Roundtable on Freedom of Investment 20

19 March 2014

Summary of Roundtable discussions by the OECD Secretariat

Organisation for Economic Co-operation and Development
Investment Division, Directorate for Financial and Enterprise Affairs
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FREEDOM OF INVESTMENT PROCESS

Freedom of Investment Roundtable 20 – 19 March 2014, OECD, Paris

SUMMARY OF DISCUSSIONS

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.

The present document summarises the views and information contributed by participants at Roundtable 20, held on 19 March 2014. Participants included representatives of the governments of the 34 OECD members, the ten other governments that have adhered to the OECD Declaration on International Investment and Multinational Enterprises (Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia) as well as government representatives from P.R. China, Colombia, Costa Rica, and South Africa. The European Commission participated in the Roundtable as did the Secretariat of the United Nations Conference on Trade and Development (UNCTAD).

The discussions at Roundtable 20 addressed several topics: 1) investor-state dispute settlement (ISDS) and investment treaty law and, in particular, the issue of "investment treaties over time"; 2) the closely related issue of legal principles applicable to joint government interpretation of investment treaties; 3) the use of OECD materials in ISDS cases to date; 4) competitive neutrality and international investment by state-owned enterprises; 5) a second round of discussions on 'hidden protectionism'; and 6) the *tour de table* on recent investment policy developments that is a feature of all Roundtables.

Part 1. Investment treaties over time

FOI participants continued their consideration of "investment treaties over time" based on a revised version of the Secretariat's background paper – in particular they deepened their exploration of the role of states in influencing investment treaty interpretation. The discussions extended those held at the October 2013 FOI Roundtable (see summary here).

The general thrust of both sets of inter-governmental exchanges was to highlight the importance for treaty partners of finding the right mix in investment treaty interpretation in two areas.

- ***Stability and flexibility of the legal framework***. Investment treaty law needs to be both stable (in order to provide a solid policy framework for investment decisions) and flexible (to allow the law to adapt to changing circumstances). Several participants noted that recent treaty terminations in at least two countries might not have taken place if adequate channels for "voice" had been available to the countries concerned.

- ***Balancing investment protection with the need for policy space***. Investment treaty law also needs to balance objectives of investment protection with the needs of governments to enact

policies in the public interest. One country at the Roundtable noted that it is difficult to build this balance into treaties in advance – his country had not foreseen the interpretations that were subsequently given to its treaties at the time it signed them.

Participants shared their experiences, past practices and recent efforts to expand the channels available to states wishing to influence treaty interpretations. Key points include:

- ***Treaty provisions giving voice to state parties already exist***. One country pointed to provisions contained in some of its treaties that create commissions of high level officials from treaty parties are charged *inter alia* with making joint interpretations via special commissions. At the same time, the need to strengthen the role of investment treaties in depoliticising investment disputes was also stressed by two participants. Quite a few countries pointed to their treaties' provisions on state-to-state dispute settlement and on treaty-based consultations as a mechanism for state influence on treaty interpretation. They asked that the treaty survey in the Secretariat's background paper be expanded to include these mechanisms.

- ***Treaty amendments*** are actively being sought by some countries, including several represented at the Roundtable. An FOI participant described his country's experiences with treaty amendments, and stated that policy makers were still learning how to use investment treaties to meet broader economic and political objectives. Another country noted its use of amendments as a way of modernising its treaties and stated that its experiences with treaty amendment have been positive.

- ***Treaty provisions giving voice to parties after treaty signing may not be necessary (or even desirable)***. One participant observed that her country has already contributed to interpretations relevant to pending cases by testifying on the intent of treaty makes. That country stated its view that treaty amendments are preferable to mechanisms for *ex post* interpretation because amendments provide more certainty as to the legal status of the change. Another country noted that it preferred short treaties and that explicit language on government voice was not necessary – governments can influence interpretation without such treaty language.

- ***Joint clarifications require shared views by treaty partners and this might not be easy to obtain***. One country noted that it has concluded two interpretative agreements with a treaty partner, but also remarked that these agreements were facilitated by the fact that both countries had similar views on the issues under discussion. Such commonality of view cannot be expected to always be present.

Part 2. Legal principles applicable to joint government interpretation of investment treaties

The Roundtable also considered the legal principles applicable to joint government interpretation of investment treaties. The Roundtable noted that the role of joint government action in the interpretive process in ISDS is attracting increasing attention from governments, commentators and practitioners. Provisions expressly contemplating the subsequent agreement of treaty parties on binding interpretations are well-established in the model BITs and treaty practice of the NAFTA governments and they have recently been included in an wider range of treaties and investment policies around the world including the ASEAN Comprehensive Investment Agreement (ACIA), CAFTA-DR and treaties in Latin America. More recently, the European Commission has indicated that it will seek to include express provisions for binding government interpretations in future EU treaties as a matter of general policy.

