

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

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FREEDOM OF INVESTMENT ROUNDTABLE

**Summary of Discussions of Freedom of Investment Roundtable 25
17 October 2016**

Note by the Secretariat

This note is a Secretariat summary of discussions at Freedom of Investment (FOI) Roundtable 25, held on 17 October 2016.

Fifty-seven 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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FREEDOM OF INVESTMENT ROUNDTABLE 25

17 October 2016, OECD, Paris

SUMMARY OF DISCUSSIONS

1. The Freedom of Investment (FOI) Roundtable supports countries' efforts to maintain and extend open, transparent and non-discriminatory policy frameworks for international investment and capital movements. It also helps countries to address policy concerns that investment may raise (e.g. in relation to national security). Policy monitoring by Roundtable participants promotes observance of countries' international investment policy commitments, including those taken under the OECD investment instruments and in the context of the G20. It also promotes sharing of experiences with investment policy design and implementation.

2. The present document summarises views and information contributed by participants at Roundtable 25, held on 17 October 2016. Participants included representatives of governments of the then 35 OECD members as well as the European Union, other governments that have adhered to the OECD Declaration on International Investment and Multinational Enterprises (Argentina, Brazil, Costa Rica, Lithuania, Morocco, Tunisia) as well as government representatives from P.R. China, India, the Russian Federation, and South Africa. The International Centre for Settlement of Investment Disputes (ICSID) was also represented.

3. The discussions at Roundtable 25 addressed several topics including: (1) [Arbitrators, adjudicators and appointing authorities in investment treaty dispute settlement](#); (2) [India's new model investment treaty](#); (3) [recent investment treaty developments](#); (4) [recent investment policy developments](#); and (5) [an international framework for investment facilitation](#).¹

1. Arbitrators, adjudicators and appointing authorities in investment treaty dispute settlement

4. A background paper provided a basis for a renewed discussion of investment treaty dispute settlement issues in particular relating to arbitrators, adjudicators and appointing authorities.² It first noted the recent evolution of the context for treaty policy on dispute settlement and that the 2016 OECD Investment Treaty Conference had reaffirmed the importance of sustained governmental analysis and discussion of dispute settlement, a better understanding of relevant facts and improved communication to the public.

5. The main analytical section of the paper examined the role and importance of appointing authorities in investor-state arbitration. Investor-state arbitration requires the ad hoc selection of arbitrators in each case by the disputing parties or appointing authorities. There are a growing number of appointing authorities active or seeking to become active in ISDS. The analysis first examined the role of appointing authorities in the selection process and composition of the pool of investment arbitrators; a second part explored some significant differences between the context for appointing authorities in commercial

¹ Roundtable participants also discussed State-owned enterprises in the global marketplace. The discussions of this topic are part of a broader work programme involving several OECD committees and working groups, and are not documented here.

² The renewed discussion follows earlier Roundtable analysis and discussion of investor-state dispute settlement (ISDS).

arbitration and investment arbitration. At the initial stage, the analysis considered appointing authorities generically rather than looking at their individual characteristics.

6. The paper noted that appointing authorities typically intervene primarily following each disputing party's selection of its co-arbitrator. This is because the appointing authority's most important role is to appoint the chair of a tribunal if the parties or co-arbitrators are unable to agree on one. As a general matter, where an appointing authority is asked to appoint the chair, it either appoints a particular individual or provides the parties with some form of list of potential candidates. In addition to their role in selecting the chair of tribunals, appointing authorities also at times select other arbitrators such as when a party fails to select its co-arbitrator. They also often have a key role in resolving challenges to arbitrators.

7. The paper noted that basic negotiation theory suggests that appointing authorities likely have a substantial impact on the composition of investor-state arbitration tribunals and of the overall pool of investment arbitrators. This includes both chairs and co-arbitrators. The appointing authority is the backdrop against which the disputing parties and their counsel generally negotiate over a possible agreed chair of the tribunal. As the parties negotiate, they know that, in the event of a failure to agree, the appointing authority will make or largely determine the choice. As a hypothetical example, it was suggested that disputing party negotiations over a chair would differ between a context where an appointing authority's appointments or lists are primarily composed of commercial arbitrators and one where such appointments or lists are composed primarily of governmental officials from third countries. It was suggested that over time, negotiated outcomes over agreed chairs may be likely to reflect profiles that resemble appointing authority appointments and lists.

