Harnessing Freedom of Investment for Green Growth

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Gus Van Harten, Associate Professor, Osgoode Hall Law School, Canada

Comment Submitted 9 February 2011

Thank you for this opportunity to comment. I have the following comments:

1. The discussion of interactions between investor-state dispute settlement and environment is helpful and welcome.

2. The recommendations for greater transparency in investor-state arbitration are likewise helpful and welcome. However, it overstates the success achieved to date. By my estimation, the only successes have been reforms in the process at ICSID and changes to the treaty language or practice in the context of U.S. and Canadian treaties. The European democracies have frankly had their heads buried on this. Further, at present, all forums for investor-state arbitration maintain undue limitations on transparency which preclude research and analysis, and as such outside scrutiny and public accountability, on the decisions taken by investor-state tribunals and their policy implications. It would be useful in this respect to list the most important institutions and forums at which investor-state arbitrations take place. These are (in order of concern about a lack of transparency): International Chamber of Commerce International Court of Arbitration, London Court of International Arbitration, and Stockholm Chamber of Commerce (all of which regularly issue awards and decisions that are kept entirely confidential), UNCITRAL-based arbitrations (where awards are regularly kept confidential, although the process is currently under revision), and ICSID (where a public record is kept of all cases and the make-up of tribunals, but awards may still be kept confidential at the discretion of the disputing parties). I suggest that now is the time for a much stronger statement on this point. Openness of the proceedings is a basic prerequisite for accountability and independence in the decision-making process where the regulatory decisions of states are subject to final review by international arbitrators.

3. I suggest also that the recommendations on investor-state arbitration should include language indicating the importance of relevant policy expertise being represented on the tribunal. In the present context, the relevant expertise lies in environmental law and policy. In some cases, a tribunal may gain access to such expertise via the parties' or tribunal-designated experts. However, where the dispute in question engages predominantly matters of environmental law and policy, it is also appropriate to ensure that the tribunal members themselves have expertise or experience in environmental or related areas of public policy. This could be achieved by way of directions by governments to the appointing authorities on who to select or promote as presiding arbitrators, or by the designation of rosters from which the parties would be required to appoint appropriately-qualified arbitrators. Investment treaties and other instruments should also include, alongside requirements that arbitrators have expertise in international, investment or business, an allowance for arbitrators who have expertise in the relevant areas of public policy.

4. Many of the principles that motivate the differentiation of non-protectionist environmental measures from green protectionism are relevant more generally to investment law. A motivating principle in the latter context should be that general and good faith measures aimed at addressing environmental or health harms and not at causing harm to foreign businesses should be presumed not to violate international investment law constraints. A clarification from governments, by way of statements of interpretation of existing treaties, would go a long way to addressing concerns that investment law requirement payment of public compensation to businesses whose assets are affected negatively (and often predictably) by

subsequent general regulation. Such clarifications should be identified as a tool and encouraged in the OECD statement. Ensuring that general regulations are protected in advance from these forms of litigation and retroactive liability risk for government would assist in leveling the competitive marketplace for all business actors. In particular, it would preclude firms that seek to exploit gaps in regulation over the short-term from receiving state indemnification for such risk-taking. Notably, and unfortunately, there are cases in which investment treaty tribunals clearly prioritized investor protection inappropriately over environmental regulation by for instance requiring payment of public compensation at full market value when a measure was passed for a legitimate environmental purpose (e.g. Santa Elena v Costa Rica; Tecmed v Mexico). This line of authority should be clarified by governments in the interests of maintaining policy space to address environmental concerns. Such clarification would not open a door to green protectionism because there is ample room for tribunals acting under investment treaties to require compensation for *de-jure* or evidently *de facto* discriminatory measures.

5. The recommendation that states engage in policy design processes to avoid violations of investment law is a good one. But the only way for it to be effective is if the current uncertainties surrounding vague substantive standards in the investment treaties are clarified. I believe the only way to do so is for states to direct tribunals, and advise indirectly investors, that general good faith measures will not trigger state liability barring evidence of targeted abuse of an investor. Otherwise, it will always remain open to tribunals to extend the treaty standards unpredictably into the domain of general regulation, creating the uncertainties alluded to in your draft and in my discussion under 4. above. In the absence of a stable hierarchical adjudicative process for the bulk of the treaties, which seems a long way off, I see no other way to achieve the level of predictability required to support general regulation.

6. To elaborate, an example of the challenges re: 5. above is indicated by Canada's Treasury Board Guidelines on International Regulatory Obligations and Cooperation. http://www.tbs-sct.gc.ca/ri-qr/documents/gl-ld/iroc-cori/iroc-cori02-eng.asp#ftn7 The Guidelines lay out a series of questions for regulators to consider before enacting new regulations (which by the way are skewed in favour of constraining rather than encouraging proactive regulation to address environmental concerns, including where such regulation emanates from international environmental law). Among these questions is the following: "Is the proposed regulation a legitimate exercise of governmental regulatory power? Could it constitute expropriation?" The second question is accompanied by an exceptionally long footnote on the concept of indirect expropriation (my emphasis below):

Canada's international trade and investment treaties typically contain a provision prohibiting the nationalization or expropriation of an investment of an investor from another party to that agreement, except where certain conditions have been met, including the payment of compensation at fair market value. Expropriation can be either direct or indirect. Indirect expropriation typically involves such a substantial interference with the investment as to support a conclusion that the investment has been taken from the investor. <u>It is Canada's position, accepted by numerous international tribunals</u>, that non-discriminatory regulations designed and applied to protect legitimate public welfare obligations, such as health, safety, and the environment, do not constitute indirect expropriation but are legitimate exercises of governmental "police powers." However, <u>given that expropriation can be very fact-specific, in situations where a proposed regulation has the potential to substantially interfere with the operations of an investment in Canada, the regulatory body proposing such a regulation should seek legal advice from the Trade Law Bureau to ensure compliance with Canada's international obligations</u>.

The point in highlighting this is, even where attempting consciously to do so, sophisticated governments are not in a position to anticipate how different tribunals will interpret a concept as broad as that of indirect expropriation. In Canadian domestic law, the concept is limited to circumstances where there is a direct taking of title by the state. Numerous investment treaty tribunals (e.g. Metalclad v Mexico) have taken the concept well beyond this approach. Others have adopted approaches that are arguably more restrictive than was even the Charter of Economic Rights and Duties of States (Methanex v USA)! Moreover, this is but one of the standards with which government must cope (the Canadian Guidelines cited here do not even attempt the task of anticipating how national treatment, MFN treatment, fair and equitable treatment, or bars on transfers and performance requirements may affect regulatory decision-making). Likewise, most of the standards have been subject to widely-divergent interpretations by different tribunals (e.g. Pope & Talbot v. ADF on national treatment, Maffezini/ Siemens v. Plama on MFN treatment, Glamis v. numerous tribunals on fair & equitable treatment).

I hope that these comments are helpful. Thank you again for the opportunity.

Ronald B Mitchell, Professor of Political Science, University of Oregon, Director of the International Environmental Agreements Database Project, United States of America

Comment Submitted 18 February 2011

Overall, this statement seems very good. My suggestions are intended as ways to improve on this already good statement and to encourage it to go further. I recognize that my academic expertise may not reflect or mesh well with the diplomatic concerns that are also necessary parts of these statements. Nonetheless, I offer them in a spirit of supportive and constructive suggestions for improvement.

Also, a word to Kathryn Gordon and Joachim Pohl -- I thought the paper "Environmental Concerns in International Investment Agreements: A Survey" was particularly impressive, well-researched, and well-written. "Hats off" to the authors.

Suggestions and comments relevant to specific sections of the draft 3-page statement, identified by header

[Bracketed text represents drafts of suggested revisions to the statement.]

Preamble, paragraph 2

This paragraph states that "greening the economy can be an important source of growth." This is true. However, it also should be recognized that as long as the production and consumption that growth entails is tied to carbon-based energy sources, there is a deep and inherent tension. I would encourage consideration of the notion that this tension is better addressed explicitly and directly rather than otherwise.

A statement something like the following might be considered:

[Given the threat posed by climate change, investments that foster a transition to a model of economic growth that is less dependent on fossil fuels and other carbon-based energy sources should be incentivised and encouraged.]

Preamble, paragraph 3

This paragraph notes, inter alia the "(v) strengthening compliance with international investment law through prior review of proposed environmental policies and measures; (vi) encouraging business "contribution to greening the economy."

This statement and others suggest the value of adopting a "facilitative" strategy of fostering the consideration of environmental concerns in investment treaties. A statement might be made that directly contrasts this with a less-useful "adversarial" strategy. The point here, and I do not have recommended language, is that we should assume companies want to include environmental protection

in their investment decisions and that their failure to do so reflects a lack of knowledge rather than a lack of commitment. The regulatory model adopted here should recognize that companies would benefit from those who can help them identify the best ways to *simultaneously* promote environmental and investment concerns and to prioritize doing so. Even when the assumption that companies are interested in environmental protection proves wrong, acting *as if* it were true may well produce greater benefits than the alternative assumption.

Support for effective international environmental law

"*Investment policy makers welcome efforts to provide improved and clearer standards [as well as identifying aspirational goals and long-term objectives], addressed to both governments and investors, for international environmental responsibilities and policy."*

Vigilance against green protectionism

Vigilance against green protectionism is important. At the same time, the statement might encourage efforts to help states identify ways to establish and achieve ambitious and legitimate environmental goals so that they do not "conflict with their international investment law obligations." The point here is that the onus of identifying *investment-consistent environmental policies* should not lie exclusively on the state creating the policy but should be a shared responsibility of the investment-receiving state, the investor state, and the international investment/environment community, including but not limited to the OECD.

When *monitoring of environmental measures for protectionist intent* produces evidence of problematic regulations, the "solution" should *as much as possible* involve helping the promulgating state to rewrite the measure so the environmental objective is achieved within the bounds of investment law.

Investor-state dispute settlement and the environment

Efforts to resolve the tensions between investment and the environment should, wherever possible, identify creative but effective Pareto-improving solutions that simultaneously further the interests of investment and environmental interests or, when furthering the interests of one, do not do so at the expense of the other.

In the document sent out, at paragraph 62 on p. 21, it discusses "Increasing efforts to reconcile the interests through interpretation." The point here is not merely to reconcile existing interests but to encourage efforts that seek to promote and further both sets of goals simultaneously.

Conflict prevention through prior internal review of proposed environmental measures for investment law compliance

"*Governments should take appropriate measures to review their relevant proposed environmental laws and measures at both national and sub-national levels for compliance with investment law disciplines. [Where changes in investment law would foster environmental protection without harming the international investment environment, governments should propose appropriate amendments to the relevant investment agreements.]"*

Enhancing business' contribution to greening the economy

"Governments should incentivise and encourage the positive contribution of companies to green growth. [Governments should also remove obstacles to such contributions. Governments should proactively seek to identify and remove existing subsidies, incentives, and regulatory advantages that encourage companies to engage in environmentally-harmful behaviors]."

Spurring green growth through FDI

"Governments should contribute to efforts to identify FDI flows in support of green growth, recognise and address hurdles faced by such flows, and assess policy performance in providing a framework to encourage green investment. [A framework of benchmarks and standards for such investment should be established and an annual review process evaluating performance against such standards should be conducted. The assessment of policy performance should lead to identification of "best practices" and should also lead to identification of a "white list" of states and corporations that are using those practices. Regular workshops should be help among appropriate policy-makers and stakeholders to disseminate and encourage the use of such "best practices" by the widest possible set of actors.]"

Regarding the "white list" notion, even the listing on 34-35 of the document sent of which countries have included environmental concerns in their BIT IIAs is useful in the sense that, one imagines, many diplomats will look at this list, see that their country ranks "low" in the percentage of IIAs that include environmental concerns and will seek to address that in the future. Of course, to serve this purpose of encouraging more IIAs to include such concerns, sorting this list by the "Percentage of treaties that refer to environmental concerns" column would be more effective than sorting them alphabetically.

James X. Zhan, Director, Investment & Enterprise Division, United Nations Conference on Trade & Development (UNCTAD)

Comment Submitted 23 February 2011

General comments

The draft statement is an important contribution to the current debate about the relationship between FDI and green growth. It highlights a number of important policy issues that arise in this context, both at the national level and with regard to international investment agreements. It can provide valuable guidance for future policymaking in these areas.

On the other hand, most of the policy recommendations contained in the draft remain at a very general level. More concrete language and action plans would enhance the usefulness of the document for the investment community. Second, the statement, as currently drafted, focuses strongly on the issue of coherence between investment and environmental policies. While this is an important topic, equal emphasis should be put on the question on what strategies countries could apply to promote more "green" investment. Third, the issue of preserving sufficient regulatory space in international investment agreements to pursue "green growth" strategies deserves more attention. Fourth, the role of the international community to support countries, in particular developing countries, in their green growth policies should not be neglected.

Specific comments

a. Support for effective international environmental law

It remains unclear what is meant by "improved and clearer standards … for international environmental responsibilities and policy". Furthermore, such standards should not only be relevant for a policy agenda on investment liberalisation, promotion and protection, but also with regard to the business contribution to greening the economy.

b. Vigilance against green protectionism

This is an important issue - also in the context of the joint OECD-UNCTAD Reports on G-20 Investment Measures.

c. Updating investment treaty practices regarding the environment

There is the question of what is "up-to-date" investment treaty practice with regard to environmental concerns. There is a case for the international community to develop some common principles in this area, which could then become a benchmark for assessing whether IIAs are up-to-date. This could also contribute to establishing a more coherent approach in IIAs.

Policy discussions have so far focused on two issues, namely a confirmation of the host countries' right to regulate and a commitment not to lower environmental standards to attract FDI. It would be useful if the statement would take up these points, and also highlight the need to identify those IIA provisions which could unduly restrict regulatory discretion in environmental matters.

d. Investor-state dispute settlement and the environment

An additional suggestion could be to provide for the possibility of expert hearings on environmental issues in investment disputes.

e. Conflict prevention through prior internal review of proposed environmental measures for investment law compliance

The proposed review should apply both ways. There is not only the issue of whether draft environmental legislation is in accordance with IIA obligations. Vice versa, there is also a need to check whether IIA provisions have to be revised because they unduly restrain host countries' policy space concerning environmental protection (see above).

f. Enhancing business' contribution to greening the economy

This section remains very vague, although it is of key relevance for green growth strategies. It should also make a distinction between government policies to promote green FDI (to be dealt with in the subsequent section) and corporate responsibility in the area of environmental protection. As suggested in UNCTAD's World Investment Report 2010 (p. 141), harmonizing corporate GHG emission disclosure is one important challenge in this context.

g. Spurring green growth through FDI

This paragraph deals with four different issues (data collection on green FDI, removal of hurdles for green FDI, establishment of a "positive framework" for investment, and assessment of policy performance). It would be preferable to separate these issues more clearly, and to also clarify their meaning. Both this paragraph and the previous section on "enhancing business' contribution" are of key importance for green growth and should figure more prominently in the statement rather than putting them at the very end.

As in the case of the previous section, the paragraph on spurring green growth uses very general language. UNCTAD's World Investment Report 2010 dealt extensively with the issue of how to strategize national clean investment promotion, how to build an effective interface for low-carbon technology dissemination through FDI, how to address potential negative effects of green FDI, and how to synergize IIA and climate change policies. (p.121). UNCTAD's findings could contribute to give the statement more substance and make it more operational.

Finally, in view of the OECD's relationship with non-OECD member countries, the statement should emphasize the need to supporting developing countries in their efforts to move to a low carbon economy with the help of FDI.

Meg Kinnear, Secretary General, International Centre for Settlement of Investment Disputes (ICSID)

Comment Submitted 24 February 2011

Thanks very much for sending me these materials. I have read through them and they are very well written - congratulations.

I do not have very much to add from an ICSID perspective. My few comments are as follows:

-p. 5 , para. 9 - I don't know how "environmental" is defined, but my impression is that in fact relatively few ISDS cases consider environmental measures, although certainly the ones that do have very important policy ramifications for a government - it might be useful to explain which cases are considered environmental in this context

-p. 9 - the discussion on national treatment assumes it applies to established investors - however, wouldn't it be a question of whether the treaty applied national treatment to pre-admission activities or whether the treaty limited coverage to post-admission activities ?

-p. 9, FN 7 - I don't understand the point about national treatment potentially providing a lower level of compensation than expropriation, and I don't think that this is borne out by any case. To the contrary, I would have thought that in all cases the damages must have a direct causal link to the basis for liability and the usual tests for compensation (DCF, book value, etc.) are effectively the same for expropriation as for other obligations.

