

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

Freedom of Investment Roundtable 28: Summary of Discussion

Note by the Secretariat

This note summarises discussions at Freedom of Investment (FOI) Roundtable 28, held on 13 March 2018.

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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JT03437828

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1. The Freedom of Investment (FOI) Roundtable is an inter-governmental forum that supports countries' efforts to maintain and extend open, transparent and non-discriminatory policy frameworks for international investment. Through analysis and regular multilateral dialogue, the Roundtable promotes the sharing of experiences with investment policy design and implementation. It also helps countries to address policy concerns that international investment may raise. 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.

2. The present document summarises views and information contributed by participants at Roundtable 28, held on 13 March 2018. Participants included representatives of governments of the 36 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, Kazakhstan, Morocco, Peru, and Tunisia), and government representatives from P.R. China, the Russian Federation, Saudi Arabia, South Africa and Thailand. The World Trade Organisation (WTO) and the World Bank (WB) also participated in the Roundtable.

The discussions at Roundtable 28 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. The Roundtable also addressed some other items that are not reported here given their procedural nature.

1. Follow-up discussion on the Fourth Investment Treaty Conference on “Treaty shopping and tools for treaty reform”

3. Roundtable participants expressed appreciation for the Fourth Annual Investment Treaty Conference on “[Treaty shopping and tools for treaty reform](#)”, which took place on 12 March 2018 just prior to the Roundtable. Participants welcomed the themes and approach as relevant for treaty-making. The technical aspects of the morning discussion of treaty shopping were described as providing valuable insights, and the detailed [agenda on the website](#) was noted as a source for useful diagrams and analysis of the issues. Participants also expressed appreciation for the session discussing the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (“Multilateral Instrument” or “MLI”), which provides a mechanism being used to update thousands of bilateral tax treaties on both procedural and substantive issues. It was noted that this successful experience was interesting to consider in light of discussion about updating investment treaties. Different views were expressed about the possible usefulness, if any, of multilateral treaties of this nature in the investment treaty context.

2. Appointing authorities and the selection of arbitrators in Investor-State dispute settlement

4. The Roundtable continued its discussion of appointing authorities and the selection of arbitrators in ISDS. (See [Summary of Discussion of FOI Roundtable 27](#), pp. 3-8) It was noted that the October 2017 discussion of the Secretariat background paper at Roundtable 27 had been limited. Additional Roundtable input on the Secretariat background paper was sought now that participants had had six months to consider it. In addition, preliminary input was sought on the initial comments received from a consultation although it was recognised that participants had only had limited time to consider the comments.²

5. The Secretariat noted growing interest in the role of appointing authorities and their role in selecting arbitrators in ISDS. While party appointment was often put forward and commented on as a key aspect of current ISDS, there is increasing attention to both the

² The background paper on Appointing Authorities and the Selection of Arbitrators in Investor-State Dispute Settlement as circulated in the consultation, and initial comments received, have been made available on the [OECD website](#).

The background paper analyses appointing authorities associated with five arbitration institutions. These include the two principal inter-governmental organisations that provide arbitration institution services in ISDS: the International Centre for Settlement of Investment Disputes (ICSID); and the Permanent Court of Arbitration (PCA). 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).

appointing authority role in selecting arbitrators and appointing authority influence on choices and negotiations over arbitrators by the disputing parties, their counsel and co-arbitrators. Interest has been increased by reporting on some appointing authority decisions on appointments in trade publications, as well as by public discussion of ISDS.

6. The Secretariat noted that the background paper sets out preliminary conclusions in six areas: (i) the complexity of an appointment system with many different actors; (ii) the important role of appointing authorities who are in some ways at the apex of the ISDS arbitration system; (iii) marked differences between appointing authorities in ISDS, both between inter-governmental and private-sector ones, and between the two inter-governmental ones; (iv) contrasting policies on appointing authority disclosure about their actions, and often limited disclosure with the exception of ICSID; (v) intense competition between arbitration institutions for ISDS cases; and (vi) limited mechanisms for accountability of appointing authorities.