The Roundtable recognised that despite fast-growing interest in such express provisions, they are by no means generally included even in recent treaties. The provisions are also rare in the many older treaties. The vast bulk of investment treaties thus do not address joint government interpretive action and are subject to more general principles. The preliminary consideration by the FOI Roundtable of the applicable legal principles focused mainly on the characteristics of the general regime for joint action in the absence of specific treaty provisions on the issue.

Article 31(3)(a) of the Vienna Convention on the Law of Treaties (VCLT), which is often considered to reflect customary international law, requires that interpreters of a treaty "take[] into account ... any subsequent agreement ... [between the treaty parties] regarding the interpretation of the treaty or the application of its provisions". The UN International Law Commission (ILC) is currently addressing the issue of "subsequent agreements and subsequent practice in relation to treaty interpretation". A first report by Georg Nolte, the Special Rapporteur, was issued in March 2013, and the ILC adopted five draft conclusions in August 2013.[1]

In theory, there is a sharp distinction between an interpretation and an amendment. An interpretation clarifies the meaning of the original text. Its effect reaches back to the entry into force of the original text. This retroactive impact of an interpretation routinely occurs as a result of a judicial or arbitral interpretation of a legal text (to the extent, if any, that the interpretation is considered to have precedential value). This may of course affect the expectations of parties -- private parties or governments -- that expected or relied on a different interpretation of the provision at issue.

In contrast to an interpretation, an amendment changes the meaning of the original text. It normally applies only to the future. In practice, however, the distinction may frequently be less clear. The line between an interpretation and an amendment may be difficult to draw in some cases. The flexibility of the general VCLT regime for amendments is a factor explaining why interpretations and amendments may not always be easy to distinguish.

The Roundtable also considered the impact of subsequent agreements on interpretation. A subsequent agreement or subsequent practice establishing an agreed interpretation by the treaty parties is often referred to as an "authentic interpretation". According to the ICJ, a subsequent agreement "represents an authentic interpretation by the parties which must be read into the treaty for purposes of its interpretation."[2] The exact meaning of "authentic interpretation", however, is subject to debate. Some conclude that such interpretations are binding, while others treat them as highly persuasive or persuasive.

The Roundtable noted that the 2013 ILC Report rejected the idea put forward by some commentators that subsequent agreements are necessarily binding. It favoured a view that the process of interpretation is a single combined operation in which subsequent agreements take their place alongside the other elements in art. 31 of the VCLT. However, the ILC considered that parties to a treaty, if they wish, can make an agreement regarding the interpretation of the treaty binding.

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1 International Law Commission, *First Report on Subsequent Agreements and Subsequent Practice in relation to Treaty Interpretation, (*19 March 2013) (Georg Nolte, Special Rapporteur); International Law Commission, *Report of the International Law Commission on the work of its sixty-fifth session*, chapter IV, 6 May - 7 June and 8 July - 9 August 2013 ("2013 ILC report").

2 *Kasikili/Sedudu Island (Botswana./Namibia)*, 1999 ICJ REP. 1045, § 49 (13 Dec. 1999) (quoting a 1966 ILC Report, Report of the International Law Commission on the Work of Its Eighteenth Session, § 33, [1966] 2 Y.B. Int'l L. Comm'n 172, 177, UN Doc. A/CN.4/SER.A/ 1966/Add.1).

Another issue raised by joint interpretations is whether the parties can agree on a subsequent interpretation based on a common view about the treaty's meaning that they reach after the treaty is concluded (i.e. joint intent as of 2014 with regard to a treaty concluded in 2005). The 2013 ILC Report suggests that the VCLT gives the treaty parties the flexibility to base their interpretive agreements on their current intent as of the date of the subsequent agreement, but some ISDS tribunals have rejected subsequent interpretations.

The Roundtable also considered the effects of treaty amendments and interpretations on third parties. It noted that the general regime under the VCLT leaves treaty parties with flexibility to modify or revoke the rights of third party States, including through amendments of the treaty. The VCLT, however, does not expressly address modifications or revocations of the rights or interests of private third parties, an omission that was deliberate.[3] The ILC project on subsequent agreements has not addressed to date the issue of their effect on third parties. The Roundtable considered some recent academic work that addresses the question of treaty interpretations and amendments affecting third parties.

The Roundtable considered how the legal framework for joint interpretation by treaty parties might apply to interpretive guidance on investment law by the Roundtable. Several participants noted that there could be significant practical difficulties in achieving consensus on issues of interpretation in a diverse body like the Roundtable.