-p. 26 , para. 83 - this would be a good place to add in a point about the importance of the participants in the ISDS process. Certainly counsel, especially counsel for a respondent State, have the opportunity to raise the kind of evidence and legal argument that would prevent fragmentation of investment and environmental law

-p. 26, para 88 - as written the paragraph seems to imply that the NAFTA Note of Interpretation was drafted to address NAFTA environmental cases. The public record on this is quite clear that the Note of Interpretation was intended to address all NAFTA cases, and not any special category of cases, and so this might be slightly amended

-p. 28, para. 92 - you might want to update to note the current discussions on transparency and ISDS at UNCITRAL

Joost Pauwelyn, Professor of International Economic Law and WTO Law, Graduate Institute of International and Development Studies of Geneva, Switzerland, Senior Advisor, King and Spalding

Comment Submitted 25 February 2011

Thank you for the opportunity to comment. Here are some preliminary thoughts that you may want to take into account:

1. You define "green investment protectionism" as environmental "policies and practices [that] restrict the free flow of capital across the global economy and ... do not have a solid justification" (para. 16). You rightly point out that this type of protectionism "is not a major problem" (para. 6).

What you did not add, however, is that, in most cases, it is the exact opposite that is problematic, and is far more often seen in practice, namely: environmental measures (especially subsidies) that seek to attract (rather than restrict) foreign investment into the country so as to create "green jobs". Yet, these measures often favor domestic products (e.g. locally made solar panels or wind turbines) made within the host country to the detriment of imported products. These measures distort normal investment decisions and may lead to the production of green materials in countries other than those that can produce these materials most efficiently (think of Japanese companies having to set up a solar panel production within Canada to benefit from certain subsidies instead of exporting the same panels from Japan to Canada).

This is not to say that such environmental policies should by definition be outlawed; only to point at where the biggest pressures for green protectionism reside. Again, it is not so much that countries want to "keep out" foreign investment (it creates jobs) or discriminate foreign investment once it is made (why bite the hand that feeds you?); rather, many countries are keen on subsidizing green industries and products but have a hard time extending benefits to imported products: whereas "foreign" green investment still comes with "local" green jobs; imported products are made abroad and seen as "outsourcing" green jobs abroad (think only of EU/US policies promoting green energy such as ethanol but at the same time imposing severe import restrictions on that same ethanol when imported from, for example, Brazil, and this even though the Brazilian sugar-made ethanol is much "greener" and cheaper than locally produced corn-made ethanol).

That this kind of green (trade) "protectionism" is present, witness that of the last seven WTO disputes, two address this very issue: one by Japan against preferential feed-in tariffs for renewable energy in the province of Ontaria which is, according to Japan, linked to the use of locally-made products (WTO dispute DS412); another by the USA against Chinese subsidies to wind power equipment conditioned, according to the USA, on the use of certain China-made components (WTO dispute DS419).

This only to say that investment and environment must be examined taking into account a third, trade component. All three interests must be carefully weighed against each other. To efficiently combat environmental problems some level of trade (rather than investment to produce locally) will help. One cannot unequivocally state that more FDI to support green industries is always the first-best option.

2. Para. 5: I do not follow what exactly you want clarified in terms of international environmental law, in particular, as it would apply (directly?) to investors.

3. Para. 8: On top of checking references to the environment in investment treaties, it would be good to also examine, case by case, those tribunal awards that have, allegedly, gone too far in protecting investors over protecting the environment. My sense is that, overall, most tribunals, especially those in last 5-10 years, have been able to strike a good balance. What cases are we really talking about when it comes to overreaching? It would be good to identify them and to think concretely how they could be decided differently, under the current legal regime or under a reformed regime.

4. Paras. 38 ff.: As compared to the WTO, a great advantage in the context of most investment treaties is that, indeed, the applicable law is defined broadly as including also other (environmental) rules and treaties. This is still a major issue before a WTO panel (can it even apply non-WTO law?) which is not an issue before (most) investment tribunals. That, in turn, should make it easier to balance investment with environmental law. That said, a major conceptual question remains, namely: assuming that individual investors derive (some?) individual rights from an investment treaty, to which extent can these individual rights be affected by (especially subsequent) environmental agreements as between states. In other words, what is the nature of investor rights as opposed to environmental obligations and does it influence the interaction between the two types of instruments as it plays out before an investor-state tribunal? Here, there is a crucial difference with WTO disputes which do remain, at all times, state-to-state.

5. Paras. 62: Granted, whereas 10 years ago all the talk was of "conflict of norms", today convergence arises around the idea that we should try to "interpret conflicts away". In most cases this should be possible (although one still needs to find a mechanism to balance one value against the other, and to think of what is the most appropriate in our context: rational connection, suitability, necessity, strict proportionality etc.?); but in others we must admit that there is a genuine conflict and that there is nothing wrong with this. Conflict of norms is not a pathological legal phenomenon; it occurs in all legal systems. The question then is rather how to resolve the "true conflict". Are traditional conflict rules (lex posterior; lex specialis), which presume that international law is "a system" valid for all cases? Or should, in some situations, conflict rules be used that we normally use for conflicts between "different systems" (here investment and environment), e.g., choice of law rules as we know them in the field of private international law or conflicts of law (there one refers, for example, to the law with the "closest connections" to the particular issue)?

I hope these off-the-cuff reactions help.

Andrew Newcombe, Associate Professor, Faculty of Law, University of Victoria, Canada

Comment Submitted 25 February 2011

Thank you for the opportunity to comment on the draft statement and background papers. The background papers are excellent and provide insightful analyses of the issues. The empirical survey of investment treaty practice on environmental provisions is particularly useful. It provides the most comprehensive analysis of the relevant treaty practice to date and is a great addition to the literature in this area.

Draft Statement

Para. 8, Updating investment treaty practice regarding the environment: The reference to whether state practices are "up-to-date" leaves open the question of which practices should be considered up-to-date and what are the best practices in this area. The Roundtable should consider further study of the questions asked in the background paper at para. 151. At the very least, the Roundtable could consider recommending that states include some preambular language in their investment treaties to highlight that investment promotion and protection and environmental measures can be mutually supportive. Investment treaty jurisprudence demonstrates that tribunals have often relied on the preambular language in the treaty in interpreting investment obligations. At a minimum, states should consider including more balanced preambular language in their treaties.

Para. 9, Investor-state dispute settlement and the environment: I agree with the comment by Professor Van Harten that the reference to "significant progress" in improving transparency since 2005 is an overstatement. Although new agreements based on the American and Canadian Models address transparency, there appears to be little progress elsewhere in actual treaty practice. In light of changing EU policy, the Roundtable should consider making a stronger statement on the need for transparency. At a minimum, OECD states should commit to making tribunal orders, decisions and awards public, subject to redaction for confidential business information. It is frankly shocking that some states have not agreed to make investment treaty awards public. This is the antithesis of good governance.

Para. 10 Conflict prevention through prior internal review of proposed environmental measures for investment law compliance: The proposal only addresses half of the equation. Just as there is a need for review of proposed environmental measures for compliance with international investment law, there is a need to review the environmental impact of new trade and investment agreements. The EU has a practice of subjecting new trade agreements to sustainability impact assessments. This type of process can be used to ensure that proposed treaties adopt best practices. Canada also subjects its investment treaties to environmental impact assessments. A second aspect of conflict prevention is the need to subject new investments to environmental/sustainability impact assessments so that potential conflicts are addressed upfront. As noted in the background papers: (i) investment law can play an important role in encouraging the necessary up-front investment (para. 36); (ii) where development causes significant harm there is a duty to prevent or at least mitigate the harm (para. 66); and (iii) there is a growing recognition of the need for environmental impact assessments (para. 34, fn 21 in the context of trans-boundary harms). There

needs to be greater coherence between the investment promotion function on investment treaties and other policies that promote green growth. Impact assessments, along with prevention and mitigation measures, are an important tool in the investment policy mix. Although I am not necessarily advocating that investment treaties include express provisions on impact assessments, I think there needs to be a clearer recognition of the role that impact assessments can play in promoting green growth.

Background papers

Page 9, footnote 7. I suggest that you delete the discussion of the relationship between national treatment and minimum standards of treatment with respect to compensation for expropriation. The issue does not arise in practice. While it is true that national treatment does require non-discrimination with respect to compensation standards, the treaty standard (usually some variation of a fair market value standard) is the one normally applied. It is unlikely that any domestic compensation standard (applicable through national treatment), would provide more favourable treatment than the minimum standard in the treaty.

The statement in para. 127 that there is only one reference to the concept of sustainable development in the sample of treaties is not accurate. Para. 117 refers to the preamble of the Australia-Chile FTA, which includes the concept. Further, the term appears in the preambles to a number of the Canadian treaties in the sample (Canada-Peru 2006; Canada-Colombia FTA 2008; Canada-Jordan 2009; Canada-Panama FTA 2010). The text and table in Annex 2 should be updated to correct this oversight.

Cai Congyan, Professor of International Law, Xiamen University School of Law, Deputy Secretary General, Chinese Society of International Economic Law(CSIEL), China

Comment Submitted 26 February 2011

This Draft is really an important document dealing with a provoking issue being paid little attention. I agree with many points in this Draft. Nevertheless, I have several comments as follows. I humbly hope that they are of some value for your further improvement of this Draft.

1. In many, if not most, cases, I think that investment concerns hostile to foreign investment may not come from host governments, especially those states hungry for foreign capital, but from civil society, for instances environmental organizations, which solely focuses upon environment agenda and are not either capable or willing to strike a balance between economic prosperity through foreign investment and environmental protection. Civil society may either impose such a great pressure that host governments may be forced to negate foreign investment, or directly make foreign investors themselves abandon their investment plans. Therefore, I suggest this Draft add some words emphasizing that foreign investment is generally compatible with environment protection, requiring that the environment assessment by public authorities toward foreign investment be transparent to environmental organizations, and appealing that civil society in host states should be friendly to foreign investment because beautiful environment alone can not make people enjoy high-quality life in the era of economic globalization. In one word, this Draft is published not only for host states, but also for civil society.

2. I absolutely share a proposition in the Draft that *de facto* environment-related discrimination may exist, though *de jure* discrimination has not become a matter of great concern. In my opinion, one of best ways to reduce this *de facto* discrimination is to improve environmental *legal system* in host states. In other words, environment law itself is the very instrument to cope with green protectionism. Advanced environmental law will increase the predictability and limit the discretion of environmental decision-making of public authority in host states. Therefore, it is suggested that the Draft encourage host states to develop an advanced environmental legal regime.

3. It seems that home states may also play some role in green economy in host states. China is a case in this regard. In recent years, some regulations have been adopted by Chinese governments to require that Chinese overseas investors make their investment environment-friendly. For example, Opinion on the Encouragement and Regulation on Chinese Enterprises' Overseas Investment Cooperation issued by

State Council in October 2006 provides that Chinese oversea investors provide environment in host states. It is unclear the actual effect of this home state approach. Nevertheless, this approach is of some value. Therefore, it is suggested that this home approach be included in the Draft.

4. The Draft suggests governments "incentivize and encourage the positive contribution of companies to green growth" because business and investors is deemed to play a crucial role in green economy. This general approach is sound. However, does it mean that some kinds of performance requirements are allowed? If not, how this approach can be realized?

5. It is admitted that investment mechanism, including investors, plays a positive role in coping with green protectionism. This role, however, should not be overestimated. Green protectionism in its nature is a substantive issue, not procedure issue. Therefore, not procedure approach but substantive approach should be considered as the most effective approach to deal with green protectionism. This means that some appropriate substantive environmental rules should be included in investment treaties.

Current environment-related rules in investment treaties, which aims to regulate the relationship between environment rules and investment rules, have two kinds: first, non-operative rules. For example, Article 12, para.1 of 2004 US Model BIT provides "the Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws"; second, operative rules. They are divided into two sub-kinds: (a) general exception rules. For instance, 2004 US Model BIT provides that "Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns"(article 12(2));(b) indirect expropriation rule. For instance, Annex B[expropriation] of 2004 US Model BIT provides that "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety and the environment, do not constitute indirect expropriations".

In my opinion, the non-operative rules should be moved to preamble to serves as a general guidance for host states, foreign investors, and investment arbitrators.

Furthermore, confining operative investment-related rules to expropriation does not prevent investors from claiming damages since they can invoke other investment rules, for instance, fair and equitable treatment rule. General exception approach seems sound. In this regard, I propose to combine subjective approach with objective approach. Subjective approach is host states-oriented. It respects host states' inherent sovereign authority to regulate environmental matters. However, the pure subjective approach, which is expressed in term of "it consider appropriate" in investment treaties (e.g., 2004 US Model BIT, article 12(2)), is in danger of going so far as to evolve into green protectionism. Objective approach is arbitrators-oriented from the perspective of investment dispute settlement. It is expressed in term of "proportionality". The pure objective approach may be too burdensome for public authorities in host states, especially those in developing states, because environmental risks, which are uncertain when questioned investment measures are made, are often too complicated for these

authorities to find a most suitable solution, let alone a sole one. Thus, loosening this pure objective approach somewhat seems appropriate. In this regard, Annex 11-B of US-Korea FTA is worth of a mention. This Annex, among other things, provides that, except in rare circumstances, when an action or a series of actions is "***extremely severe or disproportionate***" (italics added)in light of its purpose or effect, non-discriminatory regulatory actions by host state that are designed and applied to protect legitimate public welfare objectives, e.g., the environment, do not constitute indirect expropriations.

Jorge E. Viñuales, Pictet Chair in International Environmental Law, Graduate Institute of International and Development Studies, Geneva, Switzerland, Counsel, Lévy Kaufmann-Kohler

Comment Submitted 27 February 2011

1. Thank you very much for the opportunity to comment. The comments below seek to identify certain issues and/or ambiguities that would, in my view, require further consideration, either to incorporate them or to set them aside. The comments are presented following the order of the seven green growth objectives mentioned in the current Draft Statement.

(i) Support for effective international environmental law

2. Further specification of international environmental standards would be very useful. International environmental obligations are often couched in very broad terms, leaving their specification to States. States may adopt a wide variety of environmental measures pursuing different levels of environmental protection. Such a margin of maneuver is no doubt useful for accomodating the special needs of States. However, it also has a number of drawbacks. Investors may not be able to anticipate what type of measures a host State will adopt in pursuance of its obligations under an environmental treaty. Conversely, in adopting certain measures, States may not be able to persuade an investment tribunal that such measures were actually required by an environmental treaty.

3. In this connection, the more specific environmental standards proposed by the Draft Statement (a) would help investors anticipate the environmental legal framework in which they will operate, and (b) would help States assess the litigation risk entailed by the environmental measures they plan to adopt to implement their environmental agreements (one may for instance consider that environmental measures consistent with international environmental obligations, as further specified by means of international environmental standards, would a priori be consistent with investment disciplines, whereas environmental measures going beyond that level may not benefit from such a presumption of consistency).

(ii) Vigilance against green protectionism

4. The Draft Statement rightly points out that green protectionism has not been a serious concern so far. The Draft Statement's call for vigilance also appears justified. However, an important distinction is insufficiently spelled out, namely that between genuine green protectionism (i.e. protectionist measures that genuinely pursue sustainable development goals) and protectionism under an environmental disguise (i.e. measures the main purpose of which is to protect national producers, and that refer to environmental considerations as a suitable excuse). Whereas the Draft Statement's call for vigilance is entirely justified with respect to the latter type of protectionism, I believe that the former type of protectionism should receive a more nuanced approach. In all events, I think it would be useful to eliminate this ambiguity in the Draft Statement.

5. Another important point on green protectionism is that, whatever the approach followed, it must be consistent with international trade rules (WTO and FTAs). From a State's perspective, the adoption of an

environmental measure triggers at least two types of litigation risk. First, the measure may be challenged as inconsistent with trade disciplines. Second, the measure may be challenged as inconsistent with investment disciplines. The fact that a measure is found to be consistent with trade disciplines (e.g. shielded by art XX(b) of GATT) does not necessarily mean that it will be found to be consistent with investment disciplines or *vice versa*. This issue has seldom been discussed in international policy and academic circles but it is, in my view, a very important one from a practical perspective. One way to limit the litigation risk or to provide some measure of legal certainty would be the refinement (e.g. through soft-law) of international environmental standards, as discussed in paragraph 3 above. Three other avenues to pursue the same goal are discussed in my comments on the Draft Statement's objectives (iii) to (v).

