not be part of FTAs as (i) they distract from the "hard core" market access issues and bargaining thereover, (ii) they should be part of partnership agreements etc, and (iii) otherwise they should be dealt with at the International Labour Organization. 		
<p>Mr. James Howard Director, Economic and Social Policy International Trade Union Confederation</p>	<ol style="list-style-type: none"> 1. Provisions to adhere to the principles of decent work and to core international labour standards should be on the same basis as other provisions in the FTA, and therefore should have undiluted access to dispute settlement provisions and to any associated sanctions. 2. Interested parties (including social parties) should have rights to 	<ol style="list-style-type: none"> 1. There are no model agreements on this topic. Having said that, the US-Jordan FTA contains some good features. 	<ol style="list-style-type: none"> 1. There is none--not least because FTA provisions on these matters are relatively new. 2. The US-Cambodia

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	<p>raise cases on a formal basis. Any complaints must be taken up and examined in a timely basis.</p> <ol style="list-style-type: none"> 3. Incentives can be part of a package of provisions on labour standards, but should not be the only component. Sector-specific or company-specific incentives and other measures should be possible, to allow for specific targeting of concerns etc. 4. A single contact point should be established in signatories where information, regulations, complaints, etc can be dealt with. The contact point could be an agency in the national government or a joint body of the FTA signatories. 5. In general there should be provisions on consultations with social partners on these matters, just as there are in the EU treaty. 	<ol style="list-style-type: none"> 2. Any provisions on labour standards in FTA negotiated by the current Bush Administration should be avoided, in particular the use of hortatory standards and delinking from sanctions. 3. The EU-Mexico is another bad FTA in this respect as it contains no provisions on labour standards. 	<p>textile agreements, which linked incentives (access to the US market) to compliance with labour standards, has been evaluated and praised in some studies. With the demise of the MFA the specific incentives used here cannot be replicated.</p>
<p>Ms. Emily Jones Policy Advisor-- Economic Justice Oxfam GB</p>	<ol style="list-style-type: none"> 1. Subject to the remarks below about the nature of the enforcement of any labour standards provisions, FTAs should enforceable commitments by governments to protect and promote core labour standards, as set down in the ILO's Declaration on Fundamental Principles and Rights at Work, and commitments to extend this progressively to cover workers, particularly women, in precarious employment. 2. A body, formally independent of the FTA signatories, should establish if there have been any systematic abuses of ILO standards (and therefore of the FTA provisions). Only that body 	<ol style="list-style-type: none"> 1. The labour-related clauses in NAFTA and associated side letters have been ineffective. 2. In contrast the US-Cambodia agreement on labour standards in the textile industry offers 	<p>Polaski (2004) provides useful evidence in support of the effectiveness of appropriately structured labour provisions (in fact, about the US-Cambodia agreement on labour standards in the textile industry.)</p>

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	<p>would decide whether sanctions could be imposed. The independent nature of the body, which could be the ILO, is to ensure that sanctions are not imposed for reasons unrelated to labour standard violations, such as protectionism.</p>	<p>an interesting model.</p>	
<p>Mr. Francesco Marchi Director of Economic Affairs The European Apparel and Textile Organisation (EURATEX)</p>	<ol style="list-style-type: none"> 1. Industry supports the ILO Conventions and their enactment and implementation in national legislation. 2. Concerns were raised as to whether including provisions on labour standards in FTAs was a priority. Fears were expressed that such provisions could prove to be a stumbling point in FTA negotiations, in particular in the case of India. 		
<p>Mr. Nick Miller Senior Trade Policy Adviser Confederation of British Industry (CBI)</p>	<ol style="list-style-type: none"> 1. There is no need for substantive provisions on labour standards in FTAs. A commitment to comply with ILO Conventions etc is fine but, in general, these matters should be dealt with at the ILO. 2. The current shift away from a sanctions-based approach is appropriate. Sanctions should only be invoked in cases of the most egregious human rights abuses. 		
<p>Prof. Dr. Reinhard Quick Verband der Chemischen Industrie e. V. (VCI) Vice Chairman UNICE WTO Work-</p>	<ol style="list-style-type: none"> 1. As a general principle one should be careful that negotiating objectives in this area (and in the environment and competition policy for that matter) do not detract from the liberalisation of goods and services markets. It would be unfortunate if the EC's FTA partners were able to trade-off liberalisation (through exemptions and longer transition periods) because they have taken on labour standards. The overall goal of the FTA negotiation 		

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
ing Group	<p>should be to liberalise all tariffs on industrial products in 10 years.</p> <ol style="list-style-type: none"> 2. Any obligations on labour standards should be genuinely jointly agreed; these obligations should not be imposed by any one party or forced on to another party. Once agreed, however, any obligations should be enforceable through sanctions. 3. In terms of substantive provisions promoting and ensuring adherence to the ILO conventions is a legitimate objective. If fundamental rights are broken then it is appropriate to apply sanctions. 		

2.5. Remarks on resource implications of labour standards provisions.

Inclusion of labour standard provisions in a FTA may have implementation-related resource implications for signatories. The more general implications for national resource allocation, say, of labour standards on wages and export performance may well be important but is not the focus of this sub-section. The potential human and financial resources associated with the implementation of labour standard provisions is the focus here. Two important determinants of the latter are the nature of labour standards provisions included in a FTA and the labour force-related policies and enforcement priorities of the signatories at the time the FTA is negotiated. In particular, what matters is whether the former are more stringent than the latter in any of the signatories and the steps necessary to bring such signatories into compliance. To be more specific, the following four matters could have resource implications for FTA signatories:

- Establishing new labour policies, legislation, and regulations and disseminating the implications of the new policies to producers and workers' representatives, including rights;
- Establishing and maintaining capacity to monitor and enforce current and any additional labour regulations;
- Establishing and maintaining any national contact points specified in a FTA;
- Establishing and participating in any national, inter-governmental, or independent international procedure, body, or mechanism to hear and resolve disputes concerning labour policy matters between the signatories.

The principal expertise required here relates to labour law, both domestic and international (the latter as it relates to the interpretation of international conventions and the relevant provisions of the FTA).

Whether new governmental institutions need to be established is another important matter. Here much will depend on the nature of any institutions in place, whether any new

regulatory responsibilities or powers can be assigned to an existing state body with appropriate competence, and whether the labour provisions have a distinct dispute settlement mechanism than the other provisions of the FTA. These considerations could vary across potential signatories of FTAs with the EC, making generalisations about the resource-based implications of labour provisions (and many other provisions for that matter) in FTAs particularly hazardous.

A sole emphasis on implementation costs for each signatory may be misplaced, however. Developing country or Least Developed Country signatories may receive aid or technical assistance from a richer FTA signatory, which may partly or completely alleviate the resource constraints faced by the former. Moreover, if implementation-related resource-based concerns are serious then provisions may be included in FTAs allowing a signatory to (temporarily or otherwise) not comply with certain labour policy-related commitments on the grounds of insufficient resources. As noted in the legal analysis described in this section, some FTAs include such clauses. A decision as to whether such clauses are needed in a particular case could be informed by an assessment of the resource-based implications of implementing a proposed set of labour provisions before the FTA is concluded. The latter observation again indicates how FTA implementation can be usefully completed by technical assistance, capacity building, and other aid-related measures.

3. FTA provisions on policies relating to the environment.

3.1. Rationale and potential impact of FTA provisions on policies relating to the environment.

In a recent study the OECD secretariat⁵⁰ identified three over-arching purposes for including environmental provisions in trade agreements. These were:

- "Promoting sustainable development" and attaining high levels of environmental protection. The coherence between trade and environmental reform is emphasised here (page 25).
- "Levelling the playing field and improving environmental cooperation" (page 25). The concern about the former is explained as follows: "The basic premise here is that weak environmental rules and ineffective enforcement in one country can create competitive advantages over its trade partners." Environmental cooperation is said to have a number of purposes including addressing common environmental challenges, capacity building, sharing of better practices etc.
- "Pursuing an international environmental agenda" through trade agreements (page 26) may, it is argued, see faster results than through other international accords. In principle, environmental obligations in trade agreements may be backed up by sanctions that are not available in some other international fora.

None of this is to suggest that environmental provisions have been accepted by all trading nations as legitimate. Some object to the imposition of other nation's standards on their economies. Others see different standards as a matter of national priorities and preferences. Even so, environmental provisions are now included in a number of FTAs and the purpose of this section is to examine what could be learned from them. In terms of effects, in

50 OECD. Regional Trade Agreements and Environment, document number COM/ENV/TD(2006)47/FINAL, 12 March 2007.

principle one could examine the direct effect of a FTA's environmental provisions on the very environmental policies and enforcement practices or, indeed the very environmental problems, that the provisions were designed to tackle. There could also be another, more indirect effect of environmental provisions on signatories' welfare and that may be through the investment decisions of firms. Resources may well be allocated across sectors in a manner that has implications for national environmental performance. This section first discusses a legal analysis of FTA provisions, which is then followed by an overview of the relevant economic evidence.

3.2. Comparative legal analysis of FTA provisions on policies relating to the environment.

The following legal analysis follows the methodology described in section 1.2.

3.2.1. The Preamble.

Given that an agreement's objectives as stated in the preamble indicate whether or how the subject is related to the trade obligations of the signatories, it is significant that eight of the FTAs studied here do not express any statements on the parties' environmental objectives within the agreement's preamble. The eight FTAs are Australia – Thailand, Australia – Singapore, all the FTAs with Japan (Mexico, Malaysia, Singapore and Philippines), and the Singapore – NZ and Singapore – Korea. Interestingly, this is not the same set of FTAs or countries as those that did not include labour statements in the FTA's preamble. The EFTA and the India-Singapore FTAs include environmental but not labour statements in the preamble to their agreements.

As with the labour preamble statements, all the US FTAs contain at least one reference to protecting and enhancing the environment in the preamble, even where a side agreement covering environmental issues has been drawn up separately. The most general preamble

statement (found in the US-Jordan, US-Morocco and US-Bahrain FTAs) presents social development goals together in a single statement expressing the parties' desire to:

"strengthening the enforcement of labor and environmental laws and policies, promote basic workers' rights and sustainable development, and implement this Agreement in a manner consistent with environmental protection and conservation."

There is a narrower variant of this statement in the EU-Chile preamble, a single remark expresses the need:

"to promote economic and social progress for their peoples, taking into account the principle of sustainable development and environmental protection requirements."

Similarly, the US-Australia FTA simply states that the parties will implement the agreement in a manner consistent with their commitment to high labour standards, sustainable development, and environmental protection. The benchmark accorded to 'high' standards is not set out however.

The preamble to the EFTA, US – Peru, India – Singapore, and US-CAFTA-DR FTAs follow a format that typically includes one or two statements exclusively on the environment. These statements indicate the parties' commitment to implement the agreement in a manner consistent with environmental protection and conservation and to promoting sustainable development. The US-Singapore and US-Chile FTA preambles go the furthest, by including an additional reference to promoting regional environmental cooperative activities and existing commitments to multilateral environmental agreements.

Those FTAs with a separate environmental side agreement (NAFTA/NAAEC, Canada-Chile, Canada-Costa Rica) contain a specific commitment to the *Stockholm Declaration on the Human Environment* of 1972 and the *Rio Declaration on Environment and Development* of 1992 in the preamble to the side agreement. Meanwhile the preamble to the general

agreements of the NAFTA and Canada-Chile FTAs contain statements similar to those set out in the US-Chile FTA.

3.2.2. Scope of the obligations.

The spectrum of environmental provisions in the FTAs surveyed ranges from none to a commitment to implement multilateral environmental agreements (MEAs) within a chapter or side agreement dedicated to regulating the environment (see Table 5 for a taxonomy of each FTA's environmental provisions).

Despite including preamble statements on environmental issues, the EFTA agreements do not contain any environmental provisions. Similarly, the India – Singapore FTA includes a statement in the preamble on environmental protection, yet the only relevant provision regulating the environment is set out within the chapter on Standards and Technical Regulations, Sanitary and Phytosanitary Measures (Article 5.11). This is a commonly used provision which preserves the regulatory authority of a party to determine the level of protection it considers necessary and appropriate to ensure the quality of its imports, or for the protection of human, animal or plant life or health, or the environment.

On the other hand, while the Japanese FTAs do not contain any statements relating to the environment in their preamble, these agreements do contain related provisions worth some consideration. In the Japan – Philippine FTA, Article 102 on Environmental Measures states that the parties should not encourage investments by investors of the other party by relaxing its environmental measures. This is similar to the provision preventing ‘race to the bottom’ labour standards and policy within this FTA and is also subject to the general dispute settlement mechanism of the agreement.

The scope of the environmental provisions in Japan – Mexico and Japan - Malaysia FTAs is narrower. They simply set out cooperation activities to be undertaken in the field of the environment. This includes information and know-how exchange, and capacity building

related to the Clean Development Mechanism developed under the Kyoto Protocol to the UN Framework on Climate Change. The provisions make no reference to either the parties' domestic environmental standards or law enforcement, or to any commitments to multilateral environmental agreements.

As with the above description of labour regulations, all of the US FTAs include environmental provisions. Of these, the US-Jordan agreement is again distinct in containing only a single provision (Article 5) on the environment. Within this provision, the parties agree to 'strive' to ensure that environmental laws are not relaxed in order to encourage trade with the other party. There is no mention of activities that might be described as 'striving'. Again, the parties maintain their sovereign right to establish and enforce their own environmental protection laws and policies. This FTA also includes trade and environment initiatives on technical environmental cooperation, transparency elements, and provisions liberalising market access for environmental goods and services.

The most common treatment of environmental provisions in US FTAs (found in the US-Singapore, US-CAFTA-DR, US-Chile, US-Oman, US-Morocco, US-Bahrain, and US-Australia FTAs) is characterised by a separate chapter on environment. These chapters contain textually similar provisions for recognising the right for each party to the agreement to set their own domestic laws and standards of environmental protection. The parties make a commitment that these are 'high' standards of protection, which are to be continually improved upon. Nevertheless, the reference to a 'high standard' is not made with any benchmark. The parties instead make a commitment not to fail to enforce its domestic environmental laws effectively and agree that all enforcement activities relating to the environment must be confined to a party's own country. These agreements all define environmental law to mean any domestic statute, regulation or provision primarily designed to protect the environment, or prevent a danger to human, animal, or plant life or health, through:

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

The latter model of the agreement explicitly recognises the role of multilateral environmental agreements but they do not reference any of them by name within the provisions of the agreement. The parties agree to consult on the extent to which the outcome of the ‘ongoing WTO negotiations on the relationship between existing WTO rules and specific trade obligations set out in multilateral environmental agreements’ as they might apply to the FTAs they do reference.

The FTAs with the environmental side agreements (NAFTA/NAAEC, Canada-Chile, Canada-Costa Rica) similarly include provisions with an express right for each party to set their own ‘high’ level of domestic protection and nationally defined policies and priorities for the environment. Each party ‘shall’ then enforce these domestic laws effectively. That is, as with the other FTAs, no party is empowered to enforce these environmental activities in the territory of another party to the agreement.

Nevertheless, these side agreements maintain any existing rights and obligations of the parties under other MEAs, including conservation agreements. This includes the *Stockholm Declaration on the Human Environment* of 1972 and the *Rio Declaration on Environment and Development* of 1992, as set out in the Preamble. The NAFTA goes further to affirm the rights of the parties under certain international and bilateral environmental agreements, including the right to use discriminatory trade measures. These rights prevail over obligations in NAFTA in the event of an inconsistency. That is, market access rights granted under NAFTA could potentially be undermined by the rights to restrict trade according to an MEA, where

the NAFTA members are parties to the MEA. This contrasts with the GATT and other agreements, which are subsumed by NAFTA obligations.

The investment section of the NAFTA contains some weak environmental provisions which allow the parties to take measures to ensure domestic investment activities are undertaken in an environmentally sensitive way, and are 'encouraged' not to relax environmental measures to attract investment. However, these measures must be consistent with other investment obligations in the agreement. The parties are also asked to 'consider' prohibiting the export to other parties of pesticides and toxic substances that are banned in that party's territory. In such a situation, a measure prohibiting or severely restricting trade must be notified to the relevant party through an appropriate international organisation.

The NAFTA also allows general exceptions to trade rules for some environmental reasons, as they appear in the GATT, for the protection of human, animal or plant life or health and for the conservation of 'exhaustible resources' that complement domestic conservation programs. However, the latter exception is expressly interpreted in NAFTA to include both living and non-living exhaustible natural resources.

3.2.3. Environmental institutions and agencies.

The most common institutional arrangement for dealing with environmental issues (found in the US – Singapore, US-Oman, US-Jordan, US-Morocco, US-Bahrain, and US-Australia FTAs) take place in a supranational Joint Committee, which is established under the general administrative and dispute settlement provisions set up to help implement and administer the entire agreement. The Joint Committee should be composed of government officials from each party, and, in the case of the US-Singapore FTA the US Trade Representative and Singapore's Minister for Trade and Industry, should be the Joint Committee chairs. That is, there is no specific requirement for the Joint Committee to have expertise on the environment.

The US-CAFTA-DR and US-Chile FTAs create a separate supranational agency in the form of the Environment Affairs Council which is composed of cabinet level or equivalent representatives of the parties. The agreement commits the Council to meet at least once a year to discuss the implementation and progress of the environmental provisions included in the agreement.

Despite having a side agreement on environmental regulation, the Canada-Costa Rica agreement has a narrow requirement (Article 10) for each party to designate a contact point for communications between the parties and from the public related to the implementation and elaboration of the agreement. Contrary to this, the side agreements included in the NAFTA (NAAEC) and the Canada-Chile FTAs establish a much more elaborate supranational institution in the form of the Commission for Environmental Cooperation. The Commission is made up of a Council, a Secretariat, and a Joint Public Advisory Committee. The Secretariat must prepare the Annual Report of the Commission's operations and consider any submission from any non-governmental organisation or person asserting that a party to the agreement is failing to enforce its environmental law effectively. The FTA specifies that the assertion must be in a designated language, provides sufficient information to allow the Secretariat to review the submission, 'appears to be aimed at promoting enforcement rather than at harassing industry' and is filed by a person or organisation residing or established in the territory of a party. These provisions also commit the parties to create National Advisory Committees, which comprise of the public and NGOs to offer input on the implementation and further elaboration of this Agreement. The parties may also convene a governmental committee to further advise on the implementation and elaboration of the side agreement.

3.2.4. The Dispute Settlement Mechanism.

The widest-ranging model of DSM can be found in the US-Australia and US-Jordan FTAs. Here environmental disputes are subject to the core dispute settlement provisions and

procedural requirements of the FTA. In this model, the parties to the agreement can only have recourse to dispute settlement if the other party fails to enforce its domestic environmental laws effectively and in a manner affecting trade between the parties. However, there are no provisions setting out compliance mechanisms.

In addition to these requirements, the more elaborate DSM model set out in the US-Singapore, US-Oman, US-Morocco, US-Chile, US-Bahrain FTAs states that any ‘interested person’ can request investigations into alleged violations of domestic environmental law. These agreements also commit the parties to ensuring that judicial, quasi-judicial, or administrative proceedings are available, alongside effective remedies or sanctions for violations of its environmental laws. These remedies may include compliance agreements, penalties, fines, imprisonment, injunctions, the closure of facilities and the cost of containing or cleaning up pollution.

The US-CAFTA-DR FTA contains an additional procedural matter of relevance. This provision prevents a party the right to review another party’s domestic enforcement mechanisms:

‘nothing in this Chapter shall be construed to call for the examination under this Agreement of whether a party’s judicial, quasi-judicial, or administrative tribunals have appropriately applied that party’s environmental laws.’

This FTA also has a provision which states that a person or organisation residing or established in the US must file a submission under the NAAEC agreement (NAFTA) asserting that the US is failing to enforce its environmental laws effectively and may not file a submission under the US-CAFTA-DR provisions. This is presumably designed to coordinate and streamline the administrative application of US environmental FTA obligations in the north and central Americas.

The DSM within the environmental side agreement model (in the NAAEC, Canada-Chile and Canada-Costa Rica FTAs) states that if after consultation and other alternative dispute resolution mechanisms have failed, a panel must determine where there has been a per-

sistent pattern of failure by the party complained against to effectively enforce its environmental law (Article 33). The disputing parties may then agree to a mutually satisfactory action plan.

Article 104 of NAFTA states that in the event of an inconsistency between NAFTA and the trade provisions of multilateral environmental treaties, the latter shall ‘prevail to the extent of the inconsistency.’ However, it has been argued that the actual significance of this provision is unclear.⁵¹ This would depend on whether Article 104 applies to the parties pre-existing GATT obligations and whether Article 103 includes the GATT in its definition of ‘other agreements’.

The NAAEC dispute settlement mechanism allows access to private citizens as ‘interested parties’ to make submissions to the CEC Secretariat to document alleged non-enforcement of environmental laws by one or more of the NAFTA parties. However, the definition of ‘interested parties’ is not set out, and is unclear therefore whether an environmental NGO would be included in this definition. This may also depend on whether such an NGO had standing in the domestic legal system of each party. If the Secretariat finds merit in such submissions, it may recommend the production of a factual record, which outlines the circumstances of each case. However nothing entitles a party to undertake environmental law enforcement activities in the territory of another party. Further, no party can provide for a right of action under its law against any other party on the ground that another party has acted in a manner inconsistent with the agreement. The NAAEC and the Canada-Chile FTAs contain a provision (Article 29) entitling a third party to attend all hearings and to make and receive submissions. A major drawback of the NAAEC dispute settlement mechanism is the requirement for a request for a panel to be approved by a two-thirds vote of the parties. This implies a reliance on diplomatic methods for ensuring this majority vote.

3.2.5. Operational history and analysis.

This sub-section focuses on the functioning of these provisions as seen from a legal perspective. It therefore identifies also potential and actual legislative and operational caveats.

Environmental provisions in the Canada-Chile FTA mirror those in NAFTA's NAAEC. The CCAEC has the same institutional structure, principles and objectives of environmental cooperation. This involves monitoring to ensure the national implementation of environmental measures. However, a significant drawback from ensuring high environmental standards is that there is no regional harmonisation of environmental law. Further, no party can impose its level of environmental protection on another party; all parties are obligated to ensure the effective enforcement of the standards it has determined.

The CCAEC has a more cooperative mechanism than the NAAEC, which involves a more punitive response to non-compliance based on the unilateral suspension of NAAEC benefits. This better reflects the develop needs of the parties to the former agreement, which explicitly excludes the use of trade sanctions and its penalty relies on a monetary fine imposed by a panel. Using more of a carrot rather than stick approach, Canada provides Chile with cooperation programmes and capacity building measures designed to increase environmental enforcement mechanisms and assess the environmental impact of trade agreements. This might also induce a convergence with Canada's standards, although it is not an explicit objective of the agreement.

Another caveat identified is that the US-Chile and US-Singapore FTAs contain vague and potentially ineffective environmental provisions. This is despite the stipulation of the 2002 US Trade Act that the environment must be a principal negotiating objective. Previous US FTAs included stronger environmental provisions which both meet the TPA objectives and were accompanied by some environmental cooperation mechanisms. The CAFTA-DR FTA also established a public submissions process to allow members of the public to raise

concerns if they believe that a party is not effectively enforcing its environmental laws. This is innovative because it includes provisions establishing benchmarks for measuring environmental performance and outside monitoring of progress in meeting the benchmarks.

The US-Chile and US-Singapore FTAs backtrack from the US-Jordan FTA, which historically placed environmental requirements on a par with commercial issues. The former FTAs also backtracked on NAFTA-granted rights by omitting the ‘citizen submission process’ that permits citizens of the agreement’s parties to allege a failure to effectively enforce environmental laws and provides for an independent review mechanism. A further issue is that they do not establish an independent environmental cooperation institution nor a programme of activities and objectives, with the necessary financial commitments to implement any of the environmental cooperation goals set out in the agreements. There is also a concern that the definition of environmental laws in the US-Chile FTA could allow for the carve-out of natural resources, such as mining and forestry, from the FTA’s environmental rules (natural resource-related exports represent over 40% of Chile’s exports). And unlike the NAFTA and FTAs signed by Canada, these agreements do not include any legislative deference to the parties’ existing national and international environmental standards and commitments.

The provisions of the US-Singapore FTA do retain some linkages between trade and environment. Each party is required to ensure its own domestic laws provide for high levels of protection. Enforcement of that is an integral part of the FTA and remedies for non-compliance are principally monetary fines. However, in the event of non-payment, a surcharge on imports will be used to collect the fine. The Australia-US FTA is modelled on the US-Singapore FTA but is clearer on the sovereign role of the state. Again, the primary obligation on both parties is not to fail to enforce national environmental law through sustained action in a manner affecting trade between the parties. It does not allow for either party to challenge the domestic environmental laws of the other. Indeed, the agreement is silent on the nature of environment law, except for an aspirational clause that encourages high levels of

environmental protection with regard to continuous improvement. When it can be determined that domestic environmental laws are compromised for trade advantage, the parties have the legal capacity to seek remedies for non-compliance.

As with the analysis of the labour provisions, the environmental provisions in US FTAs can be divided into a Clinton Model and a Bush Model. Once again, the Clinton model goes further judicially by placing environmental obligations on a par with other trade commitments, while the Bush model provides for a separate and narrower dispute settlement mechanism. Nevertheless, the Bush model contains more 'good governance' provisions to increase the inclusivity and transparency of the process, such as the 'citizen submission process' which enables NGOs to file petitions and *amicus curiae* briefs to an independent secretariat.

3.2.6. A taxonomy of environmental provisions in FTAs.

Table 5 summarises the environmental provisions of the 27 FTAs considered in this study. The FTAs fall into three groups as far as their principle objectives are concerned: a small number have no stated objectives, some affirm WTO-related trade and investment objectives, some deliberately go beyond existing WTO language. Eight FTAs contained objectives that could be reasonably characterised as WTO+, the last of the three classifications. Where provisions related to environmental protection and investment, these measures all went beyond existing WTO disciplines and are thus labelled WTO+ in this table.

An important manner in which the FTAs differ is in their treatment of the hierarchy of treaty obligations relating to trade and environmental matters, in whether environmental provisions are subject to dispute settlement, remedies, and whether private parties had access to remedies. Having said that, some "workhorse" environmental language in FTAs could be found and this has been discussed in the text above.

Table 5: Environmental Provisions of selected FTAs.

FTA	Year	Prmb Objtv	Gen-eral Excepts	Hierarchy of Treaty Obligations	Investment	LoP	Agency	DSM	Remedies	Private Access to Remedies
Aus-Sin	2003					Domestic				
Aus-Thai	2004					Domestic				
Sin-NZ	2000			Others ⁵²		Domestic				
Sin-Kor	2005			Others, including WTO ⁵³	WTO+	Domestic				
Sin-India	2006	WTO ⁵⁴	WTO+ 55	Others ⁵⁶		Domestic				
Can-Chile	1996	WTO+	WTO+ 57	Others ⁵⁸ Stockholm Declaration 1972 Rio Declaration 1992 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1979 Montreal Protocol, 1990 Basel Convention, 1989	WTO+	Domestic	✓		✓	✓

52 Article 80 states that ‘nothing in this Agreement shall be regarded as exempting either Party to this Agreement from its obligations under any international, regional or bilateral agreements to which it is a party and any inconsistency with the provisions of this Agreement shall be resolved in accordance with the general principles of international law.

53 Article 1.3 affirms the Parties existing rights and obligations with respect to each other under existing bilateral and multilateral agreements to which both Parties are party, including the WTO Agreement.

54 Replicates the language of the GATT/WTO preamble.

55 Singapore-India exceptions include those: ‘necessary to protect human, animal or plant life or health and relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.’

56 Article 16.5 uses the same language as the Singapore-NZ FTA, *ibid*.

57 Canada-Chile: The Parties understand that the measures referred to in Article XX(b) of the GATT 1994 include environmental measures necessary to protect human, animal or plant life or health, and that Article XX(g) of the GATT 1994 applies to measures relating to the conservation of living and non-living exhaustible natural resources.

58 In addition to a preamble objective similar to that in the Australia-Singapore agreement, the side agreement on environmental provisions includes: Article 40: Nothing in this Agreement shall be construed to affect the existing rights and obligations of either Party under other international environmental agreements, including conservation agreements, to which such Party is a party.

FTA	Year	Prmb Objtv	Gen-eral Excepts	Hierarchy of Treaty Obligations	Investment	LoP	Agency	DSM	Remedies	Private Access to Remedies
Can-Cos	2002	WTO+	WTO+ ⁵⁹	CCRFTA ⁶⁰ Stockholm Declaration 1972 Rio Declaration 1992 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1979 Montreal Protocol, 1990 Basel Convention, 1989		Domestic			✓	✓
Chile-EU	2002	WTO				Domestic				
Chile-Efta	2003	WTO				Domestic				
Efta-Mex	2000	WTO				Domestic				
Efta-Sin	2002	WTO		Others ⁶¹		Domestic				
Efta-Kor	2005	WTO		Others ⁶²		Domestic				
Jap-Sin	2002					Domestic				
Jap-Mex	2004			GATT/WTO Kyoto Protocol Clean Development Mechanism	WTO+ ⁶³	Domestic				

59 As in Canada-Chile *op cit*.

60 As in Canada-Chile Article 40 *op cit* 6, but also Article I.3 The Parties affirm their existing rights and obligations with respect to each other under the Marrakesh Agreement Establishing the World Trade Organization and other agreements to which such Parties are party. 2. In the event of any inconsistency between this Agreement and such other agreements, this Agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement.

