

# Sustainable Development in Chilean International Investment Agreements

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# Sustainable Development in Chilean International Investment Agreements

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This article describes the sustainable development provisions (SDPs) that are generally found in international investment agreements (IIAs), as well as those that explicitly refer to environmental and labour standards. In turn, it examines Chilean IIAs and their sustainable development provisions in bilateral investment promotion and protection agreements (BITs) and as part of preferential trade agreements (PTAs), and compares them with the inclusion of these provisions in IIAs worldwide. Considering that Chile is one of the leading countries in the negotiation of trade agreements and that, at the same time, it has made a strong public commitment to promote sustainable development, we propose some recommendations for future negotiations or renegotiations of Chilean IIAs to include more sustainable development provisions.

Keywords: sustainable development - environmental standards - labour standards - investment treaties - free trade agreements - free trade agreements

## I. Introduction

On 5 December 1996, the first free trade agreement (FTA) signed by Chile was signed between Chile and Canada. At the same time, the parties also signed an environmental cooperation agreement (ACACC) on 6 February 1997,<sup>1</sup> together with a labour cooperation agreement. All these instruments entered into force on 5 July 1997.

Among other provisions, Art. 14 of the ACACC allows any person or non-governmental organisation (NGO) claiming that a State Party is failing to effectively enforce its environmental laws to submit a petition to any of the National Secretariats established under the agreement. After a review of formal requirements, such a petition is forwarded to a Joint Petition Review Committee for resolution. This Committee, composed of two members, one from each Party, is an independent body responsible for assessing citizens' petitions and determining whether they qualify for a response from a State Party, or recommending the preparation of a factual record.

The first petition filed on the basis of these standards (Petition A14-2000-01) was filed by the lawyer and president of the Environmental Prosecutor's Office (FIMA), Mr Fernando Dougnac Rodríguez in late 2000, on behalf of five Chilean NGOs,<sup>2</sup> arguing that the Chilean environmental authorities had failed to effectively enforce their environmental legislation by authorising the Cascada - Chile logging project without a proper environmental impact study.<sup>3</sup> While the Chilean government responded to

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<sup>1</sup> Chile-Canada Environmental Cooperation Agreement (ACACC) (1997), <https://acuerdochilecanada.mma.gob.cl/wp-content/uploads/2018/05/Texto-Acuuerdo-de-Cooperacion-Ambiental.pdf>.

<sup>2</sup> Alianza por los Bosques de Chile; Comité Nacional Pro Defensa de la Fauna y Flora (CODEFF); Red Nacional de Acción Ecológica (RENACE); Instituto de Ecología Política (IEP); and Sociedades Sustentables.

<sup>3</sup> Summary of the Petition Submitted to the Chile-Canada Commission for Environmental Cooperation under Articles 14 and 15 of the Chile-Canada Environmental Cooperation Agreement No. A14-2000-01, <https://acuerdochilecanada.mma.gob.cl/wp-content/uploads/2018/12/Resumen-A14-2000-01-2.pdf>

this submission in January 2011, denying all the charges raised in the petition,<sup>4</sup> in February 2011, the Canadian company behind the project (Boise Cascade) announced its irreversible cancellation, allegedly due to an oversupply in the market for Oriented Strand Board (OSB), which made the project financially unviable. At the same time, the company accused the government of failing to take a clear position in the face of "incessant demands from a small group of non-governmental organisations".<sup>5</sup>

This example is just one example of the direct link that exists today between the regulation of foreign investment and the protection of the environment, a link that at the international level has materialised mainly in the concept of sustainable development, understood as "meeting the needs of the present generation without compromising the ability of future generations to meet their own needs". (United Nations General Assembly 1987)

There is a significant investment gap to achieve the Sustainable Development Goals (SDGs). (United Nations General Assembly 2015). According to UNCTAD, to achieve the SDGs by 2030, a total annual investment of between \$3.3 trillion and \$4.5 trillion is needed in relevant sectors in developing countries (UNCTAD 2014b, p. 140). Some estimate an annual financing gap of about \$2.5 trillion between current financing and what is needed to achieve the SDGs in these countries (Doumbia and Lauridsen 2019, p. 1-2).

Foreign direct investment (FDI) can play a critical role in building and strengthening productive capacity and export growth, including SDGs such as technology and skills transfer, employment generation, wage growth and poverty eradication. (United Nations Committee for Development Policy (CDP) 2016, p. 9, 14) Given the significant investment gap to achieve the SDGs, it would be highly desirable for FDI flows to increase significantly in key areas to achieve the SDGs, in particular to developing countries, least developed countries (LDCs) and landlocked developing countries (LLDCs).

However, the need for FDI does not mean that there is a consensus on the promotion, facilitation or protection of foreign investment, nor that international instruments are adequate for that purpose. Instead of one multilateral investment agreement, today we have a network of more than three thousand international investment agreements (IIAs), including bilateral investment promotion and protection agreements (BITs) and other treaties with investment provisions (IIAs), mainly free trade agreements (FTAs) with investment chapters.

In recent years, these treaties have been heavily challenged regarding the protection they offer foreign investors, mainly through the investor-state dispute settlement mechanism.<sup>6</sup> Evidence on whether aggregate FDI flows have increased thanks to IIAs remains inconclusive. While some find no clear or limited relationship between treaty protections and investment, other research has focused on the conditions under which treaties may positively influence investment flows (Bonnitcha, Poulsen and Waibel 2017; Pohl 2018; UNCTAD 2014a; Bellak 2015). Investment disputes involving sustainable development issues appear to be on the rise. For example, in recent years, disputes have increased as

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<sup>4</sup> Summary of the Government of Chile's Response to the Joint Review Committee on Petitions under Articles 14 and 15 of the Chile-Canada Environmental Cooperation Agreement on Petition A14-2000-01, <https://acuerdochile-canada.mma.gob.cl/wp-content/uploads/2018/12/Resumen-A14-2000-01-1-2.pdf>

<sup>5</sup> "Ecologistas celebran cancelación de proyecto Cascada Chile", emol.com (Santiago), 22 February 2001, <https://www.emol.com/noticias/nacional/2001/02/22/46952/ecologistas-celebran-cancelacion-de-proyecto-cascada-chile.html>.

<sup>6</sup> See, inter alia, the following documents (Waibel et al. 2010; UNCTAD 2015b; UNCITRAL 2021).

some states engage in energy transition, including phasing out nuclear and coal-fired power plants, repealing or changing incentive regimes for renewable energy, and banning oil, natural gas and shale gas projects. (Garin Respaut 2020)

In this context, some voices have called for a reform and alignment of IIAs with the SDGs (Johnson, Sachs and Lobel 2020; Muchhala 2018), to include more sustainable and balanced commitments in these agreements (Bernasconi et al. 2012), or consider including labour rights and environmental protection commitments (VanDuzer 2016). Some institutions, such as the International Institute for Sustainable Development (IISD), the United Nations Conference on Trade and Development (UNCTAD), and the International Institute for Environment and Development (IISD), have developed models or guidelines for IIAs, and have also developed a number of other IIAs. (International Institute for Sustainable Development et al. 2005) or guidelines (UNCTAD 2015a; Cotula 2016) in this regard.

For some, the object and purpose of investment treaties have shifted from investment protection for economic prosperity to investment protection for sustainable development (Ortino 2017, p. 75-83). Some model BITs, such as the 2012 U.S. model BIT and the 2018 Dutch model BIT, now include provisions on sustainable development. (Chi 2018, p. 15) In recent years, most IIAs refer to sustainable development, environment, labour, corporate social responsibility or human rights in the preamble or in substantive provisions. However, the inclusion of such language remains rare when considering IIAs as a whole (Ortino 2017, p. 81).

Chile is one of Latin America's most important players in investment treaty-making. According to UNCTAD, it is the country with the most IIAs concluded in the region. (UNCTAD 2021a) Chile has concluded 46 BITs<sup>7</sup> and 36 BITs, and approximately two-thirds of these agreements have been negotiated with developing or transition economies.<sup>8</sup> Sixty-two of these agreements are currently in force. It is, therefore, important to know where Chile stands on the inclusion of sustainable development provisions in its investment agreements.

This article is structured as follows. Following this introduction, we describe in more detail the sustainable development provisions found in IIAs in general and those relating to the environment and labour. In the corresponding sub-section, we examine Chilean IIAs and their sustainable development provisions. In the conclusion, we propose some recommendations for future negotiations or renegotiations of these agreements.