7. The Secretariat noted that the consultation had generated a broad range of initial comments from different sources including stakeholders and experts. Four of the five arbitration institutions responded. Commentators uniformly welcomed analysis of appointing authorities in ISDS, with many noting that the role of appointing authorities had not been sufficiently studied. The analysis of competition between arbitration institutions for cases is seen as valuable and further exploration of competitive aspects is suggested. There was also recognition of accountability as an important issue. Some comments underlined the importance of defining who an appointing authority in ISDS is accountable to, whether only to the disputing parties as in commercial arbitration or whether there is broader accountability in light of the nature of ISDS. A number of stakeholders including BIAC advocated for greater disclosure of appointing authority appointments.

8. The Secretariat also noted a particular issue arising from comments received from the PCA regarding its policy not to disclose its appointments unless the disputing parties agree on disclosure or the arbitral tribunal decides on disclosure. The PCA comments in this area are not entirely clear. However, they appear to suggest that the PCA considers that its non-disclosure policy is mandated by the UNCITRAL Arbitration Rules. The Secretariat noted that it did not take a position about whether this apparent PCA interpretation of the UNCITRAL Rules interpretation is correct. But the Secretariat noted that if the PCA interpretation is correct, then the two leading rule systems for ISDS have diametrically opposed rules on appointing authority disclosure. It further noted that both ICSID and the PCA are inter-governmental organisations with many members from FOI participant countries at both institutions.

9. The Secretariat pointed to a further PCA comment asserting that ICID does not systematically disclose its appointments in UNCITRAL or non-ICSID cases even though ICSID does systematically disclose its appointments in ICSID cases. The PCA suggested the paper needed to be adjusted on this point. The Secretariat noted that it had not evaluated the PCA view on this point, but that follow-up work would clarify this issue.

10. The Secretariat also noted that comments contained new information about the policies of arbitration institutions towards “emergency arbitration” in ISDS. Rules on emergency arbitration typically allow an appointing authority to name a sole arbitrator within days for decisions to be rendered very quickly, sometimes in less than a week. Among other aspects, the short time frame affects remedies, making damages unavailable and leading to remedies typically taking the form of injunctions, which can be seen as intrusive for governments. Emergency arbitration rules have proliferated at commercial arbitration institutions, possibly in part in response to competitive pressures. The

Secretariat noted that concerns had been expressed by Roundtable participants about emergency arbitration in ISDS in the October 2017 Roundtable discussion. At that time, it appeared that the AI-SCC was the only institution to consider that its emergency arbitration rules were applicable to ISDS arbitration, including under pre-existing treaties; with regard to the ICC, the paper noted certain statements from the ICC referring to a categorical exclusion of ISDS from the ICC's emergency arbitration rules.

11. New information in the comments received, however, suggests that there is some uncertainty at the ICC about whether its arbitration rules could also be interpreted to allow emergency arbitration in ISDS. It was reported that senior ICC staff had publicly noted that the issue of the application to ISDS is not expressly addressed in the ICC Rules and had suggested that emergency arbitration in ISDS could be available at the ICC under the ICC Rules. It thus appears possible that the ICC might also offer ISDS claimants access to emergency arbitration against governments; as in the case of the AI-SCC, this could conceivably extend to pre-existing investment treaties.

12. The Secretariat noted that work going forward was expected to include further attention to the comments received, analysis of additional institutions, and follow up with arbitration institutions to prepare for further dialogue. It also noted that the UNCITRAL Secretariat had requested that the paper and comments be made available promptly so that they could be considered by delegates to upcoming UNCITRAL WG III discussion of ISDS which was expected to focus on the selection of arbitrators.

13. In the discussion, Roundtable participants reaffirmed their interest in analysing the role of appointing authorities. A participant noted that discussions about arbitral selection in ISDS often focus on party appointment. It is important to expand the discussion to examine if there are concerns or issues with regard to the role of appointing authorities. The analysis in the paper was useful in this regard and he had also read with interest a number of the comments.