61 Efta-Singapore: *Article 4 Relationship to Other Agreements* The provisions of this Agreement shall be without prejudice to the rights and obligations of the Parties under the Marrakesh Agreement Establishing the World Trade Organization and the other agreements negotiated thereunder to which they are a party and any other international agreement to which they are a party.

62 As in Efta-Singapore *ibid*.

63 Article 74 The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. Accordingly, a Party **should not** waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, acquisition, expansion or retention in its Area of an investment of an investor. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the Parties shall consult with a view to avoiding any such encouragement.’ (emphasis added). The use of the terminology *should not* has less compulsion than *shall*.

FTA	Year	Prmb Objtv	Gen-eral Excepts	Hierarchy of Treaty Obligations	Investment	LoP	Agency	DSM	Remedies	Private Access to Remedies
Jap-Phil	2006			WTO	WTO+	Domestic				
NAFTA/ NAAEC	1993	WTO+	WTO+ 64	NAFTA Preexisting MEA obligations ⁶⁵ Stockholm Declaration 1972 Rio Declaration 1992 Convention on International Trade in Endangered Species of Wild Fauna and Flora, 1979 Montreal Protocol, 1990 Basel Convention, 1989 Canada-US agreement on the Trans-boundary Movement of Hazardous Waste, 1986. Mexico-US cooperation agreement for the Protection and Improvement of the Environment in the Border Area, 1983.	WTO+ ⁶⁶	Domestic	✓	✓	✓	✓
US- Jordan	2000	WTO+	WTO+ 67	WTO The International Convention for the Protection of New Varieties of Plants (1991) Articles 1-22		Domestic		✓	✓	
US-Chile	2003	WTO+	WTO+ 68	WTO; preexisting MEA obligations	WTO+ ⁶⁹	Domestic	✓	✓	✓	

64 As in Canada-Chile *op cit* 5.

65 Article 40: Nothing in this Agreement shall be construed to affect the existing rights and obligations of the Parties under other international environmental agreements, including conservation agreements, to which such Parties are party.

66 Article 1114(2) NAFTA uses the same language and therefore level of compulsion as in Japan – Mexico Article 74. *op cit* 12.

67 As in Canada-Chile *op cit*.

68 US-Chile Article 9.16 goes beyond GATT Article XX: The Parties understand that sub-paragraph 1(b) ‘Subject to the requirement that such measures are not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between Parties where the same conditions prevail, or a disguised restriction on international trade, nothing in this Chapter shall be construed to prevent a Party from adopting or maintaining measures: (b) necessary to protect human, animal, or plant life or health’, includes environmental measures necessary to protect human, animal or plant life or health. (Emphasis added)

FTA	Year	Prmb Objtv	Gen-eral Excepts	Hierarchy of Treaty Obligations	Investment	LoP	Agency	DSM	Remedies	Private Access to Remedies
US-Mor	2004	WTO+	WTO+ 70	Preexisting MEA obligations	WTO+ ⁷¹	Domestic		✓	✓	
US-Aus	2004	WTO	WTO+ 72	WTO	WTO+ ⁷³	Domestic		✓		
US-Bah	2004	WTO+	WTO+ 74	WTO	WTO+ ⁷⁵	Domestic		✓	✓	

69 For example, US-Chile Article 10.12: Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

70 As in US-Chile op cit 15.

71 As in US Chile op cit 16.

72 As in US-Chile op cit.15.

73 As in US Chile op cit 16.

74 As in Canada-Chile op cit.

FTA	Year	Prmb Objtv	Gen-eral Excepts	Hierarchy of Treaty Obligations	Investment	LoP	Agency	DSM	Remedies	Private Access to Remedies
CAFTA-DR-US	2004	WTO+	WTO+ ⁷⁶	WTO; Central American integration instruments	WTO+ ⁷⁷	Domestic	✓	✓	✓	
US-Peru	2006	WTO	WTO+ ⁷⁸	WTO	WTO+ ⁷⁹	Domestic	✓	✓	✓	
US-Oman	2006	WTO	WTO+ ⁸⁰	WTO; preexisting MEA obligations	WTO+ ⁸¹	Domestic		✓	✓	

75 For example, US-Bahrain Article 16.2. ‘each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for trade with the other Party, or as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory.’

76 As in US-Australia *op cit*.

77 As in US-Australia *op cit*.

78 As in Canada-Chile *op cit*.

79 As in US-Australia *op cit*.

80 As in US-Australia *op cit*.

81 As in US-Australia *op cit*.

3.2.7. Comparative summary of legal provisions: labour and environmental measures.

The first reference to labour and environmental protections in the FTAs studied here was in the NAFTA side agreements. Since then Canada, the EU, and a few other trading nations have followed the practice of including such protections. However, there are also notable examples of both industrialised and developing countries that have not included labour and/or environmental provisions in their trade agreements, unless they have been negotiating with the US.⁸²

Those FTAs which included labour and environmental protections tend to echo the WTO preamble statements and explicitly aim to promote trade liberalisation in a manner consistent with environmental protection and conservation and sustainable development. They also aim to promote international principles and standards, typically referencing the ILO Declaration in protecting labour rights, and the Rio and Stockholm Declarations in protecting the environment.

Some of the FTAs surveyed use ‘negative’ provisions to ensure that the parties have a right to regulate domestic labour and environmental protection, as long as it is not used as a form of economic protectionism. One common method has been to explicitly incorporate or modify the general exceptions clauses provided for in Article XX of the GATT 1994.⁸³ This article sets out an exhaustive list of policy reasons and procedural conditions which might entitle the parties to set aside the core obligations of the GATT. Another negative provision identified in some of the FTAs surveyed, is the commitment by all the parties not to reduce labour or environmental standards to encourage inward investment.⁸⁴ ‘Positive’ provisions, or those provisions which directly regulate labour or environmental protection, are also used by

82 Australia, Singapore, India, Malaysia, Korea, Japan, the EFTA countries.

83 See: Article 12 Australia-Singapore reiterates Article XX GATT), Article 1601 Australia-Thailand incorporates Article XX GATT by reference, Article 22.1 Australia-US incorporates by reference with some modifications; Article 15.1 NZ-Thailand reiterates Article XX GATT, Article 168.1 Mexico-Japan Article 19.2(2) Japan-Singapore, Article 10 Japan-Malaysia, Article 23 Japan-Philippines incorporate by reference.

some of the FTAs. These FTAs reference international standards as a method of benchmarking the desired standards for domestic labour and environmental behaviour. In the case of the NAFTA, for example, these standards are explicitly linked to trade and provide for trade sanctions as an ultimate enforcement mechanism.

The FTAs with separate labour and environment side agreements⁸⁵ set their level of protection by including a conflict clause that subordinates the FTA to existing international environmental or labour agreements.⁸⁶ Alternatively, the conflict clause evident in the EFTA-Singapore FTA subordinates that agreement to the rights and obligations of the WTO and any other international agreement the parties may be signatory to.⁸⁷ The Australia-Thailand FTA affirms not only the parties existing rights and obligations under the GATT TBT Agreement but ‘all other all other international agreements, including environmental and conservation agreements, to which the parties are party.’⁸⁸

The strongest FTA with labour and environmental provisions is US-Jordan FTA. These provisions are incorporated into the main agreement and oblige the parties to ensure their domestic laws are of a high standard and to enforce them effectively. It allows the parties to take ‘any appropriate or commensurate action’ as remedies for non-compliance and overtly links trade obligations with compliance with labour and environment obligations.⁸⁹

84 Identified in the Japan-Singapore and Japan-Malaysia.

85 NAALC, Canada-Chile, Canada-Costa Rica. NAALC, for example, references CITES, the Montreal Protocol, the Basel Convention, and two bilateral environmental agreements.

86 This is ‘provided that where a Party has a choice among equally effective and reasonably available means of complying with such obligations, the Party chooses the alternative that is the least inconsistent with the other provisions of this Agreement. Article 104 NAFTA.

87 Article 4 EFTA-Singapore. Article 1.3 Chile-Korea.

88 Article 703(1) Australia-Thailand.

89 The US and Jordanian Governments reportedly agreed not to exercise that linkage, however, the precedent still stands.

3.3. Overview of published assessments of the impact of FTA provisions on policies relating to the environment.

Thirteen papers that discuss the environmental provisions of FTAs were found in the research for this report (see Table 6). Seven of these papers specifically discuss the effects of these provisions, principally in the context of the North American Agreement on Environmental Cooperation (NAAEC) (see column 3 of Table 7). Some of the authors are careful to distinguish between, if not necessarily to quantify the differential effects of, the impact of the environmental provisions of the NAFTA and the impact that that FTA had on the level and composition of production in the signatory countries. By and large, many voiced support for the proposition that the environmental provisions of NAFTA had resulted in improvements in Mexico's environmental policies, although one author contends that the extent of these improvements are limited by lack of capacity in Mexico and other authors argued that it was the training of Mexican environmental enforcement officials in the US and Canada which had improved matters in Mexico. These arguments point to the contingent nature of environmental provisions in FTAs, and there may be a case for matching the ambitions of environmental commitments with capacity building and technical assistance initiatives.

Almost all of the literature reviewed for this section is disturbing in two important respects. First, very little hard evidence was mustered in support of the numerous qualitative contentions about the effectiveness or otherwise of selected environmental provisions. Second, no empirical analysis was found that directly related the impact of environmental provisions and their implementation to measures of environmental quality, pollution, and the like. Perhaps less important is the fact that the literature seems to be dominated -almost obsessed- by the NAFTA experience, to the potential detriment of the experience of other FTAs.

Table 6: Papers relating to environmental provisions in FTAs.

Author(s)	Year	Title	Source
Altmann, Jörn.	2002	Documentation of the International Workshop "Environment and Regional Trade Agreements."	Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, October 28, 2002, Berlin, Germany.
Chomo, Grace, and Michael Ferrantino.	2001	Measuring the Link Between Trade and Environment: An Application to North American Fisheries.	<i>International Economic Review</i> May/June 2001, United States International Trade Commission Publication 3435.
Cortinas de Nava, Cristina.	2002	Regional Trade Agreements: Supportive Of Environmental Protection? NAFTA Case Study.	Federal Ministry for the Environment, Nature Conservation and Nuclear Safety, October 28, 2002, Berlin, Germany.
Cosbey, Aaron, Simon Tay, Hank Lim, and Matthew Walls.	2004	The Rush to Regionalism: Sustainable Development and Regional/Bilateral Approaches to Trade and Investment Liberalization.	A Scoping Paper Prepared for the International Development Research Centre, Canada. November 2004.
Esty, Daniel C., and Damien Geradin.	1997	Market Access, Competitiveness, and Harmonization: Environmental Protection in Regional Trade Agreements.	<i>Harvard Environmental Law Review</i> Vol. 21, 1997
Hufbauer, Gary Clyde, and Jeffrey J. Schott.	2005	Environment (Chapter 3)	In: <i>NAFTA Revisited, Achievements and Challenges</i> , Institute for International Economics, Washington DC, October 2005.
Gallagher, Kevin P.	2004	Harmonizing Up? The Development and Performance of Mexico's Environmental Policy.	<i>Free Trade and the Environment: NAFTA, Mexico, and Beyond</i> . Stanford University Press.
Kamal, Gueye, and Kenichi Imai.	2003	Harmonizing Trade and Environment in Recent Free Trade Agreements in the Asia-Pacific Region.	<i>International Review for Environmental Strategies</i> , Vol. 4(2), 2003.
Kim, Jeong Dai.	2001	A Framework for the Environmental Assessment of the NAFTA.	Fourth Annual Conference on Global Economic Analysis, June 27-29, 2001. GTAP Publication, Purdue University
Kunzlik, Peter.	2003	International Procurement Regimes and the Scope for The Inclusion of Environmental Factors in Public Procurement	<i>OECD Journal on Budgeting</i> . Volume 3(4), 2003.
OECD.	2002	Regional Trade Agreements and the Multilateral Trading System, Consolidated Report.	OECD Trade Committee, TD/TC(2002)8/FINAL, November 20, 2002.
OECD.	2007	Regional Trade Agreements and Environment.	OECD Joint Working Party on Trade and Environment. COM/ENV/TD(2006)47/FINAL, 12 March 2007.
Whalley, John.	1996	Trade and Environment Beyond Singapore.	NBER Working Paper No. 5786, September 1996.

Table 7: Comments on the effects of environmental provisions in FTAs and other remarks of potential interest.

Author(s)	Year	Comments on the effects of environmental provisions in FTAs.	Other remarks of potential interest.
Altmann, Jörn.	2002	<ul style="list-style-type: none"> • Contends that there is a large gap between the intentions and objectives of environmental provisions and their actual realisation and implementation (page 17). A number of tables cited at this point in the paper do not, in fact, support this conclusion. • Argues on page 18 "Effective regional environmental policy also requires that economically stronger partners support weaker ones during the implementation phase." • Asserts on page 161 that the experience of NAFTA has been limited, that there is some (alas uncited) evidence of implementation, and that it is unclear whether these provisions provide a good model for other countries. • Asserts on page 162 that the environmental objectives of MERCOSUR have yet to be implemented or realised. 	
Chomo, Grace, and Michael Ferrantino.	2001		<ul style="list-style-type: none"> • Estimates the effect of the tariff elimination associated with the NAFTA agreement on the fisheries sectors of the parties. Results suggest a minimal impact. No consideration is given in the empirical analysis to the environmental provisions of the NAFTA.
Cortinas de Nava, Cristina.	2002	<ul style="list-style-type: none"> • Contends that Mexico lacks the human, economic, and technological resources to be able to implement the North American Agreement on Environmental Cooperation (NAAEC) (page 43). It is argued that some Mexican agencies cannot complete the tasks assigned to them and that some have had their budgets cut. Also contends (page 44) that the time needed to coordinate so many tasks, including with the two other signatories, reduces time available to implement measures. 	

Author(s)	Year	Comments on the effects of environmental provisions in FTAs.	Other remarks of potential interest.
Cosbey, Aaron, Simon Tay, Hank Lim, and Matthew Walls.	2004	<ul style="list-style-type: none"> • Commenting on the North American Agreement on Environmental Cooperation (NAAEC), the authors contend that the mechanism allowing citizen complaints about government failures to enforce environmental laws "has been well used over NAFTA's 10-year history, in ways that frequently manage to embarrass the parties. As such it is perhaps not surprising that there has been almost no replication of this mechanism in other FTAs" (section 3.2.6). • "The NAAEC has arguably been successful in quiet, unremarkable ways-harmonizing North American environmental reporting, for example, and compiling and standardizing databases of environmental information and environmental law across the three countries. It has strong programs on conservation of biodiversity, on pollutants and health-including work on sound management of chemicals and hazardous waste-and law and policy. It also does strong analytical work on the linkages between trade and environment. These collaborative environmental efforts are arguably a greater legacy than the NAAEC's record of fostering enforcement of existing domestic environmental standards, and may in fact have helped foster the upward harmonization of standards that is one of the aims of the NAAEC" (section 3.2.6) Even if this statement is taken at face value, it is difficult to know how much of the progress made can be solely attributed to the NAAEC. Nor does the reader know what tangible outcomes (other than Mexico's phase out of Lindance which is mentioned in a footnote to this text) have been influ- 	<ul style="list-style-type: none"> • Discusses the many different ways in which environmental provisions can enter into FTAs (section 3.2). For example, a number of agreements appear to mention sustainable development and related matters in the preambles of the agreement (section 3.2.1). • The text includes a neat account of the possible outcomes that environmental provisions in FTAs might influence. "Environmental governance in the context of regional and bilateral FTAs refers to the mechanisms used to encourage upward harmonization of standards, to deal with environmental-related disputes, to ensure enforcement of environmental laws, to foster environmental cooperation on matters of shared concern, and to foster environmental-related capacity building" (section 3.2.6). • Notes in section 4.3.2. that in North-South FTAs the Southern partner tends to acquiesce to the environmental priorities of the richer counterpart. This is presumably unwillingly because the Southern partner does not tend to include similar provisions in other FTAs that it signs with Southern trading partners. They note, however, that in some FTAs (such as the Euro-Med agreements) that there a large budgets to back up the Northern parties priorities.

Author(s)	Year	Comments on the effects of environmental provisions in FTAs.	Other remarks of potential interest.
		<p>enced by the NAAEC's activities.</p> <ul style="list-style-type: none"> • The authors claim it is difficult to assess the contribution of the NAFTA-created Border Environmental Cooperation Commission (BECC) because the powers and funds given to the BECC were reassigned from bodies that pre-date the NAFTA agreement (section 3.2.6.). • The authors claim (section 4.4.2) that Mexico has taken important steps, in the context of the NAFTA environmental side agreement, to improve pollutant release inventories and persistent organic pollutants. • "The most interesting conclusion related to NAFTA is that while industry has cleaned up its production processes overall, the increased scale of economic activity has overwhelmed any such environmental benefits" (section 4.4.2). The authors cite two studies in support of this contention. • The authors mention doubts about certain provisions of the US-Singapore FTA ever being fully implemented (section 3.2.6). 	
Esty, Daniel C., and Damien Geradin.	1997	<ul style="list-style-type: none"> • Argues (section A.I, part III) that the EU strategy of seeking harmonisation in environmental product standards within the Union allows companies to reap economies of scale and eliminates associated trade impediments. • Notes (section B.2., part II) that in the first three years of NAFTA's implementation no case alleging lack of enforcement of environmental provisions has gone to arbitration, let alone seen penalties applied. Argued further that "the essence of NAFTA response to trade-environment tensions is found not in the Trade Agree- 	<ul style="list-style-type: none"> • Contains interesting remarks on the relationship between judicial rulings and the contents of environmental provisions of FTAs (section C, part II).

Author(s)	Year	Comments on the effects of environmental provisions in FTAs.	Other remarks of potential interest.
		<p>ment or even the Side Agreement but in the ongoing US and Canadian efforts to help Mexico enforce its own environmental laws," including notably the training of Mexican environmental enforcement officials.</p>	
Gallagher, Kevin P.	2004	<ul style="list-style-type: none"> • Argues that the environmental provisions of NAFTA did not prevent Mexico from reducing the intensity of plant-level enforcement efforts after the FTA came into effect. • However, the author acknowledges there are some environmental enforcement successes but does not link them to NAFTA provisions. Instead, demands for better environmental management practices from customers (including foreign customers) were said to be responsible for observed improvements. 	<ul style="list-style-type: none"> • The author discusses the role of the North American Commission on Environmental Cooperation (NACEC), which was set up as part of a side agreement to the NAFTA Agreement. The author argues "NACEC, however, is ill-equipped to help solve Mexico's significant environmental problems. In addition to lacking the necessary mandate, NACEC lacks resources to counter these problems. By its very nature, an institution with an annual budget of \$9 million can hardly make a dent in a series of problems that cost the Mexican economy over \$40 billion annually. Although NACEC is not equipped to reverse overall trends, it has made a number of significant strides in some areas."
Hufbauer, Gary Clyde, and Jeffrey J. Schott.	2005	<ul style="list-style-type: none"> • These authors argue: "Overall, the NAFTA experience demonstrates that trade pacts can simultaneously generate economic gains from increased trade, avoid the dismantling of existing environmental protection regimes, and improve environmental standards. But the NAFTA record does not demonstrate that a trade pact can reverse decades of abuse, nor can it turn the spigot on billions of dollars of remedial funding" (page 155). In the absence of NAFTA they argue that the modest improvements in Mexican environmental policy would not have occurred (page 178). • "Two concerns were raised during the NAFTA ratifica- 	<ul style="list-style-type: none"> • Contains an account of NAFTA's environmental provisions (page 155ff). • Discusses the impact of NAFTA's trade and investment liberalisation measures on the level of pollution in the signatories, citing statistical evidence in support of these contentions (page 164). • The authors argue that Mexico's environmental policies were improving before NAFTA was conceived and improved afterwards (page 165ff). Of all the improvements to enforcement etc mentioned, the authors do not link those improvements directly to NAFTA's environmental provisions. Deficiencies in

Author(s)	Year	Comments on the effects of environmental provisions in FTAs.	Other remarks of potential interest.
		<p>tion process--the 'downward harmonization' of US and Canadian environmental or public health standards and the creation of a 'pollution haven' in Mexico. The evidence shows that neither of these fears materialized" (page 163).</p> <ul style="list-style-type: none"> • Argued that harmonisation efforts inhibited a regulatory race-to-the-bottom (page 164). No quantitative evidence is offered in support of this claim. Worse, the authors offer qualitative evidence that Canadian provinces lowered their environmental standards and enforcement activities so as to help their local businesses compete (page 165). • Pointed out that the during the NAFTA negotiations the federal environmental protection agencies of both Mexico and the USA developed a plan for improving the environment along their common border (page 173). This came after similar initiatives in the past and was succeeded by another such initiative, raising the question of how much of the former plan can be attributed to NAFTA. 	<p>Mexican enforcement on its side of the border with the USA are put down to lack of municipal finance (page 169) and not to NAFTA or any associated competitive pressures.</p>
Kamal, Gueye, and Kenichi Imai.	2003		<ul style="list-style-type: none"> • Describes in section 2 the various environmental provisions in FTAs involving an Asian-Pacific country. Notes in the conclusion (page 281) that most of these FTAs include language on the environment only to the extent that the GATT Article XX exceptions are discussed.
Kim, Jeong Dai.	2001		<ul style="list-style-type: none"> • Nice overview of the existing literature on the effect of international trade and environmental pollution. Cites all the relevant papers; highlights the composition, scale, and technical change effects (section 2.2)

Author(s)	Year	Comments on the effects of environmental provisions in FTAs.	Other remarks of potential interest.
			<ul style="list-style-type: none"> Notes that Article 1114 of NAFTA calls for the parties to refrain from competitive deregulation and usefully discusses how this might be modelled in a dynamic general equilibrium model (section 3). Unfortunately the author does not implement these suggestions and thereby demonstrate the impact of this particular NAFTA provision. A major missed opportunity.
Kunzlik, Peter.	2003		<ul style="list-style-type: none"> Sections 3-5 of this paper describe how the EU, NAFTA, and Australia-New Zealand Government Procurement Agreement (which is part of those two nation's economic integration initiatives) take account of environmental matters in their public procurement chapters and provisions.
OECD.	2002		<ul style="list-style-type: none"> Section 9 of this well-cited report contains a useful overview of the environmental provisions of 15 FTAs. Unfortunately no position is taken in paper as to what provisions work, which don't, etc, upon which one might develop best practices. Table 1 of this study could provide some material for a typology of environmental provisions in FTAs, but is less detailed than the legal analysis presented in section 3.2 of this report.
OECD.	2007	<ul style="list-style-type: none"> After providing a list of unsubstantiated conjectures about the benefits of environmental provisions, on page 31 this report gets to the heart of the matter and notes: "There is little empirical evidence on this question. One analysis, the only one found here that directly addressed these issues, argues that the environmental 	<ul style="list-style-type: none"> Includes a discussion (pages 35-47) on the propensity of some industrialised countries to conduct ex-ante environmental assessments of FTAs being negotiated or about to be negotiated. The discussion in this report refers primarily to the nature of those assessments and to the procedural (not substantive) advan-

Author(s)	Year	Comments on the effects of environmental provisions in FTAs.	Other remarks of potential interest.
		<p>provisions in NAFTA have not negatively affected Mexico's economic performance, and that related institutions such as the North American Development Bank and the Border Environment Cooperation Commission have actually <i>helped</i> Mexico by investing in infrastructure that was both economically necessary and environmentally sensible (Miller, E., 2002)⁹⁰. But this hardly constitutes enough evidence on which to base general conclusions. In the absence of more empirical work, it is necessary to draw on theoretical analysis."</p>	<p>tages of conducting such assessments. These assessments are not to be confused with ex-post analyses of the impact of environmental provisions in implemented FTAs.</p>
Whalley, John.	1996		<ul style="list-style-type: none"> • Contains a useful review in section IV of the economic literature on the relationship between trade flows and environmental quality.

90 E. Miller (2002), "Did Mexico Suffer Economically from the NAFTA's Environmental Provisions?", in Caroline Deere and Daniel Esty (eds.), *Greening the Americas: NAFTA's Lessons for Hemispheric Trade*, Cambridge, USA: MIT Press, pp. 79-96. Our reading of the Miller chapter is that it does not quite support the claims made by the OECD report referenced above.

3.4. Overview of civil society assessments of FTA provisions on policies relating to the environment.

The summaries of eight civil society organisations' responses to questions about the efficacy of environmental provisions are given in Table 8 below. By and large the representatives of European business organisations articulated the same case against including environmental provisions in FTAs as they did for opposing including provisions on labour standards (see section 2.4.) The concern that environmental provisions would "distract" from "core" market access-related negotiations was again expressed. Initiatives on environmental policy in other fora, however, met with approval.

Representatives from non-business civil society organisations were sympathetic to the inclusion of environmental provisions in FTAs, however they stressed different elements that ought (in their view) to be taken into account. Experience from North American FTAs had shown that governments were reluctant to bring cases against FTA signatories concerning the implementation of their environmental policies, perhaps because they are vulnerable to countersuits. It was argued, then, that third party (including private) parties should have rights to bring cases. Cooperative or incentive-based mechanisms, rather than sanctions, were favoured. Long-term capacity building and technical assistance programmes are useful in this regard, it was said, as they can act as a carrot for better behaviour as well as changing attitudes and conditions within a signatory.

Another interviewee argued that FTA provisions on environmental matters should affirm and entrench national rights to regulate their jurisdiction's environment. The point was also made that coherence across FTA chapters was needed if environmental harm was to be avoided. A FTA's chapters on investment (especially as it relates to state appropriation and the grounds for compensation) and to intellectual property rights (with its treatment of so-called traditional knowledge, amongst others) could have substantial implications for the environment of signatories.

Table 8: Summary of civil society comments on FTA provisions on the environment.

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
<p>Mr. Michel Bricout Director, Trade & Economics European Automobiles Manufacturers' Association.</p>	<ol style="list-style-type: none"> 1. This expert answered questions about labour standards and environmental policies together, hence the replies below are similar to those in the corresponding table of responses on civil society comments on FTA provisions on labour standards. 2. Emphasised his organisation's desire to see "good behaviour" on the part of nations with respect to their environments. 3. Did not believe that provisions on environmental policies should "pollute" the economic aspects of FTAs (which he defined as being those relating to market access.) 4. Noted that including environmental provisions could jeopardise the FTA negotiations with some trading partners. 5. FTAs should not focus on political matters or internal policies. 6. When asked, he stated a preference for incentive-based approaches over sanctions-based approaches to labour standard matters. 		
<p>Mr. Aaron Cosby Associate and Senior Advisor, Trade and Investment, International Institute for Sustainable Development (IISD).</p>	<ol style="list-style-type: none"> 1. The overarching goals of such FTA provisions should be to (i) strengthen national environmental laws and their implementation, (ii) to improve international cooperation on environmental policy matters, and (iii) to promote sustainable development. 2. Any environmental provisions should be part of the body of the FTA agreement. 3. Commitments to strengthen signatories' environmental laws based on state-to-state compliance mechanisms don't work (as governments feel they live in "glass houses" and that they don't 	<ol style="list-style-type: none"> 1. The "North American" FTA provisions on the environment are mixed. The reliance on state-to-state compliance and side agreements is unappealing. Whereas 	<ol style="list-style-type: none"> 1. The citizens submissions process under NAFTA has resulted in a few cases in changes in government practices. However, this approach is very resource intensive.

Civil Society expert. Name and organization.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	<p>want to cast the first stone.) Far better to use cooperation instruments and capacity building measures.</p> <p>4. If promoting sustainable development is to be a serious objective of the FTA then this will have significant implications for many of the chapters of the proposed FTAs, including that on trade facilitation and investment measures. For example, the latter would have to clarify what constitutes investor expropriation and it would be important to ensure that the instigation and implementation of environmental regulations and the like does not constitute such appropriation.</p> <p>5. Environmental reviews that take place before the FTA is negotiated are a valuable instrument, especially if they are strongly linked to the negotiating process.</p>	<p>the text on MEA carve-outs and the expropriation language is good.</p> <p>2. The US-Singapore FTA's language on combating illegal wildlife trade (in particular as it relates to transshipments) is valuable.</p>	<p>2. The cooperation between NAFTA partners on environmental measures has had a number of benefits (e.g. improving Mexican mercury regulations.)</p> <p>3. There is a complete lack of evidence that state-to-state compliance measures have worked.</p>
<p>Dr. Guido Glania Director of International Trade Policy, Federation of German Industries (BDI).</p>	<p>1. These provisions are not a priority. They should not be part of FTAs as (i) they distract from the "hard core" market access issues and bargaining thereover, (ii) they should be part of partnership agreements etc, and (iii) otherwise they should be dealt with at other international fora.</p>		
<p>Mr. James Howard Director, Economic and Social Policy International Trade Union Confedera-</p>	<p>1. His organisation is on record as stating that environmental provisions, like other social provisions, should have precedence over commercial considerations.</p> <p>2. In disputes the precautionary principle should take precedence over commercial considerations. The burden of proof here should be on the complainant.</p>		

Civil Society expert. Name and organization.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
tion.			
Ms. Emily Jones Policy Advisor-- Economic Justice Oxfam GB.	<ol style="list-style-type: none"> 1. Any provisions included should not circumscribe the ability of governments to regulate the environment of their country. (It was argued that there should no constraint on this form of "policy space.") This consideration is thought to be particularly important given concerns about climate change and the likelihood that further national and international measures may be taken in this regard. 2. EC could consider faster phasing out of tariffs on organically-produced goods from potential FTA partners, or on other environmentally-sensitive goods from the same partners, than for other goods. 3. As a matter of coherence with environmental objectives, it is important that the FTA provisions on intellectual property do not prevent local communities from protecting traditional knowledge and biodiversity. More generally, any intellectual property rights provisions should not be stronger than in the WTO TRIPs agreement and the EC's next FTAs should encourage partner countries to avail themselves of the flexibilities permitted in the TRIPs agreement. 4. Concerns about climate change, in particular the fact that the products that a nation may wish to shield from international competition may change over time, suggest that thought should be given to devising flexibilities that allow developing countries to transfer any special treatment from one product to another product should the signatory wish, including changing tariffs on 	<ol style="list-style-type: none"> 1. Avoid BIT-like provisions which unduly restrict the rights of governments to regulate the environment. Likewise, avoid NAFTA's associated investment and environmental clauses. 	<ol style="list-style-type: none"> 1. IISD studies on NAFTA and BIT provisions and their implications for environmental protection . 2. Recommended looking at studies produced by Tufts University's Global Development and Environment Institute (GDAE). This was done and one additional study was identified and their findings summarised in the previous table.

