



14TH ROUNDTABLE ON FREEDOM OF INVESTMENT

22 March 2011 – Paris, France

Summary of Roundtable discussions by the OECD Secretariat

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The “Freedom of Investment” (FOI) process is a forum for inter-governmental dialogue on international investment policy that brings together the 34 OECD members, the 8 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, transparent and non-discriminatory policy frameworks for international investment and capital movements and to address concerns that international investment may raise. 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 14, held on 22 March 2011. In addition to OECD members, the European Commission, and the European Free Trade Association (EFTA), Argentina, Brazil, Colombia, Estonia, India, Malaysia, Morocco, Romania, and South Africa participated in this Roundtable.

The discussions at Roundtable 14 included, first, a *tour d’horizon* of recent developments. The second part of the discussions focused on green growth, investment policy and on the interaction between international investment law and international environmental law.²

Tour d’horizon

Recent investment policy developments

Some Roundtable participants noted that the financial and economic crisis has revived governments’ reflection on their approach to international investment, without questioning however their stance on openness towards foreign investment. The United Kingdom reported that its investment policy white paper published in February 2011³ confirms the UK’s openness to foreign investment, regardless of the origin of the investors, and that the UK increased their efforts to encourage and attract overseas investment. Australia reported that it had observed heightened sensitivities regarding foreign investments stemming from the turbulence triggered by the financial and economic crisis. A change in the pattern of foreign investment in Australia, especially with respect to its origin, has attracted public attention, leading to a response by the Government. A policy statement, issued in January 2011, clarifies Australia’s policy.⁴

Austria reported growing, but not yet fully articulated, public concerns regarding traditional approaches to international investment, triggered by the recent crisis and advocated a “precautionary principle” in this policy area. Australia echoed the need to cautiously manage public concerns, referring to the example of public pressure that followed from the perception of a sharp increase of residential real estate acquisitions by foreigners following Australia’s opening up of this sector. Although this perception was not backed by data, the Australian government cancelled the liberalisation to ease political pressure. Similar pressure seems to have built up more recently in relation to foreign acquisitions of rural land.

¹ The adherents to the Declaration include all 34 OECD member countries, and 8 non-member countries: Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.

² Accounts of discussions at earlier FOI Roundtables are available on the Secretariat website dedicated to the FOI process [www.oecd.org/daf/investment/foi].

³ “*Trade and Investment for Growth*”, February 2011.

⁴ “Australia’s Foreign Investment Policy – January 2011”, FIRB website.

Developments specific to countries or regions

Canada informed Roundtable participants about developments related to a telecommunications services provider in Canada that has direct and indirect investment from a foreign-owned telecommunications services provider. Canada was limited in the amount of information it could provide given that the investment was the subject of domestic legal proceedings. The *Telecommunications Act* in Canada requires that telecommunications common carriers be majority-owned and controlled by Canadians. In 2009, the Governor-in-Council determined that the telecommunications services provider met the ownership and control requirements of the Act and authorized it to begin providing telecommunications services. On 4 February 2011, the Federal Court of Canada overturned the Governor-in-Council's decision as it found that the decision was based, in part, on certain considerations not provided for in the Act. The Canadian Government appealed this decision on 18 February 2011 to the Federal Court of Appeal and a hearing in the case is scheduled on 18 May 2011.⁵ In the meantime, consultations on a further liberalisation of the telecommunication sector – which were launched in mid-2010 – continue, especially in light of planned spectrum auctions for the end of 2011 and in 2012. Canada reminded Roundtable participants that it had amended the foreign ownership restrictions on telecommunication services in July 2010 to exempt satellites.

The **European Commission** gave Roundtable participants further information about the context of recent public statements by Industry Commissioner Antonio Tajani and Internal Market Commissioner Michel Barnier. The Commissioners suggested that Europe should consider establishing “an authority tasked with examining foreign investments” that would evaluate whether takeovers of European companies by foreign companies and state-owned enterprises constitute a threat. The European Commission clarified that these statements made by individual Commissioners were not statements by the European Commission. At the time of the Roundtable, the European Commission had in fact not yet taken an official position on the matter and the European Commission's policy position continues to be of openness to investment.