(iii) Updating investment treaty practices regarding the environment

6. The Draft Statement rightly stresses the need to update investment treaties to reconcile them with environmental considerations. The Study of the OECD referred to in the Draft Statement suggested that FTAs frequently include wording on environmental regulation whereas BITs rarely do so. I entirely agree with this conclusion but I would like to mention an additional point. Neither FTAs nor BITs include wording that would allow a State or an investment tribunal to decide a conflict between one international obligation arising from an investment treaty and another international obligation arising from an environmental treaty. Such wording (one could think of art 104 and Annex 104 of NAFTA as a model) would be very useful to increase legal certainty, as I shall further discuss in the next paragraph.

(iv) Investor-State dispute settlement and the environment

7. The Draft Statement calls for more transparency in investor-State arbitration. Although I agree with this proposition, I think it is important not to overestimate the impact of transparency (e.g. through the admission of *amicus curiae* briefs) on the way in which investment tribunals incorporate environmental considerations in their decisions. In practice, investment tribunals seek to avoid as much as possible to decide trade-offs between investment and environmental protection. This is in part because it would be politically difficult – precisely because of increased transparency and pressure from civil society – to proclaim that investment protection prevails over environmental protection. At the same time, and understandably, investment tribunals do not see the enforcement of environmental obligations as their primary task. Thus, in practice, when a party or an *amicus* intervenor identify a potential trade-off between investment protection and environmental protection, investment tribunals tend to play this down and avoid approaching the issue as a conflict of norms. In order to give States and investors more legal certainty and to provide investment tribunals more confidence in the management of conflicts between investment and environmental obligations, it would be useful (a) to further specify international environmental obligations (to clarify when a State measure is adopted pursuant to an international environmental obligation) as discussed in paragraph 3 above, and (b) to introduce specific conflict rules in BITs and FTAs, as discussed in paragraph 6 above.

(v) Conflict prevention through prior internal review of proposed environmental measures for investment law compliance

8. The Draft Statement's position on this issue (the need to adapt environmental policies to investment treaties) mirrors its position on the need to update investment treaties (objective (iii) above). In this connection, I would like to suggest three main points.

9. First, as a matter of policy it is very important that States pursue the environmental goals without breaching their international obligations (investment-related or other). However, the Draft Statement gives the impression that investment treaties would set a framework within which environmental policies are required to evolve. By doing so, the Draft Statement seems to assume that investment treaties prevail over other international treaties, particularly environmental treaties. But were a measure inconsistent with an investment treaty be required by an environmental treaty, would such a measure necessarily lead to liability of the host State? This question leads to my second comment.

10. Ideally, if States at the same time update their FTAs and BITs and review the conformity of their environmental policies, no conflict would arise. But, in practice, these two processes will evolve at a different pace and with different probabilities of success so conflicts are likely to arise. How should such conflicts be solved. Whatever the specific solution (I have analysed this issue elsewhere), I believe that the Draft Statement should avoid implying, as it does now, that investment disciplines would prevail.

11. The third comment is that, the internal review of environmental measures should take into account, together with investment disciplines, also trade disciplines (see paragraph 5 above).

(vi) Enhancing business' contribution to greening the economy

12. I entirely agree with the proposition of the Draft Statement that 'Governments should incentivise and encourage the positive contribution of companies to green growth'. This could be done through a variety of national and international mesures. Concerning these latter, I would focus on facilitated project finance (e.g. through the World Bank or the IFC, the flexibility mechanisms of the Kyoto Protocol, or some other mechanisms such as Payment-for-Ecosystem Services and REDD-plus which could be further supported), the promotion of environmental goods and services, and the development of insurance schemes to promote foreign investment in some sectors and/or technologies of particular importance for mitigation, adaptation and sustainable development (energy and water efficiency, waste treatments, etc.).

(vii) Spurring green growth through FDI

13. See my comment in paragraph 12 above.

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14. Thank you very much for the opportunity to provide comments, and I hope that the above remarks will be helpful.

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Comment Submitted 27 February 2011

First I would like to thank the Freedom of Investment Roundtable and specifically Mr David Gaukrodger for giving me this opportunity to present some comments on this statement and accompanying background papers.

Given the programmatic value of the statement, the bulk of the comments will be dedicated to it., with more factual and practical comments for the background papers.

The opening paragraphs (1 and 2) rightly stress the role of investment in promoting green growth; however, it immediately follows this positive outlook with the focus on *green investment protectionism and the interaction* [i.e. conflict] *of international environmental and investment law*. This sudden shift of focus on two (perceived) problems might give the wrong impression. Of the two, it is clear from the rest of the statement and the background papers that green protectionism is more of a perception than a reality.

Paragraph 8 stresses the need for *including language in investment treaties or environmental treaties to provide guidance about how environmental and investment law goals are to be reconciled.* It is difficult to disagree with such general statement; truly the inclusion of specific provisions in the relevant treaties is the most efficient means, but generic, 'soft' obligations on the need to reconcile potentially conflicting provisions is an insufficient way of providing conflict avoidance.

Paragraph 9: recommendations on dispute resolution and the need for transparency touch on an important issue in investment arbitration. I agree with Professor's van Harten's comments on the overstatement on the success of transparency in investment arbitrations and I would add that, while there has been undoubtedly an improvement in the procedural elements of openness, participation and publicity of proceedings, an assessment of the substantive contributions by third parties reveal a much more muted landscape. To the extent that there is no obligation on tribunals to take third parties submissions into account in their award, transparency might promise more than it delivers, or might even be seen as a way to placate certain sectors of the public with an ineffectual participation that is not picked up by a system of dispute resolution ill-equipped, legally as well as politically, to do so. Finally, I, for one, would advocate abandoning the imprecise and non-legal 'transparency' and stick to the more precise and understandable references to openness, publicity and participation.

At **paragraph 10**, the following recommendation is made:

Governments should take appropriate measures to review their relevant proposed environmental laws and measures at both the national and sub-national levels for compliance with investment law disciplines.

This recommendation is meant as a means of conflict-prevention. However, two issues arise: in cases involving 'green growth', i.e., investment that is attentive to environmental concerns and indeed geared to sustainable development, conflicts between environmental regulation and investment protection are not likely to arise (but I agree with Professor Pauwelyn that this still leaves open the possibility of the interaction with trade policies); in cases of investment activities that are potentially detrimental to the environment, one does not see why it should only be environmental policies and measures to be subject to an obligation of review for compliance with investment obligations. In these cases, the obligation should go both ways. Equally, at **paragraph 5**, the expressed need for *improved and clearer standards…for international environmental responsibilities and policies*, cannot be advocated unilaterally, especially in light of the debates on the essentially 'content-free' fair and equitable provision contained in most investment agreements.

Paragraph 17. *Exceptions for essential security interests and public order.*

I think it would be better to clarify the link between environmental policies and exceptions. Arguably, exceptions clauses worded as the OECD's ones or similar ones are at the same time too restrictive in their applicability (raising the bar too high for measures that are not in response to *major risks to human health, safety and security*) and too general and vague in their wording (with no explicit reference to the environment).

A general comment on the very comprehensive and clear exposition contained in the **background paper 'Green Growth'** is that the paper might benefit from the inclusion of a general discussion on the standard of review adopted by investment tribunals. It is not only a matter of discerning what the rules on applicable law and jurisdiction are, or what rules of interpretation and conflict resolution are available to the panels entrusted with the resolution of the disputes. It is also, ultimately, crucial to establish what standard of review is applicable by tribunals to investment disputes, if we accept that these are not regular commercial disputes, albeit with an international element, but regulatory disputes in which the presence of the state as one of the parties has significant public law implications. Whatever standard one considers acceptable, strict proportionality, margin of appreciation, least-restrictive, WTO-style, approach, it is important to keep the debate open to the necessity of considering the role that tribunals have been given, *de facto* if not *de jure*.

Equally, it seems to me necessary to at least mention how stabilization clauses in investment contracts can be operationalised by umbrella clauses in investment treaties and effectively restrain the power of governments to implement regulation protective of societal goods, such as the environment, in a comprehensive way. Stabilization clauses can at the very least effectively prevent the progressive interpretation of the law, and, in the worst cases, completely relieve investors from compliance with environmental legislation above the standard required by the contract. It is for this reason, as reported by Cotula in the Journal of World Investment & Trade, that the 2007 Model Host Government Agreement for Cross-Border Pipelines, drafted by the Energy Charter Secretariat includes an economic equilibrium clause (which is a variation of the classic stabilization clauses) with an exception for environmental standards. The exception was allegedly included at the request of the EU Commission, in order to avoid possible problems of compliance by EU member states with EU's social and environmental measures.

At **Paragraph 52,** for completeness, it might be added that some jurisdictional clauses restrict the jurisdiction of the tribunal only to claims arising under particular provisions of the treaty, typically the expropriation clause (for example the UK-Soviet BIT that was at the basis of the claim in the *RosInvest v Russian Federation* arbitration).

I also would like to join Professor Mitchell in praising Gordon's and Pohl's paper **Environmental Concerns in IIAs** for so comprehensively and efficiently summarising and categorizing investment instruments on the basis of environmental concerns. Just one small comment on this paper:

Figure 2. Table 1: IIA references to environmental concerns: Country summary
The figure for Japan on third column (% of treaties that refer to environmental concerns), at 61%, does not match the figure given for the same value in the body of text at paragraph 105 in the same page (36%).

Thanks again for granting me the opportunity to submit these comments, which I hope will be found helpful.

Seattle to Brussels Network, various European countries; Environment and Development Forum, Germany[1]

Comment Submitted 1 March 2011

Content

[1] The lead author for this comment is Rhea Tamara Hoffmann, a PhD researcher at the Cluster of Excellence "Normative Orders" at Frankfurt University, Germany, who can be contacted at rhea.hoffmann@normativeorders.net. It is submitted on behalf of the "Seattle to Brussels Network" and "Forum Umwelt und Entwicklung". The "Seattle to Brussels Network" is a Pan-European Network of NGOs working on international trade, investment and development issues (www.s2bnetwork.org). The "Forum Umwelt & Entwicklung" (Forum Environment and Development) is a German NGO-network (www.forumue.de). Contact person for this expert statement and for the Forum Working Group on Trade: Peter Fuchs; Peter.Fuchs@power-shift.de).

I. General Remarks

Overall, the OECD draft statement "Harnessing Freedom of Investment for Green Growth" promotes the current international investment liberalisation regime and unduly superordinates this regime over the environmental field of law (and others). The statement makes no suggestions for improvements regarding the ecological effectiveness of environmental law and policy vis a vis international investments. It completely leaves the question unanswered, how the hitherto existing investment regime will in fact support 'green' instead of environmentally harmful growth. Future policies should refrain from promoting the traditional policy paradigm and rather tackle the serious risks posed to economic development by the environmental crisis (climate change, biodiversity loss etc.). Unfortunately, the draft statement promotes at its core a completely open, non-regulated investment environment instead of an adequate regulatory system for an effective protection of the natural environment.

A review of current treaty commitments is necessary to assess present liabilities and changes that have to be made. Governments must learn from the experiences of other countries, which have already reviewed their own treaty commitments[2].

In light of the concerns expressed below, governments – in particular OECD members in the European Union, where an overhaul of investment policy is underway[3] - should either consider withdrawing from their investment treaties or renegotiate the basic principles that form the legal basis of the treaties, in order to secure policy space and the right to regulate in favor of the public interest. [4]

[2] See e.g., United States of America, available at http://www.ustr.gov/about-us/press-office/press-releases/2009/july/public-meeting-regarding-us-model-bilateral-investmen, accessed 28.02.2011; Republic of South Africa, available at http://www.iisd.org/itn/2009/07/15/south-african-trade-department-critical-of-approach-taken-to-bit-making/, accessed 28.02.2011.

[3] For further information, see Seattle to Brussels Network (R. Knottnerus), Change EU investment policy – now is the time!, January 2011, available at http://www.s2bnetwork.org/fileadmin/dateien/downloads/Investment_Briefing_S2B-et-al_Glossary_engl_Web.pdf, accessed 28.02.2011.

[4] The background paper survey "Environmental Concerns in International Investment Agreements" notes in paragraph 95 that only 5.2% of the treaties are "reserving policy space for environmental regulation for the entire treaty" and only 1.3% of the treaties reserve "policy space for environmental regulation for specific subject matters".

II. Comments and Recommendations

1. Support for effective international environmental law

In order to support the effectiveness of international environmental law, international investment law, in contrast to the draft statement (para. 5), has to be changed and improved in certain aspects, but not vice versa. It is unlikely that the agenda of investment liberalization, promotion, and protection is always in support of sustainable development as put forward in the draft statement (para. 5).[5] In order to achieve effectiveness of international environmental law, the proper equilibrium in the relationship between international investment law and international environmental law has to be addressed.

In-depth analysis of international investment law and international environmental law shows an imbalance between these two. International investment law is constructed as a very effective system, which secures investor rights and interests whereas international environmental law lacks effectiveness, especially with regard to enforcement mechanisms. Moreover, investor rights are often protected at the expense of environmental governance.[6] International environmental law cannot be fully effective, if it is restricted and undermined by the international investment regime, as the current functioning of investment arbitration shows.

Generally, investment contracts are preferable to investment treaties as a legal mechanism, because they allow for greater certainty to be achieved in the framing of the parties' legal rights and obligations.

a) The problem of indirect expropriations

Investment standards, such as the protection against indirect expropriations (i.e. expropriation beyond formal takings of property) and fair and equitable treatment, are a potential threat to national public interest regulation. Investment law standards like the protection against indirect expropriations should be clear and precise with regard to host state measures, which ensure the protection of the environment. Sustainable development is not possible without regulations effectively preventing business from behaving ecologically harmful or risky. New national and international environmental laws should be classified in investment agreements as not violating investment standards such as the protection against indirect expropriations. There is the

[5] H. Mann/K. von Moltke, A Southern Agenda on Investment? Promoting Development with Balanced Rights and Obligations for Investors, Host States and Home States, 2005, p. 2, available at http://www.iisd.org/pdf/2005/investment_southern_agenda.pdf, accessed 28.02.2011.

[6] See K. Tienhaara, Expropriation of Environmental Governance – Protecting Foreign Investors at the Expense of Public Policy, Cambridge, 2009.

possibility to add annexes[7] to trade and investment agreements, which specify that measures, related to protect environmental and social regulation, are in the interest of the public welfare, and should not be classified as a breach of the "expropriation clause".

b) General exception clauses

Free trade and investment agreements must include articles that provide states with exceptions to liability for interference with foreign investments on exceptional grounds. Some of these exceptions should be closely related to protecting the environment. A standard exception clause used in some agreements is, for example, that "nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures necessary:

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

(b) to ensure compliance with laws and regulations that are not inconsistent with the provisions of this Agreement; or

(c) for the conservation of living or non-living exhaustible natural resources."[8]

Such a clause captures a wide range of environmental concerns and preserves the validity of all national regulation in support of the environment.[9]

c) Stabilization clauses in investor-state contracts

The draft statement does not address the effects of stabilization clauses. Stabilization clauses agreed to between the investor and the host state can be used to limit the application of new social and environmental regulation to investment activities. This way, investors can be insulated from implementing new environmental laws by freezing the law of the host state with

[7] Examples of such provisions can be found in the model treaties of the United States of America and Canada and in the draft model treaty of Norway. Annex B 4(b) of the US Model BIT clarifies the scope of regulatory takings (indirect expropriations): "Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safeties, and the environment, do not constitute indirect expropriations.", available at http://ustraderep.gov/assets/Trade_Sectors/Investment/Model_BIT/asset_upload_file847_6897.pdf, accessed 28.02.2011; Art. 6(2) of the Norwegian draft Model Treaty: "The preceding provision shall not, however, in any way impair the right of a Party to enforce such laws as it deems necessary to control the use of property in accordance with the general interest or to secure the payment of taxes or other contributions or penalties.", available at www.regjeringen.no/.../Utkast%20til%20modellavtale2.doc, accessed 28.02.2011, Canada's FIPA model is available at http://www.international.gc.ca/trade-agreements-accords-commerciaux/agr-acc/fipa-apie/what_fipa.aspx?lang=en#structure&menu_id=45, accessed 28.02.2011.

[8] See e.g., Art. 10(1) Canada Model FIPA, footnote 7; Instead of a necessity test an exception clause should be formulated as follows in order to be effective: "Regulatory measures taken by a Party that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, do not constitute a breach of the treaty."

[9] M. Sornarajah, The International Law on Foreign Investment, Cambridge, 2010, p. 226.

respect to the investment project. Furthermore, stabilization clauses provide investors with the opportunity to claim compensation for the cost of compliance with new regulations.

