13TH ROUNDTABLE ON FREEDOM OF INVESTMENT

Paris, France – 5 October 2010

Summary of Roundtable discussions by the OECD Secretariat

The "Freedom of Investment" (FOI) process is a forum for inter-governmental dialogue that brings together the 33 OECD members and 9 other adherents to the OECD Declaration on International Investment and Multinational Enterprises,[1] and many other non-OECD governments. The FOI process supports recipient countries' efforts to maintain and extend open policy frameworks for international direct investment and capital movements and to address concerns that may be raised by international investment. Monitoring and exchanges at the FOI Roundtables contribute to observance of international investment commitments, including those taken under the OECD investment instruments and in the context of the G20.

The present document summarises the views and information contributed by participants at the Freedom of Investment Roundtable 13, held on 5 October 2010. In addition to OECD members and the European Commission, Argentina, Brazil, Estonia, Malaysia, Morocco, Peru, Romania, South Africa and the IMF participated in this Roundtable. ASEAN, represented by Vietnam, Thailand and the ASEAN Secretariat, was also present.

The discussions at Roundtable 13 included, first, a *tour d'horizon* of certain important recent developments (in investment policy, in investor-state arbitration awards and relating to measures to mitigate the volatility of capital flows, exit from emergency schemes and protectionism). The second part of the discussions was centred on green growth and investment, including green investment protectionism and the interaction between international investment law and international environmental law. Accounts of discussions at earlier FOI Roundtables are available on the Secretariat website dedicated to the FOI process.[2]

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1 The adherents to the Declaration include all 33 OECD member countries, and 9 non-member countries: Argentina, Brazil, Egypt, Estonia, Latvia, Lithuania, Morocco, Peru and Romania.

2 The summaries are available at: www.oecd.org/daf/investment/foi.

Tour d'horizon

Recent investment policy developments

Canada has launched enforcement proceedings against US Steel for alleged breach of undertakings made in the course of a review under the Investment Canada Act (ICA). The background for this case is as follows: US Steel acquired Canadian company Stelco in 2007. During the review of this investment under the ICA, US Steel agreed to 31 undertakings related to levels of employment, production and capital spending. In March 2009, US Steel temporarily shut down most of its Canadian operations, affecting some 1500 jobs at two steel plants in Ontario. According to guidelines under the ICA, investors will not be held accountable for being unable to fulfil undertakings when this failure is "clearly the result of factors beyond the control of the investor". In July 2009, the Federal Government of Canada applied to the Federal Court to force US Steel to comply with the employment and production undertakings that it made when it purchased Stelco (now US Steel Canada). US Steel has denied the government's allegations and contends that it was justified in taking the measures at issue because of the unique circumstances created by the global economic crisis. In preliminary proceedings, US Steel challenged, *inter alia*, the constitutional validity of the *Investment Canada Act*. In July 2010, the Federal Court of Appeal upheld a decision rejecting the company's arguments, clearing the way for the case to proceed to trial on the merits.

In June 2010, ***Korea*** announced measures to mitigate volatility of capital flows, including:

- Limits on banks' forward foreign exchange positions (including forward, swap, cross currency interest rate swap, non-deliverable forward, etc): 50% of domestic banks' capital; 250% of foreign bank branches' capital.

- Limiting the use of foreign currency loans granted by financial institutions to residents to use for overseas purposes.

- Tighter regulations on banks' foreign exchange liquidity ratios and mid- to long-term financing ratios in foreign loan portfolios.

Korea stated that the new measures aim at ensuring prudential soundness and that they do not imply that Korea is reversing its policy of liberalization, and the government continues to maintain an open and liberalized market policy and to observe OECD rules on capital movements.

Other investment issues

Further discussion on ICSID arbitral awards and Articles 53 and 54 of the ICSID Convention. In an oral statement, the United States provided comments on the interpretation of Articles 53 and 54 of the ICSID Convention. The comments were presented in response to Argentina's presentation before the Roundtable on the same topic on 26 March 2010.[3] The United States offered three observations for consideration by the Roundtable.