14. He expressed interest in the issue of the interpretation of the UNCITRAL Arbitration Rules and in particular whether those rules provide a basis for an appointing authority policy of non-disclosure of its appointments. He noted that he had participated in the drafting of the current 2010 UNCITRAL Arbitration Rules and the UNCITRAL Transparency Rules. He had read the PCA comments about certain express prohibitions on disclosure in the 1976 UNCITRAL Rules. For example, they provide for non-public hearings. However, he stated that discussions at UNCITRAL had regularly recognised that those express provisions in the 1976 UNCITRAL Rules are the sole prohibitions on disclosure. Consequently, other types of disclosure are not prohibited. The mere fact of silence in the governing rules cannot be read as a prohibition on transparency. He noted that a number of governments had made that interpretation clear for many years, but it is also a position that has been discussed extensively at UNCITRAL.

15. He expressed interest in hearing further from PCA about what it sees in the UNCITRAL Rules that would prohibit it from announcing its appointments, noting that he is unaware of any such prohibition. Several other Roundtable participants also expressed interest in hearing further explanations from the PCA on the basis for its policy on non-disclosure of its appointments or interest in further research on the question.

16. A participant requested that the analysis extend to the pool of ISDS arbitrators with particular reference to qualifications and training. He requested analysis of the types of backgrounds and training that are needed for ISDS cases, the profiles currently selected,

and of possible price differences for arbitral services from different profiles. Analysis of the arguments in awards was also suggested.

17. It was noted that the consultation paper expressly delayed examination of the ISDS arbitral pool, including appointments involving action by appointing authorities, pending further information. The paper notes that those seeking to analyse the pool of ISDS arbitrators often lament the lack of information from institutions other than ICSID, and then analyse the pool based only on ICSID information. Given the governmental audience for the ongoing Roundtable analysis, including many governments with seats on the board of both of the inter-governmental arbitration institutions, the paper adopted a different approach. Rather than analyse a partial pool, analysis of arbitral appointments has been postponed until appointing authorities are given an opportunity to provide information about their appointments or explanations of their non-disclosure policies. This would avoid inquiries into uncertain non-public information about appointments. It was noted that some new information on these issues, such as the PCA's views about the UNCITRAL Rules, had already emerged and drawn Roundtable comments. Further information could be forthcoming on these issues from the arbitration institutions or others.

18. In connection with the Roundtable request that the Secretariat address additional appointing authorities, it was noted that the Secretariat had briefly identified recent developments in China relating to dispute settlement. These included certain Chinese arbitration institutions expressing interest in attracting ISDS cases and serving as appointing authorities in ISDS under new arbitration rules. It also included recently reported plans to develop a court system and possibly arbitration in connection with the Belt and Road Initiative. The interest in these areas was welcomed and further information was requested.

19. The Roundtable also reaffirmed its interest in inviting appointing authorities and arbitration institutions to a future Roundtable for discussions at an appropriate time. It was noted that work to expand the paper to additional arbitration institutions was on-going and would be accompanied by work to address and follow up on comments and new issues. It was also noted that senior ICSID officials had participated in early Roundtable work on ISDS which had been very valuable. In the context of broader work on the entire system of appointing authorities, however, it was not seen as appropriate to invite a single arbitration institution. Rather, it was suggested that inter-governmental work should identify issues for discussion. The Roundtable was invited to provide input on the modalities for a future session with all or some of the appointing authorities and arbitration institutions.

20. The Roundtable expressed strong support for the continuation of the work on appointing authorities, noting that the issues had rarely been addressed to date. It is also supported the prompt dissemination of the Secretariat consultation paper and comments received, together with a description of the current status of the work, to the public and to delegates at UNCITRAL Working Group III.