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	agricultural goods.		
Mr. Francesco Marchi Director of Economic Affairs The European Apparel and Textile Organisation (EURATEX).	<ol style="list-style-type: none"> 1. Bearing in mind that EU member states and their potential FTA partners have different environmental standards, there is a risk that a FTA will induce "environmental outsourcing" (as it put) from the EU to the FTA partner. A goal of FTA provisions in this area, then, should be seen that legislation is properly implemented. This includes implementing legislation in a transparent manner, which was said to be the most important aspect for EURATEX. 		
Mr. Nick Miller Senior Trade Policy Adviser Confederation of British Industry (CBI).	<ol style="list-style-type: none"> 1. Provisions on non-trade issues, such as environmental policy, should not be included in FTAs. The latter should focus on expanding trade, which in turn leads to economic growth and promotes sustainable development. 2. Environmental policy concerns should be dealt with at the multi-lateral level in MEAs; the provisions of the latter should not be confirmed in RTAs. 3. Bilateral conversations on environmental policy matters are fine but the negotiation of substantive provisions in FTAs are not. 4. No sanctions should be applied to trading partners on the grounds of their environmental policies. 		
Prof. Dr. Reinhard Quick Verband der Chemischen Industrie e. V. (VCI) Vice Chairman	<ol style="list-style-type: none"> 1. As a general principle one should be careful that negotiating objectives in this area (and in labour standards and competition policy for that matter) do not detract from the liberalisation of goods and services markets. It would be unfortunate if the EC's FTA partners were able to trade off liberalisation (through exemptions and longer transition periods) because they have taken 		

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
UNICE WTO Working Group.	<p>on labour standards. The overall goal of the FTA negotiation should be to liberalise all tariffs on industrial products in 10 years.</p> <p>2. Any obligations on labour standards should be genuinely jointly agreed; these obligations should not be imposed by any one party or forced on to another party. In this regard he noted that the environmental provisions may get further in any FTA negotiations with Korea than with India.</p>		

3.5. Resource-based implications of implementing environmental provisions in FTAs.

Most nations already devote some resources to environmental protection and the enforcement of environmental laws and regulations. In attempting to assess the additional resources needed to meet the environmental commitments in a FTA several other factors are also important, including the nature and scope of the relevant FTA commitments, the relationship of any FTA commitments to pre-existing multilateral commitments on the environment (established in MEAs), whether there is a serious prospect that the provisions will be enforced by a signatory and the nature of any sanctions allowed by the FTA for violations of the environmental provisions. It may well be that the cost of complying with an FTA provision exceeds the likely sanction for non-compliance, a point that might be taken into consideration when designing the relevant FTA provisions in the first place.

Assuming that a signatory does wish to comply with the FTA-mandated standards on the environment, then resources may be expended in the same five ways identified in section 2.5 (in the discussion of implementing labour standards). To the extent that a developing country finds locating such resources difficult, or the resources have "too high" an opportunity cost in the eyes of that nation's policymakers, then richer signatories to the FTA, bilateral donors, and international organisations (such as the World Bank) may offer capacity building and technical assistance (subject to the usual concerns about the ability to absorb such assistance etc.) One option open to the EU is to combine a set of negotiated commitments on environmental provisions with an announced and agreed sequential programme of capacity building and technical assistance measures that shift the incentives of the trading partner towards improving their environmental policies in the first place. As noted earlier, some of the extant literature argued that the training of environmental officials in particular can make a significant contribution to entrenching and improving national enforcement capacities.

4. FTA provisions on government procurement practices.

4.1. Rationale and potential impact of FTA provisions on government procurement practices.

Improved access to foreign markets provides a well-established rationale for reciprocal trade liberalisation. Therefore, one factor to take into account when considering potentially including government procurement provisions in FTAs is the size of government procurement in WTO Members. According to some estimates of the OECD, the weighted average of government procurement total expenditure in OECD Members was 17.09% of GDP in 1998, whereas it amounted to 14.48% of GDP for non-OECD Members in the same year.⁹¹ Trionfetti assesses that the size of government procurement, excluding subsidies, other transfers and salaries paid to civil servants, and finds it ranges between 10 and 12% in OECD countries.⁹² Given these estimates and the size of government spending in certain emerging markets, such as Korea, India, and Brazil, the inclusion of government procurement provisions in FTAs holds a great deal of promise.

As to the benefits of such inclusion, the reply is not so straightforward. We could not find any empirical economic studies on this precise question; most part of the economic literature reviewed focuses on the analysis of the trade impact of discriminatory procurement or on the benefits of multilateral liberalisation of government procurement markets. Yet, from these studies it is still possible to draw a partial reply to our question.

Valid, although slightly dated, are two studies on the issue of discriminatory public procurement from Baldwin (1970)⁹³ and Baldwin and Richardson (1972).⁹⁴ According to

91 See AUDET D., *Government Procurement: A Synthesis Report*, OECD Journal on Budgeting, Vol.2, No. 3, OECD 2002, p. 163. For estimates of public procurement expenditure in billion euros in EU-15, see European Commission, *Measuring the Impact of Public Procurement Policy, First Indicators, Single Market News*, March 2000, available at http://ec.europa.eu/internal_market/smn/smn20/s20mn18.htm#fn1.

92 See TRIONFETTI F., *Discriminatory Public Procurement and International Trade*, in *World Economy*, Vol. 1, (2000); TRIONFETTI F., *Home-biased Government Procurement and International Trade: Descriptive Statistics, Theory and Empirical Evidence*, in TRYBUS M., ARROWSMITH S., *Public Procurement: The Continuing Revolution*, The Hague, Kluwer Law International (2003), pp. 224-225.

93 BALDWIN R., *Non Tariff Distortions of International Trade*, Brookings Institution, Washington DC, (1970).

these authors, discriminatory public procurement affects neither domestic output levels nor imports if the overall level of demand from state entities is smaller than domestic firms willingness to supply the given product or service; here discriminatory public procurement leads private demand to increase purchases from foreign suppliers by exactly the same quantity that the government solely buys from domestic suppliers, effectively reshuffling purchasers between suppliers. However, more recent studies on the issue confirm that discriminatory procurement policy can have impact on domestic specialisation and international trade. When domestic production is lower than state administration's demand, discriminatory procurement policies result in the specialisation of domestic producers in a certain sector and reduce imports from foreign suppliers.⁹⁵ This is particularly true in markets characterised by monopolistic competition.⁹⁶

Deltas and Evenett (1997) have even assessed the distributional effects of discriminatory procurement, demonstrating that there are no benefits from discriminatory procurement for the home country as the gains from shifting profits to domestic firms are offset by the increased procurement costs.⁹⁷ Lowinger (1976) and Deardorff and Stern (1979) concluded, after having carried out a comparison between purchases from the government and purchases from the private sector during the 1970s, that huge welfare gains would derive from non-preferential procurement policies.⁹⁸

As already mentioned, a few studies dealt with the issue of the impact of the Government Procurement Agreement (GPA) on WTO Member States' markets. For instance, a study from Francois, Nelson and Palmetier (1996) stated that the conclusion of the Agreement on

94 BALDWIN R., and J. DAVID RICHARDSON "Government Purchasing Policies, Other NTBs, and the International Monetary Crisis," in H. English and K. Hay (eds.) *Obstacles to Trade in the Pacific Area*. Ottawa (1972).

95 See TRIONFETTI F., Home-biased Government Procurement and International Trade: Descriptive Statistics, Theory and Empirical Evidence, cit., p. 229.

96 *Id.*

97 DELTAS G., EVENETT S., *Quantitative Estimates for the Effects of Preference Policies*, in HOEKMAN, MAVROIDIS (eds), *Law and Policy in Public Purchasing*, University of Michigan Press, Ann Arbor, (1997).

Government Procurement during the Tokyo Round would have a significant impact on market access in certain sectors (construction, maintenance and repair services) in the United States.⁹⁹ Evenett and Shingal (2005) examined the extent to which the GPA prevented Japan's procurement market from closing during its long recession in the 1990s. They present quantitative evidence which suggests that the procurement market arising from the spending of Japan's central government fell one quarter in real size between the beginning and the end of the 1990s. More contracts fell below GPA thresholds and fewer contracts were awarded to foreigners as the 1990s went by. The authors speculate as to why the GPA agreement did so poorly. They note that the very transparency provisions built into the GPA may well have provided Japanese government officials perhaps for the first time with a comprehensive assessment of the propensity to source abroad by the 71 government purchasing bodies and that as the 1990s wore on measures were taken to reduce that propensity over time. If this conjecture is correct it may suggest that provisions in trade agreements to improve transparency of government procurement markets alone may be counterproductive.¹⁰⁰

A study conducted by the European Commission¹⁰¹ dated 2004 provides important evidence concerning the benefits of liberalisation of the procurement market within the EU. One of the main findings is that public procurement prices decreased by 30% when the directive was first applied. Some case studies reviewed in this context have also highlighted that overall the directives helped to increase intra-EU competition.

On the basis of these studies one can conclude that the inclusion of government procurement provisions in FTAs might in principle have a positive impact for both parties to the

98 OECD, Working Party of the Trade Committee, *The Relationship Between Regional Trade Agreements and the Multilateral Trading System*. Government Procurement, cit. p. 157.

99 FRANCOIS J., NELSON D., PALMETER, D. N., *Public Procurement : A Post-Uruguay Round Perspective*, Centre for Economic Policy Research, Discussion Paper 1412, London, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=4740#PaperDownload, (1996), last visited 08.05.07.

100 S. J. Evenett and A. Shingal. "Monitoring Implementation: Japan and the WTO Agreement on Government Procurement." Chapter 12 of *Economic Development & Multilateral Trade Cooperation*, edited by Simon J. Evenett and Bernard M. Hoekman. Palgrave. 2005.

101 European Commission. "A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future." 3 February 2004.

agreement, however more evidence is needed to be certain. Like its predecessors, the remainder of this section is devoted to reviewing the findings of a legal analysis of the government procurement provisions of selected FTAs and the economic research on those provisions.

4.2. Comparative legal analysis of FTA provisions on government procurement practices.

This section provides a comparative legal analysis of government procurement provisions in free trade agreements (FTAs) and discusses their benefits in terms of countries' GDP and their relationship with the WTO Government Procurement Agreement (GPA), focusing, in particular, on those sets of provisions whose scope, coverage, and content go further than the GPA. It is necessary, therefore, to briefly review the latter.

4.2.1. The WTO Government Procurement Agreement – a brief overview.

The WTO Government Procurement Agreement (GPA) is a plurilateral agreement, forming an agreed framework of rules among a limited number of WTO Members¹⁰² with respect to their internal regulations, laws, procedures, and practices in the domain of government procurement. GPA's core principles are non-discrimination and transparency.

Pursuant to the GPA's national treatment provision, each party must provide to goods, services, and suppliers of any GPA party treatment "no less favorable" than the treatment provided to domestic goods, services, and suppliers (Article III:1). To ensure proper access to procurement, the GPA lays down a series of detailed rules on tendering procedures, documentation and technical specifications, deadlines for the preparation, submission and receipt of tenders, and rules on post-contract information and publication.

102 The following WTO Members are party to the GPA: Canada, European Communities (including its 27 Member States: Austria, Belgium, Bulgaria, Cyprus, Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Lithuania, Luxemburg, Malta, Netherlands, Poland, Portugal, Romania, Slovak Republic, Slovenia, Spain, Sweden, United Kingdom), Hong Kong China, Iceland,

In addition, the GPA requires parties to set-up a domestic bid challenge system to allow suppliers to challenge procurements which they believe have been handled inconsistently with the principles of the Agreement.

The GPA obligations do not apply across the board to all procurements of all parties, but limits exist to their scope and coverage. More precisely, the GPA applies only to procurements by entities which are listed in Annexes 1 to 3 of Appendix I to the Agreement, of goods and of all services which are listed in Annexes 4 and 5 of Appendix I (that follows a positive list approach), in relation to contracts which exceed certain monetary thresholds. Each party to the Agreement is allowed to set, modify or rectify the coverage of the agreement on its own, provided it follows the procedures laid down in Article XXIV:6.

4.2.2. Government Procurement provisions in FTAs.

4.2.2.1. Overview.

The FTAs reviewed typically contain commitments similar to the ones foreseen in the GPA. Yet, only few FTAs explicitly define the parties' rights and obligations by reference to the WTO GPA; these are the EFTA States- Korea, EFTA States- Singapore, Japan-Singapore, Korea-Singapore FTAs. The majority of FTAs contain a long catalogue of rights and obligations comparable to the catalogue of the WTO GPA. This is not surprising as most of such agreements were concluded by WTO Members that are not party to the GPA. These countries were clearly unlikely to accept a simple reference to a WTO plurilateral agreement to which they are not party.¹⁰³

Israel, Japan, Korea, Liechtenstein, Netherlands with respect to Aruba, Norway, Singapore, Switzerland, United States.

103 In this regard, the US-Australia FTA represents an exception. See Article 15.14 of the FTA between US and Australia.

4.2.2.2. Preamble.

None of the FTAs examined refers in its preamble to government procurement explicitly and, in general, implicitly, albeit that some broad statements could be understood as covering government procurement as well.

4.2.2.3. Scope and coverage.

4.2.2.3.1. Definition.

As a preliminary step, we define what we mean by scope and coverage of government procurement provisions in FTAs.

By “scope” we refer in general to what the FTA rules apply. In other words, the scope of government procurement provisions in FTAs refers to the subject, object, and type of procurement. To give an example, Art. 1 GPA (titled “scope and coverage”) spells out:

“1. This Agreement applies to any law, regulation, procedure or practice regarding any procurement by entities covered by this Agreement, as specified in Appendix I.

2. This Agreement applies to procurement by any contractual means, including through such methods as purchase or as lease, rental or hire purchase, with or without an option to buy, including any combination of products and services.

[...] 4. This Agreement applies to any procurement contract of a value of not less than the relevant thresholds specified in Appendix I.”

“Coverage” is more a matter for bilateral bargaining and it refers to the actual application of FTA provisions to certain categories of contracts, entities and thresholds specified in each party’s schedule of concessions.

4.2.2.3.2. Scope.

As to the scope of government procurement provisions in FTAs, most of the FTAs reviewed apply to purchase of goods and services by governmental entities above certain minimum thresholds.

Without entering into the details of each single agreement, it suffices here to say that the following FTAs cover both goods and services: EU-Chile; Singapore-Australia; New-Zealand-Singapore; EFTA States-Chile; EFTA States-Mexico; EFTA States-Korea; EFTA States-Singapore; Japan-Mexico; Japan-Singapore; Korea-Singapore; US-Australia; US-Bahrain; Dominican Republic-Central American Countries-US; US-Chile; US-Jordan; US-Morocco; US-Oman; US-Peru; US-Singapore.

Certain FTAs exclude *de plano* certain sectors (e.g. the EU-Chile FTA and the EFTA States-Chile FTA both exclude, among others, financial services) or certain contracts (e.g. Dominican Republic-Central American countries-US; US-Bahrain; US-Jordan; US-Morocco; US-Oman; US-Peru; US-Singapore FTAs).¹⁰⁴

Some among the FTAs reviewed contain a provision on the privatisation of entities. For instance, the EFTA States-Mexico FTA provides that, when entities are privatised, parties will enter into consultations to restore the balance of their offers.¹⁰⁵ This appears to mean that privatisation of an entity included in the FTA government procurement multiplies an advantage (i.e. access to that entity's procurement) obtained by the other party. The FTA between Japan and Mexico provides that when government control of entity has been eliminated, notwithstanding that the government may possess holding thereof or appoint a corporate officer, government procurement rules should no longer apply to that entity.¹⁰⁶

4.2.2.3.3. Coverage.

As to coverage, not unexpectedly in most of the FTAs reviewed parties rely on the technique of listing covered entities and setting monetary thresholds of procurement contracts covered, as is done within the framework of the WTO GPA.

104 At this regard, it is worth noting that the New-Zealand-Singapore FTA refers to schedules of commitments only for services and is obviously intended to apply across the board to public procurement of goods.

105 See Free Trade Agreement between the EFTA States and Mexico, Art. 66.

106 Economic Partnership Agreement between Japan and Mexico, Art. 129.

A considerable number of FTAs contains commitments whose coverage goes beyond the coverage of the GPA. In this regard, one should draw a preliminary distinction between (1) those parties to the FTA which are both parties to the GPA, (2) those FTA-parties among which at least one is not a GPA party and (3) those FTA-parties which are both non-GPA parties.

As to category (1), some FTAs have reduced the monetary thresholds as opposed to the GPA. For instance, the free trade agreement between US and Singapore sets lower thresholds than the ones contained in the GPA schedules of both US and Singapore.¹⁰⁷ The same applies to the Agreement between Japan and Singapore for a New-Age Economic Partnership¹⁰⁸ and to the free trade agreement between Korea and Singapore.¹⁰⁹ The latter also broadens the entities coverage of Korea.¹¹⁰ On the contrary, the scope and coverage of the FTAs concluded by the EFTA countries with, respectively, the Republic of Korea and Singapore do not go beyond the scope of the commitments already undertaken in the context of the GPA.

As to the category (2), we observe recurring practices. In the majority of the agreements observed, GPA parties tend to agree to bilateral commitments whose scope is equivalent to the obligations undertaken in the context of the GPA: this is the case for, among others, Singapore in the Singapore-Australia Free Trade Agreement and for the US in the US-Chile Free Trade Agreement. Few GPA parties that are also parties to the FTAs tend to assume obligations whose scope goes beyond the scope of their plurilateral commitments. This is, in particular, the case for the US-Australia Free Trade Agreement: the US expands the number of entities covered¹¹¹ and lowers the thresholds for Annex I entities.¹¹² In other rare

107 See doc. GPA/W/295/Add.1, 8 December 2005, and doc. GPA/W/295/Add.2, 14 December 2005, as opposed to Annex 13A of the Free Trade Agreement between the United States and Singapore.

108 See doc. GPA/W/295/Add.1, 8 December 2005, and doc. GPA/W/295/Add.4, 24 January 2006, as opposed to Article 101(1) of Agreement between Japan and Singapore for a New-Age Economic Partnership.

109 See doc. GPA/W/295/Add.1, 8 December 2005, and doc. GPA/W/251, 18 February 2003, as opposed to Annex 16A ("Coverage of Government Procurement") of the Korea-Singapore Free Trade Agreement.

110 See list of Korean central and sub-central government entities covered, available at http://www.wto.org/english/tratop_e/gproc_e/apend_e.htm#kor, last visited 2 May 2007.

111 See, for instance, *id.*, US list of central government entities covered.

cases, instead, such as in the US-Oman Free Trade Agreement, the GPA party (in this case, the US) undertakes commitments whose scope is more limited than the GPA.

As to category (3), the sole example we are able to refer to among the agreements reviewed, is the free trade agreement between Thailand and Australia. The parties do not take any substantial commitment in relation to government procurement.¹¹³

4.2.2.4. Commitments.

The present paragraph will focus on a number of items that appear to be of particular relevance in the light of the objectives pursued. For every issue reviewed, a definition will be provided, along with a best practice example drawn from one of the agreements reviewed.

4.2.2.4.1. Selective tendering

Only few of the agreements reviewed provide for three different types of tendering procedures: open, selective, and limited tendering procedures¹¹⁴. A significant number of FTAs regulate open and selective tendering procedures¹¹⁵. The Dominican Republic – Central America – United States Free Trade Agreement regulate only open tendering procedures¹¹⁶. This does not mean that under these agreements limited tendering is forbidden but simply that it is not covered by these rules.

Selective tendering procedures are, as Art. VII.3 (a) GPA spells out, “*those procedures under which [...] those suppliers invited to do so by the entity may submit a tender*”. In order to qualify for an invitation, suppliers must satisfy certain requirements established by

112 See GPA/W/295/Add.2, 14 December 2005, as opposed to Annex 15-A of the US-Australia Free Trade Agreement.

113 See Article 1502 of the Free Trade Agreement between Thailand and Australia.

114 See, for instance, Free Trade Agreement between the United States and Australia, Art. 15.2; Free Trade Agreement between the United States and Morocco, Art. 9.9; Free Trade Agreement between the United States and Oman, Art. 9.8. Free Trade Agreement between the United States and Peru, Art. 9.7-9.8.

115 See, for instance, the EU-Chile Association Agreement, Art. 143; Singapore-Australia Free Trade Agreement, Art. 6.1; Free-Trade Agreements between the EFTA States and the Republic of Chile, Art. 54.

116 Dominican Republic – Central America – United States Free Trade Agreement, Art. 9.9.

the tendering authority. Art. X GPA provides that tendering authorities conduct the selection in a fair and non-discriminatory manner and invite tenders from the maximum number of domestic suppliers and suppliers of other parties. For the purposes of the selection, procuring authorities are also allowed to keep permanent lists of qualified suppliers.

Most of the FTAs reviewed contain rules equivalent to the GPA.¹¹⁷ Some agreements concluded by Korea or Singapore refer to the APEC Non-Binding Principles on Government Procurement and good commercial practice.¹¹⁸

Art. 15.7 of the FTA US- Australia appears to have the best language in relation to selective tendering:

“6. To ensure optimum effective competition under selective tendering procedures, procuring entities shall, for each intended covered procurement, invite tenders from the largest number of domestic suppliers and suppliers of the other Party that is consistent with the efficient operation of the procurement system.

7. A procuring entity applying selective tendering procedures shall use, in accordance with paragraph 6:

(a) a multi-use list, provided such a list is compiled in accordance with the provisions of this chapter and is appropriate to the type of procurement being undertaken;

(b) a list of suppliers that have responded to a notice inviting suppliers to submit applications for participation in a procurement;

(c) a list of suppliers that have responded to a notice requesting all interested suppliers to express their interest in the procurement, provided that the procuring entity:

(i) publishes a notice requesting any interested supplier to submit an expression of its interest in the procurement and any information requested in the notice; the notice may be the notice of planned procurement under Article 15.4.3 where that notice invited suppliers to express their interest in the procurement; and

(ii) sends an invitation to submit tenders to all the suppliers that expressed an interest in the procurement, unless it has stated in the notice that it may limit the suppliers that it will invite, in accordance with paragraph 8; or

(d) a list of all the suppliers that have been granted a license or that have been determined by the appropriate agency, authority, or organization to comply with specific legal requirements that exist independent of the procurement process, provided that:

(i) the requirement for a license or compliance with specific legal requirements is essential to the conduct of the procurement;

(ii) the complete list of such suppliers is maintained by the appropriate agency, au-

117 See EU-Chile Association Agreement, Art. 144; Free-Trade Agreements between the EFTA States and the Republic of Chile, Art. 55;

118 See, for instance, the Agreement between New Zealand and Singapore on a Closer Economic Partnership, Art. 52.1. Similarly to the GPA's core-principles, the APEC Non-binding principles are mainly focused on ensuring transparency, value for money, open and effective competitions, fair dealing and due process. See APEC Non-binding principles on Government Procurement, available at http://www.apec.org/content/apec/apec_groups/committees/committee_on_trade/government_procurement/resources/overview.html, last visited 30.04.07.

thority, or organization and is available to the procuring entity; and
(iii) the entity invites all the suppliers on the list to submit tenders in the procurement.
8. *Provided that relevant requirements and criteria have been specified in advance in a notice or in tender documentation, a procuring entity, in determining the suppliers that will be invited to tender, under paragraphs 7(b) and (c) may:*
(a) in assessing technical ability, assess the extent to which the suppliers' proposals or responses meet the technical and performance specifications of the procurement; and
(b) limit the number of suppliers that it invites to tender based on the rating of the supplier proposals or responses.
9. *A procuring entity shall apply the time limits set out in Article 15.5 for responses to the notices referred to in paragraphs 7(b) and (c).*

4.2.2.4.2. Qualification of suppliers.

Rules on qualification of suppliers are aimed at avoiding any discrimination between domestic suppliers and suppliers of the other party. These concern prompt publication of conditions for participation in tendering procedures, the nature of the conditions for participation in tenders, the process and time for qualification of suppliers.

The vast majority of FTAs reviewed relies on rules on qualification of suppliers, publication, technical specifications and objective awarding criteria.

Few FTAs contain obligations which go beyond the GPA obligations in this respect. For instance, Art. 57 the free trade agreement concluded by the EFTA States with Chile provides:

“1. Any conditions for participation in procurement shall be limited to those that are essential to ensure that the potential supplier has the capability to fulfill the requirements of the procurement and the ability to execute the contract in question.
2. In the process of qualifying suppliers, entities shall not discriminate between domestic suppliers and suppliers of another Party.
3. A Party shall not impose the condition that, in order for a supplier to participate in a procurement, the supplier has previously been awarded one or more contracts by an entity of that Party or that the supplier has prior work experience in the territory of that Party.
4. Entities shall recognize as qualified suppliers all suppliers who meet the conditions for participation in a particular intended procurement. Entities shall base their qualification decisions solely on the conditions for participation that have been specified in advance in notices or tender documentation.
5. Nothing in this Chapter shall preclude the exclusion of any supplier on grounds such as bankruptcy or false declarations or conviction for a serious crime such as participa-

tion in criminal organizations.

6. Entities shall promptly communicate to suppliers that have applied for qualification their decision on whether or not they qualify.”¹¹⁹

As to technical specifications, Article 60 of the FTA between EFTA States and Chile appears to contain the best language among the FTAs reviewed:

1. Technical specifications shall be set out in the notices, tender documents or additional documents.

2. Each Party shall ensure that its entities do not prepare, adopt or apply any technical specifications with a view to, or with the effect of, creating unnecessary obstacles to trade between the Parties.

3. Technical specifications prescribed by entities shall be:

(a) in terms of performance and functional requirements rather than design or descriptive characteristics; and

(b) based on international standards, where these exist or, in their absence, on national technical regulations⁸, recognized national standards⁹, or building codes.

4. The provisions of paragraph 3 do not apply when the entity can objectively demonstrate that the use of technical specifications referred to in that paragraph would be ineffective or inappropriate for the fulfillment of the legitimate objectives pursued.

5. In all cases, entities shall consider bids which do not comply with the technical specifications but meet the essential requirements thereof and are fit for the purpose intended. The reference to technical specifications in the tender documents must include words such as “or equivalent”.

6. There shall be no requirement or reference to a particular trademark or trade name, patent, design or type, specific origin, producer or supplier, unless there is no sufficiently precise or intelligible way of describing the procurement requirements and provided that words, such as “or equivalent”, are included in the tender documentation.

7. The tenderer shall have the burden of proof to demonstrate that his bid meets the essential requirements.

4.2.2.4.3. Time-limits.

The issue of time-limits is extremely critical in the preparation, submission, and receipt of tenders. Suppliers, especially foreign ones, must have enough time to prepare and submit their bid and, thus, actually participate to the tendering procedure.

In this regard, all FTAs concluded by the US (FTA US and, respectively, Australia, Bahrain, Morocco, Oman, and Peru) contain detailed rules on time-limits.

¹¹⁹ See similar provision in US-Peru Trade Promotion Agreement, Art. 9.7. which forbids setting as a condition for participation to a tender procedure that the foreign bidder has previously been awarded a contract by the tendering Party or has work experience within the territory of the same party.

The best provision in this respect appears to be Art. 15.5 of the US-Australia FTA.

This provision reads as follows:

“1. A procuring entity shall prescribe time limits for tendering that allow suppliers adequate time to submit applications or requests to participate in a covered procurement, including pursuant to Article 15.7.7(b) and (c), and to prepare and submit responsive tenders, taking into account the nature and complexity of the procurement.

2. Except as provided for in paragraphs 3 and 4, a procuring entity shall establish that the final date for the submission of tenders shall not be less than 30 days:

(a) from the date on which the notice of intended procurement is published; or

(b) where the entity has used selective tendering, from the date on which the entity invites suppliers to submit tenders.

3. Under the following circumstances, a procuring entity may establish a time limit for tendering that is less than 30 days, provided that such time limit is sufficiently long to enable suppliers to prepare and submit responsive tenders and is in no case less than ten days:

(a) where the procuring entity published a separate notice, including a notice of planned procurement under Article 15.4.3 at least 30 days and not more than 12 months in advance, and such separate notice contains a description of the procurement, the time limits for the submission of tenders or, where appropriate, applications for

participation in a procurement, and the address from which documents relating to the procurement may be obtained;

(b) where the procuring entity procures commercial goods or services;

(c) in the case of second or subsequent publication of notices for procurement of a recurring nature; or

(d) where a state of urgency duly substantiated by the procuring entity renders impracticable the time limits specified in paragraph 1.