8. In addition to their impact on the chair of the tribunal, expectations about appointing authority action are also likely to affect party appointments of their co-arbitrators. As noted, prior to negotiations over a chair, each party generally chooses a co-arbitrator. Experienced counsel will approach the selection of a co-arbitrator with the future negotiations over a chair in mind. An affinity with the chair is often seen as a desirable quality for a co-arbitrator because a party can prevail 2-1 if it can convince its co-arbitrator and the chair. Thus, each party's choice, while essentially unconstrained as a legal matter under existing rules, may be affected by its expectations about appointing authority behaviour with regard to selection of a chair.

9. The background paper also addressed some differences between appointing authorities in commercial arbitration and investment arbitration. Most appointing authorities are senior members or bodies in broader arbitration institutions that also provide administrative services to support arbitration. Appointing authorities active in investor-state arbitration also generally act as appointing authorities in contract-based or commercial arbitration. However, there are significant differences in how appointing authorities themselves are selected between the two systems.

10. Parties that agree to arbitration in a contract generally agree to a single set of arbitration rules in the contract. The selected rules in turn provide for a single appointing authority.³ Both parties to a contract normally must agree to these provisions. At the time the parties select their appointing authority in the contract, neither side knows whether in a future dispute it may be claimant or respondent or both. At the later time when a claimant in contract-based arbitration files its claim, it generally does not have a choice of appointing authority; a single choice has been made earlier in the contract. The background paper noted that it is widely recognised that arbitration institutions compete to make themselves attractive to parties and

³ It was noted the UNCITRAL Arbitration Rules provide for the Secretary-General of the Permanent Court of Arbitration (PCA) naming an appointing authority rather than acting directly as the appointing authority. For simplicity, the discussion generally refers to the more usual situation where the selection of arbitration rules also directly determines the appointing authority.

their counsel for commercial arbitration cases. At the time contracting parties choose an appointing authority in a contract, both contracting parties normally can be expected to share an interest in the appointment by appointing authorities of arbitrators knowledgeable about contract law.

11. The background paper noted that the situation is different in investor-state arbitration. Most investment treaties give investor claimants the option of two or more sets of arbitration rules with different appointing authorities. Typically, the investor claimant and its counsel only choose the appointing authority at the outset of the case when they choose to file an arbitration claim with a particular forum or under particular rules. Given the recognised importance of arbitrator selection, the appointing authority that goes with particular arbitration rules may be a significant factor in the investor claimant's selection of rules. Beyond the appointing authority, however, there are other differences for the claimant to consider such as the regime for enforcement, the nature and role of the secretariat or the degree of transparency.

12. Investor claimant choices between appointing authorities following the outbreak of a dispute take place relatively frequently. The frequency depends on the number of investor claims and the treaties used. In order to be available for selection by an investor claimant when it files its claim, an appointing authority must have been included by the states Parties as an option in an applicable treaty. Treaties typically have a long duration and the range of options made available to claimants generally applies for the duration of the treaty.

13. The paper suggested in conclusion that appointing authorities appear to be a linchpin of the investor-state arbitration system and need to be better understood and explained. The paper also set forth the main elements of investment court system (ICS) based on a standing Tribunal and Appellate Tribunal as set out in the recent Comprehensive Economic and Trade Agreement between Canada, the European Union and its Member States (CETA). The paper briefly described the CETA provisions and explanations by the CETA Parties but did not analyse them or compare with other approaches. It was noted that the CETA Parties have agreed to pursue with other trading partners the establishment of a multilateral investment tribunal and appellate mechanism.

14. FOI participants discussed the background paper, asked questions about potential future work and considered avenues to explore. It was noted that the work was at a preliminary stage and that a further paper was expected on economic incentives in dispute settlement systems including investor-state arbitration and the ICS. It was also noted that it was proposed that the Roundtable engage in dialogue with appointing authorities, but that feedback and additional ideas were being sought.

