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FREEDOM OF INVESTMENT ROUNDTABLE

**Summary of Discussions at FOI Roundtable 26
8 March 2017**

Note by the Secretariat

This note is a Secretariat summary of discussions at Freedom of Investment (FOI) Roundtable 26, held on 8 March 2017.

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 26

8 March 2017, 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 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.

2. The present document summarises views and information contributed by participants at Roundtable 26, held on 8 March 2017. Participants included representatives of governments of the 35 OECD members as well as the European Union, of other governments that have adhered to the OECD Declaration on International Investment and Multinational Enterprises (Argentina, Brazil, Colombia, Costa Rica, Egypt, Lithuania, Morocco, and Tunisia) as well as government representatives from P.R. China, the Russian Federation, South Africa and Thailand. The International Centre for Settlement of Investment Disputes (ICSID) and UNCITRAL also participated in the Roundtable.

3. The discussions at Roundtable 26 addressed several topics including:¹

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1. Follow-up discussion on the FOI Roundtable Conference on “Evaluating and enhancing outcomes of investment treaties”

4. Roundtable participants expressed appreciation for the third Annual Conference on Investment treaties on “Evaluating and enhancing outcomes of investment treaties”, which took place on 7 March 2017 just prior to the Roundtable. Participants welcomed the themes and approach as relevant for treaty making. They appreciated the format with a greater role for experts that also allowed for more interaction

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.

among the participants from 48 economies, academia, business representatives, civil society and the legal profession.

2. Societal benefits and costs of investor protection in international investment agreements

5. Roundtable participants noted information provided by the Secretariat on a consultation of academia, institutional stakeholders and other experts on the literature review on “societal benefits and costs of investor protection in international investment agreements”, conducted in the fourth trimester of 2016 to advance the Roundtable’s reflection on this topic. Participants expressed their continued interest in this line of work.

3. References to “fair” and “equitable” treatment in international investment agreements: A large sample survey of treaty provisions

6. Roundtable participants discussed a large sample survey of references to “fair” and “equitable” treatment in international investment agreements that the Secretariat had prepared as part of its ongoing work on fair and equitable treatment provisions in international investment agreements. Based on an assessment of references to “fair” and “equitable” treatment in over 2200 bilateral and plurilateral IIAs concluded by Roundtable participants, the study finds that:

- while over 75% of IIAs in the sample do not explicitly clarify the concepts and contours of “fair” and “equitable” treatment, the use of such unspecified clauses has declined sharply in 2010, and no treaty in the sample concluded after 2014 features this design;
- in the past 15 years, there is a strong trend towards limiting “fair” and “equitable” treatment to the minimum standard of treatment under customary international law, an approach that has begun to dominate since 2011. Recent treaties concluded by the European Union employ an alternative approach to clarify the scope of what is due under the “fair” and “equitable” treatment obligation.
- in the remaining treaties, there is significant variance in the language used to define the conceptual contours and designs of “fair” and “equitable” treatment, with various countries having introduced slightly different wording; placed references also or exclusively in preambles; or included multiple references to fair and equitable treatment in a single treaty. These practices can be observed by and large between the 1980s and early 2000s.

7. Roundtable participants noted that a revised version, which takes into consideration comments and suggestions from the Roundtable, would be presented at the forthcoming Roundtable 27 in October 2017.

4. Presentation on investment treaty policy by invited expert Professor Anthea Roberts

8. Professor Roberts opened her presentation by stating that investment treaties have been subject to substantial reforms. Broadly, two different recalibrations are underway. First, there is an ongoing recalibration between investor protection and state sovereignty. Early treaties were very focused on investor protection whereas more recent treaties have focused more on policy space. Revisions to treaty language have provided more power to protect state interests in areas such as public welfare measures or essential security. This recalibration is also reflected in a shift in understanding of the goal of investment

treaties from investor protection to sustainable development with economic goals balanced alongside non-economic goals.

9. A second ongoing recalibration involves interpretive power and there is a shift towards a greater role for the treaty Parties and a lesser role for tribunals. Older investment treaties are often short and vague, and delegate enormous interpretive power to arbitrators. She suggested that discussions during the OECD Treaty Conference the previous day demonstrated that treaty Parties have often not been pleased with arbitral interpretations and have wanted to take back some interpretive power. Governments are increasing their involvement by more precisely defining their obligations, or using tools such as joint interpretive agreements or non-disputing party submissions.

10. In Prof. Roberts' view, these developments, while important, are not enough to give long-term sustainability to the investment treaty system. There is continued pushback from governments concerned about defending claims, applicable procedures, inconsistency and damages. More broadly, in the debate over globalisation, there is pushback against treaties seen as giving value to elites. She suggested that more structural reforms will be required if we want the treaty system to survive in the long-term. Prof. Roberts noted that she was seeking here to describe the reality of the situation rather than set out a normative judgment about the right or wrong balance.

11. Prof. Roberts highlighted four areas for consideration by governments. She first advocated a change to the appointment of adjudicators. In her professional experience -- in private practice, in academia and as an occasional arbitrator -- she has observed divergent views about investment treaties between the dispute settlement community and government representatives including treaty negotiators. Treaty negotiators have different expectations and understandings from those expressed by the arbitration bar at practitioner conferences -- people think in different ways about treaty issues. It is accordingly not enough for treaty negotiators to draft in more detail; rather, it is necessary to find a better way to align adjudicators with the intentions of the treaty negotiators.

12. One reason for the divergence between treaty negotiators and adjudicators is that the treaty parties are not choosing the adjudicators. Instead, disputing parties choose in the first instance. In practice, this usually means that one adjudicator is chosen by an investor with a second one often chosen by an appointing authority. She noted that there have been a number of reform proposals such as the investment court system (ICS) or limiting adjudicators to people selected from a roster of government-selected potential adjudicators.