2. Vigilance against green protectionism

The consultation document correctly states that *"to date investment protectionism associated with green growth policies is not a major problem."* (para. 6). In fact, even the OECD's own background document "Green investment protectionism: What is it and how prevalent is it" does not name a single case of green investment protectionism, suggesting that this is not a problem at all. National environmental regulation should in any case not be called "green protectionism" and even de facto discriminatory environmental regulation can be a legitimate instrument of environmental policy (for example in the case of 'first mover' environmental policies, which cannot wait for international regulatory harmonisation).

Instead of asking for vigilance against green investment protectionism and monitoring of environmental policy measures, international investment obligations should be monitored and interpreted in a way that reduces the chilling effect on both national and international environmental regulation.

3. Updating investment treaty practices regarding the environment

The background paper survey "Environmental Concerns in International Investment Agreements" shows that international investment agreements do not take environmental concerns fully into account. For instance, para. 95 states that only 8.2% of the agreements refer to environmental concerns. With regard to the protection of indirect expropriations, only 0,75% of the treaties contain provisions that preclude non-discriminatory environmental regulation as a basis for claims of "indirect expropriation". The low use of environmental language in investment treaties should alarm everyone interested in the realization of public policy purposes.

a) Using the learning-effect

Recent international investment disputes show that both maintaining an adequate policy space as well as making use of the right to regulate is made increasingly difficult: Arbitration cases have challenged a wide range of environmental regulations, including the bans of various chemicals for environmental and health reasons[10], a permit refusal for a hazardous waste landfill[11], an export ban on PCB waste,[12] and measures requiring open-pit metallic mines to backfill[13]. It is also worth mentioning that national social policies, such as the Black Economic

[10] Ethyl **Corporation v Canada**, UNCITRAL (NAFTA).
[11] Metalclad Corporation v. United Mexican States, (ICSID Case No. ARB(AF)/97/1).
[12] S.D. Myers Inc. v. Canada, UNCITRAL (NAFTA).
[13] Glamis Gold Ltd. v. United States of America, UNCITRAL (NAFTA).

Empowerment framework of the Republic of South Africa, aimed at reducing discrimination after the fall of the Apartheid regime, have been opposed by foreign investors.[14] Governments and policy makers at the international level have to learn from investment disputes and should take appropriate measures accordingly.

The case Vattenfall v. Germany[15], for example, shows that international investment arbitration can pose a serious threat to environmental regulation and democracy[16]. In 2009, Vattenfall took the German government to an ICSID tribunal for arbitration, seeking approximately 1.4 billion Euros in compensation for allegedly violating the terms of the Energy Charter Treaty. Vattenfall argued that new regulations – the introduction of environmental measures that restrict the use and discharge of cooling water for the coal-fired power plant – ran counter to assurances given by public authorities. What makes this claim even more troubling is the fact that the regulatory limitations of Vattenfall's water permit were needed to meet the public authorities' obligations under the EU water framework directive (2000). In August 2010, the contesting parties reached a settlement of the dispute without the exact terms ever being made public (in spite of numerous requests by civil society and parliamentarians asking for transparency).

b) Domestic policy space to secure social and environmental regulation

Most current investment agreements curtail the policy space for host states to protect and promote ecological, social and developmental goals[17]. This can lead to a regulatory chill, where states abandon proposed social, environmental or developmental regulation in favor of lower standards.

c) Clarifying investment standards

Investment treaties require host states to provide guarantees to foreign investors, including national treatment, most-favored national treatment, compensation in the case of an (even

[14] Piero Foresti, Laura de Carli and others v. Republic of South Africa, (ICSID Case No. ARB(AF)/07/1).
[15] Vattenfall AB, Vattenfall Europe AG, Vattenfall Europe Generation AG v. Federal Republic of Germany (ICSID Case No. ARB/09/6); please note that the exact amount and reasons of the dispute remain unknown because the arbitration proceeds in secret due to the choice of the parties (Rule 32 (2) ICSID Arbitration Rules); for further information on this case, see N. Bernasconi, Background paper on Vattenfall v. Germany arbitration, 2009, available at http://www.iisd.org/pdf/2009/background_vattenfall_vs_germany.pdf, accessed 28.02.2011.
[16] A. v. Bogdandy/I. Venzke, In Whose Name? An Investigation of International Courts' Public Authority and its Democratic Justification, 2010, p. 4, noting that "democracy in the city state now has a price", because the higher ecological standards were introduced due to political promotion in earlier electoral campaigns of the government of the city state Hamburg, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1593543, accessed 28.02.2011.
[17] See e.g. South Africa on this position (making policy recommendations), Republic of South Africa, Bilateral Investment Treaty Policy Framework Review, Government Position Paper, June 2009, p. 54, available at http://www.pmg.org.za/files/docs/090626trade-bi-lateralpolicy.pdf, accessed 28.02.2011.

indirect) expropriation, fair and equitable treatment, and the free transfer of capital. The wording of these treaty obligations is problematic, as it creates a sense of ambiguity regarding the interpretation of used terminology, which makes it impossible for investors and host states to determine their rights and respective obligations with certainty. This way, the absence of precise language gives too much leeway to tribunals to interpret the treaties in their own subjective ways which in turn leads towards improper assumption of law making functions on their part.[18]

One of the most far-reaching manifestations of the interaction between international investment law and the environment is the classification of host states' environmental regulation as indirect expropriations or a breach of fair and equitable treatment. Increasingly, investment agreements are invoked to challenge host states' regulations that address environmental, health or social issues.

Investment disputes on indirect expropriations strongly indicate that there is an uncertainty about the interpretation of treaty standards. Tribunals used several different approaches to determine whether an indirect expropriation had occurred or not. [19] For example, some tribunals did not ask for the purpose of a state's measure at all, when considering a breach of the "protection against indirect expropriation" standard, but only relied on the interference of the measure with the investment in question. Thus, legitimate regulation in the public interest could be qualified as an indirect expropriation, if the arbitration tribunal decides to use this approach. The uncertainty about the concept of indirect expropriations and conflicting arbitral decisions undermine the legitimacy of international investment law as a whole.[20] Qualifying state measures as indirect expropriations deeply interferes with the sovereignty of a state, which has a right to regulate[21] or sometimes even an obligation to protect[22].

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[18] On arbitration tribunals' law making function, see S. W. Schill, International Investment Treaties: Instruments of Bilateralism or Elements of an Evolving Multilateral System?, Paper presented at the 4th Global Administrative Law Seminar, Viterbo, June 13-14, 2008, p. 17 f., available at http://www.iilj.org/GAL/documents/Schill.pdf, accessed 28.02.2011.

[19] See e.g. Metalclad Corporation v. United Mexican States, (ICSID Case No. ARB(AF)/97/1) (assessing only the effect of the intereference); Methanex Corp. v. United States of America, UNCICTRAL (NAFTA) (assessing the purpose of the regulation); Técnicas Medioambientales Tecmed SA v. United Mexican States, (ICSID Case No. ARB(AF)/00/2) (weighing the public interest protected against the effect of the measure).

[20] M. Perkams, The Concept of Indirect Expropriation in Comparative Public Law, in S. W. Schill (ed.), International Investment Law and Comparative Public Law, Oxford, 2010, p. 110.

[21] M. Sornarajah, The Right to Regulate and its Safeguards, in UNCTAD, The Development dimension of FDI: policy and rule-making perspectives, Proceedings of the Expert Meeting held in Geneva from 6 to 8 November 2002, p. 205, available at http://www.unctad.org/en/docs/iteiia20034_en.pdf, accessed 28.02.2011.

[22] See e.g., the (non-binding) treaty body commentaries on the right to water stating that "The obligation to *protect* requires State parties to prevent third parties from interfering in any way with the enjoyment of the right to water.", CESCR general comment 15, "The Right to Water (art. 11 and 12)", adopted 26 November 2002, para.

The broad interpretation of the fair and equitable treatment standard in international investment agreements also constrains host states by advancing investor interests at the expense of public policy.[23]

Therefore, investment arbitration poses a serious threat to democratic choice and the capacity of governments to act in the public interest through innovative policy-making in response to changing social, economic, and environmental conditions. The disputes that have been arising out of the Argentine financial crisis have shown far-reaching restrictions on state actions to deal with exceptional circumstances.[24] This could also be relevant for recent world's financial crisis. States must not contract away sovereignty.

d) Preambular language of international investment agreements

Although the preamble of a treaty does not constitute a source of obligation *per se*, it provides helpful guidance in interpreting the treaty. Art. 31(2) of the Vienna Convention on the Law of Treaties (VCLT) explicitly states that the preamble of a treaty can be used for interpretive purposes. Therefore, the inclusion of references to important policy goals, such as the protection of the environment and sustainable development, is necessary.

e) Interaction between international investment law and international environmental law

International investment treaties should provide explicit guidance as to the interaction between international investment law and international environmental law and how international environmental interests are pursued in disputes.[25] Otherwise, as the background paper notes correctly in para. 83, governments *"transfer their competence to decide what should be done in the case of conflicts to the law-applier".* The law-appliers are arbitrators in institutional arrangements, which tend to give primacy to investment treaty concerns. Against the background of the finding that most of the interactions between these two fields of law are *"likely to occur in investment arbitration cases rather than in fora created by environmental agreements"*[26]*,* there is an urgent need to specify international investment treaties in a way that environmental concerns are not undermined anymore.

23, available at http://www.unhchr.ch/tbs/doc.nsf/0/a5458d1d1bbd713fc1256cc400389e94/$FILE/G0340229.pdf, accessed 28.02.2011.

[23] K. Miles, International Investment Law: origins, Imperialism and Conceptualizing the Environment, Colorado Journal of International Environmental Law and Policy, 2010, p. 43.

[24] W. Burke-White, Argentine financial crisis: state liability under BITs and the legitimacy of the ICSID system, Asian Journal WTO & International Health Law & Policy, 2008, p. 201.

[25] E.g., through explicit conflict clauses in international investment agreements.

[26] Background paper "Green Growth: Relations between International Environmental Law and International Investment Law", para. 37.

f) Implementation of "Investment and Environment" clauses in investment agreements

In addition to general exception clauses, all treaties should include an "Investment and Environment" clause which clearly defines binding obligations, imposed to ensure the protection of the environment and sustainable development. This clause prevents the watering-down of social and environmental legislation in order to attract investment. It has to be constructed without the requirement for environmental measures to be "otherwise consistent with the Treaty"[27]. If "Investment and Environment" clauses include this requirement they become a mere rhetorical phrase and therefore meaningless.

4. Investor-state dispute settlement and the environment

Problems in the relationship between international investment law and international environmental law often result out of investor-state arbitration. Investment agreements allow investors to bring claims directly to an arbitral tribunal, bypassing domestic courts and excluding the home state as a party to the process.

Investor-state dispute settlement gives investors inappropriate leverage to undermine legitimate measures to promote sustainable development, environmental protection, and human health and safety. At the moment, there are conflicts of interest for arbitrators and some biased arbitrators, who are selected on ad hoc basis. As international arbitrators frequently lack expertise in understanding local laws and societal values that are often at the heart of investment disputes, their decisions risk undermining national laws and values. Especially where investment disputes raise constitutional questions, such as the allocation of powers among governmental organs or permissible limitations of property rights[28], the principle of democratic accountability requires that domestic courts adjudicate such disputes whenever possible.

a) Exhaustion of domestic remedies

International investment agreements should require foreign investors to exhaust all available domestic remedies. Removing cases from domestic legal systems also undermines incentives to establish a sustainable rule of law. Moreover, most domestic judicial systems as well as public international law require the exhaustion of domestic remedies.[29] Therefore, investor-state dispute settlement should only be allowed without prior exhaustion of local remedies, if a

[27] See e.g., Art. 12(2) of the US Model BIT, which is similar to the NAFTA, see footnote 7.
[28] E.g., investors challenging South African Black Economic Empowerment regulation, which was meant to reduce discrimination in the post Apartheid Era. See footnote 14.
[29] In human rights cases and under the Convention on the Law of the Sea (UNCLOS), for example, claimants are required to exhaust domestic remedies before bringing a claim to an international tribunal.

judicial process in the host state cannot afford due process of law, if it is arbitrary or if there is a chance that the domestic court delays rendering a final judgment.

b) Replacement of investor-state dispute settlement by state-state dispute settlement

Under the present arrangement of investor-state dispute settlement, governments should consider the need to repeal the investor-state dispute resolution system in investment treaties. Where the domestic legal system is well-developed there is no need at all to have investor-state arbitration. Investor-state arbitration was introduced in order to de-politicize disputes and guarantee judicial remedies in cases where developing states did not offer an appropriate judicial system in line with the rule of law. Thus, governments should include only state-state dispute resolution mechanisms and omit dispute mechanisms directly accessible to investors. State-state dispute settlement is better suited than investor-state arbitration to address public law and policy issues that arise in the adjudication of investment disputes, fully engaging the state parties which established the investment protection framework of the BIT or FTA.[30]

c) Appellate mechanism

Governments should consider establishing an appellate mechanism in investor-state dispute settlement. This can be achieved by inserting specific provisions regarding such mechanisms into the investment agreements. Appeal rights integrated in investment treaties are an alternative to missing appellate mechanisms in investment arbitration rules. There have been discussions on reforms of procedural matters, but changes in the ICSID Convention, for example, are unlikely due to a need of consent of all treaty parties.

d) Transparency and public participation

In disputes where a public interest is concerned, third party participation is particularly necessary to integrate a broader non-investment view on issues regarding the protection of the environment or sustainable development. With regard to the interaction of international investment law with international environmental law, *amicus curiae* briefs can provide important additional information to the tribunal about environmental issues. Transparency and third party participation are intimately linked, meaning that *amicus curiae* briefs are not possible without public knowledge of the existence of disputes.[31]

Even under the ICSID Rules of Procedure for Arbitration Proceedings, updated 2006, not all proceedings are open to the public. Other investment dispute settlement fora are even less

[30] Regarding the general finding that international investment arbitration has to be regarded as a field of public law rather than commercial arbitration, see G. van Harten, Investment Treaty Arbitration and Public Law, Oxford, 2007.
[31] K. Tienhaara, Third Party Participation in Investment-Environment Disputes: Recent Developments, Review of European Community and International Environmental Law, Vol. 16, 2007, p. 2 f., available at http://ssrn.com/abstract=1740088, accessed 28.02.2011.

transparent in this regard. From an environmental and democratic perspective opportunities for third party participation are still very limited[32], because changes in the transparency of proceedings and the disclosure of documents are not sufficient enough.

e) Interaction between international investment law and international environmental law

Due to the limited jurisdiction of a tribunal, the direct invocation of environmental concerns might be possible only as a defense of the host state. Investor-state arbitration tribunals have no jurisdiction to resolve claims under international environmental law. Nevertheless, choice of law clauses might provide for public international law including international environmental law. Most international investment treaties require investment arbitration tribunals to apply international law including applicable international environmental law.[33] However, defining the applicable international environmental law provides problems because most of the international environmental law principles have an imprecise international legal status both with regard to their content and their binding nature.[34] Therefore, international investment treaties should provide for explicit guidance as to how environmental interests are pursued.

The indirect invocation of environmental concerns could be achieved through treaty interpretation. In cases of overlap between international investment law and international environmental law, the rules for treaty interpretation of the VCLT could help to resolve conflicts. Therefore, arbitrators have a very critical role in the interpretation of treaties. However, due to a lack of capacity to handle complex cases involving the interaction of international investment law and international environmental law or other fields of public international law, some arbitrators consider treaty interpretation only rarely.

f) Dispute settlement system and governments international responsibility

It is the responsibility of governments to insist on sustainable reforms of the dispute settlement system, as the required amendments of multilateral treaties need the consent of the governments.

With regard to states' compliance with social and environmental commitments (made in international treaties) governments need to reflect their own limitations and should therefore enable trade unions and civil society organisations to submit cases to complaint procedures and courts.

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[32] Ibid., p. 22.

[33] An institutional provision defining the applicable law in investment disputes can also be found in Art. 42 of the ICSID Convention, which requires the application of international law in ICSID cases.

[34] P. Sands, Principles of International Environmental Law, Cambridge, 2003, p. 231; L. Paradell-Trius, Principles of International Environmental Law: An Overview, Review of European Community and International Environmental Law, Vol. 9, 2000, p. 94.

5. Conflict prevention through prior internal review of proposed environmental measures for investment law compliance

The draft statement proposes prior internal review of environmental measures to achieve compliance with international investment law. This suggestion disregards the negative impact of international investment law and arbitration on public policy and undermines the effectiveness of environmental laws. Instead of trying to reach compliance of environmental measures with international investment law, the review should be the other way round. International environmental law adjudication lacks a specialised body and has, consequently, unfolded in a variety of "borrowed forums".[35] When the environmental dimension of international investment has been taken into account by investment tribunals, the protection of investor rights was often unduly prioritized, since arbitrators lack appropriate knowledge regarding both national and international environmental law. Therefore, governments should review their international investment agreements with regard to inherent restrictions on environmental measures and include and clarify language and clauses, as stated under Point 1 and 3 above, in order to support the effectiveness of environmental law.