4. When a procuring entity publishes a notice of intended procurement in accordance with Article 15.4 in an electronic medium, or, in the case of selective tendering, issues an invitation to tender via an electronic medium and provides, to the extent practicable, the tender documentation via an electronic medium, the procuring entity may reduce the time limit for submission of a tender by up to five days. In no case shall the procuring entity reduce either time limit to less than ten days from the date on which the notice of intended procurement is published.

5. Where a procuring entity intends to limit the submission of tenders to all suppliers that the entity has determined have satisfied the conditions for participation, except where a notice of a multi-use list has been readily accessible in electronic form for a reasonable period, the entity shall include in an invitation to tender the time limit for submitting applications. Any conditions for participation in a tendering procedure shall be published sufficiently in advance to enable interested suppliers of the other Party to initiate and, to the extent that it is compatible with the efficient operation of the procurement process, complete the registration and qualification procedures within the time allowed for tendering.

6. A procuring entity shall require all participating suppliers to submit tenders in accordance with a common deadline. For greater certainty, this requirement also applies where:

(a) as a result of a need to amend information provided to suppliers during the procurement process, the procuring entity extends the time limit for qualification or tendering procedures; or

(b) negotiations are terminated and suppliers are permitted to submit new tenders.

4.2.2.4.4. Bid challenge.

Most of the FTAs reviewed provide for bid challenge systems to allow suppliers taking part to a tender to challenge contracts which they consider having been awarded in breach of procurement rules. Yet, the degree of sophistication of these systems varies from agreement to agreement. Most of the agreements reviewed provide for a degree of detail in their rules more or less equivalent to the GPA.¹²⁰ The best provision for this regard seems to be the one contained in Art. 125 of the Economic Partnership Agreement between Japan and Mexico:

1. In the event of a complaint by a supplier that there has been a breach of this Chapter in the context of a government procurement, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring entity. In such instances the procuring entity shall accord impartial and timely consideration to any such complaint, in a manner that is not prejudicial to obtaining corrective measures under the challenge system.

2. Each Party shall provide non-discriminatory, timely, transparent and effective procedures enabling suppliers to challenge alleged breaches of this Chapter arising in the context of government procurements in which they have, or have had, an interest.

3. Each Party shall provide its challenge procedures in writing and make them generally available.

4. Each Party shall ensure that documentation relating to all aspects of the process concerning government procurements covered by this Chapter shall be retained for 3 years.

5. The interested supplier may be required to initiate a challenge procedure and notify the procuring entity within specified time-limits from the time when the basis of the complaint is known or reasonably should have been known, but in no case within a period of less than 10 days.

6. A Party may require that a challenge procedure be initiated only after the notice of procurement has been published or, where a notice is not published, after tender documentation has been made available. Where a Party imposes such a requirement, the 10 day period described in paragraph 5 above shall begin no earlier than the date that the notice is published or the tender documentation is made available.

7. Challenges shall be heard by an impartial and independent reviewing authority with no interest in the outcome of the government procurement and the members of which are secure from external influence during the term of appointment. A reviewing authority which is not a court shall either be subject to judicial review or shall have procedures which provide that:

(a) participants can be heard before an opinion is given or a decision is reached;

(b) participants can be represented and accompanied;

(c) participants shall have access to all proceedings;

(d) proceedings can take place in public;

(e) opinions or decisions are given in writing with a statement describing the basis

¹²⁰ See, for instance, the Economic Partnership Agreement between Japan and Mexico, Art. 125; Free Trade Agreement between Korea and Singapore; Agreement between New Zealand and Singapore on a Closer Economic Partnership; FTA US-Bahrain, Art. 9.11.

for the opinions or decisions;

(f) witnesses can be presented; and

(g) documents are disclosed to the reviewing authority.

8. Challenge procedures shall provide for:

(a) rapid interim measures to correct breaches of this Chapter and to preserve commercial opportunities. Such action may result in suspension of the procurement process. However, procedures may provide that overriding adverse consequences for the interests concerned, including the public interest, may be taken into account in deciding whether such measures should be applied. In such circumstances, just cause for not acting shall be provided in writing;

(b) an assessment and a possibility for a decision on the justification of the challenge; and

(c) where appropriate, correction of the breach of this Chapter or compensation for the loss or damages suffered, which may be limited to costs for tender preparation or protest.

9. With a view to the preservation of the commercial and other interests involved, the challenge procedure shall normally be completed in a timely fashion.

It is worth noting that, in respect to bid challenge provisions, some FTAs adopt an alternative approach. For instance, Article 54 New Zealand and Singapore on a Closer Economic Partnership provides that when a supplier is not able to solve the dispute with a procuring government body, it should seek the assistance of the designated body of the party in whose territory it is located, which will try to reach a mutual agreement with the designated body of the other party. The agreement of the designated bodies relies on the political will and commitment of the parties rather than on the ordinary legal redress.¹²¹ If the dispute remains unresolved, the final authority is deferred to the minister responsible for government procurement in the party which is alleged to have breached government procurement rules.¹²²

Art. 54 Agreement between New Zealand and Singapore on a Closer Economic Partnership reads as follows:

“1. In the event of a complaint by a supplier that there has been a breach of this part, each Party shall encourage the supplier to seek resolution of its complaint in consultation with the procuring government body. In such instances the procuring government body shall accord timely and impartial consideration to any such complaint.

2. Failing resolution through consultation between the supplier and the procuring government body, the complainant should seek the assistance of the designated body of the

¹²¹ OECD, Working Party of the Trade Committee, The Relationship Between Regional Trade Agreements and the Multilateral Trading System. Government Procurement, TD/TC/WP(2002)24/FINAL, 9 October 2002, p. 14.

¹²² See Agreement between New Zealand and Singapore on a Closer Economic Partnership, Art. 56.

Party in whose territory the complainant is located. A complaint made informally may be processed informally if this is deemed appropriate by the designated body and the complainant.

3 Failing resolution, the designated body receiving the complaint shall formally raise it with the designated body of the other Party for investigation of any alleged breach of this part and for a report by it in writing. The Parties agree to provide details and documentation to permit a full investigation of complaints. Confidentiality of all information shall be maintained.

4 If the response is satisfactory to the designated body which received the original complaint, then the complaint shall lapse.

5 If satisfactory resolution is not achieved, the designated body which received the original complaint may then refer the matter to the Minister responsible for procurement in the other Party for further investigation and decision.

6 In the event that a complaint cannot be resolved through the steps set out above within 30 days after the designated body receiving the original complaint has formally raised it with the designated body of the other Party, the provisions of part 10 shall apply. A Party shall be entitled by subrogation to exercise the rights and assert the claims of its own supplier against the other Party. The subrogated rights or claims shall not be greater than the original rights or claims of that supplier.”

4.2.2.4.5. Dispute settlement.

Nearly all FTAs contain dispute settlement provisions for disputes arising between the two contracting parties. Very few FTAs provide for specific dispute settlement systems for disputes arising between parties in relation to government procurement. Dispute Settlement systems for government procurement are foreseen in Chapter 9 of the EFTA States-Korea FTA, Chapter 15 of the Economic Partnership Agreement between Japan and Mexico, and Chapter 16 of the Singapore-Australia Free Trade Agreement.

4.2.2.4.6. Institutional matters.

The FTAs reviewed contain a great variety of formulas in relation to institutional co-operation among parties to the FTAs.

Some of these are typical of those agreements in which parties did not intend to assume significant commitments in relation to government procurement. A good example can be found in the FTA between Japan and the Philippines. This agreement establishes a Subcommittee on Government Procurement whose functions are *inter alia* exchanging of infor-

mation on the measures regarding government procurement, analysing information on each party's government procurement market and discussing "issues relating to government procurement" without however leading to commitments which are left to further negotiations.¹²³

A similar example can be observed in the Thailand-Australia Free Trade Agreement where parties express the will to establish a working group with a view to making recommendation to the FTA Joint Commission on the scope of commencing bilateral negotiations on government procurement.¹²⁴

Government procurement-specific institutional machineries are foreseen also in other FTAs containing more substantive provisions on government procurement. For instance, the New-Zealand-Singapore Free Trade Agreement provides that the "Designated Bodies" and a committee of senior officials responsible for government procurement policy of each party meet to discuss issues and reviews.¹²⁵ The US-Chile FTA also establishes a "Committee on Procurement", which is in charge of addressing matters related to the implementation of the government procurement commitments assumed by the parties.¹²⁶

Few FTAs provide for government procurement-specific institutional machineries coupled with a non-government procurement-specific one. For instance, under the Japan-Mexico FTA a "Sub-Committee on Government Procurement" is set up to analyse information on each party's government procurement market, to evaluate the effective access of the party's suppliers to government procedure of the other party, to monitor the application of the relevant provisions of the FTA, and to provide a forum to identify and address issues that may arise. The result of this work is submitted to the Joint Committee which then may make the

123 Agreement between Japan and the Republic of Philippines for an Economic Partnership, Art. 133.

124 Free Trade Agreement between Thailand and Australia, Art. 1502.

125 Agreement between New Zealand and Singapore on a Closer Economic Partnership, Art. 56.

126 Free Trade Agreement between the United States and Chile, Art. 9.18

appropriate recommendations to the parties.¹²⁷ A similar set of clauses appears in the Japan-Philippines FTA.¹²⁸

Agreements which do not include any government procurement specific institutional machineries are the FTAs between EFTA States and Chile; EFTA States and Mexico; Korea and Singapore; US and Australia; US and Bahrain; US and Morocco; US and Oman; US and Peru; US and Singapore; EC and Chile.

4.2.3. A taxonomy of government procurement provisions in selected FTAs.

Table 9 facilitates a comparison across the government procurement provisions of the 27 FTAs studied here and bears out many of the observations made earlier. Only five FTAs avoid mention of any government procurement-related provisions. Having said that another four FTAs have government procurement provisions that confine themselves to institutional matters, and not directly to market access (for example). FTAs in which the US has been a signatory in the recent past (specifically those FTAs after the conclusion of the US-Jordan FTA at the end of the Clinton Administration) have included an extensive range of government procurement provisions, strongly suggestive of a greater level of ambition on the part of US trade policymakers.

An interesting feature of government procurement provisions in trade agreements (and is found in the WTO GPA too) is that they often require the establishment of a domestic bid challenge procedure that is open to private parties that have participated in bidding for a state contract and have some grievance or matter they wish to raise. Bidders for state contracts,

127 Economic Partnership Agreement between Japan and Mexico, Art. 127.

128 Agreement between the Government of Japan and the Republic of the Philippines for an Economic Partnership, Art. 133.

therefore, do not as a first resort have to go to their respective governments to initiate formal dispute settlement procedures.

Table 9: Public procurement provisions of selected FTAs.

FTA	Preamble	Scope		Coverage	Commitments							
		Goods	Services		Open tendering	Selective tendering	Limited tendering	Qualification of suppliers	Time-limits	Bid challenge	Dispute Settlement	Institutional matter
Chile-EU		√	√	√	√	√	√	√	√	√		
Australia-Singapore		√	√	√	√	√	√	√		√	√	
Australia-Thailand												√
Canada-Chile		√	√	√	√	√	√	√	√	√		√
Canada-Costa Rica												
EFTA- Chile		√	√	√	√	√	√	√	√	√		
EFTA-Korea											√	
EFTA-Mexico		√	√	√						√		
EFTA-Singapore												
Japan-Malaysia												√
Japan-Mexico		√	√	√	√	√	√			√	√	√

FTA	Preamble	Scope		Coverage	Commitments								
		Goods	Services		Open tendering	Selective tendering	Limited tendering	Qualification of suppliers	Time-limits	Bid challenge	Dispute Settlement	Institutional matter	
Japan-Philippines													√
Japan-Singapore		√	√	WTO+									
Japan-Thailand													√
Korea-Singapore		√	√	WTO+	√	√	√	√	√	√			
India-Singapore													
New Zealand-Singapore		√	√	√	√	√	√			√			√
NAFTA/NA AEC													
US-Australia		√	√	WTO+	√	√	√	√	√	√			
US-Bahrain		√	√	√	√	√	√	√	√	√			
CAFTA		√	√	√	√	√	√	√	√	√			
US-Chile		√	√	√	√	√	√	√	√	√			√
US-Jordan													

FTA	Preamble	Scope		Coverage	Commitments							
		Goods	Services		Open tendering	Selective tendering	Limited tendering	Qualification of suppliers	Time-limits	Bid challenge	Dispute Settlement	Institutional matter
US-Morocco		√	√	√	√	√	√	√	√	√		
US-Oman		√	√	WTO-	√	√	√	√	√	√		
US-Peru		√	√	√	√	√	√	√	√	√		
US-Singapore		√	√	WTO+	√	√	√	√	√	√		

4.3. Overview of published assessments of the impact of FTA provisions on government procurement practices.

Despite considerable efforts very few studies on FTA provisions on state procurement practices were found (see Table 10). Only four of those articles discuss the effects of such provisions, and one does so in a very cursory fashion (see column three of Table 11). The other articles provide detailed empirical assessment of the EU's own procurement directives; two using data from 1987 to 1994/5, which sounds promising until one realises that they refer to a period at least 12 years ago. The other study focuses on the period 1995 to 2003 and therefore may be more informative. The latter study contains evidence and claims which are suggestive of benefits from the implementation of EU procurement directives, but no attempt is made out to separate out the independent contribution of the latter.

Two other considerations, related to the paucity of the studies on procurement reform in FTAs, are worth mentioning. First, no study of the impact of procurement provisions in a FTA in which the EC was not a party could be found.¹²⁹ Second, there are no econometric studies available, making it difficult to know just how much of the observed changes in import penetration, etc. can actually be attributed to the relevant procurement provisions. This

129 Note here the emphasis is on an *ex-post* evaluation of implemented procurement provisions in a FTA. It should be noted, however, that Evenett (1998) included theoretically-motivated gravity equation estimates of the likely potential impact of provisions among the selected APEC nations were they completely open their public procurement markets to other APEC nations. In the framework examined by Evenett discriminatory public procurement practices could reduce international trade through two channels: by reducing government demand for goods produced overseas and by reducing the amount of domestic goods available for sale to international markets. In his study of intra-APEC trade flows Evenett found evidence of the former effect but not the latter. See Simon J. Evenett, "Liberalizing Government Procurement in APEC Nations," in US International Trade Commission (1998) *The Economic Implications of Liberalizing APEC Tariff and Nontariff Barriers to Trade*, Washington, D.C.

makes it very difficult to argue that there is a body of evidence to support the proposition that any particular public procurement provision in a FTA has had the consequences claimed of it.

Table 10: Papers relating to public procurement provisions in FTAs.

Author(s)	Year	Title	Source
European Commission.	2004	A report on the functioning of public procurement markets in the EU: benefits from the application of EU directives and challenges for the future.	European Commission.
Evenett, Simon, and Bernard Hoekman.	2005	International Cooperation and the Reform of Public Procurement Policies.	CEPR working paper.
Gordon, Harvey, Shane Rimmer, and Sue Arrowsmith.	1998	The Economic Impact of the European Union Regime on Public Procurement: Lessons for the WTO.	The World Economy, Volume 21(2) March 1998. (Reprinted in <i>Public Procurement: Global Revolution</i> , edited by Sue Arrowsmith and Arwel Davies. Kluwer Law International. 1998).
Hart, Michael, and Pierre Sauvé.	1997	Does Size Matter? Canadian Perspectives on the Development of Government Procurement Disciplines in North America.	In <i>Law and Public Purchasing: The WTO Agreement on Government Procurement</i> . Edited by Bernard M. Hoekman and Petros C. Mavroidis. University of Michigan Press, 1997.
Kunzlik, Peter.	2003	International Procurement Regimes and the Scope for The Inclusion of Environmental Factors in Public Procurement.	OECD Journal on Budgeting: Volume 3(4), 2003.
OECD.	2002	Regional Trade Agreements and the Multilateral Trading System, Consolidated Report.	OECD Trade Committee, TD/TC(2002)8/FINAL, November 20, 2002.
Sahaydachny, Simeon A., and Don Wallace, Jr.	1999	Opening Government Procurement Markets.	In: <i>Trade Rules in the Making</i> , ed. Miguel Rodriguez Mendoza, Patrick Low, Barbara Kotschwar. Brookings Institution Press, Washington DC, 1999.

Table 11: Comments on the effects of procurement provisions in FTAs and other remarks of potential interest.

Author(s)	Year	Comments on the effects of procurement provisions in FTAs.	Other remarks of potential interest.
European Commission.	2004	<ul style="list-style-type: none"> • Report includes a lot of information on the state of the procurement markets in the EU in 2002 and 2003. No novel statistical analysis was reported, however other previous studies were referred to. The report has the following findings: • In 2002 the total EU procurement market was worth 1.5 trillion euro, equivalent to 16% of EU GDP. • Public procurement directives have increased the transparency of procurement processes. The number of invitations to tender and contract has doubled from 1995 to 2002. The average number of bidders has risen 30 percent. Still, only 16 percent of total EU procurement opportunities are published, due to variations in transparency rates across countries, as well as differences in public institutions, government administrations, organisational characteristics, and administrative practices and habits. • In a sample analysed for this report 30 percent of bids came from subsidiaries of foreign firms. These firms tended to win contracts just as often as domestic firms. • The report claims that the application of procurement rules has cut price dispersion of some relatively similar (homogeneous) goods by 30 percent. Case study evidence shows price convergence too. • 78 percent of all contracts are awarded to small- and medium-sized enterprises, suggesting that they have not been marginalised as a result of procurement reforms. 	

Evenett, Simon, and Bernard Hoekman	2005		<ul style="list-style-type: none"> • Contains a useful list of countries for which studies of national procurement reforms are available.
Gordon, Harvey, Shane Rimmer, and Sue Arrowsmith.	1998	<ul style="list-style-type: none"> • Study provides an extensive empirical assessment of the EU procurement directives. The study covers the timeframe from 1987 to 1994, which makes it rather old. The authors come to the following negative conclusion, which as argued below, is belied by more positive evidence. "The European Union regime on public procurement represents the most longstanding and rigorous attempt to open up competition in public markets. The recent study...on the impact of the regime shows, however, disappointing results, with the objectives sought being achieved in only a few sectors. Key reasons include the problem of effective enforcement, lack of clarity in the rules, the existence of structural market obstacles, and lack of response on the supply side" (page 185). 	
Hart and Sauvé.	1997	<ul style="list-style-type: none"> • To the extent that this paper makes any statements about the effects of procurement provisions in FTAs, in the concluding paragraph (page 218) it conjectures that the NAFTA provisions will deliver less in terms of opening up markets than the EC approach of combining procurement reforms with competition law enforcement. 	<ul style="list-style-type: none"> • Provides an account of the negotiations among Canada, the United States, and Mexico on government procurement practices in the context of the NAFTA. The authors argue (page 217) the asymmetries in the parties' economic size limited the extent of liberalisation, as did the presence of large sub-national government spending bodies. No argument is given to suggest that this finding is NAFTA-specific.
Kunzlik, Peter.	2003		<ul style="list-style-type: none"> • Sections 3-5 of this paper describe how the EU, NAFTA, and Australia-New Zealand Government Procurement Agreement (which is part of those two nation's economic integration initiatives) take account of environmental matters in their public procurement chapters and provisions.

OECD.	2002	<ul style="list-style-type: none"> • The nearest this study comes to making a claim about the effects of procurement provisions in FTA is the following statement "In the Pacific Rim substantial achievement in the liberalisation of procurement markets has been achieved in ANZCEFTA" (page 88). 	<ul style="list-style-type: none"> • Detailed overview of the procurement-related provisions in FTAs.
Sahaydachny, Simeon A., and Don Wallace, Jr.	1999	<ul style="list-style-type: none"> • Contains a mixed assessment of EU procurement initiatives. "The EU experience illustrates the ambitious scope of liberalization to which a regional economic group can aspire....At the same time the EU experience illustrates difficulties that can linger in the implementation of regional aspirations. Those difficulties include, in particular, imperfect or incomplete implementation at the national level and limited economic impact compared to initial expectations" (page 467). The authors cite in an accompanying footnote a 1996 EC report that claimed that only three member states had fully implemented all the relevant EU directives into national law. • "The most easily measured indicator of non-compliance with the directives is failure to publish notices. The study revealed that as a result of the procurement legislation, there has been in an increase in the number of entities publishing, reflecting, in particular, implementation of the Utilities Directives, and a recent increase in publication by sub-central bodies. The total number of notices published in the <i>Official Journal</i> has risen from around 12,000 in 1987 to 95,000 in 1995" (page 167; other supporting evidence offered here too.) Notes on page 168 that non-compliance may in fact reflect a different interpretation of the requirements contained in a directive. • Presents evidence on page 168-9 that the authors argue implies that the published notices in the <i>Official Jour-</i> 	<ul style="list-style-type: none"> • The following general claim is made concerning the effects of procurement reform: "The increased willingness to expose public procurement to market forces, including the forces of international trade, is in line with the spreading recognition that a public purchaser is more likely to obtain value for money by using procurement procurements to mobilize the commercial marketplace to offer the best available value, the latest technology, and the most favorable contractual terms. The path to those objectives lies in erecting fewer rather than more trade barriers in the government procurement field" (page 463). • The authors provide an informative account of the work of the FTAA Working Group on Government Procurement (page 469ff) and of the various aspects of procurement reform at the national level (page 471ff).

		<p><i>nal</i> are particularly important for firms seeking to enter new markets. Their survey reveals that 41 percent of such firms had found useful information from this source. "The survey also found that an estimated 14 to 20 percent of all suppliers to the public sector had identified additional opportunities in their domestic markets, and an estimated 9 to 13 percent in other EU markets, and that over two-thirds of <i>Official Journal</i> readers considered information provided in notices to be adequate for business purposes" (page 169).</p> <ul style="list-style-type: none">• The authors contend that "the current rules are far from clear and unambiguous in a number of key areas, giving significant scope for unintentional breaches. Lack of clarity can also increase the possibilities for deliberate non-compliance, in that effective policing of the rules becomes more problematic" (page 170).• Further evidence on changes in competition for procurement contracts and import penetration is presented on pages 171-173.• There is limited evidence of price convergence as a result of the implementation of the procurement directives and the authors attribute that to other factors.	
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4.4. Overview of civil society assessments of the impact of FTA provisions on government procurement practices.

Table 12 summarises the contents of several interviews with civil society organisations about the priorities and merits of FTA provisions on government procurement practices. Six of the nine interviewees chose to comment on this matter. With one exception, representatives of European business organisations argued that the negotiation of such provisions was a priority. Attention was drawn to the size of government procurement outlays in the EU's announced list of potential FTA partners, to the propensity to support so-called national champions, and for governments to employ non-transparent procurement policies in pursuit of different goals. Reference was made by some of these representatives to the standards contained in the WTO's GPA and to the relevant provisions of the recently concluded US-Korea FTA; as noted earlier the latter going further than the former in market access and other terms. It was suggested that the latter FTA's government procurement provisions might provide a useful reference point for the EU's negotiating strategy on this subject.

On the face of it the responses of the two interviewees from non-business civil society organisations contradict one another. One recommends inclusion of such provisions in FTAs; one is firmly against doing so. However, closer questioning about their objectives revealed a considerable alignment in views. Both sought to preserve the discretion of governments to support national enterprises and to discriminate against foreign bidders from countries that do not meet certain criteria (such as being democracies etc.) Comparing the responses of the business and non-business organisation representatives it is not immediately apparent how to reconcile these different perspectives, in particular as they relate to supporting state enterprises or as some referred to them national champions.

Table 12: Summary of civil society comments on FTA provisions on government procurement practices.

Civil Society expert. Name and organization.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
<p>Mr. Michel Bricout Director, Trade & Economics European Automobiles Manufacturers' Association.</p>	<ol style="list-style-type: none"> 1. This interviewee distinguished between countries where foreign firms (including the EU's) were the principal suppliers of cars versus those nations where there is a domestically-owned car producer or producers. The following comments refer to the latter countries where the potential for national champions to be developed cannot be ruled out. 2. Provisions on government procurement practices are needed in countries where national champions in the automobile industry could be nurtured. The interviewee had China, Malaysia, and India in mind here (while recognising that there is no proposal for a EU-China FTA.) 3. The EU's next set of FTAs "must address this issue." 		
<p>Dr. Guido Glania Director of International Trade Policy, Federation of German Industries (BDI).</p>	<ol style="list-style-type: none"> 1. Provisions on government procurement are important but not as "key" as non-tariff barriers, services, tariff reductions, and improving market access in general. Much depends, however, on the size of the government procurement market in the signatory government. Korea, for example, is important as the associated volume of government contracts is "quite interesting." 2. On this matter it is important to differentiate between signatories and non-signatories of the WTO's GPA Agreement. 3. For signatories of the WTO GPA agreement, such as Korea, steps should be taken to enhance the scope and volume of tenders subject to non-discriminatory treatment. Clear defined thresholds and lower thresholds are needed. Apparently the Ko- 	<ol style="list-style-type: none"> 1. The US-Korea FTA should be examined for potential provisions and associated language. 	

Civil Society expert. Name and organization.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	<p>rea-US FTA provisions on government procurement include thresholds which are 50 percent below WTO GPA levels. The state institutions covered by trade disciplines should be expanded. More transparency should be required of pre-qualification requirements.</p> <p>4. It is most important that there is a sound basis upon which to review procurement-related procedures that are thought to be discriminatory. National law systems should work in this regard but this could be complemented by bilateral inter-governmental committees between the signatories (as in the US-Korea FTA.)</p>		
<p>Mr. James Howard Director, Economic and Social Policy International Trade Union Confederation.</p>	<p>1. Provisions on promoting transparency in government procurement practices should be supported (due to the links between the absence of transparency and corruption, non-open government, and a tendency towards closed tenders for state contracts.)</p> <p>2. Socially justified preferences, both negative and positive, should be permissible. A state body should be perfectly entitled to refuse to buy from a Burmese supplier in current circumstances (with potential implications for the EU-ASEAN negotiations). More positively, preferences in state purchasing to suppliers from depressed areas or regions should be allowed. It was acknowledged that this may require legal language which deviates from the WTO GPA Agreement.</p>		
<p>Ms. Emily Jones Policy Advisor-- Economic Justice Oxfam GB.</p>	<p>1. Provisions on government procurement should be excluded from FTAs because they represent an encroachment on national policy space.</p> <p>2. Provisions that are confined to transparency are less objection-</p>	<p>1. Avoid the approach to government procurement practices taken in the EPA</p>	

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	<p>able than those that seek to eliminate any discrimination in favour of local suppliers.</p>	<p>negotiations.</p>	
<p>Mr. Francesco Marchi Director of Economic Affairs The European Apparel and Textile Organisation (EURATEX).</p>	<ol style="list-style-type: none"> 1. Provisions relating to the procurement markets of the EU's trading partners are important. 2. A three-step approach was advocated. Trading partners with better developed and transparent public procurement systems may be able to skip the first one or two steps. First, trading partners would be expected to publish information on the laws and procedures relating to public procurement. Improving transparency in this context was said to be helpful to the 180,000 European small and medium sized enterprises in the apparel and textile sector. Second, the principles and practices of the WTO and other relevant international standards (presumably UNCITRAL) should be adopted in FTA provisions. Third, provisions should be included to open up foreign procurement markets. 		
<p>Mr. Nick Miller Senior Trade Policy Adviser Confederation of British Industry (CBI).</p>	<ol style="list-style-type: none"> 1. Provisions to open foreign procurement markets should be part of the new set of EU FTAs (especially as the WTO GPA negotiations have been so disappointing.) 2. Provisions should be included to ensure consistency in treatment of national and sub-national state purchasers and authorities. 3. Where possible the principle of non-discrimination should be promoted. 		

4.5. Resource-based implications of implementing FTA provisions on public procurement practices.

In the small literature on the WTO's GPA a prominent explanation for limited developing country participation in this plurilateral agreement has been that its costs of implementation are so high. Moreover, representatives from Australia and New Zealand (two other non-members) have argued that the GPA is too prescriptive and does not allow for institutional experimentation and emulation of private sector practices by state bodies in their procurement-related decision-making. These concerns and considerations are likely to arise should proposals for procurement provisions in the EU's next generation of FTAs match, or go beyond, the provisions contained in the WTO's GPA. The provisions concerning tendering procedures (especially as they relate to transparency, notification, and publication requirements including language of publication), qualification of suppliers, and the creation of both bid challenge procedures and institutions between FTA signatories require skilled human resources, and qualified expertise may well be at a premium in developing countries. Some of these provisions might require outlays of government spending too (such as establishing the court for the bid challenge mechanism as well as additional salaries etc.) To the extent that the procurement provisions liberalise part (or all) of state procurement in a FTA signatory, then if a competitive tendering procedure is less administratively intensive than the scheme it replaced then there could be implementation-related savings, not costs as is so often discussed. However, without knowledge of the potential FTA provision and of the level of domestic procurement capacity in an EU trading partner, it is difficult to go beyond a qualitative identification of potential resource implications. Generalisation here may be inappropriate given the variation in the levels of development of the potential EU FTA partners.

The procurement-related implementation costs may be alleviated by longer phase-in times, training programmes of procurement officials, and associated capacity building pro-

grammes, as well as the training of judges or other officials to administer the bid challenge procedures. Potential FTA signatories could be offered technical assistance, although the point could legitimately be made that the greater share of the benefits from improved public procurement procedures are likely to accrue to the reforming nation and not to its trading partners. Greater competition for state contracts from both domestic and foreign firms alone should enable governments to obtain better value for money from tight public budgets. In conclusion, trade-related public procurement provisions are a topic where concerns about implementation costs are of long-standing, having been discussed openly since the conclusion of the Uruguay Round GPA. This does not make those costs insuperable or necessarily undermine the value of including such provisions in FTAs, however, particular care may be needed in this case to ensure that the choice of public procurement provisions to be proposed is such that the cost-benefit calculus associated with them tilts in the right direction for the EU's potential future FTA signatories.

