Annex 1. Harnessing freedom of investment for green growth

Communication by the Freedom of Investment Roundtable

International investment is a vital source of finance and a powerful vector of innovation and technology transfer as countries address the effects of climate change and seek to promote green growth. Recognising this and desiring to make a contribution to the development of green growth policies, the Freedom of Investment (FOI) Roundtable hosted by the OECD has discussed important aspects of the role of international investment in supporting the realisation of countries' green growth objectives.[1]

The FOI Roundtable has explored in particular the issue of green investment protectionism and the interaction of international environmental and investment law. It also appreciates that greening the economy can be an important source of growth, as emphasised by work of the OECD Investment Committee and the OECD Environmental Policy Committee on enhancing business' contribution to greening the economy and unlocking green foreign direct investment (FDI).[2]

This document sets forth findings by FOI Delegates[3] on the role of international investment in supporting the realisation of countries' green growth objectives; specifically it underlines the importance of (i) mutual supportiveness of international environmental and investment law; (ii) monitoring investment treaty practices regarding the environment; (iii) ensuring the integrity and competence, and improving the transparency of investor-state dispute settlement; (iv) strengthening compliance with international investment law through prior review of proposed environmental measures and through effective environmental law and regulatory practices; (v) vigilance against green protectionism; (vi) encouraging business contribution to greening the economy; and (vii) spurring green growth through FDI.

A draft version of these findings was circulated for comment to experts, international organisations, civil society representatives and FOI participants. The Roundtable expresses its appreciation for the comments received, which have been carefully considered. The findings reflect extensive analysis and discussion in the Roundtable.

Mutual supportiveness of international environmental and investment law

The international investment policy community has a strong interest in effective policy frameworks that clarify environmental responsibilities and sharpen incentives for governments and businesses to live up to these responsibilities. Effective international environmental law and standards allow the international investment policy community to pursue with greater confidence its agenda of investment liberalisation, promotion and protection, in support of sustainable development. Important international environmental standards for investors can be found in international instruments such as the OECD Guidelines for Multinational Enterprises and the United Nations *Global Compact*.

> *FOI Delegates believe that their governments' environmental and investment policy goals are compatible. They also consider that those goals can be made mutually reinforcing and that this mutual supportiveness should be fostered.*

Monitoring investment treaty practices regarding the environment

A stocktaking exercise has shown that specific references to the environment are included in a limited number of investment agreements. However, the number is increasing. Governments participating in FOI Roundtables that have been respondents in investor-state cases challenging public policy measures now tend more explicitly to address such public policy issues, including environmental issues, on a systematic basis in investment treaties.

> *FOI Delegates consider that governments should continue to monitor their investment treaty practices with regard to environmental goals.*

Investor-state dispute settlement and the environment

The investor-state dispute settlement (ISDS) system may impose substantial liability on governments where public measures are found to be inconsistent with their international investment law obligations. It is essential to ensure the integrity and competence of investor-state arbitration tribunals. Transparency and openness of ISDS enhances its legitimacy by ensuring that the public is aware of the claims made, how the State is responding, and the tribunal's decisions. Governments, investors, academics and others can analyse the processes and outcomes. Since 2005 when the OECD Investment Committee adopted a Statement supporting greater transparency in ISDS, there has been progress in improving transparency. Still, investor-state cases can remain unknown to the public under many investment treaties. Ongoing negotiations at UNCITRAL to develop a legal standard on transparency for treaty-based investor-state arbitration and the expanded use of transparency provisions in investment treaties should assist further in advancing the goals of the 2005 Statement, including in environment-related cases.

> *FOI Delegates consider that governments should seek to ensure that investor-state arbitrations, including in cases involving environmental matters, are conducted in a transparent manner including the possibility for open hearings and, where appropriate, third-party participation.*

Preventing conflicts

It is important that new environmental measures generally respect key investment law disciplines such as non-discrimination, creating a level playing field for all investors. This process is most effective and efficient if it is integrated into policy design at an early stage: policies can be better-designed and expensive conflicts are avoided.

Good practices for regulation and governance in the environmental area are also of fundamental importance for preventing conflicts. Environmental impact assessments of significant new investments are important to identify and prevent conflicts between economic development and the environment.

> *FOI Delegates consider that governments should review their new proposed environmental measures for compliance with investment law obligations, such as those regarding non-discrimination.*

Vigilance against green protectionism

Some countries have expressed concern that the green growth policy agenda could be captured by protectionist interests. However, OECD policy monitoring suggests that to date investment protectionism associated with green growth policies is not a major problem. None of the 42 countries that report regularly to the OECD about investment measures have reported measures involving overt discrimination against non-resident or foreign investors in relation to environmental policy. Neither have participating countries reported to date serious concerns about such measures by other countries.

Nonetheless, vigilance is encouraged. Environmental policy measures that appear to be neutral may potentially involve *de facto* discrimination. In addition, some environment-related state aids (such as grants, loan guarantees or capital injections for individual firms), now widely used including as part of emergency investment measures in the wake of the financial crisis, may potentially pose risks to competition.

> *FOI Delegates consider that governments should ensure that measures taken to pursue green growth are consistent with their international obligations including their international investment law obligations. The monitoring of measures, including state aid, for protectionist intent or effects should continue, including as part of ongoing policy monitoring at the Freedom of Investment Roundtable and in the joint OECD-UNCTAD Reports on Investment Measures for the G-20.*

Encouraging business' contribution to greening the economy

Businesses have a key role to play in the transition to a green economy. More companies are responding to the challenges and opportunities of moving towards a low-carbon economy, developing environmentally-friendly products and services, and reporting on and reducing their greenhouse gas emissions. Stronger government policies are needed to encourage more companies to take such action and to encourage companies to go further and adopt more ambitious measures - reducing waste, adopting low-carbon technologies and shifting to renewable energies.

> *FOI Delegates consider that governments should establish or reinforce their policy framework to encourage, in a manner consistent with their international commitments, the positive contribution of business to green growth.*

Spurring green growth through FDI

FDI contributes to the production of environmental goods and services, and to transfers of technology, management processes and capital that can improve the environment. More such FDI will be required in the future. Investment law protections can play a very important role in encouraging the necessary investment.

Lack of comparable data between countries, however, obscures both FDI's contribution and the possible obstacles to it. A definition of FDI in support of green growth (or of key categories of such investment) would help governments use scarce public resources to lever private investment, assess policy performance in providing a positive framework for investment in support of green growth, and better identify and lower any hurdles to such investment.

> *FOI Delegates consider that governments should contribute to efforts to measure FDI in support of green growth and to assess policy performance in providing a framework to encourage it.*

Notes

1 The OECD-hosted Freedom of Investment (FOI) Roundtable is an intergovernmental forum that brings together OECD member and non-member governments from around the globe at regular meetings. It helps governments design better policies to reconcile openness to international investment with legitimate regulation in the public interest.

2 See www.oecd.org/daf/investment/cc.

3 This document has been approved by delegates to the FOI Roundtable from the following governments: Australia, Austria, Belgium, Canada, Chile, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Israel, Italy, Japan, Korea, Luxembourg, Mexico, Morocco, the Netherlands, New Zealand, Norway, Peru, Poland, Portugal, the Slovak Republic, Slovenia, Spain, Sweden, Switzerland, Romania, Turkey, United Kingdom and the United States. Together with the delegate from the European Commission, who has also approved the document, these delegates are referred to herein as the “FOI Delegates”.