First, in the United States' view, Argentina's interpretation of Articles 53 and 54 is flawed. According to the United States, Argentina erroneously construes Article 54 as conditioning its obligation under Article 53 to abide by and comply with an ICSID award. However, the United States asserted that the plain text and negotiating history of the ICSID Convention belie this interpretation. In the United States' view, Article 53 establishes an unequivocal obligation on the disputing parties to abide by and comply with an

[3] Argentina's presentation is reflected in the summary of the March 2010 Roundtable discussion. See http://www.oecd.org/dataoecd/54/5/45317381.pdf at pp. 3-5.

ICSID award; Article 54, which contemplates recognition and enforcement of the award, applies to all contracting States and is necessary only after a disputing party has failed to honour Article 53. Further, the United States disagreed with Argentina that the appointment by the United States of certain judicial authorities under U.S. law implementing Article 54.2 of the ICSID Convention supports Argentina's interpretation; it requested that Argentina refrain from citing to those designations for that purpose in the future.

Second, the United States cautioned that Argentina's interpretation of Articles 53 and 54 would create a loophole in the ICSID Convention that would undermine the ICSID system of dispute settlement. In the United States' view, it would allow an ICSID Contracting State to condition unilaterally its Article 53 obligation to abide by and comply with an award, depending on the scope of its domestic-law requirements for recognition and enforcement of final judgments of its courts. According to the United States, in some cases, this might lead to domestic-court review of ICSID awards, a process prohibited by Article 53.

Third, the United States noted that every ICSID ad hoc annulment committee that has squarely addressed Argentina's interpretation of Articles 53 and 54 has rejected it. The United States quoted the decision of the ad hoc committee in *Continental Casualty v. Argentine Republic*, which agreed with three other decisions rejecting Argentina's argument.[4]

In response, Argentina reiterated its position as set forth during the March 2010 Roundtable according to which it is necessary for investors to follow the formalities applicable to enforcement in Argentina of final judgments of Argentine courts, pursuant to Article 54 of the ICSID Convention. It made certain further observations about the ICSID Convention text, noting that (i) both Article 53 and 54 are in the same section of the ICSID Convention which refers to Recognition and Enforcement; and (ii) Article 54 does not say that it applies only after a failure to comply with Article 53. It also contended that Article 54(3) would be superfluous under the US interpretation because it would eliminate the distinction between enforcement of awards and execution of awards. Argentina also contended that its interpretation of Article 53 and 54 did not lessen the final and binding nature of awards as provided for by Article 53; it contended that Article 54, under its interpretation, strengthens the final and binding nature by granting the award the status of a final judgment, a stronger form of finality than is provided for under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Argentina also reaffirmed its view (as stated in

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4 See *Continental Casualty Co. v. Argentine Republic*, Decision on Argentina's Application for a Stay of Enforcement of the Award, (ICSID Case No. ARB/03/9) (Annulment Proceeding) ¶ 12 ("In this respect, the Committee notes that [Argentina contended] that in order for Continental to obtain payment of the Award, it would be necessary for Continental to follow the formalities applicable to enforcement in Argentina of final judgments of Argentine courts, pursuant to Article 54 of the ICSID Convention. The Committee notes that in three other cases, ad hoc committees have found that this position of Argentina is inconsistent with Argentina's obligation under Article 53 of the ICSID Convention to carry out without delay the provisions of the award without the need for enforcement action under Article 54 of the ICSID Convention. The Committee agrees with the conclusions in those earlier cases in respect of the obligation of the award debtor under Article 53 of the ICSID Convention.").

The three cases cited by the Continental Casualty committee were *Enron Corporation & Ponderosa Assets, L.P. v. Argentine Republic* (ICSID Case No. ARB/01/3), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award (Rule 54 of the ICSID Arbitration Rules), 7 October 2008 ("*Enron First Stay Decision*") ¶¶ 54-85; *Compañíá de Aguas del Aconquija S.A. and Vivendi Universal S.A. v. Argentine Republic* (ICSID Case No. ARB/97/3) (Annulment Proceeding), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award rendered on 20 August 2007 (Rule 54 of the ICSID Arbitration Rules), 4 November 2008 ("*Vivendi Stay Decision*") ¶¶ 31-37; and *Sempra Energy International v. Argentine Republic* (ICSID Case No. ARB/02/16), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, March 5, 2009 ("*Sempra First Stay Decision* ¶¶ 32-53.

