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Summary of discussions of Freedom of Investment Roundtable 23

(Note by the Secretariat)

13-14 October 2015

This note is a Secretariat summary of discussions at Freedom of Investment (FOI) Roundtable 23, held on 13-14 October 2015.

Fifty-six governments are invited to participate in the Roundtable.

For general information on the Roundtable and its work please refer to www.oecd.org/daf/inv/investment-policy/foi.htm.

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FREEDOM OF INVESTMENT ROUNDTABLE 23

13-14 October 2015, OECD, Paris

SUMMARY OF DISCUSSIONS

1. The Freedom of Investment (FOI) Roundtable supports countries' efforts to maintain and extend open, transparent and non-discriminatory policy frameworks for international investment and capital movements. It also helps countries to address policy concerns that international investment may raise (e.g. in relation to national security). Policy monitoring by Roundtable participants promotes observance of countries' international investment policy commitments, including those made in the OECD investment instruments and in the context of the G20. It also promotes sharing of experiences with investment policy design and implementation.

2. The present document summarises discussions as well as views and information contributed by participants at Roundtable 23, held on 13-14 October 2015. Participants included representatives of governments of the then 34 OECD members as well as the European Union, of some of the twelve other governments that have adhered to the OECD Declaration on International Investment and Multinational Enterprises (Argentina, Brazil, Colombia, Costa Rica, Latvia, Lithuania and Peru) as well as government representatives from P.R. China, India, Indonesia, the Philippines, the Russian Federation and South Africa.

3. Participants at Roundtable 23 addressed the following topics:

Roundtable participants also briefly discussed the role of State-owned enterprises in the global marketplace. The discussions of this topic are part of a broader work program involving several OECD committees and working groups, and are not documented here at this stage.

1. Societal benefits and costs of international investment agreements

4. At the Roundtable, participants continued their discussion of the societal benefits and costs of international investment agreements (IIAs) that they had begun in March 2015 at Freedom of Investment Roundtable 22. The discussion was based on revisions to the earlier note by the Secretariat to add consideration of the societal costs of IIAs, among other issues.

5. Guided by the approach of Regulatory Impact Assessments – now widely used by governments to evaluate the benefits and costs of existing and proposed regulatory measures – and based on a review of existing literature from a broad range of institutions, the note prepared by the Secretariat presents an inventory of preliminary evidence on societal benefits and costs of IIAs and identifies research gaps that would need to be filled to make a more comprehensive assessment of benefits and costs of IIAs possible. It discusses the economic effects for home, host and transit economies; the effects on global and domestic governance; and the impact on the pursuit of strategic foreign policy objectives.

6. The draft study, which is subject to further discussion and revision, finds that in most dimensions of effects that it considers, evidence of benefits and costs of IIAs may be difficult to measure, as it depends on a large number of determinants:

- Whether home- and host societies can reap economic benefits from their IIAs depends on a series of cumulative conditions. Existing literature suggests that economic outcomes depend on a multitude of determinants; this limits the scope of general statements on economic benefits of IIAs. The study notably finds that attempts to assess an effect of IIAs on investment flows using econometric approaches and FDI statistics have thus far had serious methodological shortcomings and have not led to valid findings. IIAs also generate fiscal costs, but an assessment of the costs triggered by IIAs and a comparison with a scenario without IIAs meets with methodological difficulties.

  The study notes that transit economies – countries that offer regulatory and other advantages and experience significant capital flows to and from holding companies incorporated in their territory – may increase their competitiveness for attracting holding companies, by offering IIAs with many countries; they can reap benefits from financial and legal services rendered as a result of the domiciliation of such holding companies.

- Effects of IIAs on domestic and international governance are to a large extent unexplored in the literature,. Whether IIAs reduce governments' willingness or capacity to regulate in the public interest has only recently begun to be subject to more systematic study. Other effects of IIAs on governance have been studied in more depth and have produced mixed findings.

  The availability of ISDS, now generally the case in IIAs, can depoliticise some disputes. The availability of ISDS may achieve somewhat fairer competitive conditions between certain groups of enterprises, such as among different enterprises from a given country, or among enterprises from countries with differing levels of influence. At the same time, it may create some distortions of competition between enterprises that are covered by IIAs and those that are non-covered, in particular domestic enterprises.

  Some IIAs potentially foster transparency and respect of internationally recognised environmental, labour, human rights and anti-corruption standards due to explicit treaty obligations to this effect. However, only a few treaties contain such language, and they take different approaches. Also, whether these clauses bring measurable advances in the areas they address has yet to be established.

- The study also addresses the question of the contribution of IIAs to advancing strategic foreign policy objectives – one of the declared motives of some governments to conclude some IIAs, in particular FTAs. The few studies express different views about whether IIAs produce benefits or harm in this regard.

- Investment treaties vary (e.g., whether they cover market access issues in addition to investor protection issues), as do provisions related to the balance between investor treatment and regulatory powers. The study, however, focuses on IIAs in general because most existing literature does so.

7. The study does not yet make an assessment of the distribution effects within societies and among societies and the benefits and costs of these effects, and of the impact of IIAs on competitive conditions that result from diversion effects. Also, the present form of the note does not yet explore the effects of IIAs

on governance with sufficient depth, given that Roundtable participants discuss this matter separately (see below item 3.).

8. Numerous Roundtable participants shared their views on the findings of the note as well as their own experience and opinions. They suggested that the views of business associations and trade unions could yield additional insights; that pricing of political risk insurance could help quantify the impact of IIAs; and that intergovernmental consultation committees set up by more recent FTAs with investment provisions could hold information relevant to the study. Participants also suggested that countries' perceptions of treaty benefits and costs could change when they turn from a capital importer to capital exporter.

9. Roundtable participants suggested that further efforts should be made to determine the societal benefits and costs of IIAs and the investment treaty system as a whole. They recognised that benefits and costs of IIAs depend on specific factors such as treaty design, characteristics of the economies involved in the investment, and features of individual investments projects. They thus considered that analysis of societal benefits and costs of IIAs at a general level would not yield uniform results. Future work on societal benefits and costs could be carried out on subsets of IIAs in order to determine the factors that influence societal benefits and costs. Roundtable participants mentioned specific treaty features or characteristics of the economies that are involved in individual treaties as possible determinants of whether IIAs tend to procure societal benefits or induce costs.

10. Roundtable participants encouraged the Secretariat to enhance the note and to identify factors that are likely to determine whether the potential societal benefits and costs of IIAs identified in the inventory accrue under given circumstances.

2. "*A Welfare Economic View of International Investment Agreements*" – Presentation by Prof. Emma Aisbett (University of Hamburg, Germany) as an invited expert

11. Prof. Emma Aisbett described how government regulatory policies on IIAs can be examined from the perspective of welfare economics.[1] She addressed (i) the rationale for application of a welfare economics approach to policymaking and the key elements of this analytical approach; and (ii) its application to government regulation in the form of IIAs.

Introduction to welfare economics and policy-making

12. Prof. Aisbett explained that analysing existing or planned regulatory policies based on their impact on the welfare of society is now widely accepted as good policy. It is notably recommended in the 2012 OECD Recommendation of the Council on Regulatory Policy and Governance. The approach provides structure and analytical clarity to complex policy questions. In defining what constitutes the optimal outcome in terms of welfare (the "welfare function"), the welfare economics approach generally takes a utilitarian approach. The welfare of all the different people or entities in a given society is given equal weight. For a given policy, increases and decreases in welfare are netted out to evaluate an overall impact on society. Welfare in this sense means the same thing as economic efficiency. Optimising welfare thus equates to optimising economic efficiency and some may be more comfortable with that terminology.