13. Prof. Roberts sees two consequences from such increased government role. It would first potentially change who is selected. Today, the default person is still often from a commercial arbitration background and less from a public international law or public law background. Few investment treaty negotiators have been appointed in ISDS, in contrast to WTO practice. An increased role for governments in selecting adjudicators can be expected to lead to greater representation of public international law and public law profiles. At the same time, if governments are to choose adjudicators or employ a closed roster, governments need to balance their interests including their interests as capital exporters and importers. At present, government appointments are made as a respondent in an individual case which can lead to focusing on defensive interests. Government appointments in advance, if well considered, could lead to more neutral decision makers and help make the system more sustainable. Increased government participation in appointment could also help adjudicators understand that their role is to give effect to the joint intentions and wishes of the treaty parties, not just those of the disputing parties.

14. Second, Prof. Roberts advocated greater attention to the potential role of state-to-state dispute settlement (SSDS) in some circumstances and to the rights of states under investment treaties. She noted that people tend to think about the history of investment dispute settlement as involving two stages, a first

stage involving SSDS through diplomatic protection with various problems, followed by a second stage with investor-state arbitration and depoliticised disputes. She challenged this view as inaccurate, noting that SSDS has not been removed from investment treaties; almost all treaties today provide for SSDS as well as ISDS.

15. Prof. Roberts clarified that she was not suggesting SSDS for every case, but rather that governments be given an opportunity to step in in certain cases. Such intervention could be useful, for example, where there are many claims against a single state or where SSDS could allow an important interpretive point at issue in many cases to be resolved in an authoritative interpretation that would provide consistency. She noted that governments used this mixed approach in the Iran-US Claims tribunal. That tribunal heard many individual claims, but broader or repeat claims were put to the tribunal as a whole in a state-sponsored way. This allowed a reasonable outcome and one that was consistent across the system. The goal should be to work out a role for both ISDS and SSDS in order better to achieve some of the different purposes that governments are trying to achieve including reasonable and consistent decisions.

16. Prof. Roberts' third suggestion was for governments to address the asymmetry of investment treaties, which is frequently criticised. Currently, treaties create obligations only for states but not for investors. This can be changed if governments want to do so because treaties can impose obligations on private parties. Focusing in particular on possible government counterclaims, she noted that treaties can allow for counterclaims based on contract (as in the TPP), violations of host state law (as in the Iran-Slovakia treaty), or international law obligations relating to anti-corruption, the environment or human rights (as in some SADC model treaties or the draft Indian model treaty). These approaches will not appeal to all governments, particularly capital exporters that may be concerned about their misuse against their investors, but they can address some of the concerns about the asymmetry of investor-state arbitration.

17. A fourth suggestion was to consider reform of remedies for breach of investment treaties. Today, it is just assumed that compensation is the remedy in investor-state arbitration. It is of course very different at the WTO or in domestic public law where the usual remedy for a breach of law by a government is a change of public law going forward rather than financial compensation to a claimant for injury incurred from the date of breach and for future lost profits. Some would say that requiring public law changes as a remedy would infringe state sovereignty and, for that reason, Professor Roberts recommended that such changes should not be mandated. However, she suggested that treaty parties consider giving respondent states that are found liable for a treaty violation the option either to change the law or to pay compensation at the remedy stage. She also advocated consideration of limiting compensation to reliance (out-of-pocket) damages rather than expectation damages based on lost profits. This could allow protection against unreasonable risk for investors, without necessarily having to provide compensation for the full scope of lost profits.

18. The Roundtable expressed appreciation for Prof. Roberts' interesting and thought-provoking presentation. A participant suggested that from his perspective the ongoing re-drafting is not in fact a re-calibration compared to earlier treaties as had been suggested, but rather reflects a return to the original intent. Treaty negotiators did not realise that treaties could be interpreted to apply in some ways that have emerged in the cases.

19. A participant underlined that the key adjudicator selection in arbitration is the chair. He noted that his government tended to choose public international law experts as its co-arbitrator while investors typically choose commercial arbitrators as their co-arbitrator. The key is the chair because that will be the person who will decide. So in discussions about selection of adjudicators in arbitration we should focus on the selection of the chair. He stated that in that context it is of overriding importance to have a very neutral institution select the chair, otherwise the case will in effect be pre-decided as has happened in many cases.

20. On SSDS, he agreed about a useful role for SSDS on for example repetitive issues, but queried how SSDS for multiple claims on the same issue would work since investors always remain free to go to ISDS. On counterclaims, he questioned whether governments would want to bring such claims in ISDS as opposed to the domestic courts. Another participant from the same jurisdiction stated that his country's treaty partners have expressed reluctance to impose obligations on companies based on the idea that treaties are negotiated between states. He noted his government did not necessarily agree with this, but it had been an obstacle in practice to providing for compliance with host state law. He suggested that instead of imposing obligations on investors, governments could preclude access to treaty remedies if there is non-compliance with domestic law.

21. Addressing the issue of remedies, a participant noted that his government treaty policy focuses on prevention of disputes but also provides for SSDS. However, his government did not want a narrow focus on monetary compensation. In incorporating SSDS, it wanted more than just an updated diplomatic protection system and accordingly, it studied the WTO system. The WTO remedial system focuses on the measure at issue and the need to bring it into conformity with the WTO agreements. SSDS should not be seen as a lesser remedy than ISDS because SSDS can solve a systemic issue, not just the issue of one investor. Instead of encouraging a lengthy litigation process, SSDS may also foster a more predictable relationship in the long run.

22. A participant sounded some cautionary notes on the selection of adjudicators and stated that there are complexities associated with governments pre-selecting adjudicators. He stated that under the traditional system with the government as respondent, it plays an equal role choosing its own co-arbitrator and negotiating with the claimant over a possible agreed choice of chair. For government selection systems, a first question involves whether investors and business will have concerns that their interests might not be adequately reflected. A second issue is the impact on the ability of the parties and in particular the government to select the best arbitrators for the case at hand in light of its specificities. His government carefully examines the nature of the government measure at issue and chooses its co-arbitrator accordingly; some cases turn on international law issues, others may be dominated by issues of environmental law. It did not want its hands tied with adjudicators selected in advance. He questioned whether it could erode confidence in the treaty system if governments lost this power to choose adjudicators in individual cases. He also questioned the relevance to investment treaties of the use of SSDS at the Iran-US tribunal. Investment treaties apply across the whole economy whereas the Iran-US treaty covered a narrow range of issues. It is unclear if there are many common issues where SSDS is relevant if you consider investment across whole economy.

