

Unclassified

English text only

24 April 2018

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE**

Freedom of Investment Roundtable: Summary of Discussion at Roundtable 27

Note by the Secretariat

17 October 2017

This note is a Secretariat summary of discussions at Freedom of Investment (FOI) Roundtable 27, held on 17 October 2017.

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

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

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JT03430620

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 taken under 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 views and information contributed by participants at Roundtable 27, held on 17 October 2017. Participants included representatives of governments of the 35 OECD members as well as the European Union, other governments that have adhered to the OECD Declaration on International Investment and Multinational Enterprises (Argentina, Brazil, Colombia, Costa Rica, Egypt, Lithuania, Morocco, and Tunisia), and government representatives from P.R. China, the Russian Federation, South Africa and Thailand. The United Nations Conference on Trade and Development (UNCTAD), the United Nations Commission on International Trade Law (UNCITRAL), the World Trade Organisation (WTO) and the World Bank (WB) also participated in the Roundtable. The International Centre for Settlement of Investment Disputes (ICSID) participated in part of the Roundtable.

The discussions at Roundtable 27 addressed several topics¹ including:

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¹ The order of discussion was determined in part by logistical requirements; items have been arranged by theme here.

1. Arbitrators, Adjudicators and Appointing Authorities in ISDS

1.1. Adjudicator compensation systems in ISDS

3. The Roundtable considered a revised paper by the Secretariat addressing adjudicator compensation systems in Investor-State Dispute Settlement (ISDS) which had been discussed at Roundtable 26 in March 2017.² The paper provides an overview of adjudicator compensation and examines (i) fee-based systems of remuneration of judges and reforms to introduce salaries in colonial America and the United States, France and England in the 18th and early 19th centuries; (ii) debates over the impact of compensation systems on adjudicators; (iii) contemporary approaches to the compensation of judges in advanced economies; (iv) the co-existence in advanced economies of national courts with salaried judges since the early 19th century with generally strong support for commercial arbitration based on *ad hoc* fee-based remuneration; and (v) similarities and differences between commercial arbitration and investment arbitration, focusing on how the largely similar compensation systems may have different effects and be differently perceived by the public. The Roundtable noted that following a period for any additional comments, the paper would be made available as a Secretariat working paper on the website.³

1.2. Arbitration Institutions and the Selection of Arbitrators in Investment Arbitration: An Overview

4. Following an initial Roundtable discussion about appointing authorities in ISDS in October 2016⁴, the Roundtable considered a substantially expanded background paper. The appointing authority's most important role is to appoint the chair of a tribunal if the parties or co-arbitrators are unable to agree on one. The paper considers appointing authorities in general and analyses the appointing authorities associated with five arbitration institutions, with particular attention to their role in the appointment of ISDS arbitrators. The term "arbitration institution" refers here to institutions that provide appointing authority services along with broader support services for arbitration such as secretaries to tribunals, hearing rooms, etc.⁵

5. The five arbitration institutions include the two principal inter-governmental organisations that provide arbitration institution services in ISDS: the International Centre

² See Summary discussions at Roundtable 26 (8 March 2017), pp. 8-12.

³ The [paper](#) is now available on the OECD website.

⁴ Summary of discussions at Roundtable 25 (17 Oct. 2016).

⁵ As set forth below, at the conclusion of the Roundtable 27 discussion, the Roundtable requested the Secretariat to gather additional information from the five arbitration institutions as well as from stakeholders and experts. Initial information has been received from these sources in a consultation on the paper. The [consultation paper and initial comments received](#) are available on the OECD website.

References to the background paper generally reflects the information that was presented to the Roundtable and discussed in October; certain additional information received subsequently is noted in footnotes, but generally comments received are not reflected herein. Analysis of the issues addressed herein is ongoing.

for Settlement of Investment Disputes (ICSID); and the Permanent Court of Arbitration (PCA). In addition to their inter-governmental nature, they are both important in the current system: ICSID is the market leader in terms of the number of ISDS cases overall and by year, and the PCA has a significant ISDS case load, principally under the UNCITRAL Arbitration Rules.⁶ Both institutions are based on international treaties and have supreme governance bodies with government representatives.

6. The initial review also includes three private-sector arbitration institutions: the Arbitration Institute of the Stockholm Chamber of Commerce (AI-SCC); the International Chamber of Commerce (ICC); and the Singapore International Arbitration Centre (SIAC).⁷ All three are primarily commercial arbitration institutions. Their rules are included as options for covered investors in far fewer treaties than ICSID, but they have demonstrated strong interest in increasing their role in ISDS.