The Roundtable noted that in addition to or as an alternative to agreed interpretations by treaty parties, governments have a wide range of other options. Parties to treaties can encourage the creation of non-agreed interpretations that may be persuasive. These can take the form of draft conventions, recommendations, restatements, legal commentaries, practice guidelines and case-law digests.

The arbitration bar actively participates in creating and collaborating in interpretive materials relating to investment law. Such work can thus proceed with varying levels of contributions from both government and private sector interests. The Roundtable noted examples of non-agreed interpretive materials currently developed by bodies operating within the framework of international organisations (UNIDROIT, UNCITRAL, the ILC, the Hague Conference on Private International Law, etc.) and by private bodies belonging to the arbitration bar. Some participants expressed interest in developing interpretive documents of this type.

Part 3. Use of OECD materials in ISDS cases to date

The Roundtable also considered the citation and use of OECD materials in ISDS cases.[4] Participants noted that as a general matter, parties in ISDS cases cite the authorities that they consider to most likely to persuade the tribunal. Previous arbitration cases are currently the most frequently cited materials in ISDS cases.

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3 See 1966 ILC Report, § 33 (noting proposal to include and decision to exclude provision from draft in light of division of opinion, notably about whether such a provision would be beyond the scope of the law of treaties at that time).

4 For convenience, "OECD materials" refers generally to all OECD-related documents, including both documents adopted or negotiated by governments and Secretariat working papers.

OECD materials are referred to in roughly 10% of publicly available ISDS decisions and awards.[5] Citation of OECD materials remains rare in comparison to other kinds of authorities, but a wide range of OECD materials of different types have been cited on a wide range of issues. Parties and tribunals do not always distinguish between documents adopted or negotiated by governments and Secretariat working papers, referring instead generally to the OECD.

The use of OECD materials by the parties and arbitral tribunals vary. Tribunals sometimes merely note parties' references to OECD documents. In a few cases, tribunals appear to consider themselves to be following or rejecting their understanding of an OECD view. In most cases however, OECD work is mentioned as an additional reference. The OECD is sometimes cited as an outside body without reference to its intergovernmental character and it relationship with the investment treaty parties. In other cases, it is argued that OECD materials reflect the views of treaty parties who are OECD members.

Some participants highlighted that the frequency of reference to OECD materials in investment arbitration cases. The Chair noted that this illustrates the importance of the statistical and analytical work undertaken for the Roundtable.

Part 4. Competitive neutrality and investment by state-owned enterprises

The FOI Roundtable welcomed a presentation by the Secretariats of the Investment Committee and the Working Party on State Ownership and Privatisation Practices. These presentations explored the interaction of state owned enterprises (SOEs) and investment processes and set forth ideas on how future monitoring of SOE's international investment activities might be undertaken.

The OECD Secretariat noted that the FOI Roundtables monitor the extent to which countries honour their commitments to keep markets open to foreign investment, including investment by SOEs, and has been mandated by the G20 since 2008 to public report on potentially protectionist investment measures. In doing so, the OECD uses as benchmarks its Code of Liberalisation of Capital Movements and its National Treatment instrument as well as the OECD Declaration on Sovereign Wealth Funds and Recipient Country Policies and more specific guidelines relating to national security which were developed and adopted in tandem with the "Santiago Principles" for SWFs.

The OECD Secretariat also advanced the view that there is a need for a specialised forum to (1) gather further evidence on the internationalisation of SOEs; and (2) provide a consultation mechanism for sharing views and information on both the benefits for home and host societies of SOEs operating abroad and possible host country concerns about these operations. The OECD Secretariat noted that a possible solution would be to entrust the task to a joint Taskforce of Delegates from interested OECD committees (currently the Competition, Corporate Governance, Investment and Trade Committees) and representatives from other G20 economies. Such a dialogue process could draw from the valuable experiences of the International Working Group of Sovereign Wealth Funds that FOI Roundtable hosted at the OECD, which worked together to produce a mutually beneficial package of commitments from both countries home of SWFs and countries recipient of their investments.

FOI participants agreed to continue their consideration of this issue based on a more detailed proposal to be made available at a future FOI Roundtable.

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[5] The OECD is referred to in some fashion in 55 awards and arbitral decisions (including multiple decisions in the same case) amongst the decisions available on the Investor-State Law Guide database. There are currently 517 such awards and decisions in the database (Feb. 2014).

Part 5. Hidden protectionism

For its second round of discussions on hidden protectionism[6], the FOI Roundtable drew on a Secretariat note entitled 'Protectionism, Promoting Effective Public Policy and Countering Hidden Protectionism'. The discussion began with a consideration of the definition of protectionism. For the past several decades, the OECD's approach to this definition has had, at its core, the concept of nationality-based discrimination and, in particular, the concept of national treatment (that is, foreign investors are to be treated not less favourably than domestic investors in like circumstances).