15. A participant stated that the availability of multiple appointing authorities in an investment treaty can create uncertainty. Her government's treaties generally identify a single appointing authority to provide greater predictability to the appointment process. Another participant indicated that he shared concerns expressed by some about investor-state arbitration as reported in the first section of the background paper and considered that although progress has been made, they remained of concern. He considered that the paper and discussion in various international fora demonstrated that the designation of arbitrators and especially the chair is of critical importance for the outcome of disputes and can be more important than the merits or the arguments of the parties. He advocated further significant work and discussion of the issues.

16. A participant stated that the paper opened a number of avenues to explore and requested further work. For example, he found the issue of competition between arbitration institutions to be an important theme that deserved further attention. He welcomed the expected further attention to the incentives of arbitrators and adjudicators, expressed interest in those issues for dispute settlement institutions. He noted competition could be addressed for example with regard to the extent to which it may improve or diminish the quality of services rendered. Another participant expressed interest in exploring government

preferences in selecting arbitrators, to the extent such information is available, which could inform discussions about both ad hoc and permanent systems, as well as issues such as codes of conduct or efforts to address conflicts of interest. Interest in continued analysis was noted as was the importance of Roundtable dialogue with appointing authorities and international institutions active in dispute settlement.

2. India's new model investment treaty

17. India presented its new model investment treaty to the Roundtable. It provided some general context; addressed the origins and development of the model; and described its salient features. India stated that the Indian government is committed to attracting foreign direct investment (FDI) to supplement domestic skills, capital and technology in the national interest. It pointed to India as one of the most attractive destinations for FDI in the world, with more than USD 40 billion received in 2015-16. It underlined that government efforts to improve the ease of doing business have led to a substantial increase of FDI over the last two years.

18. India noted that the text is a model intended for future negotiations. It results from historical experiences, domestic sensitivities, and extensive debate and discussion, a process integral to India's democratic system of decision-making. The model does not preclude negotiations with due regard to the concerns of other countries and India is not proposing to take a rigid approach to the application of its model. The model is to be used as the basis for all future negotiations.

19. India noted that its government initiated a policy on bilateral investment treaties in 1991 as part of economic reforms to attract FDI and create a stable legal regime for investor claims. Following a first 1994 treaty with the UK, India has signed 83 bilateral investment treaties (BITs), of which 73 are in force. A previous model was developed in 1993 and amended in 2003. India started rethinking on the previous model in 2012. The process involved extensive inter-ministerial work, and consultations with several international organisations, stakeholders and the public. India stated that the outcome of the review was a robust and coherent revised model text which was approved by the Cabinet in December 2015. India explained that a number of other countries have attempted to reform their policy on investment treaties and various developments led India to review its treaty.

20. India then described the broad principles that lie behind the new model. The model does provide protection to genuine foreign investments. The new model also reflects that while it is important for investment treaties to provide a normative and institutional framework for foreign investors to enforce their rights and claims, it is also important to ensure that treaties do not impede on policy space or the power to regulate foreign investment for legitimate public purposes. A requirement of exhaustion of local remedies, subject to a ceiling on the number of years, is a condition for foreign investor access to dispute settlement under the treaty. India stated that its judicial system is fairly efficient and independent. The model is designed to promote sustainable development. India noted that the definition of investment uses an enterprise-based approach.

21. Following this description of the broad principles underlying the model, India provided a more detailed review of key provisions.⁴ The new model is more detailed than earlier treaties both on substantive law and with regard to dispute settlement. India noted that the model uses a post-establishment model of protection. It excludes sensitive public policies including taxation, government procurement, public services provided by state-owned enterprises, and compulsory licenses in accordance with TRIPS.

⁴ The description here is based on the general oral presentation by India at the Roundtable. Recourse should be had to the text of the model treaty for the precise provisions.

22. India also noted that the definition of covered investment uses an enterprise-based approach; it provides for protection of enterprises incorporated in the host state. It clarifies the assets of such enterprises that are protected which include equity, debt, licenses under domestic law and property rights, provided they are owned by the enterprise. To be covered, investments must also have key investment characteristics such as the commitment of capital, certain duration, the expectation of profit, the assumption of risk and significance for the development of the host state. The definition of covered investors includes both natural and legal persons. Investors who are legal persons must have substantial business activities in the home state. Covered measures are broadly defined to include measures of the central and state governments and their instrumentalities.