7. The paper notes that interest in the role of appointing authorities in ISDS is growing for several reasons: now-frequent amendments to arbitration rules and practices have given them a greater role; recent decisions relating to the designation of appointing authorities in ISDS are expected to have an impact on the number of ISDS cases and have drawn comment; and there is academic interest in correlations between the choice of arbitral rules and arbitration institution on the one hand, and ISDS case outcomes on the other hand.

8. Public expressions of dissatisfaction with an ISDS arbitral pool seen as dominated by commercial arbitrators, men, people from the upper reaches of the top 1% of incomes or individuals from developed countries have also generated increased interest in selection procedures for arbitrators including by appointing authorities. The multilateral investment court system (ICS) proposal by the EU and Canada has generated debate about the relative merits of government appointment of judges and the current system of appointments by disputing party/counsel and appointing authorities. Greater transparency from arbitration institutions has been advanced by some as an incremental solution to address the issue of public confidence in ISDS. The Roundtable has emphasised the general need for better information and explanations to the public.

9. To simplify the initial presentation and facilitate comparisons, the paper assumes that (i) the claimant investor has access to treaty coverage under one or more investment treaties that provide it with a choice of appointing authorities or designating authority; (ii) the investor selects the appointing authority or designating authority when it chooses to file its claim under particular arbitration rules; and (iii) neither the treaty parties nor the disputing parties have agreed to vary the arbitration rules applicable to appointing authority issues.

⁶ The 1965 ICSID Convention and ICSID Arbitration Rules (amended in 2006) are widely included in investment treaties; the UNCITRAL Arbitration Rules are the second most-frequently included. The UNCITRAL Rules provide the PCA with a unique role as designator of appointing authorities; the PCA also frequently serves as appointing authority in UNCITRAL cases. The UNCITRAL Rules were updated in 2010 and further amended in 2013 to include the UNCITRAL Transparency Rules.

⁷ The three principal sets of arbitration rules at issue from these institutions were all issued or updated in 2017: the 2017 AI-SCC Arbitration Rules, the 2017 ICC Arbitration Rules and the 2017 SIAC Investment Arbitration Rules (SIAC IA Rules).

All five arbitration institutions can serve as appointing authorities in cases under the UNCITRAL Rules.

10. The analysis initially focuses principally on the selection of the chair of the three-person tribunals that dominate in ISDS. This important appointing authority function usually involves the broadest exercise of discretion, but has attracted less analysis than more visible functions such as taking decisions on challenges to individual arbitrators. Mechanisms for selection of the chair are also of most relevance to broader debates about the selection of neutral adjudicators.

11. The expanded paper (i) describes the importance of appointing authorities and the different context for their role in commercial arbitration and ISDS; (ii) presents a rough typology of the nature and modes of intervention of appointing authority-related actors, including informal as well as formal processes; (iii) examines the institutional structure of the five arbitration institutions, the nature of their appointing authority and how it is selected within the institutional context; and (iv) describes how those appointing authorities act to select the chair under the rules of their arbitration institution and under other arbitration rules. It also considers the expanded role of the appointing authority under certain amendments to arbitration rules to introduce “emergency arbitration” into ISDS, notably at the AI-SCC, and the unique role in ISDS of the PCA as the designator of appointing authorities under the UNCITRAL Rules. A final section addresses the different policies of the five appointing authorities on disclosure of their appointments in individual ISDS cases.

12. Although work was continuing, the paper proposed some preliminary observations and conclusions for discussion. First, the appointing authority system appears very complex. Many actors carrying out the same or similar functions and in different ways. Second, appointing authorities are a very important component of the ISDS system and are in some ways at its apex. They appoint arbitrators and in particular the chair in a significant proportion of ISDS cases. Their influence extends beyond their direct interventions because expectations about their likely choices with regard to the chair influence both disputing party negotiations over an agreed chair and disputing party selections of co-arbitrators. More broadly, listing and appointing practices by appointing authorities may significantly affect the overall pool of ISDS arbitrators.

13. Third, appointing authorities differ markedly between the five arbitration institutions. Government representatives select the appointing authorities at the two inter-governmental institutions; the appointing authorities are individuals and generally former senior national government officials. Businesses or business organisations select the appointing authorities at the three private arbitration institutions (which primarily administer commercial arbitration cases). Private-sector institutional appointing authorities are collective bodies composed primarily of private arbitration lawyers with a commercial arbitration background.