23. A participant noted his jurisdiction has proposed government nomination of ISDS adjudicators. It also supports adjudicator familiarity with public international law as a way to better reflect treaty party intent in adjudication. He noted that the investment arbitration community have expressed concern about whether governments will appoint balanced adjudicators. The nature of the community and the established nature of investor-state arbitration may explain some of this scepticism. As a major capital exporter and importer, his jurisdiction will take its full range of offensive and defensive interests into account, as it does in other nomination processes, such as at the WTO. It similarly balances offensive and defensive interests in preparing submissions in WTO cases so the practice is well-established. It is important to get away from the logic that the power of appointment gives rise to bias in favour of the appointing party. He noted the example of the European Court of Human Rights (ECHR), which addresses only claims against governments, but is recognised as a successful government-appointed and unbiased court.

24. He stated that it remained unclear why there have been so few SSDS cases under investment treaties and it has been a subject of significant interest. His jurisdiction's treaties seek to make SSDS more clearly available, for example on measures of general application that may affect many investors. Some have suggested that this could amount to diplomatic protection if there are ongoing ISDS cases. They have

tried to clarify that it is not diplomatic protection to make it possible to have state-to-state consultations or SSDS on measures of general application that could help resolve issue on another level and could resolve the issue for all investors. It can lead to a modification of the law, an outcome similar to domestic public law and classical international law in which non-pecuniary remedies are favoured. A regulatory change could then be taken note of in the context of ISDS cases. On the related issues of remedies, he noted that his jurisdiction had given serious consideration to favouring non-pecuniary remedies which can be valuable in lessening investor exit from the market and government damages liabilities. However, the political sensitivities of the perceived impact of investment treaties on the right to regulate in current debates make it difficult to provide for non-pecuniary remedies akin to those at the WTO in the investment context. Governments can of course change a regulation and that action would be taken into account in subsequent evaluation of damages.

25. A participant noted that the discussion about adjudicators reminded her of ICSID's recent call for comments about possible changes to the ICSID rules. Her government has proposed attention to the issue of whether rule changes could bring balance to the roster of arbitrators in particular with regard to problems of competence in different languages, knowledge of different legal systems and similar issues.

26. With regard to investor obligations under investment treaties, a participant stated that his understanding is that investment treaties serve to protect investors from measures contrary to the rule of law such as expropriation without compensation or arbitrary government action. In his view, these are very basic principles of recognised rights under international law. He had difficulty accepting proposals that investors should be denied access to dispute settlement if they are accused of violating national laws. He agreed that investors must comply with national law, but they must be able to test such laws before an international tribunal (whether an investment court or an arbitral tribunal) especially if they post-date the investment. The tribunal can decide whether the host state has legitimately required the investor to comply with the laws or if the laws are discriminatory or arbitrary. In his view, the issue of compliance with national law should be resolved as part of the overall merits rather than an issue of jurisdiction.

27. Prof. Roberts thanked participants for their interesting comments on a wide range of issues and noted that there was insufficient time to address all the points. She agreed with the point that the current appointment system gives rise to one arbitrator for each side and one in the middle, and suggested it would be preferable to have three neutrals. States can choose all the adjudicators, but they need to choose carefully. She stated that major states will have dual interests, but expressed concern that other governments may have less interest in choosing balanced adjudicators. She agreed that the ECHR demonstrated that government appointments can work well. She pointed out that if the ECHR was half appointed by NGOs and human right claimants, it would be like ISDS, but with a different balance.

28. Prof. Roberts acknowledged that counterclaims can make some constituents nervous. But she underlined it is a question of policy, not law – governments unquestionably have the ability to impose obligations on private entities in treaties. Given this unquestioned power, the question is whether it is wise to do so. On the issue of possible government preferences for domestic proceedings to address investor misconduct, she noted that a government power to bring counterclaims in a treaty allows the government to choose between the domestic court route or the international level, but it only has this option if the treaty permits counterclaims.

29. On the issue of whether it is better to address investor misconduct through counterclaims or denial of access to ISDS, she noted an increasing move to deny jurisdiction (access). However, she sounded two cautionary notes. First, tribunals often jealously guard their scope of jurisdiction. If a finding of misconduct results in a denial of jurisdiction, this may result in a high standard to establish investor misconduct. Second, a denial of jurisdiction may often be too extreme given the facts. A reduction of investor damages but not to zero may be the right result in some cases depending on the facts.

30. On the comments on SSDS, she agreed that SSDS can be useful to address systemic issues such as key issues of interpretation or to address issues involving smaller investors. But where it co-exists with ISDS in a treaty, the treaty should address the relationship between ISDS and SSDS. For example, it can give governments the power to consult and to decide to go to SSDS or to stay with ISDS. The public welfare notice in the recent Australia-China treaty reflects this type of thinking: if a respondent thinks a measure is a public welfare measure, it can call for inter-governmental consultations. The governments can agree to resolve the issue outside of ISDS. The financial services provisions in US treaties and in the Canada-China treaty include similar mechanisms where the treaty parties have the power to agree to ISDS or SSDS. But treaties generally say too little about the relationship between ISDS and SSDS. Treaty drafting has improved on substance, but attention is needed on procedure.

31. The Chair thanked Prof. Roberts for a very interesting presentation and discussion, noting that the issues raised have been and are on the Roundtable's agenda for discussions of investment treaty policy. Her thoughts provided valuable input for the Roundtable's further deliberations.