23. The model provides for national treatment in like circumstances in order to achieve equal protection. In order to address the problem of treaty shopping, most-favoured-nation (MFN) has been excluded. The model provides protection from direct and indirect expropriation. It clarifies the notion of indirect expropriation, and provides for fair market value as a compensation standard for expropriation. It does not include a fair and equitable treatment (FET) provision. It seeks rather to define the core aspects of the minimum standard of treatment under customary international law. The treaty permits the transfer of funds without restriction, but provides for exceptions to allow for capital controls in the event of a serious balance of payments or monetary crisis.

24. India stated that ISDS is applicable to disputes arising out of an alleged breach of major substantive obligations under the treaty. Claimants must first exhaust domestic remedies for five years (unless claimants prove that there is no domestic remedy available) There is an obligation to seek negotiations during the cooling-off period. Parallel claims must be waived. Obligations for arbitrators to be independent and impartial have been strengthened. Accelerated procedures are available for frivolous claims or jurisdictional objections. Non-disputing treaty party governments may make oral and written submissions. The disputing parties must make certain documents relating to the dispute public.

25. The model contains both general and security exceptions which preserve policy space. General exceptions apply to matters of larger public interest such as environmental policy and public safety. The model also includes a chapter on investor obligations to seek to rebalance the asymmetry of existing treaties.

26. India stated that the model treaty has been developed as a realistic proposition as part of a gradual process of reform. Each treaty must be approved by the Cabinet so there is room for change in individual treaties. It is hoped that the model will become a template for treaty policy discussions and will be of interest to other governments.

27. Roundtable participants thanked India for the presentation of its model and asked questions in the limited time available. It was noted that many individual provisions could be examined, but the discussion focused primarily on more general issues relating to the model. It was noted that India has suggested that the model could be a basis for broader investment treaty policy discussion, and clarifications were sought about how India would see such process taking place. India noted that the model is recent; as India moves ahead, it is interested in engaging with other countries.

28. A participant noted that his government and India had very recently successfully concluded negotiations on a treaty. The process involved a merging of their quite similar models. He could accordingly attest to India's flexibility in practice in that context.

29. Another participant stated that the presentation made it obvious that the international regime faces many challenges with many countries reviewing their treaties or terminating treaties. It is no longer merely a debate given action by Ecuador, Venezuela, Indonesia, South Africa and India which shows a

crisis. Another participant suggested that it would be more accurate to describe the treaty system as continuing to further develop.

30. Another participant noted that his government has developed model treaties and is familiar with the balance of offensive and defensive interests. At the same time, he noted some features of the India model that differ significantly from many existing treaties, including the exhaustion requirement, the replacement of FET or the exclusion of MFN. He noted that these provisions involved complex balancing. He inquired about feedback that India has received from international investors. India noted that its model was only approved in December 2015. It stated that investment flows continue to be good.

31. The Chair thanked India again for the very interesting presentation. He noted that the Roundtable had benefitted from a number of interesting presentations of recent models or treaty policies. These clearly show that the treaty system is in a state of flux. It was suggested that comparison of recent approaches would show significant common concerns or interest over a number of issues, such as the avoidance of frivolous claims, strengthening responsible business conduct, investment facilitation or precise definitions or other different new approaches to FET clauses. The close alignment with regard to concerns was not always matched by final outcomes in terms of treaty provisions.

3. Recent investment treaty developments

a. Work on investment under the Chinese G20 Presidency

32. China provided the Roundtable with a brief overview of work on investment in the context of its Presidency of the G20 in 2016. China noted that robust international trade and investment was one of four priorities for its Presidency. China has made substantial efforts in this area both internally and externally. It expressed appreciation for the close cooperation of G20 members and the assistance of international organisations including the OECD. China noted that fruitful outcomes in trade and investment were apparent in three areas.

33. First, a standing mechanism has been created at Ministerial level for trade and investment cooperation. China explained that the G20 arose as an institution following the financial crisis and initially focused primarily on policy coordination relating to finance, but with the implications of the crisis for the global economy and trade and investment, there are important issues for the G20 to address in those areas. China hosted a meeting of G20 Trade Ministers in July 2016 following decisions in Antalya under the Turkish G20 Presidency. In their statement adopted at the July 2016 meeting, Trade Ministers sent a strong signal in support of global trade and investment for growth and sustainable development, and promoting policy cooperation and coordination. They emphasised the importance of a supportive environment for business and investment, and of coherent international and national policy making. The statement encouraged UNCTAD, the World Bank, the OECD and the WTO to advance on work on investment promotion and facilitation.