14. Fourth, arbitration institutions apply contrasting policies to disclosure about the ISDS appointments by their appointing authorities. With the exception of ICSID, disclosure of appointing authority action has often been minimal. Disclosure still remains limited everywhere; for example, although appointing authorities generally have unlimited discretion in selecting individuals for the short lists of potential arbitrators that they submit to the disputing parties, there is no disclosure of lists either individually or in aggregate. The two inter-governmental organisations in particular have different disclosure policies. The differences may reflect different historical development, types or

intensity of government engagement with the issues at the two institutions, competitive considerations or other factors.⁸

15. Fifth, there is evidence of significant competition between arbitration institutions for ISDS cases. ISDS appears to be a market segment in a broader commercial arbitration market. In addition to competition between existing institutions active in ISDS, a number of other competitive forces widely recognised as important appear likely to be at play: the power of customers (investor claimants, lawyers and lawyer/arbitrators, governments); the threat of new entrants (e.g., other commercial arbitration institutions); the threat of substitutes (the ICS, domestic courts, insurance, commercial arbitration); the power of suppliers (potential arbitrators, staff). Lock-in may also be relevant to competition in the field: while investors and investor counsel are often free to change their appointing authority preferences at any time including in response to unwelcome appointing action, governments are typically locked into appointing authorities for many years under current investment treaties.

16. Appointing authorities bestow a valuable benefit on the arbitrator that they select as chair. The market is characterised by reciprocal relationships among a small group of arbitration institutions and arbitrators/lawyers with each group both competing for cases and playing a role in selecting the other. The extensive scope for forum shopping and treaty shopping in ISDS can frequently give investment arbitration counsel a role in post-dispute choices of arbitration institutions and appointing authorities (unlike commercial arbitration counsel). At the three private sector arbitration institutions, private lawyer/arbitrators constitute the appointing authority which further accentuates the reciprocal relationships. Competition analysis is ongoing.

17. Sixth, there appear to be limited mechanisms for public or internal accountability of appointing authorities. No reasons are provided for appointment decisions. Internal and external recourse against appointing authority decisions is rarely specified. No national or other parliaments have engaged in inquiries about the operation of arbitration institutions in ISDS; press coverage rarely if ever reports on the detail of how arbitration institutions operate or how ISDS tribunals are constituted. The market for cases appears to be a mechanism allowing for a degree of accountability which increases the importance of market analysis.

18. Governments engaged in an initial and preliminary discussion of the issues. Participants noted that appointing authorities and their role in selecting arbitrators have rarely been analysed and welcomed attention to the issues. Several participants stated that governments take serious risks when they transfer the power to select arbitrators and in particular the chair of ISDS tribunals to a private institution over which they have no control or authority. Governments need to be cognizant of the risks involved in that delegation. It was suggested that broad investment treaty provisions including private sector institutions as appointing authorities dated from an era when treaty negotiators were less focused on issues raised by adjudicator selection than they are today.

19. Another participant stated that competition between appointing authorities emerged as an important issue in his first preliminary reading of the paper. That issue was

⁸ In post-Roundtable comments, the PCA has suggested that general ICSID disclosure of its role as an appointing authority in all cases applies to ICSID cases, but not to ICSID's activities as appointing authority under the UNCITRAL Rules. Policies and issues in this area, including whether the arbitration rules adopted by inter-governmental organisations constrain the scope of disclosure by appointing authorities of their actions, are under ongoing review.

possibly obvious when one takes a step back to consider the system, but it had been little addressed to date. It would appear to impact the choice of adjudicators which in turn appears to impact the profiles of those adjudicators in terms of their expertise, knowledge and professional background. This was important information in terms of how the system should be further reformed.

20. He also found interesting the preliminary analysis of the power of investment arbitration counsel/arbitrators to select post-dispute among arbitration institutions and appointing authorities. He noted the difference with counsel/arbitrators in commercial arbitration. The greater power of investment arbitration counsel/arbitrators to direct cases to particular institutions merited further reflection and attention. He also supported further exchanges with the relevant institutions to obtain more information and better understand practices in the field. Another participant also emphasised the importance of transparency and suggested that more information about how the arbitration institutions generate their lists of proposed arbitrators would be valuable. It was seen as important for the maintenance of the credibility of the system.

21. Another participant also emphasised that the selection of arbitrators is very important for ISDS. Transparency in this area is needed to achieve trust and confidence in the system. He also raised two specific procedural issues about appointing authorities. He stated that although the World Bank President is the ICSID appointing authority, it is general knowledge that in practice at ICSID, appointing authority activity is commonly delegated to the ICSID Secretary-General. In many cases although not all, decisions are rendered by tribunals in 2-1 decisions. He considered that a mechanism is needed to give the disputing parties some control over selections by the ICSID Secretary-General. Second, the UNCTRAL Rules give the PCA Secretary-General the power to choose the appointing authority to decide on a challenge to an arbitrator. Decisions by an appointing authority in this sensitive context should be accompanied by reasons in order to ensure credibility to the process and for disputing parties.

