

Unclassified**English text only****6 November 2019****DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE****Freedom of Investment Roundtable 30: Summary of Discussion****Note by the Secretariat**

This note by the Secretariat summarises discussions at Freedom of Investment (FOI) Roundtable 30, held on 13 March 2019.

Sixty-two economies 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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Freedom of Investment Roundtable 30: Summary of Discussion

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 30, held on 13 March 2019. 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, Egypt, Jordan, Kazakhstan, Morocco, Tunisia and Ukraine), and government representatives from P.R. China, Bulgaria, Croatia, Laos PDR, the Russian Federation, South Africa and Viet Nam. The World Trade Organisation (WTO), the World Bank (WB), the International Chamber of Commerce (ICC) and the UN Industrial Development Organization (UNIDO) also participated in the Roundtable.

3. The discussions at Roundtable 30 addressed several topics¹ including:

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¹ The Roundtable also addressed some other items that are not reported here given their procedural nature or relation to ongoing work in other OECD Committees.

1. Follow-up discussion on the FOI Roundtable Conference on “Investment Treaties and Level Playing Fields”

1. The Roundtable provided comments and feedback on the fifth Annual Conference on Investment Treaties on “[Investment Treaties and Level Playing Fields](#)”, which took place on 11 March 2019.
2. The Conference examined several aspects of investment treaty policy that have become controversial or important in light of growing calls for a level playing field. The discussion covered: (i) preferences for investment treaty-covered investors over non-covered investors; (ii) growing concerns about a level playing field with regard to state-owned enterprises (SOEs); and (iii) concerns that investment treaties tilt the competitive playing field for the distribution of government benefits and burdens towards investor interests and away from other societal interests including labour and the protection of human rights. Roundtable participants expressed appreciation for the Conference which addressed important challenges faced by policy makers.

2. Proposal for work on investment treaties and business responsibilities

3. The Roundtable requested the Secretariat to prepare a scoping paper analysing developments potentially relevant to investment treaty policy in the area of business and investor responsibilities. It was noted that topics that could be considered in work in this area include domestic law approaches, including domestic implementation of the [OECD Guidelines for Multinational Enterprises](#) (OECD Guidelines); possible links between domestic rules on investor obligations and restrictions on access to ISDS under investment treaties; an overview of the various approaches to RBC obligations in investment treaties, including provisions on the right to regulate ones that cross-refer to international guidelines such as the OECD Guidelines. Several participants noted that they had recently adopted new model investment treaties that may provide useful examples.
4. Participants noted that policy makers face a range of challenges when deciding whether to include RBC commitments in investment treaties. These challenges include whether to include voluntary or binding obligations, how to design the obligations and whether to impose obligations on governments, investors or both. A participant suggested that guidance for treaty negotiators on these challenges and policy concerns could be considered for future work. Analysis of the arguments in ISDS awards was also suggested, including cases where awards of monetary compensation to the investor were reduced on account of RBC violations. It was suggested that work in this area could also provide valuable perspectives to assist delegates at UNCITRAL’s Working Group III on ISDS reform.
5. The Chair noted that Roundtable participants strongly supported the proposed work. It was noted that Switzerland had provided funds to help support the scoping work, which was gratefully acknowledged by the Roundtable.

3. Acquisition- and ownership-related policies to safeguard essential security interests

6. Roundtable Participants provided their feedback on the [Conference on acquisition- and ownership-related policies to safeguard essential security interests](#) held on 12 March 2019, the day before the Roundtable. The Conference responded to renewed interest in this

topic, which had been the founding subject of the Roundtable in 2006. The conference was preceded by an [inception workshop](#) a year earlier, on 13 March 2018. Participants expressed appreciation for the important topic and structure of the Conference and for the external expert panellists who attended.

7. Roundtable participants also discussed a [research note by the Secretariat on policy developments and policy design in this area of investment policy](#). The research note is part of a larger effort to update and expand an earlier report by the Secretariat, released in 2016,² to respond to an increasing interest to learn about existing designs for adaption and inspiration. The report, for which the European Union provided co-funding, will ultimately cover trends and policy designs based on experiences and policies of all 62 economies invited to participate in the Roundtable.

8. Several participants expressed a strong interest in gaining a better understanding of policy designs in this area and their expectation that the forthcoming report by the Secretariat would contribute to satisfying this interest. In this context, several participants expressed their appreciation for the research note that the Secretariat had prepared and circulated ahead of the conference.

9. A participant noted that national security interests extended beyond clear examples such as defence and protection of natural resources to a wide range of political, economic and financial matters. She suggested that any assessment of the reasonableness of measures taken by countries with respect to national security should be performed with respect to the gravity of the circumstances that prompted their adoption. A participant encouraged the Secretariat to consider the importance of national security carve-outs in investment treaties to complement its work on domestic policies in this area.