6. Enhancing business' contribution to greening the economy

Governments have to make investors aware of the need to take environmental considerations seriously in planning and conducting business in foreign countries. However, this is not enough in order to achieve an effective international environmental law.

At the moment, foreign investors have effective rights but no or little obligations under international investment rules. There is an urgent need to include binding standards regarding investor responsibility and accountability in every BIT and FTA signed. Obligations of foreign investors must be introduced into international investment agreements clarifying their obligations with regard to environmental and human rights standards. Binding provisions on investor behavior can be based on international standards such as the OECD Guidelines for Multinational Enterprises, the Principles for Responsible Investment (PRI) and the ILO Tripartite Declaration of Principles on Multinational Companies and Social Policy. These provisions should include transparency, external monitoring obligations and the possibility for victims of malpractices by investors to access effective judicial remedy.

7. Spurring green growth through FDI

Although the „Green Growth Strategy" is claiming to contribute to green growth, the proposed trade and investment policy for business abroad is without conditionality and not related to actual investment impacts on jobs, the environment, human rights and social standards. The

[35] J. E. Viñuales, Foreign Investment and the Environment in International Law: an Ambiguous Relationship, British Yearbook of International Law, Vol. 80, 2010, p. 73.

claim in para. 12 of the draft statement *("Foreign direct investment undoubtedly contributes to transfers of technology, management processes and capital that improve the environment.")* is not well-founded. It feeds into the statement's overall plea for a "business as asual"-approach in international investment policy. If OECD-governments follow this recommendation they risk complete failure with regard to creating a new legal investment and environmental law regime that really helps to bring about the urgently needed transformation towards a low-carbon and sustainable economy.

Thank you for the opportunity to comment.

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Comment Submitted 1 March 2011

I find the choice of the subject truly timely and would like to congratulate all those who have been involved to prepare the draft statement and background papers. I thank you very much for giving me an opportunity to comment on these already rich and insightful documents.

I. Draft Statement

Paragraphs 6 and 7

For the sake of clarity, I would submit that paras. 6 and 7 of the draft statement should be placed between paras. 9 and 10. The FOI Roundtable would then state that it supports more "green" investment law (paras. 5, 8 and 9), while environmental measures should be introduced and/or carried out in good faith (paras. 6, 7 and 10).

Paragraph 9

The FOI Roundtable might wish to state that it fully supports the UNCITRAL's current effort to elaborate a standard on transparency applicable to treaty-based investor-State arbitration.

II. Background Paper "Environmental Concerns in International Investment Agreements: A Survey"

This background paper is particularly informative – here I enthusiastically echo Professor Ronald Mitchell and Professor Andrew Newcombe on the outstanding quality of the paper. Nevertheless, even the two most scrupulous authors were not able to take into account a treaty that had not been made publicly available yet when they prepared their excellent paper! Japan and India signed a Comprehensive Economic Partnership Agreement on 16 February 2011[1]. Following are the relevant provisions:

Preamble

> "FURTHER RECOGNISING that the economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development and that the economic partnership can play an important role in promoting sustainable development;"

Article 8: Environmental Protection (Chapter 1: General Provisions)

> 1. Each Party, acknowledging the importance of environmental protection and sustainable development and recognising the right of each Party to establish its own domestic environmental policies and priorities, shall ensure that its laws and regulations provide for adequate levels of environmental protection and shall strive to continue to improve those laws and regulations.
>
> […]

[1] <http://www.mofa.go.jp/region/asia-paci/india/epa201102/index.html>

4. The Parties reaffirm their rights and obligations under any international agreements concerning the environment, to which both Parties are parties.

Article 11: Exceptions (Chapter 1: General Provisions)

1. For the purposes of this Agreement except Chapters 6 [Trade in Services] and 9 [Intellectual Property], Articles XX and XXI of the GATT 1994 are incorporated into and form part of this Agreement, *mutatis mutandis*.

2. For the purposes of Chapters 6 and 8 [Investment], Articles XIV and XIV bis of the GATS are incorporated into and form part of this Agreement, *mutatis mutandis*.

Article 99: Environmental Measures (Chapter 8: Investment)

Each Party recognises that it is inappropriate to encourage investment activities in its Area of investors of the other Party by relaxing its environmental measures. To this effect each Party should not waive or otherwise derogate from such environmental measures as an encouragement for establishment, acquisition or expansion of investments in its Area.

III. A Proposed Appendix

Although the draft statement and the background papers are admirably clear and, I would find it useful to include a brief account of the current state of the arbitral jurisprudence somewhere in a background paper or probably as an appendix, so as for the participants in the FOI Roundtable to better understand the problem. Although it is often feared that the ISDS based on IIAs "could tend to give some primacy to investment treaty concerns over international environmental law considerations in cases of overlapping or conflicting norms"[2], a rapid survey of arbitral decisions gives us rather an optimistic impression.

Only a succinct explanation will be sufficient, given a large number of academic writings on the subject[3].

Below is a possible appendix that I tentatively drafted.

A. Arbitral Precedents on the Relationship between International Investment Law and International Environmental Law

1. S.D. Myers (2000)

Facts: S.D. Myers [SDMI], a US corporation engaged in the treatment and disposal of PCBs, established a Canadian subsidiary for the export of PCBs to its treatment facility located in the United States. Canada introduced a ban on the export of the PCB wastes from Canada. Canada argued that Canada's obligations under the Basel Convention and Transboundary Agreement prevailed over NAFTA Chapter 11 obligations to the extent of the inconsistency.

Held[4]: "The Basel Convention came into force in May 1992, when twenty states had ratified it. CANADA became a party to it. The U.S. has not." [para. 212]

[2] Background papers, p. 26, para. 85.

[3] *See e.g.* Sabrina Robert-Cuendet, *Droits de l'investisseur étranger et protection de l'environnement*, Leiden, Nijhoff, 2010, xiv+530p.

[4] (First) Partial Award of 13 November 2000, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/SDM_archives.aspx?lang=en>

"The drafters of the NAFTA evidentially considered which earlier environmental treaties would prevail over the specific rules of the NAFTA in case of conflict. Annex 104 provided that the Basel Convention would have priority if and when it was ratified by the NAFTA Parties." [para. 214]

"Even if the Basel Convention were to have been ratified by the NAFTA Parties, it should not be presumed that CANADA would have been able to use it to justify the breach of a specific NAFTA provision because …*where a party has a choice among equally effective and reasonably available alternatives for complying….with a Basel Convention obligation, it is obliged to choose the alternative that is …least inconsistent… with the NAFTA*. If one such alternative were to involve no inconsistency with the Basel Convention, clearly this should be followed." [para. 215, original emphasis]

"CANADA was concerned to ensure the economic strength of the Canadian industry, in part, because it wanted to maintain the ability to process PCBs within Canada in the future. This was a legitimate goal, consistent with the policy objectives of the Basel Convention. There were a number of legitimate ways by which CANADA could have achieved it, but preventing SDMI from exporting PCBs for processing in the USA by the use of the Interim Order and the Final Order was not one of them." [para. 255, emphasis added]

"The Tribunal concludes that the issuance of the Interim Order and the Final Order was a breach of Article 1102 [national treatment] of the NAFTA."

Note: The tribunal took into account Canada's obligations under the Basel Convention despite the fact that the US was not party to it.

2. Chemtura (2010)

Facts[5]: Chemtura Corporation ("Chemtura"), a United States agricultural pesticide products manufacturer, alleges that the Government of Canada, through its Pest Management Regulatory Agency (the "PMRA"), wrongfully terminated its pesticide business in lindane-based products, which are used on canola/rapeseed, mustard seed and cole crops to control flea beetle infestations, and on cereal crops to control wireworm. Chemtura alleges NAFTA violations of Article 1105 (minimum standard of treatment) and Article 1110 (expropriation).

Held[6]: "[T]he evidence on the record does not show bad faith or disingenuous conduct on the part of Canada. Quite the contrary, it shows that the Special Review[7] was undertaken by the PMRA in pursuance of its mandate and as a result of Canada's international obligations [arising from the Aarhus Protocol to the Convention on Long-Range Transboundary Air Pollution on Persistent Organic Pollutants]". [para. 138]

"[T]he Tribunal concludes that the Claimant's allegations of bad faith in connection with the launching of the Special Review of lindane have not been established." [para. 143]

[5] A summary available on the US Department of State's website: <http://www.state.gov/s/l/c29737.htm>

[6] Chemtura Corporation v. Canada, Award, 2 August 2010, <http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/crompton_archive.aspx?lang=en>

[7] The PMRA, on the basis of the Special Review, which had been carried out in conformity with Canada's domestic law (Pest Control Products Regulations), concluded that the risk assessment findings warranted regulatory action by way of suspension or termination of lindane registrations. *See* para. 29 of the Award.

(The Tribunal thus rejected the Claimant's claims on NAFTA Art. 1105 (fair and equitable treatment). [para. 163])[8]

Note: Measures taken in good faith to implement international environmental law obligations do not constitute a violation of the fair and equitable treatment clause.

B. Arbitral Precedents on the Host State's Environmental Measures Based on Its Domestic Law

1. Santa Elena (2000)

Facts: The claimant, Compañía del desarrollo de Santa Elena, the majority of whose shareholders are US citizens, was formed in 1970 primarily for the purpose of purchasing Santa Elena, with the intention of developing large portions of the property as a tourist resort and residential community. In 1978, Costa Rica issued an expropriation decree for Santa Elena to create a national park to preserve fauna and flora. Following a long series of intermittent negotiations, parties decided to settle their dispute concerning the amount of compensation by arbitration.

Held[9]: "In approaching the question of compensation for the Santa Elena Property, the Tribunal has borne in mind the following considerations: […]

- While an expropriation or taking for environmental reasons may be classified as a taking for a public purpose, and thus may be legitimate, the fact that the Property was taken for this reason does not affect either the nature or the measure of the compensation to be paid for the taking. That is, the purpose of protecting the environment for which the Property was taken does not alter the legal character of the taking for which adequate compensation must be paid. The international source of the obligation to protect the environment makes no difference." [para. 71]

" Expropriatory environmental measures - no matter how laudable and beneficial to society as a whole - are, in this respect, similar to any other expropriatory measures that a state may take in order to implement its policies: where property is expropriated, even for environmental purposes, whether domestic or international, the state's obligation to pay compensation remains." [para. 72]

Note: This award is often considered to represent the potential danger that could be entailed by ISDS to environmental protection[10]. The tribunal's indeed sweeping statement needs, however, to be read with care.

First, this is not an investment treaty arbitration. Thus, the tribunal was not in a position to apply any investment treaty whatsoever.

Secondly, this is a case involving an outright direct expropriation. No question of indirect expropriation or regulatory takings was raised.

Thirdly, the parties were in agreement concerning the standard of compensation. As the tribunal notes:

- "Respondent submitted that, under international law, which, it asserted, the parties had agreed was applicable to the dispute, Claimant is entitled to compensation on the basis of the fair market

[8] The tribunal also held that, even if FET obligations more favourable to investors should be imported by way of NAFTA Article 1103 (Most Favoured Nations Treatment), the conclusions reached by the tribunal would remain unchanged. [paras. 235-237]
[9] Compañía del desarrollo de Santa Elena v. Costa Rica, ICSID Case No. ARB/96/1, Final Award, 17 February 2000, <http://icsid.worldbank.org/>.
[10] *See e.g.* Professor van Harten's comment, para. 4.

value of the Property as of the date of its expropriation on 5 May 1978." [para. 35, emphasis added]

- "As mentioned above, there is no dispute between the parties as to the applicability of the principle of *full compensation for the fair market value of the Property*, i.e., what a willing buyer would pay to a willing seller." [para. 73, original emphasis]

2. Metalclad (2000)

Facts[11]: The Metalclad Corporation, a U.S. waste disposal company, instituted arbitration proceedings against Mexico under the ICSID Additional Facility Rules. Metalclad alleged breaches of various NAFTA Articles. Its notice of arbitration asserted that Mexico's local authorities wrongfully refused to permit Metalclad's subsidiary to open and operate a hazardous waste facility that Metalclad had built in La Pedrera, San Luis Potosi, despite the fact that the project was allegedly built in response to the invitation of certain Mexican federal officials and allegedly met all Mexican legal requirements.

Held[12]: "When Metalclad inquired, prior to its purchase of COTERIN [a Mexican company], as to the necessity for municipal permits, federal officials assured it that it had all that was needed to undertake the landfill project. Indeed, following Metalclad's acquisition of COTERIN, the federal government extended the federal construction permit for eighteen months." [para. 80]

"Even if Mexico is correct that a municipal construction permit was required, the evidence also shows that, as to hazardous waste evaluations and assessments, the federal authority's jurisdiction was controlling and the authority of the municipality only extended to appropriate construction considerations. Consequently, the denial of the permit by the Municipality by reference to environmental impact considerations in the case of what was basically a hazardous waste disposal landfill, was improper". [para. 86]

"Metalclad was entitled to rely on the representations of federal officials and to believe that it was entitled to continue its construction of the landfill." [para. 89]

"The totality of these circumstances demonstrates a lack of orderly process and timely disposition in relation to an investor of a Party acting in the expectation that it would be treated fairly and justly in accordance with the NAFTA." [para. 99, emphasis added]

"The Tribunal therefore holds that Metalclad was not treated fairly or equitably under the NAFTA and succeeds on its claim under Article 1105." [para. 101]

"The Tribunal holds that the exclusive authority for siting and permitting a hazardous waste landfill resides with the Mexican federal government. This finding is consistent with the testimony of the Secretary of SEMARNAP [Mexican Federal Secretariat of Environment, National Resources and Fishing] and is consistent with the express language of the LGEEPA [Mexico's General Ecology Law of 1988]." [para. 103]

"[T]he Municipality denied the local construction permit in part because of the Municipality's perception of the adverse environmental effects of the hazardous waste landfill and the geological

[11] A summary available on the US Department of State's website: < http://www.state.gov/s/l/c3752.htm> [Slightly modified by the present author.]

[12] Metalclad Corporation v. Mexico, ICSID Case No. ARB(AF)/97/1, Award, 30 August 2000,

unsuitability of the landfill site. In so doing, the Municipality acted outside its authority. […] [T]he Municipality's denial of the construction permit without any basis in the proposed physical construction or any defect in the site […] effectively and unlawfully prevented the Claimant's operation of the landfill." [para. 106]

"These measures, taken together with the representations of the Mexican federal government, on which Metalclad relied, and the absence of a timely, orderly or substantive basis for the denial by the Municipality of the local construction permit, amount to an indirect expropriation." [para. 107, emphasis added]

Note: The tribunal did not find the host State's violation of NAFTA Article 1005 (fair and equitable treatment) or 1010 (expropriation) for the simple reason that the host State's environmental measures negatively affected the investor. What was decisive was the lack of transparency in the host State's administration and decision-making process.

3. Tecmed (2003)

Facts[13]: Mexican authorities refused to renew a Spanish investor's license to operate a hazardous waste landfill in the municipality of Hermosillo, in the state of Sonora, Mexico. The operating license of the landfill at the time of the investment was valid indefinitely. Later, the Instituto Nacionale, de Ecologia (INE), an environmental agency of the Mexican government, changed the license terms to require renewal on an annual basis. In July 1997, a new mayor took office in the municipality. This, coupled with the widespread public protests against the landfill operation in its location, led to an understanding between the investor and INE pursuant to which investor would continue operating the landfill until a new location was found for its operation. In November 1998, when the investor applied for the renewal of its license, however, INE rejected its application, and later ordered the landfill to be shut down, giving rise to arbitration.

Held[14]: "[T]he Arbitral Tribunal will consider, in order to determine if they are to be characterized as expropriatory, whether such actions or measures are proportional to the public interest presumably protected thereby and to the protection legally granted to investments, taking into account that the significance of such impact has a key role upon deciding the proportionality. […] There must be a reasonable relationship of proportionality between the charge or weight imposed to the foreign investor and the aim sought to be realized by any expropriatory measure." [para. 122]

"During its operation of the Landfill, Cytrar [a local company organized by Tecmed] breached a number of the conditions under which the Permit was issued […] [T]he Arbitral Tribunal considers that such infringements, that did not trigger the revocation or termination of the permits under which such transportation and discharge took place and that are not defined in the Permit's conditions, are not determinants of the Resolution [by which INE denied Cytrar authorization to operate the landfill and ordered its closedown]." [para. 123]

"[T]he Arbitral Tribunal points out that such Resolution does not suggest that the violations compromise public health, impair ecological balance or protection of the environment, or that they may be the reason for a genuine social crisis. […] On various occasions, the Municipality of

[13] A very concise summary of the complicated case provided by Christopher F. Dugan et al., *Investor-State Arbitration*, New York, Oxford Univ.Pr., 2008, pp. 510-511.