Brazil reported on the effect that the Tax on Financial Transactions (IOF), levied on non-residents' investment in fixed-income securities, had to reduce the strong inflow of short-term capital, i.e. investments for periods up to a year. Brazil had increased the tax, which was introduced in October 2009 in the wake of the financial and economic crisis, in two steps to currently 6%. Brazil explained that the IOF was introduced as a macro-prudential measure to limit the effects of the crisis on Brazil's economy, including contributions of short-term portfolio inflows that contributed to inflationary pressures and to rapid appreciation of the Real. A time-profile that Brazil presented to Roundtable participants showed that between September 2010 and January 2011, short-term fixed income investments declined from USD 9.3 billion to around USD 0.3 billion. Brazil thus considers that the increase of the IOF achieved its intended goal. Brazil also pointed out that the tax's collateral effect on long-term investment in Brazil was minimal, given that the 6% tax is levied only on short-term portfolio investments, while a 2% tax applies to individual equity, initial public offerings and venture capital, and FDI is not subject to the tax. Brazil also pointed out that the tax is non-discriminatory and, as a provisional measure, will only remain in place as long as necessary.

Investment treaty making

Roundtable participants noted a sustained activity in the negotiation and conclusion of investment treaties and heard information on the recently concluded *Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) Investment Protocol* and the trilateral *China/Japan/Korea investment agreement* that was still under negotiation at the time of the Roundtable.

⁵ The hearing took place as scheduled.

Australia and New Zealand explained that the *Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) Investment Protocol*, which was signed on 16 February 2011 and is expected to enter into force in the second half of 2011 was the latest effort in a comprehensive endeavour to establish a single economic market between the two countries. Regional integration and liberalisation arrangements already provided for the freedom of movement of goods, services and labour. The absence of capital flows has been a gap in the relationship, which the Investment Protocol now fills. The Investment protocol contains comprehensive obligations and protections which New Zealand considers relatively standard of modern investment treaties and provisions on market access. Among other issues, the ANZCERTA Investment Protocol sets a higher threshold for investment allowed without a screening process (NZD 477 million, up from NZD 100 million, for Australian investment in New Zealand, and AUD 1.005 billion, up from AUD 231 million, for New Zealand investments in Australia).

Australia noted, that the Protocol constituted a step towards liberalisation and that it endeavours to extend this liberalisation to more countries. Canada reminded Roundtable participants that the conclusion of NAFTA in the mid-1990 led Canada into a situation where Canada's increase of the threshold for the foreign investment reviews for NAFTA parties Mexico and the United States resulted in a conflict with obligations under OECD Investment Instruments. At the time, the OECD promptly called upon Canada to honour its commitments under these instruments, which led Canada to progressively raise its review threshold for all OECD members and in fact all WTO members. Participants agreed to review progress made by Australia and New Zealand in this context in due course.

Australia stressed that the foreign investment screening procedures that it carried out were fairly neutral: The screening criteria were merely a negative test, thus putting the onus on the government to argue against certain investment projects. Australia deems that this neutral nature of the reviews is confirmed by the fact that in the past ten years, only one investment proposal has been rejected, while thousands of projects moved forward, of which a small minority has had conditions attached that typically sought to ensure that market conditions were maintained. New Zealand also reminded Roundtable participants that it had made administrative and regulatory changes to reduce the compliance costs of its screening regime in 2010, leading to a reduction of the average processing time of applications from 63 to 38 days over the last year.

Japan and Korea described the ongoing negotiations of the China-Japan-Korea trilateral investment treaty. Negotiations of the treaty began in March 2007 and are now in the final phase; 12 rounds of negotiations took place in November 2010 alone. In light of the current negotiations, neither Japan nor Korea were able to provide details about the arrangements likely to be included in the treaty, but both countries expect better conditions for investment among the three countries. Currently, China and Japan have a bilateral investment agreement that dates back to 1989 and that is now, in Japan's view, rather obsolete, as it contains neither clauses on pre-establishment nor liberalisation. In contrast, Japan qualified the current BIT with Korea, which was concluded in 2003, as a high-standard agreement that includes liberalisation clauses. Japan stated that the trilateral agreement with China and Korea corresponded rather to this more modern treaty. Relationships between China and Korea are subject to a BIT which was updated in 2007 and which features a slightly higher level of protection. However, Korea hopes that the trilateral treaty will reinforce the level of investor protection. Further information on the treaty will be provided to Roundtable participants at one of its upcoming meetings.

