



Roundtable on Freedom of Investment 17

8 October 2012

Summary of Roundtable discussions by the OECD Secretariat

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FREEDOM OF INVESTMENT PROCESS

Freedom of Investment Roundtable 17, 8 October 2012, OECD, Paris

SUMMARY OF DISCUSSIONS

The “Freedom of Investment” (FOI) Roundtable is a forum for inter-governmental dialogue on international investment policy that brings together the governments of the 34 OECD members, the ten other governments that have adhered to the OECD Declaration on International Investment and Multinational Enterprises,¹ and the governments of many other countries. The Roundtable supports recipient countries’ efforts to maintain and extend open, transparent and non-discriminatory policy frameworks for international investment and capital movements. It also addresses concerns that international investment may raise. Monitoring and exchanges at Roundtables contribute to observance of international investment commitments, including those taken under the OECD investment instruments and in the context of the G20.

The present document summarises the views and information contributed by participants at the FOI Roundtable 16, held on 20 March 2012. In addition to OECD members, Argentina, Brazil, P.R. China, Colombia, Costa Rica, Egypt, Estonia, Jordan, Latvia, Morocco, Romania, Russia, Serbia, South Africa, Tunisia and the European Commission participated in this Roundtable. The Energy Charter Secretariat and the United Nations Conference on Trade and Development (UNCTAD) were also represented at the Roundtable.

The discussions at Roundtable 17 included (i) continued consideration of investor-state dispute settlement (ISDS), including the results of a public consultation conducted by the Roundtable and discussion of a draft progress report; (ii) a review of recent developments in investment policy, and (iii) a discussion of priorities for future Roundtable work.²

Part I. Continued consideration of ISDS

Public consultation on ISDS

Participants welcomed the comments received in the electronic public consultation on the Secretariat’s scoping paper on ISDS. They noted that commentators had made important points from a variety of perspectives. The Roundtable expressed its appreciation for the time taken by contributors.

Argentina noted that some public consultation contributions referred to Argentina. It expressed concerns about the objectivity of a contributor to the consultation who, it contended, was affiliated with a law firm that has both represented clients in claims against Argentina and engaged in paid lobbying on behalf of American Task Force Argentina. It also expressed concerns about the anonymity of a submission by a commentator identified as a global US-based law firm. The Chair clarified that the compendium of comments merely reflects the comments received and does not comment on the views expressed by third

¹ The adherents to the Declaration include all 34 OECD member countries, and 10 non-member countries: Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia.

² Accounts of discussions at earlier FOI Roundtables are available on the website dedicated to the FOI process [www.oecd.org/daf/investment/foi].

parties. He indicated that it would not be appropriate to suppress the comment from the law firm without having made clear from the outset that anonymous submissions were excluded.

Discussion of a Roundtable progress report on ISDS

Participants discussed a draft Roundtable progress report on its work so far on ISDS, including discussions by delegates at earlier Roundtables. They agreed that the Secretariat would circulate a revised version of the report for comment by participants and that the final report³ would then be posted on the FOI Web page.

Part II. Monitoring of recent policy developments and other investment issues

1. Finland

Finland provided information on the introduction, on 1 June 2012, of a new investment screening mechanism for the purpose of safeguarding Finland's essential security interests and public order. The mechanism consists of a prior authorisation procedure for investments in specific sectors from outside the EU, the EEA and Switzerland. Reviews are either triggered by the filing by the investor, or *ex officio* where there is a suspicion that an investor is using a "straw-person" to circumvent the screening mechanism. Details on the design of the review process are available in Box 1 below.

Finland informed participants that, at the time of the Roundtable, four investment proposals had been assessed under the new legislation, all of which had been approved.

2. Canada, France, Italy and Malaysia

Canada, France, Italy and Malaysia are among the Roundtable participants that operate, or have recently introduced, "strategic" investments funds that invest in privately-owned companies. Canada, France and Italy provided information on these funds' mandates and operations and shared their views on whether such funds could potentially be used to fend off foreign investors.

Canada, which has two sector-specific funds – one for the automotive industry and the other for aerospace and defence industries – informed participants that these entities provide repayable funding to companies for strategic industrial research and pre-competitive development. The assistance is available for Canadian-incorporated companies of all sizes, including subsidiaries of foreign-controlled companies. Under the aerospace and defence industries, Canada had, up to September 2012, provided CAD 825 million to 25 projects.

Canada explained that the objective of the funds is to enhance competitiveness. It noted that they were not designed and are not used to give preference to Canadian-owned enterprises, given that foreign controlled companies incorporated in Canada were also eligible to receive the support.

³ <http://www.oecd.org/daf/internationalinvestment/investmentpolicy/ISDSprogressreport.pdf>

Box 1. Finland's "Act on the Monitoring of Foreigners' Corporate Acquisitions"

On 1 June 2012, Finland's new "Act on the Monitoring of Foreigners' Corporate Acquisitions in Finland" came into effect. The Act repeals the former Act 30.12.1992/1612. The objective of the Act is to monitor, and, should a key national interest so require, restrict the transfer to foreigners and to foreign organisations and foundations of influence over the companies monitored.