March 2010) that the domestic laws in many countries implementing Article 54 are consistent with Argentina's interpretation, referring to the UK, Australia, New Zealand and US laws; Argentina indicated that notwithstanding the US objection, it would cite and interpret what Argentina considers to be relevant state practice, including US state practice.

Argentina contended that its interpretation would not create a loophole in the ICSID Convention. It stated that investors frequently have an option between ICSID or UNCITRAL arbitration and that they know the consequences of each choice. It also contended that Chile had complied with the award in *MTD Equity Sdn. Bhd. v. Chile (*ICSID Case No. ARB/01/7) using an Article 54 procedure and has not been criticized for that approach.

With regard to ICSID case law, Argentina contended that other ICSID cases were relevant beyond the four cited by the United States as squarely addressing the issue and rejecting Argentina's interpretation. It referred to three earlier ICSID decisions.[5] It asserted that those cases considered that the main issue was whether a state has incorporated its Article 54 obligation into domestic law and that this was because Article 54 relates to the procedure to be followed.

Argentina also referred to *Vivendi Stay Decision,* one of the four cases identified by the United States. Argentina noted that the *Vivendi* committee had stated that it did not "entirely agree" with Argentina which it took to mean that the committee substantially agreed with Argentina. It also noted that the *Vivendi* committee referred to Article 54 and required Argentina to state that it would comply with Article 54 as a condition for granting the stay of enforcement. Hence, in Argentina's view, the *Vivendi* committee found that Article 54 applies to ordinary compliance with ICSID awards, prior to and independent from any failure by the award debtor to comply with the award.

France expressed its full support of the US position with regard to the interpretation of Articles 53 and 54 of the ICSID Convention. It expressed concern that Argentina's position was delaying the payment of awards. Spain also agreed with the US position. Canada expressed hesitancy about speaking because it is not yet party to the ICSID Convention, but considered that it was qualified to speak because the process of adopting implementing legislation for the Convention is underway. It stated that it shares the United States' interpretation of Articles 53 and 54. It noted that the strength of the enforcement mechanism is one of the reasons why Canada wants to join ICSID and it would be concerned if the Argentine view were accepted.

South Africa noted that it is not an ICSID member and would not be able to discuss these issues in an ICSID forum. It first noted that although it was normal to consider the drafting history where states disagree about the interpretation of a treaty, here it would be important to remember that the specific drafting history of the ICSID Convention lessened the value of the *travaux préparatoires* as a tool of interpretation. There were no formal negotiations, but rather consultations by World Bank officials in capitals before they drafted a text. Second, however, South Africa noted that one of the purposes of the ICSID Convention was to avoid the weaknesses of UNCITRAL arbitration and in particular the potential for review of arbitration awards by domestic courts; this was the basis for deciding on the limited

[5] *See CMS Gas Transmission Company v. Argentine Republic* (ICSID Case No. ARB/01/8), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, September 1, 2006 ("CMS Stay Decision"); *MTD Equity Sdn. Bhd. and MTD Chile S.A. v. Republic of Chile* (ICSID Case No. ARB/01/7), Decision on the Respondent's Request for a Continued Stay of Execution, June 1, 2005 ("MTD Stay Decision") ¶ 37; *Azurix Corp. v. Argentine Republic* (ICSID Case No. ARB/01/12), Decision on the Argentine Republic's Request for a Continued Stay of Enforcement of the Award, December 28, 2007 ("Azurix Stay Decision").

annulment procedure within the ICSID context. South Africa indicated that after listening to Argentina, it wondered whether that purpose had been achieved; it was open to interpretation.

The Netherlands also expressed total support for the US and French position on the interpretation of Articles 53 and 54. It further considered that the interpretive principle of giving treaty provisions an *effet utile* was important; it considered that it was not the purpose of the ICSID Convention to impose a further level of review or delay after the award is final. Germany expressed the view that Article 53 is an absolute and unconditional requirement of compliance with the award by the respondent state. It considers that Article 54 is addressed to the other ICSID parties.