This concept – which is underpinned by very complex questions of how discriminatory treatment is to be identified – has been the subject of extensive intergovernmental discussions at the OECD and in other international organisations. Particularly noteworthy is the OECD Investment Committee's 1993 clarification stating that, "the key to determining whether a discriminatory measure applied to foreign controlled enterprises constitutes an exception to National Treatment is to ascertain whether the discrimination is motivated, at least in part, by the fact that the enterprises concerned are under foreign control.[7]"

During FOI discussions, non-members stressed the importance of understanding discrimination in its broader policy context. In their remarks on hidden protectionism, Argentina and South African highlighted the difficulties associated with defining hidden protectionism and the need for further discussion of this issue. In particular, they stressed the need to balance considerations of openness and non-discrimination with other policy goals. China cautioned about defining protectionism as deviations from the principle of non-discrimination, especially at the access stage. In addition, it noted that subsidies and government procurement are usually exceptions to national treatment. China stressed that future policy monitoring in the FOI should pay attention to the fact that participants include both members and non-members when proposing to notify monopoly and concessions for transparency purposes. 1. The FOI Roundtable also looked at the policy characteristics that create high risks for protectionist abuse of policy mechanisms. It was noted that there are two main channels for hiding protectionism. First, protectionism might be hidden by making public little or no information about relevant policy measures. Second, it might be hidden because it is disguised in other policy contexts that addresses legitimate public policy goals (e.g. to safeguard national security or the stability of the financial system). Policies carrying high risks of abuse for protectionist purposes tend to give large amounts of discretion to public officials in their implementation and that present special problems for making public information on policy implementation (for example, detailed information on decisions taken under national security review mechanisms may compromise national security or compromise confidential business information).

The Secretariat's background note highlights the difficulties posed for external monitoring of policies that are at high risk of hidden protectionism due to the information asymmetries that exist between public officials directly involved in the policy making and external monitors. These information asymmetries and related problems of external monitoring heighten the risks that these policies will be used for protectionist purposes. The Annex to this summary reproduces policy settings for areas that are deemed by the 44 countries adhering to the National Treatment instrument to be particularly high risk for being used for protective purposes. These are: 1) policies related to essential security interests and public order; 2) regulation of corporate organisation (e.g. on representation on

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6 See *Summary of FOI Roundtable 19* for an overview of the first discussion.

7 Quoted from *National Treatment of Foreign Controlled Enterprises*, OECD 1993 p. 22.

companies' boards of directors) 3) monopolies and concessions; 4) public procurement; and 5) state aids and subsidies.

In their consideration, countries noted that, in addition to the monitoring tradition already established at the OECD, other disciplines exist on area of high risk for hidden protectionism. In particular, the role of the European Commission and of the European Court of Justice was highlighted by Germany.

The European Commission expressed the view that 'monopolies and concessions' would be a fertile area for future work, noting that it would complement ongoing work on 'competitive neutrality' and state owned enterprises. The Commission also supported the idea, raised in the background paper, of inviting the institutions that accompany and support OECD-hosted dialogue on investment policy – and notably the Business Industry Advisory Committee -- to contribute information, on countries' policy settings so as to offset information asymmetries and to improve the effectiveness of OECD-based external monitoring.

Part 6. Recent investment policy developments – tour de table

Australia

On 25 February 2014, the Australian Treasurer was quoted as stating "If you're advised that an Australian company is a major taxpayer and if it is purchased by someone overseas and therefore its tax liability would be reduced domestically to zero, that feeds into a decision about what is contrary to the national interest – you'd lose potentially a substantial lick of revenue. And that does have an impact on the national interest."[8] Australia's Foreign Investment Review Board (FIRB) reviews inward investment proposals with a view to determining if the proposed investment is contrary to the national interest.

Australia was asked to provide more information on how tax issues are integrated into FIRB's deliberations. Australia responded that the fiscal impact of proposed acquisitions is a longstanding factor in deliberations of the FIRB. In January 2013, a former tax commissioner was appointed to the FIRB. The FOI Chair then asked whether there has not been a shift in focus; Australia answered that heightened awareness of base erosion and recent international cooperation on base erosion and profit shifting – including during Australia's G20 presidency – also may have raised the visibility of the issue within the FIRB.

Canada

In response to a question on how Canada intends to ensure transparency, predictability and accountability of its rules on foreign investment, Canada provided a written explanation of Canadian investment policy that is reproduced in the box below.

[8] Quote taken from The Australian "*New tax test on foreign takeovers*" by David Crowe and David Uren, The Australian, 25 February 2014.