34. China stated that a second key outcome was the establishment of the Trade and Investment Working Group (TIWG) and the endorsement of its terms of reference. The TIWG has played a key role in fostering cooperation, implementing commitments and instructions from prior summits, and addressing emerging issues. In addition to G20 Members, the TIWG has gathered invited guests, international organisations and representatives of the business community.

35. The third key outcome identified by China was the issuance of G20 Guiding Principles for Global Investment Policymaking. China noted that while the Principles are brief and non-binding, they cover elements such as, among others, the importance of fighting against investment protectionism; establishing open, transparent and predictable conditions for investment; providing strong protection to

investors; and reaffirming the right to regulate. China emphasised that the Principles will strengthen coherence in international and national investment policy making and help business in making international investment decisions. China described the Principles as the first multilateral framework for international investment rules and believes they could pave the way for future work in appropriate fora including in the Roundtable.

36. The Chair applauded China for putting emphasis on trade and investment in the G20 context. He was aware that the process started under the Turkish G20 Presidency, but noted that significant progress has been made under the Chinese Presidency. This was true in particular with regard to investment facilitation, an issue under consideration in the Roundtable. He welcomed the role of the OECD in the process and the invitation to it to contribute. Another participant also praised China's efforts and success, expressed appreciation for the role of international organisations including the OECD in the work, and expressed a desire for continuation of the cooperative spirit and work under the German G20 Presidency in 2017.

b. Reported notices of termination and requests for joint government interpretations of investment treaties by India

37. India briefly provided information on its recent actions to terminate certain investment treaties and to seek joint government interpretations of others. It stated that it was terminating and/or renegotiating 58 outdated treaties whose initial terms of validity had expired. It is issuing proposed joint interpretations for the remaining 25 treaties in force whose initial term has not yet expired. India noted that the decision to issue proposed joint interpretations was taken in early January 2016 following formal government approval of the new model in December 2015.

38. India noted that the preamble to the proposed joint interpretations seeks to clarify that the purpose of the proposed joint interpretation is to address uncertain and ambiguous arbitral interpretations of investment treaties. The basis of the joint interpretation is the Vienna Convention on the Law of Treaties (VCLT).

39. India outlined other key aspects of proposed joint interpretations with regard to the definition of investment; denial of benefits; treatment of tax matters; limitation of fair and equitable treatment; effective means provisions; certain clauses possibly subject to being interpreted as umbrella provisions; national treatment and most-favoured nation provisions; expropriations, essential security; and ISDS. In response to a question from a participant about reactions to the termination notices or proposed joint interpretations from treaty partners, India stated that it is engaged in active discussions with its treaty partners.

40. It was noted that the line between joint interpretations and amendments of treaties can be blurred at times. It was also noted that the Indian example draws attention to the broader issue of the need to address older treaties. As the treaty system changes, the changes do not only raise issues with regard to policy with regard to new treaties – an area on which interest has focused a great deal. They also raise issues about the relationship between new and old treaties. This issue has become of greater importance with the emergence of a wider variety of new models taking different approaches.

4. Recent investment policy developments

41. Roundtable participants discussed recent investment policy developments that had taken place since the last Roundtable in March 2016. The discussion was based on an [inventory of measures taken between 16 February 2016 and 15 September 2016](#). Four countries – Australia, Canada, South Africa, and the United Kingdom – provided information on recent policy changes:

Australia and Canada

42. Australia and Canada were asked about significant surcharges that three States of Australia and a Province of Canada have begun to impose on foreigners that seek to acquire or possess residential real estate in their territories; they were also asked how these measures interact with Australia's and Canada's national treatment commitments. These surcharges – 15% in one case in Canada's province of British Columbia – respond to strong price increases in real estate which is partly driven by foreign investors' interest and market participation. They are not justified by additional costs related to the status of the acquirer as a foreigner. In some sub-national entities in Australia, absentee foreigners – owners of residential real estate that do not live in the property at a given date or over a certain period – are also subject to additional taxes that are not imposed on domestic owners regardless of their presence at the property.