The UK indicated that, in response to Argentina's statement, it considers any suggestion that the UK domestic legislation implementing the ICSID Convention would allow the UK to avoid its obligations to comply with awards is incorrect; it indicated that it intended to provide a statement in writing to the Roundtable. Argentina clarified that its references to domestic implementing legislation were not meant to suggest that any national legislation allows for circumvention of the ICSID Convention.

Monitoring procedures

Participants noted that the monitoring role of the FOI Roundtable had been strengthened since the adoption of improved procedures for monitoring in 2008. They asked the Secretariat to make proposals for further improvement of procedures for consideration at the next Roundtable meeting.

Measures to mitigate the volatility of capital flows, exit from emergency schemes and protectionism

FOI Roundtable 13 welcomed Udaibir Das, Assistant Director of the Monetary and Capital Markets Department of the International Monetary Fund. In addition to establishing a broad macro-prudential tableau as background for the discussion (e.g. on the pronounced variations in economic recovery and in market perceptions of sovereign risk in different countries), Mr. Das' presentation also echoed and reaffirmed some of the themes that have emerged in OECD-hosted monitoring of investment measures and financial protectionism. These include:

- *Varying pace of exit*. Some countries are making concerted moves toward removing crisis-related schemes while others are maintaining schemes or even adding new ones. According to Mr. Das, this variation in exit policy stance stems from two sources: variations in the strength of recovery and variations in the strength of domestic banks.

- *Emergency measures in finance are not neutral in terms of their impacts on competitive conditions and the global allocation of capital*. Many of the banks that have received government support are often globally active; they are important institutional conduits for foreign direct investment and other international capital flows. Government support and, at times, involvement in the management of such banks, have a bearing on all aspects of these banks' operations and on competitive conditions in international banking. Mr. Das noted that, so far, evidence for this proposition is largely "anecdotal"; he pointed to the following features of emergency support programmes in the financial sector: they have, for the most part, been enacted at the national level with little consideration for ensuring a level playing field internationally; they have targeted "national strategic institutions"; they have involved fiscal commitments by advanced economies that emerging markets have not, for the time being, been able to match; some (notably bank rescues) have ring fenced assets in particular jurisdictions when a bank was found to be in danger of failure (indicating a lack of burden sharing among jurisdictions). Thus, on the whole, emergency measures in finance appear to have exacerbated fragmentation of international capital markets and created more pronounced *de facto* barriers among national markets.

- *The short term is becoming the long term*. For many macro-prudential measures, it is becoming increasingly difficult to distinguish between emergency measures and what is increasingly becoming business-as-usual. In a similar vein, it is getting increasingly difficult to differentiate between policies that result from "economic imperatives" and those that reflect an emerging "political economy" of support and protectionism.

Mr. Das called attention to a new IMF publication dealing with these issues: "Unwinding Financial Sector Interventions: Preconditions and Practical Considerations."[6]

Green growth and international investment law

Participants at the Roundtable considered background papers and discussed issues relating to green growth and investment law. They noted that green growth can be defined as "the means by which the current economy can make the transition to a sustainable economy. It involves promoting growth and development while reducing pollution and greenhouse gas emissions, minimising waste and inefficient use of natural resources, maintaining biodiversity, and strengthening energy security".[7]

The discussions took place in two phases. The first dealt with "green investment protectionism" and the second with interactions between international investment law and international environmental law.

Green investment protectionism

The OECD houses the world's only comprehensive international instruments for promoting openness to non-resident investors and non-discriminatory treatment of established, foreign controlled investors. Using the principles set forth in these instruments, green investment protectionism can be defined as environmental measures that *de jure* or *de facto*: place restrictions on the establishment of firms (that is, on setting up businesses) that are more onerous than those applied to resident investors in like circumstances; create barriers to outward investment; or treat foreign-controlled investors established in the country less favourably than domestic investors in like circumstances. These measures are to be considered protectionist unless they are genuinely needed to protect a country's essential security interests and public order.

During the discussions, Canada and the United States highlighted both the importance and the difficulty of determining the meaning of "in like circumstances" in specific policy contexts. The United States also pointed to what it considers to be the ambiguity and breadth of the term "public order" used in this definition.