## **II. Sustainable development provisions in investment treaties**

Some previous work has already mapped sustainable development provisions (SDGs) in IIAs. In 2014, based on a sample comprising 70% of all IIAs, the Organisation for Economic Co-operation and Development (OECD) estimated that only 12% contained a reference related to sustainable development. (Gordon, Pohl and Bouchard 2014) A report for the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP) analysed and compared the SDGs embedded in a selected sample of 20 models IIAs and 340 BITs from eighteen Asia-Pacific LDCs and LLDCs. (Chi 2018) UNCTAD's mapping of 2575 IIAs includes provisions on health and environment, labour standards and corporate social responsibility, among other topics (UNCTAD 2021b).

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<sup>7</sup> However, the countries with the most BITs in Latin America are Cuba (59) and Argentina (54).

<sup>8</sup> For this we follow the classification in ("World Economic Situation and Prospects 2020" 2020)

Sustainable development is a broad, evolving and multifaceted concept (Barral 2012). If we were to look only at the SDGs, we would have to consider 17 different goals and 169 targets. (United Nations General Assembly 2015) Therefore, in this section, we will adopt a narrower concept of sustainable development, focusing on provisions that generally refer to sustainable development or specifically to environmental protection and labour rights.

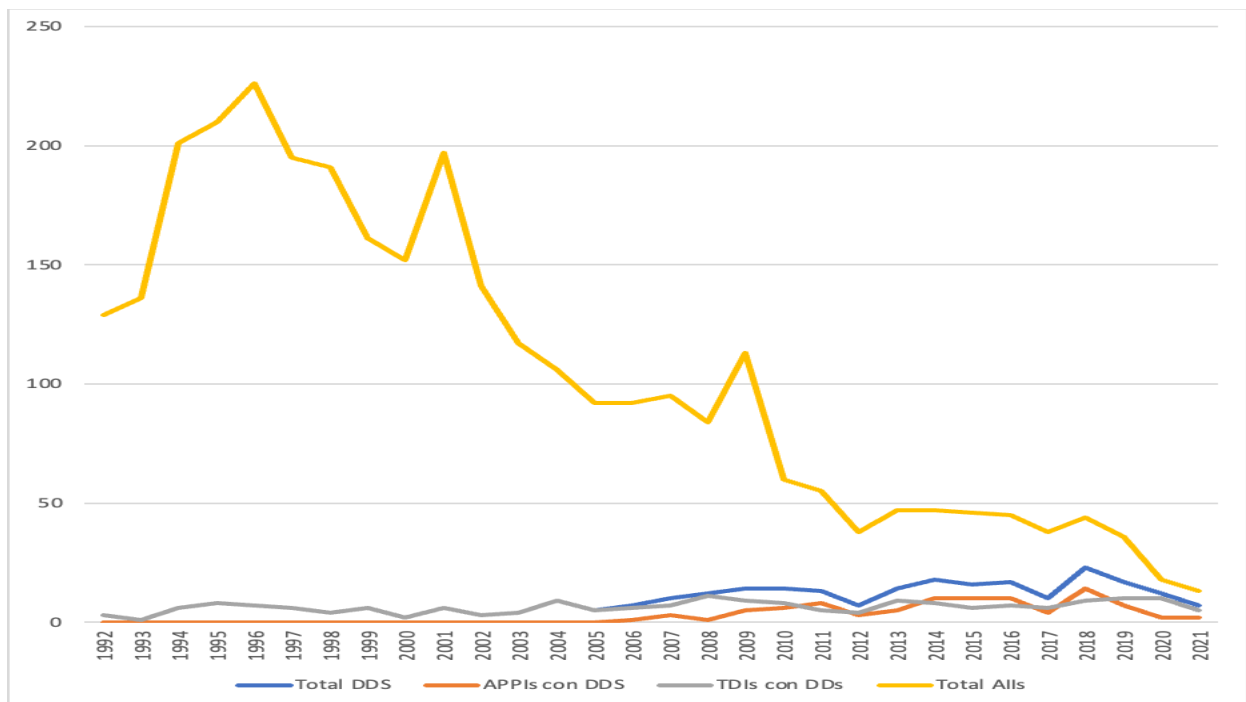
To identify sustainable development provisions in existing IIAs, we have primarily used the Electronic Database of Investment Treaties (EDIT), which currently includes the text of 3604 IIAs, being 3143 BITs and 461 BITs.<sup>9</sup> We have mapped both provisions that generally refer to sustainable development and those that include some keywords and expressions directly related to that notion in the three specific topics mentioned above.

## A. General sustainable development provisions (SDP)

### 1. IIAs at the global level

We have identified at least 327 IIAs with sustainable development provisions, concluded since 1992. Most of these are BITs with investment chapters or provisions (180 agreements), and only 90 BITs. The proportion of SDP in IIAs has increased over time. For example, while only 1% of IIAs concluded in 2000 contained references to sustainable development, ten years later, that proportion increased to 23%. By 2020, around two-thirds of the agreements concluded that year included such provisions. Most of these agreements (268 IIAs) include such references in the preamble, 210 PITs and 58 BITs.

**Figure 1. Sustainable Development Provisions in IIAs**



<sup>9</sup> The Electronic Database of Investment Treaties (EDIT) is a comprehensive, full-text, machine-readable IIA database of the World Trade Institute - University of Bern, < <https://edit.wti.org/>>. See (Alschner, Elsig and Polanco 2021)

As far as FTAs are concerned, the oldest agreement to include mentions of sustainable development in the preamble is the preamble to the 1992 Agreement establishing the European Economic Area (EEA).<sup>10</sup> In the case of BITs, the explicit mention of 'sustainable development' as one of the treaty's objectives first appeared in the preamble of the 2006 Canada-Peru BIT.<sup>11</sup> As mentioned above, the IISD published its model agreements on investment for sustainable development the previous year.

Over time, however, other subtypes of SDP have emerged in IIAs. One of these is the general confirmation of sustainable development commitments in international law. We found at least 32 IIAs that include such provisions. Several of them refer to specific environmental or labour obligations that will be elaborated on later in this article, such as the 1992 United Nations Conference on Environment and Development (UNCED) Agenda 21 and the 1998 International Labour Organisation (ILO) Declaration on Fundamental Principles and Rights at Work, among others.<sup>12</sup>

Another sub-type of SDP is cooperation commitments. The Treaty establishing the European Economic Community, as amended by the Maastricht Treaty in 1992 (and since renamed the Treaty establishing the European Community - TEC), was the first to include a reference to the "sustainable economic and social development of developing countries, and more particularly the most disadvantaged among them" as one of the cooperation activities to be promoted by the Community.<sup>13</sup>

We found other rules that may give rise to new sub-types of SDP in more recent agreements. For example, the trade agreement between the European Union (E.U.) and the United Kingdom to conclude its Brexit process considers consultation with civil society groups to discuss the implementation of the agreement:

*1. Each Party shall consult on matters covered by this Agreement and any supplementary agreement with its newly established or existing domestic advisory group(s), composed of a representation of independent civil society organisations, including non-governmental organisations, business and employers' organisations, as well as trade unions, working on economic, sustainable development, social, human rights, environmental and other issues. Each Party may convene its national consultative group(s) in different configurations to discuss the implementation of different provisions of this Agreement or any supplementary agreement*<sup>14</sup>

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<sup>10</sup> EEA Agreement (1992), Preamble: "DETERMINED to preserve, protect and improve the quality of the environment and to ensure prudent and rational utilisation of natural resources on the basis, in particular, of the principle of sustainable development, as well as the precautionary and preventive principle".

<sup>11</sup> APPRI Canada - Peru (2006), Preamble: "RECOGNISING that the promotion and protection of investments of investors of one Party in the territory of the other Party shall be conducive to the stimulation of mutually beneficial business activity, the development of economic cooperation between them and the promotion of sustainable development".

<sup>12</sup> See, for example, the EU Agreements with Mexico (2001), Korea (2010), Colombia-Ecuador-Peru (2013), Canada (2016), Singapore (2018) and Vietnam (2019); the Canada-Korea FTA (2014); the China-Korea FTA (2015); the Brazil-Chile FTA (2018); and in the UK the Agreements with New Zealand (2022), Australia (2021), the EU (2020), Moldova (2020), Japan (2020), Ukraine (2020), Georgia (2019) and Korea (2019), among others.