[1] The slide presentation that Prof. Aisbett used during her presentation is available at [link to be included once file has been uploaded to the web].

13. Prof. Aisbett noted that welfare economics can help identify the winners and losers from existing or proposed policies, but it refrains from making recommendations about distribution of costs and benefits. Efficiency is considered to be achieved if the winners could compensate the losers – this concept is known as Hicks-Kaldor efficiency. Prof. Aisbett emphasised that economic efficiency (or welfare) is not a narrow financial calculation. It includes a wide range of non-monetary interests such as the value of a healthy environment and it is well-suited to the evaluation of a wide range of policies.

14. Prof. Aisbett explained that economists refer to a government's "objective function". This represents the valuation of the different interests that go into societal welfare. She stated that trade economists have emphasised that democratic governments can place whatever weights they want in their objective functions. The idea is to find mutual gains rather than to change democratically-set priorities to favour one group or another. For example, public concern about the scope of foreign investment in agriculture may lead a government to limit foreign investment in that field. A democratically-set interest in having such limits is accepted by trade economists as part of the objective function that governments are free to determine.

15. Prof. Aisbett emphasised what she described as broad agreement among economists on the basic idea of using welfare economics and cost-benefit analysis to evaluate policy options. She noted, however, that while the OECD and OECD governments are leaders in cost-benefit analysis for regulatory policy based on a welfare economics, they have rarely if ever applied it to their regulatory policy on investment treaties. Applying the method to IIAs thus involves breaking new ground.

16. Prof. Aisbett stated that welfare economics starts from the postulate that the free market will maximize welfare in the absence of market failures. While this postulate may appear to suggest sharp limits on the role of government, there are in fact many market failures that merit consideration and that may merit a policy response from government. The first question that welfare economics analysis asks with regard to a particular regulatory intervention, and in this case through an investment treaty, is thus whether there are market failures. For Prof. Aisbett, economists' focus on identifying market failures is noteworthy because in her view it differs sharply from the typical approach of investment policy makers in many governments and of many international organisations. Rather than seeking to maximise investment, economists promote instead the achievement of the optimal level of investment because too much investment is harmful to society.

17. Prof. Aisbett stated that a market failure is a necessary, but not a sufficient condition to justify government regulatory intervention. In addition, welfare economics posits that a government intervention should only take place where a correction for a market failure is possible and where its costs do not exceed the gains. If it is not well-targeted, an intervention to correct one market failure may create or exacerbate other market failures and lead to a decline in welfare.

Market Failures, welfare economics and IIAs

18. Prof. Aisbett then turned to address IIAs. She noted that two types of possible market failures have been proposed as justifications for an intervention with regard to international investment: (i) a hold up risk; and (ii) the possible undervaluation of the welfare of foreign investors by host governments. She described the hold-up problem based with an example. A host government offers an individual investor favourable conditions, but changes these conditions to the detriment of the investor once the investor has sunk costs. In Prof. Aisbett's view, this scenario does exist in some cases, but it is rare in the current environment of intense competition for investment. Governments are aware that being seen to exploit the hold-up potential will be harmful to their reputation. Where it exists, it is a problem both for investors and the host governments: investors lose if they are held up; the government also loses if companies do not invest in their country. As a result, both parties have an interest in resolving the hold-up problem. This can

be done through *ad hoc* contracts, but it is often suggested that treaties and ISDS can lower transaction costs associated with such contracts or complement them. Thus for host governments that are suffering from hold-up risks, well-drafted treaties appear to be a potential correction to the hold-up problem.

19. Prof. Aisbett stated that under-valuation by host governments of the welfare of foreign investors is a second issue that is often cited to justify the existence of IIAs. She cited three possible examples involving under-valuation of different groups: (i) under-valuation of foreign investor interests compared to domestic constituencies including domestic investors, resulting in discriminatory policies against foreign investors; (ii) undervaluation of investor interests generally in comparison to an often strong governmental interest in obtaining revenue, resulting in excessive taxation or fees; and (iii) under-valuation of investor interests compared to social groups seeking regulation, such as environmental groups or indigenous peoples, resulting in over-regulation compared to globally optimal levels.

20. For Prof. Aisbett, under-valuation of foreign investor interests appears less convincing as a rationale for treaty policy. As a preliminary matter, she stated that under-valuation of the welfare of a given constituency is not a problem for the host government. The government chooses its valuations of different interests and its level of regulation. The government could thus value foreign investors' interests more highly and adjust regulation accordingly if it desired to do so.

21. In Prof. Aisbett's view, the primary case for regulatory intervention through a treaty would be where a host under-values the welfare of foreign investors relative to all domestic constituencies including domestic investors. In that event, provisions which force the host to improve its treatment of foreign investors both pre- and post-investment will increase investor and home state welfare, but not host state welfare. This gives rise to potential mutual gains through reciprocal agreements, notably in the context of broader free trade agreements. She considers that the host government can provide a benefit to a home government and its investors by providing improved pre- and post-establishment treatment to foreign investors, but will want something in return from the home country. She considered that the reciprocal negotiating concessions necessary to achieve mutual benefit in this situation are similar to the trade agreement context and state-to-state dispute settlement (SSDS) may be better suited than ISDS to achieving those gains in this context.

22. Prof. Aisbett stated that the last step in the welfare economics analysis is to evaluate whether the existing or proposed regulatory correction would create market distortions or exacerbate existing ones. If so, overall welfare may decline as a result of the intervention. She briefly addressed three possible distortions. First, it is possible that the welfare of domestic investors is no more valued by governments than that of foreign firms. Domestic investors may be even less valued than foreign investors. Foreign firms are generally much larger and more mobile, mistreatment of them is more likely to international attention, and many host governments actively seek to encourage FDI due to perceived positive spillovers. Prof. Aisbett stated that if there is no systemic bias against foreign investors, then correcting the government's distortion against investors generally only in regard to foreign investors is poorly-targeted; it distorts competition. Particularly where the treaty parties have similar levels of development, treaty-provided advantages may squeeze domestic companies out of the market. Generous treaty protection and in particular ISDS only for foreign investors may also cause foreign investors to lose interest in political or economic reform to improve the treatment of investors generally in poorly governed host countries.

23. Prof. Aisbett stated that a second possible distortion is the creation of moral hazard. Complete insurance is known to lead to moral hazard and she described IIAs as in effect free insurance for covered investors. In her view, efficient investment should factor in the risk that future regulation will intervene to correct socially harmful consequences of the investment. Free insurance with market-value compensation against the costs of such future regulation of investment causing social harm would lead foreigners to overinvest beyond the efficient level. Prof. Aisbett considered that IIAs may lead to over-investment

particularly in sectors exposed to future regulation to address social harms such as the extractive industries. These sectors are not generally associated with the spill-overs and technology transfers seen by many governments as important to economic development through foreign investment, but they give rise to many claims under IIAs. Thus treaties may be poorly targeted to induce the desired kinds of investment.