OECD-based investment policy monitoring sheds light on the prevalence of green investment protectionism. In particular, the 42 countries adhering to the OECD investment instruments are subject to policy notification requirements. An investment measure, under these notification procedures, is any measure in any sector (including "green" sectors) or enacted for any purpose (including environmental protection) that discriminates against foreign or non-resident investors. In principle, measures targeting green sectors or operating through environmental policies should show up in these notifications.

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6 Available at: www.imf.org.

7 See *OECD and Green Growth* (2009), http://www.oecd.org/dataoecd/42/28/44273385.pdf.

In fact, no such notifications were found for the 42 countries adhering to the OECD investment instruments. Thus, OECD policy data suggest that green investment protectionism, as just defined, is not a major feature of the policy landscape, at least for now. None of the notified investment measures involved environmental subject matter (though some notifications related to environmentally-sensitive sectors such as power generation).

OECD notification and data collection processes also generate information about measures (including those targeting green sectors) that are permitted under the OECD instruments, but that nevertheless affect international investment (e.g. measures designed to protect national security and public monopolies and concessions). For the 42 countries making this type of notification, only two instances of environmentally-related measures of this type were found (for Israel and Switzerland). Both involved provision of environmental services by public monopolies.

FOI Roundtable participants were asked if their experiences confirmed the finding, suggested by OECD-based policy monitoring, that "green investment protectionism" is not prevalent. Brazil, the Netherlands and the United States stated that they agreed with this characterisation; however, the United States warned that risks of green protectionism were still present in some countries.

In contrast, in the course of policy monitoring of investment-related emergency measures taken in response to the crisis, several examples were found of green state aid policies (such as grants, loan guarantees or capital injections for individual firms). This information suggests that green aids of this type are not uncommon – at least 5 EU countries have had such policies reviewed by the Commission under the EU's state aid policies[8] and a non-exhaustive search of several non-EU government websites turned up similar policies. These programmes may not be "protectionist", using the non-discrimination criterion. They place all non-subsidised investors – domestic, foreign-controlled and non-resident – at competitive disadvantage relative to their subsidised counterparts. What is clear, however, is that these programmes have the potential for altering competitive processes in green sectors, including those operating through international investment. Thus, they are a source of concern for the international investment policy community

An additional concern is that these policies could be used to disguise protectionism. Green state aid policies lend themselves to disguising protectionism because of their dual nature: certain such policies appear necessary because of market failure, as Brazil pointed out, but, if poorly designed, such policies can pose serious risks to competition. The *OECD Interim Report of the Green Growth Strategy* notes this duality. It first cites the positive role that such policies can play in redressing market failure: "Without public intervention, the related market failures… can … delay or even prevent the development of clear technologies. Unleashing green innovation requires a policy response on several fronts… including but not limited to… direct subsidies to firms engaging in green activities." It then notes the need to design such policies to minimise the risks to competitive processes: "Market-friendly approaches that avoid 'picking winners' and encourage competitive selection of investments … are likely to be the most efficient." [9] Brazil stressed the importance of these findings of the *OECD Green Growth Strategy* and highlighted the importance of government policy in facilitating and promoting the dissemination of clean technologies.

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8 Information about these measures was collected while developing reports on recent investment policy developments to the G20 and FOI Roundtables. While looking into investment-related emergency measures, a number of green state aid measures were found. These were adopted by several EU countries as part of their fiscal stimulus programmes and reported to the European Commission under EU state aid disciplines.

9 See the Interim report on the Green Growth Strategy Chapter III "Preliminary results on key elements of the green growth toolkit", p. 44, http://www.oecd.org/dataoecd/42/46/45312720.pdf.

FOI Roundtable participants discussed whether the investment policy community should play a role in monitoring such policies. Some FOI Roundtable participants (the Netherlands and the United Kingdom) were reluctant to embark on a major information-gathering effort in the area of green state aids/subsidies. They noted the potential overlap with international trade policy monitoring and with other efforts, such as the European Commission's review of state aid policies. In the end, FOI Roundtable participants agreed that they would include green subsidies and aids in their ongoing monitoring processes, when these are called to the Roundtable's attention, either by Roundtable participants or by the Secretariat and when they have clear relevance for international investment.

Interaction between international investment law and international environmental law

Both international environmental law and international investment law have developed rapidly over the past several decades. In the international environmental field, nearly 3000 multilateral environmental agreements have been concluded, covering many environmental issues. There are also now more than 3000 international investment agreements. In addition to treaties, there is applicable customary international law in both areas. International environmental law and international investment law will increasingly interact and it will be important to balance their respective goals.