3. Societal benefits and costs of International Investment Agreements: empirical research on the impact of investment treaties for companies' investment and divestment decisions

21. Roundtable participants have considered societal benefits and costs of international investment agreements (IIAs) since early 2015 and have discussed the matter repeatedly, based on a literature review of aspects and available empirical evidence.³ The literature review found that little empirical evidence is available with respect to many claims about the positive or negative impact of IIAs.

22. Many Roundtable Participants have expressed continued interest in gaining a better understanding of the benefits and costs of IIAs and the parameters that determine the benefit/cost balance and have requested that the OECD Secretariat propose further avenues for research that could advance their understanding of treaty implications.⁴

23. A particularly important gap in empirical evidence concerns the question of whether investment treaties enable or increase capital flows between treaty partners – among the main *raison d'être* of investment treaties. Extant studies have sought to assess their effect by using aggregated FDI data compiled for balance-of-payments purposes, but the literature review has shown that this use of FDI statistics is unlikely to produce valid results.

24. To remedy the gap in robust empirical evidence on this crucial issue, the OECD Secretariat proposed a different study design for consideration by Roundtable participants. This design would draw on a large set of firm-level data – ORBIS – and the OECD's own comprehensive treaty database to test empirically whether treaty-based investment protection is correlated with foreign investment decisions, in particular whether treaty-based investment protection is associated with an increase in investment or a reduction in divestment in countries associated with a treaty. Unlike existing study designs, it would use firm-level data rather than aggregated national FDI statistics, and would consider all forms of treaty-based investment protection, regardless of the treaty type (hence include BITs, PTAs, and bilateral and plurilateral arrangements).

25. Participants in the Roundtable noted that the current empirical work on divestment decisions would likely provide first insights on the question. Participants suggested that the approach may produce new insights on the effect of investment treaties on firms' investment decisions. They noted however that the proposal was not currently funded and that voluntary contributions to the OECD were required to carry out the envisaged work. In the absence of immediate pledges for such contributions, Roundtable participants agreed to return the proposal at a later stage.

³ The literature review is now publicly available as Pohl, J. (2018), "[Societal benefits and costs of International Investment Agreements: A critical review of aspects and available empirical evidence](#)", OECD Working Papers on International Investment, 2018/01, Paris.

⁴ See [Freedom of Investment Roundtable 27: Summary of Discussion](#), item 2.

4. Presentation on recent discussions on investment facilitation in the WTO context

26. A representative of the WTO Secretariat provided the Roundtable with information on discussions on investment facilitation in the WTO context. She summarised discussions under the 'Informal Dialogue on Investment Facilitation for Development' held in 2017 (6 meetings held between May and November 2017). These were focused on WTO Members sharing experiences and best practices on investment facilitation. She noted that at the Eleventh WTO Ministerial Conference (MC11), 70 Members (counting the EU as 29 Members) agreed to co-sponsor the "Joint Ministerial Statement on Investment Facilitation for Development" (document WT/MIN(17)/59). The Joint Ministerial Statement outlines three mutually-supportive tracks of action:

- to begin structured discussions with the aim of developing a multilateral framework on investment facilitation;
- to engage in continuous outreach to all WTO Members to learn more about their investment facilitation priorities and needs; and
- to work in cooperation with relevant intergovernmental organisations to assess developing and least developed Members' requirements in implementing a possible multilateral framework "so that technical assistance and capacity building support can be made available to address these identified needs".

27. She noted that an organisational meeting for WTO Members to discuss how they wish to organize outreach activities and the 'structured discussions' on investment facilitation was being held on the same day as the Roundtable (13 March 2018). It would give all WTO Members a voice in how to advance the next phase of the initiative. The first meeting of the next, post-MC11 phase will be held in the spring.

5. Monitoring of recent investment policy developments

28. Roundtable participants discussed selected recent investment policy developments that had taken place since the last Roundtable in October 2017. Three economies – Australia, Latvia, Lithuania – provided information on recent changes of their investment policies or of initiatives in this area; most of these policy changes and initiatives relate to national security. Several other countries has likewise introduced policy changes that are likely of interest to the international investment policy community, but due to time constraints, it was decided that these measures would be discussed at the next available Roundtable scheduled for 23 October 2018.