22. Another participant suggested extending the analysis to include the International Court of Justice (ICJ). It has a great potential role in SSDS under a number of investment treaties, but has also played a role in some ISDS cases. Another participant suggested that the useful research could be complemented with the provision of policy options for treaty negotiators. For example, it could be useful to know whether one set of arbitration rules can be used with a different appointing authority. It was noted that in general, there is power to vary arbitral rules. There are some models of single appointing authority choices in some existing treaties. Other combinations could be possible, but care and analysis would be needed.

23. Another participant underlined the role of governments in nominating to the ICSID roster. In her view, this provides governments with power to correct the balance in the arbitral pool. Issues about composition of the arbitral pool in terms of gender, regional representation or race could be addressed. It was noted, however, that systemic issues should be taken into account in this area. An attempt to reconfigure the arbitral pool by constraining one institution and not others may simply place that institution at a competitive disadvantage rather than help solve the issue. In some cases, such action with regard to one institution could serve a signalling function to others about desired changes, but in a competitive system with various competitive forces, that outcome would be uncertain.

24. It was suggested that two different trends could be at play. Long-term lock in of governments to certain appointing authorities, and investor and investor counsel power to

choose among them, could be seen to favour investor interests under existing treaties. But the trend in recent treaties to increasingly narrow or eliminate investor choice of appointing authorities was also relevant. This development could generate vigorous competition between arbitration institutions to appeal to governments in order to be included in future investment treaties. Analysis of how treaty provisions have evolved in this area would be of interest.

25. In conclusion, the Roundtable expressed strong interest in continuing with this important analysis in a new area. A particular focus should be on systemic issues and on issues of possible bias or influences in the system rather than on specific cases or appointments. The relevance of appointing authority rules and practice to the competition between arbitration institutions for cases should be considered. Analysis should also consider further how the competition between appointing authorities could affect their actions. The analysis in the paper should also be expanded to include certain additional arbitration institutions or other institutions that have played or could play a role as appointing authorities in ISDS. In addition, input on the issues should also be sought including from arbitration institutions, stakeholders and participants in ISDS as part of continuing dialogue in this area. The Secretariat should determine how best to proceed whether by a questionnaire, interviews or other possibilities. Government representatives with experience with arbitrator selection were also invited to provide additional information.

2. Societal benefits and costs of International Investment Agreements

26. Roundtable participants continued their considerations of societal benefits and costs of international investment agreements, which had already given rise to discussions at Roundtables 23, 24, and 25, and a session at the Annual Conference on Investment Treaties 2017 and a consultation of the relevant scientific community, the institutional stakeholders associated with the OECD. These various sources of input had led to a revised secretariat note that sets out aspects of societal benefits and costs of IIAs, and reviews available empirical evidence that supports these aspects.

27. Roundtable participants expressed the view that the inventory by the Secretariat contained a comprehensive and up-to-date collection of aspects that are advanced in academia, among policy makers, businesses and civil society; that the note should be made available as a working paper to inform and encourage further research in areas where empirical insights were lacking.⁹ Roundtable participants emphasised the importance of clarifying that the findings do not necessarily reflect their views or the views of the OECD, but the views of third actors.

28. Roundtable participants also considered that further work on societal benefits and costs of IIAs is a priority and that the Roundtable would be the appropriate forum for

⁹ The note was made publicly available through the website www.oecd.org/daf/inv/investment-policy/working-papers.htm in early 2018.

such work. Based on a list of options for a further course of action prepared by the Secretariat, they asked the Secretariat to propose areas and methodological minima for original research on aspects identified as requiring better understanding; identify areas of treaty practice that enhance societal benefits or lowers costs of IIAs, especially considering recent treaty innovations; and collect government practice on how to assess benefits and costs of IIAs.

3. Balance of investor protection and the right to regulate: statistics on fair and equitable treatment provisions

29. Roundtable participants considered a revised Secretariat note with a large sample survey of references to “fair” and “equitable” treatment in international investment agreements. An earlier version was discussed at Roundtable 26.¹⁰

30. The survey is part of ongoing work on fair and equitable treatment provisions in international investment agreements, which relate to the broader work on the balance of investor protection and the right to regulate in investment treaties. The survey reports the findings of a descriptive statistical survey of references to “fair” and “equitable” treatment provisions in over 2200 bi- or plurilateral investment treaties concluded by Roundtable participants. It summarises the presence of language referring to “fair” and “equitable” treatment in these treaties; classifies and presents general features of such references, such as locus and language; and sets out treaty language addressing the contours of “fair” and “equitable” treatment. It identifies changes of treaty practice over time and across countries and documents broader trends in policies in the use and design of this central provision in international investment agreements

31. The Roundtable noted that following the discussion, it was expected that the paper would be made available as a Secretariat working paper on the website.