The United States responded to a question addressed to all Roundtable participants on whether or not recent IMF staff discussions and the G20 Seoul Summit Leaders' Declaration with respect to usefulness of capital controls under certain circumstances were likely to influence treaty writing practice for investment agreements. For the United States, these agreements – both FTAs with investment chapters and BITs – have historically featured an unqualified clause on free transfers of capital. Later models and investment agreements also include a prudential exception, but this is not directed at capital controls. The United

States reported that a considerable variety of views have been expressed in the context of the ongoing review of the US Model BIT, with some expressing a desire for a provision affording the ability for governments to impose capital controls in times of balance of payments difficulties.

Green Growth and International Investment

Discussion of the interaction of international investment agreements and environmental policy

Mr. Christophe Douaire de Bondy, Deputy Director and Counsel, Trade Law Bureau, Government of Canada, addressed, from a practitioner's perspective, the interaction of international investment agreements (IIAs) and international environmental obligations. Mr. Bondy spoke as an expert and in his personal capacity.

Mr. Bondy's presentation touched on Canada's experience in four interrelated areas: (i) prior review of new government measures, including proposed legislative and regulatory changes in the environmental sector, for compliance with investment law obligations; (ii) environmental clauses in Canada's IIAs, including in investment chapters of free trade agreements (FTAs); (iii) continuing State oversight over the interpretation of Canada's IIAs; and (iv) investor-State disputes relating to environmental measures and international environmental law.

He noted that the four topics are substantially intertwined in the practice of Canada's Trade Law Bureau. The Trade Law Bureau (i) provides advice regarding the conformity of proposed Canadian government measures with its international trade and investment obligations; (ii) acts as counsel in the negotiation of international trade and investment agreements; and (iii) represents Canada (as either a disputing or non-disputing party) in trade and investment disputes.

Prior review of new proposed environmental legislation or regulations from an investment law perspective

Mr. Bondy stated that under the federal Management Framework for International Trade Litigation, Canadian government departments have the responsibility to minimize and, where possible, avoid the risk of trade and investment disputes. This includes ensuring that Ministers consider how a new proposed measure conforms with Canada's international trade and investment obligations. In developing a risk assessment for a proposed measure, departments and agencies are to consult the Trade Policy branch at the Department of Foreign Affairs and International Trade (DFAIT) and the Trade Law Bureau.

DFAIT is in turn responsible for ensuring that Ministers are aware of any litigation risks associated with a proposal to negotiate a new or modified trade or investment agreement, including the potential impact on existing measures.

In practice the Trade Law Bureau has frequent dealings with government departments whose work is functionally linked with international investment. Depending on the importance of the measure and the initial assessment of risk, its input can involve preliminary views or more formal written opinions. It can be asked to advise how a measure might be designed to minimize the risk of infringement of one of Canada's international investment obligations. Its advice extends to measures with an environmental component, examined in the light of the specific protections granted under Canada's investment treaties.

Canada's experience with environmental clauses in investment treaties and investment chapters of FTAs

While the investment treaty language Canada has employed has been refined in various ways since the early 1990s, Mr Bondy noted that the intention throughout has been the same: to ensure that the

benefits flowing from increased foreign investment are not achieved at the expense of environmental protection.

In the NAFTA (1994) the issue was addressed in various ways:

- the preamble of the NAFTA notes that the goals of the Agreement are to be consistent with State policy in favour of environmental protection and sustainable development.
- the investment chapter itself contains specific references to environmental protection. For instance:
 - Article 1114 (1) effectively confirms that except in cases where an environmental measure is discriminatory, violates the international customary minimum standard of treatment, or involves a straight and uncompensated expropriation of property, environmental regulation should not lead to a violation of any substantive protections under Chapter Eleven.
 - Article 1106 (Performance Requirements) confirms, among other things, that environmental requirements do not in themselves constitute performance requirements.
- Article 104 further expressly provides that specified environmental undertakings will prevail over the provisions of the NAFTA generally.
- the NAFTA was also accompanied by side-agreements on both labour and environmental cooperation (the North American Agreement on Environmental Cooperation, or NAAEC).