<sup>13</sup> Art. 130u TEC.

<sup>14</sup> EU-UK Trade and Cooperation Agreement (2020), Art. 7.

The new BIT between Colombia and Spain (2021) includes a general rule of non-discrimination in these matters: "*No Contracting Party may apply its environmental, labour or human rights legislation in a manner that constitutes a disguised restriction on Investment or an unjustifiable discrimination between the Contracting Parties*".<sup>15</sup>

## **2. Chilean IIAs**

We have identified only 27 IIAs, of which Chile is a party that include provisions on sustainable development. Only one of them is equivalent to a BIT - the investment cooperation and facilitation agreement with Brazil (2015). The remaining 26 are BITs, mostly FTAs with investment chapters. Interestingly, of the latter group, 11 are agreements concluded with Latin American countries bilaterally or in the framework of preferential trade agreements, such as the Pacific Alliance (with Colombia, Mexico and Peru), or the Trans-Pacific Partnership Agreement (TPP) and its successor, the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (TPP11) - considering that the latter two agreements also have Mexico and Peru as parties, and although as is known, Chile has not yet ratified the TPP11.

In 24 of these 27 agreements, references to sustainable development are found in the preamble, with no further reference to sustainable development commitments in this part of the treaty.<sup>16</sup> For example, the Chile-Paraguay Trade Agreement states in its preamble, as one of the objectives of the agreement:

*PROMOTE the protection and conservation of the environment and the contribution of trade to sustainable development; as well as mutual cooperation on trade-related environmental issues.*

However, detailed references to specific environmental and labour commitments are frequently found in the chapters devoted to these issues.

## **B. Environmental Protection Provisions (EPPs)**

### **1. IIAs at the global level**

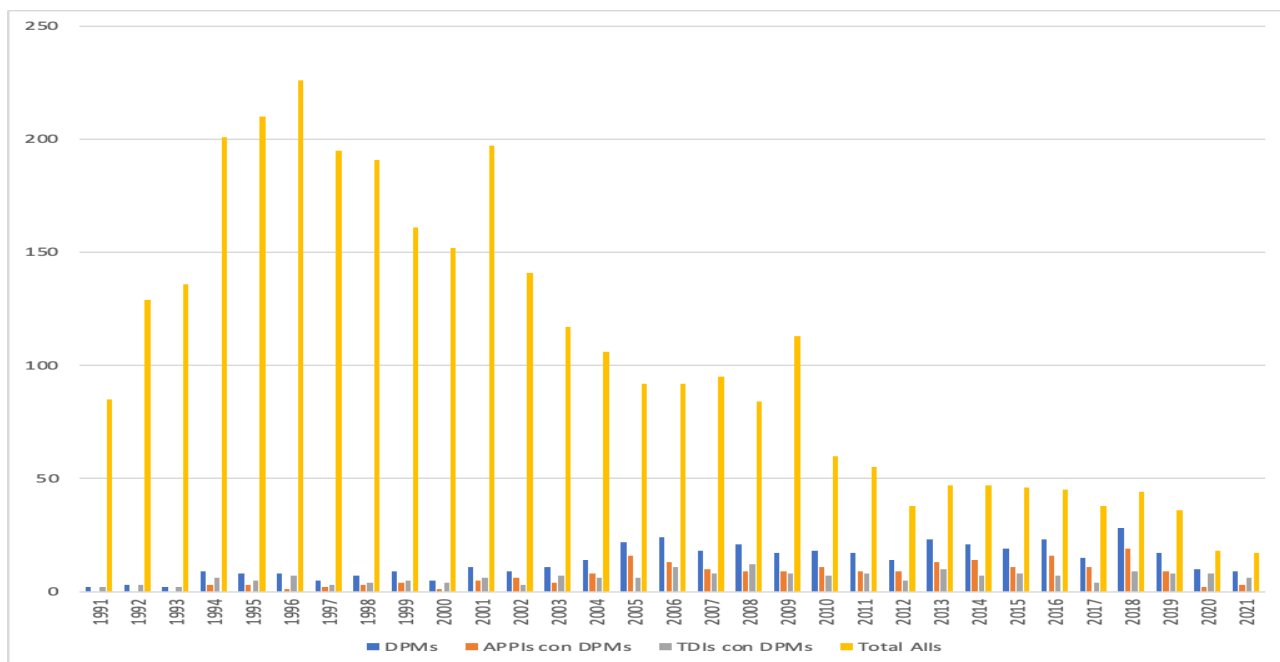
We have identified at least 419 IIAs with environmental protection provisions (EPPs) concluded since 1991. Most of them are BITs (224 agreements), and the rest are BITs with investment chapters or provisions (195 agreements). The share of EPPs in IIAs has increased over time. For example, while only 2 per cent of IIAs concluded in 1991 contained references to environmental protection, ten years later, that share increased to 6 per cent, and then to 31 per cent in 2011. By 2020, around 56% of the agreements concluded that year included such provisions.

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<sup>15</sup> Colombia - Spain BIT (2021), Art. 16.3.

<sup>16</sup> See FTAs with Paraguay (2021), Brazil (2018), Argentina (2017), Uruguay (2016), the Pacific Alliance Additional Protocol (PAAP) (2014) and the Economic Complementation Agreement (ECA) with Ecuador (2020).

**Figure 2. Environmental protection provisions in IIAs**



Most of these agreements (256 IIAs) include general environmental references in the preamble, 135 IIAs and 121 treaties with investment provisions (TIPs).<sup>17</sup>

There are five important sub-types of EPPs in IIAs. The first is the "non-derogation obligations" or "balancing clauses", which are (Chi 2018, p. 17,22) or "balancing clauses", (Asteriti 2012) which essentially require contracting states not to lower or relax their environmental laws or standards in order to promote foreign investment and thus avoid a "race to the bottom" in environmental protection. We found at least 128 agreements with such provisions.

The first example of such provisions is found in the 1992 North American Free Trade Agreement (NAFTA):<sup>18</sup>

*Article 1114. Environmental measures (...)*

*2. The Parties recognise that it is inappropriate to encourage investment by relaxing domestic health or safety or environmental measures. Accordingly, no Party should waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as a means of inducing the establishment, acquisition, expansion or retention of an investor's investment in its territory. If a Party believes that another Party has encouraged an investment in such a manner, it may request consultations with that other Party, and both Parties shall consult with a view to avoiding such inducements.*

Subsequent agreements that include such provisions have maintained a fairly similar wording to the abovementioned NAFTA provision, with the slight variation that, in some cases, it does not include a consultation process if one of the contracting states considers that the other State has given such an

<sup>17</sup> Only two agreements include mentions in the preambular text of a specific environmental concern: biodiversity. These are the Association Agreement between the EU and Central America (2012); and the Political Dialogue and Co-operation Agreement between the European Community and the Andean Community (2003).

<sup>18</sup> NAFTA (1992), Art. 1114(2).



impulse.<sup>19</sup> In some cases, this provision is part of the agreement's preamble.<sup>20</sup> Another variant of this sub-type of provision adds that "*The Parties shall endeavour not to derogate from, waive or relax measures as an encouragement for the expansion, retention or disposition in its territory of an investment of an investor of the other Party*".<sup>21</sup>

The second sub-type of EPPs are exception clauses designed to exempt the State from its IIA obligations or from the State's responsibility for adopting environmental measures that would otherwise be inconsistent with its IIA obligations (Asteriti 2012). These provisions are partly inspired by Article XX of the General Agreement on Tariffs and Trade (GATT),<sup>22</sup> and consider exceptions "*necessary to protect human, animal or plant life or health*" (GATT equivalent, Art. XX (b)); or "*relating to the conservation of exhaustible natural resources*" (GATT equivalent, Art. XX (g)). We find at least 390 IIAs with these exceptions, the vast majority making direct reference to GATT rules under the formula "*mutatis mutandis*",<sup>23</sup> although some transcribe a large part of their content, without containing an express reference to these rules.<sup>24</sup>

The first example of an IIA that includes such provisions is the Australia-Papua New Guinea Trade Agreement (1976).<sup>25</sup> The first proper BIT to have similar exceptions is the China-Singapore BIT (1985), but with slightly different wording:

*The provisions of this Agreement shall in no way limit the right of any Contracting Party to apply prohibitions or restrictions of any kind or to take any other measures aimed at the protection of its essential security interests, or the protection of public health or the prevention of diseases and pests in animals or plants.*<sup>26</sup>

The third sub-type of EPPs confirms environmental commitments under international or domestic law (Chi 2018, p. 17,22). When IIAs include this sub-type of provisions, they usually refer to international obligations or principles. As for the former, although some references are made only in the preamble,<sup>27</sup> some 32 IIAs (the vast majority of them concluded by the E.U.) make explicit references to international law. These include the 1992 Rio Declaration on Environment and Development, the 1992 Agenda 21 on Environment and Development and the 2002 Johannesburg Plan of Implementation on Sustainable Development.<sup>28</sup> Some 11 IIAs mention the Millennium Development Goals

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<sup>19</sup> See, for example, Israel - Korea FTA (2021), Georgia - Japan BIT (2021), Art. 20; Japan - Morocco BIT (2020), Art. 19; Argentina - Japan BIT (2018), Art. 22; Japan - Jordan BIT (2018), Art. 19; Lithuania - Turkey BIT (2018), Art. 17; and Canada - Moldova BIT (2018), Art. 15, among others.