4. Presentation on UNCITRAL’s recent mandate to work on the possible reform of Investor-State Dispute Settlement (ISDS)

32. An UNCITRAL Secretariat representative provided the Roundtable with a general overview of UNCITRAL and its work, and information about its mandate to address the possible reform of ISDS. He noted that UNCITRAL seeks to develop legislative standards. Work in UNCITRAL Working Groups and the Commission can lead to the

¹⁰ See Summary of discussions at Roundtable 26 (8 Mar. 2017), item 3.

adoption of texts that are transmitted to the United Nations General Assembly, and may be adopted as a model law and legislative guide.

33. He noted that in addition to the New York Convention on arbitration, UNCITRAL has adopted arbitration rules that are frequently used in ISDS. However, contrary to some erroneous media reports, UNCITRAL does not administer individual arbitration cases. As such, it differs from ICSID or the PCA. UNCITRAL's recent work in developing the UNCITRAL Transparency Rules and the Mauritius Convention was also described. He noted that the Mauritius Convention would be entering into force the following day with ratifications by Canada, Mauritius and Switzerland.

34. UNCITRAL gave its Working Group III a broad mandate to work on the possible reform of Investor-State Dispute Settlement (ISDS) in July 2017. The mandate has three parts. The Working Group will identify concerns regarding ISDS and consider whether reform is desirable. If so, the Working Group will develop relevant solutions to be recommended to the Commission. The Commission agreed that broad discretion should be left to the Working Group in discharging its mandate. The mandate provides that the deliberations, while benefiting from the widest possible breadth of available expertise from all stakeholders, will be government-led with high-level input from all governments, consensus-based and be fully transparent. It was further agreed that any recommended solutions would be designed taking into account the ongoing work of relevant international organisations and would allow each State the choice of whether and to what extent it wishes to adopt the relevant solutions. He called on governments with expertise and practical knowledge about ISDS and reforms to participate. He noted that international inter-governmental organisations invited by the Commission to the Working Group would be able to participate in the forthcoming November 2017 session.

35. In the ensuing discussion, a participant noted he was a long-standing participant in UNCITRAL work and he emphasised the importance of government participation in these new discussions. He underlined that it is very important for governments to be represented by officials from capitals and relevant departments for the discussions. He pointed to the importance of a true multilateral process and an open discussion, including the issues discussed in an earlier inter-governmental Dialogue on investment treaties the previous day.¹¹

36. Another participant also emphasised that the process initiated at UNCITRAL was very important. The international investment policy community needs to work on ISDS and the UNCITRAL process is well-suited for that purpose. His jurisdiction is particularly interested in having active participation from the relevant international organisations. He emphasised the depth of analysis of ISDS at the OECD over the last few years including the papers currently under discussion and expressed interest in active OECD Secretariat participation in the work at UNCITRAL.

37. He also stated that it is extremely important that delegations be government-led and contain government investment policy experts and government ISDS experts. The three steps of the mandate are important and time is needed to analyse issues and concerns. He expected that the November 2017 Working Group meeting would focus on those aspects.

¹¹ The annual OECD-hosted inter-governmental Dialogue on Investment Treaties addressed in October 2017 a progressive agenda for investment treaties and innovations in the Trans-Pacific Partnership Agreement.

38. Another participant echoed the views of the first two, noting that there is now a lack of credibility in ISDS which can involve either perceptions or well-justified concerns. The earlier inter-governmental Dialogue addressed some important issues. She participated in July at UNCITRAL and was pleased that the mandate integrates different views. It is important to proceed carefully. She also emphasised that it would be very helpful if the OECD could support the work in UNCITRAL.

39. Another participant took the opportunity to reiterate his jurisdiction's position which was open to the first stage examination of issues. It looked forward to contributing to the discussion without prejudging the outcome. Another participant was also pleased with the mandate and the open nature of the work, which is particularly important in the current context, and stressed that his government will be fully engaged.

