Initial Environmental Assessment (EA) of the Canada-Jordan Foreign Investment Promotion and Protection Agreement (FIPA)

I. Executive Summary

This report outlines the results of the Initial Environmental Assessment (EA) of the Canada-Jordan FIPA negotiations. Negotiations were conducted over two sessions, in February and June of 2007, using Canada's model FIPA as the basis for the discussions.

The Canada-Jordan FIPA is the third such agreement to benefit from an EA. The EA of a FIPA follows the process outlined in the 2001 *Framework for the Environmental Assessment of Trade Negotiations*[1]. The process focuses on the likely environmental impacts (both positive and negative) that could result from this agreement and calls for three potential phases of EA; the initial, draft and final assessments. The middle, or draft, phase is not undertaken if the FIPA is not expected to generate significant economic effects in Canada. However, a Final EA report is always undertaken and seeks to demonstrate how environmental considerations informed and were integrated into the decision-making process.

The Initial EA of the Canada-Jordan FIPA attempts to identify the likely economic effects of the FIPA and, on this basis, draw conclusions about the potential environmental impacts in Canada. The report also considers the impact of the FIPA on the ability of Canada to regulate in the interest of environmental protection. Given the strong commitment to public consultation pursuant to the Framework for Conducting Environmental Assessment of Trade Negotiations, stakeholder input was taken into account wherever possible throughout the process.

Over the long term it is anticipated that the FIPA will contribute to the development of a favourable business climate, conducive to the growth of two-way investment. However, actual increases in investment flows may be difficult to precisely measure or track, and will depend upon many factors, including the financial capacity of individual investors and their assessment of opportunity and risk. It is therefore difficult to assess the economic impact of FIPAs and any consequent environmental effects as these impacts are realised over time, whether in the form of enhanced investment opportunities or improved bilateral relations in general.

In general however, the results of the Initial EA indicate that significant changes to investment flows into Canada are not expected as a result of these negotiations. As such, the economic effects and the environmental impact in Canada are not expected to be significant.

The Canada-Jordan FIPA will not have a negative effect on Canada's ability to develop and implement environmental policies and regulations. In fact, the provisions of the agreement safeguard Canada's ability to maintain and expand the current framework of policies, regulations, and legislation for protection of the environment in a manner consistent with its domestic and international obligations.

The Government of Canada welcomes comments on this Initial EA to be provided by May 12, 2008. Based on the information available, a Draft EA will not be carried out as the economic

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[1] Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/env/env-ea.aspx?lang=en&menu_id=2&menu

effects and potential environmental impact in Canada are not expected to be significant. The issuance of the Final EA is expected to coincide with the signing of the FIPA; input received through public and stakeholder consultations will be considered and integrated as appropriate in the Final EA report. Please submit comments to: consultations@international.gc.ca

II. Introduction

A FIPA is an international treaty that places binding obligations on host governments regarding their treatment of foreign investors and their investments. By setting out clear rules and an effective enforcement mechanism, a FIPA provides a stable legal framework to promote and protect foreign investment. It typically sets out a range of obligations pertaining to non-discriminatory treatment, expropriation, transfer of funds, transparency, due process and dispute settlement, among others.

While Canada negotiates FIPAs in order to protect Canadian investment abroad, the disciplines are reciprocal and serve to reinforce Canada's image as a stable and predictable destination for foreign investment. In this respect, FIPAs help enhance two-way investment flows between signatory countries.

In the absence of a FIPA, Canadian investors rely primarily on host country laws and institutions for protection, which adds a variety of risks to their ventures. For example, a host country may change domestic laws after an investment is made in a way that discriminates against foreign investors. In cases where a policy change discriminates against a Canadian investor, for example, and causes harm to its investment, a FIPA can be a valuable instrument of protection for Canadian investments abroad.

Emerging economies and those in transition are increasingly important destinations for Canadian investment abroad. By specifying the rights and obligations of the signatories regarding the treatment of foreign investments, a FIPA contributes to a predictable investment framework and engenders a stable business environment.

From the perspective of developing countries, foreign investment represents an important driver of economic development. Developing countries need and want the capital that investment brings and want to ensure that investment flows predictably to their countries. FIPAs signal that these countries are interested in creating an investment regime that is conducive to attracting foreign investment.