24. Third, Prof. Aisbett suggested that other domestic groups in society may also be under-valued compared to foreign investors. The government may under-value consumers, indigenous groups, ethnic minorities or citizens generally in comparison with foreign investors leading to under-regulation (for global welfare). Prof. Aisbett invited participants to evaluate, based on their experience in government or more generally, how governments in fact value the views of these groups compared to others in practice. She stated that if the welfare of these groups is undervalued more than that of foreign firms, then using IIAs to make host governments fully internalize the welfare of foreign investors is likely to worsen national and global welfare.

25. Roundtable participants expressed appreciation for the informative presentation and provided comments and questions in a number of areas during the limited time available for discussion. With regard to concerns that local firms may be squeezed out by foreign firms because those firms are granted better protection by treaties, a participant indicated that his government proceeds on a reciprocal basis. It provides the high level of protection available under its domestic law plus the treaty protection to foreign covered investors. By way of reciprocity, it expects equivalent protection for its investors. The goal is not to force local companies out of business, but rather it is hoped that the partner country's protection of its investors will rise to the level of that provided under the treaty to foreign investors. If that occurs, it would restore an equal level of competition.

26. Another participant pointed to differences between FDI compared to domestic investment and noted that FDI tends to be less labour-intensive and has uncertain impact of the balance of payments. Prof. Aisbett noted that on average foreign firms are big and efficient and thus employ fewer people; if governments are concerned about matters other than economic efficiency, they may take that into account. She also noted that to the extent that foreign firms benefit in both markets on a reciprocal basis from bilateral treaties, larger MNEs that are active internationally will benefit and SMEs, which are associated with higher levels of employment and innovation, will suffer.

27. The participant also considered that reciprocity was entirely theoretical because of the asymmetry of investment flows between countries. At the WTO, there is the principle of less than full reciprocity and the principle of special and differentiated treatment of developing countries to address the asymmetry. Similar principles do not exist under investment treaties. Prof. Aisbett stated in this regard that Jagdish Bhagwati, a leading economist who wrote a well-known book in defence of globalisation, defended globalisation in all fields except for investment treaties because of the lack of reciprocity in investment. He saw a big difference between trade where flows are generally balanced at least overall and investment where flows are asymmetric. The participant also expressed interest in the issues of over-investment and of secondary distortions. Prof. Aisbett noted that she had left things out in her effort to be brief such as the potential positive impact of spillovers from foreign investment which was also an important secondary impact perceived by many governments.

28. Another participant suggested that a welfare or utilitarian approach raises a host of problems. In his view, there is an immediate issue of operationalization because of the issue of deciding which externalities or inter-dependencies one takes into account. Choices in that area may affect conclusions so that findings may reflect pre-conceived conclusions. As an example, he pointed to the issue of positive spill-overs from FDI to which Prof. Aisbett had just alluded. In view, consideration of spill-overs might lead to different conclusions by the host government about the value of foreign investment. If the government takes the spill-overs into account, it might have an incentive to improve its treatment of

foreign investors. Prof. Aisbett recognised that governments frequently want to encourage spill-overs from foreign firms, but stated that that issue does not require a treaty response. If a government wants to increase spillovers, it can do so by modifying its own policies. Examples of such modifications could include opening its market to more foreign investment or offering targeted tax breaks.

29. The participant also suggested that the costs of ISDS may encourage reform by host governments. Prof. Aisbett responded that she was not suggesting that treaties reduce incentives to improve governance with regard to covered foreign investors. She recognises that they likely do encourage better treatment of covered foreign investors, but considers that they reduce the pressure for broad-based reform for all investors and raise issues for competition.

30. The Chair thanked Prof. Aisbett and noted that there were many issues that could be discussed in the presentation. He stated that as an economist by training and policy maker in this area, he is struggling with the fact that in addition to Bhagwati as noted by Prof. Aisbett, many other eminent American economists, such as Paul Krugman, Dani Rodrik and Jeffrey Sachs, have some reservations about investment treaties. It is important to be aware of that. He suggested that the ongoing rebalancing that many are talking about may be about getting back to an economic consensus on policy following what may have been an overshoot. The Roundtable expressed interest in further consideration of the many issues raised with respect to investment treaty policies.

3. The balance between investor protection and the right to regulate

31. Roundtable participants engaged in an initial consideration of the issues raised by the balance between investor protection and the right to regulate in investment treaties. Participants discussed two background papers. The first provided a preliminary outline of issues relating to balancing. The second began a fact-finding process by examining action by some governments to address the balance between investor protection and the right to regulate in investment treaties by limiting the fair and equitable treatment (FET) standard to the minimum standard of treatment under customary international law.

Preliminary outline of issues

32. Participants recognised the balance between investor protection and the right to regulate as an issue at the core of contemporary debates about treaty policy. It involves questions about both policy goals and public support, which were the two issues addressed at the 2015 OECD investment treaty Conference.[2] In terms of policy goals, achieving a proper balance is both an acknowledged policy goal for many governments and an area on which they must convince public opinion about the achievement in practice of an acceptable balance. In terms of public support, participants noted the existence of widely diverging views about the impact of treaty on the right to regulate.

33. The paper first seeks briefly to present some aspects of the debate over treaties and the right to regulate in some jurisdictions. The second section notes that policy analysis today is increasingly focused on the impact of individual rules rather than treaties as a whole. Some reasons for this evolution are explored as are the potential benefits for policy makers of the more intensive analysis. The third section provides a brief introduction to four broad concepts put at issue by the mandate given by the Roundtable: (a) regulation; (b) investor protection; (c) the impact of treaties on regulation and the question of "regulatory chill"; and (d) balancing investor protection and the right to regulate. The analysis is only introductory, but breaking down these broad concepts leads to the identification of a significant number of

[2] See OECD Investment Treaty Conference: Policy Goals and Public Support (March 2015).

issues and questions for analysis and discussion. Given the focus on protecting the right to regulate in most recent government action relating to treaties, that aspect is given some priority, but the value of reducing regulatory risk for investors is also underlined.

34. At this initial stage, ISDS is generally excluded from the analysis. It was noted that the Roundtable has engaged in scoping level analysis of ISDS and the Secretariat is engaged in further analysis of ISDS as part of a specific mandate from the Roundtable.[3] In contrast, policy issues raised by substantive law are a new area and deserve priority attention in the first instance. While for these reasons ISDS is initially excluded here as a general matter, it is important to recognise that the ISDS system is a core part of the public and policy debate over the impact of treaties on the right to regulate. Accordingly, the exclusion of ISDS should be seen as for analytical purposes rather than as suggesting that it is not relevant to the question of balancing.

35. Participants welcomed sustained attention to the question of balancing. Generally governments noted that they had taken a broad range of measures in their treaties to address balance. A participant noted that as governments promote open investment and investor protection, they need to be consistent with governments' right to regulate in the public interest. Measures to address the balance in recent treaties include clarifications, exceptions, safeguards, schedules of reservations of policy space in particular areas, and stronger regulation of ISDS. A participant noted that while it was still improving its treaties, many of its reforms could be traced back to the early 2000s. In response to a question in the paper, a participant noted that her government had not engaged in the evaluation of contingent liabilities for investor protection under investment treaties; it was proceeding based on a case-by-case evaluation with regard to whether to include ISDS in its treaties.