<sup>20</sup> See, for example, the Cameroon-United Kingdom Economic Partnership Agreement (2021).

<sup>21</sup> BIT between Argentina and the United Arab Emirates (2018), art. 12(2).

<sup>22</sup> General Agreement on Tariffs and Trade, 30 October 1947, [https://www.wto.org/spanish/docs\\_s/legal\\_s/gatt47.pdf](https://www.wto.org/spanish/docs_s/legal_s/gatt47.pdf).

<sup>23</sup> See, e.g., Australia - UK FTA (2021), art. 31.1.1.

<sup>24</sup> See, e.g., Israel - Korea FTA (2021), art. 21.1.3.

<sup>25</sup> Australia-Papua New Guinea Trade Agreement (1976), Art. 8.

<sup>26</sup> China-Singapore BIT (1985), Art. 11.

<sup>27</sup> See Mexico - EC Economic Cooperation Agreement (2012), Preamble; EU - SADC Economic Partnership Agreement (2016), Preamble.

<sup>28</sup> See Albania - EFTA FTA (2009), Art. 31, EU - Korea FTA (2010), Art. 131; Colombia - Ecuador - EU - Peru FTA (2013), Art. 267, among others.

(MDGs).<sup>29</sup> About 5 agreements recognise the importance of climate change mitigation and adaptation,<sup>30</sup> including, in some cases, explicit references to the Paris Agreement.<sup>31</sup>

When references are made to domestic laws, they usually refer to the contracting State's right to define its environmental protection level. When found in PTAs, agreements tend to follow NAFTA Article 1114 (1): "1. *Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining or enforcing any measure, otherwise consistent with this Chapter, that it considers appropriate to ensure that investments in its territory are made taking into account environmental concerns.*" Some BITs also include similar provisions. For example, the BIT between Lithuania and Turkey (2018) recognises: "*the right of each Contracting Party to establish its own level of environmental protection and its own sustainable development policies and priorities, and to adopt or amend its environmental laws and regulations, each Contracting Party shall ensure that its laws and regulations provide adequate levels of environmental protection and shall endeavour to further improve such laws and regulations*".<sup>32</sup>

In several agreements, this principle is extended as part of a country's "right to regulate", to adopt and implement its laws and regulations governing economic activity in the public interest. We found at least 97 IIAs with such provisions, most of them FTAs (76 agreements).<sup>33</sup>

The fourth sub-type of EPPs clarifies the notion of "indirect expropriation". At least 90 IIAs stipulate that non-discriminatory regulatory actions designed and implemented to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute an expropriation, except in "rare circumstances".<sup>34</sup> However, few of these agreements clarify what is meant by such circumstances. For example, where a measure or series of measures are extremely severe or disproportionate in light of their purpose.<sup>35</sup>

Environmental cooperation commitments are a fifth sub-type of EPPs. Although, as mentioned above, cooperation clauses are common when referring to sustainable development in general, specific cooperation activities are less common in IIAs. We found at least 28 IIAs with such provisions, usually

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<sup>29</sup> See, for example, New Zealand - UK FTA (2022), Art. 22.3; Central America - EU Association Agreement (2012), Art. 1; Eastern and Southern African States - Economic Partnership Agreement with the EU (2009), Art. 2; Economic Community of West African States (ECOWAS) Supplementary Investment Act (2008), Art. 16.

<sup>30</sup> See, for example, the Partnership Agreement between the EU and the Organisation of African, Caribbean and Pacific States (2021), arts. 1 and 7, among others.

<sup>31</sup> See New Zealand - UK FTA (2022), Art. 22.6; Australia - UK FTA (2021), Art. 22.5; Chile - Paraguay FTA (2021), Art. 12.15; and the EU-China Comprehensive Investment Agreement, Arts. 1 and 6.

<sup>32</sup> BIT between Lithuania and Turkey (2018), Art. 17(2). Similar language is included in the BIT between Slovakia and the United Arab Emirates (2016), Art. 12(2); and in the BIT between Iran and Slovakia (2016), Art. 10(2).

<sup>33</sup> See, for example, Colombia-Spain BIT (2021), Art. 14; EU-Vietnam Investment Protection Agreement (2019), Art. 2.2; Brazil-Chile FTA (2018), Art. 172; Argentina-United Arab Emirates BIT (2018), Art. 11, among others.

<sup>34</sup> See, e.g., Australia - UK FTA (2021), Annex 13 B; Georgia - Japan BIT (2021), art. 11(4); China - Mauritius FTA (2019), ch. 8, Annex B; Armenia - Singapore Trade in Services and Investment Agreement (2019), Annex 3-A; Myanmar - Singapore BIT (2019), Annex II.

<sup>35</sup> Japan - Morocco BIT (2020), Annex; South Korea - Uzbekistan BIT (2019), Annex I; Chile - Hong Kong SAR Investment Agreement (2016), Annex I.

in FTAs with investment chapters.<sup>36</sup> One of the few BITs that includes such provisions is the recently announced EU-China Comprehensive Investment Agreement.<sup>37</sup>

## 2. Chilean IIAs

We have identified 30 IIAs to which Chile is a party that include environmental protection provisions. These references are mainly found in the preamble of FTAs with investment chapters (22 agreements).<sup>38</sup> However, only 27 of these IIAs include EPPs in the main text of the agreement. Only three of them are BITs, the agreement between Chile and Uruguay (2010), which has been replaced by the investment chapter of the FTA signed between the same parties in 2016; the Agreement on Cooperation and Facilitation of Investments (ACFI) between Brazil and Chile (2015), which was also replaced by the investment chapter of the FTA signed between the same parties in 2018; and the Investment Agreement between Chile and Hong Kong (2016). Within the FTAs, most of them are bilateral agreements, except for the preferential trade agreements with the Pacific Alliance, the TPP and its successor, the TPP11.

Of all these IIAs, the one with the most detailed provisions regarding citizen participation in environmental matters is the aforementioned Canada FTA's Environmental Cooperation Agreement. Among others, the ACACC reaffirms the right of each country to set its own level of environmental protection, policies and priorities, and promotes transparency and public participation, including actions available to private parties, at the administrative, quasi-judicial and judicial levels. Citizens and non-governmental organisations can submit petitions if they believe that governments have not effectively enforced their environmental laws, which are evaluated by an independent committee and may eventually lead to the preparation of a "factual record". Governments have access to a consultation and dispute settlement mechanism to deal with cases where it is believed that there is a persistent pattern of failure to enforce environmental law in either Party effectively.<sup>39</sup> The same agreement created a Commission for Environmental Cooperation between the two countries, whose bodies were charged with monitoring compliance. Unfortunately, trade agreements subsequent to this treaty did not have this level of detail (or commitments) in this area. For example, although the FTA with the United States (2003) also includes an environmental cooperation agreement and the creation of a joint commission, it is mainly limited to joint cooperation activities and information exchange, and does not include a petition mechanism that can lead to a factual record.<sup>40</sup>

With respect to the categories of EPPs described above, 15 Chilean IIAs include "non-derogation obligations" or "balancing clauses", stating that the Parties recognise that it is inappropriate to encourage investment through a relaxation of applicable domestic health or safety or environmental measures. Accordingly, no Party should waive or otherwise derogate from, or offer to waive or der-

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<sup>36</sup> See, for example, India-United Arab Emirates Comprehensive Economic Cooperation Agreement (2021), art. 14.5.