10. Roundtable participants considered the next steps that should follow in this line of work. Participants agreed that discussion of future directions of work in this area should be deferred until after the Secretariat's complete note is considered by the Roundtable in October 2019. Several participants noted that the [OECD Guidelines for Recipient Country Investment Policies relating to National Security](#) adopted in 2009 continue to be a useful instrument for policy design and assessment and that it may be premature to consider a review or revision of those Guidelines at this time. They suggested that such an approach should be revisited by the Roundtable once a better understanding about policies in this area had been built through the Roundtable's ongoing analytical work.

11. In terms of format for future proceedings on this topic, Roundtable participants expressed different views on the merits and trade-offs of the presence of non-government actors such as business, academia and stakeholders and encouraged to consider possible meeting formats, in particular expert meetings among interested governments, to complement future plenary meetings on this topic with external experts and stakeholders.

4. Monitoring of recent investment policy developments

12. Roundtable participants discussed selected recent investment policy developments that had taken place since the last Roundtable in October 2018. The participants referred to a list of issues for discussion prepared by the Secretariat. Two countries notified

² Wehrlé, F. and J. Pohl (2016), "[Investment Policies Related to National Security: A Survey of Country Practices](#)", *OECD Working Papers on International Investment*, No. 2016/02, OECD Publishing, Paris, <https://oe.cd/natsec2016>.

amendments to their policies related to national security: Germany and Hungary. These notifications are required under the [Declaration on International Investment and Multinational Enterprises](#) and the related [3rd Revised Decision on National Treatment](#).³ France and Norway announced forthcoming notifications of their policies that are recently in effect or still under preparation. Five other countries – P.R. China, the Netherlands, South Africa, United Kingdom and United States – and the European Union provided information on recent changes of their investment policies or of initiatives in this area.

4.1. P.R. China

13. China informed Roundtable participants that on 29 March 2018, the [State Council Measures for the Overseas Transfers of Intellectual Property Rights \(trial\)](#) had entered into effect. Released on 18 March 2018, the Measures set up procedures to review the implications for national security and China's innovation and development capabilities of transfers of intellectual property from China to other countries. Intellectual property for the purpose of the rules includes patent rights, proprietary rights related to integrated circuit design, computer software copyrights, and rights related to new plant varieties. Transfers may occur when technology is exported, in the course of foreign acquisition of Chinese enterprises, or any other technology transactions, such as involving, for example, changes in the IP ownership or license. The review is conducted under the responsibility of specified authorities which differ depending on the assets subject to transfer. The new rules do not apply to intellectual property transfers that touch upon national defence, for which specific rules continue to apply. The length of the trial implementation of the measure had not been defined at the time of the Roundtable.

14. China explained that the purpose of the Measures was to provide a fair and transparent process for reviews of proposed external transfers of intellectual property rights and contribute to improving the domestic investment environment. The review procedures set out in the Measures provide detailed guidelines for relevant government departments to follow when issuing and reviewing decisions related to intellectual property transfers abroad in line with the existing technology export control review mechanism established in the Regulations on the Administration of Technology Import and Export. China explained that the Measures are an integral part of the security review system envisaged in the [Notice of the General Office of the State Council on the Establishment of the Security Review System for Mergers and Acquisitions of Domestic Enterprises by Foreign Investors](#) issued in 2011. The 2011 Notice provides an overview of China's current security review system for outbound transfers of intellectual property rights.

4.2. France

15. France informed Roundtable participants that changes to France's mechanism to manage risks associated to acquisitions came into effect on 1 January 2019.⁴ Among the changes were tightened controls for acquisitions related to emerging technologies such as artificial intelligence, robotics and semiconductors. Further changes in the review process are currently being planned in the context of the [Loi PACTE](#). France undertook to notify

³ The notifications are published on the OECD website: <https://oe.cd/natsec>.

⁴ [Décret no 2018-1057 du 29 novembre 2018 relatif aux investissements étrangers soumis à autorisation préalable](#).

the Roundtable regarding the entry into force of the new laws in due course and provide additional information at that time.

4.3. Germany

16. Germany informed Roundtable participants that on 29 December 2018, a revision of the German inbound investment review mechanism had come into effect. The change, made through an amendment of the Foreign Trade and Payments Ordinance (*Außenwirtschaftsverordnung*), lowered the screening threshold for defence companies and in sensitive sectors such as critical infrastructure from 25% previously to now 10%. The reform also added the media sector to the list of sensitive sectors. Further details on the reform are available in the notification to the Roundtable in document DAF/INV/RD(2019)1.

17. The German government also provided some insights on the proposal that the German government establish a government fund to temporarily take over assets to avert undesirable takeovers, which had been made on 5 February 2019.⁵ Germany informed the Roundtable that discussions regarding the proposed fund were ongoing and it would provide further information in October 2019 on any developments.