Following the NAFTA, Canada introduced further refinements to its standard treaty language relating to the environment, while retaining this basic framework.

- Notably, Canada has added language confirming its longstanding understanding that environmental regulation cannot constitute an indirect expropriation.

Mr. Bondy noted that the point of this language is not to reduce existing protections against indirect expropriation, but rather to confirm the police powers of the State as recognised under customary international law and in such decisions as *Methanex Corp. v. United States*. The language is included for greater certainty and clarity.

Mr. Bondy underlined that it is critical to also consider the substantive provisions granting protections to investors. In this regard, Canada seeks to strike the right balance, notably by avoiding indeterminate or vague obligations that might possibly be read in conflict with increased environmental protection or other important State goals.

The point overall is to provide investor protection while confirming that international investment law does not conflict with the State's ability to regulate in the normal course, including in order to protect the environment.

The State's role in the ongoing interpretation and application of its existing investment treaties

Mr. Bondy indicated that Canada has inserted two different mechanisms into its international investment agreements to ensure a continuing State role in their interpretation: a right to intervene on treaty interpretation issues; and a right to issue, jointly with the other treaty parties, a binding interpretive

statement about the treaty. It is important for governments to have ongoing input into the interpretation of IIAs because they are important instruments of State policy.

a) Right to intervene on issues of interpretation of the treaty

Mr. Bondy noted that Canada's investment treaties generally ensure that each State that is a Party to the investment treaty can make submissions on a point of interpretation in investor-state cases brought under that IIA regardless of whether the State is a disputing party. In order to be able to exercise this right, States receive copies of the evidence and argument submitted in each dispute brought under the IIA.

Submissions from non-disputing States help ensure that investment tribunals respect the treaty Parties' understanding of their obligations. Non-disputing Parties cannot comment on the facts of a case. But they can help ensure that the tribunal applies the agreement to these facts in manner consistent with the Parties' intent.

Mr. Bondy also stated that concurrent submissions of the treaty Parties are particularly compelling in light of Article 31 of the Vienna Convention on the Law of Treaties (VCLT), which is accepted as an expression of customary international law. According to Article 31(3) VCLT, subsequent State agreement regarding the proper interpretation of a treaty to which they are party, or subsequent State practice, shall be taken into account by a tribunal when determining the meaning of a treaty.

The three NAFTA Parties have made over 60 separate submissions of this type.

b) Right jointly to issue a binding interpretive statement

Canada's IIAs also permit the State Parties collectively to issue a binding Note of Interpretation. The best-known example is the NAFTA Free Trade Commission Note of Interpretation of 2001. The 2001 Note confirmed that there is no default provision in favour of confidentiality in Chapter Eleven. This was a statement in favour of transparency in response to concerns by members of civil society that Chapter Eleven proceedings were not sufficiently publicized, and in response to arguments on the part of certain claimants to the effect that the proceedings should remain confidential.

The 2001 Note of Interpretation also confirmed that Article 1105 of NAFTA upholds the Minimum Standard of Treatment (MST) of aliens at customary international law.⁶

Defending claims addressing the interaction between international investment obligations and international environmental obligations

Mr. Bondy noted that several NAFTA cases have concerned measures relating to the environment, but underlined that this does not mean that environmental protection and investment protection have become competing norms. He noted that some have expressed concerns that that protection offered to foreign investors under these agreements would reduce government's right to regulate, concerns that may have been exacerbated by the fact that several early NAFTA cases related to the environment. However, he noted that from his perspective as government counsel in NAFTA ISDS cases, these fears are not borne out.

⁶ NAFTA Article 1105(1) provides that "[e]ach Party shall accord to investments of investors of another Party treatment in accordance with international law, including fair and equitable treatment and full protection and security".