36. Another participant suggested that if a government wants to avoid exposure to claims, it needs to analyse the general provisions in its treaties in light of its expected regulatory agenda in order to determine if it needs to provide for additional policy space including in particular areas. This needs to be conducted with regard to individual provisions such as FET or national treatment (NT). Government has a key role to define in advance in its treaties its desired scope to regulate if it wants to reduce the likelihood of claims. A participant noted that her jurisdiction was a relative late-comer to treaties. Its treaties have benefitted from reforms engaged in by others in many areas, but joint governmental interpretations in some areas are of interest.

37. Another participant underlined that the balance between investor protection and the right to regulate is a very important issue in her jurisdiction and that her authorities were closely aware of public concerns in this area. These included concerns that ISDS provides covered investors with the power to bring claims where new regulations affect their profits. She noted that some past agreements were drafted more with investor protection that with the right to regulate in mind; for example some expressly grant investors a right to a stable business environment, which has been interpreted at times as provided a general guarantee against repeated legislative changes. Concerns about arbitral interpretations favouring investor interests have also been expressed.

38. In this context, her authorities, together with some negotiating partners, have adopted a number of new approaches. These included providing greater clarity about both the scope of investor protection and about arbitration procedures. Clauses to reaffirm expressly the right to regulate in the text of the

[3] David Gaukrodger & Kathryn Gordon (2012), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, 2012/03, OECD Publishing; FOI 21, Summary of discussion, p. 8.

agreement were an important clarification in this regard as were clearer or narrower versions of key standards such as FET and indirect expropriation.

39. Participants briefly discussed the potential impact of a general right to regulate clause. Some participants emphasised that the scope of the right to regulate as legitimate regulation still needs to fleshed out further. Words like "legitimate" or "bona fide" are sometimes used to describe acceptable regulation, but may not provide enough clarity about the limits of the right to regulate. Important to see the extent to which we can learn from comparative law such as at the WTO and explore how the OECD could contribute to discussions elsewhere as well. It was noted that it is important to not introduce further uncertainty into the interpretation of treaties.

40. It was underlined that there is a strong historical dimension to the issues. In the context of discussing recent clarifications and treaty policies that expressly take balancing into account, differing views were expressed about the meaning of older treaties with little detail. Some suggested that recent approaches, including to clarify the limits of investor protection, were intended to ensure interpretations that are generally implicit in earlier agreements.

41. One participant suggested that the right to regulate was part of customary international law and can be considered to be a general principle of law applicable to treaties generally. The right to regulate is always implicitly part of treaties and needs to be balanced with investor protection provisions. There should thus be reciprocal impact.

42. Others suggested that many older treaties were drafted principally with investor protection in mind. In their view, many newer treaties are better because they have been prepared with greater regard for the right to regulate than earlier ones and they have also reduced the range of discretion for tribunals.

43. The differing views in this area were coloured by diverging views about outcomes under older treaties (which were noted to continue to account for the majority of investor claims). Some considered that they have insufficiently taken account of important regulatory interests and thus necessitated reformed treaty practices and other reforms. Others suggested that they are broadly acceptable or that the numbers of cases remain modest overall.

44. A participant pointed out that the issue of balancing has been at the core of a recent major review of its model BIT over the past year which is reaching its final stages. The fundamental premise of its new model is that while it is important to provide normative and institutional framework for foreign investors to enforce their rights and claims, it is also important to ensure that investment treaties do not impede on the government's policy space or ability to regulate for public purposes. It is a delicate balancing act between IP and the right to regulate. To this end, the new model has six goals: (i) ensure that treaties are only an additional and exceptional layer of protection for the hard cases, with ordinary cases being resolved in the domestic courts; (ii) provide for the primacy of domestic courts by requiring exhaustion of local remedies, which will be accompanied by reforms to improve the domestic courts; (iii) narrow the scope of treaty protection to the traditional scope of foreign direct investment (FDI), defined by the OECD as a lasting interest by a resident enterprise, by defining an investor as an enterprise, and excluding the protection available under current treaties for all kinds of indirect and minority investors and their reflective losses; (iv) change the asymmetry in the current system under which investors get protections and procedural avenues regardless of their conduct and recognise that treaties have a role in promoting sustainable development by encouraging good business conduct; (v) retain ISDS after extensive deliberations, with detailed rules to address conflicts of interest, transparency and other issues; and (vi) recognise that there is no substitute for well–drafted treaties, that existing treaties may contain vague provisions that leave too much discretion to interpret to arbitrators on both substantive protections and dispute settlement. (India)

45. Participants also discussed the relationship between investment treaties and domestic law with regard to the right to regulate and balancing. A participant noted that its Constitution and courts provide strong protections for investors and set out limits on the right to regulate. Several participants noted that their domestic law provides significant protections for investors. Treaties are thus an extra layer of protection. They also typically provide for damages, a remedy that is rarely available under domestic law. A participant noted that the impact of treaties on the right to regulate had been a key component of its recent review of treaty policy. It had compared domestic law protections under its Constitution and domestic dispute settlement with the protections as applied by ISDS arbitrators. Proposed new domestic legislation includes a specific provision on the right to regulate that allows for government to take measures including to redress historical injustices, protect the environment and uphold constitutional rights. She noted that the proposed legislation emphasises that the right to regulate is not absolute, as another participant had noted. It is subject to limits under the constitution and will be implemented in a manner consistent with constitution.

46. Several participants pointed to their efforts to prevent disputes notably through training programs and education for public officials. A participant noted that her government has developed a blended training program with on-line and in-person components and practical case exercises. It is important to inform those whose job is to prepare regulations about the rules including in sub-national governments. With advance knowledge, it may be possible to re-design proposed regulations to take treaty constraints into account while still achieving policy goals. It was noted that opposition to treaties from domestic regulators can be attributed to misunderstanding about their impact – some are requesting guarantees that regulations will not be challenged.

47. It was suggested that with the evolving nature of views about investment policy, it is important for governments to be attentive not to overshoot in rebalancing their treaties to provide for greater policy space and to take note that the notion of the "right to regulate" is not absolute.

Government action to address the balance between investor protection and the right to regulate in investment treaties: The limitation of the fair and equitable treatment standard to the minimum standard of treatment under customary international law

48. The Secretariat presented a background fact-finding paper addressing government action to address the balance between investor protection and the right to regulate in investment treaties. The initial focus in this area was on obligations to provide "fair and equitable treatment" (FET). FET is often included as part of the protection provided to covered foreign investors in investment treaties although it was noted that some recent treaties and model treaties do not refer to FET.

49. FET is an "absolute", "non-contingent" standard of treatment, as opposed to the "relative" standards embodied in "national treatment" and "most favoured nation" principles which define the required treatment by reference to the treatment accorded to other investment. FET has leapt to prominence in the last 15 years as the principal ground of liability at issue in many if not most investment treaty arbitration claims. It also appears to be the substantive treaty provision most often cited in debates about the right to regulate.

50. FET clauses are of different kinds. A key distinction is between FET provisions that are limited to the minimum standard of treatment of aliens under customary international law (referred to herein as "MST-FET"), and FET clauses that are autonomous from the minimum standard of treatment. The first incorporates a body of external law into the treaty; the second sets an autonomous treaty standard.