In 2003, the Government approved a FIPA model[2] that serves as a template for Canada's discussions with investment partners on bilateral investment rules. More background on Canada's FIPA program is available in Annex I of this report.

The Canadian government is committed to integrating sustainable development into domestic and foreign policy, and the environmental assessment of trade and investment negotiations is one mechanism to help achieve this. We are therefore committed to conducting environmental

[2] Available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what_fipa.aspx?lang=en#structure

assessments (EAs) of trade negotiations using a process that requires interdepartmental coordination along with public and stakeholder consultations, including provincial and territorial governments. The 2001 *Framework for the Environmental Assessment of Trade Negotiations* details this process. The Framework was developed in response to the 1999 *Cabinet Directive on Environmental Assessment of Policy, Plan and Program Proposals*[3], which requires that all initiatives considered by Ministers or Cabinet must be assessed if implementation of the proposal may result in important environmental effects, either positive or negative. Detailed guidance for applying the Framework is contained in the *Handbook for Conducting Environmental Assessments of Trade Negotiations*[4].

III. Background on the EA Process

The Framework provides a methodology for conducting an EA of a trade or investment negotiation. It is intentionally flexible so that it can be applied to different types of negotiations (e.g., multilateral, bilateral, regional) while ensuring a systematic and consistent approach to meet two key objectives.

The first objective is to assist Canadian negotiators to integrate environmental considerations into the negotiating process by providing information on the possible environmental impacts of the proposed agreement. As such, negotiators and environmental experts are involved in the EA, and work is intended to proceed in tandem to the negotiations.

The second objective is to respond to the environmental concerns expressed by the public. The Framework contains a strong commitment to communications and consultations throughout the process for each EA of trade negotiation.

Three phases of assessment are provided for: the Initial EA, Draft EA, and Final EA. These phases are designed to correspond to progress with the negotiations. The Initial EA is a preliminary examination to identify key issues and generally occurs early in the negotiations. The Draft EA builds on the findings of the Initial EA and requires detailed analysis. A Draft EA is not undertaken if the negotiation is not expected to yield significant economic changes and/or significant environmental effects as a result of such changes. The Final EA generally takes place at the end of the negotiations. At the conclusion of each phase, a public report is issued with a request for feedback. A Final EA report will always be developed and issued following the conclusion of negotiations.

A consistent analytical methodology is applied during each phase undertaken. The Framework recognizes that economic and environmental effects can relate to changes in the level and pattern of economic activity, the type of products traded, technology changes, as well as regulatory and policy implications.

A list of EA reports undertaken within the *Framework for the Environmental Assessment of Trade Negotiations* is available at: http://www.international.gc.ca/trade-agreements-accords-commerciaux/env/env-ea.aspx?lang=en&menu_id=2&menu

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3 Available at: http://www.ceaa-acee.gc.ca/016/directive_e.htm

4 Available at: http://www.international.gc.ca/assets/trade-agreements-accords-commerciaux/pdfs/handbook-e.pdf

The findings of this Initial EA have been communicated to Canada's lead negotiator for the Canada-Jordan FIPA, to the Environmental Assessment Committee (EAC) for the Canada-Jordan FIPA, the government of Canada's interdepartmental Steering Committee for the Environmental Assessment of Trade Negotiations. The results will also be used to inform all of the above, as appropriate, on the upcoming negotiations on a Canada-Jordan FTA. Likewise, any comments the public has on this report will inform the Final EA, and be circulated to key contacts within the Government of Canada. EAs of all FIPAs will continue to evolve based on our experience and feedback from experts and the public.

IV. Invitation to Submit Comments

In keeping with the Framework, an Environmental Assessment Committee (EAC) has been formed to undertake the analysis of the FIPA. Coordinated by the Department of Foreign Affairs and International Trade Canada, the Canada-Jordan FIPA Environmental Assessment Committee includes representatives from other Federal government departments, including Environment Canada, the Canadian Environmental Assessment Agency, and Natural Resources Canada. An important responsibility of the EAC is to oversee the solicitation of input from provinces and territories, stakeholders representing business, academics, and non-governmental organization, as well as the general public.

As part of its commitment to an open and transparent process, the Government has opened this Initial EA for public comment from April 14, 2008. Feedback on the likely economic effects and the likelihood and significance of resultant environmental impacts are especially welcome. Please bear in mind that the assessment is focused on the possible environmental impacts in Canada. Transboundary effects may be considered where such effects are anticipated to have significant impact, either positive or negative, upon the Canadian environment.