43. Australia stated that the Federal Government was in discussions with the three States – New South Wales, Queensland, and Victoria – that had introduced the surcharges and taxes on foreigners that were acquiring or holding concerned real estate. Australia stated that it would only bring these discussions to a more formal level once if concerns had been raised; at the time of the meeting on 17 October 2016, Australia stated that it had not been aware of any concerns in this regard.

44. Canada informed participants that on 25 July 2016, British Columbia had introduced an additional 15% property transfer tax for the acquisition of residential real estate by foreign individuals or foreign-owned companies in the Greater Vancouver Regional District. A pro-rata calculation was applied for mixed use properties, and the tax would only be levied on the value of share of the value associated with residential real estate. Canada further stated that the tax was applied to all purchases registered since 2 August 2016, and that according to the authorities of British Columbia, revenues would be used in favour of housing and rental programmes.

45. Canada further informed Roundtable participants that the Federal Government was reviewing the measure in line with current practice, according to which the Federal Government assesses measures taken by authorities at sub-national level with respect to their impact on international obligations and trade commitments. Canada announced that it would inform Roundtable participants on the outcome of the assessment.

South Africa

46. South Africa was asked whether it could provide information on the International Arbitration Bill, 2016 that had been introduced in Parliament and on which an explanatory summary of the International Arbitration Bill, 2016, had been published in the South African Government Gazette on 28 April 2016.⁵ The government has described the bill as designed to incorporate the UNCITRAL Model Law on International Commercial Arbitration into South African law. According to the government explanation, it provides, inter alia, for a new regime for the recognition and enforcement of foreign arbitral awards. The bill would repeal the Recognition and Enforcement of Foreign Arbitral Awards Act, 1977.

47. South Africa informed Roundtable participants that parliamentary treatment of the bill was still in a very early stage and it was not possible to anticipate when the will would be read or adopted. South Africa announced that it would provide information on the progress of the bill.

⁵ The text of the bill is available at <https://pmg.org.za/bill/639/>.

United Kingdom

48. The United Kingdom was asked about an announcement that the government had made on 15 September 2016 on plans that it will impose a new legal framework for future foreign investment in Britain's critical infrastructure including in nuclear energy.⁶ The statement also said that the UK government will "take a special share in all future nuclear new build projects. This will ensure that significant stakes cannot be sold without the Government's knowledge or consent" and that the "Office for Nuclear Regulation will be directed to require notice from developers or operators of nuclear sites of any change of ownership or part-ownership. This will allow the Government to advise or direct the ONR to take action to protect national security as a result of a change in ownership."

49. The United Kingdom government stated that the preparation of this legislation was still in very early stages and will take inspiration from other countries' experiences and approaches. Its implementation would modernise the United Kingdom's legislation in the area and ensure proportionality.

50. The United Kingdom also announced that it would keep the Roundtable informed of developments of this legislation.

5. An international framework for investment facilitation

51. A background paper provided a basis for a discussion on investment facilitation. It suggested that investment facilitation should be understood as a combination of tools, policies and processes that foster a transparent, predictable and efficient regulatory and administrative framework for investment and that maximise the benefits to the host economy. It noted that the OECD's Policy Framework for Investment (PFI) was a major tool addressing investment facilitation, both in general and in many country reviews. The paper encouraged discussion on the development of an international framework to facilitate investment in support of sustainable and inclusive growth, and compared perspectives of international organisations. It suggested consideration of (i) the building blocks of an international framework for investment facilitation, including the PFI; (ii) how such a framework could be used in the context of current G20 and other related work; and (iii) the role the OECD could or should play in supporting and implementing such a framework.

52. Roundtable participants welcomed an initial discussion on this topic of growing importance in the global economic agenda, including at the G20. It was noted that a global investment facilitation framework could take different forms such as a multilateral agreement or an advisory framework. Some Roundtable participants were supportive of further OECD exploration of an international framework for investment facilitation. It was noted that work should not duplicate discussions in other fora. It was decided that the issue would be further discussed at a future Roundtable.

⁶ For the full statement see "[Government confirms Hinkley Point C project following new agreement in principle with EDF](#)", United Kingdom Government press release, 15 September 2016.