Mr. Bondy noted that *Chemtura* exemplifies the complex circumstances that can lead to an investor claim and the challenges of explaining to a tribunal why a government acted as it did in particular circumstances. International environmental law can play a significant role in this context.

Mr. Bondy first outlined the situation with regard to lindane at the time of the government measure at issue in *Chemtura*. Chemtura had for many years sold lindane-based pesticides in Canada. By the 1970s, lindane had come under increasing scrutiny as a persistent organic pollutant and its uses had been progressively limited. However, as of the late 1990s, lindane was still widely used in growing canola, one of Canada's most important crops.

Until the late 1990s, the United States had tolerated the import of lindane-treated canola seeds, but in early 1998, it changed its position. Exports of Canadian lindane-treated canola to the U.S. were at risk. Canadian canola farmers decided to organize a voluntary, three-year withdrawal of lindane use. They hoped to stave off enforcement action by the U.S., while allowing a smooth transition to replacement products for lindane. Such products had been proposed by pesticide manufacturers, but had not yet been approved.

To manage the voluntary industry withdrawal, Canadian canola farmers needed the buy-in of the four companies that sold lindane for use on canola. They also needed buy-in from Canada's Pest Management Regulatory Agency (PMRA) to help manage the phase-out from lindane and to review lindane replacements within that three-year period. As of the fall of 1998, Canadian canola farmers organized the voluntary withdrawal. PMRA agreed to support it provided it was voluntary. PMRA also committed to review replacements but without promising approval.

In parallel, Canada had independently undertaken to review lindane by signing the Aarhus Protocol to the UNECE Convention on Long-Range Transboundary Pollution (LRTAP) in the summer of 1998. The Protocol included a list of 'restricted' substances – national review of their remaining registered uses was required within two years.

Mr. Bondy noted that PMRA's scientific review of lindane also coincided with its general program to re-evaluate over 400 long-standing pesticide registrations for consistency with current standards. In light of the substantial backlog of re-evaluations to be performed, the PMRA set in place generic review protocols. Applying these standards, PMRA scientists determined that remaining registered uses of lindane did not meet current Canadian safety standards. PMRA advised the registrants that the registrations for lindane would be suspended subject to a phase-out period for remaining product; this roughly coincided with the end of the voluntary withdrawal.

In its claims based on NAFTA Article 1105 (the minimum standard of treatment) and Article 1110 (expropriation), Chemtura argued that the PMRA's decision to suspend lindane had been motivated by improper considerations. It alleged that the motivation was the desire to support Canada's canola farmers and that the decision was a foregone conclusion without a sound scientific basis.

It is of great importance for counsel to ensure that the tribunal faced with such claims understands the motivation of a particular measure. A government cannot rely on a bald assertion of environmental motivations; it needs to demonstrate precisely what environmental or other good-faith regulatory intent and context inspired the measure, and the non-discriminatory manner in which it was implemented. Canada needed to take special care to explain to the *Chemtura* tribunal (a) the specific circumstances surrounding lindane (reduced usage since 1970s, mounting concerns); (b) the general context of the re-evaluation and PMRA's related process of reviewing old chemicals; (c) the timing of PMRA's decision to re-evaluate lindane and Canada's Aarhus commitment; and (d) the scientific steps applied in re-evaluating lindane. It

was also important to confirm the integrity of PMRA including through evidence from senior PMRA management that no order was given to reach any specific conclusion re lindane.

In essence, it was important to give comfort to the tribunal that the Canadian government decision concerning lindane was indeed environmentally motivated, and did not constitute unfair treatment. Mr Bondy noted that Canada, in presenting evidence of the motives inspiring a particular measure, is not asking arbitral tribunals to second-guess the policy rationale or indeed the science behind a measure. Canada instead seeks to demonstrate that the measure was adopted with the intention of protecting the environment, and that the decision was not tainted by some fundamental unfairness.

With regard to the Minimum Standard of Treatment claim, Canada stressed that Chemtura had had the opportunity to make submissions in the context of the review of lindane; the decision had been taken consistent with the PMRA's standard procedure; and the outcome had not been a foregone conclusion.