Comments on this document may be sent by email, mail or fax to:

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V. Analysis of the Canada-Jordan FIPA

Negotiations related to the Canada-Jordan FIPA were conducted over two sessions, in February and June of 2007, using Canada's model FIPA as the basis for the discussions. As the parties were able to quickly reach agreement on the substantive provisions of the treaty, which closely reflect Canada's model agreement, the negotiations were concluded in an extraordinarily short period of time. As a result, negotiators were not able to follow the customary timeline with respect to carrying out the EA. Nevertheless, the findings of the EA process will be taken into consideration as the agreement is reviewed prior to its formal signature and ratification.

a) Identification of Likely Economic Effects

The first step in the EA process is the identification of the likely economic effects of the FIPA. This process typically begins with a review of official data on the level of known Jordanian investment into Canada. Unfortunately, no official statistics are available in this regard. This paucity of data can occur for a number of reasons; e.g., the sample size is so small that in reporting the aggregate data it may be possible to identify individual investors, challenges associated with the reporting/tracking of investment flows, or investment flows that are extremely low/non-existent. Based on a review of unofficial data and anecdotal evidence, it appears that the latter explanation applies with respect to Jordanian investment into Canada. Given that poverty, debt and unemployment remain significant challenges, the Kingdom's economy remains heavily dependant on foreign aid. There is therefore little likelihood of significant Jordanian investment into Canada in the near to mid-term.

Similarly, no official data concerning the level of Canadian investment in Jordan is available. Based on a review of unofficial data and anecdotal evidence it appears that the level of Canadian investment in Jordan is relatively modest. That said, the expanding Jordanian economy and the Kingdom's continued commitment to its privatisation program is expected to provide investment opportunities for Canadian investors in a variety of sectors including manufacturing, mining, telecommunications, and transportation. However, actual increases in Canadian investment flows will depend upon many factors, including the financial capacity of individual investors and their assessment of, inter alia, opportunity and risk.

b) Identification and Assessment of Likely Environmental Impacts in Canada and the Context for these Impacts

The Framework calls for the identification and assessment of the environmental impacts that could stem from the anticipated economic effects of the FIPA. The likelihood and significance of such impacts would depend on the degree of increase in investment, the sectors targeted for investment, and the measures in place to protect the environment in relation to those activities.

As noted above, Jordan's stock of investment in Canada is estimated to be negligible. While it is expected that the FIPA will contribute to the development of a favourable business climate conducive to growth of two way investment, actual increases in investment flows will depend upon many factors, including the financial capacity of individual investors and their assessment of opportunity and risk. Given Jordan's current economic and social circumstances significant new flows of investment into Canada as a result of the FIPA, particularly in the short to medium-term, are not anticipated. Therefore, it is expected that the environmental effects of the FIPA on Canada will be minimal.

c) Policy and Regulatory Context

Canada's EA of Trade methodology, as outlined in the Framework, calls for consideration of the potential policy and regulatory effects of the FIPA. Foreign investors in Canada are bound by the same environmental protection regulations that govern the activities of domestic investors. Proposed projects resulting from inward investment would be subject to applicable environmental assessment legislation, including the Canadian Environmental Assessment Act and provincial environmental assessment regulations.

Recent revisions to the Government of Canada's FIPA model have clarified governments' right to regulate in the public interest. The new model includes a general exception that permits a Party to take measures necessary to protect human, animal or plant life or health, the environment and safety, or measures primarily aimed at the conservation of exhaustible natural resources, provided that these measures are not applied in an arbitrary or unjustifiable manner and are not disguised restrictions on trade or investment. In addition, the model clarifies the rules governing direct and indirect expropriation with regard to governments' right to regulate. FIPA parties may also reserve existing laws and regulations such that they are not subject to specified obligations of the treaty, and they may reserve sensitive sectors for future regulation. Finally, the revised FIPA model strengthened a clause on "not lowering standards". Specifically, this clause recognizes that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. In the event a Party has offered such encouragement, the other Party may request consultation.

The revised FIPA model served as the basis for Canada's position in the Canada-Jordan negotiations. As the negotiated agreement very closely mirrors Canada's model FIPA, the Canada-Jordan FIPA will not impact on Canada's ability to develop and implement environmental policies and regulations. The provisions of the agreement safeguard Canada's ability to maintain and expand the current framework of policies, regulations, and legislation for protection of the environment in a manner consistent with its domestic and international obligations.