Effective international environmental law can undoubtedly support the goals of investment policy. To the extent that the international environmental framework creates appropriate incentives for governments and investors to protect the environment and to manage environmental risks, foreign investment will be more protective of the environment; accordingly, the investment policy community can pursue with greater confidence and credibility its agenda of investment protection, promotion and liberalisation. Moreover, the international environmental law regime can help to clarify what the international community sees as appropriate and necessary environmental policies. This can assist users of investment treaties to give more concrete meaning, in an environmental context, to investment law standards on indirect expropriation, fair and equitable treatment, the international minimum standard or national treatment.

Similarly, to the extent that it promotes open international investment and responsible business conduct, international investment law can provide important support to the attainment of environmental objectives. The 1997 Kyoto Protocol, which implements the 1992 UN Framework Convention on Climate Change, focuses specifically on increasing investment to lower carbon emissions. Most notably, the Clean Development Mechanism (CDM) allows developed countries or their entities to obtain emission credits by making low-carbon investments in developing countries. The *Interim Report on the OECD Green Growth Strategy* underscores the important role that investment will play in helping societies achieve their green growth goals.[10]

The *Interim Report on the OECD Green Growth Strategy* also points to the wide range of regulatory, tax and expenditure policies that are likely to play a role in green growth strategies.[11] Changes in environmental policies, including those shaped by international commitments, frequently impose costs on investors and may be the subject of investor-state arbitration. The background papers and discussion addressed a number of issues in this regard.

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10 See id.

11 See the Interim report on the Green Growth Strategy Chapter III "Preliminary results on key elements of the green growth toolkit" for a discussion of policies that play a role in national green growth strategies. http://www.oecd.org/dataoecd/42/46/45312720.pdf

Investment treaties generally require that investor-state arbitral tribunals apply international law (including applicable international environmental law) to resolve disputes within their jurisdiction

Participants noted that the applicable rules for resolving disputes under investment treaties[12] frequently expressly require the tribunal to apply "international law" as part of the applicable law. For example, the Energy Charter Treaty [art. 26(6)] provides that the Tribunal "shall decide the issues in dispute in accordance with this Treaty and applicable rules and principles of international law". The NAFTA as well as US and Chinese model bilateral investment treaties call for the application of international law as part of the applicable law. The ICSID Convention (art. 42) also generally requires the application of international law in ICSID cases involving investment treaty claims.

In addition to frequently requiring the application of international law, investment treaties are "more than usually dependent on their wider context" because they are relatively simple treaties.[13] They generally set forth the applicable general investment law standards such as for national treatment, fair and equitable treatment, or the international minimum standard of treatment. But they frequently say little about the consequences of breach (except for expropriation) or about issues such as the rules for attributing acts by various state-related entities to the state in question. For these questions and others, the parties and arbitrators must have recourse to other international law.[14] As stated by an ICSID Annulment Committee in *MTD v Chile*, the tribunal was required "to apply international law as a whole to the claim, and not the provisions of the BIT in isolation".[15]

Applicable international law in investor-state arbitration can include international environmental law (including both treaties and customary international law) that is applicable to the parties to the investment treaty. Determining the existence and content of such law can present challenges. Many environmental treaties and numerous soft law documents refer to important general principles and standards, such as the principle of sustainable development, the polluter-pays principle or the precautionary principle.[16] Some principles, such as the obligation not to cause transboundary environmental damage, have been recognised as part of customary international law.[17] However, most of these principles have an uncertain legal status both with regard to their content and their binding nature. For example, there is considerable debate about what, within the field of environmental law, constitutes "rules" or "principles"; what is "soft law"; and which environmental treaty law or principles have contributed to the development of customary international law. Japan noted that it is important to distinguish between soft law and actual public international law. More generally, the United States noted that third party participation in investor-state cases, notably through *amicus* briefs to which the parties have an opportunity to respond, can be an effective and cost-efficient way to provide important additional information to the tribunal about environmental issues.