5. Investment treaties and adjudicator compensation systems

32. The Roundtable continued its consideration of arbitrators, adjudicators and appointing authorities on the basis of a background paper addressing adjudicator compensation systems. The paper noted that it is widely recognised that the compensation system in investor-state arbitration has helped it achieve independence from host governments. But it also noted that public criticism is accumulating on other issues and includes concerns about direct pecuniary interests in case outcomes, incentives to engage in lengthy and costly procedures, or an over-riding interest in future appointments due to the ad hoc nature of arbitral appointments. There have also been critiques of the possible multiple roles of the same person as arbitrator, legal counsel or expert, including concurrently in different investor-state cases. While many critiques allege pro-investor biases, it was noted that incentives may at times be perceived by some to cut the other way. If there is significant public concern about the impact on the system on right to regulate or the scope of government liability in certain jurisdictions, possible economic interests in preserving a lucrative investor-state arbitration system could for example be seen as encouraging narrow interpretation of often-flexible treaty provisions in particular cases to the detriment of certain investor claimants.

33. The paper noted that new proposals in ISDS are also grappling with issues of adjudicator compensation. The bilateral investment court system (ICS) included in CETA as signed in October 2016 between the Canada, the European Union and EU Member States provides for government appointment of adjudicators, but only partly specifies the compensation arrangements, leaving key aspects for future decision or adjustment. It is facing evaluation and criticism of some initial approaches.

34. While adjudicator compensation has become part of the public debate over ISDS, it has been subject to limited analysis. Investment treaties currently in force rarely if ever address the issue. Existing guidelines on conflicts of interest in arbitration prepared by the arbitration bar take *ad hoc* nomination and payment by the hour as a given. There is a growing focus on issues for individual arbitrators, but even in some recent papers addressing the ICS there is little or no attention to compensation systems.

35. In light of this context, the background paper began to examine compensation systems for adjudicators and dispute settlement administrators in ISDS. It used in part a comparative perspective based on approaches in domestic courts in advanced economies, an approach rarely used for investor-state arbitration. The paper expressed no view about the value of any particular benchmark. It recognised that governments may of course have different views about proper benchmarks for investor-state arbitration, if any, depending on their treaty policy goals and context. However, the paper suggested that domestic courts are likely to be an important point of reference for the public in evaluating investor-state arbitration both

because they are known and because investor-state arbitration is often advanced as a solution to perceived weaknesses in domestic courts. It noted that the CETA Parties have recently expressly referred to domestic courts as a model for ISDS in a joint interpretation of the treaty.²

36. Compensation for adjudicators and court officials is generally considered in good institutional design for courts as a core issue for judicial independence and for attracting good judges. In addition to issue of legitimacy and public confidence, compensation systems can also be a consideration for institutional design and desired outcomes of a dispute settlement system. There are of course many other factors that may affect adjudicator attitudes.

37. The paper first provided historical context. Litigant fees payable to judges were widely used to compensate judges in colonial America, France and England in the 18th century. Remuneration of judges by private litigant fees was essentially abolished in all three between 1776 and 1825. Private payments to judges in individual cases were replaced by government salaries. Leading thinkers such as Voltaire, Alexander Hamilton and Jeremy Bentham advocated for the changes and the reforms are seen as fundamental features of the courts.

38. The second section of the paper considered the historical and contemporary debate over the impact of compensation systems for adjudicators. Leading thinkers have considered that compensation structures and the degree of plaintiff choice of courts have affected adjudication or can be expected to affect adjudication on issues such as jurisdiction. The paper reported on a range of views about the impact of compensation systems on the behaviour of adjudicators and court officials, but it took no position on the actual impact, if any, of economic interests in general or in particular cases. At the same time, it noted the widely-recognised importance of appearances in this context, as illustrated by Lord Hewart's well-known statement that "justice must not only be done, it must also be seen to be done".³

39. The third section explored contemporary approaches to the compensation of judges in advanced economies. Common institutional arrangements for judges in senior courts include stable government salaries; remuneration solely from the government rather than from litigants; disclosure of salaries to the public; limits on remuneration from other sources and outside activities; and appointment for life or for significant fixed terms with a possibility of re-appointment. Beyond providing for stable salaries and other institutional arrangements, governments apply additional rules to exclude the influence and perceived influence of pecuniary interests from adjudication. Some jurisdictions, including the UK and the US, establish especially strict rules for pecuniary interests. For example, in the UK, if a pecuniary interest exists, a judge is subject to an "automatic disqualification" rule.

40. A fourth section explores the co-existence in advanced economies of national courts with salaried judges since the early 19th century with generally strong support for commercial arbitration based on *ad hoc* fee-based remuneration. It suggested that aspects facilitating co-existence may have included (i) limited exposure to commercial arbitration of public entities and governments in advanced economies; (ii) findings that a party agreeing to commercial arbitration has waived its claim to object to certain pecuniary interests in adjudicators; and (iii) the bilateral nature of agreement to commercial arbitration in which both parties agree to waive their access to the courts, but both parties also agree to subject themselves to claims in arbitration.

41. A final section compares commercial arbitration and investment arbitration with regard to compensation arrangements and their potential impact, and public perceptions. Relatively little information

² [Joint Interpretative Instrument on the Comprehensive Economic and Trade Agreement \(CETA\) between Canada and the European Union and its Member States \(2016\)](#), § 6(f).

³ *R. v. Sussex Justices, Ex parte McCarthy* ([1924] 1 KB 256).

is made publicly available about compensation under either arbitration system, with the notable exception of the ICSID USD 3000 cap on daily arbitrator fees. Compensation structures are similar (*ad hoc* nomination and per hour fees). However, important differences between commercial arbitration and investment arbitration may affect the incentives created, their impact and the degree of public interest in the issues.

42. Two key differences are that (i) only investor claimants bring investment treaty cases whereas either party to a contract can claim in commercial arbitration; and (ii) investor claimants can frequently choose the forum or appointing authority after a dispute has arisen (under treaties giving investors a choice or through treaty shopping) whereas a single forum for commercial arbitration is generally chosen, prior to any dispute, by both parties to a contract. At the time contract parties are deciding on a single appointing authority and arbitration forum, neither contract party knows if it will be the claimant or the party possibly seeking a broad approach to jurisdiction. In contrast, investment arbitration market participants and parties are aware, including at the time the investor can often select an appointing authority, that the investor will always be the party seeking broad approaches to jurisdiction and other issues.