4.4. Hungary

18. Hungary informed Roundtable participants that its pre-screening procedure of investors' conformity to national security interests in specific, defined activities as the Law on the Control of the Foreign Investments Offending the National Security of Hungary had entered into force on 1 January 2019. Further details on the law, its scope and procedures is available in Hungary's notification of the policy to the Roundtable in DAF/INV/RD(2019)2.

4.5. Netherlands

19. Netherlands informed Roundtable participants that a [Bill on "undesirable control over telecommunications"](#) had been introduced to the State Council on 19 April 2018. The State Council, an advisory organ of the government, provided its advice to the government on the Bill, which was then submitted to the Dutch parliament on 5 March 2019. Netherlands undertook to provide the Roundtable with an update on the ongoing legislative process for the proposed new Bill in October 2019.

20. Netherlands confirmed that the Bill would require potential acquirers of a controlling share (defined as 30% or more of the share capital) in Dutch telecom operators to submit their proposals to the Minister of Economic Affairs and Climate for review. The Minister could prohibit or unwind such transactions if they would jeopardize national security or public order. The Bill would require any party wishing to acquire a controlling stake in a Dutch telecom operator to notify the government of the intended transaction and submit it for screening. Netherlands stated that companies in the sector include those that provide mobile, fixed telephony and internet as well as internet nodes, data centres, hosting and certification services.

⁵ [National Industry Strategy 2030](#), Federal Ministry of the Economy and Energy, 5 February 2019.

4.6. Norway

21. Norway informed Roundtable participants that a new [National Security Act](#) had come into effect on 1 January 2019. The law establishes, in its Chapter 10, a mandatory review mechanism for certain acquisitions of businesses by foreign and domestic investors. Details of the scope and operation of the mechanism are set out in a [Decree](#). Norway undertook to provide a formal notification of the new Act in October 2019.

4.7. South Africa

22. South Africa informed Roundtable participants about the adoption of the [Competition Amendment Act \(Act No 18 of 2018\)](#). Among other issues, it introduces a mechanism to review proposals for foreign acquisitions with respect to their national security implications, set out in item 14 of the Act. Parts of the Act – but not the mechanisms referred to here – entered into effect on 13 February 2019.

4.8. United Kingdom

23. United Kingdom informed Roundtable participants that the government had conducted a public consultation on its [National Security and Investment White Paper](#) between 24 July and 16 October 2018. The White Paper addressed the government's plans to upgrade its powers to scrutinise investments and address the risks that arise from hostile parties acquiring ownership or control over business or other entities or assets that have national security implications. The government was considering the input received during the public consultation process. There is no timeline set for publication of the government's formal response to the public consultations. According to the accompanying [Statement of Policy Intent](#), the proposal implies a further reform of the UK's investment policies related to national security, which would establish a review mechanism independent from the current review system under the merger review system.

4.9. United States

24. The United States informed Roundtable participants that since the entry into force of the [Foreign Investment Risk Review Modernization Act \(FIRRMA\)](#) and the [Export Control Reform Act \(ECRA\)](#) on 13 August 2018, the United States government have taken a number of steps to implement the new powers and obligations that CFIUS and other authorities had received. In particular:

- [Interim Rules](#) that require filings with CFIUS for certain investments in critical technologies and expands jurisdiction to certain non-controlling investments had come into effect on 10 November 2018; and
- On 19 November 2018, the Commerce Department had released a [proposed rule on Review of Controls for Certain Emerging Technologies](#).

25. The United States referred to its explanations shared during the [conference on acquisition- and ownership-related policies to safeguard essential security interests](#) held on 12 March 2019 – the day before the Roundtable.

4.10. European Union

26. The European Union informed Roundtable participants that a formal signing ceremony for the adoption of rules to establish a [framework for screening of foreign direct investments into the European Union](#) was scheduled for 19 March 2019. The EU Council had approved the text of the proposed framework on 5 March 2019. The new rules cover certain EU-acquisitions and the establishment of a cooperation mechanism among EU Members for their respective national mechanisms and were expected to come into force in April 2019.⁶ The framework envisages an implementation period of 18 months until 11 October 2020 to establish the contact points and secure channels by which the EU Members will share information under the cooperation mechanism.

5. Report on discussions on investment facilitation at the WTO

27. Roundtable participants heard a presentation by the WTO Secretariat on recent developments at the WTO with regard to investment facilitation.

28. The WTO representative recalled 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”.

29. The WTO representative noted that the current objectives for these discussions are to identify and develop the elements of the proposed multilateral framework. It was noted that the WTO hosted eight meetings in 2018 that addressed the broad themes identified in the 2017 Joint Ministerial Statement. The focus for 2019 is to develop future possible elements for the proposed multilateral framework based on a checklist of more than 80 elements identified during the 2018 meetings. The first substantive meeting for the next phase of this initiative was held on 4 March 2019 with several other meetings scheduled in 2019.

⁶ The new rules were [published in the Official Journal of the EU](#) and thereby entered into force on 10 April 2019.