The tribunal expressly noted that it had no doubt the decision to review lindane and the conclusions reached by PMRA were driven by proper (environmental) considerations. Importantly, the tribunal agreed that it is not the role of an investor-state tribunal to second-guess the science-based decision-making of specialized domestic regulators.

The expropriation claim was rejected on the ground that there had not been a "substantial taking" of Chemtura's property (necessary to a finding of indirect expropriation). The tribunal further noted, however, that even if the tribunal had found the suspension of lindane to be an indirect expropriation, Canada's measure would in any event have been excused as a legitimate exercise of its police power to protect human health and the environment, cancelling out that finding.

Mr. Bondy noted that Canada's prior international environmental law commitment under the Aarhus Protocol to the LRTAP Convention -- to review its remaining registered uses of the pesticide lindane -- provided an important response to the allegation that this scientific review was launched for trade reasons, rather than to address environmental concerns.

Mr Bondy noted that in cases applying the standards in Canada's international investment agreements, where tribunals have found on the facts that a measure was environmentally motivated, they have found no conflict between the measure and Canada's investment law obligations. Where by contrast tribunals have considered that the real motivation of a measure was protectionism, they have found a violation of one or more substantive protections, notably that of national treatment. Mr. Bondy noted that *Chemtura* was in this sense consistent with previous NAFTA decisions, while providing important additional clarity regarding the limited role of investment treaty tribunals vis-à-vis State environmental and other regulatory decision-making.

Discussion

The Chair thanked Mr. Bondy for a very interesting and informative presentation on an important issue. The Chair noted that the inclusion of specific environmental clauses in investment treaties can provide for greater certainty and predictability, and can reduce concerns in the public domain including about the alleged one-sidedness of the system.

Canada noted that it welcomed the *Chemtura* decision not only because the challenged policy was based on rigorous scientific analysis and applied in the public interest, but also because losing in such a case would have generated great public concerns. It noted that all of the case documentation is on the DFAIT website.

The Chair referred to his participation in a recent Austrian Parliamentary hearing. He noted that concerns were expressed in the Parliament about the mere existence of claims such as those in *Chemtura*, notwithstanding that the government prevailed. He noted that the *Chemtura* outcome was very welcome and that a different result would have affected the debate in Austria.

The European Commission noted that the interaction between investment and environmental policy is complex. The July 2010 European Commission policy statement on international investment policy underlines the importance of consistency between different EU policies. While the EU does not yet have any EU-level international investment agreements, it has important environmental legislation which seeks to maintain a high level of protection. The Commission is not aware of any case challenging non-discriminatory regulation in the EU. In the debate on investment policy with the European Parliament, the question of the relationship between investment policy and other EU policies (both external and internal) has been raised; in this context, the European Commission has underlined the need for consistency with the other policies and the need to strike a fair balance between the different interests at stake. The European Commission noted that investment agreements serve primarily to protect investments and that there is also a question of the correct instruments to achieve a certain number of policy goals. The European Commission agreed with the Chair and Canada that the outcome in *Chemtura* was welcome and re-emphasised that consistency with other policies is key.

Finland agreed with the European Commission that investment treaties are primarily made to protect investments. It also agreed with Canada that it is possible that some environmental measures may in fact not be motivated by environmental concerns but rather are disguised protectionism. It noted that stakeholders frequently raise two points. First, some stakeholders, such as environmental NGOs, frequently ask whether investment agreements can be used to promote environmental protection. The Finnish delegate considered that this would be difficult because government decisions on environmental issues, such as adherence to an environmental treaty, cannot be influenced by BITs. Moreover, even if an investment agreement leaves wide policy space for environmental measures, that does not mean that a government will actually use it if it does not want to promote environmental objectives.

Mr. Bondy noted that he was personally undecided about whether IIAs could be used to promote environmental objectives, but that there are often at least so-called non-derogation clauses. In such clauses, which are useful to at least avoid detrimental effects on environmental policy, the parties agree not to weaken environmental or other public policies in order to promote trade or investment.