43. Other differences include more frequent issues of public interest and taxpayer liability for any damages in investment arbitration; greater future consequences for investment arbitration decisions given recurrent litigation over a limited range of similar treaty clauses and more frequent publication and citations of previous awards; more frequent contentious and political issues about the balance between investor protection and the right to regulate in contrast to greater consensus about basic principles of contract law; and greater consequences for decisions over jurisdiction in investment arbitration, which determine the scope of international review of government action and government damages liability. The paper suggested that the differences may generate greater public interest in compensation arrangements for adjudicators in ISDS than in commercial arbitration. They may also produce higher public expectations about the need for institutional independence and impartiality of adjudicators and dispute settlement institutions.

44. An annex to the paper began to gather some preliminary facts about adjudicator and dispute administrator compensation in investor-state arbitration and the ICS. It was noted that there is limited public information. It was suggested that the increased transparency of some aspects of ISDS may draw public attention to remaining significant gaps in information, including about adjudicator compensation, especially in light of strong disclosure standards for compensation of the domestic judiciary. The preliminary inquiry addressed only the narrow issue of the direct impact on arbitrator compensation of certain decisions in individual cases. It was noted that increased fees arise from decisions rejecting government attempts to end claims early and can also result from decisions postponing jurisdictional or other potential claim-terminating objections until the merits. Based on the limited available information gathered in earlier research, average arbitral fees and expenses per case can be roughly estimated at about USD 427,000 per arbitrator per case (16% of USD 8 million average case costs, or USD 1.28 million, for three arbitrators).⁴ If it is roughly estimated that the merits account for half the fees and expenses in a case, preliminary decisions on jurisdiction would on average determine whether each arbitrator has the opportunity to earn USD 213,500 in fees (less expenses) for additional work on the merits.

45. Estimated average administrative fees per case amount to USD 160,000 based on the average case costs and costs for arbitration institution fees (2% of total costs). Arbitration institutions have expanded substantially along with investor-state arbitration with staff growth since 2004 of 350% at ICSID and 500% at the Permanent Court of Arbitration (PCA). Other arbitration institutions including apparently new entrants were also noted in the investment arbitration field.

⁴ Gaukrodger, D. and K. Gordon (2012), "[Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community](#)", OECD Working Papers on International Investment, 2012/03, p.19.

46. On the ICS, it was noted that the CETA sets out a number of provisions relating to adjudicator compensation but leaves a range of issues for future determination by a joint inter-governmental committee. The basic initial structure for the first instance Tribunal involves a mix of salary paid by the treaty Parties and per day fees payable by litigants. The joint committee will set the initial monthly salary (retainer) paid for by the Parties. Litigant fees are substantial, equivalent to the ICSID level (USD 3000/day); adjudicator decisions can accordingly affect the amount of future fees in a case. The compensation system for Tribunal Members can be transformed into a regular salary rather than the retainer and case fees model by the joint committee (which will also decide on the compensation regime for the Appellate Tribunal). The EU and Canada have proposed a plurilateral court structure applicable to a greater number of investment treaties and a consequently greater expected case flow.

47. The Chair opened the discussion by noting that the issue of adjudicator compensation has emerged frequently in recent public discussions about ISDS in particular in Europe but also elsewhere, and that it had also previously been raised in Roundtable discussions. Participants generally found the historical analysis of the shift from private litigant fees to judicial salaries in national systems to be very interesting although they expressed different views about its pertinence to ISDS. A participant stated that the analysis of adjudicator compensation helped to better understand some criticism of investor-state arbitration notably with regard to the impact of compensation on procedures and case outcomes. He expressed agreement with the view of the OECD Secretary-General that governments should address perceived economic incentives in investor-state arbitration by reference to the achievements of advanced national courts that have ensured that in adjudication such economic interests are excluded and seen to be excluded.⁵ Further work and consideration in this area were important.

48. Noting current intensive work in his jurisdiction on issues of adjudicator compensation systems in ISDS, another participant stated that the historical evolution can illuminate current debates. Remuneration systems are crucial because they reflect whether the adjudication system is essentially a private system or whether it follows public law principles, as his jurisdiction is seeking to do. He stated that it is very important to address the question of economic incentives of adjudicators – be they real or only perceived – because of the need to restore public trust in ISDS. He agreed with the views expressed in the paper about the importance of perceptions for public confidence.

49. Another participant agreed that it is interesting to see the evolution of national court systems and consider them in the context of ISDS. But the comparisons have limits because ISDS was developed and takes place in a very different context. For example, in national courts, there is a single body of national law and a high volume of cases whereas in ISDS, panels are convened to decide a particular dispute and particular facts. Public policy issues do arise but there are ways to address them in the ISDS system. He disagreed with any suggestion that investment arbitrators have an actual incentive to grant broad jurisdiction and stated that he did not consider that ISDS has been characterised by broad arbitral interpretations of jurisdiction. He also noted the existence of other incentives and disincentives such as, for example, arbitrators' interest in their reputation and in whether their decisions will be regarded as well reasoned in future. In his view, there are other ways to deal with concerns in ISDS including codes of conduct, rules on disclosure and arbitrator selection criteria.

50. Another participant agreed that the historical background is very interesting and stated that the issue of who pays adjudicators is an important factor in considering whether a system is neutral or not. However, she found it unclear whether and to what extent the historical analysis is relevant to ISDS. Was it being suggested that arbitrators in ISDS are corrupt or that the issue is akin to venality? At a minimum, there are no common views or judgments on this. She expressed interest in considering the issues further

⁵ Angel Gurría, [The Growing Pains of Investment Treaties](#), OECD Insights (13 Oct. 2014).

and pointed to the recognition in the paper that many other things beyond compensation issues may affect adjudicator attitudes; those additional potential factors should be considered.