5. FTA provisions on non-tariff barriers.

5.1. Rationale and potential impact of FTA provisions on non-tariff barriers.

As tariff barriers have fallen with the implementation of successive multilateral trade accords, fears about the potential substitution of these transparent measures with less transparent but no less market-access impeding non-tariff barriers has grown. The potential for nullification and impairment, as well as outright reversals, of hard-won market access gains has provided a strong rationale for interest in non-tariff barriers among trade policymakers.

Progress in tackling non-tariff barriers has been slow, however, for a number of reasons. Unlike tariffs it is difficult to classify or define precisely what is a non-tariff barrier. This is not just a matter of intent (i.e. protectionist intent). Non-tariff barriers can have a wide range of different characteristics, all of which need to be properly taken into account. Worse, what some contend is a non-tariff barriers others regard as a perfectly legitimate piece of domestic regulation. Indeed, some prefer the term non-tariff measures to non-tariff barriers to indicate that the purpose of the government intervention in question is not to inhibit trade.

In some sectors standards, such as sanitary and phytosanitary standards, play a critical role in determining whether a firm has access to a given market in the first place. Product design standards can legitimately vary across countries but some suspect that national standards can be used deliberately to impede imports. The sector-specificity of many standards often further fragments discussions on non-tariff barriers, yet at the same time can generate strong sectoral interests supportive of including certain provisions into trade agreements.

Empirical analysis of non-tariff barriers requires some subtlety. The incentives provided by the non-tariff barrier must be carefully thought through, as this will reveal in which ways (if at all) private sector firms will respond to the imposition or presence of such a barrier. Typically, this requires knowledge of the objectives, form, and implementation of the government policy in question. In principle, empirical analysis could reveal what would be the impact on market outcomes or international commerce if the offending non-tariff barrier were

removed. Perhaps of equal interest are empirical studies that estimate the impact on commercial outcomes of replacing a given non-tariff barrier with another one that is less, or completely, non-discriminatory. The sector specificity of many non-tariff barriers invariably lead many researchers to pursue industry-level analysis, although one should not forget the potential for these barriers to have economy-wide effects.

In the next subsection the form and implementation of FTA provisions on five prevalent non-tariff barriers are discussed. After that, the results of a review of the empirical literature on the effects of FTA provisions on non-tariff barriers are presented, along with summaries of the interviews with European civil society organisations concerning the merits of FTA provisions on NTBs, and finally some comments on the potential resource-based implications of such FTA provisions.

5.2. Comparative legal analysis of FTA provisions on five types of non-tariff barriers.

Per the terms of reference for this study, the legal analysis of FTA provisions on non-tariff barriers was confined to five possible types. Namely, those non-tariff barriers relating to alcoholic beverages, automobiles, electronic goods, chemicals (including pharmaceuticals), and textiles. In what follows the legal analyses of each type of provision is discussed in turn. Given the diversity in the form and scope of the FTA provisions relating to potential NTBs in these five sectors there was not a sufficient comparative basis upon which to assemble a taxonomy of NTB provisions in FTAs (in contrast to the four other types of FTA provision examined for this report).

5.2.1. Alcoholic Beverages.

5.2.1.1. The Preamble.

There are no statements or preamble objectives related to alcoholic beverages in any of the FTAs surveyed.

5.2.1.2. The Scope of the Provisions.

Among the FTAs studied, the US agreements with Chile, CAFTA-DR, and Peru present a distinct model of regulation in which the US is concerned with protecting Bourbon Whiskey and Tennessee Whiskey as ‘distinctive products’ of the US in the markets of the other parties to these agreements. In addition to reaffirming the parties’ commitments under the WTO TRIPS Agreement, the provisions included in these FTA’s commit the parties to prohibit the sale of Bourbon Whiskey and Tennessee Whiskey unless it has been manufactured in the US and in accordance with the relevant domestic regulations governing the production of these whiskey brands.

In the US-Chile FTA, reciprocal commitments are accorded to *Pisco Chileno* (Chilean Pisco), *Pajarete*, and *Vino Asoleado*. In Chile, these beverages are authorised to be produced only in Chile and according to certain regulations. They can therefore be viewed as ‘distinctive products’ of Chile.¹³⁰ The US also recognises ‘*Pisco Perú*’ as a distinctive product of Peru in the US-Peru FTA. However, the US-CAFTA-DR does not contain any commitment from the US to recognise any ‘distinctive’ alcoholic products from the CAFTA-DR countries.

These provisions are found exclusively in the FTAs the US has signed with Latin America countries. The only provision regulating alcohol in the other US agreements covered in this study is the US-Singapore FTA. Here Article 2.9 on Distilled Spirits requires that Singapore harmonises its excise taxes on imported and domestic distilled spirits before 2005.

¹³⁰ *Distinctive products* are defined by the EU as agricultural or food products originating from a determined region and whose quality or characteristics are due essentially or exclusively to the geographical environment, including natural and human factors, and whose production and processing happen in the same region. This is to be contrasted with the narrower category of *geographical indicators*, which are defined in the WTO TRIPS Agreement as: "indications which identify a good as originating in the territory of a Member, or a region or locality in that territory, where a given quality, reputation or other characteristic of the good is essentially attributable to its geographical origin." A *trade mark* on the other hand does not require any in-

The Canada-Costa Rica FTA presents an alternative model of regulation. Within the main body of the agreement, there is a provision on Wine and Distilled Spirits¹³¹ which obliges the parties to remove any regulation requiring that imported spirits are blended with domestic spirits. In addition to this, the agreement incorporates Annex III.8 (Wine and Distilled Spirits) that applies to other measures relating to wine and distilled spirits and requires that any measure related to the listing of wine and distilled spirits conform to the national treatment provisions set out in the GATT, the WTO TRIPS Agreement, and other procedural requirements for transparency and non-discrimination. Further provisions state that if the distributor of wines or spirits is a public entity they may charge the ‘actual cost-of-service differential’ between wine or distilled spirits of the other party and domestic wine or distilled spirits.

Subject to the national treatment requirements, the alcoholic beverages annex allows the parties to maintain or introduce a measure limiting on-premise sales by a winery or distillery to those wines or distilled spirits produced on its premises. A provision further permits existing private wine store outlets in two Canadian provinces (Ontario and British Columbia) to discriminate in favour of wine of those provinces, although only to the degree of existing discrimination set out in an existing regulation. A provision also allows the Province of Quebec to require that any wine sold in grocery stores in Quebec be bottled in Quebec, provided that alternative outlets are made available in Quebec for the sale of wine of the other party whether or not such wine is bottled in Quebec.

This annex is reproduced in the Canada-Chile FTA but in this case, the FTA also includes an additional annex (Annex C-11) on Geographical Indications. This annex obliges Chile to protect the geographical indication of ‘Canadian Whisky’ by prohibiting the import or sale of any product under the name of ‘Canadian Whisky’ unless it has been manufactured

herent originality from a product, rather it is a name, symbol or other identifying device for a product that has been officially registered. The trade mark is legally restricted to the use of the owner or manufacturer.

131 Article III.8.

in Canada and in accordance with Canadian regulations governing ‘Canada Whisky’ for consumption domestically. Further, Chile must require that any product marked ‘Canadian Whisky’ has certification from a competent Canadian authority until Chile fully implements its obligations under the TRIPS Agreement. In return, Canada is obliged to protect the geographical indication covering Chilean Pisco – ‘*Pisco Chileno*’ in Canada under the Trade-marks Act.

The EC-Chile FTA presents comprehensive regulation covering alcoholic beverages. The parties reaffirm their obligations under the WTO SPS and WTO TRIPS Agreement, particularly Article 23, which is referred to in order to ensure that geographical indications are protected effectively, while trademarks are phased out. Geographical indications cover terms referring to the Member State in which the alcoholic product originates and an extensive appendix of geographical indications (Appendix I), in addition to wine originating in Chile and a separate appendix listing geographical indications (Appendix II).

A safeguard provision is also included (Article 25), which entitles the parties to introduce temporary additional import certification requirements in response to legitimate concerns, including health, consumer protection or fraud.

In the NAFTA¹³² wine and distilled spirits are regulated between Canada and the US according to the provisions of chapter 8 of the Canada-US FTA. Beers and malted drinks are not subject to specific regulation. Chapter 8 specifies that measures concerning listing for sale of wine and distilled spirits are to be transparent and non-discriminatory. The chapter allows a provincial liquor board or any other public body distributing wine and distilled spirits to charge the additional cost of selling the imported product. Differential charges on wine which exceeded this amount were reduced over a seven year period. All other discriminatory pricing measures were to be eliminated immediately. Provisions also allow wineries or distilleries to limit sales on their premises to wines and spirits produced on those premises, while certain

private wine outlets in named Canadian provinces were permitted to favour the sale of their own wine.

The annex contains provisions prohibiting all the NAFTA parties from imposing blending requirements on distilled spirits imported from the other party. Canadian Whiskey and US Bourbon Whiskey are recognised as distinct products of their respective countries, and Tequila and Mezcal are recognised by all the parties as a distinctive product of Mexico. This distinction prohibits the sale of any products under those names, unless they were manufactured in accordance with the relevant laws.

The provisions regulating alcoholic beverage trade between Canada and Mexico follow the procedural provisions set out in the US-Canada agreement. However, certain annexes of the 1989 Canada-European Economic Community Agreement concerning Trade and Commerce in Alcoholic Beverages, apply with ‘such changes as the circumstances may require.’ Further all discriminatory mark-ups on distilled spirits were eliminated immediately.

5.2.1.3. Institutions and agencies.

No supranational agencies or institutions are set up to deal with the regulation of alcoholic beverages in the US-Singapore, US-Chile, US-CAFTA-DR or the US-Peru FTAs. In the latter two FTAs, however, a provision is included which states that the Committee on Trade in Goods must recommend that the agreement be amended if one of the parties wishes to designate an alcoholic beverage as a distinctive product.

In the Canada-Chile and Canada-Costa Rica FTA, a Sub-Committee on Agriculture is created which provides, among other things, a forum for the parties to consult on issues relating to market access for agricultural goods, including wine and alcoholic beverages.

In the EC-Chile FTA an Association Committee establishes a list of oenological arbitrators¹³³ while a Joint Committee of representatives of the parties implement the Agreement and make recommendations to further the objectives of agreement and in particular: ‘it shall put forward proposals on issues of mutual interest in the wine sector’ (Article 30:5).

5.2.1.4. The Dispute Settlement Mechanism.

The general dispute settlement mechanism of the US-CAFTA-DR, US-Chile, US-Peru, US-Singapore, NAFTA, Canada-Chile and Canada-Costa-Rica FTAs, covers the application of the provisions regulating alcohol. None of these agreements provide for a private right of action under its domestic law against the other party, in the event that the other party has not observed its obligations under the agreement. The DSM provisions apply only when there is a dispute regarding

- the interpretation and application of the agreement,
- the failure to carry out the obligations attached to the agreement,
- nullification or impairment of benefits accruing from the agreement.

The DSM consists initially of consultations, good offices, mediation and conciliation. An arbitration panel is available should these mechanisms fail to resolve the dispute, which allows for third party participation. The panel produces a final report for implementation by the offending party. If the recommendations are not implemented within the timetable set down in the agreement, the Commission governing the dispute may determine a monetary assessment to be paid by the offending party. If this does not occur, the complaining party can suspend benefits up to the level determined by the panel.

The EU-Chile DSM set out in the *Alcohol Annex* provides that any dispute in the arbitration procedure concerned with the oenological practices and processes must be examined

¹³³ Oenological arbitrators are experts in the art of wine-making tasked with the position of arbiter in any discussions concerning wine varieties.

under Title VIII of the agreement. This consists of consultations and arbitration. The panel hearing may be open to interested parties if the panel so agrees. The panel's ruling is binding and in the event of non-compliance, a party may suspend benefits accruing to the offending party, seeking initially to suspend benefits in the same Title or Titles where possible.

Disputes relating to the implementation or interpretation of all other provisions regulating alcohol should be settled first in consultations and failing this, under the general dispute settlement mechanism referred to in part IV of the Association Agreement. Again, in the event of non-compliance of the final panel report under part IV, the complaining party is ultimately entitled to suspend the benefits granted equivalent to the level of nullification and impairment caused by the non-compliant measure.

The NAFTA dispute settlement mechanism included in Chapter Twenty establishes a Free Trade Commission of cabinet level representatives from all the parties. This Commission supervises the implementation and operation of the agreement, in addition to resolving any disputes regarding its interpretation and application. Notwithstanding this, should a dispute arise which may be settled in the NAFTA or the WTO DSU, the complaining party may chose either forum but to the subsequent exclusion of the other.¹³⁴ However, the NAFTA DSU does not provide for right of action for any party under its domestic law against any other party on the ground that a measure of another party is inconsistent with this Agreement.¹³⁵

If following consultations, good offices, conciliation and mediation, the parties are unable to resolve the dispute, an Arbitral Panel may be established by the Commission, which may also be attended by 'interested' third parties. The panels are composed of five individuals chosen from a roster of relevant independent experts, identified by the parties. This panel produces an initial and final report with recommendations for resolving the dispute. If these rec-

134 Article 2005:6.

135 Article 2021: Private Rights

ommendations are not implemented, the complaining party may suspend benefits of equivalent effect until the dispute is resolved.

5.2.2. Automobiles.

5.2.2.1. The Preamble.

There are no statements or preamble objectives related to automobiles, vehicles, or cars in any of the FTAs surveyed.

5.2.2.2. The Scope of the Provisions.

Only five of the FTAs covered have provisions regulating automobiles. These are the NAFTA, US-CAFTA-DR, US-Chile, Japan-Philippines and US-Australia FTAs.

The US-CAFTA-DR agreement contains provisions regulating the sale of second hand cars. The national treatment obligations and provisions eliminating non-tariff barriers are suspended in the following countries:

- The Dominican Republic for the importation of motor vehicles and motorcycles older than five years, and vehicles greater or equal to five tons older than 15 years, and motor vehicles not suitable for operation.
- In El Salvador for the importation of motor vehicles older than eight years, and on buses and trucks older than 15 years.
- In Honduras for the importation of motor vehicles older than seven years and buses older than ten years.
- In Nicaragua for the importation of motor vehicles older than seven years.

In the US-Chile FTA, Article 3.11 prohibiting non-tariff measures does not apply to Chilean laws and provisions regulating the importation of second hand cars. However, the age of the car is not specified. This is also the case of the US-Australia FTA, which suspends its national treatment requirements and prohibition of non-tariff barriers on the importation of

second hand motor vehicles under Section 17A of the *Motor Vehicles Standards Act of 1989* and the *Motor Vehicles Standards Regulations of 1989*.

The US-Australia FTA and NAFTA list some exceptions to the general government procurement requirements in the field of automobiles. In the NAFTA this exemption includes: motor vehicles, trailers and cycles, vehicular equipment components and engine.¹³⁶ In the US-Australia FTA, the exemption covers both state and regional government procurement policies towards purchasing vehicles. These are exempt from the general government procurement provisions in order to protect a party's essential security interests relating to the procurement of arms, ammunition or war materials for national security or for national defense purposes.

5.2.2.3. Institutions and Agencies.

No particular agencies or institutions are set up to deal with the regulation of automobiles under these agreements, except for the NAFTA Automotive Standards Council,¹³⁷ which facilitates the implementation of national standards related measures of the parties that apply to automotive goods, and addresses other unspecified but related matters. This Council may include representatives from the state or provincial government and the private sector. All Council recommendations must be agreed to by all the parties. The Council's work programme involves increasing the compatibility of national standards related measures that apply to automotive goods based on:

- the impact on industry integration,
- the extent of the barriers to trade,
- the level of trade affected, and,
- the extent of the disparity.

136 NAFTA Article 1018(1) (Exceptions) Section B. List of Certain Goods. Annex 1001.1a-1. Federal Supply Classification codes 23, 25, 29.

In developing its work program, the Council may address other related matters.

5.2.2.4. Dispute Settlement Mechanism.

The regulation relating to the trade in motor vehicles is covered by the DSM covering the entire FTAs, as outlined above.

5.2.3. Electronic Goods.

5.2.3.1. The Preamble.

There are no statements or preamble objectives related to electronic goods in any of the FTAs surveyed.

5.2.3.2. The Scope of the Provisions.

Australia-Thailand FTA commits the parties to ‘take steps’ to implement parts 1, 2 and 3 of the *APEC Mutual Recognition Arrangement for Conformity Assessment of Electrical and Electronic Equipment* with respect to the other party.

In the US FTAs with CAFTA-DR, Australia, Peru, Bahrain, Chile, Singapore, Oman, Morocco, and Jordan consumer electronics are covered only within the copyright provisions. The text presents a model which attempts to remove a NTB by providing that

‘neither Party shall be obligated to require that the design of, or the design and selection of parts and components for, a consumer electronics, telecommunications, or computing product provide for a response to any particular technological measure, so long as the product does not otherwise violate any measures implementing the relevant provisions on the protection of copyright.’

The US-Australia FTA provides for a powerful NTB in the field of electronic goods. The Government Procurement chapter does not cover the procurement of the goods FSC 59

Electrical and Electronic Equipment Components, due to application of Article 22.2 on Essential Security.

5.2.3.3. Institutions and agencies.

No particular agencies or institutions are set up to deal with the regulation of electronic goods under these agreements.

5.2.3.4. Dispute Settlement Mechanism.

The regulation relating to the trade in electronic goods is covered by the DSM covering the entire FTAs, as outlined above.

5.2.4. Chemicals, including pharmaceuticals.

5.2.4.1. The Preamble.

There are no statements or preamble objectives related to chemicals in any of the FTAs surveyed.

5.2.4.2. The Scope of the Provisions.

Of the FTAs surveyed, only the US agreements with Australia, Chile, CAFTA-DR, Peru, Oman, Jordan, and Singapore incorporate specific provisions regulating chemicals, including pharmaceuticals. Of these, all but the US-Australia FTA include chemicals and pharmaceuticals within the chapter on intellectual property rights. In addition to this, the US-Australia FTA includes an annex on pharmaceuticals.

In addition to reaffirming the parties' commitments under the WTO TRIPS agreement, these FTAs include similar patent provisions within the intellectual property chapter. They stipulate that if either party permits a third person to use the 'subject matter' of a subsisting patent to support an application for marketing approval of a pharmaceutical product, that

party shall prohibit the pharmaceutical product from being made, used, or sold in the territory of that party.

These agreements also incorporate into the intellectual property chapter, provisions covering ‘Measures Related to Certain Regulated Products.’ These provisions set out the time frames to protect patents, which are generally five years for pharmaceutical products and ten years for agricultural chemicals. The provisions regulate the granting marketing approval for a new pharmaceutical or agricultural chemical product, or a new chemical entity in a previously approved product. They also cover the submission of new or existing information concerning the safety or efficacy of the product and the consent of a person that previously submitted such information to obtain marketing approval.

All the FTAs include provisions which state that for pharmaceutical products that are subject to a patent, both parties must make available an extension of the patent term to compensate the patent owner for unreasonable curtailment of the patent term as a result of the marketing approval process. They must also disclose the identity of the third party as well as ensure that marketing approval is not granted to a third party before the patent term expires, or by consent of the subsisting patent owner.

The agreed principles of the US-Australia pharmaceuticals annex¹³⁸ are to promote innovative pharmaceutical and high quality health care by developing intellectual property protection, research and development, competitive markets, and principles of good governance. The annex sets out transparency procedures which cover the time frames, rules, and principles for assessing and commenting on proposals, in addition to disseminating relevant information to health professionals and the public/consumer. It also establishes an independent review process.

138 Specifically Annex 2-C.

Under the NAFTA, chemicals and chemical products¹³⁹ are exempt from the general government procurement provisions in order to protect a party's essential security interests relating to the procurement of arms, ammunition, or war materials for national security or for national defence purposes.

5.2.4.3. Institutions or agencies.

The only body established to deal with chemicals and pharmaceuticals is in the US-Australia pharmaceuticals annex. Here a Medicines Working Group is created as an agency to promote the Annex, while existing dialogue between the relevant regulatory agencies in each party is encouraged with a view to making innovative medical products more quickly available to their nationals.

5.2.4.4. The Dispute Settlement Mechanism.

The regulation relating to the trade in chemicals is covered by the DSM covering the entire FTAs, as outlined above.

5.2.5. Textiles.

5.2.5.1. The Preamble.

There are no statements or preamble objectives related to textiles in any of the FTAs surveyed.

5.2.5.2. The Scope of the Provisions.

The conflict clause in the NAFTA, Canada-Chile, and Canada-Costa Rica FTAs provide that if any inconsistency arises between this Agreement and the WTO Agreement on Textiles and Clothing (ATC) or any other existing or future agreement applicable to trade in

139 Article 1018(1) (Exceptions)Section B. List of Certain Goods. Federal Supply Classification code 68.

textile or apparel goods, these FTAs prevail unless the parties agree otherwise. Conversely, the conflict clause set out in the US-Singapore FTA provides that the rights and obligations of the WTO Agreement on Textiles and Clothing prevail.

Only the following FTAs have NTB provisions regulating textiles: NAFTA, Canada-Chile, Canada-Costa Rica, US-Singapore, US-Peru, US-Morocco, US-Bahrain, and US-Oman. All the agreements also include safeguards in the form of both tariff actions and quantitative restrictions.¹⁴⁰ All the FTAs surveyed prohibit any party from taking or maintaining a safeguard under their respective FTA, against a textile or apparel good that is subject or becomes subject to the GATT Safeguards Agreement.

5.2.5.3. Emergency Tariff Actions.

In the NAFTA, Canada-Costa Rica, and Canada-Chile FTAs if a textile good originating in either country is being imported in such increased quantities and in a manner which causes or threatens to cause serious damage to a domestic industry, the tariff actions available under the agreement's safeguard provisions allows the importing party to suspend any further reduction of tariff rates agreed to in the FTA on the good in question. It also permits the importing party to increase the rate of duty on the good, although this level can not exceed the MFN rate of tariff duty in effect immediately preceding or at the time of signing the agreement.¹⁴¹

In determining the effect of increased imports on the industry in question, changes in relevant economic variables including: output, productivity, utilisation of capacity, inventories, market share, exports, wages, employment, domestic prices, profits and investment should be considered, while changes in technology or consumer preference cannot be considered. Unless the parties agree otherwise, these safeguards cannot be maintained for more than

140 Bilateral Emergency Actions: Canada-Chile Annex C-00-B Section 3 & 4. Canada-Costa Rica Annex III.1: Section 4 and 5.

141 Whichever is the lesser. *Ibid.* Canada-Chile Section 4.1(b) and Canada-Costa Rica; Section 3.1(b).

three years, and cannot be taken against any particular good more than once during the transition period. Once the safeguard has been lifted, the tariff rate must be set at the rate that would have been in effect one year after the initiation of the action, and beginning January 1 of the year following the termination of the action.

The parties must agree to the compensation to be paid by the party invoking a safeguard. This should be substantially equivalent to trade effects or equivalent to the value of the additional duties expected to result from the action. These concessions shall normally be limited to textile goods. If the parties disagree on the level of compensation, the exporting party can take tariff action having trade effects substantially equivalent to the safeguard taken against any goods imported from the other party.

5.2.5.4. Emergency Quantitative Restrictions.

In the Canada-Costa Rica FTA, quantitative safeguards may be imposed if a party can demonstrate that a non-originating textile good¹⁴² is being imported into its territory from the other party in increased quantities and under such conditions that cause serious damage to a domestic industry. Initially the importing party must request consultations with the exporting party with a view to eliminating the serious damage or threat. The parties must:

- consider the situation in the market in the importing country,
- consider the history of trade in textile and apparel goods between the parties,
- seek to ensure that the imported textile goods are accorded equitable treatment with those textile goods from non-party suppliers.

In the Canada-Costa Rica FTA if the parties disagree on a satisfactory level of export restraint, then the importing party may impose annual quantitative restrictions on imports of the good from the other party no less than:

142 This non-originating good must have entered the exporting party under a tariff preference level.

- the quantity of the imported good as reported during the first 12 of the most recent 14 months preceding the month in which the request for consultations was made, and,
- 20 per cent of such quantity.

For each successive calendar year, it should increase by six per cent although no such restriction should remain in effect beyond the transition period or one year following the full integration into the WTO. In the Canada-Chile FTA the quantitative restrictions applied to cotton, manmade fibre, and other non-cotton vegetable fibre good categories are less restrictive (20 per cent and six per cent annual increase, respectively) than wool good categories (six per cent and two per cent annual increase respectively).

Chapter 5 of the US-Singapore agreement sets out Singapore's obligation to register and monitor the conduct of all textile enterprises in Singapore exporting to the US. This includes production, processing, or manipulation of textile goods in its territory, in a free trade zone and under the Outward Processing Arrangement. It also incorporates an obligation to maintain records and documents that may be relevant to determining the existence or extent of any such circumvention. Government inspections of such enterprises should be conducted without prior notice, at least twice a year to verify compliance with the laws covering textile goods. Singapore is obligated to provide a prompt, written report to the US.

General safeguard provisions are also included for textile trade.¹⁴³ These follow the same conditions as the NAFTA, Canada-Chile, and Canada-Costa Rica FTAs, except that the tariff emergency actions are contained in the same article as the quantitative restriction emergency actions. Further, no action may be maintained for a period exceeding two years, although this period may be extended by up to two years if necessary to prevent or remedy serious damage and to facilitate adjustment by the domestic industry. The party taking an action must provide compensation in the form of concessions equal to the trade effects or the value

of the additional duties expected to result from the emergency action. The concessions must be limited to textile goods.

The US-Peru FTA chapter on textiles is similar to the model of safeguard measures set out in the US-Singapore FTA. The differences lie in the commitment to apply a textile safeguard only following an investigation by a parties' competent authority and the extension period for a two-year safeguard is only up to one year.¹⁴⁴ The US-Oman FTA allows safeguards to be maintained for up to three years, but no action can be taken against a good ten years after the duties on that good have been eliminated as a result of the FTA.¹⁴⁵ This is also the case for the US-Morocco FTA textile safeguard provisions, although these have the possibility of being extended for a further two years unless ten years have elapsed since the duties on the good were eliminated as a result of the FTA.¹⁴⁶

The US-Chile safeguard provisions for textiles follow similar requirements although they provide that no emergency action can be maintained for a period exceeding three years and no emergency action can be taken or maintained eight years after duties on a good have been eliminated because of the FTA commitments.¹⁴⁷ This is the same in the US-Bahrain FTA textiles chapter, where bilateral emergency actions for textiles may not be maintained for more than three years, and cannot take place after ten years following the elimination of customs duties under the FTA.

The NAFTA has additional provisions covering labelling requirements in the chapter covering technical barriers to trade¹⁴⁸ and in the textiles chapter there is a regulation concerning the trade in second hand clothing and other second hand articles. A subcommittee is required to work towards the harmonisation of labelling requirements between the parties

143 US-Singapore. Article 5.1.

144 US-Peru. Article 3.3.

145 US-Oman. Article 3.1.

146 US-Morocco. Article 4.1.

147 US-Chile. Article 3.19.

148 NAFTA Annex 913.5.a-4.

through the adoption of uniform labelling provisions including: pictograms and symbols to replace written information, care instructions, fibre content information, and national registration numbers for manufacturers or importers of textile and apparel goods.

The NAFTA committee on trade in worn clothing is required to assess the potential benefits and risks that may result from the elimination of existing restrictions on the parties' trade in worn clothing and other worn articles. This assessment includes an examination of the effects on business and employment opportunities, and on the parties' market for textile and apparel goods. The provisions allow a party to maintain any restrictions on the importation of worn clothing and other worn articles that were already in effect at the entry into force of the agreement,¹⁴⁹ unless otherwise agreed upon by the parties.

5.2.5.5. Institutions and agencies.

In the US-Peru FTA a committee on Textile and Apparel Trade Matters is established.¹⁵⁰ The committee meets only upon the request of any party or the US Free Trade Commission to consider any matter arising under the textiles chapter.

Under the NAFTA the technical barriers to trade chapter establishes a Subcommittee on Labelling of Textile and Apparel Goods to perform the functions discussed above.¹⁵¹ It is composed of representatives from the parties and manufacturing and retailing sectors, in addition to experts.¹⁵² A Committee on Trade in Worn Clothing is also created within the NAFTA textiles chapter to assess the potential benefits and risks that may result from the elimination of existing restrictions on trade between the parties in worn clothing and other worn articles.¹⁵³ This committee is composed of representatives of each party in consultation with representatives from the manufacturing and retailing sectors in each party.

149 Those second hand goods classified under heading 63.09 of the HS.

150 US-Peru. Article 3.4.

151 NAFTA. Annex 913.5.a-4.

152 NAFTA. Article 913(5).

153 NAFTA. Annex 300-B. Section 9.

In the Canada-Costa Rica FTA the parties entrust a competent and adequately resourced investigating authority, which is empowered under domestic law, to determine whether serious injury or threat thereof necessitates invoking textile safeguards.