<sup>37</sup> EU - China Global Investment Agreement (GIA), Art. 3: "Dialogue and cooperation on investment-related labour issues. The Parties agree to dialogue and cooperate, as appropriate, on investment-related labour issues of mutual interest arising under this Section, complementary to efforts under existing bilateral and multilateral mechanisms".

<sup>38</sup> Only five Swiss BITs include PPE in the preamble. These are the agreements with Georgia (2014), Kosovo (2011), Trinidad and Tobago (2010), Egypt (2010) and Serbia and Montenegro (2005).

are the exception clauses designed to exempt the State from its obligations in IIAs (Asteriti 2012) or from liability<sup>39</sup> ACACC (1997)

<sup>40</sup> Chile-United States Environmental Cooperation Agreement (ACACE) (2003).

ogate from, such measures as a means of inducing the establishment, acquisition, expansion or retention of an investor's investment in its territory.<sup>41</sup> The Chilean FTAs with Argentina, Canada, Mexico and Korea add that if a Party believes that the other Party has encouraged an investment in such a manner, it may request consultations with that other Party, and both Parties shall consult with a view to avoiding such inducements.<sup>42</sup>

For their part, exception clauses with express reference to or following the model of Article XX of the GATT are present in XXX IIAs signed by Chile.<sup>43</sup> The TPP, the Chile-Canada FTA (after its modification in 2017), the Chile-Hong Kong Investment Agreement (2016), and the FTA with Argentina (2017), include measures necessary to protect human, animal or plant life or health; or the preservation of living or non-living non-renewable natural resources, within the exceptions to the prohibition of adopting performance requirements. This is to the extent that such measures are not applied in an arbitrary or unjustified manner, or do not constitute a disguised restriction on international trade or investment.<sup>44</sup> A similar provision is found in the Pacific Alliance Additional Protocol, which further provides that parties may require an investment to use a technology to meet health, safety or environmental requirements.<sup>45</sup> Some agreements contain an equivalent reference to GATT Article XX in Article XIV of the General Agreement on Trade in Services (GATS),<sup>46</sup> which also considers measures necessary to protect human, animal or plant life or health within its general exceptions.<sup>47</sup>

In turn, 13 Chilean IIAs include EPPs confirming environmental commitments under international law. However, some only include mentions in the preamble to these commitments,<sup>48</sup> or make a generic mention in the text of the agreement of multilateral environmental agreements.<sup>49</sup> The Chilean FTAs with Canada and Mexico are more specific in this matter, stating that in case of incompatibility between these treaties and the specific trade obligations contained in the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer, or the Basel Convention on Persistent Organic Pollutants (POPs), the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES), the Montreal Protocol on Substances that Deplete the Ozone Layer, or the Basel Convention on Persistent Organic Pollutants, or the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal, these obligations shall prevail to the extent of the inconsistency provided that, where a Party has a choice between equally effective and reasonably available means of

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<sup>41</sup> Chile - Japan FTA (2007), Art. 87; Chile - Turkey FTA (2009), Art. 37.8; Chile - Malaysia FTA (2010), Art. 9.5.2; Chile - Hong Kong FTA (2012), Art. 142.5; Chile - Thailand FTA (2013), Art. 11.5.2; PAAP (2014), Art. 10.31.2; ACFI Brazil - Chile (2015), Art. 17.2; Chile - Uruguay FTA (2016), Art. 12.3.5; Chile - Hong Kong Investment Agreement (2016), Art. 15.2; Chile - Indonesia FTA (2017), Art. 9.5.2; Brazil - Chile FTA (2018), Art. 8.17.2. and Art. 17.3; Chile - Ecuador FTA (2020), Art. 17.3.5; Chile - Paraguay FTA (2021), Art. 12.4.6.

<sup>42</sup> Canada - Chile FTA, Art. G-14.2; Chile - Mexico FTA, Art. 9-15.2; Chile - Korea FTA, Art. 10.18.2; Argentina - Chile FTA (2017), Art. 8.14.

<sup>43</sup> Chile - Korea FTA, Art. 20.1.1.

<sup>44</sup> Canada - Chile FTA, Art. G-06; TPP Art. 9.10.3; Chile - Hong Kong Investment Agreement (2016), Art. 18.1; Argentina - Chile FTA (2017), Art. 8.19.

<sup>45</sup> PAAP (2014), Art. 10.8.1.f), Art. 10.8.5.

<sup>46</sup> Chile - Japan FTA (2007), Art. 192.2.; Chile - Hong Kong FTA (2012), Art. 181.2.

<sup>47</sup> General Agreement on Trade in Services (GATS), Art. XIV(b), [https://www.wto.org/spanish/docs\\_s/legal\\_s/26-gats.pdf](https://www.wto.org/spanish/docs_s/legal_s/26-gats.pdf).

<sup>48</sup> For example, the preamble of the EC-Chile Association Agreement (2002) refers to the World Summit for Social Development in Copenhagen (1995).

<sup>49</sup> Chile - United States FTA, Art. 19.9; Chile - Hong Kong FTA (2012), Art. 142.1; Chile - Uruguay FTA (2016), Art. 12.4; Chile - Indonesia FTA (2017), Art. 9.5.4.

complying with such obligations, it shall choose the one that presents the least degree of inconsistency with the other provisions of the FTA.<sup>50</sup> The TPP includes a general provision reaffirming the commitments of the parties to multilateral environmental agreements, detailing some, in particular, such as the Montreal Protocol, the International Convention for the Prevention of Pollution from Ships (MARPOL), the U.N. Fish Stocks Agreement and CITES.<sup>51</sup>

The FTAs with Argentina and Brazil, in addition to reiterating commitments made in multilateral environmental agreements, recall the Stockholm Conference on the Human Environment (1972), the United Nations Convention on the Law of the Sea (1982), the Rio Declaration on Environment and Development (1992), Agenda 21 on Environment and Development (1992), the Johannesburg Earth Summit on Sustainable Development (2002), Rio+20: The Future We Want and the 2030 Agenda for Sustainable Development. The treaty with Argentina added the United Nations Framework Convention on Climate Change (1992) and its related legal instruments, including the Paris Agreement (2016).<sup>52</sup> The EPA with Ecuador and the FTA with Paraguay reaffirm the respective commitments undertaken only with respect to the latter agreements and the Kyoto Protocol (1997).<sup>53</sup>

With regard to domestic law, 13 Chilean IIAs, in very similar terms to the NAFTA, provide that nothing in the treaty shall be construed to prevent a Party from adopting, maintaining or enforcing any measure it considers appropriate to ensure that investment activities in its territory are carried out in a manner that takes into account environmental concerns.<sup>54</sup> Other agreements expressly recognise the right of each Contracting State to define its level of environmental protection and to adopt or amend its environmental laws accordingly, adding that each Party shall ensure that its laws provide for high levels of environmental protection and shall endeavour to improve such laws.<sup>55</sup> In some cases, the "right to regulate" in its territory to achieve legitimate public policy objectives, such as the protection of health and the environment, is expressly recognised.<sup>56</sup>

With regard to the fourth subtype of EPPs, 9 Chilean IIAs clarify that the notion of "indirect expropriation", except in exceptional circumstances, non-discriminatory regulatory acts of a Party that are designed and applied to protect legitimate public welfare objectives, such as public health and the environment, do not constitute indirect expropriations.<sup>57</sup> More recent treaties, such as the Chile - Hong Kong Investment Agreement (2016), and the Canada - Chile FTA (as amended in 2017), exemplify exceptional circumstances where a measure or series of measures are so stringent, having regard to their objective, that they cannot reasonably be perceived to have been adopted and applied in good faith.<sup>58</sup>

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<sup>50</sup> Canada - Chile FTA, Art. A-04; Chile - Mexico FTA, Art. 1-06.

<sup>51</sup> TPP (2016). Art. 13.10, 20.4, 20.5, 20.6, 20.16 and 20.17.

<sup>52</sup> Argentina - Chile FTA (2017), Art. 13.1 and 13.3; Brazil - Chile FTA (2018), Art. 17.1 and 17.4.

<sup>53</sup> Chile - Ecuador FTA (2020), Art. 17.17; Chile - Paraguay FTA (2021), Art. 12.5 and 12.15.