Finland noted that a second important question is whether investment agreements limit the ability of governments to regulate. Finland considers that European treaties, and especially Finnish treaties, leave room for the government to regulate in the environmental area, but they do limit discrimination. He further noted that Professor Hamamoto's comment in the context of the FOI electronic consultation on Harnessing Freedom of Investment for Green Growth shows that investor-state dispute settlement (ISDS) tribunals have recognised environmental objectives. The question is more one of procedure: so as long as policies are developed in a transparent way, and investors have time to give input, to adapt and to comply, there should not be a problem. He noted that the Roundtable could in the future look into the WTO Technical Barriers to Trade (TBT) agreement, which provides for the possibility of foreigners being involved in the preparatory phase for legislation and which has been followed in the EU.

The Secretariat noted that Mr. Bondy had underlined the importance of protectionist versus legitimate governmental motives in evaluating a measure under the investment law standards in Canada's treaties. It asked Mr. Bondy about how he would address cases where governmental intent may be mixed, i.e., where some constituencies in the government may be focussed on the environmental purposes while others may be focussed on the economic consequences. In the *Chemtura* case, Canada had demonstrated to the tribunal's satisfaction that the scientific process at issue was insulated from outside pressures, but other

cases could involve a less discrete or less scientific process. Mr Bondy indicated that it would depend primarily on the facts and that a specific example would be necessary.

South Africa stated that it was very honoured to participate in the Roundtable and noted that it will be hosting the 17th Conference of the States Parties to the UN Climate Change Convention at the end of 2011. South Africa has reviewed its IIA framework over the last two years and Cabinet and Parliament have now given some authorisations with regard to the direction to take. One issue has been review of the model BIT. South Africa noted that the Roundtable discussion is topical because a big issue to emerge from this process has been the environment. When South Africa started its review, IIAs and environmental issues were placed in different streams. But the environment has now become a mainstream issue. SA's position in relation to policy space has also changed in light of recent experience. South Africa considers that Mr. Bondy's view that IIAs are instruments of state policy is important point.

South Africa has agreed to many international agreements that it has not yet incorporated into national law. This creates a more complex regulatory environment which may lead investors to challenge the incorporation of these international agreements into domestic law. Investment treaties should give more direction on these issues. They should also require ongoing dialogue and consultation, and provide a very clear statement of how the issue should be handled.

Switzerland asked how the Canadian government handled communication issues during the *Chemtura* case, including with regard to Parliament, and whether there is a policy. Canada noted that when litigation is ongoing, not much can be said. In Parliamentary sessions, especially when an agreement is brought to Parliament for approval to ratify, there are often questions about the impact of an agreement on environmental policy.

Poland echoed the European Commission view that the relationship between environmental law and investment law is complex, and that it is necessary to find the right way to achieve consistency with different policies. It further agreed with Finland that IIAs have a limited role, primarily to promote investment. Poland also agreed with South Africa about preserving the right to regulate in concluding IIAs and preserving the ability to bring in new non-discriminatory measures. It is important to achieve more clarity on the issue of environmental clauses and exemptions.

The Netherlands agreed generally with Finland, but would go a little further. In quantitative terms, Prof. Hamamoto's comment in the FOI electronic consultation lists only six cases. It is not clear if this is an exhaustive list of cases, but it suggests that the issue is not a huge problem. The Netherlands noted that there had been emphasis on NAFTA in the background papers and discussion, and that this represents only a limited area. To balance the picture, there should be a presentation involving an EU BIT. The Netherlands suggested that European BITs have the advantage of open language and standard provisions, like in EU law, on public policy and protection of health, etc., that allow the tribunal to reach a real balance, and tribunals have done so, as shown by the limited disputes that do exist. The involvement of the NAFTA Parties in disputes through post-treaty interpretive input to tribunals limits the power of the tribunal to balance. Such intervention pushes the disputes in a specific direction unlike under European BITs.

The Chair asked for volunteers for a presentation of an environmental case involving an European BIT.