5.1. Australia

5.1.1. Foreign acquisitions of agricultural land

29. Australia provided information on a new measure applicable to foreign acquisitions of agricultural land. According to an announcement of 1 February 2018, foreign acquirers are henceforth obliged to show that agricultural land they intend to acquire has been part of a public sales process and marketed widely to potential Australian bidders for a minimum of 30 days, and that Australian bidders have had an opportunity to participate in the sale process.⁵

30. Australia explained that the requirement merely increased transparency of Australia's national interest test, as the criteria now made explicit had been routinely considered in past decisions on foreign acquisitions in Australia. Australia added however that the announcement was triggered by concerns that the Treasurer had faced in the context of recent sales processes of agricultural land, in particular of large farms such as Kidman&Co Ltd. Australia stated that the policy was applied regardless of the nationality of the foreign acquirer.

5.1.2. Ownership of electricity transmission, distribution and generation assets

31. Australia also provided information on a further announcement made on 1 February 2018, related to the planned introduction of restrictions on foreign acquisitions of electricity transmission and distribution assets, and some generation assets.⁶ Australia explained that the announced measure were merely codifying restrictions that had been applied in the past, and that they were based on national security considerations.

32. The policy would allow the government to manage the level of ownership of single asset or assets in a certain sector to ensure diversity ownership in sectors of critical importance. Making the policy explicit helps, in the eyes of Australia, to avoid surprises for foreign investors, Australia's state governments, and private sellers of assets.

33. Asked about the national security implications of electricity generation, Australia explained that the country's electricity market was particular: in some areas, such as islands, there was only one generation asset.

5.2. Latvia

34. On 28 December 2017, Latvia notified the OECD of a new investment policy related to national security, which had come into effect on 29 March 2017. The policy introduces a mandatory review mechanism for the acquisition of specific assets, independent of the nationality of the acquirer. More details on the policy are available in Latvia's notification [DAF/INV/RD\(2018\)1](#).

⁵ [“Ensuring Australians can purchase agricultural land while foreign investment is geared toward jobs and growth”](#), Treasurer media release, 1 February 2018.

⁶ [“New conditions on the sale of Australian electricity assets to foreign investors”](#), joint media release, by the Treasurer, the Minister for Home Affairs and The Minister for Immigration and Border Protection, 1 February 2018.

5.3. Lithuania

35. Lithuania informed Roundtable participants that on 1 March 2018, changes to the Law on Enterprises and Facilities of Strategic Importance to National Security and other Enterprises of Importance to ensuring National Security entered into effect. Lithuania has had an investment screening procedure motivated by national security considerations for more than 15 years. Changes in the geopolitical and security situation in the region and the necessity to improve the reliability and effectiveness of the mechanism, as well as changes to the listed enterprises following restructuring were the main drivers for the policy reform. Lithuania emphasised that international obligations such as EU rules and the OECD [*Guidelines for Recipient Country Investment Policies relating to National Security*](#) had been considered in the legislative process, the OECD Secretariat had been consulted, and Lithuania had drawn on good practice observed in other countries when designing its policy reform.

36. The new legislation defines a list of five sectors important for national security (energy, transport, information technologies and telecommunications and other high technologies, finance and credit, and military equipment); only certain activities in these sectors will be subject to screening however. These activities will be specified in implementing decrees. The new policy also specifies security zones as well as enterprises and facilities of strategic importance for national security. These assets will also be specified in a decree. Further, Lithuania informed Roundtable participants that the new policies also allowed for ex-post screening, if a past acquisition is identified to pose a risk for the country's national security. Such screenings could be initiated by the government, the minister in charge of national security, the bank of Lithuania or other authorities set out in a decree.

37. Lithuania explained that implementing decrees have yet to be passed to make the mechanisms fully operational and that it will notify the OECD of the changes in line with its obligations.

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