<sup>54</sup> ACACC, Art. 3; Canada - Chile FTA, Art. G-14.1; Chile - Mexico FTA, Art. 9-15.1; Chile - Korea FTA, Art. 10.18.1; Chile - United States FTA, Art. 10.12; Chile - Peru FTA (2006), Art. 11.13; Chile - Colombia FTA (2006), Art. 9.13; BIT Chile - Uruguay (2010), Art. 14; PAAP (2014), Art. 10.31.1; ACFI Brazil - Chile (2015), Art. 17.1; TPP (2016), Art. 9.16; Chile - Hong Kong Investment Agreement (2016), Art. 15.1; FTA Brazil - Chile (2018), Art. 8.17.1.

<sup>55</sup> Chile - United States FTA, Art. 19.1; Chile - Uruguay FTA (2016), Art. 12.3.1-2; Chile - Ecuador FTA (2020), Art. 17.3.1; Chile - Paraguay FTA (2021), Art. 12.4.2.

<sup>56</sup> Canada-Chile FTA, Art. G-01.3; Argentina-Chile FTA (2017), Art. 8.4 and 13.2; Brazil-Chile FTA (2018), Art. 17.2.

<sup>57</sup> Chile-United States FTA, Art. 19.1; Australia-Chile FTA, Annex 10-B; Chile-Uruguay BIT (2010), Annex A; Chile-China Supplementary Investment Agreement (2012), Annex A; PAAP (2014) Annex 10.11-1; TPP (2016), Annex 9-B; Argentina-Chile FTA (2017), Art. 8.8.

<sup>58</sup> Chile - Hong Kong Investment Agreement (2016), Annex I; Canada - Chile FTA, Annex 10-D.

Finally, 16 of these agreements include general environmental cooperation commitments.<sup>59</sup> Certain agreements establish a specific focus on certain areas. The agreement with the European Community establishes some issues of special interest to promote the conservation and improvement of the environment, the prevention of pollution and degradation of natural resources and ecosystems, and the rational use of these in favour of sustainable development.<sup>60</sup> The FTAs with Malaysia, Turkey and Uruguay establish various areas of collaboration such as: a) climate change; b) biodiversity and natural resource conservation; c) hazardous chemicals management; d) air quality; e) water management; f) waste management; g) marine and coastal ecological conservation and pollution control; h) strategic environmental impact assessment; i) improving environmental awareness or environmental education.<sup>61</sup> The FTA with Malaysia adds mining practices and mine rehabilitation to these areas of cooperation. The FTA with Thailand adds cooperation on green technology. The FTA with Uruguay adds sustainable development objectives, access to information, participation and justice in environmental matters, as well as renewable energy and energy efficiency (although the latter agreement does not include waste management).<sup>62</sup>

## **C. Labour Protection Provisions (LPPs)**

### **1. IIAs at the global level**

There are at least 343 IIAs with labour protection provisions (LPPs) concluded mainly since 1999.<sup>63</sup> Most of these agreements are BITs (217 agreements), and the rest are FTAs with investment chapters or provisions (126 agreements), but historically, BITs started to include labour provisions before FTAs. As early as 1965, the Common Convention on Investment in the States of the Central African Customs and Economic Union (CEMAC) established that foreigners should benefit from labour and social welfare legislation under the same conditions as nationals of the States of the Union. In the 1990s, treaties such as NAFTA (1992) and the Canada-Chile FTA (1996) included a parallel agreement on labour cooperation.

The share of LPPs in IIAs has also increased over time, although less than sustainable development and environmental provisions and not linearly. In 2000, there were eight IIAs with LPPs, representing 5% of the IIAs concluded in that period. Ten years later, there were fifteen IIAs with such provisions, representing 25% of IIAs that year. The proportion increased significantly only in the last five years, with 2018 being the year with the most LPPs (27, representing 61% of IIAs concluded that year).

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<sup>59</sup> Bolivia - Chile ECA (1993), Art. 19(g); ACACC; ACACE (2003); Chile - Turkey FTA (2009), Art. 37.3; Chile - Malaysia FTA (2010), Art. 9.5.2; Chile - Hong Kong FTA (2012), Art. 143; Chile - Thailand FTA (2013), Art. 11.3; TPP (2016), Art. 20.12; Chile - Uruguay FTA (2016), Art. 12.11; Brazil - Chile FTA (2018), Art. 17.8; Chile - Ecuador FTA (2020), Art. 17.4.

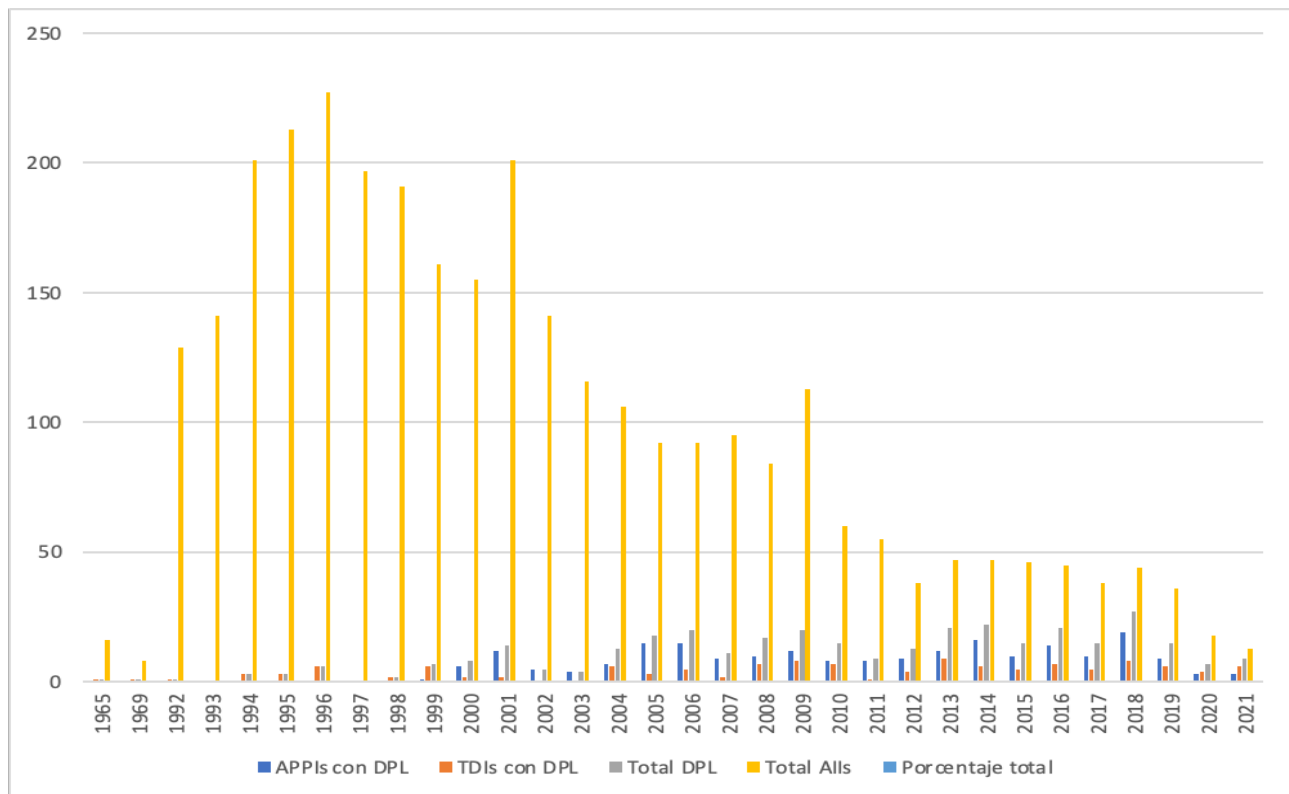
<sup>60</sup> These are: a) the relationship between poverty and environment; b) the environmental impact of economic activities; c) environmental problems and land use management; d) projects aimed at strengthening Chile's environmental structures and policies; e) exchange of information, technologies and experience, including on environmental standards and models, training and education; f) environmental education and training initiatives aimed at strengthening citizen participation; and g) technical assistance and joint regional research programmes. EC-Chile Association Agreement (2002), Art. 28.

<sup>61</sup> Chile-Turkey FTA (2009), Art. 37.8; Chile-Malaysia FTA (2010), Art. 9.5.4; Chile-Thailand FTA (2013), Art. 11.5.5.