51. Many FET clauses, especially in older treaties, are "bare" FET clauses that merely refer to fair and equitable treatment without further detail. There has been considerable debate about whether particular

FET provisions, and in particular bare FET clauses, are limited to the customary international law minimum standard or constitute an autonomous self-contained concept. The paper notes that bare FET clauses in BITs are frequently seen by arbitral tribunals today as autonomous from customary international law, a marked change from the situation as seen at the OECD in a 2004 working paper noting that no case had been found applying a FET standard in a BIT as an autonomous standard.[4]

52. The paper notes that a finding that a clause is autonomous increases the scope for arbitral interpretation of the clause. Fairness is a broad legal principle and can give rise to the elaboration of many norms. In ISDS arbitral decisions and commentary, FET has frequently been seen as a broad and general obligation that gives rise through arbitral interpretation and analysis to extended lists of more specific rules, standards or norms in different contexts. For example, a recent survey of FET, based on a review of arbitral decisions, refers to the standard extending to good faith, consistency of conduct, transparency of rules, recognition of the scope and purpose of laws, due process, prohibition of harassment, a reasonable degree of stability and predictability of the legal system, recognition of investors' legitimate expectations, and prohibitions of arbitrariness and discrimination.

53. Review of recent treaty practice shows growing use of FET provisions that expressly limit FET to MST-FET. Examples include the PR China-Korea FTA, the recent Pacific Alliance agreement as well as in Canadian and US model BITs and treaties). The approach harkens back to the 1967 OECD Draft Convention. The paper notes that the growing use of this approach may be in part a reaction to the interpretation of autonomous FET clauses in ISDS.

54. MST-FET clauses are by definition expressly defined by reference to customary international law. Views about the formation of customary international law vary to some degree between different constituencies. However, it is generally recognised that government action and government views about the law are the primary focus in determining customary international law.

55. A fact-finding focus on government action and government views on customary international law is valuable because they have rarely been considered in ISDS cases and commentary. Cases and commentary have focussed primarily on arbitral views about interpretation. The views of governments generally are rarely examined even where customary international law is at issue. The focus of the paper on government action and views thus reflects a new angle of approach.

56. The first and best known example of an MST-FET approach is the 1994 NAFTA as authoritatively interpreted by the NAFTA governments. The paper noted that for several reasons, NAFTA government views on MST-FET standard are a valuable initial reference in an examination of the balance of investor protection and the right to regulate. NAFTA governments have had a much higher success rate in defending cases under the MST/FET provision in NAFTA than governments in FET claims under BITs. NAFTA also provides unparalleled access to government views about treaties and in particular the interpretation of the MST-FET provision. NAFTA governments have been active in providing interpretations including in particular on MST-FET in general and in particular contexts. The high level of transparency of ISDS under NAFTA makes many government views publicly available.

57. At the same time, the limitations of the NAFTA experience were noted. The government interpretations of customary international law relating to MST-FET under NAFTA are those of a small number of governments in a single region. The NAFTA Parties are two high-income economies and an

[4] See OECD, "Fair and Equitable Treatment Standard in International Investment Law", OECD Working Papers on International Investment, 2004/03.

upper middle-income economy using the World Bank classification.[5] Some governments may have differing views about the approach or content of MST-FET; some may be of the view that customary international law in NAFTA is or is part of a regional form of customary international law. Nonetheless, for the many governments using or considering the use of MST-FET in their treaties, the substantial body of views about MST-FET in the NAFTA context is a useful reference.[6]

58. The paper also noted several limitations that arise from the preliminary nature of the background research into the views of NAFTA parties about MST-FET. It is not exhaustive and may not cover all views expressed by the NAFTA governments. In addition, it has been guided to some degree by interest in explanations of the different rates of success of FET claims under NAFTA as opposed to other treaties, it may give prominence to interpretations by NAFTA governments that are narrower than those of ISDS tribunals or commentators. All of the NAFTA governments support robust foreign investor protection. However, they generally consider that this is consistent with a clearly-defined scope of liability under MST-FET.

59. The fact-finding also sets forth the views of individual NAFTA governments which may differ. There is a significant degree of convergence on the approach, but the analysis is not limited to issues on which all NAFTA governments agree. Not all of the governments may have taken a position on an issue. It was also noted that the inclusion of government interpretations in the background paper should not be seen as definitive statements of their position. Views on customary international law can evolve or may be linked to the particular facts or context of the case. Recourse should be made to the original publicly-available documents.

60. The paper engages in fact-finding about the NAFTA governments' view without regard to how they have been addressed by arbitral tribunals. It was noted that this approach follows on earlier Roundtable work focusing on government "voice" with regard to treaty interpretation. It breaks new ground because while there is extensive commentary about arbitral interpretations of treaties, there has been little systematic attention to government views. As fact-finding, the government action and views are described and no position is taken with regard to their correctness or persuasiveness.

61. The paper also clarifies that it engages in fact-finding about the governments' views about rules of MST-FET that can form the basis for damages claims by foreign investors. It was underlined that the NAFTA governments are generally strong supporters of many if not all of the principles discussed in the paper as a matter of investment policy. They have supported the inclusion of many of them in policy documents such as the OECD's Policy Framework for Investment. The narrow issue addressed in the paper is government views about their role, if any, as a basis for government liability in damages under customary international law under the MST-FET provision.

62. The paper then describes the views of the NAFTA governments on MST-FET both with regard to the nature of the standard and its content. With regard to the nature of the MST-FET standard, the paper notes that all of the NAFTA governments have interpreted the reference to customary international law to refer to law established by reference to a general and consistent practice of States that they follow from a sense of legal obligation. All of the NAFTA Parties have stated that the claimant bears the burden of establishing that the norm it invokes exists as a matter of customary international law. This requires that the claimant establish both state practice and *opinio juris* with regard to the proposed norm at issue.

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5 See World Bank Classification of country and lending groups.

6 Governments are of course generally free to include treaty norms that differ from customary international law either by providing greater or lesser protection to investors than customary international law, subject to mandatory *jus cogens* norms.

63. All NAFTA governments have rejected assertions that the signing of BITs with FET clauses creates customary international law. They consider that there is no *opinio juris* because there is no obligation to sign BITs with FET clauses; moreover, FET provisions in treaties vary widely and thus state practice lacks the necessary element of consistency.

64. For NAFTA governments, arbitral decisions have limited relevance to interpreting MST-FET. Arbitral interpretations of MST-FET play a role only insofar as they have addressed state practice and *opinio juris*, the elements of customary international law. Arbitral interpretations of autonomous FET provisions have no relevance for the interpretation of MST-FET.

65. NAFTA governments have also rejected the claim, advanced by claimants and some commentators and adopted by some ISDS tribunals, that the standards for autonomous FET have merged with the MST-FET standard. The NAFTA governments have stated that the customary international law can evolve. However, proof of the development of a new customary international law norm requires proof of state practice and *opinion juris*. Customary international law also does not evolve just because time passes and, as noted, arbitral decisions have limited relevance.

66. All three NAFTA governments agree that the threshold for demonstrating a violation of the MST-FET standard in art. 1105 is high. NAFTA governments have also emphasised that violation of domestic administrative law is insufficient to show breach of MST-FET because their domestic courts apply more demanding standards to government action than the MST. Domestic courts engaged in judicial review, which cannot award damages, can sanction behaviour that does not meet the much more demanding international standard for liability.