Box. Ensuring transparency, predictability, and accountability of Canada's foreign investment reviews

Overview. Canada's foreign investment review rules are set out in legislation and the regulations and guidelines that support the law. The *Investment Canada Act* (ICA or the Act) and its supporting regulations are available on the internet in French and English. http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00012.html).

Foreign investment reviews are codified in law. The Act is the primary mechanism for reviewing foreign investments. Its purpose is twofold: to review significant foreign investments to determine if they are likely to be of net benefit to Canada and to review investments that could injure national security. Where an investment is subject to review under the Act, the Minister's approval is required prior to it proceeding. The Minister approves applications only where a proposed investment is likely to be of net benefit to Canada. In making this determination, the Minister considers business plans and other information submitted by the investor in light of the six net benefit factors that are listed in section 20 of the Act. In some cases, investors may submit undertakings (e.g., with respect to employment levels) to support their applications.

The threshold for net benefit reviews is published annually. With respect to the net benefit review, acquisitions of control by foreign investors are subject to review where the value of the assets of the Canadian business is equal to or above the established threshold. This threshold is calculated according to a formula available in the Act (section 14.1(2)), and is published annually on the Industry Canada website (http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00050.html).

Canada publishes clarifications to the legislation to assist with interpretation. The Minister has the authority to issue guidelines and interpretation notes (under section 38 of the Act) with respect to the application and administration of any provision of the Act or its regulations. This includes Guidelines on Filing Requirements, Administrative Procedures and Investment by State-Owned Enterprises. (available at http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk00066.html.) The Guidelines are complementary to the provisions of the Act and do not modify the provisions of the ICA.

Canada encourages discussions with the government for any questions investors may have

In accordance with the Guidelines–Administrative Procedures, investors are encouraged to contact officials of the Investment Review Branch of Industry Canada at the earliest stages of the development of their investment projects and prior to the filing of applications. Such consultations provide a useful forum for discussion that may serve to clarify proposals and encourage the development of investments of benefit to Canada. Industry Canada Investment Review Branch officials are ready at all times to meet with investors for such discussions.

December 2012 Announcement. On December 7, 2012, the Government announced clarifications to Canada's foreign investment review process, which consisted of four main initiatives:

1. A statement on SOE investments in the oil sands clarifying that the Minister of Industry will find the acquisition of control of a Canadian oil sands business by a foreign SOE to be of net benefit to Canada on an exceptional basis only, and that the Minister of Industry will also continue to carefully monitor SOE transactions throughout the Canadian economy to determine whether they are likely of net benefit to Canada;
2. Revisions to the SOE Guideline to include entities that are influenced directly or indirectly by a foreign government;
3. An announcement that the Government intends to liberalize the review threshold under the Act to $1 billion in enterprise value, over four years, only for private sector investors; and
4. Providing the Minister of Industry the flexibility, when necessary, to extend the time available to conduct national security reviews of proposed foreign investments.

The December 2102 announcement and related documents are available on the internet:

http://news.gc.ca/web/article-en.do?nid=711489.

Annual reporting on the administration of the Act. In 2009, the Act was also amended to provide that the Director of Investments shall, for each fiscal year, publish a report on the administration of the Act, other than investments or investment proposals found to be injurious to national security. The published annual reports contain statistics on the administration of the Act (including details on the applications and notifications received) and are available on the Industry Canada website: http://www.ic.gc.ca/eic/site/ica-lic.nsf/eng/h_lk81126.html.

Korea

On 13 August 2013,[9] an amendment to the Telecommunications Business Act came into effect.[10] The change allows foreign investors from countries with which Korea has an FTA – in particular EU Member States and the United States – to indirectly own up to 100% of Korean facility-based telecommunication businesses with the exception of *Korea Telecom* (KT) and *SK Telecom*. Korea was asked how this liberalisation measure in favour of certain economies will be aligned with Korea's commitments and obligations under the OECD Investment Instruments, notably the non-discrimination principle under Art. 9 of the Codes of Liberalisation.

In its response, Korea reasserted its commitment to open international investment flows and to ongoing investment liberalisation in Korea. This measure will also be discussed at upcoming meetings of the Advisory Task Force on the OECD Codes of Liberalisation.

Mexico

By a decree that entered into effect on 12 June 2013,[11] Mexico allowed up to 49% foreign ownership in radio and television broadcasting under the condition of reciprocity.[12] Mexico was asked how the reciprocity requirement will be aligned with Mexico's commitments and obligations under the OECD Investment Instruments, notably the non-discrimination principle under Article 9 of the Codes of Liberalisation (*Non-discrimination*).