<sup>62</sup> Although the FTA with Indonesia (2017) does not have an investment chapter per se, its text includes a similar list of cooperation activities, adding the fight against illegal, unregulated and unreported fishing; sustainable products; the promotion of sustainable forest management and trade in legally harvested forest products; and the promotion of sustainable agricultural practices. Chile - Indonesia FTA (2017), Art. 9.5.5.

<sup>63</sup> LPPs do not include labour mobility provisions (right of entry, visa, work permits), as their emphasis is not on labour protection, but on the movement of workers.

**Figure 3. Labour protection provisions in IIAs**



Most of these agreements (251 IIAs) include general labour references in the preamble, 137 BITs and 93 TIPs.<sup>64</sup>

There are four other important sub-types of LPPs in IIAs.<sup>65</sup> The first is non-derogation provisions, which require Contracting States not to waive or derogate from their labour laws in order to favour the establishment, acquisition, expansion or permanence of an investment or an investor in their territory. We found at least 131 IIAs that include such clauses, often with a corresponding commitment not to lower environmental standards, in terms similar to those in NAFTA.<sup>66</sup>

The second sub-type of LPPs are provisions that refer to international labour rights standards, such as those described above in relation to the EPPs, but without necessarily incorporating those standards as a binding part of the IIA. For example, we find 57 IIAs that explicitly refer to ILO standards, such

<sup>64</sup> Only two agreements include mentions in the preambular text of a specific environmental concern: biodiversity. Central America - Association Agreement with the EU (2012); Andean Community - Political Dialogue and Cooperation Agreement with the EC (2003).

<sup>65</sup> Here we largely follow the typology described in (Chi 2018, p. 22).

<sup>66</sup> For example, the BIT between Hungary and Kyrgyzstan (2020), states that "7. The Contracting Party shall not encourage investment by lowering domestic environmental, labour or occupational health and safety legislation, or by relaxing core labour standards. Where a Contracting Party considers that the other Contracting Party has offered such encouragement, it may request consultations with the other Contracting Party and both Contracting Parties shall consult with a view to avoiding such encouragement".

as the Declaration on Fundamental Principles and Rights at Work and its Follow-up (1998).<sup>67</sup> The first IIA in which such provisions are found is the Cotonou Agreement (2000).<sup>68</sup> One of the most recent agreements where such standards are found is in the successor agreement recently agreed between the E.U. and the members of the Organisation of African, Caribbean and Pacific States, which contains ILO references to decent work and children.<sup>69</sup> The U.K.'s FTAs with Australia (2021) and New Zealand (2022), furthermore explicitly endorse the Call to Action to End Forced Labour, Modern Slavery and Human Trafficking, launched at the U.N. General Assembly in New York on 19 September 2017, its commitment to advancing the Principles that should guide government action to combat human trafficking in global supply chains and the U.N. Guiding Principles on Business and Human Rights. Both agreements underline the importance of the ratification of the 2014 Protocol to the ILO Forced Labour Convention, 1930, done in Geneva on 11 June 2014.<sup>70</sup>

A third sub-type is the exception clause, which exempts Contracting States from their responsibility to adopt labour rights measures that would otherwise be inconsistent with their IIA obligations, usually as part of general exceptions. One of the most common provisions in this regard are those providing for exceptions related to prison labour products, in terms similar to GATT Art. XX (e). Such clauses are more common in FTAs with investment chapters and are rarely found in BITs. We found at least 30 IIAs with such LPPs.<sup>71</sup>

The fourth sub-type of LPP are provisions that confirm or recognise that contracting states have primary obligations to protect labour rights, but at the same time, have the right to choose their own level of labour protection. A typical example of such provisions is that each contracting party shall not fail to effectively enforce its labour law, through sustained or recurring action or inaction, in a manner affecting trade between the parties. Such provisions are found in at least 16 IIAs,<sup>72</sup> the oldest being the Jordan-US FTA (2000).

Labour cooperation is a fifth sub-type of LPP. As mentioned above, cooperation provisions are usually found when they relate to sustainable development in general, and specific labour cooperation

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<sup>67</sup> These include: a) Freedom of association and the effective recognition of the right to collective bargaining; b) The elimination of all forms of forced or compulsory labour; c) The effective abolition of child labour; and d) The elimination of discrimination in respect of employment and occupation.

<sup>68</sup> Cotonou Agreement (2000), Art. 50: "1 The Parties reaffirm their commitment to internationally recognised core labour standards, as defined in the relevant International Labour Organisation (ILO) conventions, and in particular to freedom of association and the right to collective bargaining, the abolition of forced labour, the elimination of the worst forms of child labour and non-discrimination in employment.

<sup>69</sup> Partnership Agreement between the European Union and the Organisation of African, Caribbean and Pacific States (2021), Art. 33 and 35.

<sup>70</sup> Australia - UK FTA with Australia (2021), Arts. 21.1, 21.3, 21.5 and 21.7; Australia - New Zealand FTA (2022), Arts. 23.1, 23.3 and 23.7.

<sup>71</sup> Subject to the requirement that the measure is not applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination between the Parties where the same conditions prevail, or a disguised restriction on international trade between the Parties, nothing in this Chapter shall be construed to prevent a Party, including its contracting entities, from adopting or maintaining a measure (...) relating to the good or service of a person with a disability, philanthropic or for-profit institutions, or prison labour....) (d) relating to the good or service of a person with a disability, philanthropic or non-profit institutions, or prison labour".

<sup>72</sup> TPP (2016), Art. 19.5.1; Australia-PeruFTA (2018), Art. 18.4.1, EU-China CAI, Art. 2.1; Australia-UK FTA (2021), Art. 21.6.1; Chile-Paraguay FTA (2021), Art. 11.5.1; UK-New Zealand FTA (2022), Art. 23.6.4.



clauses are less common in IIAs. Again, the recently announced EU-China CAI is one of the few IIAs to include such provisions.<sup>73</sup>

## 2. IIA Chileans

We have identified 22 IIAs to which Chile is a party that include labour protection provisions. These references are mainly found in the preamble of FTAs with investment chapters. For example, the Labour Cooperation Agreement (CCLCA) of the Chile-Canada FTA (1996) mentions the promotion of investment with due regard to the importance of labour laws and principles as part of its preamble.<sup>74</sup>

However, only 14 Chilean IIAs include LPPs in the main text of the Agreement. In some of them, one of the agreement's objectives is to promote the development of labour policies and practices that improve working conditions, employment and living standards in the territory of each of the Parties.<sup>75</sup> In others, labour protection is one of the aspects to be promoted when referring to corporate social responsibility.<sup>76</sup>

There are 10 such agreements that consider non-derogation LPPs, committing not to weaken or reduce the level of labour protection provided for in their laws, regulations or standards, or to waive or otherwise derogate from them, with the sole intention of encouraging investment from another Party,<sup>77</sup> or by way of refraining from monitoring its labour laws.<sup>78</sup>

Another 10 of these treaties include LPPs that recognise the right of each Party to establish its own domestic labour standards and, consequently, to adopt or amend its labour legislation, endeavouring to ensure that its laws establish labour standards consistent with internationally recognised labour rights, and shall endeavour to improve such standards in this regard.<sup>79</sup> Some of these provide for labour laws and regulations to provide for "high standards" in this area.<sup>80</sup> Others add that a Party shall not fail to effectively enforce its labour law, through a sustained or recurring course of action or inaction, in a manner that affects investment between the Parties.<sup>81</sup>

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<sup>73</sup> EU - China CAI, Art. 3: "Article 3. Dialogue and cooperation on investment-related labour issues. The Parties agree to dialogue and cooperate, as appropriate, on investment-related labour issues of mutual interest arising under this Section, complementary to efforts under existing bilateral and multilateral mechanisms".

<sup>74</sup> Labour Cooperation Agreement between the Government of Canada and the Government of the Republic of Chile, [http://www.sice.oas.org/trade/chican\\_s/Labor.asp](http://www.sice.oas.org/trade/chican_s/Labor.asp)

<sup>75</sup> Chile-Colombia FTA (2006), Art. 1.2.1(i)

<sup>76</sup> PAAP, Art. 10.30.2, ACFI Brazil - Chile, Art. 15.2 (e).

<sup>77</sup> Chile - United States FTA (2003), Art. 18.2.2; Chile - Colombia FTA (2006), Art. 17.2.2; Chile - Hong Kong Memorandum of Understanding on Labour Cooperation (MECL) (2014), Art. 2.5; Brazil - Chile ACFI, Art. 17.2; TPP, Art. 19.4; Brazil - Chile FTA (2018), Arts. 8.17.2 and 16.5.