[14] Tecnicas medioambientales Tecmed v. Mexico, ICSID Case No. ARB(AF)/00/2, Award, 29 May 2003, <http://ita.law.uvic.ca/> [English translation of the original Spanish text].

Hermosillo and the Minister of SEMARNAP [Mexican Federal Secretariat of Environment, National Resources and Fishing], Ms. Julia Carabías Lillo, have insisted that Cytrar's Landfill operation complies with the Mexican legal provisions on environmental protection and public health preservation or meets the requirements necessary not to impair the environment or public health." [para. 124]

"Actually, according to the evidence submitted in this arbitration proceeding, it is irrefutable that there were factors other than compliance or non-compliance by Cytrar with the Permit's conditions or the Mexican environmental protection laws and that such factors had a decisive effect in the decision to deny the Permit's renewal. These factors included "political circumstances"." [para. 127]

"INE, instead of deciding by itself —as it was empowered by law— as to the Permit's renewal on the basis of considerations exclusively related to INE's specific function linked to the protection of the environment, ecological balance and public health, it consulted with the mayor of the Municipality of Hermosillo and the Governor of the State of Sonora […] The only conclusion possible is that such consultation or inquiries were driven by INE's socio-political concerns […] None of the parties to which INE makes the inquiry expresses concerns as to the danger that the Landfill may pose to public health, ecological balance or the environment. To the contrary, their concerns are […] to put an end to the political problems […] caused by the Landfill to the federal, state and municipal authorities, by permanently closing the Landfill." [para. 129]

"Based on the above […] the Arbitral Tribunal finds and resolves that the Resolution and its effects amount to an expropriation in violation of Article 5 of the Agreement [= Mexico-Spain BIT] and international law." [para. 151]

Note: Although this award is also often quoted as an environmental-unfriendly award[15], the tribunal found the host State's violation of the BIT because it considered – rightly or wrongly – that the measures taken by the host State had not in fact been motivated by environmental considerations.

4. Methanex (2005)

Facts[16]: Methanex Corporation, a Canadian marketer and distributor of methanol, submitted a claim to arbitration under the UNCITRAL rules on its own behalf for alleged injuries resulting from a California ban on the use or sale in California of the gasoline additive MTBE. Methanol is an ingredient used to manufacture MTBE (methyl tertiary-butyl ether).

Held[17]: "The California Executive Order signed by the Governor of California on 25th March 1999 recorded the Governor's certification that "on balance, there is significant risk to the environment from using MTBE in gasoline in California"." [Part II, Chapter D, para. 14]

"[U]nder the California Bill and as appears from the recital to the Executive Order, the Governor based his certification on the UC [University of California at Davis] Report, its peer review by other agencies and experts, the public meetings and the ensuing findings and recommendations that: "while MTBE has provided California with clean air benefits, because of leaking underground fuel

[15] Professor van Harten's comment, para. 4.
[16] A summary available on the US Department of State's website: <http://www.state.gov/s/l/c5818.htm>
[17] Methanex Corporation v. USA, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, <http://www.state.gov/s/l/c5818.htm>.

storage tanks MTBE poses an environmental threat to groundwater and drinking water ...".” [Part II, Chapter D, para. 15]

“Methanex claims that […] [i]f, as California acknowledged, the true problem was leaking USTs, it was irrational for California to ban only one component of reformulated gasoline (MTBE) whilst allowing dangerous and potentially lethal components, such as benzene, to continue to contaminate California’s groundwater.” [Part II, Chapter D, para. 24]

“In brief, Methanex alleges that the US measures came into being because California intended rank protectionism of ethanol and concomitant punishment of methanol, methanol-based MTBE, and indeed Methanex.” [Part II, Chapter D, para. 25]

“[In 2000] CARB [California Air Resources Board] found that:

> *“MTBE is highly soluble in water and will transfer to groundwater faster, farther and more easily than other gasoline constituents such as benzene when gasoline leaks from underground storage tanks and pipelines”* [Part III, Chapter A, para. 33]

“As regards the likelihood of continued MTBE leakages from even the most modern USTs and the comparative risks associated with the leakage of ethanol, benzene and MTBE, Professor Fogg [professor of hydrogeology, University of California] pointed out that (i) ethanol tends to be readily biodegraded, (ii) the natural attenuation of benzene is going to mitigate the problem of its leakage from USTs in 80 to 90 percent of cases, but (iii) there is no evidence that biodegradation, either aerobic or anaerobic, without any engineered intervention at leaking tank sites is sufficient to deal with MTBE leakage.” [Part III, Chapter A, para. 79]

“[A]s a matter of general international law, a <u>non-discriminatory</u> regulation <u>for a public purpose</u>, which is enacted <u>in accordance with due process</u> and, which affects, inter alios, a foreign investor or investment is not deemed expropriatory and compensable unless specific commitments had been given by the regulating government to the then putative foreign investor contemplating investment that the government would refrain from such regulation.” [Part IV, Chapter D, para. 7, emphasis added]

“As against the public record, Methanex has developed a conspiratorial thesis, principally based on the general character of some of ADM’s [ADM: Archer-Daniels Midland, the principal US producer of ethanol] principal officers, a statement purportedly made by Senator Burton (which is supported only by unreliable hearsay), and an allegedly “secret” dinner which ADM hosted for Mr Davis [the Governor of California]. This thesis has already been considered in Chapter III B above. The first two bases do not lead the Tribunal to draw any appropriate, relevant conclusions, and Methanex has been unable to prove its suspicions about the dinner, an event which looms centrally in its thesis.” [Part IV, Chapter D, para. 13]

“For reasons elaborated here and earlier in this Award, the Tribunal concludes that the California ban was made for a public purpose, was non-discriminatory and was accomplished with due process. Hence, Methanex’s central claim under Article 1110(1) of expropriation under one of the three forms of action in that provision fails. From the standpoint of international law, the California ban was a lawful regulation and not an expropriation.” [Part IV, Chapter D, para. 15]

<u>Note</u>: The tribunal took note of various scientists’ testimonies indicating that California’s ban on MTBE was solidly based on scientific considerations. It is also to be noted that the investor did not allege that any host State’s measure, irrespective its necessity for environmental protection, would

constitute a violation of international investment law so long as it adversely affected investment activities. It rather advanced a "conspiratorial thesis".

5. Glamis Gold (2009)

Facts[18]: Glamis Gold Ltd., a publicly-held Canadian corporation engaged in the mining of precious metals, submitted a claim to arbitration under the UNCITRAL Arbitration Rules on behalf of its enterprises Glamis Gold, Inc. and Glamis Imperial Corporation for alleged injuries relating to a proposed gold mine in Imperial County, California. Glamis claimed that certain federal government actions and California measures with respect to open-pit mining operations denied its investments the minimum standard of treatment under international law in violation of Article 1105.

Held[19]: "Claimant asserts that [Department of Interior] Solicitor Leshy's 1999 M-Opinion ("Leshy's Opinion" or "M-Opinion") and the subsequent Record of Decision ("ROD")[20] denying the [Glamis's] Imperial Project Plan of Operations were both arbitrary contraventions of prior law and practice and denied Claimant a fair and transparent business environment in which to invest." [para. 631]

"The Tribunal […] agrees that the shift in the 1999 M-Opinion […] represented a significant change from settled practice and, arguably, surprised Claimant." [para. 759]

"The Tribunal also recognizes, however, Respondent's argument that the M-Opinion was a "reasoned opinion based upon preexisting legal authority" and drafted upon the BLM's [BLM: Bureau of Land Management] request for legal advice." [para. 760]

"The issue presented to the Tribunal therefore is whether a lengthy, reasoned legal opinion violates customary international law because it changes, in an arguably dramatic way, a previous law or prior legal interpretation upon which an investor has based its reasonable, investment-backed expectations." [para. 761]

"To begin addressing this question, the Tribunal first notes that it is not for an international tribunal to delve into the details of and justifications for domestic law. […] In the context of this claim, this Tribunal may consider only whether the M-Opinion occasioned "a gross denial of justice, manifest arbitrariness, blatant unfairness, a complete lack of due process, evident discrimination, or a manifest lack of reasons." The Tribunal finds that it does not."[21] [para. 762]

Note: The tribunal was interested in the procedural legitimacy rather than the substantial legitimacy of the environmental measures taken by the host State. As in *Methanex*, the investor did not call into question the host State's power to impose environmental regulations but alleged that the host State had lacked good faith when it introduced new regulations.

6. Chemtura (2010)

Facts: See above.

[18] A summary available on the US Department of State's website: <http://www.state.gov/s/l/c10986.htm> [Slightly modified by the present author.]
[19] Glamis Gold v. USA, Award, 8 June 2009, <http://www.state.gov/s/l/c10986.htm>.
[20] Signed by the Secretary of the Interior of the United States.
[21] The facts on which the tribunal found its conclusion are described in detail in paras. 763-771.

Held[22]: "[T]he Tribunal considers in any event that the measures challenged by the Claimant constituted a valid exercise of the Respondent's police powers. As discussed in detail in connection with Article 1105 of NAFTA, the PMRA took measures within its mandate, in a non-discriminatory manner, motivated by the increasing awareness of the dangers presented by lindane for human health and the environment. A measure adopted under such circumstances is a valid exercise of the State's police powers and, as a result, does not constitute an expropriation." [para. 266]

Note: This paragraph is an *obiter dictum* (see paras. 263-265). However, it is in line with the precedents listed above.

* * *

Thank you again for the opportunity to comment on the excellent draft statement and background papers. I hope that the above comments and proposals will be helpful.

[22] Chemtura Corporation v. Canada, *supra* note 6.

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Comment Submitted 1 March 2011

The Draft Statement by the OECD on "Harnessing Freedom of Investment for Green Growth" takes up the important issue of the relationship between environmental law and international investment law, an issue that already has given rise to many discussions in both investment law and environmental law circles and that has fueled the critique that international investment treaties and investment treaty arbitration are pro-investor-biased. I have a few comments that may help to strengthen the Statement and the Background Papers.

1. An important underlying assumption of the Draft Statement seems to be that the interests protected by international environmental law (and the aim to green the economy) are potential threats to interests protected by international investment law. Accordingly, the Draft Statement's findings start with encouraging clearer environmental rules (so that State action becomes more predictable to foreign investors) (para. 5); followed by demanding vigilance against green protectionism (paras. 6 and 7); suggesting that the investment treaty-practice of States should be updated to include environmental-related provisions (para. 8); suggesting the introduction of rules on more transparency in investor-State arbitration (para. 9); and finally that prior internal review mechanisms for environmental measures should be established (para. 10). All these findings and suggestions, which I support (with a few caveats as regards para. 8) have the purposes of avoiding that measures for the protection of the environment and for enhancing the green economy lead to conflict with investment law principles. The positive contributions of international investment law to greening the economy, by contrast, come last and appears less prominently in the Draft Statement (paras. 11 and 12).

2. While environmental policies may indeed give rise, and in practice often do give rise, to concerns of foreign investors in the continued feasibility of their undertakings, and accordingly constitute a political risk, I would encourage the OECD FOI Roundtable to focus more strongly in the reenforcing impact international investment law can have for environmental policies, in particular in the context of investments into the green economy. While the positive impact investment protection has on investments into green technology is mentioned (paras. 1, 11, 12 and 36), I would encourage to put this consideration center stage in the Draft Statement and to further explore the positive impact of international investment law for the protection of investments in the green economy.

3. The contribution of international investment law to greening the economy is particularly important given that the CDM-mechanism, the primary tool of climate change control, is based on a market approach to reducing CO2-emissions through the emissions-trading scheme that incentivized investments into green technology. Such an environmental law-based market mechanism only works when there is a functioning market; one aspect for the functioning of such a market and the existence of the respective incentive structure for investing into green technology is the control of political risk through mechanisms that make government action predictable and that effectively curtail the abuse of

governmental powers in a system that is faithful to the rule of law. International investment law provides exactly the mechanisms necessary for this purpose, that is mechanisms that provide legal stability, legal certainty, control of governmental abuse of public power, and access to independent control mechanisms of government action in the form of investor-State arbitration. The principles on which international investment law based, in other words, are necessary prerequisires for the functioning of a transborder market for emission-trading and the foreign direct investment in green technology. Accordingly, this common concern and the aid that international investment law and investor-State arbitration can furnish to the purposes of international environmental law should be strengthened and receive a more promiment place in the Draft Statement than currently is the case.

4. The Draft Statement also should take the opportunity to include a clear statement to the effect that investment treaties should not (and in judging from the arbitral jurisprudence on point in fact do not) prevent governments from implementing measures for the protection of the environment that interfere with the interests of foreign investors, provided these measures are non-discriminatory and restrict interests of foreign investors in a proportional manner.[1] Yet, the Draft Statement seems to accept without question much of the wide-spread critique that the existence of investment treaty commitments and the dispute settlement mechanism under the treaties is an obstacle to greening the environement.

5. In the same vein, the Draft Statement suggests that States should consider revising their treaty-practice (para. 8). At the same time, the Draft Statement implies that incorporating such environmental provisions is a matter of being "up-to-date" with modern investment treaty practice. I am critical, however, whether one can say that having environmental provisions in investment treaties and investment chapters in free trade agreement, instead of the lean continental-European-style investment treaties which only contain principles of investment protection without more, is the more modern and thus more accepted approach. I am critical of this recommendation because it suggests that the American and Canadian model treaties are the up-to-date practice, while the traditional European-style treaties are outdated and backwards. Yet, as investment treaty jurisprudence has shown in the past, investment treaty tribunals are receptive to taking account of the public interests, including (but not limited to) issues of environmental protection, and balance these concerns against the protection afforded to investments under investment treaties. This receptiveness and sensitivity of arbitral tribunals, in my view, is present independent of whether specific environmental carve-outs or specific environmental provisions were included in investment treaties or not. Accordingly, I see no reason to suggest as a general recommendation to States the worls over to abandon the European-style investment treaty model, even though it still is used widely by Germany, France, the United Kingdom, China, and others. The "European" approach in general seems to be based on the assumption that investment treaty tribunals merit trust in finding solutions that achieve an appropriate balance between investment protection and competing private and public interests, including the protection of the

[1] In fact, past jurisprudence generally has found acceptable solutions and has held in all cases that concerned environmental issues that non-discriminatory measures that restricted foreign investment interests in a proportional manner in order to further a legitimate aim, namely the protection of the environment and of public health, did not require compensation or the payment of damages under standard investment law concepts such as indirect expropriation or fair and equitable treatment.

environment, without the need to guide and channel arbitral jurisprudence by stricter or more precise wording in investment treaties.

6. Instead of changes to treaty practice, I would suggest encouraging the use of comparative public law and cross-regime analyses, that is analysis of how domestic legal systems and other international legal regimes, such as human rights law and WTO law deal with the tension between the protection of property and economic interests and the environment. Making use of such methods by investment treaty tribunals themselves may be an immediately applicable way for tribunals to react to and deal with the challenges launched vis-à-vis investment law from environmental protection groups without the need of adopting changes to investment treaty practices (this is a very cumbersome and long-lasting process and in view of existing arbitral jurisprudence does not seem necessary). Finally, I am also critical whether specific environmental carve-outs in investment treaties are the proper solution, as there are also other equally important public policy concerns that would need to be covered as policy goals justifying infringements of business interests, such as the protection of labor and social standards, the protection of anti-discrimination laws, etc. These other public interest would be disregarded if environmental protection receives special treatement in international investment law.

7. Not addressed in the Draft Statement, but in my view more critical than the principles of international investment law, by contrast, are contract-based or contract-like instruments (such as concessions, investor-State contracts, etc.) that shield foreign investors against State measures that further environmental purposes and that contain stabilization clauses, which freeze the regulatory framework to the benefit of a foreign investors and isolate tzhe investor from subsequent regulatory change. How States should deal with such clauses, and whether they should include them in any contractual instruments they enter into in respect of foreign investors, seems to be an important point the Draft Statement could and perhaps should address.