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12 For convenience, the term investment treaties is used broadly herein to encompass the investment provisions in Free Trade Agreements as well as more specific treaties such as bilateral investment treaties.

13 Campbell McLachlan, Investment Treaties and General International Law, 57 ICLQ 361, 374 (April 2008).

14 Other applicable law frequently also includes national law for some issues "due to the private or commercial interests at the heart of" investment treaty jurisdiction. See Z. Douglas, The Hybrid Foundations of Investment Treaty Arbitration, 74 BYIL 151, 195 (2003).

15 *MTD Equity Sdn Bhd v Chile* (Decision on Annulment), ICSID Case No ARB/01/7 (ICSID 2007).

16 Other principles include the principle of preventive action, the principle of co-operation and the principle of common but differentiated responsibility. See Sands 2003, p. 231.

17 See ICJ, *Legality of the Threat of Use of Nuclear Weapons, Advisory Opinion*, [1996] ICJ Reports 241, para. 29. See also ICJ, *Case concerning Pulp Mills on the River Uruguay* (*Argentina v. Uruguay)* (20 April 2010) (recognizing Environmental Impact Assessments (EIA) as a practice that has attained customary international law status).

Investor-state tribunals have limited jurisdiction.

It is important to distinguish between the jurisdiction of a tribunal and the issue of the applicable law. International tribunals have limited jurisdiction – they can only resolve specified types of disputes.

In investment treaty cases, the jurisdiction of the arbitration tribunal requires the consent of the host state as expressed in the investment treaty (and the investor's consent). Jurisdictional clauses in investment treaties vary depending on the existence of, for example, "umbrella" clauses. However, for investor-state tribunals, jurisdiction is frequently limited to investment law claims (based for example on alleged violations of the national treatment, expropriation, fair and equitable treatment or international minimum treaty standards) or claims under investment contracts. Investor-state tribunals have no jurisdiction to resolve claims under international environmental treaties or law.

Rules for treaty interpretation can help to reconcile applicable international environmental law and investment law, and to resolve conflicts between them

The Vienna Convention on the Law of Treaties (VCLT) is the primary source of principles for interpreting treaties and their interaction. The rules for treaty interpretation can help to reconcile applicable international environmental law and investment law, and to resolve conflicts between them.

There are some general principles that are applied to select one norm over another in cases of conflict: later law prevails over earlier; more specific prevails over more general. But these principles are not always persuasive where norms are from different areas of the law (sometimes referred to as special regimes).

In cases of overlap from different areas of law, international law frequently seeks to integrate and to achieve a balance between the competing interests furthered by different regimes rather than applying only one to the detriment of the other.

Ultimately, the issues raised by overlapping and conflicting norms from different regimes are, to a substantial degree, ones of interpretation and the tribunal has a critical role. Choices about the institutions for dispute resolution will therefore have material consequences for the resolution of conflicts of norms across regimes.

Need for attention to the treatment of international environmental law

As governments pursue more active environmental policies that involve international commitments to green growth, international environmental law will play an increased role in framing national policies. This new wave of environmental policy measures will also take place in a world in which investment arbitration is regularly used.

The international environmental law context may be relevant in different ways in investor-state arbitration cases. For example, international environmental law may make the policy reasons behind a particular action or the imposition of costs on investors more understandable or more legitimate. In some cases, a more intensive legal analysis by the tribunal of the interaction between norms may be required.

Given that governments have frequently agreed in their investment treaties to submit to arbitration, a practical question remains: what can governments do if they are concerned with the way arbitral tribunals weigh international environmental and investment interests?

Participants noted that one approach is to try to address the matter in the relevant treaties. A review of investment treaties containing environmental references shows varying approaches to environmental issues. Except in exceptional areas, international law does not recognise a hierarchy of norms. At present, for most countries, investment treaties themselves rarely provide express guidance as to how this accommodation of environmental and investment interests is to be achieved.

Participants recognised Canada and the United States as leaders in efforts to address environmental issues expressly in their investment treaties, through a variety of provisions. Japan and New Zealand also have significant experience in this area. As noted by the United States, treaty provisions reflect the views of all parties so there are variations within national practice. Overall, despite a trend towards greater attention, treaty texts on the environment remain very limited overall: only about 6 per cent of the treaties in a sample of more than 1500 bilateral investment treaties contain texts relating to the environment. Several participants suggested that this treaty experience with environmental provisions could usefully be analysed in more detail.

