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Harnessing Freedom of Investment for Green Growth

Andrew Newcombe (University of Victoria Faculty of Law) · Friday, March 18th, 2011

The OECD-hosted Freedom of Investment (FOI) Roundtable is in the process of finalizing a statement regarding the role of international investment in supporting the realization of countries' green growth objectives. The draft statement entitled "Harnessing Freedom of Investment for Green Growth" (Draft Statement) and three draft background consultation papers (Draft Papers) are available on the [OECD website](#). Over the past two months, the OECD Secretariat has sought [comments](#) on the Draft Statement and Draft Papers from various experts with an interest in the interaction between international investment and the environment. Delegates at the March 2011 Freedom of Investment Roundtable are expected to finalize the draft for the attention of Heads of Government and Ministers attending the OECD Ministerial Meeting in May 2011.

The Draft Statement highlights the positive and vital role that investment can serve in promoting green growth and proposes finding in seven areas:

(i) support for effective international environmental law; (ii) vigilance against green investment protectionism; (iii) updating investment treaty practices; (iv) ensuring the integrity and competence, and improving the transparency of investor-state dispute settlement; (v) strengthening compliance with international investment law through prior review of proposed environmental measures; (vi) encouraging business' contribution to greening the economy; and (vii) spurring green growth through FDI.

With respect to investor-State arbitration, the Draft Statement recommends 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, 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.

In my comments on the Draft Statement, I questioned whether there really has been "significant

progress in improving transparency of ISDS since 2005”, as suggested in the text of the Draft Statement. Although North American BIT practice has certainly embraced transparency, there are still many agreements being concluded that do not include provisions for transparency in investor-State arbitration.

The Draft Papers are excellent, particularly the paper on “Environmental Concerns in International Investment Agreements: A Survey”. This paper provides a comprehensive empirical survey of investment treaty practice on environmental provisions. Based on a sample of 1,623 international investment agreements, the study finds that only 133, or 8.2%, contain a reference to environmental concerns. The paper provides a very useful survey of treaty practice and the language used in various treaty provisions.

With respect to investment treaty practice and the environment, the Draft Statement recommends that:

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.

What undoubtedly will remain contested is whether IIAs adequately integrate and balance the goals of international environmental and investment law and what constitutes up-to-date treaty practice.

On the issue of integrating and balancing the goals of international environmental and investment law, readers may be interested in a new edited collection published earlier this year called *Sustainable Development in World Investment Law*. This collection of 30 papers analyzes the state of international investment law through the lens of sustainable development. The various chapters in the volume identify, characterize, and analyze existing rules, innovations, and best practices in international investment agreements, including the investment measures used by other sustainable development treaties and instruments. The table of contents and introductory chapter are available [here](#).

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