VI. Other Environmental Considerations – Transboundary Effects

Canada's *Framework for Conducting EAs of Trade Negotiations* calls for national assessments, and allows for consideration of transboundary, regional, and global environmental impacts if they have a direct impact on the Canadian environment. However, it is outside of the scope of this study to assess the potential for positive or negative environmental impacts that could potentially occur in Jordan as a result of these negotiations, or to judge the measures in place within Jordan to enhance or mitigate such impacts.

VII. Stakeholder Feedback

The notice of intent to conduct an EA of the Canada-Jordan FIPA was published on the website of the Department of Foreign Affairs and International Trade Canada on February 4, 2008. The notice included an invitation to interested parties to submit their views on the likely environmental impacts of the Canada-Jordan FIPA on Canada. There were no comments received on the Notice of Intent. We have however received general comments on conducting EAs of FIPAs through other consultation mechanisms.

While it is outside the scope of this study to analyze the potential environmental effects of the Canada-Jordan FIPA on Jordan, there is scope to review initiatives that attempt to address the environmental impacts of investment activity in Jordan.

a) Canada/ Jordan Environmental Cooperation Activities

The Canadian International Development Agency (CIDA) contributed approximately $4 million over seven years, from 1998 to 2005, to the Jordan Valley Integrated Waste Management project. Through this project Canada assisted Jordan in introducing an improved technology for community waste management in the Jordan Valley. It involved the creation of a new and efficient waste management system and the introduction of appropriate cost-effective waste water treatment technology. The project also included a strong community-participation element and a revenue-generation component.

Jordan is also part of CIDA's Water Demand Initiative in the Middle East and North Africa (MENA) region. The goal of the project is to facilitate the adoption and implementation of water demand management strategies, policies and tools in countries of the MENA region. The program is comprised of a number of components including: action research, field-level pilot activities, regional exchange, knowledge networking and capacity development. The $2 million project, which began in 2005, is expected to run until 2010.

CIDA is a currently funding the $2 million dollar Mediterranean Wetlands Capacity Building project, which is operational in four countries including Jordan. The project is designed to build civil society's capacities to engage with their governments about improved wetlands management. The wetlands are an important water resource for many communities in a region where annual water consumption outstrips renewable resources. The inclusion of civil society will help reduce possible tensions and take into account the opinions of those people who rely on the wetland resources. This project, which began in 2007, is expected to run until 2012.

b) Third Party Input

In revising its model FIPA and expanding its FIPA program, the Department of Foreign Affairs and International Trade Canada conducted a number of workshops and public consultations concerning FIPAs at which the following issues were raised:

- the relationship between investment and environmental regulation in the country with which Canada is negotiating;
- challenges associated with determining how investment will change as a result of the negotiation;
- options for improving FIPA EA consultation mechanisms and options for integrating environmental considerations into negotiating and policy development processes.

As outlined in the Handbook for Conducting Environmental Assessments of Trade Negotiations, consultations were also held with the Environmental Assessment Advisory Group (EAAG); and external group of experts on trade and environment matters. These consultations allowed the Department to solicit comments and guidance from these experts. The feedback that was received informed the analysis for this assessment and was shared with the interdepartmental Environmental Assessment Committee established for the Canada-Jordan FIPA.

VIII. Conclusion and Next Steps

The Initial EA concludes that significant changes to investment in Canada are not expected as a result of the Canada-Jordan FIPA negotiations. As such, the environmental impacts on Canada are not expected to be significant.

Following the receipt of public comments on the Initial EA, the Final EA will be completed taking into account the consultative findings. In the light of the Initial EA's conclusions regarding the likely economic activity and resultant environmental impacts in Canada, preparation of a Draft EA is deemed to be unnecessary. The release of the Final EA will coincide with the signing of the agreement.

Annex 1
Canada's FIPA Program

a) Background on Canada's FIPA Program

A FIPA (Foreign Investment Promotion and Protection Agreement) is a bilateral agreement aimed at protecting and promoting foreign investment through legally-binding rights and obligations.