5.2.5.6. Dispute Settlement Mechanism.

In all of the textile safeguards provisions in these FTAs, if there is a disagreement between the parties on a satisfactory level of export restraint, the importing party may impose either an annual quantitative restriction on imports of the good or an increase in the rate of duty applied to the good in question. Compensation must be offered in the form of concessions equal to the trade effects or the value of the additional duties expected to result from the emergency action. The concessions must be limited to textile goods.

In the Canada-Costa Rica and Canada-Chile FTAs, the parties are prohibited from requesting the establishment of an arbitral panel under the general DSM provisions regarding any proposed emergency action.¹⁵⁴ This implies that safeguard actions are ultimately non-judiciable under the agreement.

5.3. Overview of published assessments of the impact of FTA provisions on non-tariff barriers.

Given that no study was found that examined the quantitative implications of liberalising non-tariff barriers in the context of a FTA, the papers reserved for additional scrutiny and that are reported in Table 13 contain different discussions of various aspects of non-tariff barriers. Three of the studies (OECD 2004, USITC 1998, and WTO 1998) contain information on the non-tariff barriers employed by some of the countries that the EC is considering negotiating FTAs with. (The data sources used in these three studies may be of interest, potentially to replicate and update these analyses. More details can be found in Table 14.)

The studies by Beghin and Bureau (2001) and Maskus et al. (2000) provide good overviews of the existing literature on the effects of non-tariff barriers, both specifically focus on technical barriers to trade and on sanitary and phytosanitary measures. Unfortunately, none of the literature reviewed specifically reports estimates of the effects of liberalisation in the context of FTAs. Even so, the discussions in these papers are more focused on the matters of interest here than the more general treatments of measuring and estimating non-tariff barriers (see, for example, Deardorff and Stern 1998).¹⁵⁵

The study by Moenius (2004) contains interesting results about the effect of own national standards for manufactured goods. These are found to boost imports on average, raising the question as to how much extra trade would result if any two countries adopted a common standard. If Moenius' finding is correct then it might call into question the magnitude of the commercial payoff of any FTA provisions harmonising standards in manufactured goods.

154 Canada-Chile Article F-01:5; Canada-Costa Rica Article VI.2(5).

155 Naturally Deardorff and Stern's monograph (and original report to the OECD from the previous year) were reviewed in the preparation of this report. This monograph does not provide any additional information on the magnitude or prevalence of non-tariff barriers into any of the countries that the EC is considering negotiating a FTA with. Moreover, a careful reading found no information or evidence on the effects of preferential liberalisation of non-tariff barriers. See Alan V. Deardorff and Robert M. Stern (1998) *Measurement of Nontariff Barriers*, University of Michigan Press, Ann Arbor MI.

Table 13: Papers relating to non-tariff barrier provisions in FTAs.

Author(s)	Year	Title	Source
Beghin, John C., and Jean-Christophe Bureau.	2001	Measurement of Sanitary, Phytosanitary and Technical Barriers to Trade.	A Consultants' Report Prepared for the Food, Agriculture and Fisheries Directorate, OECD. 17-18 September 2001.
Maskus, Keith E., and John S. Wilson, Tsunehiro Otsuki.	2000	Quantifying the Impact of Technical Barriers to Trade, A Framework for Analysis.	The World Bank Development Research Group. Policy Research Working Paper No. 2512. December 2000.
OECD.	2004	Analysis of Non-Tariff Measures: The Case of Prohibitions and Quotas.	OECD Trade Policy Working Paper No. 6, 27 September 2004. TD/TC/WP/(2004)28/FINAL.
Moenius, Johannes.	2004 (1999)	Information versus Product Adaptation: The Role of Standards in Trade.	Working paper, Northwestern University. (Manuscript)
Stephenson, Sherry M.	1999	Standards and Technical Barriers to Trade in the Free Trade Area of the Americas (Chapter 11).	In: <i>Trade Rules in the Making</i> , ed. Miguel Rodriguez Mendoza, Patrick Low, Barbara Kotschwar. Brookings Institution Press, Washington DC, 1999.
Trachtman, Joel P.	2003	Toward Open Recognition? Standardization and Regional Integration Under Article XXIV of GATT.	Journal of International Economic Law, Vol. 6(2), June 2003.
US International Trade Commission.	1998	The Economic Implications of Liberalizing APEC Tariff and Nontariff Barriers to Trade.	US International Trade Commission Investigation No. 332-372, Publication 3101, April 1998. Washington DC.
WTO Committee on Regional Trade Agreements.	1998	Inventory of Non-Tariff Provision in Regional Trade Agreements, Background Note by the Secretariat.	WTO Committee on Regional Trade Agreements, WT/REG/W/26 5 May 1998.

Table 14: Comments on the effects of non-tariff provisions in FTAs and other remarks of potential interest.

Author(s)	Year	Comments on the effects of non-tariff provisions in FTAs.	Other remarks of potential interest.
Beghin, John C., and Jean-Christophe Bureau.	2001		<ul style="list-style-type: none"> • Useful survey of the <u>methods</u> to define and quantify the impact of sanitary, phytosanitary, and technical barriers to trade. This study will be helpful to anyone who has to quickly ascertain the strengths and weaknesses of the methodology used in a given piece of quantitative research. The only study whose results are discussed in detail is Moenius (1999) and this study is referred to separately in this table. • While the empirical studies referred to in this survey relate to these barriers, it is not obvious that they shed light on the effect of liberalisation within the context of a FTA.
Maskus, Keith E., and John S. Wilson, Tsunehiro Otsuki.	2000		<ul style="list-style-type: none"> • Although this paper discusses the steps taken by the APEC nations and by the EU in the area of technical standards, no evidence is presented as to the actual or potential effect of these measures. • A sizeable review of the empirical literature on standards is provided in section 5 of this paper. Moenius (1999) again receives a lot of attention (page 26). The authors note: "He found the importer-specific standards significantly reduced imports for the non-manufacturing sectors but significantly raised them for the manufacturing sectors. In contrast, exporter-specific standards were positively associated with most grouped trade flows."
OECD.	2004		<ul style="list-style-type: none"> • This OECD study provides the most recent evidence on the use of prohibitions and quotas on non-agricultural trade by WTO members. The latter make

Author(s)	Year	Comments on the effects of non-tariff provisions in FTAs.	Other remarks of potential interest.
			<p>submissions to the WTO on these matters, and the OECD study reports that as of March 2004 (when the last list of notifications was made available), since 1996 39 countries had made submissions about new QRs and 16 about changes to existing QRs. Therefore, this information does not reveal what QRs were in place in 1996. Given that not all QRs may not be reported to the WTO, there is a potential for undercounting. Even so, the information contained in the Annexes to this study refers to some of the trading partners that the EC is likely to open negotiations on FTAs with.¹⁵⁶ (It should also be noted that Annex 1 of this OECD study contains a list of WTO members who do not maintain any QRs.)</p> <ul style="list-style-type: none"> • The OECD study refers to a WTO report on the treatment of QRs in FTAs (see table 1 of the OECD study). The WTO study does not report specific details on the types of QR, nor on the effects of these QR provisions. • The caveats to the OECD's study are given in paragraph 6 on page 6. It is acknowledged that the data may be incomplete or out of date. • The OECD secretariat made no attempt to quantify the impact of these prohibitions and quotas. All of the other research referred to reports the prevalence of QRs, not their effects.
Moenius, Johannes.	2004		<ul style="list-style-type: none"> • This empirical analysis calls into question the contention that all importer-specific standards reduce trade,

¹⁵⁶ India, for example, made notifications to the WTO on QRs in 1996, 1997, and 1998. Korea did likewise in 1997.

Author(s)	Year	Comments on the effects of non-tariff provisions in FTAs.	Other remarks of potential interest.
			<p>in particular trade in manufactured goods. What makes this study unique is the very detailed data on standards that the author assembled from different national standards sources.</p> <ul style="list-style-type: none"> Using data for 471 SITC industries over 1985-1995 the author shows (i) that countries which share a standard in a given industry see higher levels of trade than otherwise, (ii) countries with own standards in agriculture experience less imports, and (iii) countries with own standards in manufactures experience more imports than if there were no such standards. Unfortunately this study does not examine whether the effects of standards, or indeed the presence of shared standards, were influenced by the presence of FTAs.
Stephenson, Sherry M.	1999		<ul style="list-style-type: none"> This paper discusses the role of standards and standard setting in the Americas. No reference is made to empirical literature on the effects of regional initiatives in this regard.
Trachtman, Joel P.	2003		<ul style="list-style-type: none"> In section I.D. of this paper the author discusses the likely impact of technical standards in FTAs. The author asks what the economic impact would be, and then goes on to cite an analysis that, in turn, is solely based on theoretical considerations. No empirical evidence is directly referred to or referred to in footnotes.
US International Trade Commission.	1998		<ul style="list-style-type: none"> Contains a study (by Ingersoll and Frankena) which reports information on the prevalence and height of certain non-tariff barriers on goods imports into selected APEC nations (specifically, Malaysia, Indone-

Author(s)	Year	Comments on the effects of non-tariff provisions in FTAs.	Other remarks of potential interest.
			sia, Philippines, and Thailand.) Presents more detailed information on non-tariff barriers facing imports of chemical products.
WTO Committee on Regional Trade Agreements.	1998		<ul style="list-style-type: none"> • Contains summary information in Annex IV on the treatment of quantitative restrictions on imports and on exports in numerous FTAs reported to the WTO before and after 1990. In addition to being dated, this summary information does not provide information on differences in such provisions across FTAs.

5.4. Overview of civil society assessments of various aspects of potential FTA provisions on non-tariff barriers.

The summaries of seven interviews with civil society organisations on these potential measures can be found in Table 15. The representatives of European business organisations were all of the view that provisions on NTBs were very important, if not the most important negotiating priority. There was agreement that provisions needed to provide for fast redress to European exporters or firms affected by the standards set by a trading partner and that a consultation mechanism be established to discuss proposals before new standards are implemented in the FTA signatories. There was disagreement between the business organisation representatives concerning the merits of a horizontal or cross-sectoral approach (that builds on the WTO TBT agreements and other relevant multilateral trade agreements) or sector-specific initiatives to tackle specific challenges facing European exporters. It should be noted that these interviewees identified a large number of distinct sector-specific NTBs in the EU's list of FTA partners and readers are referred to the entries in Table 15 for further details.

Two representatives from other European civil society organisations identified other priorities for any NTB provisions in FTAs. The latter were, it was argued, not to prevent a signatory from legitimately regulating important non-trade matters in their respective jurisdictions, such as health matters. Furthermore, to the extent that EC-imposed technical standards or other standards are included in FTAs and must be met before developing country exporters can gain access to the EU market, then assistance should be granted by the EC to such exporters. The latter commitment to assistance should be binding on the EC, it was argued.

Table 15: Summary of civil society comments on FTA provisions on non-tariff barriers.

Civil Society expert. Name and organization.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
<p>Mr. Michel Bricout Director, Trade & Economics, European Automobiles Manufacturers' Association.</p>	<ol style="list-style-type: none"> 1. This expert identified three sets of automobile-specific issues that should be addressed in the EU's future FTAs: technical standards, taxation, and arbitration. 2. This expert argued that non-tariff barrier matters were even more important than tariffs. 3. With respect to technical standards, signatories to the EU's FTAs should commit to implement the 1958 and 1998 UNECE agreements on technical standards on cars. Korea, for example, has signed the 1958 agreement but has only implemented 4 out of 120 of the associated obligations. The expert argued that these matters were less important for India and ASEAN, but as the former is a rising economic power (with a large car company, Tata) then over time compliance with the 1958 and 1998 agreements will become more significant. Finally, FTA signatories should accept that exports of cars from parties known to be complying with the 1958 and 1998 agreements should not require further testing or standards certification in the importing country. 4. With respect to taxation, he noted that some nations have discriminatory tax systems that favour certain types of engines over others. All discriminatory taxes of this sort should be eliminated by parties to the EU's future FTAs. It was acknowledged that countries had the right to tax cars on the basis of the environmental pollution that they create, however they should tie such 		

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	taxes explicitly to pollution-related metrics and not to other characteristics of cars. 5. With respect to arbitration, the EU's future FTAs should include fast, binding arbitration for disputes on technical standards and taxation-related matters.		
Dr. Guido Glania Director of International Trade Policy, Federation of German Industries (BDI).	1. In general the provisions on NTBs need to be detailed and sector-specific. Horizontal disciplines, such as those associated with the WTO TBT agreement, are not particularly worthwhile. Any sector-specific provisions must go beyond WTO standards and should include clear DSU provisions. 2. With respect to automobiles, certain environmental standards, road safety rules, and procedures associated with testing, mutual recognition, and harmonisation warrant particular attention. 3. With respect to the electronics sector, national standards are often adopted. Examining the scope for mutual recognition and harmonisation is important. Where possible, it should be examined whether a standard is necessary, discriminatory, or whether it can be reconciled with international standards.	1. Attention was drawn to the specific provisions on automobiles in the US-Korea FTA.	
Mr. James Howard Director, Economic and Social Policy, International Trade Union Confederation.	1. A horizontal provision should be included that allows for an assessment of a measure thought to be a non-tariff barrier. In such assessments the motivation of the measure should be taken into account as it could be perfectly legitimate (e.g. health and safety, consumer protection, etc). 2. The interviewee was open to enhance transparency and due process rights associated with such measures.		
Ms. Emily Jones,	1. Many of the Community's rules-of-origin constitute a non-tariff		

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
Policy Advisor, Economic Justice, Oxfam GB.	<p>barrier that undoes the value of any market access concessions made by the EC.</p> <ol style="list-style-type: none"> 2. Binding provisions on the EC should be included in its FTAs to help exporters from developing countries to meet EC TBT and SPS standards. This should be complemented by an independent and fast procedure through which complaints made by exporters from developing countries against the standards-related decisions of EC customs officials and the like can be resolved. 3. More generally, thought needs to be given to develop an asymmetric approach to NTB disciplines that favour developing country signatories of FTAs signed with the EC. 4. With respect to chemical-related regulations, thought needs to be given to developing binding commitments on the EC to assist (financially and otherwise) exporters from developing countries to meet current and future EC-set standards. 		
Mr. Francesco Marchi, Director of Economic Affairs, the European Apparel and Textile Organisation (EURATEX).	<ol style="list-style-type: none"> 1. It was recalled that since 2005 DG Trade and EURATEX have had a common strategy towards non-tariff barriers and the principles underlying this strategy and the associated cooperation should continue. 2. With respect to technical standards, it was argued that Korea, India, and Thailand (and to lesser extent Indonesia) were deliberately employing very bureaucratic and discriminatory standards to deter imports, most notably from China. These standards and the process by which they are set would have to be tackled in any new EU FTAs. 3. Clearer rules concerning customs valuation and clarification are 	<ol style="list-style-type: none"> 1. Concerning the EU certificate of origin the EU-Mexico FTA was said to be "unfortunate." It was argued that Mexican customs agents have still not implemented their associated measures. 	

Civil Society expert. Name and organization.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	<p>very important. Moreover, customs officials in certain trading partners (India was mentioned) do not keep up-to-date and this creates problems for importers.</p> <ol style="list-style-type: none"> 4. Provisions should be included so that EU certificates of origin should not be rejected for spurious reasons. 5. Provisions to clarify labelling requirements for textile products are needed. 6. An early-warning system on TBTs is needed, so that a trading partner can comment and even engage in discussions with another party about a potentially problematic regulation. This should go beyond the WTO notification requirements for TBTs. 7. FTA negotiations with India should give particular attention to complex customs procedures, complex tax arrangements, complex labelling requests, access to distribution networks, and respect for environmental legislation. 8. FTA negotiations with Korea should give particular attention to complex import certificates, limited access to the retail sector (although this was acknowledged as a service sector issue), use of opaque behind-the-border measures (transparency), and matters associated with the Kaesong zone in North Korea. It is also important to ensure that textiles exported from Korea actually come from there and not from China. 9. FTA negotiations with Indonesia should address the substantial red tape associated with import documentation, the impact of domestic taxes, limited access to distribution sector, and licensing and prior testing regulations. 	<ol style="list-style-type: none"> 2. As far as TBT provisions are concerned, the Korea-US FTA may provide some inspiration. The argument was made that the EU should seek to obtain from Korea more concessions on TBTs than the US did. 3. The US-Korea and EFTA-Korea FTAs may have interesting provisions on rules of origin for goods produced in Korea. The US-Singapore FTA was said to have interesting customs treatment provisions. 	

Civil Society expert. Name and organization.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	<p>10. FTA negotiations with Thailand should pay attention to customs red table, classification errors by customs officials, and difficult to attain domestic standards (which are not a major problem now but could become so.)</p> <p>11. With respect to export restrictions on silk, measures should be taken to ban these. Such restrictions on the ability to source from trading partners should be eliminated. This was said to be a problem in Korea, Thailand, and Vietnam.</p> <p>12. Provisions should be introduced to allow disputes between importers and customs officials to be resolved quickly and cheaply.</p>		
<p>Mr. Nick Miller, Senior Trade Policy Adviser, Confederation of British Industry (CBI).</p>	<ol style="list-style-type: none"> 1. There needs to be strong focus on NTBs in the EU's forthcoming FTA negotiations. Tariffs are becoming less important in comparison. 2. A standstill agreement (forbidding the introduction of new NTBs) during the negotiation of the FTA should be agreed with negotiating parties. This agreement would apply horizontally, to all sectors. 3. Where possible horizontal disciplines on non-tariff barriers should be developed (like the WTO TBT approach.) Sector-specific approaches should be avoided. 4. Thought should be given to creating a mediation process to examine suspicious government measures that may, in fact, be NTBs. Such a process may help with the smaller, "irritating" barriers and those measures that are "legacy items," on the statute books but rarely used. These measures should be replaced. Recourse to DSU may be needed for more substantial NTBs. 		

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	<ol style="list-style-type: none"> 5. With respect to NTBs in alcohol one negotiating priority is to get Thailand to abandon its discriminatory advertisements against certain types of alcoholic beverage. 6. With respect to NTBs in alcohol one negotiating priority in India is to eliminate excise taxes which, in effect, often get applied twice on imported goods (once at the border and once at the point of sale.) 7. With respect to NTBs in automobiles an important priority is to get Korea to eliminate the discrimination in its tax system against higher value cars (or cars with greater engine size.) This is resulted in the markets for foreign cars in Korea being effectively closed. 8. With respect to NTBs in chemicals, labelling-related matters are a broad concern. In Korea the relevant pricing mechanisms for chemicals is not transparent. 9. With respect to NTBs in textiles, provisions on labelling are needed. 		
<p>Prof. Dr. Reinhard Quick, Verband der Chemischen Industrie e. V. (VCI) Vide Chairman, UNICE WTO Working Group.</p>	<ol style="list-style-type: none"> 1. Non-tariff barriers are quite an important matter, but not the most important subject. (The latter being the elimination of all tariffs on all industrial products with no room for sensitive products and the like at the end of negotiated transition periods.) 2. It is tedious to negotiate on non-tariff barriers by sectors; horizontal disciplines should be developed in future FTAs. 3. Double pricing measures and export taxes should be eliminated and prohibited. Indirect subsidisation should become an actionable subsidy. On these matters the EC should stick to the line it 	<ol style="list-style-type: none"> 1. Except for the proposed provisions on double pricing, the approach taken to NTB matters in the EC-GCC FTA negotiations should be avoided. 	<ol style="list-style-type: none"> 1. It was argued that as this is new ground for trade policymaking there is little or no evidence to guide negotiators.

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	<p>has taken in the DDA negotiations.</p> <p>4. A non-binding, fast-moving procedure should be included in future FTAs to allow for an impartial assessment of measures that might be non-tariff barriers to trade. Panels of three persons would undertake these assessments and their findings could then be taken up in state-to-state consultations. A sanctions-based approach should be avoided. However, provisions to allow for the reapplication of pre-FTA tariffs should be included in a FTA should the consultations process break down. When discussing this procedural option the stress should be on encouraging a party to remove an offending NTB and not on sanctions.</p>		

5.5. Resource-based implications of the adoption of potential NTB provisions.

The earlier account of the different FTA provisions on NTBs suggests that they call for the creation of fewer institutions (committees, agencies, etc) than in the case of FTA provisions on labour, environment, and public procurement policies. Moreover there may be little, if no, administrative resource implications of NTB provisions that eliminate discrimination against classes of firms. Even so the substantial variation in the nature of NTB provisions across the five sectors considered here should qualify any attempt at generalisation.

Commitments to publish new procedures (or proposals for new procedures) and to engage in consultations with trading partners may well enhance transparency and discourage discrimination (at least against the FTA signatories), however they may require more administrative resources. In addition, the time taken may slow down regulatory decision-making. Whether these are significant concerns depends on the pre-existing procedures for deliberating on new regulations. To the extent that the negotiation of a FTA encourages a signatory to independently streamline or upgrade their national regulatory processes then the overall effect may well be to shorten regulatory processes and reduce burdens on both the government budget and on business.

One concern that does receive quite a lot of attention in existing economic research, in the discussions on Aid for Trade, and in considering measures to strengthen the supply side capacities of developing countries concerns the costs borne by exporters in the latter countries as they try to meet the standards imposed by private buyers and by public bodies in industrialised countries. Various aid initiatives have been launched in this regard and, to the extent that the EC supports such initiatives, one option would be to extend them to potential FTA signatories. One practical consideration that might be borne in mind is that many of these standards are imposed by the private sector (and can change quite often) and it is not immediately obvious that any obligation the EC may feel to help foreign exporters comply with EC-imposed standards carries over to the requirements of private sector purchasers.

6. FTA provisions on competition policy and state aid.

6.1. Rationale and potential impact of FTA provisions on competition policy and state aid.

More often than not the inclusion of competition elements in regional and other trade agreements reflects an awareness of the potential for anti-competitive practices to undermine the benefits of trade liberalisation, and the consequent need for measures to address such practices.¹⁵⁷ Awareness of the significance of anti-competitive practices for trade dates back at least to Smith (1776)¹⁵⁸, which dealt at length with the costs imposed on societies (both colonies and imperial powers) by the colonial trading monopolies of the eighteenth century. Smith's analysis shows considerable prescience in drawing attention to the significance of international anti-competitive behaviour for trade and development and to the symbiotic role of private and public actors in this regard (Anderson and Holmes 2002¹⁵⁹).

A number of rationales for including competition elements in international trade agreements have been developed in modern economic literature. Graham and Richardson (1997)¹⁶⁰ develop the case for a possible WTO agreement on Trade-Related Antitrust Measures (TRAMS) that would encompass the following elements: (i) provisions regarding national treatment for local affiliates of foreign firms; (ii) measures regarding the international control of cartels and similar practices; (iii) expansion of existing WTO consultative procedures to address anti-competitive practices; (iv) international procedures regarding merger notification; and (v) a "TRAMS-plus" arrangement to address competition concerns in declining industries demanding trade protection. This proposal was envisaged as a "modest step forward" rather than an end point in harnessing the potential synergies between trade and

157 This subsection's text is a modified version of the material in Anderson and Evenett (2006) (the full reference for which is given in table 11).

158 A. Smith, *The Wealth of Nations* (first published 1776; republished by Penguin Classics, 1986).

159 R. D. Anderson, P. Holmes, "Competition Policy and the Future of the Multilateral Trading System," *Journal of International Economic Law* 5:(2): 531–63.

160 E. M. Graham, J. D. Richardson, *Competition Policies for the Global Economy* (Washington, D.C.: Institute for International Economics, 1997).

competition policy. The various elements of Graham and Richardson's proposal were justified with reference to their potential contribution to eliminating barriers to market access; the stepping up of international efforts to address the harm caused by international cartels, which are encouraged by gaps in current legal prohibitions at the national and international level; the potential contribution of simple consultative mechanisms in regard to export and investment foreclosure; and related concerns.

Delving further into the specific contribution of international agreements, potentially including trade agreements, in addressing particular anti-competitive practices Clarke and Evenett (2003)¹⁶¹ postulate two sources of positive spillovers that provide rationales for international collective action with respect to practices such as cartels, which typically impose welfare losses on all affected countries. First, public announcements of cartel enforcement actions in one country tend to stimulate enforcement efforts in other countries, particularly where there is an established relationship between the relevant enforcement authorities. In this way, trading partners benefit from active enforcement abroad. Second, the investigation and prosecution of arrangements such as international cartels can be facilitated by accessing information about the nature and organisation of the arrangement from another jurisdiction that has successfully completed such an investigation. These considerations highlight the potential benefits of international accords committing the participating countries to take action in this area (Clarke and Evenett 2003; pp. 117–18; see also Anderson and Jenny 2005¹⁶²).

Another recognised set of rationales for international agreements on competition law and policy arises from the potential for inter-jurisdictional conflicts in competition law enforcement and related negative spillovers. This potential is evident, for example, in the recent

161 J. Clarke, and S. J. Evenett, "A multilateral framework for competition policy?" in Switzerland, State Secretariat of Economic Affairs and Simon Evenett, *The Singapore Issues and the World Trading System: the Road to Cancun and Beyond* (Bern: State Secretariat for Economic Affairs, 2003).

162 R. D. Anderson, and F. Jenny, "Competition Policy, Economic Development and the Possible Role of a Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy", in Erlinda Medalla, ed., *Competition Policy in East Asia*, Routledge/Curzon, 2005.

flurry of cases in various jurisdictions involving practices of the Microsoft Corporation. As explained by Anderson and Heimler¹⁶³ (2006; p. 32):

"... In such cases, different approaches to the assessment of liability and, particularly, the imposition of different remedies can give rise to spillovers in the sense that measures adopted in one jurisdiction can affect commercial decisions and/or the welfare of consumers in another jurisdiction. In many cases, the spillovers will be positive in the sense that measures taken to protect competition in one market will also benefit consumers in other markets and will have no adverse effects. However, negative spillovers can also arise. To take an extreme example, the breaking up of a large international corporation as a result of a finding of abuse of dominant position in one jurisdiction might be deemed negative in another jurisdiction in which behavioral remedies for the alleged abuses are deemed sufficient. Yet once a corporation is broken up for the sake of one jurisdiction it may well, for practical purposes, be broken up in respect of the rest of the world."

Still another set of rationales for including competition-related provisions in international trade agreements (whether of a regional or a multilateral nature) is political-economic in nature. Developing this line of reasoning, Birdsall and Lawrence (1999)¹⁶⁴ state that a principal benefit of trade agreements aimed at measures beyond the border can be to facilitate domestic policy reforms, by providing a tool for overcoming domestic constituencies that could otherwise block the reform process. They refer specifically to the case of competition policy, observing that:

"When developing countries enter into modern trade agreements, they often make certain commitments to particular domestic policies – for example, to antitrust or other competition policy. Agreeing to such policies can be in the interests of developing countries (beyond the trade benefits directly obtained) because the commitment can reinforce the internal reform process. Indeed, participation in an international agreement can make feasible internal reforms that are beneficial for the country as a whole that might otherwise be successfully resisted by interest groups." (Birdsall and Lawrence 1999: 136)

The foregoing are by no means the only rationales that have been advanced by proponents of competition policy provisions or elements in international trade agreements. Other

163 R. D. Anderson, A. Heimler, Abuse of Dominant Position: Enforcement Issues and Approaches for Developing Countries (mimeo, 2006).

164 N. Birdsall, R. Z. Lawrence, "Deep integration and trade agreements: good for developing countries?" in Inge Kaul, Isabelle Grunberg and Marc A. Stern (eds) *Global Public Goods: International Cooperation in the 21st Century*, New York: Oxford University Press for the United Nations Development Program, 1999.

specific objectives that have been advanced include reinforcing the capacities of competition agencies in developing countries to protect such countries from anticompetitive practices that impact on their consumers and businesses; promoting (voluntary) cooperation between the competition agencies of participating countries to assist them in investigating particular cases; and contributing to a greater degree of ‘balance’ in trade agreements between the rights of producers and the protection provided for consumers and other members of society (Anderson and Jenny 2005).

Next in this section is a comparative legal analysis of the competition-related provisions of a selected number of FTAs. Following that is an account of the empirical literature (such as it is) on the impact of FTA provisions on competition law and policy, a summary of interviews with representatives of leading European civil society organisations on the merits of including such provisions in FTAs and, finally, some observations on the resource-based implications of adopting such FTA provisions.

6.2. Comparative legal analysis of FTA provisions on competition policy and state aid.

6.2.1. Introductory remarks.

A review of competition provisions in FTAs (e.g. Holmes, Müller, Papadopoulos, Sydorak 2005) shows that the commitments reflected in these provisions fall basically into three broad categories:

- Procedural commitments;
- Substantive commitments limited to trade between parties to the FTA; and
- Substantive commitments concerning the domestic regime of the parties to the FTA.

Interestingly, EU bilateral agreements are the main examples of FTAs that provide for substantive commitments and even for harmonisation of competition rules of the parties. In

contrast, the competition provisions of the FTAs concluded by the US and Canada are basically limited to cooperation on competition matters (Holmes, Papadopoulos, Kayali, Sydorak at 74) without commitments on substantive competition rules.

Ample evidence is found in the literature of the existence of anti-competitive conduct in developing countries, as well as estimates of costs there from for developing countries' economies (Jenny 2004). It has been pointed out that multinational firms based in developed countries are not, by a long shot, the only source of anti-competitive practices affecting developing countries (Jenny (2004) at 134).

Little is known about the operation of competition provisions in FTAs, as is about their effects. Qualitative evidence about the operation of competition provisions of certain specific FTAs is to be found in Acevedo (2005) and in Marsden and Whelan (2005).