40. Another participant also looked forward to an open and constructive discussion of possible reform of ISDS at UNCITRAL. It is very important to follow the three steps. The discussion should strike the right balance between the need to ensure that it is a government-led process with high level input from all governments, while also benefiting from participation of variety of stakeholders. Reform of ISDS will affect most countries and their business communities and civil societies; the impact will be limited to the comparatively limited number of UNCITRAL members. He encouraged the UNCITRAL Working Group to reach out to the wider international community and to try also to listen to voices from those not represented in UNCITRAL meetings, especially developing countries. It is also important to ensure better transparency and to better inform all about the discussion and decision-making mechanisms at UNCITRAL. This would allow better participation in the process.

41. He also noted the OECD's in-depth research and active discussion in the field and encouraged the OECD to actively participate in the process and discussion at UNCITRAL. He suggested that UNCITRAL should develop a systematic approach to ensure the coordination between its work and other important international organisations in the field. A systematic approach would help the efficiency of the process.

42. The potential role of the OECD in this new work was further addressed. In terms of what the OECD could contribute, participants had noted the existing and ongoing body of work resulting from intensive work on ISDS. The work since 2011 practically without interruption included input from experts and stakeholders. Even in work in other areas, like fair and equitable treatment provisions and the balancing of interests, the discussions frequently noted the importance of ISDS to outcomes. It was noted that there was a lot of learning in the Roundtable discussions that is summarised on the website as well as in the materials discussed by the Roundtable. The expertise and knowledge building developed by governments in their discussions between governments at the OECD would be valuable in deliberations and discussions. The ISDS scoping paper and more recent work on arbitrators, adjudicators and appointing authorities were noted as relevant existing and on-going work.

43. In terms of how the OECD could contribute, it was noted that a wide range of approaches could be considered. The close cooperation with UNCITRAL was noted as was recent progress towards making relevant OECD papers available on the UNCITRAL website. With the understanding that it is a government-led process, there could for example be room for presentations and discussions that could facilitate governments and others coming forward with some of the learning and discussions at the OECD.

44. In response to the discussion, the UNCITRAL representative clarified that while UNCITRAL has 60 member states, all states receive an invitation through their permanent missions in New York and Geneva. He noted that the UNCITRAL Secretariat has invited the same inter-governmental organisations and other observers as for the discussions on transparency of investment arbitration to the new discussions on ISDS. He noted that UNCITRAL has received requests from other IGOs and NGOs to participate as observers in the discussions about possible reform of ISDS. He stated that the UNCITRAL Secretariat is evaluating whether they should be invited based on Commission criteria.

45. With regard to the suggestion for UNCITRAL Secretariat to engage in a systematic approach to integrating the work of international organisations, he noted that the UNCITRAL Secretariat does not have the resources to address all the issues under discussion. Its paper for the November meetings relies heavily on UNCTAD and OECD work. He expressed interest in coordinating more to develop the necessary documents for the UNCITRAL discussions.

46. The Chair thanked the UNCITRAL representative and noted some general conclusions. The three step process was generally seen as a good one, he noted that it also aligned with OECD approach and Roundtable deliberations. Second, he noted broad emphasis on the importance for governments to take the lead in the process given its political nature. He noted that in the UNCITRAL context, this was not a challenge but it has a reason because UNCITRAL has been, perhaps more than other institutions, very forthcoming in engagement with private sector and private sector stakeholders and in particular lawyers. This engagement is important but it is very important to provides checks on it for this new process due to many perceptions that the ISDS system is lawyer-driven. In this context, the OECD has things to offer as a fundamentally government-led organisation, albeit with lots of stakeholder input. It works primarily in inter-governmental meetings as in the Roundtable.

47. A third area of discussion related to the role of inter-governmental organisations. Governments want to avoid duplication of work. It is important to benefit from work already done and not to duplicate it elsewhere. In some areas, we have stepped beyond the first step at the Roundtable into causes and identifying options to address. The OECD should be able to contribute in particular to the first step in a meaningful manner. As noted in the discussion, this should happen in a systematic manner through a process that ensures that the accumulated knowledge can be fed in to the process. This is true for other inter-governmental organisations although the focus here is naturally on the OECD.

48. The same interest in cooperation applies with regard to Roundtable work. The Roundtable can include UNCITRAL developments in its inter-governmental deliberations on a regular basis. He noted that the Roundtable would welcome UNCITRAL colleagues for updates on a regular basis; this could allow ongoing discussions on how best to cooperate and share information and workloads between the organisations. The Chair reiterated the importance of many Roundtable government participants participating in the UNCITRAL process.

5. Monitoring of recent investment policy developments

49. Roundtable participants discussed recent investment policy developments that had taken place since the last Roundtable in March 2017. The discussion was based on an [inventory of measures taken between 16 February 2017 and 15 September 2017](#). Five economies – Germany, Japan, Netherlands, the United Kingdom and the European Union – provided information on recent changes of their investment policies related to national security or of initiatives in this area.