67. In terms of content of the standard, all of the NAFTA governments have recognised that the obligation not to deny justice in adjudicatory proceedings is a rule established under MST-FET. Canada and the United States have repeatedly rejected as unfounded investor claims that the MST-FET incorporates a rule protecting a foreign investor's legitimate expectations. More specifically, they have rejected claims that the MST-FET contains a rule providing a right to a stable legal environment. They have also rejected an alleged rule protecting investor expectations based on assurances or commitments.

68. While both Canada and the US exclude any rule requiring protection of legitimate expectations, they have expressed differing positions on whether an investor's expectations are even relevant as a factor to be considered in MST-FET. The United States considers that no demonstration of relevance has been made based on the two elements of customary international law. As noted above, Canada shares the general view that MST-FET rules must be demonstrated based on the two elements. However, in some contexts it has accepted that legitimate expectations based on specific commitments maybe a relevant factor to be considered under certain conditions, albeit without examining state practice or *opinio juris* on the point.

69. Canada and the US have rejected claims that the MST-FET provision imposes a general obligation on States to refrain from arbitrary conduct. The Parties have noted the existence of a distinct national treatment obligation and have stated that there is only limited protection from discrimination under MST-FET or alternatively that no stand-alone or independent obligation prohibiting "discrimination" exists under the MST-FET provision in NAFTA. All three NAFTA governments consider that regulatory transparency is not part of customary MST. Canada and the US have rejected good faith as stand-alone standard of customary MST. All three governments have rejected the view that MST-FET gives rise to a general arbitral inquiry about "fairness, equity and reasonableness".

70. The Chair noted that with limited time for an initial discussion of the issues he would invite participants to concentrate their interventions on the fact-finding aspects of the paper.

71. A participant noted that its recent FTAs with investment protection and ISDS provide for MST-FET, but that its BITs generally do not. It was very interested in discussion and analysis about MST-FET and FET. It is important to determine if there are a significant numbers of disputes that remain non-public.

72. A participant welcomed the discussion of the right to regulate and FET, but noted that the paper focused on the views of NAFTA governments. She noted that some arbitrators have not agreed with the NAFTA governments about the scope of FET. She regretted the limited focus on the meaning of FET more generally and how particular meanings can ensure clarity about the scope of the right to regulate and suggested additional attention to these issues as the work progresses.

73. A participant noted that some treaties specifically define FET which is the approach supported by his government. Bare FET clauses need a lot of interpretation and are hard for tribunals to interpret. Usually, the only point of reference for interpretation is prior decisions. However, he suggested that one way to anchor the interpretation of FET could be based on noting that treaties generally include NT in addition to FET. This can provide a reason to look at domestic law. In his country he suggested that a particular domestic law doctrine corresponded to FET and suggested that such a principle may exist in other domestic systems around the world.

74. Another participant said as in other countries, domestic law gives investors access to administrative law justice and the courts are available for everyone. In preparing domestic legislation, her government had looked at whether FET is needed given the attendant risks and given existing rights in the domestic Constitution. FET has been defined imprecisely and has opened door to investor challenges to measures permissible under the domestic Constitution and legal system based in particular on investor claims that their expectations have been affected. She suggested that for those thinking about including FET provisions, it is important to define them precisely to avoid the risk of future challenges by investors. Her government has a strong domestic law system with good protections and it aligns investor protection with domestic law constitutional provisions. Proposed legislation also provides that international arbitration is available only if domestic remedies are exhausted. Another participant noted that clauses addressing expectations need to be very precise to ensure that only formal commitments are covered and not vague promises or inducements.

75. A participant noted that his government's treaties include MST-FET provisions. He noted that with regard to terms like FET, it is important to demonstrate that the right to regulate has been preserved because the provision has given rise to litigation. It is important to have an identifiable standard which is why his government uses MST-FET. The notion of fair and equitable treatment does not provide for much certainty and could lead to an arbitrator subjectively deciding what he/she thinks is fair. Referencing the separate existing body of customary international law anchors FET and provides for a clearer rule. Recent treaties involving his government have gone further in specifying the MST. It is specified as including denial of justice and full protection and security. However, the specification is not a closed list. It is kept open and can evolve if new customary international law norms are generated.

76. A participant expressed interest in consideration of the impact of MFN provisions on the different FET provisions. He wondered in particular about the impact of an MFN provision if a country narrows a FET provision in one treaty but has different commitments in other treaties.

77. Another participant noted that his government has experienced the application by arbitrators of what they considered to be autonomous FET clauses despite the government's arguments that bare FET clauses are limited to MST-FET. He considered that with regard to the right to regulate, non-MST versions of FET give tribunals an almost unlimited power and can amount to denial of the right to regulate. FET should be subject to a high standard for breach to allow necessary policy space. He considered that legitimate expectations are not part of FET or customary international law; if they were, governments

would have insufficient policy space. He considered that the MST-FET standard includes denial of justice, manifest arbitrariness and discrimination in some cases. In his view, the content of MST constitutes the limit to the right to regulate. Broad FET reduces the right to regulate. States should work together to agree on the content of FET, expressly recognise the right to regulate, and set out the limits of both rights.

78. A participant stated that FET had been developed because national treatment provisions allow for equally bad treatment for all investors. FET thus provides a floor for foreign investors. He considered that an initial focus on NAFTA was understandable as a preliminary matter. However, it is important to avoid situations where the issue becomes one of competition to see which approach is more certain to make the government win. It is important to recall that the purpose of treaties is to protect investors and they should win if they are mistreated. Other participants agreed that it is not a question of competition, but underlined that it is important to understand the legal consequences of taking different approaches. He noted that some countries have a lot of experience with the autonomous FET standard. That experience provides a basis to evaluate what is best for each government's interests including with regard to the right to regulate. Assessments of autonomous FET along with MST-FET as analysed by the paper can inform decisions to use one or the other or something else. He noted that the Canada-EU CETA has tried to define FET. He invited future work to try to define the scope of standard itself and noted it would be helpful to see what tribunals say about the content of MST-FET.

79. A participant whose treaties use bare FET noted that it is risky in some ways because tribunals discretion to interpret, but noted that tribunals also have to take account of all aspects and circumstances. With regard to the earlier suggestion possibly to anchor FET in comparative domestic law, it was suggested that the Secretariat could reflect on whether FET could be considered as NT and MFN together because that could be a ceiling on what a country could provide.

80. The Chair welcomed the strong interest in the discussion and the papers, and invited further comments and contributions. He noted that that there were good reasons for an initial focus on NAFTA, but that it was recognised that this was only one aspect of ongoing debates. It is important to investigate whether there is more evidence about government opinions on standards in this area and governments could provide information in this respect. He also noted that a new attempt to address FET in CETA occupies what might be considered a middle ground. As a recent development, it may deserve more attention even though there is no state practice or arbitral decisions yet. We welcomed the expected continued work on the issues.

4. Investment policies related to national security

81. Roundtable participants discussed a study of investment policies related to national security put in place by economies that participate in the Roundtables.[7] The survey offers a comparative analysis of countries' investment policy approaches to address national security concerns stemming from foreign investment. It classifies the different forms of restrictions to address national security concerns, including prohibitions for foreign investment, reviews and screening mechanisms; and identifies differences between restrictions on ownership and acquisitions. The section also presents how countries define the scope of application of their policies.