Mexico stated that is was aware of the non-conformity and that additional legislation will be passed. It expects that Congress will enact legislation that is in conformity with Article 9 of the Codes. This measure will also be discussed at meetings of the Advisory Task Force on the OECD Codes of Liberalisation.

South Africa

South Africa served a notice of termination or non-renewal of twelve investment treaties, all with European Union Member States as well as with Switzerland. These include BITs with Belgium and Luxembourg (on 7 September 2012), Germany (23 October 2013), Netherlands (1 November 2013), Switzerland (30 October 2013), following the note of termination concerning the BIT with Spain (on 23 June 2013). South Africa was asked to provide an update on its approach to investment protection and to investment treaty practice.

South Africa reported that it had 20 BITs in force and had negotiated others that did not enter into force. These include two with Asia (Korea and P.R. China) and two with Latin America (Cuba and Argentina). South Africa notified twelve of these for termination, all with EU members. The timing of the terminations was in some cases driven by treaty provisions that create a short time window in which the treaty could be terminated before its validity would have been automatically

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9 This date is outside this Roundtable's reporting period, but the measure was included here because it was not discussed at an earlier Roundtable.

10 "*Telecommunications Business Act Amendments*", Ministry of Science, ITC and Future Planning, 14 August 2013.

11 This date is outside this Roundtable's reporting period, but the measure is included here because it was not discussed at an earlier Roundtable.

12 *"Decreto por el que se reforman y adicionan diversas disposiciones de los artículos 6o, 7o, 27, 28, 73, 78, 94 y 105 de la Constitución Política de los Estados Unidos Mexicanos, en materia de telecomunicaciones*", Diario Oficial, 11 June 2013.

renewed for a long term. Treaties with Italy and Greece have not yet been terminated; in the case of Italy, South Africa had missed the time window for termination, and the treaty with Greece cannot be terminated unilaterally until 2021. The terminated treaties all contain 'survival clauses' extending protections for qualifying investments that range from 10 to 20 years. For the Latin American treaties, South Africa has begun to discuss termination with the two countries concerned.

With regard to its policy strategy vis-à-vis other African countries, South Africa is participating in discussions at the regional level – SADC and African Union – about investment protection. According to South Africa, the SADC model investment treaty will provide a guide for negotiation and provides guidance as to how future treaties should be structured.

South Africa also stressed that its treaty terminations or non-renewals should be seen in the context of the broader strategy for investment policy in South Africa. First, for investment treaty policy, the terminations offer the possibility of renegotiation on the basis of a new template for treaties (such as the SADC model investment treaty just mentioned). Second, some of the functions of the treaties are being assumed by new legislation, the Promotion and Protection of Investment Bill, which was published for public comment on 1 November 2013. The Bill seeks to integrate into national law the standards that are typically found in treaties.

At the time of the FOI Roundtable in March 2014, 40 submissions to the consultations on the Promotion and Protection of Investment Bill had been received from businesses and NGOs. The views expressed in the submissions are wide ranging, with some stating that the draft law reduces protections and others that the protections it provides are too strong. The submissions embody four broad themes: 1) the need to clarify definitions; 2) the need to clarify standards of protections; 3) concerns about ISDS; and 4) relationship to other legislation, especially to finance. The government expects to submit a revised draft to Parliament in the second half of 2014 and to finalise the bill by end 2014.

South Africa cited a number of reasons for this new approach to investment protection. First, it noted that investment treaties are neither necessary nor sufficient for attracting foreign investment – thus, it does not believe that its renunciation will have a major impact on foreign investment inflows, especially when viewed in light of broader policy changes being made by South Africa. Second, due to legal technicalities, South Africa had to terminate certain European countries because of, as described above, the way the treaty termination provisions in those treaties were formulated. For other European countries, the terminations were done in order to make the termination policy more 'even handed.'

South Africa also expressed its concerns about what it considered to be lack of clarity as to exactly how responsibilities for treaty making in the European Union were allocated, with some of the confusion stemming from differing levels of policy making (at the level of the EU and at the national level). Another country that has treaties with members of the European Union stated that they shared this concern, particularly in relation to how its treaties with EU countries should be amended. The European Commission agreed to present an update on EU treaty making policies at FOI Roundtable 21 in October 2014.

After South Africa's presentation, a number of European countries expressed regret that it had adopted this course of action.

United States

On 18 February 2014, the Federal Reserve Board approved a final rule that affects supervision and regulation of foreign banking organisations operating in the United States. It requires *inter alia* that foreign banking organisations with a significant presence in the United States establish an intermediate holding company over its United States subsidiaries. In addition, organisations with combined U.S. assets of USD 50 billion, have to meet enhanced liquidity risk-management standards, conduct liquidity stress tests, and hold a buffer of highly liquid assets based on projected funding needs during a 30-day stress event. The final rule was scheduled to enter into effect on 1 June 2014.