5.1. Germany

50. Germany provided information on an amendment to the Foreign Trade and Payments Ordinance which had entered into effect on 18 July 2017.¹² The changes specify the scope and application of the cross-sectoral review mechanism, in particular the possibilities to intervene in foreign direct investment proposals by foreigners of assets if such acquisitions may threaten public order or national security. Given what is described as a new threat scenario and the increasing importance of key infrastructure and defence technology, the amendments specify that threats to national security may arise from foreign ownership in companies that host critical infrastructure; produce industry-specific software for it; work with surveillance mechanisms, cloud-computing-services or telematic infrastructure. Specifications also cover defence-related industries, where the term “war weapons” in the rules have been clarified to include sensor and electronic warfare technologies. Finally, the rules of administration of the review procedures have been adjusted with a view to the growing number and complexity of acquisitions.

51. The government expects and estimated number of 10 more cases per year in which an investor has to notify a planned transaction. It estimates the administrative costs per case to be around EUR 125 per transaction (EUR 195 for each case of a “deep” review in the cross sectoral review; and EUR 260 for a “deep” review for sector-specific review).¹³

5.2. Japan

52. Japan informed Roundtable participants about changes to the rules on the review of inward foreign investment, which came into effect on 1 October 2017. The changes are based on a reconsideration of threats to national security, changes to the business environment and the spread of critical technologies, including dual-use technologies. The new rules: extend the review mechanism to acquisitions of non-listed companies, which were hitherto not covered by the rules, and introduce the post-investment administrative measures in case of breaches of the rules.

¹² [Neunte Verordnung zur Änderung der Außenwirtschaftsverordnung](#), 14 July 2017. The Ordinance complements the *Foreign Trade and Payments Act* and sets out specific rules for the implementation.

¹³ [Neunte Verordnung zur Änderung der Außenwirtschaftsverordnung](#), 14 July 2017, item E.3.

5.3. Netherlands

53. The Netherlands informed Roundtable participants about consideration in the Dutch Parliament about establishing rules to manage national security risks stemming from foreign ownership in companies operating in the telecoms sector.¹⁴ Interest in reviewing the merits of introducing such rules has been triggered or intensified by a series of proposed acquisitions, beginning with a proposed investment by *América Móvil* in *KPN* in 2013 and subsequent proposals for investment in companies involved in crypto-technology, chip-manufacturing and postal services in subsequent years.

54. In May 2017, the Ministry of Economic Affairs published a legislative proposal and held a public consultation on this proposal, which had finished by the time of the Roundtable in October 2017. Possible amendments were being discussed among Ministries, and the incoming government was expected to decide whether to bring the proposal to parliament.

55. The Netherlands informed the Roundtable that the current proposal foresaw possible restrictions only in relation to the telecommunications sector. It would vest the Ministry of Economic Affairs with the competence to prohibit a takeover of an important Dutch telecommunications company provided that the transaction would threaten national security or public policy. The conditions under which such a threat could be found to exist would be set out in a closed list.

5.4. United Kingdom

56. The United Kingdom informed the Roundtable about considerations of its government on how to ensure that investments and takeovers do not raise national security concerns. A [public consultation](#) had been launched on the day of the Roundtable – 17 October 2017 – on a green paper on the “[National security and infrastructure investment review](#)”¹⁵.

57. The proposals subject to public consultation include planned changes to the Enterprise Act 2002; in particular, amendments to the turnover threshold and share of supply tests would allow the review of transactions of smaller firms whose ownership is essential for the United Kingdom’s national security. Also, the proposal would allow the government to intervene in transactions related to companies involved in dual use and military use sector and some parts of the advanced technology sector.

58. The United Kingdom is also consulting on longer term proposals according to which the government could be allowed to scrutinize a broader range of transactions under a voluntary or mandatory review process. The purpose of this proposal is to align policies in this area with policies and practice of major advanced economies and to respond to the changing nature of threats.

¹⁴ [Brief van de Minister van Veiligheid en Justitie aan de Voorzitter van de Tweede Kamer der Staten-Generaal](#), 22 May 2017.

¹⁵ “[National security and infrastructure investment review – The Government’s review of the national security implications of foreign ownership or control](#)”, October 2017.

5.5. European Union

59. The European Union informed Roundtable participants about a “[Proposal for a Regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union](#)” and an accompanying “[Commission Staff Working Document](#)”, which were issued on 13 September 2017.¹⁶

60. The European Union informed the Roundtable that the proposal had not yet been subject to consultation with EU Members or the European Parliament.