51. Finding the research thought-provoking, another participant offered an initial observation. He stated that ISDS resembles domestic administrative litigation systems in many countries in which private parties can sue the government. He suggested consideration of compensation systems in domestic administrative courts, noting that centralised rather than local compensation systems for judges can help ensure that local governments do not interfere with such courts. He stated that this broader research could be helpful given the similar issues. Another area suggested for possible future comparative attention was mixed tribunals composed of professional and lay or expert adjudicators.

52. The Chair noted several references to the importance of public attitudes as a separate issue from the question of actual impact of remuneration systems. This was an important point, but in his view the question of actual impact also merits attention. On the one hand, remuneration is definitely not the only influence on adjudication decisions and probably not the most important one. But on other hand, it would be a strong statement to suggest that there is no evidence that remuneration systems have an influence on adjudicators' decision making. He noted that the OECD considers itself as an advocate of market-based economic systems that are based on the idea that people react to economic incentives. Corruption is not the right word to describe each time people react to economic incentives – such reactions are just a fact.

53. In consequence, he would assume that it is a fair starting point for analysis that remuneration systems may have an impact on the functioning and outcomes of adjudication systems. It may not be a major impact, but it may have an impact. If this is true, it is also legitimate to consider what the impact is, what kind of effects one wants to exclude and what kind one wants to encourage. Beyond the need to address public attitudes, these aspects also make the inquiry into remuneration systems a legitimate and important one for the Roundtable. He noted that examining compensation systems does not preclude also looking into other issues that may be more important in adjudicator decision making. The Roundtable decided to consider at a forthcoming meeting a further draft of the paper.

6. Recent investment treaty developments

54. Argentina informed Roundtable participants about the signature of a bilateral investment treaty with Qatar, the first to be concluded by Argentina in 15 years. Not yet in force, the treaty reflects a new policy approach to investment treaties, taking into consideration Argentina's experience in Investor-State arbitration proceedings. The treaty seeks to strike an appropriate balance between the rights and obligations of states, and the rights and obligations of investors. It incorporates the dimension of economic and sustainable development in its preamble. Argentina described some of the treaty's main features, noting that it defines the term 'investment' by the commitment of resources in the territory of the host country and in accordance with its laws and regulations; limits fair and equitable treatment standard to the customary international law minimum standard of treatment; limits the application of MFN to future treaties; incorporates a right to regulate provision that recognizes the government's power to regulate on a non-discriminatory basis; and provides that non-precluded and security measures are self-judging. With regards to dispute settlement, the treaty includes investor-State arbitration with an investor choice between ICSID and the PCA as the two appointing authorities for arbitrators; and introduces the standard of "justified facts" for challenges to the impartiality and independence of arbitrators, which Argentina expects will provide for greater predictability and precision following its frequent experience as a respondent state.

55. Australia informed the Roundtable that (i) India terminated the India-Australia bilateral investment treaty as of 23 March 2017; and (ii) signature of an updated Singapore-Australia Free Trade Agreement reflecting both countries' recent treaty practice.

56. Brazil informed the Roundtable Participants of the successful conclusion of negotiations with India over a bilateral investment treaty. The negotiations involved inclusion of elements from both countries' new investment policies. Cabinet approvals were necessary prior to publication of the treaty.

57. Japan informed Roundtable Participants that it ratified TPP in January 2017. Japan noted that it was the first country to ratify the TPP agreement and that, in its view, the TPP investment chapter strikes an appropriate balance between the protection of investors and the protection of States' legitimate right to regulate.

58. Poland has set up a working group to review Poland's investment treaties in light of EU law and the economic interests of Poland and its investors. The group will also prepare a new model treaty and a list of potential treaty partners, and examine investment treaty claims against Poland.

59. On 28 October 2016, the Council of the European Union (the meeting of EU Member State ministers) agreed to the conclusion of CETA and specified its intention to apply the agreement on a provisional basis. The European Parliament approved the CETA on 15 February 2017. The European Union explained the scope of the proposed provisional application. It would exclude investment protection provisions and the Investment Court System. National treatment and most-favoured-nation treatment as regards market access for foreign direct investment, which is subject to state-to-state dispute settlement, was not excluded from the intended provisional application of the agreement.

7. Presentation by UNCITRAL on its recent work on transparency in investment arbitration

60. The UNCTRAL Secretariat presented UNCITRAL's recent work on transparency standards in treaty-based investor-State arbitration. Over four years of negotiations, UNCITRAL produced the *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration*, which entered into force on 1 April 2014, and the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* ("Mauritius Convention"). The Mauritius Convention was developed to address transparency concerns for existing treaties. It offers a flexible mechanism for States – they can choose to opt-in and make the *Transparency Rules* applicable to treaties concluded before 1 April 2014.

61. UNCITRAL indicated that as of March 2017, two countries (Canada and Mauritius) had ratified the Mauritius Convention and that another ratification was expected shortly. The Convention will enter into force six months after the third ratification is deposited.⁶

62. A participant stated that governments as well as private investors can be interested in maintaining certain aspects of arbitration proceedings confidential. It suggested that certain public interests, such as international relations, are better preserved when they remain confidential. It was also suggested that a recent case demonstrated that a degree of transparency could be achieved by disputing party consent without actually applying the UNCITRAL rules or treaty. The Roundtable expressed appreciation for the update from UNCITRAL and interest in continuing to follow developments.

8. Presentation by ICSID on possible amendments to ICSID rules and regulations

63. The ICSID Secretariat presented ICSID's recent work to modernise ICSID's rules and regulations. The rules were last amended over a decade ago. Following public and ICSID Member State

⁶ Switzerland subsequently also ratified the Mauritius Convention which is consequently expected to enter into force on 18 October 2017.

consultations, ICSID has identified a series of issues and areas where reform and amendments could be envisaged.⁷ ICSID stated that it will be preparing working papers on these issues and expects to circulate some papers to Member States by the end of 2017 for comments. It will endeavour to subsequently organise regional meetings to discuss in detail the topics and the proposed approach. The Roundtable expressed appreciation for the update from ICSID and interest in continuing to follow these developments.