Participants underlined, however, that the treaty issues extend beyond specific environment provisions. It was noted in particular that general treaty provisions, such as the frequent limitation of the national treatment obligation to cases involving “like circumstances”, apply to environmental issues as well as to other issues. For example, the determination with regard to the existence of like circumstances can allow consideration of the regulatory context, which could include, for example, the need to implement an international environmental commitment. Germany noted that there is debate about the usefulness of environment-specific clauses in investment treaties especially where the goal is to treat environmental goals in the same manner as other important public policy goals; it noted that the analysis in the background papers is relevant to other areas of public policy in addition to environmental policy and welcomed a debate about how to provide sufficient guidance to tribunals. The Chair stated that in principle it is well established that public policy concerns and in particular environmental concerns must be integrated into the interpretation of investment treaties.

Participants noted that obstacles exist to fully addressing environmental issues in treaties. In addition to the need to achieve domestic consensus on the issues, achieving change through treaty drafting is difficult because of the large number of treaties and the need to renegotiate existing treaties.

In addition to treaty practice, delegations discussed dispute settlement outcomes relating to international environmental commitments. It was noted that the recent *Chemtura v. Canada* case involved consideration of Canada’s international environmental law obligations in finding that Canada had acted in good faith with regard to an investor.[18] France noted that attention to dispute resolution outcomes could be particularly important for states whose investment agreements do not contain specific environmental clauses.

South Africa noted issues about the role of arbitrators in investor-state cases, contrasting a self-contained approach in which the arbitrators apply only the rules in the investment treaty, an approach in which they apply a vaguer concept of international investment law and an approach in which they apply applicable international law generally. It noted in particular that where international law applies it would mean that all of international law, including any applicable peremptory norms, would be applicable. It was noted in this context that arbitrators must apply the applicable investment treaty which gives them jurisdiction and that many such treaties expressly require the arbitrators to apply “international law” as part of the applicable law. This broad scope of potentially applicable law can raise concerns including (i) the capacity of the arbitrators to handle complex issues of law, particularly in the area of environmental law with its heavy scientific content; and (ii) the costs necessary to resolve such issues and the impact on access to justice for investors and state budgets.

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[18] *Chemtura Corp. v. Canada*, (NAFTA/UNCITRAL), Award (2 August 2010).

Several delegations underlined that the role of the arbitrators is to apply the law and to interpret the relevant agreements. The arbitrators will generally have a substantial interpretive role although it will depend on the treaty provisions at issue. The importance of international dispute resolution warrants attention to its processes and outcomes with regard to the interaction between international environmental commitments and investment law. It was noted that the increased transparency of investor-state dispute resolution will facilitate this scrutiny.

For comparative purposes, the discussion also addressed dispute resolution under environmental treaties. Participants noted that current procedures under international environmental law generally rely primarily on a mix of cooperative, "peer review" mechanisms and soft dispute resolution mechanisms (such as conciliation). The soft "non-compliance" procedures provided for by several multilateral environmental agreements (MEAs) create a kind of peer review process that can resemble the investment policy reviews undertaken in OECD-based investment dialogue. Many MEAs also provide for conciliation and for the possibility of binding arbitration where the parties so agree, but these facilities are rarely used. The UN Convention on the Law of the Sea is exceptional in providing for compulsory, binding arbitration. The United States noted that international environmental law could evolve in some areas towards more use of compulsory procedures or towards more active use of dispute resolution.

Participants noted that compulsory dispute settlement procedures created under international investment agreements are actively used by investors and use is growing. For instance, new cases registered at the International Centre for the Settlement of Investment Disputes (ICSID) rose from an average of less than one per year over the 1972-1980 period to almost 23 per year over the 2001-2009 period. As of December 31, 2009, a total of 305 ICSID cases had been registered. Thus, relative to international environmental law, international investment law is notable for the active use of compulsory dispute resolution.

The Chair noted that the issues are relatively new, but that they now increasingly arise both in the treaty and in the dispute resolution context. Participants agreed that further attention was warranted in 2011 both to green growth and investment, and to investor-state dispute settlement.