82. The study's second section identifies how countries have implemented some of the key principles set out in the Roundtable's 2009 *Guidelines for recipient country investment policies relating to national security* in actual policy in order to meet their need to safeguard national security while reducing these

[7] The study is now publicly available at http://dx.doi.org/10.1787/5jlwrrf038nx-en.

policies' impact on international investment. It focuses on the policies of 17 FOI Participants that have designed investment policies related to national security.

83. The study finds:

- A broad variety of policy approaches to address national security concerns stemming from foreign ownership has developed. At the outset, it appears that none of the approaches is in itself more restrictive than others; instead different approaches reflect different perceptions of risk. The survey also suggests that policies generally tend to cover broader areas of the economy while becoming simultaneously more flexible. The categorisation offered by the survey may help policymakers assess whether existing policies are likely to work as intended and where future reform efforts may lead to more efficient and less constraining approaches.

- Many reforms that countries have undertaken of their investment policies related to national security have brought about more detailed regulation in this policy area. Whether they have also led to greater regulatory depth and greater clarity and predictability for investors, is less certain, given the trends towards greater flexibility.

- Many policies of 17 FOI Participants are inspired by the principles of transparency and predictability. As compared to the situation prevailing prior to the adoption of the Guidelines, an increasing number of countries provide for preliminary opinions on whether an investment may be subject to review. The vast majority of countries also specify timeframes in which the review must be completed and provide in one form or another criteria against which the reviews should proceed from.

- Governments have set up different mechanisms for ensuring accountability, notably by recognizing the importance of high-level political involvement in the review process, by allowing decisions to be challenged through administrative appeals and courts, and by disclosing policy outcomes.

84. Roundtable participants welcomed the overview of the many different policy designs and agreed with the categorisations of the policy approaches. Participants agreed that the 2009 Guidelines have contributed to improvements of policies in this area. However, further improvements of predictability, transparency, certainty and opportunities for consultations were called for, especially in relation to government controlled investors (GCIs) and state-owned enterprises (SOEs), which face increasing challenges under national security reviews – even though only a few countries have explicit policies related to GCIs and SOEs.

5. Recent investment policy developments

85. Roundtable participants also discussed recent investment policy developments that had occurred in the six months preceding the Roundtable. The discussion was based on an inventory of measures taken between 15 February 2015 and 16 September 2015. Four countries – Australia, P.R. China, Finland and the Russian Federation – provided detailed information on recent policy changes:

Australia

86. Australia informed Roundtable participants about recent and upcoming policy changes with respect to foreign investment in the Australian agriculture and residential real estate sectors.[8] These changes include – as of 1 March 2015 – a lowering of the screening threshold for purchases of agricultural land by foreigners from AUD 252 million to AUD 15 million; also existing ownership is henceforth included for the appreciation of this lower amount. Exceptions from the new rule apply to some countries under the FTAs with Singapore and Thailand (where the review threshold is AUD 50 million) and with Chile, New Zealand and the United States (where the review threshold is AUD 1,094 million).

87. Australia also announced plans for further modifications of its framework for inward foreign investment, which are scheduled to take effect on 1 December 2015. These include:

- the lowering of the screening threshold for foreign investment in agribusiness to AUD 55 million (with exceptions for investors from some countries with which Australia has concluded FTAs and to which higher thresholds apply);

- the introduction of fees for the review of foreign investment proposals; and

- the extension of the sanctions associated with breaches of review obligations and ownership restrictions. A broader "modernisation package" regarding foreign ownership rules was also under consideration and preparation.

88. Australia stated that it welcomes foreign investment and that the Government was creating a business-friendly environment through deregulation, free trade agreements and better services for investors who play by the rules. It also recalled that Australia had only blocked three business proposals since 2001.[9] However, Australia also noted that foreign investment had become an increasingly sensitive issue for the Australian community and that the reforms were designed to provide reassurance to the community. The lowering of the screening threshold for agriculture assets responded to the fact that the pre-reform threshold of AUD 252 million effectively exempted agricultural land acquisitions from screening.

89. Australia further informed Roundtable participants about the reforms that it planned to introduce with respect to residential real estate and which will take effect on 1 December 2015. These changes include stronger enforcement of existing rules with stricter penalties, including civil pecuniary penalties, criminal penalties and divestment orders; application fees for foreign investors; and a consolidation and harmonisation of legislation.

People's Republic of China

90. P.R. China informed Roundtable participants about its new National Security Law, which came into effect on 1 July 2015. Among other features, the law will eventually modify the rules applicable to reviews of inward investment proposals based on national security considerations. The new law introduces a comprehensive definition of national security, and mandates reviews for investments involving key materials and technologies, internet or information technology, and other major projects and events.

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8 In line with its obligations, Australia had notified the OECD about the planned changes on 13 March 2015.

9 These include the proposed takeover of Graincorp by Archer Daniels Midland in November 2013, the proposed takeover of the Australian Securities Exchange by the Singapore Stock Exchange (April 2011) and the proposed takeover of Woodside Petroleum by Shell (April 2001).

91. P.R. China stated that the mechanism for national security reviews of inward investment which had been in place since 2011 was satisfactory and struck a proper balance between openness for foreign investment and the protection of China's national security; only a small proportion of investment proposals were scrutinized for national security concerns.

92. The new National Security Law was a more comprehensive and basic law, which also covered national security risks associated with foreign investment. At present, the mechanism for review established in 2011 was still applicable, pending implementing regulations of the new law which were still being prepared.

93. P.R. China also drew attention to the new draft Foreign Investment Law, which was made public in January 2015 for consultation. This draft Law also contains a section on national security reviews. At present, the Chinese government was working on the draft based on the feedback it had received during the consultation. A date for the new law entering in effect had not yet been set.

Finland

94. Finland informed Roundtable participants about the decision-making process related to foreign investment in a nuclear power plant and adjacent nuclear facilities planned to be built in Finland. The project will be owned and operated by Fennovoima, a Finnish company. In a decision-in-principle of the Finnish Government dated 18 September 2014,[10] the Finnish government stated that it was of the view *"that a clear majority of Fennovoima's ownership must be held by parties residing or domiciled in EU or EFTA countries and that these holdings should constitute at least 60 per cent of the shares"*.

95. Finland explained that the foreign ownership restriction contained in this decision-in-principle was based on section 11 of the Finnish Nuclear Energy Act (990/1987). According to this provision, the construction of a nuclear facility of considerable general significance requires a government decision-in-principle stating that the construction project is in line with the public interest. The Finnish government is of the view that the ownership of the company operating the facility must be in line with public interest, and that in the specific case, at least 60% of the shares of Fennovoima must be held by parties residing or domiciled in the EU or the EFTA countries as this will help ensure control over the country's energy policy and its security of supply. Finland further explained that the decision-in-principle was not based on the *Act on the Monitoring of Foreign Corporate Acquisitions* (172/2012), which concerns corporate acquisitions made by foreign citizens.

96. The acquisition of a 34% stake in Fennovoima by Rusatom Overseas CJSC, a Russian enterprise, was confirmed in a decision of 3 March 2014 by the Finnish Ministry of Employment and the Economy in a separate process under the Act on the Monitoring of Foreign Corporate Acquisitions.