61. The Commission proposal would establish a new legal framework to protect essential interests. This legal framework would consist of three elements: the first one would establish a legal framework for screening of inward foreign investment by Member states. It would establish procedural minima, such as a transparency requirement, establish the principle of non-discrimination by investors from different states, and set forth an obligation to establish an adequate redress mechanism. The second component of the proposal would set up a cooperation mechanism between Member states and The Commission. It would be activated when a proposal in one or several Member states may affect the national security of other Member state(s) and would allow the other Member states to comment on the investment proposal. The third component of the proposal would establish a Commission role in screening on grounds of security where FDI may affect European Union interests, for instance when they concerns EU-wide programs.

6. Presentation by UNCTAD on recent work on investment treaties

62. An UNCTAD representative reported on part of UNCTAD’s recent World Investment Report (WIR) including its attention to Phase 2 of an investment treaty reform program, dedicated to the modernisation of first-generation treaties through a range of approaches. It also presented the preliminary results of its annual October 2017 high-level Conference on IIAs which had taken place the previous week.

63. She outlined the ten options for Phase of IIA reform in the WIR. She noted that statistical information was available on the UNCTAD website. The overall number of IIAs and of treaty-based claims continues to rise. There is a broad consensus about the need for reform of IIAs. Reform has begun including based on UNCITAD tools to allow for more sustainable-development oriented reform.

64. More remain to be done and UNCTAD’s Phase 2 addresses the existing stock of treaties. Three reasons necessitate reform. First, most treaties are old and were negotiated. Second, almost all claims are brought under older IIAs with 90% based on pre-2000 treaties. Third, the multiple treaties generate inconsistencies and overlaps leading to complexity and fragmentation. The co-existence of old and new treaties give rise to greater treaty shopping and forum shopping. Current reform processes are often not coordinated.

¹⁶ Documents [2017/0224 \(COD\)](#) and [SWD\(2017\) 297 final](#), respectively.

65. The 2017 WIR present ten different reform policy options with their pros and cons. Cost benefit analysis should be used. Strategic, systemic and coordination and capacity challenges need to be considered and addressed. Many states addressed these challenges in the recent UNCTAD meeting. The meeting reaffirmed that the IIA system is too big for reform by a single country or institution; cooperation is key. A summary of the discussion will be made available in the future. She also noted that the 2018 WIF would take place in Geneva in October 2018.

66. Roundtable participants offered a number of comments. A number of Roundtable participants who also participated in the IIA Conference expressed appreciation for the opportunity engage in a wide-ranging exchange of views. It was noted that the 10 reform options describe a broad scope of different options. Reform, disengagement, the multilateral investment court (MIC) and many other approaches are reflected.

67. A participant welcomed UNCTAD's work in cataloguing reform options for governments, but stated that the documents should not be seen as prescriptive because the decisions lie with governments. It is also important to remember the underlying purpose of treaties in providing protection and predictability for investors, and to ensure reform efforts bear these goals in mind.

68. Participants noted that jurisdictions were engaged in a wide range of reform processes, including replacing large number of older treaties with new ones, re-negotiations, and disengagement. Some suggested that multilateral reform is the more reasonable and efficient way, but noted that it is challenging and that other approaches are also needed. The need to integrate the sustainable development goals (SDGs) was emphasised, both in terms of ensuring that investment treaties do not interfere with achievement of the goals and seeking to have treaties advance those goals. An example was given of a treaty that tries to accommodate subsequent international treaties. Another participant pointed to insufficient flexibility as a weakness in the current system and suggested that alongside core areas with hard obligations treaties should leave more space for joint government actions in other areas. A participant emphasised a key role for bilateral negotiations.

69. Questions were raised about the outcome of intensive and public stakeholder consultations processes to develop new model treaties in the event such new models could not be put in place with treaty partners. Concerns were expressed about possible frustration in that context and the consequences. Some tension was also seen between the growing desire for democratic oversight of treaty content and the nature of multilateral negotiations which involve compromises. This could raise delicate issues given the heated debate over ISDS. Some participants pointed to the risk of reform efforts overshooting and the danger of them leading to complete exit from the system. It was also noted that while each country needs to consider its preferences, there can be combinations shared by countries, such as with regard to particular provisions.

70. Participants also discussed the complementarity of the work of different international organisations. It was suggested that the OECD could engage in intensive analysis and look for evidence to better evaluate the lists of pros and cons of different approaches. A participant welcomed UNCTAD's projected work on policy coherence in its phase 3 and encouraged the OECD to engage in research on the institutional context of IIA reforms and the integration of the SDGs into IIAs.