8. Overall, the Draft Statement, in my view, is an important chance to emphasize in a public statement the positive effects that international investment law can have for the policy goals underlying international environmental law. At the same time, I agree, however, that more transparency in investor-State arbitration and the implementation of prior review mechanism, the development of clearer environmental standards, and vigilance vis-à-vis green protectionism are crucial topics to be addressed in the Draft Statement. What I suggest is rather to strengthen the importance of the observations contained in paras. 11 and 12, and that strengthens the benefits of international investment law for greening the economy, instead of incorporating the perception that environmental law is a restriction on the freedom of investment or that investment law is an obstacle for achieving the aims of environmental law. In order to serve this purpose, the Draft Statement may not only consider to give paras. 11 and 12 a more prominent place, but also stress that (1) investments into green technology are protected investments under investment treaties; and (2) that investment treaties should not prevent governments from implementing measures for the protection of the environment, provided these measures are non-discriminatory and restrict interests of investors in a proportional manner, and should not be interpreted in such a way.

9. With respect to Background Paper 1, my only concern is that the notion of “green investment protectionism” is currently very broad and needs some more clarification. At present some passages in

Background Paper 1 read as if every unilateral State measures that furthers environmental protection and restricts foreign investment interests falls under the *prima facie* suspicious category of "green protectionism".[2] Such an understanding, however, would appear overly broad as it caputures also non-discriminatory unilateral State measures that aim at protecting the environment. Instead, it should be made clear that the crucial criterion for a measures to be "protectionist" is not whether it is unilateral (that is, an autonomous State measures as compared to a measure implementing a multilateral agreement), but whether it discriminates (*de facto* or *de iure*) to the detriment of foreign and to the benefit of domestic investors.[3]

10. Background Paper 2 already is a comprehensive overview over the relationship, overlaps, and tensions between international investment law and international environmental law. In addition to the issues covered, I would suggest to suplement the paper with a section that canvasses the arbitral jurisprudence on how State measures that were taken to protect the environment were dealt with in investment treaty arbitrations in the past. Discussing this jurisprudence would allow a conclusion on the still much debated question of whether international investment law actually lead to (or should reasonably be perceived to lead to) a regulatory chill with respect to measures for the protection of the public interest, including measures for the protection of the environment. The analysis of past arbitral jurisprudence, in my view, would strengthen the perspective that international investment law does not constitute an obstacle to States passing measures to protect the environment, provided that such measures do not discriminate between foreign and domestic investors and that any restrictions on foreign investment interests are proportional. In this respect, proportionality analysis, which constitutes an emerging trend in investment arbitration, could be mentioned as a technique of defragmentation and as a methods that already is used, but should be used more by arbitral tribunals, in order to reconcile investment protection and the protection of the environment. Such an analysis might lead to a more nuanced view as regards the the policy recommendation in para. 8 to States to "update" their investment treaty practice by including environment-related provisions.

11. Background Paper 3 contains the (to my knowledge) so far most comprehensive analysis of the investment treaty practice of States as regards the different possibilities to deal with the tension between investment law and environmental law. This survey is extremely useful and insightful as an indicator of how States perceive of the tension between investment protection and environmental concerns. One additional question following from the survey, which should be mention in para. 161 (and

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[2] See eg para. 17: "Green-investment protectionism would include environmental rules and administrative or enforcement procedures that create *de jure* restrictions on inward or outward capital flows, as well as domestic arrangements that, although not *de jure* discriminatory, create *de facto* restrictions." (emphasis added).

[3] The reasons for the proposed definition and its breadth, I suspect, might stem from the fact that Background Paper 1 takes the definition of "investment protectionism" from the OECD instruments regarding freedom of capital flow. In these instruments "investment" is understood as the activity of capital crossing a border (hence limitations on that movement by definition are protectionist because they shield domestic investors from foreign competition). In the international investment law context, by contrast, the notion of "investment" and accordingly the term "investment protectionism" is different. Here, "investment" refers to the business activity, the undertaking on the ground, itself; it is not primarily the capital, but the business operation that constitutes the investment (hence only measures that differentiate between domestic and national business, eg for an environmental purpose are protectionist measures and are problematic under the national treatment standard in international investment treaties).

which could be answered by expanding Background Paper 2 as suggest above), is whether the inclusion in investment treaties of environment-related language actually changes the content of the investment treaty obligations as compared to the traditional continental-European style model of investment treaties and whether it would change investment treaty jurisprudence.

I hope these comments prove helpful in the further process at the OECD in regard of such an important policy goal as that of greening the economy and making it more sustainable.

Robert Howse, Lloyd C. Nelson Professor of International Law, New York University School of Law, United States of America

Comment Submitted 2 March 2011

The following observations relate to legal issues raised by the draft statement. I do not necessarily share the assumptions about economic policy and industrial policy that appear to underpin the statement, or the view of what constitutes an undesirable distortion of competition; but others are more qualified to address those dimensions. I should also note that the "Green Protectionism" concept is not fully defined in the draft statement, and its relationship to particular legal standards in investment law, while mentioned, is not really developed. For example, bilateral investment agreements and free trade agreements with investor protection provisions differ widely as to the extent that they discipline subsidies or state aids. Unless they are tied to performance requirements or offered on a discriminatory basis, as a general matter, subsidies or state aids even of the kind apparently criticized in the statement would not run afoul of investment treaty norms, and some treaties have very explicit exceptions for subsidies or state aids.

I am not sure whether it is the case that environmental measures are frequently considered in investor-state dispute settlement. Attempts to use investor-state arbitration to attack environmental laws of general application are largely non-existent or at least very rare, and the one case that obviously did so, Methanex, illustrated that the legal norms of investment law do not easily countenance such challenges. A much more significant issue arises where a particular investor is targeted using environmental pretexts (S.D. Myers, Metalclad), or where general environmental laws or policies are applied to the investor in an arbitrary, discriminatory or non-transparent manner. These are problems with the political and regulatory process and may not be visible at all on the face of the law. I thus have doubts as to usefulness of prior review of general environmental laws for compatibility with investment treaty obligations. At the same time, the statement might usefully address the importance not just of substantive international environmental standards but of good practices for regulation and governance.

I hope this helpful.

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Comment Submitted 2 March 2011

Thank you very much for sending me the draft statement on Harnessing Freedom of Investment for Green Growth and the three background papers. Although "green growth" is not my area of expertise, I have found these materials very interesting and topical.

I found particularly interesting the tension between the need to initiate an effective international environmental legal framework and the need to ensure that it does not entail any form of discrimination. Set out below, please find some comments of mine.

1. Green Protectionism (p. 5 and p. 7 et seq.)

To be long-term viable, measures for the promotion of "green growth" must be designed to ensure that they do not effectively create free trade barriers or restrictions on the flow of foreign investments. Such measures would otherwise run the risk of being counterproductive and limit growth and innovation in the "green economy". The policy statement to reject green protectionism would therefore seem to be a cornerstone of any program for "green growth".

2. Compliance with investment law (p. 15)

One recommendation in the draft statement is that *"[g]overnments should take appropriate measures to review their relevant proposed environmental laws and measures at both national and sub-national levels for compliance with investment law disciplines."* As you mentioned in paragraph 35 of your essay, international environmental treaties have only recently paid any attention to investment issue. This is supported by the fact that specific references to the environment are included in only 8 percent of investment agreements. In my view, the key to balancing this tension is for governments to be proactive at the outset of treaty negotiations, which will allow them more flexibility to initiate environmental measures that would not breach provisions of the relevant treaty (e.g. non-discrimination and national treatment).

3. Updating investment treaty practice (p. 5 and p. 29 et seq.), enhancing business' contribution to greening the economy (p. 6), spurring green growth through FDI (p. 6.) and conflict prevention through prior internal review of proposed environmental measures (p. 6)

The four above-mentioned policy statements are interrelated and will therefore be addressed jointly.

When discussing investment treaty practice and environmental protection, it is important to preserve the integrity of the investment treaty regime. The undoubted overall success of BITs and other IIAs rests on the integrity of the system. In particular the ability of such treaties to afford investors an efficient remedy against arbitrary conduct by the host state through stringent substantive protection standards and international arbitration is the key to the success of the system. In my view, there is no contradiction between environmental protection and investment protection as long as new environmental policies are implemented in a way that respects the rights of private investors. I believe that long-term "green growth" is better served by building on, encouraging and protecting the interests of private investors when implementing new environmental polices than by lowering investment protection standards or by creating special exceptions in IIAs for environmental policies. The policy statement set out in para. 10 is therefore to be commanded.

However, if governments were to adopt the position that IIAs create too far-reaching restrictions on the implementation of new environmental policies, the proper way to address such concerns would be to renegotiate existing IIAs or to include appropriate language in new IIAs, i.e. what is suggested in the policy statement set out in para. 8. It is not within the power of arbitral tribunals appointed to rule on individual investment disputes to introduce such limitations or exemptions without support in the wording, or based on the proper interpretation, of the applicable IAA.

4. Investor-state dispute settlement and the environment (p. 5 and p. 13 et seq.)

Sometimes, when issues such as investment protection and environmental protection are discussed, there seems to be a misunderstanding of the role and the authority of arbitral tribunals within the investor-state dispute settlement (ISDS) system. When concluding IIAs, states have voluntarily and deliberately included dispute resolution provisions providing for international arbitration (for example ICSID Rules, UNCITRAL Rules or SCC Rules). The role of an arbitral tribunal under these arbitration rules is to decide the dispute before it based on the facts, arguments and evidence presented by the parties and in accordance with the terms if the IIA and relevant rules and principles of international law. It is not the role of such tribunals to create new law or contribute to the development of environmental policies.

An arbitral tribunal that takes on such a role would run the risk of exceeding its jurisdiction and thus having the resulting award set aside.

Similarly, since the dispute settlement mechanism under IAAs is set up to settle individual disputes between investors and host states, it is, as are contractual disputes between private entities and states that are settled through arbitration, a private procedure to which the public does not typically have access. Moreover, since the role of an arbitral tribunal is to decide the dispute before it, the participation in the procedure by NGO's or similar organizations promoting particular policy interests, will not automatically aid the arbitral tribunal in its fact finding. It could therefore be questioned whether increased transparency of ISDS is always desirable and/or whether it would ensure that environmental considerations play a greater role in investment treaty cases. At the end of the day, the arbitral tribunal must, irrespective of the level of transparency and the number of amicus briefs, still apply the IAA and the rules and principles of international law applicable to the investment.

I hope that these comments might be helpful.

Jan Wouters, Professor of International Law and International Organizations, University of Leuven, President, Flemish Foreign Affairs Council, Of Counsel, Linklaters De Bandt; Nicolas Hachez, University of Leuven, Belgium

Comment Submitted 2 March 2011

We would like to thank the OECD for giving us the opportunity to comment on this draft statement (hereinafter "the statement"). The statement is a very welcome initiative, notably as it addresses the ways in which liberalized investment and green growth may be made mutually reinforcing. A concern that has been voiced for some time is the fact that currently, international law and practice appear biased in favour of investor protection, to the detriment of other legitimate concerns such as the preservation of the environment (as evidenced by the excellent survey of environmental provisions in international investment agreements (IIAs) accompanying the statement).[61] The fact that an OECD initiative seeks to address this concern is in itself a very promising step towards redressing this imbalance. While we acknowledge the nature of the statement as a programmatic and necessarily short document, the avenues which the statement identifies in order to promote green growth (and more generally environmental stewardship) through foreign direct investment (FDI) may not be ambitious enough and still rely too much on the legal instruments and visions which, to date, have produced this very imbalance. Following are a few more specific points substantiating this general comment.

1. The statement and its background papers place strong emphasis on the vigilance that must be had regarding 'green protectionism.' However, the statement itself says, and the background paper makes it evident, that until now green protectionism has been a minor issue at least as far as FDI is concerned. The fact that so much attention is given to green protectionism in a political statement focused on promoting green growth may therefore risk to obscure the purpose of such statement. Additionally, while protectionist practices should indeed be combated, some degree of flexibility may be warranted in some cases, especially with a view to sincere and non-discriminatory environmental policies. It is worthwhile to refer in this respect to the long-standing case-law of the European Court of Justice, which has consistently recognized the protection of the environment as an imperative reason of public interest that – in combination with a proportionality test – may justify non-discriminatory restrictions to free movement (of goods, persons, services and capital) within the European Union's single market. It would be good for the statement to accept this and possibly elaborate in a more positive manner the notion of 'well-founded public policy goals' in paragraph 16. Right now this paragraph (and para. 17) could be read by some as meaning that only restrictive measures based on 'essential security interests and public order' will not be regarded as 'protectionist'.
2. The statement proposes that, in order to avoid investment-related disputes and possibly litigation, environmental measures contemplated by host states should be screened against their investment obligations (para. 10). This seems to establish investor protection as the benchmark against which all

[61] See, with regard to international investment law and human rights, Jan Wouters & Nicolas Hachez, "When Rules and Values Collide: How Can a Balanced Application of Investor Protection Provisions and Human Rights Be Ensured?", 3:2 *Human Rights & International Legal Discourse* 301-344 (2009).

future legislation should be tested. Although it is obvious that States must honour their international legal obligations, the screening proposal as currently formulated could arguably lead some host States to lower their environmental policy objectives in order to avoid conflict, and could in that sense contribute to the imbalance mentioned above. A State's pursuit of environmental policies and more environmentally-sensible FDI policies should remain possible with due respect to international legal obligations. This could in some cases involve a renegotiation of certain IIAs, which may be an alternative solution to avoiding conflicts but is currently not reflected in the statement.

3. The statement addresses the issue of the possible conflicts between investment protection and environmental law in the context of reforming future IIA practice and dispute settlement procedures (on this last point, see *infra,* para. 4). It recommends that States 'update' their treaty practices in future IIA negotiations. First of all, the notion of 'up-to-date practices' is in need of further elucidation. Second, this recommendation leaves aside the question of what should be done with the thousands of IIAs which are currently in force. Next to promoting a more harmonious interpretation of international environmental and investment legal rules by arbitrators and practitioners, we think this question should also crucially be addressed through attempts to responsibilize investors regarding their environmental duties. In this respect both paragraphs 5 and 11 are in need of further elaboration.

4. The proposals in the statement regarding dispute settlement derive from a current trend to reform IIA practice and arbitration rules so as to introduce more transparency and participation into FDI arbitration (see para. 9).[62] While a few successes have already been recorded on those counts, much still needs to be done. A dose of transparency and participation in dispute settlement will not by itself prevent FDI arbitration to potentially contribute to the imbalance between investment protection and environmental preservation outlined above. Indeed, the relevant transparency and participation mechanisms (public hearings, systematic publication of awards, admission of *amici curiae* briefs, etc.) mostly aim at providing information to the tribunal which the latter is free to take into account or not, or at ensuring a level of publicity to the proceedings which, on its own, has little or no bearing on the contents of the award. The statement could therefore be formulated in a more ambitious manner, including:

- Ensuring that arbitral tribunals possess the expertise necessary to address all relevant aspects of the dispute (economic as well as social or environmental);
- Considering more extensive possibilities to appeal awards which appear to disregard an essential concern relevant to the dispute (which would also help ensuring unity in the case-law, e.g. regarding central concepts such as fair and equitable treatment or indirect expropriation);
- Challenging the view that *ad hoc* arbitration is the only possible mechanism for settling investment disputes, and launching a debate regarding the establishment of a permanent investment dispute settlement institution.

[62] See Jan Wouters & Nicolas Hachez "The Institutionalization of Investor-State Arbitration and Sustainable Development", in M. Gehring, M.-C. Cordonier-Segger & A. Newcombe (eds.), *Sustainable Development in International Investment Law*, London: Kluwer Law International, 2010, pp. 617-641.

Nicolle Graugnard, Policy Manager, Commission on Trade and Investment Policy; Andrea Bacher, Policy Manager, Commission on Environment and Energy, Corporate Economists Advisory Group, International Chamber of Commerce (ICC)

Comment Submitted 2 March 2011

As the world business organization and the only representative body that speaks with authority of enterprises from all sectors in every part of the world, the International Chamber of Commerce (ICC) underscores the private sector's key role in contributing to the majority of investments essential to greening economies. The private sector is indispensable to achieve green growth. Through domestic and foreign direct investment (FDI), the private sector is essential in developing and diffusing the innovative products, processes, technologies, and services that generate and will continue to generate sustainable solutions. For example, to halve global emissions by 2050, the United Nations and the International Energy Agency (IEA) estimate that the private sector will contribute more than 80% of the predicted $1 trillion in climate finance required.

Part of the challenge and opportunity for business is to understand the concrete possibilities of a "Green Economy" with its investment opportunities and risks for both, developed and developing countries. While no single agreed definition or set of financial measurements as to what exactly constitutes "Green Growth/Economy" exists, the ICC Green Economy Task Force defines "green economy" as follows:

"The business community believes that the term "green economy" is embedded in the broader sustainable development concept. The "green economy" is described as an economy in which economic growth and environmental sustainability work together in a mutually reinforcing fashion while supporting progress on social development. Business and industry have a crucial role in delivering the economically viable products, processes, technologies, services, and solutions required for the transition to a Green Economy."