FIPAs accomplish their objectives by setting out the respective rights and obligations of the countries that are parties to the treaty with respect to the treatment of foreign investment. Typically, there are agreed exceptions to the obligations. FIPAs seek to ensure that foreign investors: will not be treated worse than similarly situated domestic investors or other foreign investors; will not have their investments expropriated without prompt and adequate compensation; and, in any case, will not be subject to treatment lower than the minimum standard established in customary international law. As well, in most circumstances, investors should be free to invest capital and repatriate their investments and returns.

Canada's policy is to promote and protect investment through a transparent rules-based system in a manner that reaffirms the right of Governments to regulate in the public interest, including developmental interests. As an instrument that supports the rule of law and fosters fairness, transparency, non-discrimination and accountability, a FIPA encourages good governance. A FIPA also promotes sustainable development principles by exhorting Governments to not lower health, safety or environmental measures in order to attract investment.

Canada began negotiating FIPAs in 1989 to secure investment liberalisation and protection commitments on the basis of a model agreement developed under the auspices of the OECD (Organization for Economic Cooperation and Development). In 1994, Canada introduced a FIPA model incorporating the enhanced investment protection afforded under the NAFTA (North American Free Trade Agreement). Canada signed 5 agreements using the OECD model and signed 18 FIPAS based on the 1994 model for a total of 23 FIPAs to date.

b) Canada's New FIPA Model

In 2003, Canada began updating its FIPA model to reflect lessons learned from its experience with the implementation and operation of the investment chapter of the NAFTA. The principal objectives of this exercise were: to enhance clarity in the substantive obligations; to maximize openness and transparency in the dispute settlement process; and to discipline and improve efficiency in the dispute settlement procedures. Canada also sought to enhance transparency in the listing of reservations and exceptions from the substantive disciplines of the Agreement.

In May 2004, Canada's new model for the negotiation of FIPAs was published on the Department of Foreign Affairs and International Trade Canada's website http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what_fipa.aspx?lang=en#structure. The new FIPA model provides for a high standard of investment protection and incorporates several key principles: treatment that is non-discriminatory and that meets a minimum standard; protection against expropriation without compensation and restraints on the transfer of funds; transparency of measures affecting investment; and dispute settlement procedures. The new model serves as a template for Canada in discussions with investment partners on bilateral investment rules. As a template, the provisions contained therein remain subject to negotiation and further refinement by negotiating parties. Thus, although all FIPAs can be expected to follow this approach, it is highly unlikely that any two agreements will be identical.

Canada's FIPA negotiating program is intended to reflect the priorities of Canadian investors. With many countries expressing great interest in negotiating FIPAs with Canada, we are currently undertaking a comprehensive priority setting exercise to consider potential FIPA partners based on the following factors: 1) likelihood of engagement 2) commercial and economic interests 3) lack of investor protection 4) trade policy interests 5) political / developmental interests.

c) Environmental Issues Related to the new FIPA Model

Underlying Canada's new FIPA model are renewed commitments to transparency, including with respect to crosswalks between investment agreements and environmental issues. For instance, Canada seeks commitments whereby Parties would agree to publish laws, regulations and other procedures respecting any matter covered by the FIPA. We also seek to allow Parties an opportunity for prior comment on future legislation covering inward investment.

Canada also recognizes the benefits of transparency with respect to procedural arrangements associated with our investment agreements. This includes investor-state dispute settlement procedures, whereby Canada seeks to facilitate third-party (amicus) submissions to tribunals, for example.

Canada’s new FIPA model incorporates various safeguards aimed at protecting Canada’s right to regulate for legitimate public welfare objectives. It also includes a statement in the preamble on the consistency of the agreement with sustainable development, in addition to general exceptions with related to protecting human, animal, or plant life or health à la GATT Article XX/GATS Article XIV.

The revised FIPA model clarifies Canada’s position that non-discriminatory measures, such as a regulation, designed and applied to protect legitimate public welfare objectives, such as health, safety and the environment, do not constitute an indirect expropriation. For example, unless a measure is so severe that it cannot be reasonably viewed as having been adopted and applied in good faith, a non-discriminatory environmental regulation that may adversely affect an investor would not constitute indirect expropriation.

The revised FIPA model includes a clause on "not lowering standards", whereby signatories recognize that it is inappropriate to attract investment through lowering health, safety, and environmental standards. Specifically, this clause recognizes that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures. In the event a Party has offered such encouragement, the other party may request consultation.