The Act defines as a *key national interest* (2§:1) securing national defence or safeguarding public order and security in accordance with Articles 52 and 65 of the *Treaty on the Functioning of the European Union*, should the fundamental interests of society be under the threat of severe damage.

The assessment regarding which organisation and business undertaking is considered critical in terms of securing functions fundamental to society is based on the State Council's security strategy and the strategy to safeguard the essential functions of the society (YETT Strategy). The strategy is a public document (available at <http://www.defmin.fi/?l=en&s=335>).

Subject to review are what the law designates as *Monitored entity* (2§:2), that is 1) a defence industry company and 2) any other such organisation and business undertaking considered critical in terms of securing functions fundamental to society on the basis of its field, business or commitments. Compared to the previous Act of 1992, the scope of enterprises subject to potential review has thus been reduced: only two categories of monitored entities are potentially concerned, while the 1992 legislation also covered enterprises in any other sector provided they had a certain size and turnover.

Foreign owner (2§:3) means:

- (a) any foreigner not domiciled in a European Union (EU) or European Free Trade Association (EFTA) member state;
- (b) any organisation or foundation not domiciled within a EU or EFTA member State;
- (c) any organisation or foundation domiciled within a EU or EFTA member State in which a foreigner referred to in subparagraph a) or an organisation or foundation referred to in subparagraph b) controls at least one tenth of the aggregate number of votes conferred by all shares in a limited liability company, or has a corresponding actual influence over another organisation or business undertaking.

The Ministry of Employment and the Economy is in charge of administering the Act. Previously, the Ministry of Defense was responsible for applications of defense industry enterprises. As under the earlier law, the evaluations of the applications will be carried out jointly with different ministries, National Emergency Supply Agency and General Headquarters.

Corporate acquisition (2§:5) means an acquisition or other corresponding measure due to which a foreign owner gains ownership of a number of shares in a monitored limited liability company, corresponding to at least one tenth of the aggregate number of votes conferred by all shares in the limited liability company, or corresponding to actual authority in a limited liability company or another monitored entity; corporate acquisition also means an organisation other than one referred to foreign ownership, if it has the aforementioned influence in a monitored company. The threshold for monitored influence that triggers a review has been reduced from one third of the votes (Act No. 1992/1612) to ten percent.

A foreign owner must apply for advance confirmation by the Ministry of Employment and the Economy for any corporate acquisition involving a defence industry company (4§). The Ministry must confirm the corporate acquisition unless it potentially conflicts with a key national interest. If the application does conflict with a key national interest, the Ministry must refer the matter for consideration at a government plenary session.

A foreign owner may notify a corporate acquisition concerning a non-defence industry company for the confirmation of the Ministry of Employment and the Economy (5§). Such a notification may also be made in advance. The Ministry must confirm the corporate acquisition unless it potentially conflicts with a key national interest. If it is the case that the corporate acquisition does conflict with a primary national interest, the Ministry must refer the matter for consideration at a government plenary session.

The Government may refuse to confirm a corporate acquisition only if this is necessary due to a key national interest (7§).

Right of appeal

Decisions made by the Ministry of Employment and the Economy under section 4(3) or section 5(3) on transferring the matter, or under section 5(4) on undertaking a further examination, are not open to appeal. A decision by the Government, referred to in section 7, or by the Ministry, referred to in section 4(2), is open to appeal in the manner prescribed in the Administrative Judicial Procedure Act (586/1996).

France provided information on the *Fonds stratégique d'investissement* (FSI), which was created in 2008. France reported that the policies of the FSI had not changed, and that the fund was operating as a private investor, that is, being exclusively bound to the objective of seeking return on investment. France mentioned that the purpose of its investments is in part to train small and medium sized enterprises and that the FSI's projected investment time is 5-6 years. The fund was regularly investing in SMEs operating in sectors that may be affected by the crisis, especially in cases where a company was threatened by the crisis but represented value because it possesses a specific technology.

France also asserted that the FSI was not in a position to fend off investors as it only took minority stakes and systematically operated in conjunction with private investors. These partner investors could also be foreign State-owned enterprises. France mentioned that in the future, the FSI would be integrated in the *Banque publique d'investissement*, or public investment bank, and would thus take the characteristics of a banking institution.

Italy provided information on the *Fondo strategic italiano* (FSI), which was established in August 2011 and had begun making its first investments in mid-2012. Italy explained that the FSI was an independent financial institution. Its majority shareholder is the *Cassa depositi e prestiti*, a company in which the Italian government holds 70% and a broad group of bank foundations the remaining 30%. Foreigner investors, including foreign sovereign wealth funds, were invited to contribute to the FSI, not least to increase diversity and internationalisation of the fund.

Italy reported that the FSI makes investments at market conditions and subject to publicly available rules. Italy mentioned two investments that the fund had made in two Italian companies: an investment in utilities company HERA of up to EUR 100 million, which was still subject to antitrust and regulatory approvals and would lead to a 2.6%-6% stake in HERA; and an investment in the context of an initial public offering by AVIO, a company producing aviation propulsion systems that is majority foreign-owned.