Resource efficient products, processes, technologies, services, and solutions, such as energy and eco-efficient manufacturing, low-carbon technologies, building, or transport infrastructure require large and long-term investments. Having the right investment framework in place is fundamental for business. A comprehensive and balanced investment framework should be clear, stable, and predictable so that investors trust that policy goals and incentives will be in place for the duration of the project fostering innovation-led green growth.

In this regard, ICC submits the following comments to the statement on "Harnessing Freedom of Investment for Green Growth":

5. **Support for effective international environmental law**
   Investment policy makers welcome efforts to provide improved and clearer standards, addressed to both governments and investors, for international environmental responsibilities and policy.

- ICC encourages synergies between compatible multilateral environmental agreements. However, preserving and complementing the independence and tailored nature of multilateral agreements should be a priority.
- The long-term goal of integration will require global economic and social institutions to become more responsive to environmental concerns, but will also require more integration of social and economic dimensions by "environmental" institutions.

6. Vigilance against green protectionism

Governments should reject investment protectionism associated with green growth policies. They should ensure that measures taken to pursue green growth are consistent with their international investment law obligations. They should regularly monitor environmental measures, including state aid, for protectionist intent or effects, including as part of ongoing policy monitoring at the Freedom of Investment Roundtable hosted by the OECD.

- ICC believes that it is crucial to strengthen multilateral trade and investment vital to the economic and technological flows required to implement solutions as well as avoid potential competitive distortions in international trade for the transition to greener economies. We encourage governments to keep options open to greening all sectors.
- ICC emphasizes that environmental regulations should be "least investment-restrictive". While governments have the right to regulate economic activity with respect to cross-border investment, they should do so in a manner that does not impede unnecessarily the overall cross-border flow of investment and/or disrupt the benefits it brings to home and host countries.
- Where environmental regulations establish a review process, the process should be fact-based, analytically rigorous, and should assure procedural and legal certainty by being timely, transparent and non-discriminatory.
- Governments should ensure effective protection for investors against environmental measures tantamount to expropriation, so-called "creeping expropriation" caused by progressive erosion of the original conditions under which an initial decision was made. In the event such actions take place, expropriations must be carried out in a non-discriminatory fashion and investors must be provided with an acceptable timetable for divestment. Clear guarantees of prompt, adequate and effective compensation should be paid in freely convertible currencies.

8. Updating investment treaty practices regarding the environment

Governments should examine whether their investment treaty practices are up-to-date with regard to environmental concerns and consider including language in investment treaties or environmental treaties to provide guidance about how environmental and investment law goals are to be reconciled.

- Enabling policy frameworks in general and especially for investment will be necessary for making continuous improvement in greening products, services, and production processes while companies remain competitive. Governments play a significant role in defining the conditions for enabling a transition in this regard. ICC believes that the objective should be to foster investments for green growth, rather than mandate them.

9. Investor-state dispute settlement and the environment

Governments should seek to ensure that, where relevant, the ISDS system adequately integrates and balances the goals of international environmental and investment law. To the greatest extent possible, governments should strive to ensure that the ISDS system adequately addresses the application of investment law to environmental measures in a transparent and publicly-accountable manner that allows, where appropriate, participation by interested third parties. In order to ensure a consistent treatment of this issue, governments should consider including provisions on transparency of ISDS in their investment agreements.

- ICC agrees that where possible to enhance effective integration of environmental and investment interests.
- To ensure effective protection of investor rights, ICC strongly believes that investment agreements should include a binding investor-to-state dispute settlement mechanism.
- In addition to general transparency provisions, notably the obligation to publish, notify, and impartially administer all relevant rules and regulations pertaining to the conditions for, restrictions of and changes in the investment regime affecting foreign investors, the right of foreign investors to appeal and review such measures before they become effective should form a part of procedural transparency in the context of any investment framework.

10. Conflict prevention through prior internal review of proposed environmental measures for investment law compliance

Governments should take appropriate measures to review their relevant proposed environmental laws and measures at both national and sub-national levels for compliance with investment law disciplines.

- ICC encourages the long-term goal of compliance of environmental laws and measures at both national and sub-national levels with investment law disciplines. Business delivers a great deal of the jobs, investments, technologies, products and services that drive the changes and innovations needed to move towards green growth. Supportive frameworks and regulations are needed for business to contribute fully to sustainable development and green growth therein. Business is organized in supply and value chains that overlay national structures so cross-border compliance and enforcement are important.

11. Enhancing business' contribution to greening the economy

Governments should incentivise and encourage the positive contribution of companies to green growth.

- While there are several initiatives getting underway in some countries to transition to a greener economy, these are mainly domestic and dependant on public sector support. For the transition to reach its potential and be sustainable, and for companies operating in numerous countries and within global marketplaces, the next steps in this arena will have to address the need to follow an international cooperative approach and transition from public support and subsidy to market-based efforts that are internalized within the private sector.
- The green economy does depend on an engaged and incentivized private sector working in partnership with the public sector. Greening economies is a systemic challenge and a

shared responsibility that will require collaborative action between all actors in society – business, governments, civil society and consumers.

- There are a number of different economic instruments for environmental policy, including fiscal instruments and tradable permits, which aim at promoting the production and use of environmentally sound products and processes within a market framework. By enabling industry and consumers to adapt to market signals, such instruments are intended to provide greater flexibility than traditional command and control regulations. Whether taxes, subsidies or other policy instrument are employed, they need to be based on cost-benefit analysis, be transparent, non-distortive and economically, environmentally, and socially effective.
- Skills and capacity are needed when planning the transition to a green economy and jobs. Governments, workers, and enterprises alike will have to meet the skills demands of evolving labor markets, while recognizing that there is no one-size-fits-all solution adequate to the myriad contexts and realties that will emerge. It is critical to develop the right skills for the right jobs and public-private partnerships can hereby play a major role in building the essential knowledge and skills required for the transition to a green economy.
- ICC supports strengthening multilateral trade and investment vital to the economic and technological flows required to implement "green" solutions as well as avoid potential competitive distortions in international trade, especially for developing countries.

12. Spurring green growth through FDI

Governments should contribute to efforts to identify FDI flows in support of green growth, recognise and address hurdles faced by such flows, and assess policy performance in providing a framework to encourage green investment.

- We encourage cooperative efforts to recognize and integrate environmental and equity externalities. While the concepts are clear, in many cases methodologies to evaluate externalities do not exist both because of incomplete scientific understanding and because of lack of publicly accepted methods to value non-market impacts. Accounting measures and standards will be required to understand and measure FDI flows in support of green growth.
- IP protection is an integral part of the broader enabling frameworks that provide the private sector with the confidence needed to engage in direct foreign investment, joint ventures, partnerships and licensing arrangements with local partners, establish local operations and open new research facilities, e.g. critical to the technology deployment needed to deal with climate change.
- Proper IP protection and enforcement are critical prerequisites and we urge governments to strictly enforce them.
- Governments should, in the formulation or modification of policies that affect investment, take the fullest possible account of the need of investors in for stability, continuity and growth.

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Comment Submitted 2 March 2011

Thank you for providing the opportunity to comment on the OECD's draft statement on "Harnessing Freedom of Investment for Green Growth." While this draft statement offers many opportunities for comment, I have reduced my suggestions to three points. It appears to me that a shift toward these three points would make the draft statement more reflective of contemporary concerns and developments.

1. The need to refer to mutual supportiveness (Paragraph 8)

The current premise seems to be that international investment obligations and environmental interests are primarily in conflict with each other. The premise should instead be Member states' maximum efforts to avoid any such conflict. The OECD is uniquely situated to support bridges across the pluralist landscape of international environmental and investment laws. This could be achieved with a reference to the principle of mutual supportiveness. The principle of mutual supportiveness has most prominently emerged in the area of trade and environment relationships, but is not limited to this area.

Examples referring to this principle include the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA-DR), which applies mutual supportiveness not only to trade, but also to investment (in Chapter 10)[1]. CAFTA-DR also integrates an Environmental Cooperation Agreement reflecting mutual supportiveness[2]. Since its inception, the Andean Community trade bloc has reflected this principle as well.[3] Noteworthy is the NAFTA Chapter 11 investment arbitration case *S.D. Myers*, which emphasized that "environmental protection and economic development can and should be mutually supportive."[4]

In this context, one should also stress that some multilateral environmental agreements have foreseen the integral role of international investment. For example, flexible market mechanisms under the Kyoto Protocol have an inherently environmental objective and are regulated to that effect.[5]

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[1] CAFTA-DR, Preamble (instructing Parties to "IMPLEMENT this Agreement in a manner consistent with environmental protection and conservation, promote sustainable development, and strengthen their cooperation on environmental matters"). *See also* CAFTA-DR, Art. 17.1.

[2] Environmental Cooperation Agreement, Preamble ("ACKNOWLEDGING that economic development, social development and environmental protection are interdependent and mutually reinforcing components of sustainable development . . . .").

[3] Cartagena Agreement, Art. 146 ("Member Countries shall undertake joint policies that enable a better use of their renewable and nonrenewable natural resources and the preservation and improvement of the environment").

[4] *SD Myers, Inc v. Canada*, Partial Award, 13 Nov. 2000, 40 ILM (2001) 1408, at paras 220, 247.

[5] *See* Kyoto Protocol, Art. 6 (establishing free transfer of emissions credits so as to encourage investment in carbon reduction projects); *see also* Art. 12(2) ("The purpose of the clean development mechanism shall be to assist Parties . . . in achieving sustainable development and in contributing to the ultimate objective of the Convention, and to assist Parties . . . in achieving compliance with their quantified emission limitation and reduction commitments . . . .").

Another example is the Convention on Biological Diversity, which establishes a link between investment and sustainable development.[6]

The draft statement should adopt this approach by including a reference to mutual supportiveness. The OECD draft statement should at first assume a synergy (instead of a conflict) between Member state economic and environmental interests and obligations.

Paragraph 8 could therefore read as follows:

> *Governments should examine whether their investment treaty practices are up-to-date with regard to environmental concerns.~~consider including language in investment treaties or environmental treaties to provide guidance about how environmental and investment law goals are to be reconciled~~ [Governments should also foster mutual supportiveness between these economic and environmental interests].*

2. Transparency through publicity (Paragraph 9)

Whereas the draft language currently focuses on the role of amici curiae, the broader interest at stake here is publicity. Dispute settlement is integral to the international investment framework, and transparency should be included in this framework. While an amicus curiae may have a special interest or expertise in the disputed matter, amicus participation is only one aspect of the transparency debate.

Other aspects include open hearings and the publication and submission of awards, areas in which NAFTA dispute settlement has notably evolved.[7] The UNCITRAL Working Group II has recently discussed caveats that could ensure the redaction of sensitive data and protect arbitral integrity.[8] The OECD draft statement should keep pace with this trend toward the greater publicity of international investments.

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[6] Convention on Biological Diversity, Preamble ("*Acknowledging* that substantial investments are required to conserve biological diversity and that there is the expectation of a broad range of environmental, economic and social benefits from those investments .. . .").

[7] During the 2003 meeting of the NAFTA Free Trade Commission, "the United States and Canada affirmed that they will consent to opening to the public hearings in Chapter 11 disputes to which either is a party, and to request the consent of disputing investors to such open hearings." *See* "NAFTA Commission Announces New Transparency Measures," Office of the United States Trade Representative, 2 October 2003 (*available at* http://www.ustr.gov/about-us/press-office/press-releases/archives/2003/october/naftacommission-announces-new-transparen).

[8] *See* "A/CN.9/717 - DRAFT Report of Working Group II (Arbitration and Conciliation) on the work of its fifty-fourth session" (*available at* http://www.uncitral.org/uncitral/en/commission/working_groups/2Arbitration.html).

Paragraph 9 could therefore read as follows:

> *Governments should seek to ensure that, where relevant, the ISDS system adequately integrates and balances the goals of international environmental and investment law. To the greatest extent possible, governments should strive to ensure that the ISDS system adequately addresses the application of investment law to environmental measures in a transparent and publicly-accountable manner that ~~allows~~ [encourages open hearings, published submissions and], where appropriate, participation by interested third parties. In order to ensure a consistent treatment of this issue, governments should consider including provisions on transparency of ISDS in their investment agreements.*

3. Environmental responsibilities of the private sector (Paragraph 11)

The notion that governments solely bear this responsibility does not reflect the current state of environmental protection. The draft statement should promote principles according to which private actors have environmental responsibilities.

One can refer to the U.N. Global Compact,[9] Section III of Agenda 21,[10] and the public participatory and cooperative objectives of the 1992 Rio Declaration, all of which support the role of private actors as partners in the U.N.'s sustainable development goals.[11] The U.N. Environment Programme has specifically launched its Climate Neutral Network to build private efforts to mitigate climate change.[12]

In fact, the OECD has already advocated for private actors' increased environmental responsibility, through its Guidelines for Multinational Enterprises.[13] As these Guidelines have attracted the partnership of governments, businesses and NGOs, the OECD draft statement under consideration should similarly diffuse environmental responsibility among all key economic

[9] U.N. Global Compact, Principle 7 ("Businesses should support a precautionary approach to environmental challenges"), Principle 8 ("[Businesses should] undertake initiatives to promote greater environmental responsibility"), Principle 9 ("[Businesses should] encourage the development and diffusion of environmentally friendly technologies").

[10] *See*, *e.g.*, Agenda 21, Chapter 23.2 ("One of the fundamental prerequisites for the achievement of sustainable development is broad public participation in decision-making. Furthermore, in the more specific context of environment and development, the need for new forms of participation has emerged. This includes the need of individuals, groups and organizations to participate . . . .").

[11] Rio Declaration on Environment and Development, Principle 27 ("States and people shall cooperate in good faith and in a spirit of partnership in the fulfilment of the principles embodied in this Declaration and in the further development of international law in the field of sustainable development.").

[12] *See* http://www.unep.org/climateneutral/About/tabid/95/Default.aspx ("The Climate Neutral Network . . . [will] acquire ever greater interactivity and participation including more intergovernmental bodies, community groups, NGOs, climate neutral events and eventually perhaps even individual households and citizens").

[13] *See generally*, OECD Guidelines, Part I, Section 5, Chapeau (instructing enterprises to contribute to the sustainable development goals of international agreements). Clause 8 expressly refers to the utility of partnerships ("[In particular, enterprises should] contribute to the development of environmentally meaningful and economically efficient public policy, for example, by means of partnerships or initiatives that will enhance environmental awareness and protection").

actors. This can be best accomplished by including in the draft statement a reference to the central role of the private sector, and the usefulness of Member states' partnerships with non-state actors.

Paragraph 11 could therefore read as follows:

> *[The role of the private sector is central to harnessing freedom of investment for green growth.] Governments should incentivise and encourage the positive contribution of companies to green growth [by, inter alia, forging partnerships between public and private environmental interests. Such partnerships strengthen efforts toward green growth, and confirm that sustainable investment policy is a responsibility that Member states share with non-state actors.]*

The OECD's efforts to ensure the harmonization of environmental and investment interests are laudable. I fully support this endeavor, and remain at the OECD's disposal as any questions arise.

Renaud Sorieul, Secretary, United Nations Commission on International Trade Law (UNCITRAL)

Comment Submitted 2 March 2011

Thank you very much for consulting the UNCITRAL secretariat on the OECD draft three-page statement on Harnessing Freedom of Investment for Green Growth. We are very honoured to be requested for comments. As UNCITRAL is currently undertaking work on transparency in treaty-based investor-State arbitration, the UNCITRAL secretariat would like to comment on 'Investor-state dispute settlement and the environment' as laid out in paragraph 9 of the draft statement.

At its forty-first session in summer 2008, UNCITRAL had decided that the topic of transparency in treaty-based investor-State arbitration should be dealt with as a matter of priority immediately after completion of the – at that time ongoing - revision of the UNCITRAL Arbitration Rules (*Official Records of the General Assembly, Sixty-third Session, Supplement No. 17* and corrigendum (A/63/17 and Corr.1), para. 314.). At its forty-third session in summer 2010, UNCITRAL had entrusted its Working Group II (Arbitration and Conciliation) with the task of preparing a legal standard on that topic, as UNCITRAL viewed that topic of significant importance (*Official Records of the General Assembly, Sixty-fifth Session, Supplement No. 17*, para. 190). Against that background, the UNCITRAL secretariat takes note of the efforts by the OECD to further transparency in treaty-based investor-State arbitration