<sup>78</sup> Chile-Uruguay FTA (2016), Art. 11.5; Argentina-Chile FTA (2017), Art. 12.5; Chile-Paraguay FTA (2021), Art. 11.6.

<sup>79</sup> Chile - United States FTA (2003), Art. 18.1.2; Chile - Colombia FTA (2006), Art. 17.1.2. and 17.2.1; Chile - Hong Kong MEFTA (2014), Art. 2.2; Brazil - Chile FTA, Art. 17.1; Chile - Uruguay FTA (2016), Art. 11.3 and 11.4; Argentina - Chile FTA (2017), Art. 12.4; Chile - Indonesia Comprehensive Economic Partnership Agreement (CETA) (2017), Art. 9.6.3; Brazil - Chile FTA (2018), Arts. 8.17.1 and 16.4; Chile - Paraguay FTA (2021), Art. 11.4.

<sup>80</sup> ACLCC, Arts. 2 and 3.

<sup>81</sup> TPP, Art. 19.5; Chile - Uruguay FTA (2016), Art. 11.6; Argentina - Chile FTA (2017), Art. 12.6; Brazil - Chile FTA (2018), Art. 16.6; Chile - Paraguay FTA (2021), Art. 11.5.

We found LPPs referring to international labour rights standards in 10 IIAs signed by Chile, which mainly recall its obligations stemming from its membership in the ILO and the 1998 ILO Declaration.<sup>82</sup> While the CCLCA with Canada is not as detailed as the existing environmental agreement with the same country (since there is no possibility for citizen petitions or non-derogation obligations), the agreement commits Canada and Chile to objectives, including the improvement of working conditions and living standards, and the promotion of ILO labour principles to protect workers' rights.<sup>83</sup> To achieve these objectives, the CCLCA creates institutions and mechanisms for cooperative activities, and intergovernmental consultations, as well as for independent assessments and dispute resolution related to obligations to enforce national labour law.

In addition to the 1998 ILO Declaration, the FTA with the United States reiterates compliance with ILO Convention 182 concerning the Prohibition and Immediate Action for the Elimination of the Worst Forms of Child Labour (1999).<sup>84</sup> In turn, the FTA with Argentina reaffirms commitments under the ILO Constitution of 1919, the Declaration of Philadelphia of 1944, the rights contained in the United Nations Universal Declaration of Human Rights of 1948, the United Nations International Covenant on Economic, Social and Cultural Rights of 1966, the United Nations International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families of 1990, and the implementation of the United Nations Guiding Principles on Business and Human Rights of 2011.<sup>85</sup> The FTA with Brazil also promotes the implementation of these principles.<sup>86</sup> For its part, the FTA with Paraguay reaffirms the labour commitments made within the ILO, particularly in the 1998 Declaration on Fundamental Principles and Rights at Work and its Follow-up, as well as those on decent work contained in the 2008 Declaration on Social Justice for a Fair Globalization.<sup>87</sup>

Finally, 14 Chilean IIAs include LPPs referring to cooperation activities.<sup>88</sup>

### III. Conclusion

In this article, we have identified a growing number of sustainable development provisions in IIAs, including those that refer to sustainable development in general terms and specific ones, such as environmental and labour provisions. Among these, environmental provisions are the most prevalent type of SDP in modern IIAs. This trend has been particularly noticeable in the last decade. However, it should also be noted that the number of investment agreements concluded in the same period has decreased considerably compared to previous years.

Chile is one of the leading Latin American countries in negotiating and concluding investment agreements and free trade agreements with investment chapters. At the same time, it has made a strong

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<sup>82</sup> Chile - United States FTA (2003), Art. 18.1.1, Chile - Colombia FTA (2006), Art. 17.1.1; Chile - Hong Kong MEFTA (2014), Art. 2.1; TPP, Art. 19.1, 19.2 and 19.3; Chile - Uruguay FTA (2016), Art. 11.1, 11.3 and 11.4; Argentina - Chile FTA (2017), Art. 12.1 and 12.3; Chile - Indonesia EPA (2017), Art. 9.6; Brazil - Chile FTA (2018), Art. 16.1 and 16.3.

<sup>83</sup> ACLCC, Art. 44 and Annex 1.

<sup>84</sup> Chile-United States FTA (2003), Art. 18.5.

<sup>85</sup> Argentina - Chile FTA (2017), Art. 12.3.

<sup>86</sup> Brazil - Chile FTA (2018), Art. 16.3.

<sup>87</sup> Chile-Paraguay FTA (2021), Art. 11.2.

<sup>88</sup> CCFTA; EC-Chile Association Agreement (2002), Art. 44.4; Chile-United States FTA (2003), Art. 18.2.5; Chile-Colombia FTA (2006), Art. 17.3; MECL and Chile-Hong Kong FTA (2014), Art. 19.5; Australia-Chile FTA (2008), Art. 18.2.7; Chile - Thailand FTA (2013), Arts. 11.3 and 11.6; TPP, Art. 19.10; Chile - Uruguay FTA (2016), Art. 11.9; Argentina - Chile FTA (2017), Art. 12.9; Chile - Indonesia EPA (2017), Art. 9.6; Brazil - Chile FTA (2018), Art. 16.9; Chile - Paraguay FTA (2021), Art. 11.11.

public commitment to promote sustainable development and achieve the SDGs. The draft of the new Constitution establishes a permanent policy of territorial equity for sustainable development in harmony with nature.<sup>89</sup> The United Nations Development Programme (UNDP) has recently published a report to boost the impact investment market in Chile, with the aim of developing, and at the same time, visualising the opportunities and challenges it has to impact the achievement of the 2030 Agenda and the SDGs.<sup>90</sup>

However, few of Chile's international investment agreements include provisions on sustainable development. When they do, they are mainly part of the preamble of these treaties and are not directly binding obligations. Only 29% of Chilean IIAs include general provisions on sustainable development. Thirty per cent of these agreements have explicit environmental commitments, and 15 per cent include clear labour commitments. While this figure is in line with the global average of such provisions in IIAs (8% of SDP, 12% of EPPs and 10% of LPPs), there is much more work that can be done.

This is not to say that Chile has not made improvements in recent years. After a promising debut with the FTA with Canada and the United States, specific commitments on sustainable development in Chilean IIAs became scarce, until the negotiation of the TPP11 and the signing in recent years of the FTAs with Argentina, Brazil, Uruguay and Paraguay.

In this article, we have provided a limited overview of sustainable development provisions in IIAs. But Chile could also consider other types of provisions in future negotiations or renegotiations of investment agreements. For example, in recent years, we have seen the inclusion of gender provisions in IIAs, in line with Goal 5 of the SDGs, which is to achieve gender equality and empower all women.<sup>91</sup> Chile has been a pioneer in this area.

Regardless of the quantity of sustainable development provisions found in IIAs, it is probably most important to focus on their quality. Atanasova has already suggested that, rather than comparing the soft law language that IIAs use for non-international economic law (IEL) disciplines or the lack of reference to these fields in earlier agreements, it seems desirable to compare it to the more effective language that IIAs already use in relation to IEL disciplines (Atanasova 2021).

Finally, to prevent these provisions from becoming mere "decoration", Chile should also focus on their effective implementation. Efforts could also be made to renegotiate "old generation" IIAs that do not include sustainable development provisions, although such a modification is not up to Chile alone.

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<sup>89</sup> Constitutional Proposal, May 2022, <https://www.chileconvencion.cl/wp-content/uploads/2022/05/PROPUESTA-DE-BORRADOR-CONSTITUCIONAL-14.05.22.pdf>

<sup>90</sup> UNDP, <https://www.cl.undp.org/content/chile/es/home/presscenter/articles/Noticias/pnud-lanza-informe-sobre-inversion-de-impacto-en-chile.html>

<sup>91</sup> See, for example, Canada-Chile FTA (as amended in 2017), Art. Nbis-01: "4. The Parties recognise that international trade and investment are engines of economic growth, and that improving women's access to opportunities and removing barriers in their countries increases their participation in national and international economies, and contributes to sustainable economic development. Similar provisions are found in the FTAs with Argentina, Brazil, Paraguay, Uruguay and in the EPA with Ecuador.

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