Russian Federation

97. The Russian Federation offered its view in relation to the further restriction of foreign ownership in media companies. The law, which was signed in October 2014 by the President of the Russian Federation and which was scheduled to become effective on 1 January 2016, prohibits ownership or control of over 20% in the share capital of media companies by: foreign States, international organisations, Russian nationals who also have a nationality of another State, foreign natural and legal persons, as well as

[10] The full text of the decision-in-principle is available in Finnish and Swedish.

Russian legal persons that are more than 20% foreign-owned. Previously, the limit was 50% and only applied to TV and radio; the new 20% threshold will also apply to print and Web media.

98. The Russian Federation stated that the law was compatible with the Russian Federation's WTO obligations.

6. Recent investment treaty developments

99. Roundtable participants also discussed several recent investment treaty developments. Issues discussed included (i) a proposal by the European Commission on an investment court system and a permanent multilateral international investment court; (ii) proceedings by the European Commission against five EU member states for alleged infringement of EU law for maintaining so-called "intra-EU" bilateral investment treaties with other EU member states; (iii) adoption of trade promotion authority in the United States; (iv) proceedings relating to alleged labour rights violations under CAFTA-DR; and (v) entry into force of the Framework Agreement of the Pacific Alliance between Chile, Colombia, Mexico and Peru.

EU Commission proposal on an investment court system and international investment court

100. On 16 September 2015, the European Commission published a new approach to the resolution of investment treaty disputes. It proposed a new Investment Court System for its negotiations on the Transatlantic Trade and Investment Partnership (TTIP) and ongoing and future trade and investment agreement negotiations.[11] The Commission also announced that it will start work on a permanent international investment court, together with other countries.

101. Earlier in the summer, on 8 July 2015, the European Parliament adopted a resolution supporting TTIP but calling for "replace[ment] [of] the ISDS system with a new system for resolving disputes between investors and states". The new system should feature publicly appointed, independent and professional judges, public hearings and an appellate mechanism. It should ensure that "private interests cannot undermine public policy objectives".[12]

102. The European Commission noted that its proposals reflected the views of the European Parliament as well as an earlier public consultation on the investment provisions in TTIP in 2014. It provided further details to the Roundtable on the proposed Investment Court System. It clarified that its September 2015 public proposal was a Commission proposal which was under discussion with EU member states and EU institutions and did not yet reflect an EU proposal to negotiating partners.

103. The Commission explained that the changes are designed to adopt a more traditional court-like mechanism similar to national and international courts in which governments appoint judges in advance. It would break with the approach based on party and/or arbitration institution appointment in each case. The system provides for the appointment of 15 first-level judges in advance by governments. It also introduces a two-level system with appeals. Judges will be subject to strict ethical requirements.

104. The Commission stated that the new approach responds to criticism of issues of public policy and affecting public finances being decided by a system built on commercial arbitration, widely perceived

11 European Commission, press release, 16 September 2015.

12 European Parliament, Resolution, 8 July 2015.

within the EU as a system of private justice. According to the Commission, the introduction of an appellate mechanism would increase the legitimacy and efficiency of dispute resolution and contribute to greater predictability and legal certainty for investors and governments. The new system would also include provisions for transparency, a loser pays provision, limits on parallel or overlapping claims, disclosure of third party financing, and time limits for proceedings.

105. Responding to questions from participants about parallel work with other countries beyond the TTIP context, the Commission stated that it was analysing the idea of a standing plurilateral investment court, which is the ultimate objective of the new approach.

Proceedings by the European Commission against five EU member states for alleged infringement of EU law for maintaining bilateral investment treaties with other EU member states.

106. The European Commission considers that bilateral investment treaties between EU member states ("intra-EU BITs") are incompatible with EU law and must be terminated.[13] The Commission informed Roundtable participants that, in its view, these BITs, which confer rights upon investors from some EU member states only and not to all EU investors, risk overlapping and conflicting with EU law. They should be terminated for reasons of legal certainty. It considers that these intra-EU BITs are not needed because the 2014 EU enlargement has brought all EU member states and investors under the single market. The Commission stated that these considerations are limited to intra-EU BITs. They do not concern EU treaties or treaties between an EU member state and third states. The Commission stated that these treaties raise different considerations because they do not involve the EU internal market.

107. On 18 June 2015, the European Commission announced that it had launched the first stage of infringement procedures by sending letters of formal notice to five EU member states (Austria, the Netherlands, Romania, Slovakia and Sweden) requesting termination of their intra-EU BITs. Simultaneously, the Commission initiated an administrative dialogue with 21 other Member States that still have intra-EU BITs in place.[14] If a Member State which has received a formal notice does not comply with the request, the Commission may send a formal request to comply with EU law. If the Member State still fails to comply with the request, the Commission may decide to refer the Member State to the Court of Justice of the EU.[15]

108. The Commission informed Roundtable participants that it is currently examining the answers received from EU member states in response to the formal notice and the requests for information, respectively. It is discussing the next steps but no decision has been taken so far.

Adoption of Trade Promotion Authority in the United States

109. On 29 June 2015, President Obama signed Trade Promotion Authority (TPA) after it was adopted by both houses of Congress. The TPA establishes a Congressional oversight and consultation process for trade and investment negotiations. Congress retains the authority to review and decide whether any proposed US trade and investment agreement will be implemented. However, it must decide to accept or reject the agreement as a whole within a specified and limited time frame.

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13 European Commission, press release, 18 June 2015.

14 European Commission, press release, 18 June 2015. Italy and Ireland have already terminated their intra-EU BITs.

15 European Commission, General information on infringement procedures, with references to art. 258 of the Treaty on the Functioning of the European Union (TFUE).

110. The US stated that the text of the TPA, which is publicly available, contains a section on investment negotiating objectives which largely track the earlier objectives established by the US Congress in 2002. Compared to the 2002 TPA Act, they also reflect a balance between reducing and eliminating exceptions to NT, freeing the transfer of funds relating to investment, reducing and eliminating performance requirements, and clarifying and limiting FET, providing mechanisms to dismiss and eliminate frivolous claims, and ensuring transparency in ISDS. The US stated that the TPA is largely consistent with the 2012 model US BIT and recent US treaty practice including in the TPP.

Proceeding under CAFTA-DR relating to labour rights provisions.

111. The US briefly responded to the question on this development, noting that its FTAs have some broader binding language on labour and the environment than its BITs. The more ambitious language reflects the broader scope of FTAs. The US indicated it could transmit specific requests for further information to the appropriate authorities.

Entry into force of the Framework Agreement of the Pacific Alliance

112. On 20 July 2015, the Framework Agreement of the Pacific Alliance between Chile, Colombia, Mexico, and Peru entered into force.[16] The goal of the Alliance is to further regional integration and to strengthen ties with the Asia-Pacific region. All signatories of the Pacific Alliance, with the exception of Colombia, are also part of the then ongoing Trans-Pacific Partnership (TPP) negotiations.

113. Chile specified that the Framework Agreement does not itself include investment provisions. However, it provides the institutional framework for ratification of a Pacific Alliance free trade agreement (the Additional Protocol to the Framework Agreement). The Additional Protocol was signed in June 2012 and contains investment provisions.

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[16] Organization of American States, Trade Policy Developments.