9. Recent investment policy developments

64. Roundtable participants discussed recent investment policy developments that had taken place since the last Roundtable in October 2016. The discussion was based on an [inventory of measures taken between 16 September 2016 and 15 February 2017](#). Four countries – Australia, Canada, Tunisia, and the United Kingdom – provided information on recent policy changes. Roundtable participants also discussed the issue of non-formalised measures related to foreign investment.

a. *Australia: establishment of a “Critical Infrastructure Centre”*

65. Australia provided information on the recent establishment of a “Critical Infrastructure Centre” within the Attorney-General's Department to manage national security risks to Australia's critical infrastructure. The creation of the Centre was announced in a media release by the Attorney-General and the Treasurer dated 23 January 2017.⁸

66. Australia informed Roundtable participants that the Centre is expected to develop coordinated national security risk assessments and to provide advice to support government decision-making on investment transactions. As of March 2017, the Centre supported the operation of the foreign investment framework by providing input in relation to case-by-case assessments. The Centre is also expected to provide greater certainty and clarity to investors and industry on the types of assets that will attract national security scrutiny.

67. Once the centre has identified key critical infrastructure – initially including electricity, water and ports sectors, but potentially expanded in consultation with states, territories, industry and investors – the centre would assess risks (including those arising out of foreign ownership) and develop mitigation strategies. It will draw on expertise and capability from across government agencies and will engage with

⁷ ICSID has identified 16 topics for attention: 1) review procedures for appointment and disqualification of arbitrators, explore feasibility of code of conduct for arbitrators; 2) clarify rules on preliminary objections and bifurcation; 3) explore possible provisions on consolidation of proceedings and parallel proceedings; 4) modernize institution rules, means of communications and filing of briefs and supporting documentation, and general functions of the secretariat; 5) modernize and simplify rules concerning the first session, procedural consultation and pre-hearing conference; 6) modernize rules on witnesses and experts and other evidence; 7) explore possible provisions for suspension of proceedings and clarify rules on discontinuance when parties fail to act; 8) reflect best practices for preparation of award, separate and dissenting opinions; 9) explore presumption in favor of allocating costs to the prevailing party, possible provisions on security for costs and security for stay of enforcement of awards; 10) review provisions on provisional measures; 11) clarify and streamline procedure in annulment proceedings; 12) review and modernize provisions on costs, fees and payment of advances, and discontinuance for failure to pay advances; 13) explore possible provisions on transparency, clarify rules on non-disputing party participation; 14) improve time and cost efficiency and explore feasibility of guide for efficient conduct of process; 15) explore possible provisions on third party funding; and 16) streamline Additional Facility rules for non-ICSID Convention cases.

⁸ “[Keeping Australia's Critical Infrastructure Secure](#)”, Joint Media Release of the Attorney General and the Treasurer, 23 January 2017.

all levels of governments, regulators, and, as appropriate, with owners and operators of the identified infrastructure assets.

b. Australia and Canada: Surcharges for the acquisition or possession by foreigners of residential real estate

68. Australia and Canada informed Roundtable participants about developments related to surcharges for the acquisition or possession by foreigners of residential real estate that states of Australia and a province of Canada have introduced for the acquisition or possession of residential real estate. These increased taxes and surcharges – amounting to 15% in one case – were introduced to respond to strong price increases in real estate which have been partly driven by foreign investors’ interest and market participation. The additional taxes are not driven by additional costs related to the status of the acquirer as a foreigner.

69. Canada informed Roundtable participants that the federal government was engaging with the province in question. Canada also informed Roundtable participants that the federal government was assessing the interaction of provincial level rules with Canada’s international trade and investment obligations.

70. Australia informed participants that the federal government was likewise in contact with the authorities of its states. A working group on housing affordability that had been created among the Australian states offered a forum for these discussions. Australia announced that it would provide more ample information on the issue to the Roundtable in October 2017.

c. Canada: New Guidelines on the National Security Review of Investments

71. Canada informed Roundtable participants on the release of [Guidelines on the National Security Review of Investments](#) under the *Investment Canada Act* and in fulfilling a pledge made in the 2016 Fall Economic Statement. The Canadian Government had issued these Guidelines on 19 December 2016 to provide information to investors about the administration of the Act’s national security review process. The Guidelines set out factors that the Government considers when assessing whether an investment poses a national security risk. The publication is expected to increase transparency and predictability for investors about the review and brings Canada’s practice in line with its peers.

72. Canada reminded Roundtable participants that the government had also announced in the 2016 Fall Economic Statement that the threshold for the “net-benefit” review under the *Investment Canada Act* (which is a separate review process from the national security review) will be raised to CAD 1 billion in 2017, two years sooner than the planned date in 2019.

d. Tunisia

73. Tunisia informed Roundtable participants about the imminent entry into force of Tunisia’s new code for investments on 1 April 2017, along with its implementing decree.⁹ The code was adopted by parliament on 17 September 2016 and its entry into force was initially scheduled for 1 January 2017. It will replace legislation dating back to 1993, which the government of Tunisia considers no longer adapted to the global environment and to Tunisia’s political and economic context.