Canada stated that it would very much welcome a presentation on a European BIT case. However, it noted that the European Commission had indicated that it was not aware of challenges. Canada was not, however, seeking in the present context to compare investment treaty models and their success in reaching a balance. Canada agreed with the Netherlands that the ability to regulate in the public interest did not

appear to be a serious problem based on the cases. Nonetheless, South Africa has a valid point that IIAs are not meant to constrain the right of governments to regulate in the public interest. Language in the treaty to clarify this principle brings greater certainty regarding its proper interpretation.

Finland noted that in many cases, problems arise from government contracts and concessions with private investors, which are incorporated by clauses in BITs such as umbrella clauses. This element could be the subject of further consideration. Mr. Bondy agreed that problems can arise from government contracts and concessions with private investors containing standstill clauses which are incorporated by clauses in BITs such as umbrella clauses, and noted that Canadian IIAs do not contain umbrella clauses.

France noted that some consider that environmental clauses in investment treaties can clarify meaning and send a reassuring public message, but questioned whether clarity is in fact achieved as the Chair suggested. France has not added environmental clauses because of concerns that the other treaty party might abuse such clauses for protectionist purposes. Such clauses always leave a margin of maneuver, which is a source of concern, particularly because it is not certain how tribunals will interpret the clause. This issue is thus linked to the issue of improving the predictability of arbitration decisions. In response Mr. Bondy noted that in his view tribunals have been getting the balance right under Canada's treaties and the environmental clauses have not raised problems.

Argentina expressed support for South Africa's position. The relationship between investment treaties and environmental policies is a very sensitive issue. There are three important ICSID cases. In two decided cases, *Compañía del Desarrollo de Santa Elena SA v. Republic of Costa Rica*, and *Aguas del Tunari SA v. Republic of Bolivia*, the investment tribunals accorded more importance to the investment interests than to the environmental interests. A third important case is the ongoing investment law dispute between Philip Morris and Uruguay about tobacco product regulation.⁷ It is necessary to understand these issues better.

Colombia stated that it was pleased to participate in its first Roundtable. It noted Mr. Bondy's reference to a treaty clause providing that environmental regulation cannot be considered to be indirect expropriation. This is a very important issue and Columbia now includes similar language in its investment treaties.

Colombia stated that the issue of third party participation in investment disputes is of increasing importance to the general public particularly with regard to the investment/environment relationship. Colombia inquired about whether there were any *amicus curiae* in *Chemtura* and about the related issue about how the public interest is addressed in these cases. Mr. Bondy indicated that no one asked for *amicus curiae* status in *Chemtura*, but under the general criteria established in 2003 for *amicus* participation in NAFTA cases, it would have been possible. Canada maintains the most transparent approach possible.

Mr. Bondy also addressed a few further questions and comments from delegates. With regard to the impact of IIAs on the ability to regulate as raised by several delegates, Mr. Bondy indicated that he did not consider that Canada's treaties raised issues in this regard. Canada has sought to achieve and maintain this result by adopting clear and precise treaty language regarding the protections to be offered in its IIAs, where necessary providing additional clarity through the Note of Interpretation mechanism.

Without seeking to summarise the discussion, the Chair noted that South Africa's emphasis on the need for continued dialogue was important. He also noted that several delegates had noted that they did not

⁷ *FTR Holding S.A. (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (ICSID Case No. ARB/10/7) (request for arbitration 26 March 2010).

see grounds for serious concerns about environmental regulation. The Chair also noted that there are different approaches to investment treaty making among Roundtable participant governments. It is important to be aware that the different approaches may affect each other. Use by one group of countries of more explicit language in order to clarify the text has relevance for those countries who prefer to keep the guidance to tribunals to a minimum and to leave it to tribunal's discretion. We should focus on the interaction between the approaches. The Chair thanked Mr. Bondy again for his presentation.

Discussion of the draft communication on Harnessing Freedom of Investment for Green Growth

Delegates welcomed and discussed the comments received from outside experts and delegates in the electronic consultation relating to the draft communication on *Harnessing Freedom of Investment for Green Growth* and related background papers. They discussed a revised draft of the communication and agreed that the Secretariat would circulate a further revised version for approval by delegates in time to allow inclusion of the approved document in the report on OECD Green Growth Strategy for the meeting of the OECD Council at Ministerial level on 25-26 May 2011.