3. China, Japan and Korea

China and Japan provided information on the China-Japan-Korea trilateral investment agreement, which had been signed in Beijing on 13 May 2012. Japan explained that the trilateral investment agreement⁴ was the first legal framework among the three countries in the field of economy and that it led to an enhanced level of protection of investors and investments. The agreement features clauses on, among others, national treatment, most-favoured-nation treatment, investor-state-dispute settlement, and a clause on the completion of capital transfers relating to investment. The agreement prohibits export restrictions as well as performance and technology transfer requirements. The treaty also covers the protection of intellectual property rights, establishing a new obligation to prevent counterfeiting.

At the time of the Roundtable, the three contracting countries were undertaking their respective internal procedures necessary for the entry into force of the agreement. The agreement enters into effect a month after the last notification of the completion of the procedures has been notified to the treaty partners.

4. South Africa

South Africa provided information on two recent developments, one concerning South Africa's decision on its future policies with respect to international investment agreements, the other concerning a planned change with respect to policies governing private security firms in the country.

⁴ Japan informed delegates that the text of the agreement was available on the websites of Japan's Ministry of Foreign Affairs and of the country's Ministry for Trade and Industry.

South Africa confirmed that on 26 July 2012, the South African Minister for Trade and Industry had revealed a comprehensive cabinet decision dating back to 2010 on South Africa's future policies regarding international investment agreements. The decision was based on the outcome of a review process, carried out between 2007 and 2010.

The decision is composed of four elements, including the decision: (1) to not conclude additional BITs unless compelling arguments would call for an exception; (2) to terminate all first-generation BITs, i.e. treaties that were concluded following the end of Apartheid in 1994; any renegotiation would be based on an updated model; (3) to establish a work program to transpose provisions found in BITs into domestic legislation, to strengthen domestic legislation in relation to investment, and to align this legislation on investment with the Constitution; and (4) to entrust an inter-ministerial committee with all decisions in this area.

South Africa explained that the country had concluded 15 treaties, mainly with EU members, immediately after the end of the Apartheid. The democratically elected government sought to signal that the investments continued to be protected; the move was also motivated by the expectation that BITs would favour inward FDI. Then, however, South Africa underwent what it described as a "learning period", based both its own experience and experience of others, and realised that expectations of an increase of FDI did not materialise.

South Africa later saw two challenges from investors and a threat of a challenge by a third investor, all of which were perceived as frivolous claims made by marginal investors. This experience nonetheless drew the government's attention on the poorly designed, standardised and imprecise provisions of its BITs – South Africa considers that virtually all provisions in the concerned BITs are problematic – and the resulting potential threat for government policy. South Africa explained that at the time of the negotiations, the South African government disposed of little expertise and merely followed the global trend of at the time with little consideration of risks resulting from the treaties. Moreover, as these treaties had been signed before the constitution had entered into force in 1996, some of the treaties do not fully conform with the transformative elements of the later constitution, e.g. in the area of labour and property rights, that were designed to address the legacy inherited from the Apartheid period.

The decision on when to terminate individual treaties was driven by the treaty provisions itself, some of which foresaw a short time window for termination before they would be automatically extended. At the time of the Roundtable only the termination of the BIT with Belgium/Luxembourg treaty had been notified. South Africa expects that the overall implementation of the new policy would be completed rather in the medium to long term. Especially the incorporation of BIT-type provisions in national law could take time, as does the development of a new model BIT. South Africa reported to entertain dialogue with the European Commission, given that most treaties lined up for termination had been concluded with European Union members, and any renegotiation of an investment agreement would also be done with the European Commission, given the transfer of competence in this area.

South Africa is convinced that the implementation of the new policy, in particular the termination of its BITs did not mean that investors had to fear arbitrary treatment, given that South Africa's legal framework matched highest international standards and was further updated. Also, the concerned treaties included clauses on the protection of investments of up to 20 years after the termination of the treaty. South Africa asserted that the discussion at the Roundtable and in other multilateral settings provided comfort as they showed that other countries also adapted their policies when circumstances changed.

With respect to the planned change of policies regarding the regulation of private security companies, South Africa explained that the plans were still at an early stage, and promised to provide further information to the Roundtable. South Africa noted that the plans for change were driven by the sharp

increase in the personnel of private security companies in the country, which almost doubled between 2007 and 2012, growing from 900,000 to 1,700,000, now outnumbering the South African police and armed forces combined. The bill that was under consideration of the time of the Roundtable had multiple objectives, primarily to control and registration of firearms; the reform of foreign ownership rules of security companies was only one issue among many.

5. *United States*

The United States reiterated information from the Statement from the Treasury Department on the U.S. President's decision, published on 28 September 2012, to prohibiting the acquisition and ownership of four wind farm project companies in the United States by Ralls Corporation, a Chinese-controlled company.

6. *Austria*

Austria informed Roundtable participants that it was revising the investment screening mechanism that it had introduced into its foreign trade Act in late 2011 for the purpose of safeguarding national security. The revision would reduce the scope of sectors in which investments may be subject to review, and clarify the scope of the review process. Austria announced that it will provide more ample information on the revision at a forthcoming meeting.