6.2.2. The FTAs examined in this legal analysis.

Among the FTAs examined the following ones do not contain competition clauses: India-Singapore, US-Bahrain, Dominican Republic-Central American countries-US, US-Jordan, US-Morocco, and US-Oman. This is explained in the literature by the fact that one of the parties to these FTAs does not have competition rules. If the approach taken has been to limit competition provisions in FTAs to cooperation, then obviously such competition provisions would not make sense where a party to an FTA does not have competition rules.

However, some of them make reference to competition in the context of other provisions included in the FTA (in the case of the US-Jordan and US-Morocco FTAs in the context of intellectual property rights provisions; the Dominican Republic-Central American countries-US FTA contains a competition provision in the telecommunications section). It should also be borne in mind that several parties to FTAs, in particular the US and Canada, have concluded competition agreements outside such FTAs. (For an analysis of this matter see Holmes, Müller, Papadopoulos, Sydorak 2005; pp. 37-60.)

The review of the competition provisions of the FTAs examined focuses on the preamble of FTAs, the scope of the competition provisions, their content, and institutional matters.

6.2.2.1. The Preamble.

Some of the FTAs examined do not refer in the preamble to competition policy (the EU-Chile, Singapore-Australia, Canada-Chile, Japan-Malaysia, Japan-Mexico, Korea-Singapore, New Zealand-Singapore, US-Australia, US-Chile, and US-Peru FTAs). Others do. Within this category, some refer to competition policy in one statement together with other issues (Japan-Philippines and Japan-Singapore FTAs). Others contain a separate statement concerning competition policy that may in certain cases appear in the operative part of the agreement (Canada-Costa Rica, EFTA States-Chile, EFTA States-Mexico, EFTA States-Singapore, and US-Singapore FTAs) as the following quotation demonstrates.

US-Singapore

“Recognizing that the conduct subject to this Chapter has the potential to restrict bilateral trade and investment, the Parties believe prosecuting such conduct, implementing economically sound competition policies, and engaging in cooperation will help secure the benefits of this Agreement” (Art. 12.1).

Some justify competition clauses by the need to ensure that the benefits of trade liberalisation are not undermined by anti-competitive activities, as in:

Canada-Costa Rica

“[Resolved to:] ensure that the benefits of trade liberalization are not undermined by anti-competitive activities” (Preamble).

All FTAs referring to the rationale for competition provisions appear to justify the inclusion of such provisions as a measure to support the trade enhancing objectives of the FTAs.

6.2.2.2. Scope and content of competition provisions.

The scope concerns the question of whether the competition provisions define the anti-competitive conduct they address and, if they do, what types of anti-competitive conduct they address. The content relates to the obligations these provisions entail with respect to these types of anti-competitive conduct: procedural obligations or substantive obligations and, if so, which ones.

Below the scope and content are presented separately but, when assessing competition provisions of a given FTA, they must obviously be examined together e.g. in the EFTA States-Jordan FTA there are provisions foreseeing regulation of the main elements of anti-competitive agreements and abuse of dominance; there are no provisions on coordination and cooperation. In the EFTA States-Singapore FTA there are provisions on coordination and cooperation; there are no provisions concerning the main elements of anti-competitive agreements. Bearing in mind that practically all FTAs examined exclude competition provisions from their dispute settlement system, substantive commitments on competition are not likely to be very effective in the absence of any provisions on cooperation and coordination.

6.2.2.2.1. Scope.

A first, obvious distinction relates to whether or not the FTAs examined address specifically the classical categories of competition policy: restrictive agreements (RA) (such as agreements between competition on prices or on market sharing, or agreements between suppliers and distributors obliging the latter ones not to resell below a given price), abuse of dominance/unilateral anti-competitive conduct (AD), and merger control (MC). Some FTAs do refer to these categories including EU-Chile (RA, AD); Singapore-Australia (RA, AD, MC); Thailand-Australia (RA, AD, MC); Canada-Cost Rica (RA, AD, MC); EFTA States-Chile (RA, AD, MC); EFTA States-Korea (RA, AD); EFTA States-Mexico (RA, AD, MC); EFTA States-Singapore (RA, AD); Japan-Thailand (RA, AB, MC); and Korea-Singapore (RA, AD, MC).

EFTA States-Chile

“3. For the purposes of this Agreement, “anti-competitive business conduct” includes, but is not limited to, anti-competitive agreements, concerted practices or arrangements by competitors, the abuse of single or joint dominant positions in a market and mergers with substantial anti-competitive effects” (Art. 73).

Others FTAs refer to undefined “anti-competitive activities/business conduct” (Canada-Chile, Japan-Malaysia, Japan-Mexico, Japan-Philippines; Japan-Singapore, US-Australia, US-Chile, US-Peru, US-Singapore). However, some of these FTAs refer the parties to the application of their own domestic law.

Japan-Mexico

“Each Party shall, in accordance with its applicable laws and regulations, take measure which it considers appropriate against anti-competitive activities, in order to facilitate trade and investment flows between the Parties and the efficient functioning of its market” (Art.131).

In some cases there are particular clauses dealing with undertakings to which a party has granted special and exclusive rights. The conduct addressed is, expressly or implicitly, that of enterprises. Some FTAs deal also specifically with (state) monopolies and state enterprises (Canada-Chile, US-Australia, US-Chile, US-Peru, US-Singapore). While recognising that a party may maintain or designate a monopoly, FTAs provide for procedural commitments and some broadly worded substantive commitments. A good example is offered by the US-Chile FTA.

US-Chile

“3. Each Party shall ensure that any privately-owned monopoly that it designates after the date of entry into force of this Agreement and any government monopoly that it designates or has designated:

(a) acts in a manner that is not inconsistent with the Party’s obligations under this Agreement wherever such a monopoly exercises any regulatory, administrative, or other governmental authority that the Party has delegated to it in connection with the monopoly good or service, such as the power to grant import or export licenses, approve commercial transactions, or impose quotas, fees, or other charges;

(b) acts solely in accordance with commercial considerations in its practices or sale of monopoly good or service [...];

(c) provides non-discriminatory treatment to covered investments, to goods of the other Party, and to service suppliers of the other Party in its purchase or sale of the monopoly good or service in the relevant market; and
(d) does not use its monopoly position to engage, either directly or indirectly, [...] in anti-competitive practices in a non-monopolized market or its territory that adversely affect covered instruments” (Art.16.3).

6.2.2.2.2. Content.

A second distinction between the FTAs examined concerns what one could subsume under procedural commitments and what one could subsume under substantive commitments entered into by the parties in relation to the anti-competitive conduct covered.

6.2.2.2.2.1. Commitments on procedural rules.

Some FTAs contain commitments relating to two or more procedural rules, such as notification, consultation, exchange of information, and even coordination of enforcement.

EU-Chile

“The Parties agree to cooperate and coordinate among themselves for the implementation of competition laws. The cooperation includes notification, consultation, exchange of non-confidential information and technical assistance” (Art.172(3)).

Comparable clauses, as the case may be with less items, appear in other FTAs (Thailand-Australia, Canada-Chile, Canada-Costa Rica, EFTA States-Chile; EFTA States-Korea, EFTA States-Mexico, EFTA States-Singapore). However, some FTAs are limited to undefined “cooperation” (Japan-Malaysia, Japan-Mexico, Japan-Philippines, Japan-Singapore).

Hereinafter what can be considered as best practice provisions (i.e. provisions that regulate the obligations of the parties as adequately as possible as to subject matter and scope, and modalities (when? how? For example, in what cases is “notification” to the other party required and when should notification take place?) of each one of these procedural commitments are reproduced:

6.2.2.2.1.1. On notification.

Canada-Costa-Rica

“3. For the purpose of this Chapter, enforcement actions that may affect important interests of the other Party and therefore will ordinarily require notification include those that:

- (a) are relevant to enforcement actions of the other Party;*
- (b) involve anti-competitive activities, other than mergers and acquisitions, carried out in the whole or in part in the territory of the other Party and that may be significant for that other Party;*
- (c) involve mergers and acquisitions in which one or more of the enterprises involved in the transaction, or an enterprise controlling one or more of the enterprises to the transaction, is incorporated or organized under the laws of the other Party [...];*
- (d) involved remedies that expressly require or prohibit conduct in the territory of the other Party or are otherwise directed at conduct in that territory; or*
- (e) involve the seeking of information located in the territory of the other Party, whether by personal visit by officials of a Party or otherwise, except with respect to telephone contacts with a person in the territory of the other Party where that person is not subject to enforcement action and the contact seeking only a response on a voluntary basis.*
- (f) Notifications will ordinarily be given as soon as the competition authority of the Party becomes aware that the notifiable circumstances pursuant to paragraphs 2 and 3 are present” (Art. XI.3).*

6.2.2.2.1.2. On consultations.

EFTA States-Mexico

“A Party may request consultations regarding any matter related to this Chapter. The request for consultations shall indicate the reasons for the request and whether any procedural time limit or other constraints require that the consultations be expedited. Upon request of a Party, consultations shall promptly be held with a view to reaching a conclusion consistent with the objectives set forth in this Chapter” (Art. 55).

6.2.2.2.1.3. On exchange of information

This usually is a delicate issue where one party wants to be able to request confidential information from the other party. A particular aspect of the issue is the possible use by the requesting party of non-public information in criminal investigations. As an example of a fairly simple provision on exchange of information:

EFTA States-Singapore

“2. The Party addressed [...] shall cooperate through the supply of publicly available non-confidential information of relevance to the matter in question. Subject to its domestic law and the conclusion of a satisfactory agreement safeguarding confidentiality of information, the Party addressed shall also provide any other information available to the requesting Party” (Art.50).

A more elaborate provision is to be found in:

EC-Chile FTA

“1. With a view to facilitating the effective application of their respective competition laws, the competition authorities may exchange non-confidential information.

2. For the purposes of improving transparency, and without prejudice to the rules and standards of confidentiality applicable in each Party, the Parties hereby undertake to exchange information on regulatory sanctions and remedies applied in the cases that, according to the competition authority concerned, are significantly affecting important interests of the other Party and to provide the grounds on which those actions were taken, when requested by the competition authority of the other Party.

3.[relating to state aid].

4. All exchanges of information shall be subject to the standards of confidentiality applicable in each Party. Confidential information whose dissemination is expressly prohibited or which, if disseminated, could adversely affect the interest of the Parties, shall not be provided without express consent of the source of information.

5. Each competition authority shall maintain the confidentiality of any information provided to it in confidence by the other competition authority, and oppose any application for disclosure of such information by a third Party that is not authorized by the competition authority that supplied the information.

6. In particular, where the laws of a Party so provide, confidential information may be provided to their respective courts of justice, subject to maintaining its confidentiality to the respective courts” (Art.177).

6.2.2.2.1.4. On Coordination.

There are no provisions providing for genuine *ex ante* coordination e.g. where a case of anti-competitive conduct would on the basis of certain criteria be allocated to the competition authority of one party to the exclusion of the authority of the other party, as under the EEA Agreement. The operation of “positive comity” (see *infra*) could be considered as a form of coordination.

6.2.2.2.2. Certain commitments relating to application.

In addition to these procedural commitments, a number of FTAs contain provisions reflecting various commitments relating to (non-discriminatory) application of one or more of such matters as procedural fairness/guarantees, due process, and to transparency (Singapore-Australia; Canada-Costa Rica; EFTA States-Chile; Japan-Thailand; Korea-Singapore; US-Australia; US-Chile; US-Peru; US-Singapore).

Such commitments are not without interest, particularly if undertaken by parties that do not have a long experience of enforcing competition laws. Their importance is increasingly being recognised i.a. in the International Competition Network.

Canada-Costa Rica

“4. Each Party shall ensure that:

(a) the measures it adjusts or maintains to prosecute anti-competitive activities, which implement the obligations set out in this Chapter [...] are published or otherwise publicly available; and

(b) any notification of such measures occurring after the entry into force of this Agreement are notified to the other Party within 60 days, with advance notification to be provided where possible.

5. Each Party shall establish or maintain an impartial competition authority that is:

(a) authorized to advocate for competition solutions in the design, development and implementation of government policy and legislation; and

(b) independent from political interference in carrying out enforcement actions and advocacy activities.

5. Each Party shall ensure its judicial and quasi-judicial proceedings to address anti-competitive activities are fair and equitable, and that in such proceedings, persons that are directly affected:

(a) are provided with written notice when a proceeding is initiated;

(b) are afforded an opportunity, prior to any final action in the proceeding, to have access to relevant information, to be represented, to make submissions, including any comments on the submissions of other persons, and to identify and protect confidential information; and

(c) are provided with a written decision on the merits of the case.

7. Each Party shall ensure that, where there are any judicial or quasi-judicial proceedings to address anti-competitive activities, an independent domestic juridical or quasi-judicial appeal or review process subject to any final decision arising out of those proceedings” (Art. XI.2).

6.2.2.2.3. Negative and positive comity

“Negative comity” means that a party will take into consideration that its enforcement activities may affect important activities of another party.

Such provisions should not be controversial. A good example is to be found in:

Canada-Costa Rica

“2. [...] each Party [...] shall give full and sympathetic consideration to possible ways of fulfilling its enforcement needs without harming [that other Party’s important] interests” (Art. XI.3).

“Positive comity” means that a party may request another party to take enforcement action. Such provisions are not common. Of the FTAs reviewed, only the EFTA States-Mexico and Japan-Mexico Agreements contains such provisions. The relevant provision from the former agreement is reproduced below.

EFTA States-Mexico

“3. If a Party considers that an anti-competitive business conduct carried out within the territory of the other Party has an appreciable adverse effect within its territory, it may request that the other Party initiates appropriate enforcement activities. The request shall be as specific as possible about the nature of the anti-competitive business conduct and the effect within the territory of the requesting Party, and shall include an offer of such further information and cooperation as the requesting Party is able to provide.

4. The requested Party shall carefully consider whether to initiate enforcement activities, or to expand on-going enforcement activities with respect to the anti-competitive business conduct identified in the request. The requested Party shall advise the requesting Party of the outcome of the enforcement activities and, to the extent possible, of significant interim developments” (Art. 52).

6.2.2.2.4. Commitments on substantive rules.

As opposed to commitments on procedural rules, commitments of substantive rules relate to the content of rules, e.g. on what the parties agree should be considered as a cartel and whether it should be prohibited, always or under certain conditions. In the FTAs examined there are practically no commitments on substantive rules. In some FTAs the parties agree that there should be no competitive advantages to state-owned businesses (Singapore-Australia, Japan-Thailand, Korea-Singapore).

In particular there are no provisions setting forth competition rules that both parties must apply to anti-competitive conduct that affects trade between the parties, unlike in a number of EC FTAs; nor are there provisions harmonising the domestic competition regimes

of the parties or provisions whereby one party undertakes to introduce in its domestic system a competition regime similar to that of the other party, again as in a number of EC FTAs. Jenny (2004; pp. 22) rightly observes that trade policy makers are less interested in promoting the convergence of the substantive provisions of competition laws, but are more interested in ensuring that such laws and their enforcement are non-discriminatory.

6.2.2.2.2.5 Commitments on state aid.

The present subsection provides an overview of state aid (also called subsidies) provisions contained in FTAs which are an object of the present study. The overview is preceded by a brief introduction on the WTO rules applicable to subsidies.

6.2.2.2.2.5.1 Brief introduction on subsidies provisions in WTO Agreements.

The WTO Agreement on Subsidies and Countervailing Measures (SCM) disciplines the use of subsidies and the use of countervailing instruments by WTO Members. The Agreement contains a definition of subsidy, a general prohibition of export subsidies (“prohibited subsidies”) and disciplines on subsidies which cause adverse effects to the interests of another WTO Member (“actionable subsidies”). The SCM Agreement covers only subsidies on goods. Subsidies on services are referred to in Art. XV of the General Agreement on Trade in Services (GATS). The Agreement on Agriculture (AoA) contains rules on subsidies on agricultural products.

6.2.2.2.2.5.2 The Preamble.

None of the FTAs reviewed contains in its preamble a reference to state aid/subsidies.

6.2.2.2.2.5.3. Scope and content of state aid/subsidies provisions in FTAs.

Among the FTAs examined the following ones do not contain any provisions concerning state aid/subsidies: Japan-Mexico FTA, Japan-Singapore FTA, Japan-Philippines FTA, North American Agreement on Environmental Cooperation, US-Singapore FTA, and the EU-Chile Association Agreement.

The remaining FTAs reviewed do not contain substantive provisions in relation to subsidies but simply recall the parties' obligations undertaken in the context of the SCM Agreement and the AoA. For instance, in the Singapore-Australia FTA,¹⁶⁵ Thailand-Australia FTA,¹⁶⁶ India-Singapore FTA,¹⁶⁷ Chile-EFTA States FTA¹⁶⁸, Korea-EFTA States FTA,¹⁶⁹ and Singapore-EFTA States FTA,¹⁷⁰ the contracting parties simply reaffirm their commitment to abide by the provisions of the SCM Agreement.

In these FTAs, subsidies granted to services are normally excluded from the scope of application of the FTAs rules on services; such exclusion is found in the Singapore-Australia Free Trade Agreement,¹⁷¹ Japan-Philippines FTA,¹⁷² Japan-Malaysia FTA,¹⁷³ and India-Singapore FTA.¹⁷⁴

Many of the agreements reviewed contain specific rules on agricultural export subsidies (Thailand –Australia FTA,¹⁷⁵ New Zealand-Australia FTA,¹⁷⁶ US-Australia FTA,¹⁷⁷ Canada-Chile FTA,¹⁷⁸ Canada-Costa Rica FTA,¹⁷⁹ US-Chile FTA,¹⁸⁰ US-Morocco FTA,¹⁸¹ US-

165 Singapore Australia Free Trade Agreement, Art. 7.

166 Free Trade Agreement between Thailand and Australia, Art. 207.

167 Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, Art. 2.8.

168 Free Trade Agreement between the EFTA States and the Republic of Chile, Art. 81.

169 Free Trade Agreement between the EFTA States and the Republic of Korea, Art. 2.9

170 Free Trade Agreement between the EFTA States and Singapore, Art. 15.

171 Singapore-Australia Free Trade Agreement, Chapter 7, Art. 2.

172 Japan-Thailand Economic Partnership Agreement, Art. 72 (2) (c).

173 Agreement between the Government of Japan and the Government of Malaysia for an Economic Partnership, Art. 94.

174 Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, Art. 7.2.

175 Free Trade Agreement between Thailand and Australia, Art. 208.

176 Agreement between New Zealand and Singapore on a Closer Economic Partnership, Art. 7.

177 Free Trade Agreement Between Australia and the United States, Artt. 3.1 and 3.3.

178 Free Trade Agreement Between Canada and Chile, Art. C-14.

Peru FTA,¹⁸² US Bahrain FTA,¹⁸³ US-Jordan FTA,¹⁸⁴ Dominican Republic-Central America-US FTA,¹⁸⁵ Japan-Malaysia FTA,¹⁸⁶ and Japan-Thailand FTA¹⁸⁷). In these provisions, parties state their commitment to achieve the multilateral elimination of export subsidies for agricultural goods and to refrain from introducing or maintaining agricultural export subsidies, in accordance with the obligations undertaken in the context of the WTO.

6.2.2.2.5.4. Procedural commitments.

Some FTAs contain procedural commitments, such as consultation and exchange of information in relation to state aid/subsidies. For instance, the FTA between EFTA States and Mexico¹⁸⁸ and the Thailand-Australia FTA¹⁸⁹ contain provisions for sharing of information in relation to domestic subsidies programs.

As to consultation, the EFTA-Singapore FTA provides that a party which considers that it is adversely affected by a subsidy of another party request consultations with that party on such matters, requests which must be accorded sympathetic consideration.¹⁹⁰ Similar provisions are found in Art 81(3) of the Chile-EFTA States FTA, and Art. 11(3) of the Mexico-EFTA States FTA.

All the FTAs concluded by the US contain provisions applicable in the event that a non-party is exporting a subsidised agricultural good to the territory of one of the parties to the FTA, which undermines the interests of the other party to the FTA. These provisions

179 Free Trade Agreement Between Canada and Costa Rica, Art. III.12.

180 Free Trade Agreement between the United States and Chile, Art. 3.16.

181 Free Trade Agreement between the United States and Morocco, Art. 3.3.

182 Free Trade Agreement between the United States and Peru, Art. 2.16.

183 Agreement between the Government of the United States of America and the Government of the Kingdom of Bahrain on the establishment of a Free Trade Area, Art. 2.11.

184 Free Trade Agreement between the United States and Jordan, Art. 3.16.

185 Dominican Republic-Central America-US Free Trade Agreement, Art. 3.14.

186 Agreement between the Government of Japan and the Government of Malaysia for an Economic Partnership, Art. 21

187 Japan Thailand Economic Partnership Agreement, Art. 20.

188 Free Trade Agreement between the EFTA States and Mexico, Art. 11.

189 Free Trade Agreement between Thailand and Australia, Art. 208 (3).

commit the parties to consultation with a view to agreeing on specific measures that may be adopted to counter the effects of export subsidies.

6.2.2.2.2.5.5. Dispute settlement.

The India-Singapore FTA¹⁹¹ excludes expressly disputes between the parties over the grant of allegedly illegal subsidies from the dispute settlement provision of the Agreement. Similar provisions are found in: Art. 87 of the Chile-EFTA States FTA and Art 9.1. of the Korea-EFTA States FTA.

6.2.2.3. Institutional matters.

6.2.2.3.1. Institutional machinery.

The FTAs examined do not contain separate, specific institutional machinery for competition matters. The administration of the competition clauses is entrusted very generally to the general institutional machinery of the FTAs.

There is a wide scale of institutional machinery models used by these FTAs, albeit that the models are mostly the classical ones. Such machinery has little or no teeth. They are obviously not meant to make decisions binding on the parties. However, where they are coupled with notifications, they may generate peer pressure.

6.2.2.3.2. Dispute settlement.

The dispute settlement clauses of the FTAs examined do generally not apply to the competition clauses, with the sole exception of New Zealand-Singapore FTA. This is a remarkably weak point in all the FTAs examined and is all the more striking as the commitments entered into are mostly of a procedural nature.

190 Free Trade Agreement between the EFTA States and Singapore, Art. 29.

191 Comprehensive Economic Cooperation Agreement Between the Republic of India and the Republic of Singapore, Art. 7.15.

Certain considerations may explain this. First, parties may want to avoid that decisions of national competition authorities and courts are in effect overturned in international dispute settlement proceedings. Second, the application and interpretation of many of the competition provisions in the FTAs examined are hardly capable of being subjected to dispute settlement proceedings as they are either “soft law” or too vague. Third, if party A enforces obligations of party B resulting from competition provisions, party A may expect that party B will also seek to enforce party A’s obligations.

However, a number of FTAs allow parties to subject disputes arising from the application of the competition provisions to specific consultation procedures short of dispute settlement procedures. A good example thereof is to be found in Canada-Costa Rica FTA.

Canada-Costa Rica

The Free Trade Commission

“1. The Parties hereby establish the Free Trade Commission, comprising cabinet-level representatives of the Parties or their designees.

2. The Commission shall:

- (a) supervise the implementation of this Agreement;*
- (b) oversee its further elaboration; and*
- (c) consider any other matter that may affect the operation of this Agreement.*

3. The Commission may:

- (a) adopt binding interpretations of this Agreement;*
- (b) seek the advice of non-governmental persons or groups;*
- (c) take such other action in the exercise of its functions as the Parties may agree, and*
- (d) modify in fulfilment of the objectives of this Agreement:*
 - (i) the schedule of a Party contained in Annex III.3.2 (Tariff Elimination), with the purpose of adding one or more goods excluded in the Tariff Elimination Schedule;*
 - (ii) the phase-out periods established in Annex III.3.2 (Tariff Elimination), with the purpose of accelerating the tariff reductions;*
 - (iii) the rules of origin established in Annex III.1 (Textiles and Apparel Goods) and Annex IV.1 (Specific Rules of Origin);*
 - (iv) the Uniform Regulations on Customs Procedures.*

4. The modification referred to in paragraph 3(d) will be implemented by the Parties in conformity with Annex XIII.1.4 (Implementation of the Modifications Approved by the Commission).

5. The Commission may establish committees, subcommittees or working groups taking into consideration any recommendation of the Coordinators. Except where specifically provided for in this Agreement, the committees, subcommittees and working groups shall work under a mandate recommended by the Coordinators and approved by the Commission.

6. The Commission will establish its rules and procedures. All decisions of the Commission shall be taken by mutual agreement.
7. The Commission shall normally convene once a year in regular session. Regular sessions of the Commission shall be chaired alternately by each Party." (Art. XIII.1).

6.2.2.3. A taxonomy of competition policy and state aid provisions in FTAs.

A taxonomy of the various procedural and substantive provisions in the 27 RTAs selected for this study can be found in Table 16. Agreements involving European (EU and EFTA) and Asia-Pacific signatories tend to include a wider range of competition and state aid provisions than FTAs involving the US. The latter tend to be confined to selected provisions on state aid, matters relating to state enterprises, certain sectors (such as telecommunications), and a few procedural matter. Of the competition and state aid provisions in non-US FTAs there is a further distinction between FTAs where Japan is a signatory (where almost all the relevant competition provisions refer to procedural matters) and where European nations and Australia are signatories (where procedural and substantive provisions on competition law and policy tend to be found).

Few FTAs include provisions for negative and positive comity (explicit forms of cooperation between competition enforcement agencies) and on merger control. Finally, no separate column was added to Table 16 for the relevant dispute settlement provisions. This was not an oversight. It is a reflection of the fact that, as noted earlier, so few FTAs allow competition matters to be taken to the agreement's dispute settlement mechanism.

Table 16: Competition and state aid provisions of selected FTAs.

FTA	Preamble	Procedural obligations								Provisions addressing anti-competitive behaviour				
		General cooperation provision	Notification	Consultations	Exchange of information	Coordination on enforcement	Negative comity	Positive comity	Commitment re due process/transparency/proc. fairness	Restrictive agreements	Abuse of dominance/unilateral anti-competitive conduct	Merger control	State enterprises/state monopolies	State aid/subsidies
Chile-EU		√	√	√	√	√	√		√	√		√		
Australia-Singapore				√	√			√	√	√	√	√		
Australia-Thailand	√	√	√	√	√	√			√	√	√		√	
Canada-Chile		√	√	√	√	√				√		√		
Canada-Costa Rica	√	√	√	√	√	√	√		√	√	√	√		
EFTA- Chile	√		√	√	√	√		√	√	√	√		√	
EFTA-Korea	√			√					√	√				
EFTA-Mexico	√	√	√	√	√			√	√	√	√		√	
EFTA-Singapore	√			√	√	√			√	√			√	
Japan-Malaysia		√	√	√	√	√								
Japan-Mexico		√	√	√	√	√	√	√						
Japan-Philippines	√	√	√	√	√	√								
Japan-Singapore	√	√	√	√	√	√				√				
Japan-Thailand	√	√	√	√	√	√		√	√	√	√			

FTA	Procedural obligations										Provisions addressing anti-competitive behaviour				
	Preamble	General cooperation provision	Notification	Consultations	Exchange of information	Coordination on enforcement	Negative comity	Positive comity	Commitment re due process/transparency/proc. fairness	Restrictive agreements	Abuse of dominance/unilateral anti-competitive conduct	Merger control	State enterprises/state monopolies	State aid/subsidies	
Korea-Singapore		✓		✓					✓		✓	✓		✓	
India-Singapore															
New Zealand-Singapore				✓		✓									
NAFTA/NAAC															
US-Australia		✓		✓	✓	✓			✓			✓		✓	
US-Bahrain														✓	
CAFTA														✓	
US-Chile					✓	✓			✓			✓		✓	
US-Jordan														✓	
US-Morocco														✓	
US-Oman														✓	
US-Peru		✓		✓	✓					✓		✓		✓	
US-Singapore	✓	✓		✓	✓				✓	✓		✓		✓	

6.2.2.4. Concluding remarks of the legal analysis.

This legal analysis revealed the following matters. First, some of the FTAs examined do not even include competition provisions (six out of 26). Second, others refer to undefined “anti-competitive activities/business conduct” while still others refer to the classical categories of competition policies. Third, none of the FTAs examined lays down substantive provisions to be applied by the Parties, except some that limit themselves to exclude competitive advantages to their state-owned undertakings. Fourth, all but one FTA exclude the competition provisions from the dispute settlement clauses. Fifth, a number of the FTAs examined justify the inclusion of competition provisions by the need to avoid that anti-competitive activities undermine the FTAs.

The EC has in the past managed to persuade some FTA parties to go much further than shown on the FTAs examined in this study. The EC has concluded a number of agreements in which the other party entered into commitments with respect to its domestic competition laws (see the description in Holmes, Müller, Papadopoulos, and Sydorak 2005; pp. 21-28). These agreements, with the exception of the agreements concluded by the EC with Moldova, Russia, and Ukraine, make also clear that anti-competitive practices are incompatible with the agreement insofar they have an effect on trade between the parties. Will the EC want, or be able, to obtain the same sort of competition clauses in future FTAs?

If not, the next best solution appears to be, while accepting that each party applies its own competition rules to conduct that affects trade between the parties, to obtain clauses (i) requiring that these competition rules be applied in a manner consistent with the FTA and (ii) requiring a fair, non-discriminatory, and transparent application of those competition rules, with notification, consultation, and cooperation obligations. An obligation of either party to provide a form of review would be very useful. Needless to say that such clauses would in any case have to be included.

If the other party would not have domestic competition laws, the EC could attempt to persuade this other party to accept a commitment to adopt competition laws, as it managed to do in certain agreements with Eastern European and Central Asian countries.