74. Tunisia stated that the overall purpose of the new legislation was to improve and liberalise the investment climate in Tunisia and to relaunch the country’s economy and strengthen its competitiveness, in

⁹ [Loi No. 2016-71 du 30 septembre 2016, portant loi de l’investissement.](#)

line with its domestic economic priorities oriented towards sustainable and regional development, and job and value creation. The new law simplifies the legal and administrative framework for investments in Tunisia and introduces an incentives-based system in which investors can receive an investment premium depending on their economic return, and their contribution to job creation and to the country's development. It liberalises market access and sets out guarantees and obligations for investors. It sets up a Higher Council for Investment, which will act as a one-stop-shop for investors, and will provide investment premiums and examine investment projects relating to national security. It also creates a Tunisian fund for investment, in order to avoid the proliferation of funding mechanisms for investments.

e. United Kingdom

75. On 23 January 2017, the UK government announced a new industrial policy. The United Kingdom explained that part of this policy will be strengthened national security safeguards including by enhancing scrutiny of future foreign investments in key parts of the United Kingdom's critical national infrastructure. While the details of the policy are still being under development and will be subject to a consultation in due course, the United Kingdom endeavours to design a tightly targeted and proportionate system that provides clarity and certainty to foreign investors. So far, the United Kingdom has only a limited review mechanism in place. A plan to strengthen these mechanisms was first announced on 15 September 2016.¹⁰

f. China

76. China informed Roundtable participants about a significant change of its policies to open up to and to deregulate inbound foreign investment in a further effort to promote inbound investment and to make China more business-friendly for foreign investment. Following a decision by the People's Congress in September, four legislative changes came into effect on 8 October 2016. Henceforth, inbound foreign investment no longer requires prior approval by the Ministry of Commerce (MOFCOM), unless it concerns enterprises in sectors or activities that are classified as "restricted" or "prohibited" for foreign investment. For investment in other sectors, which concerns an estimated 95% of inward investment, only a filing is required, either before or after the registration of the enterprise. China stated that it has rolled out this new system nationwide following successful pilot-tests in several free-trade zones.

g. Brazil

77. Brazil briefly informed Roundtable participants about recent efforts by the Brazilian government to strengthen its investment policies. These concern both revision of the Brazilian model agreement, and institutional reforms, in particular with regards to investment facilitation.

78. Among the recent institutional reforms features the establishment of an "Ombudsman for direct investments". The Ombudsman will help investors establish and maintain and expand their investments. The institution will operate as a one-stop-shop to advise investors and to receive potential complaints. The institution will dispose of a network of focal points, will benefit from specialists and comprise an advisory group that will respond to investors.

¹⁰ On 15 September 2016, the United Kingdom government announced that "[T]here will be reforms to the Government's approach to the ownership and control of critical infrastructure to ensure that the full implications of foreign ownership are scrutinised for the purposes of national security. This will include a review of the public interest regime in the Enterprise Act 2002 and the introduction of a cross-cutting national security requirement for continuing Government approval of the ownership and control of critical infrastructure." [Government confirms Hinkley Point C project following new agreement in principle with EDF](#), United Kingdom Government press release, 15 September 2016.

79. Brazil announced a more ample presentation on this and other institutional enhancements for the next meeting on October 2017.

h. Non-formalised measures

80. Roundtable participants also briefly considered a perceived tendency that non-formalised measures related to international investment have spread across a wider range of countries, including notably advanced economies, or at least that such measures have become more visible. These observations include:

- Some governments have engaged in one-on-one discussions with individual companies, or have made widely publicised statements on the merits or demerits of specific major *outward* investment projects by specific companies without basing these actions on formalised policies;
- A new aspect of some recent non-formal measures is that they are now deliberately visible.

81. Both these phenomena present specific challenges in relation to predictability, fairness, and non-discrimination for the investment policy community and are potentially damaging for international investment. The absence of formulated policy that underpins specific statements – combined with the authority of those making the statements – can leave investors uncertain about the present and future conditions in which they are operating and will operate. The selectiveness of such statements in relation to specific companies and investment projects can lower predictability for other companies that are not the explicit targets of the statements. The rationale and material and temporal scope of such implicit policies may also be unclear.

82. One-on-one government negotiations with individual companies can also raise concerns about non-discrimination because not all companies have access to such negotiations and the resulting conditions; this concern may be exacerbated if agreements are not publicly available or are not applied in a consistent manner as government policy. Roundtable participants recognised that it could be challenging to develop categories and approaches to classify and scrutinise such measures. They agreed however to assess developments and discuss these phenomena in greater detail at a forthcoming occasion. Some participants warned more broadly about the rising strength of nationalism, populism and mercantilism, which were threatening the core values of the investment policy community at the OECD and the benefits of international investment.

10. Foreign investment review mechanisms

83. Following an earlier FOI Roundtable discussion of investment policies related to national security based on a Secretariat survey of country practices¹¹, Roundtable 27 considered screening mechanisms of foreign investment based on broader national interest considerations and in particular the extent to which they may constitute impediments to foreign investment. The discussion was partly related to the issue of how screening should be scored under the OECD *FDI Regulatory Restrictiveness Index* which measures discriminatory measures against foreign investors in over 60 economies.

84. Screening based on national interest was prevalent worldwide in the 1970s. It was subsequently eliminated in many countries as part of more general liberalisation and as the economic and political concerns that screening had been intended to address diminished. Several countries have nevertheless recently introduced, reintroduced or expanded screening, in most cases out of concern for national security,

¹¹ Wehrlé, F. and J. Pohl (2016), [Investment Policies Related to National Security: A Survey of Country Practices](#), *OECD Working Papers on International Investment* No. 2016/02.

but policymakers are also adapting to changes in global investment, notably the increasing investments by state-owned enterprises, sovereign wealth funds and new economic players.

85. The Roundtable discussion focused principally on the extent to which screening might deter foreign investors and whether there are meaningful differences in the implementation of screening practices across countries which might merit more subtle and varied treatment in the *FDI Index*. Some participants contended that their screening regimes are transparent and reject very few potential investors. It was also suggested that other countries might engage in *ex post* reviews or have other less formal ways of restricting individual investments – so that the *FDI Index* treats formal and transparent regimes with undue severity. Other participants suggested that it would be problematic to evaluate implementation and to assess which mechanisms are less restrictive than others. In the limited time available, the discussion did not address other aspects of the merits of screening based on national interest.

86. Participants generally agreed that the threshold at which screening occurs is an important consideration and the way it is treated under the *FDI Index* could merit improvement. More broadly, participants generally acknowledged the utility of the *FDI Index* as a measure of discrimination against foreign investors but suggested that a review of the methodology, including the way screening is treated, would be timely.

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