The United States was asked to provide more information on the final rule and how the rule contributes to establishing a level playing field in prudential regulation for domestic and foreign banking institution. In its answer, the United States referred interested parties to the 18 February 2014 Federal Reserve press release describing the final rule. It emphasised the significant benefits of the new rule for ensuring the financial stability of the US financial system and added that, due to this greater stability, both US and global welfare would be enhanced.

The European Commission remarked that many US supervisory concerns were reasonable in light of problems that were identified during the crisis and it recognised that some changes in the new rule were an improvement. However, in its view, the new rule is problematic inasmuch as it abandons the principle of home country supervisions in favour of territorial supervision. This has resulted in higher compliance costs for foreign banks and the obligation to form a US holding company will be especially costly. The Commission also expressed concerns about cumbersome discussions between supervisory authorities as a result of the new rule, about the need to redo some bank resolution plans, about copycat reactions from other jurisdictions (leading to fragmentation of financial markets) and about how discretion would be exercised.

ANNEX – MEASURES REPORTED FOR TRANSPARENCY UNDER THE NATIONAL TREATMENT INSTRUMENT

Measures reported for Transparency

(Summary of selected categories taken at national level as notified under the National Treatment instrument)

Abbreviations: D **D**efence products and technologies; GP Government Purchasing (security related); N **N**ationality requirement; **P P**rohibition**; R/A T**rans-sectoral reviews or authorisation requirements; Res **Res**idency requirement.

	Public order and essential security interests	**Corporate organisation**	**Monopolies and Concessions**	**Government Purchases (not including security-related measures)**	**State Aids and Subsidies**
Argentina	R/A (in border areas) P(certain defence-related activities)	Res (Trans-sectoral and air transport)	Various sectors	None	None
Australia	R/A (transectoral – FIRB can consider security-related issues) CC(certain defence-related activities)	N (maritime transport)	Various sectors	None	None
Austria	R/A (trans-sectoral)	None	Various sectors	None	None
Belgium	None	None	Various sectors	None	None
Brazil	R/A (certain border areas)	N (employees in firms employing more than 3 people)	Various sectors	None	None
Canada	R/A (trans-sectoral); GP	Res(25% corporate boards must be resident); N(brokerage services)	Various sectors	None	None
Chile	P(nuclear energy; acquisition of border lands for some nationalities); R/A(some defence activities; foreign owned vessels flying Chilean flag)	N or Res (25% of employees of firms with 25 or more employees must have nationality or be residents for more than 5 years) N or R (financial services); N(for various other sectors such as maritime transport and air transport)	Various sectors	None	None
Colombia	R(acquiring land in border areas) N(private security services) P(some defence related activities) N(private security services	N (in some sectors, such as maritime and air transport).	Gambling and alcoholic beverages	None	None
Costa Rica	R/A(investment in border areas). R for owners of such investments.	N (control and boards in road transport; for crews in maritime transport, members of mining cooperatives)	Various sectors.	None	None
Czech Republic	None	None	Rail transport and minerals.	None	None
Denmark	R/A (defence industries) B (80% Danish nationality in certain defence industries).	None	Various sectors	None	None

Measures reported for Transparency

(Summary of selected categories taken at national level as notified under the National Treatment instrument)

Abbreviations: D **D**efence products and technologies; GP Government Purchasing (security related); N **N**ationality requirement; **P P**rohibition**; R/A T**rans-sectoral reviews or authorisation requirements; Res **Res**idency requirement.

	Public order and essential security interests	**Corporate organisation**	**Monopolies and Concessions**	**Government Purchases (not including security-related measures)**	**State Aids and Subsidies**
Egypt	P (defence and radioactive substances)	None	Various sectors.	None	None
Estonia	None	Res (50% of company board members).	Various sectors	None	None
Finland	R/A (trans-sectoral)	Res (managing director and at least one member of the board plus at least one of the individuals involved in audit); various other residence requirements in a number of sectors (finance related)	Rail, social, some forms of gambling and marketing alcoholic beverages)	None	None
France	R/A (aerospace construction; nuclear energy)	N (directors of agricultural cooperatives; and of Agence France Presse)	Various sectors	None	None
Germany	R/A(trans-sectoral and a separate authorisation procedure for in war weapons manufacturing)	None	Various sectors	None	None
Greece	None	None.	Various sectors	None	None
Hungary	None	None.	Various sectors	None	None
Iceland	None	Res (founders and a majority of board of directors and managing directors of limited liability companies)	Various sectors	None	None
Ireland	GP	None	Various sectors	None	None
Israel	R/A (defence industries; privatisations); N (directors, officers and some others in certain infrastructure and defence activities); GP	Res (directorships in companies whose shares are listed only in Israel; mutual fund employees who make decisions regarding domestic securities)	Various sectors.	None	None
Italy	R/A (strategically-sensitive sectors such as defence, energy, transport and communications)	N (for board members and top executives in air transportation and maritime transportation companies entered in the national register)	Various sectors	None	None
Japan	R/A (trans-sectoral) P(for foreign or foreign controlled entities in most types of broadcasting) N(board members and auditors of national telecoms company, NTT)	N (maritime transport entities must be headquartered in Japan and 66% of managing directors must be nationals.	Tobacco manufacturing	None	None
Jordan	None.	N (management positions not allowed for non-Jordanian nationals; foreign employees in engineering and architecture, medical service providers, real estate services; boards of directors in advertising and insurance).	Various sectors	None	None