If the other party refuses to subject the application and interpretation of competition provisions to the dispute settlement machinery of the FTA, the EC should insist as a fall-back position on the inclusion of a clause similar to the one of the Canada-Costa Rica FTA. This clause is reproduced in para. 6.2.2.3.2.

6.3. Overview of published assessments of the impact of FTA provisions on competition policy and state aid.

The 14 publications identified in Table 17 shed light on the nature and effects of the competition and state aid provisions of FTAs. Without doubt, the emphasis in the existent literature is overwhelmingly on the competition provisions, with little attention given to state aid. Six of these publications offer assessments of the effects of competition provisions, and one includes econometric estimates of the effects of different types of competition-related provisions (Anderson and Evenett 2006). A number of observations are worth making in this regard. First, it seems that FTA negotiations and associated agreements have begotten some improvements without explicitly specifying the steps subsequently taken, including revisions to national competition laws and enforcement institutions as well as greater informal cooperation between enforcement agencies. This could be interpreted as either the parties making a number of unwritten commitments to enhance domestic institutions and informal cooperation, or it could be due to parties independently taking advantage of the prospect of the implementation of the FTA. Either way, this finding acts as a caution against only considering the effects of the FTA in terms of the latter's provisions.

The second overall observation is that, perhaps unsurprisingly, the impact of competition provisions in FTAs is said to be contingent on the nature and existence of signatories' pre-existing national competition laws and enforcement institutions. The third observation is that there is some empirical evidence that certain competition-related FTA provisions influence the amount of foreign direct investment (FDI) inflows that a country can secure. It appears that transparency-related competition provisions encourage such inflows, while the evidence on the effects of other such provisions is mixed. Interestingly taken together, many packages of competition-related provisions appear to have a positive impact on the value of inward/cross-border mergers and acquisitions, a form of FDI inflow. While these econometric results are encouraging it is important to bear in mind that they follow from a single study and

that there are undoubtedly many other economically important variables than inward FDI. Moreover, given the recent vintage of many competition provisions in FTAs it may not be surprising that there is relatively little qualitative and quantitative evidence of their effects. (No doubt similar remarks could be made about some of the other FTA provisions considered in this report and no attempt is made, therefore, to somehow separate out competition-related provisions for special praise or criticism.)

Table 17: Papers relating to competition and state aid provisions in FTAs.

Author(s)	Year	Title	Source
Alvarez, Ana Maria, Julian Clarke, and Veronica Silva.	2005	Lessons from the negotiation and enforcement of competition provisions in South-South and North-South FTAs (chapter 4).	Brusick, Philippe, Ana Maria Alvarez, Lucian Cernat (eds.) <i>Competition Provisions in Regional Trade Agreements: How to Assure Development Gains</i> , UNCTAD.
Araujo, José Tavares de, and Luis Tineo.	1999	Competition Policy and Regional Trade Agreements (Chapter 18).	In: <i>Trade Rules in the Making</i> , ed. Miguel Rodríguez Mendoza, Patrick Low, Barbara Kotschwar. Brookings Institution Press, Washington DC, 1999.
Azevedo, André.	2005	The Working of the US-Brazil Cooperation Agreement on Competition Enforcement.	Paper delivered in the framework of the CPFTR.
Brusick, Philippe, Ana Maria Alvarez, and Lucian Cernat (eds.)	2005	<i>Competition Provisions in Regional Trade Agreements: How to Assure Development Gains</i> .	United Nations Conference on Trade and Development, UNCTAD/DITC/CLP/2005/1.
Cernat, Lucian.	2005	Eager to Ink, but Ready to Act? FTA proliferation and international cooperation on competition policy (Chapter 1).	Brusick, Philippe, Ana Maria Alvarez, Lucian Cernat (eds.) <i>Competition Provisions in Regional Trade Agreements: How to Assure Development Gains</i> , UNCTAD.
Anderson, Robert, and Simon J. Evenett.	2006	Incorporating Competition Provisions into Regional Trade Agreements: Characterization and Empirical Analysis.	Mimeo. University of St. Gallen, Switzerland. Available at www.evenett.com
Holmes, Peter, Henrike Mueller, Anestis Papadopoulos, and Anna Sydorak.	2005	A Taxonomy of International Competition Cooperation Provisions.	Paper for the International Research and Policy Symposium on "Competition Policy for International Development, Growth and Trade" organised by the Centre for Economic Policy Research. Brussels, December 9-10, 2005.
Marcos, Francisco.	2006	Downloading Competition Law from a Regional Trade Agreement (FTA): A New Strategy to Introduce Competition Law in Bolivia and Ecuador.	Instituto de Empresa Business School, Working Paper, October 2006.
Marsden, Philip, and Peter Whelan.	2005	The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement between Canada and Chile.	Paper delivered in the framework of the CPFTR.
Marsden, Philip, and Peter	2005	The Contribution of Bilateral Trade or Competition	Paper delivered in the framework of the CPFTR.

Author(s)	Year	Title	Source
Whelan.		Agreements to Competition Law Enforcement between Canada and Costa Rica.	
Marsden, Philip, and Peter Whelan.	2005	The Contribution of Bilateral Trade or Competition Agreements to Competition Law Enforcement between the EU and Mexico.	Paper delivered in the framework of the CPFTR.
Mathis, James H.	2005	North-South Cooperation Instruments: The Effectiveness and Impediments for Bilateral Approaches to Cross-border Anti-trust Enforcement.	Paper for the International Research and Policy Symposium on "Competition Policy for International Development, Growth and Trade" organised by the Centre for Economic Policy Research. Brussels, December 9-10, 2005.
OECD.	2002	Regional Trade Agreements and the Multilateral Trading System, Consolidated Report.	OECD, TD/TC(2002)8/FINAL, November 20, 2002.
Rosenberg, Barbara, and Mariana Tavares de Araujo.	2005	Implementation costs and burden of international competition law and policy agreements (chapter 6).	Brusick, Philippe, Ana Maria Alvarez, Lucian Cernat (eds.) <i>Competition Provisions in Regional Trade Agreements: How to Assure Development Gains</i> , UNCTAD.

Table 18: Comments on the effects of competition and state aid-related provisions in FTAs and other remarks of potential interest.

Author(s)	Year	Comments on the effects of competition and state aid-related provisions in FTAs.	Other remarks of potential interest.
Alvarez, Ana Maria, Julian Clarke, and Veronica Silva.	2005	<ul style="list-style-type: none"> • The authors argue that FTA provisions can lead to beneficial informal cooperation between competition agencies. "Indeed, one of the benefits reported by several respondents to the questionnaire was that the bilateral or regional treaty tended to spur informal, as well as formal, links" (page 138). • "The evidence from the UNCTAD Questionnaire suggests that the FTAs are a means of opening communication channels, and that these channels are subsequently expanded by competition authorities...until a satisfactory level of cooperation has been achieved" (page 139). 	<ul style="list-style-type: none"> • Although details of the specifics of the UNCTAD Questionnaire are given in this chapter, unfortunately no systematic tabulation of the responses was provided.
Araujo, José Tavares de, and Luis Tineo.	1999	<ul style="list-style-type: none"> • In the introduction to this chapter the authors state a negative conclusion which is somewhat belied by the evidence that they subsequently present. The conclusion is as follows "However, in contrast with other topics on the integration agenda, such as tariffs, quotas, and subsidies, the harmonization of competition rules is achievable not through mercantilist negotiations, but essentially through cooperation among national competition agencies in the enforcement of their respective competition laws. Indeed, the most important part of this process is accomplished unilaterally when a competition policy authority is prepared to act as the regulator of last resort in the economy" (page 445). • The authors discuss the NAFTA, in particular its provisions on competition law and policy, and argue "The NAFTA negotiations have had a marked influence on 	

Author(s)	Year	Comments on the effects of competition and state aid-related provisions in FTAs.	Other remarks of potential interest.
		<p>the modernization of Mexican competition policy institutions. On December 24, 1992, one week after the signing of the trade agreement, a new law replaced the old and inoperative 1934 legislation and, among other important innovations, established the Federal Competition Commission as an autonomous agency" (page 448).</p> <ul style="list-style-type: none"> • The authors discuss the mixed experience in implementing the ANDEAN community's competition provision (the so-called Decision 285 enacted in 1991). On the one hand the authors document that "...a number of institutional limitations have contributed to the failure of Decision 285" (page 452). On the other hand, they contend that "despite these shortcomings, Decision 285 inaugurated the age of competition policy enforcement among the Andean countries. In November 1991 the Peruvian government enacted the laws on foreign direct investment and competition that led to the creation of the Institute for the Protection of Free Competition and Intellectual Property (INDECOPI) in the following year" (page 453). (One of INDECOPI's functions is to act as an independent competition law enforcement agency.) The authors go on "...one month after the enactment of the Peruvian competition laws the government of Venezuela created the Superintendency for the Promotion and Protection of Free Competition (PRO-COMPETENCIA), granting it sufficient autonomy to enforce the new competition policy law" (page 453). Then, to cap it off, the authors argue on the next page "Following the path initiated by Peru and Venezuela, in 	

Author(s)	Year	Comments on the effects of competition and state aid-related provisions in FTAs.	Other remarks of potential interest.
		<p>December 1992 the Columbian government enacted Decree 2153, which updated the provisions of the 1959 law, strengthened the powers of the competition policy agency, and reduced the degree of government discretion on competition matters." (It is worth noting that since the publication of this chapter the members of the Andean Community have adopted a new competition-related instrument, known as Decision 608.)</p> <ul style="list-style-type: none"> The authors discuss the lack of progress in harmonising competition policies in MERCOSUR. They note on page 459: "At present competition is approached very differently by the various MERCOSUR countries. Paraguay and Uruguay do not have competition laws in place... In Argentina and Brazil, although competition laws exist, their components, enforcement mechanisms, and policy goals differ greatly." These arguments suggest that the national preconditions for successful implementation of FTA provisions are not in place. 	
Brusick, Philippe, Ana Maria Alvarez, and Lucian Cernat (eds.)	2005		<ul style="list-style-type: none"> A recent book containing 13 chapters on various development-related aspects of the competition provisions of free trade agreements. The main findings in this book concerning the effects of such provisions are listed in this table according to the author or authors of the respective chapter of this book.
Cernat, Lucian.	2005	<ul style="list-style-type: none"> The author comes to the following negative conclusion about the implementation of what he refers to as competition-related provisions (CRPs). "Despite this negotiating dynamism, little actions has been recorded in the implementation phase of CRPs. Therefore, it seems that FTA partners are more eager to ink CRPs than to 	<ul style="list-style-type: none"> The author presents a taxonomy of the trade and competition-related provisions of over 300 FTAs (see sections 3 and 4). This includes a discussion of the state aid provisions and their apparent importance in FTAs involving transition economies.

Author(s)	Year	Comments on the effects of competition and state aid-related provisions in FTAs.	Other remarks of potential interest.
		<p>put them into practice. The actual impact of this gap between negotiations and implementation is obviously difficult to quantify" (page 31). However, he goes on to argue "Things are easier to assess when it comes to the requirement to have a national law or establishing adequate regulatory frameworks. In such instances, a causal relationship between CRPs in FTAs and the track record of implementing agencies can be more easily established" (pages 31-32).</p>	
Anderson, Robert, and Simon J. Evenett.	2006	<ul style="list-style-type: none"> • Presents econometric estimates of the effect on the value of inward cross-border mergers and acquisitions (M&A, a form of FDI) of various different competition (but not state aid) provisions. Panel regression techniques were applied to a dataset of M&A inflows into 116 jurisdictions over a 15 year period. Considers eight hypotheses in this respect. Finds that the transparency-related provisions consistently raise the amount of inward M&A. The other provisions do not independently raise M&A. Estimates of the impact of combinations of competition provisions are provided too. 	<ul style="list-style-type: none"> • In section 2 the authors describe the different ways in which competition-related language can enter into FTAs. An important point here is that competition-related terms often enter into FTAs outside of the competition-specific chapters of such agreements.
Holmes, Peter, Henrike Mueller, Anestis Papadopoulos, and Anna Sydorak.	2005		<ul style="list-style-type: none"> • Paper provides a detailed taxonomy of the competition- and state aid-related provisions of FTAs signed with the EC and with other leading trading partners.
Marcos, Francisco.	2006		<ul style="list-style-type: none"> • The author offers the following conjecture as to the likely effect of the Andean Community's 2005 act to adopt a new competition-related instrument, known as Decision 608. On page 4 the author contends "...the prospects of the new rule should not be exaggerated, the poor experience with the Andean Community antitrust rules enacted before the Decision

Author(s)	Year	Comments on the effects of competition and state aid-related provisions in FTAs.	Other remarks of potential interest.
			<p>608 is inherited, and it is not easy to foresee where will its enforcement lead and what the effectiveness of Decision 608 will be. Apart from the weaknesses of the Andean Community itself, and the lack of resources of the Secretary General (which is the institution in charge of enforcing the rule) that may hinder the application of Decision 608, there is considerable asymmetry in the member states on how widespread competition culture is in their economic systems and laws."</p> <ul style="list-style-type: none"> Decision 608 allows Bolivia and Ecuador to apply the Andean competition rules even though neither jurisdiction has enacted a national competition law. The author discusses in section 3 the various pros and cons of "downloading" (his term) from regional rules. Overall, however, the author tends to emphasise the likely negative aspects of such an approach. Arguably, this assessment is speculative in nature even if a number of potentially relevant factors have been identified.
Mathis, James H.	2005	<ul style="list-style-type: none"> After reviewing four FTAs with competition provisions and one bilateral cooperation agreement between two competition agencies, the author considers how much actual cooperation between enforcement agencies has resulted. He argues on pages 23-24: "All the agreements discussed are recent in origin and the lack of a longer track record to document the degree of cooperation take takes place between the agencies is a clear caveat to the discussion on operation of the agreements. However, the picture as it appears to be emerging is not 	<ul style="list-style-type: none"> The objective of this paper was to summarise the findings of several in-depth legal analyses of the competition-related provisions of some FTAs and other cooperation agreements.

Author(s)	Year	Comments on the effects of competition and state aid-related provisions in FTAs.	Other remarks of potential interest.
		<p>particularly promising either. The other authors [whose analyses of the agreements he cites and discusses] can only seem to conclude optimistically that at least a framework is present that could facilitate cooperation. In other words, there is not much cooperation going on under the formal mechanisms (requests and response for assistance or coordination) and what cooperation that may be going on is apparently informal and 'probably' being facilitated in some manner by the framework agreement."</p> <ul style="list-style-type: none"> • The author concludes on page 27 with the following remark "Except for non-case specific cooperation, there is no basis to say that 'in operation' the trade agreements have a higher or more active level of cooperation." 	
OECD.	2002		<ul style="list-style-type: none"> • Contains a useful detailed overview of the different types of competition-related provisions of many FTAs. This overview does not include a discussion of the state aid provisions.
Rosenberg, Barbara, and Mariana Tavares de Araujo.	2005	<ul style="list-style-type: none"> • In section 4.2 the authors describe why the Fortaleza Protocol, that the MERCOSUR member states signed in 1996 and in which these parties agreement to harmonise their competition laws, has not been effectively implemented. The authors identify two reasons on page 208. First, the fact that only two of the MERCOSUR member states (Argentina and Brazil) have enacted national competition laws in the first place. Second, that the Protocol's main focus is on the trade distorting effects of intra-regional competition cases and not on the factors traditionally taken into account in national 	

Author(s)	Year	Comments on the effects of competition and state aid-related provisions in FTAs.	Other remarks of potential interest.
		competition law enforcement (such as market power and the elimination or reduction of distortion to market outcomes).	

6.4. Overview of civil society assessments of various aspects of potential FTA provisions on competition policy and state aid.

A summary of six interviews with representatives of leading European civil society organisations about the merits of these potential FTA provisions can be found in Table 19. There was little enthusiasm and plenty of outright opposition to the inclusion of competition and state provisions in the next generation of EU FTAs. Some representatives of business organisations saw these provisions as a distraction from the central market access-related negotiating agenda for FTAs and argued that any state aid concerns could be taken care of by using countervailing duty measures. (Having said that one business representative did argue FTAs should be used to prohibit state aid and, in the absence of such a ban, to require notification and consultation among signatories when state aid are used.) It was argued by many that cooperation between competition agencies should be furthered by other means, and the work of the International Competition Network was mentioned in this respect.

For the representatives of non-business civil society organisations there was a concern that non-discrimination clauses in competition and state aid provisions would prevent developing countries from taking measures to promote their nascent industries, in particular those industries comprising of many small and medium sized businesses. One representative of a development NGO argued that the EC should be bound in its FTAs to help developing country signatories to develop their competition law enforcement regimes. However, it was contended that competition provisions were not to be used to propagate the EU's model of competition law.

Table 19: Summary of civil society comments on FTA provisions on competition and state aid.

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
<p>Mr. Michel Bricout, Director, Trade & Economics, European Automobiles Manufacturers' Association.</p>	<ol style="list-style-type: none"> 1. Since competition law is an internal policy, the EU's FTAs should not have provisions on these matters. 2. However, state aid used to by foreign car producers to stimulate their exports are a concern. These matters should be dealt with by the EU's trade defence instruments, which his organisation opposes any attempt to water down (in the context of a FTA or elsewhere.) 		
<p>Dr. Guido Glania, Director of International Trade Policy, Federation of German Industries (BDI).</p>	<ol style="list-style-type: none"> 1. Competition law matters are not a key priority. There was a fear of distraction in the negotiations from "core" business. Worse, trading partners may ask for some type of <i>quid pro quo</i>, possibly longer phase-in periods with their own tariff dismantling, faster liberalisation by the EU, or exceptions from their own reforms. The focus should be on market access-related issues. 2. Competition provisions in FTAs, and other provisions for that matter, should not be used to weaken the EU's trade defence instruments. If foreign firms receive state aid then this should be tackled under countervailing duty provisions. 3. The respondent questions what could be accomplished with respect to competition law and policy in FTAs. Were FTA provisions really needed to secure more cooperation? What about other instruments to promote cooperation such as the International Competition Network and bilateral cooperation accords between competition agencies. 4. Having said this there was more room for cooperation between 		

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	<p>competition agencies, especially in the area of mergers and acquisitions. Bans on export cartels would be good. However, these topics should only be pursued if the negotiating party wishes to pursue these topics. Otherwise, the subject should be dropped.</p>		
<p>Mr. James Howard, Director, Economic and Social Policy, International Trade Union Confederation.</p>	<ol style="list-style-type: none"> 1. In "genuinely" developing countries there is a "clear" case for state subsidies for infant industries. This should be allowed. However, as a country develops the justification for these measures becomes more tenuous. Middle-income developing countries should not be allowed to use such subsidies; a level playing field should apply here. 2. With respect to competition law provisions, these should be looked at carefully especially in FTAs between signatories at different stages of development. For instance, there are circumstances when differences in development between signatories are significant when it is socially desirable to discriminate in favour of domestic firms. It was stressed that this organisation was not necessarily opposed to provisions on competition law and policy. 		
<p>Ms. Emily Jones, Policy Advisor, Economic Justice, Oxfam GB.</p>	<ol style="list-style-type: none"> 1. There should be no provisions, binding on developing country signatories of EC FTAs, on competition policy and state aid. The EC should be bound to support the development of competition law and policy in developing countries, on terms that the developing countries concerned decide. There should not be an attempt to import the EC's model of competition law and policy. 2. No competition-related provisions should be included in FTAs 		

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
	<p>that effectively impede the capacity of government to use competition law and policy to nurture small and medium sized enterprises (SMEs).</p> <p>3. Provisions should be avoided which <i>de facto</i> or <i>de jure</i> privilege foreign investors over domestic firms in proceedings before the national competition agency.</p>		
Mr. Nick Miller, Senior Trade Policy Adviser, Confederation of British Industry (CBI).	<p>1. There is no scope for competition law and related matters to be dealt with in a FTA. (There is no objection to the principles of competition and competition law.)</p> <p>2. Competition law in the EU is well developed but the battle has still to be won. It takes a long time to develop and share best practices and the ECN and ICN are the right vehicles in this regard, not FTAs.</p> <p>3. Questions were raised as to whether adding substantive principles on competition law are going to complicate matters.</p> <p>4. On balance it was felt that FTA negotiations on competition provisions would cause confusion and distract negotiators from the overall goals of increasing trade and eliminating trade barriers.</p>		
Prof. Dr. Reinhard Quick, Verband der Chemischen Industrie e. V. (VCI) Vide Chairman, UNICE WTO Work-	<p>1. As a general principle one should be careful that negotiating objectives in this area (and in labour standards and environmental policy for that matter) do not detract from the liberalisation of goods and services markets. It would be unfortunate if the EC's FTA partners were able to trade off liberalisation (through exemptions and longer transition periods) because they have taken on labour standards. The overall goal of the FTA ne-</p>	<p>1. Consideration should be given to the two EU-US co-operation agreements between their respective competition law enforce-</p>	

Civil Society expert. Name and organisation.	Desired EC negotiating objectives.	Any model FTA provisions or provisions to avoid or improve on.	Compelling evidence on the effectiveness of the FTA provisions in question.
ing Group.	<p>gotiation should be to liberalise all tariffs on industrial products in 10 years.</p> <ol style="list-style-type: none"> 2. Competition law and policy should be discussed in the context of FTAs. 3. Although antidumping provisions will continue to exist, competition policy-based approaches would be preferable way to tackle any corporate "abuses". Eventually, and it was acknowledged that this is a long-term objective, antidumping measures should be replaced by competition law-related measures. 4. Cooperation between competition enforcement agencies should be encouraged, including provisions to allow for the exchange of confidential information between agencies. Protections for the confidential information of corporations would be part of these provisions too. 5. With respect to state aid there should be a principle that trade-distortive state aid be prohibited. Procedurally, there should be an obligation to communicate with a FTA party if state aid are to be put in place. 	<p>ment bodies. These agreements have worked, even though they are not part of FTAs.</p>	

6.5. Resource-based implementation of competition and state aid provisions in FTAs.

Given the diversity of national experience with respect to competition law and its enforcement and the wide range of possible FTA commitments on competition- and state aid-related matters, it will be difficult to generalise about the resource-based implications of adopting such provisions. For sure, commitments to set up a new enforcement agency and inter-agency cooperative mechanisms will require human and financial resources. However, it should be noted that FTA provisions could be drafted in such a way that a commitment to enforce a national competition law does not require the creation of a new enforcement agency, so potentially lowering implementation costs. In many developing and industrialised countries the competition law enforcement function is performed by a government agency that undertakes other functions too. For example, the competition and consumer protection laws are implemented by the same agencies in a number of jurisdictions, including the United States (the Federal Trade Commission) and the United Kingdom (the Office of Fair Trading). Having said all of this, it is worth bearing in mind that factors other than resource costs should also influence which government agency is assigned the task of implementing competition law and on what terms.

The training of lawyers and economists to implement competition law is a challenge in many jurisdictions, richer and poorer like, not least because there is often a lucrative private sector market for these skills. Ideally such training should be undertaken by current or former competition law enforcement officials and, in the context of the EU's forthcoming FTA negotiations, this may call for any formal commitments to be augmented by more collaboration between competition agencies in the potential FTA partners and in the EU member states (not to mention DG Comp's potential contribution.) Whether such collaboration could be financed out of existing EC and Member State budgets is a separate and important question.

In discussions on the resource costs of regulatory activities in general it is important to keep some perspective. These agencies perform useful societal functions the value of which ought to be taken into account. In the small number of jurisdictions where empirical evaluations of competition law enforcement actions have been undertaken they have tended to show substantial benefits to purchasers and to the economy in general; benefits that are often multiples of the annual budget of the competition enforcement agencies. Seen on these terms governments should, therefore, have a strong incentive to invest in their own competition law regimes and its enforcement; the additional assistance provided by foreign agencies may be very valuable but the core support for promoting competition within a jurisdiction should come from that jurisdiction's government.

7. Concluding remarks.

The last fifteen to twenty years have seen a substantial number of FTAs signed worldwide. According to some counts the number of FTAs in existence exceed 200 and are heading towards 300 very quickly. Not all of those FTAs are the same and it is not surprising, then, that as it launches a new wave of FTA negotiations with developing countries, the European Commission and trade policy officials in Member States want to examine what has already been negotiated in other FTAs and what, if anything, is known about the empirical effects of various FTA provisions. The purpose of this Report was to describe what is known about the legal form and economic effects of five different types of provisions typically found in FTAs. The findings for each type of provision were reported in separate sections in this report.

The first objective of this report was to characterise the form, content, and implementation of five different types of provision found in 27 relatively recently concluded FTAs. Given the EU's forbearance in negotiating and signing new FTAs in recent years inevitably the focus is principally on FTAs signed by other trading parties. In principle, this could provide new models or approaches that could be adapted to the European Commission's objectives and put to trading partners. The implications for the EC's negotiating strategy vary across provisions and the reader is referred to the Executive Summary at the beginning of this report for relevant recommendations etc.

The second purpose of this report has been to take a hard look at the empirical evidence and statements concerning the effects of selected provisions on FTA agreements. It is important to stress that no attempt was made to restrict attention to any one type of approach to empirical research, nor was any restriction made on the types of effects (such as trade-effects or investment-effects) considered. Despite considerable efforts searching databases of available research, libraries, and the like, very few studies were found that specifically discuss the effects of the following FTA provisions: labour standards, environmental matters, public

procurement practices, certain non-tariff barriers, and competition and state aid policies. For sure there is a growing body of legal analyses of these provisions, and indeed some taxonomies have been drafted.¹⁹² However, the number of empirical analyses of the effects of specific FTA provisions that attempted to strip out the variation caused by other relevant factors could be counted on the fingers of one hand. Even so, the information that was found on effects was tabulated here and discussed, with a separate section devoted to each of the five types of FTA provisions.

It was certainly a disappointment to find such a dearth of econometric or other empirical analyses of the effects of FTA provisions. Having followed the literature on both government procurement practices and trade-and-competition policy for a number of years, it was not terribly surprising to confirm the limited evidential base in those policy areas. However, it was a surprise to find that the other three types of FTA provisions considered here (namely, social and labour policies, environment policies, and non-tariff barriers) were in a similar situation. Unless and until the underlying research base improves, this implies that arguments based on anecdotal evidence, qualitative claims, and deductions made from first principles will have to bear the most weight in convincing the EC's trading partners of the merits of including certain provisions in future FTAs. This downbeat conclusion might be tempered by the following two pertinent observations. First, the lack of such empirical evidence did not prevent the representatives of European civil society organisations (interviewed for this report) from assembling cogent arguments to support their recommendations concerning the EC's negotiating priorities. Second, when breaking new ground in trade policymaking it is almost inevitable that negotiating proposals will get ahead of the underlying research base; analyses among the latter being inherently about what has happened before and take time for the necessary evidence to be assembled. How far ahead, though, is a matter of comfort.

192 Almost all of these taxonomies have been drafted by OECD officials, or as part of an Inter-American Development Bank project on FTA provisions that Evenett participated in during 2005 and 2006, or as part of a EC-funded trade-and-competition project that Evenett was the scientific coordinator of.

Annex 1. List of FTAs examined in-depth for this study.

The EC chose the following FTAs for in-depth analysis for this study:

1. EU-Chile (a benchmark from a previously completed EU FTA).
2. Australia-Singapore.
3. Australia-Thailand.
4. Canada-Chile (including its Agreement on Environmental Cooperation).
5. Canada-Costa Rica (including its Agreement on Environmental Cooperation).
6. EFTA-Chile.
7. EFTA-Korea.
8. EFTA-Mexico.
9. EFTA-Singapore.
10. Japan-Malaysia.
11. Japan-Mexico.
12. Japan-Philippines.
13. Japan-Singapore.
14. Japan-Thailand.
15. Korea-Singapore.
16. Singapore-India.
17. Singapore-New Zealand.
18. NAFTA (including the US-Canada-Mexico North American Agreement on Environmental Cooperation).
19. US-Australia.
20. US-Bahrain.
21. US-Dominican Republic-CAFTA.
22. US-Chile.
23. US-Jordan.
24. US-Morocco.
25. US-Oman.
26. US-Peru.
27. US-Singapore.

Annex 2. Bibliography for the comparative legal analyses of selected FTA provisions, organised by provision.

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A.4. Competition and state aid.

All papers below referred to as "CPFTR paper" were part of an EC-funded project supervised by Simon J. Evenett, one of the co-authors of this report. The final versions of these papers can be obtained by emailing Evenett at simon.evenett@unisg.ch

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Annex 3. Documents supplied by members of European civil society to authors of this report.

Document supplied by:	Document title.
Mr. Brendan Barnes European Federation of Pharmaceutical Industries Associations (EFPIA)	Category I : priority NTB's for the WTO DDA NAMA Negotiations.
	Non-tariff barriers in the Pharmaceutical Sector.
Dr. Guido Glania Director of International Trade Policy, Federation of German Industries (BDI)	Germany needs open markets worldwide: Arguments in favour of a trade policy mix.
Mr. James Howard Director Economic and Social Policy International Trade Union Confederation	RESPONSE TO EUROPEAN COMMISSION QUESTIONNAIRE ON FREE TRADE AGREEMENTS WITH COUNTRIES OF ASEAN, INDIA AND SOUTH KOREA, UKRAINE, THE ANDEAN COMMUNITY AND CENTRAL AMERICA.
Mr. Nick Miller Senior Trade Policy Advisor Confederation of British Industry (CBI)	CBI Position Paper - Free Trade Agreements.
	CBI Position Paper - EU-ASEAN Free Trade Agreement.
	CBI Position Paper - EU-India Free Trade Agreement.
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	CBI Position Paper - EU-Russia Economic Relations.