Measures reported for Transparency

(Summary of selected categories taken at national level as notified under the National Treatment instrument)

Abbreviations: D **D**efence products and technologies; GP Government Purchasing (security related); N **N**ationality requirement; **P P**rohibition**; R/A T**rans-sectoral reviews or authorisation requirements; Res **Res**idency requirement.

	Public order and essential security interests	**Corporate organisation**	**Monopolies and Concessions**	**Government Purchases (not including security-related measures)**	**State Aids and Subsidies**
Korea	R/A (trans-sectoral); P (air traffic control limited to national government; radar and missile guidance)	N (Chief executive of national airline)	None.	None	None
Latvia	None	None	Electrical power transmission and distribution; some postal services	None	None
Lithuania	P(state security and defence)	None	Mining, coins and postal services	None	None
Luxembourg	None.	None	Various sectors	None	None
Mexico	R/A (trans-sectoral; special procedure for defence industries)	Res or N (affiliate of foreign financial institution; chief executive and some directors of holding companies of commercial banks; chief executives of majority state owned companies)	Various sectors	None	None
Morocco	None	N (maritime transport, audio-visuals) R(private higher education and medical facilities)	Various sectors	None	None
Netherlands	None	None	Various sectors	None	None
New Zealand	None.	None.	Rail freight services' use of rail track	None	None
Norway	P (contracts involving classified information except under special arrangements)	Res(manager and half of board members)	Various sectors	None	None
Peru	R/A (trans-sectoral); GP	N(employees; senior managers of firms providing security services; directors and top executives in air and maritime transport; crews of foreign flagged fishing vessels)	None	None	None
Poland	R/A(real estate investments in border areas; airports)	Res(supervisory boards of a broadcasting and telecommunications companies)	None	None	None
Portugal	NF(maritime cabotage)	None	Various sectors	None	None
Romania	None	None	Various sectors	None	None
Slovak Republic	None	None	None	None	None
Slovenia	P(defence)	None	Various sectors	None	None
Spain	R/A(defence)	None	Various sectors	None	None
Sweden	R/A(defence)	None	Various sectors	None	None
Switzerland	None	N or Res (hiring services) Re s(trans-sectoral board)	Various sectors	None	None

Measures reported for Transparency

(Summary of selected categories taken at national level as notified under the National Treatment instrument)

Abbreviations: D **D**efence products and technologies; GP Government Purchasing (security related); N **N**ationality requirement; **P P**rohibition**; R/A T**rans-sectoral reviews or authorisation requirements; Res **Res**idency requirement.

	Public order and essential security interests	**Corporate organisation**	**Monopolies and Concessions**	**Government Purchases (not including security-related measures)**	**State Aids and Subsidies**
Tunisia	None	N(chief executive of credit institutions; some requirements for boards in fisheries and aquaculture; boards of certain commercial firms) Reciprocity (tax advisory services)	Various sectors	None	None
Turkey	No state owned enterprise or individual in petroleum sector; N(air and maritime cabotage) R/A(real estate acquisitions in strategically sensitive regions)	None	Various sectors	None	None
United Kingdom	P (in certain firms operating in aerospace, energy) P(certain military freight transport operations); Industry Act provides discretionary powers to oppose the proposed transfer of control of manufacturing assets to foreigners when this is deemed not to be in the public interest); GP	N (directors and chief executive of aerospace and defence firms as provided for in their articles of association).	None at national level.	None	None
United States	R/A(trans-sectoral); N (cabotage for air and maritime transport) N(transport of military supplies and personal effects) P(broadcasting and telecommunications companies with more than 25% foreign control); GP	N (trans-sectoral requirements for incorporation in a US state; also in some energy sectors; majority of directors of a national bank that is affiliated with a foreign bank must be US citizens; custom brokerages)	None at national level.	None	None

Source: OECD.