



Roundtable on Freedom of Investment 18

20 March 2013

Summary of Roundtable discussions by the OECD Secretariat

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FREEDOM OF INVESTMENT PROCESS

Freedom of Investment Roundtable 18, 20 March 2013, OECD, Paris

SUMMARY OF DISCUSSIONS

The “Freedom of Investment” (FOI) Roundtable supports recipient countries’ efforts to maintain and extend open, transparent and non-discriminatory policy frameworks for international investment and capital movements. It also addresses concerns that international investment may raise (e.g. in relation to national security). Monitoring and exchanges at Roundtables contribute to observance of international investment policy commitments, including those taken under the OECD investment instruments and in the context of the G20, and facilitate sharing of experiences in investment policy design and implementation.

The present document summarises the views and information contributed by participants at Roundtable 18, held on 20 March 2013. Participants included representatives of the governments of the 34 OECD members, the ten other governments that have adhered to the OECD Declaration on International Investment and Multinational Enterprises (Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia) as well as government representatives from P.R. China, Costa Rica, Jordan, Russia, Serbia and South Africa. The European Commission participated in the Roundtable as did the Secretariats of the International Centre for the Settlement of Investment Disputes (ICSID) and of the United Nations Conference on Trade and Development (UNCTAD).

The discussions at Roundtable 18 included (i) continued consideration of investor-state dispute settlement (ISDS) and international investment law; (ii) consideration of issues of competitive neutrality raised by international investment by state-owned enterprises; and (iii) a review of recent developments in investment policy.

Part I. Continued Consideration of ISDS and International Investment Law

The Roundtable first engaged in an initial consideration of the consistency issues raised by shareholder claims for reflective loss in ISDS based on a Secretariat background paper, as part of the Roundtable's broader work program on consistency in ISDS. Participants then discussed, based on a second background paper, strategic objectives of investment treaties and in particular investment promotion, and how ISDS fits with principles of good governance developed at the OECD and at other international organisations.

Investment Treaties as Corporate Law: Shareholder Claims and Issues of Consistency

The Roundtable noted that claims by company shareholders seeking damages from governments for so-called "reflective loss" now make up a substantial part of the ISDS caseload. (Shareholders’ reflective loss is incurred as a result of injury to “their” company, typically a loss in value of the shares.)

To provide an initial framework for policy analysis, the Roundtable considered three main aspects: (i) a comparative law approach to shareholder claims comparing advanced systems of national law (and other international law) with ISDS; (ii) identification of the consistency issues raised by shareholder claims for reflective loss; and (iii) the question of recourse by the company, i.e., the ability of the company to obtain a remedy, and its relevance to shareholder claims for reflective loss.

For purposes of the initial preliminary policy analysis and discussion, an expansive regime allowing a broad range of shareholder claims for reflective loss was generally assumed; detailed treaty and case law analysis was deferred. For purposes of the policy discussion only, some general meanings were given to certain terms, with shareholder referring generally to a direct or indirect shareholder, and company referring generally to a company in which the relevant shareholder(s) owns shares, directly or indirectly. No position was taken with regard to the question of whether any such assumptions, interpretations or definitions are applicable with regard to BITs in general or any particular treaty.

Comparative law

Participants noted that shareholders can be harmed in two different ways: (i) direct injury to their rights as shareholders; and (ii) reflective loss due to injury to the company. Direct injury to shareholder rights can arise if, for example, shares are expropriated or there is interference with shareholder voting rights.

Reflective loss, in contrast, is incurred indirectly or by reflection. The company suffers injury and shareholders suffer reflective loss as a result of the injury to the company. Typically, when a company is harmed, the value of shares in the company declines. The company may also reduce its dividends or stop paying them altogether. Practically every injury to a company harms its shareholders.

Many ISDS arbitral tribunals have found that shareholders covered by BITs are entitled to recover for reflective loss in ISDS. Some commentators have described the issue as one of settled law under a typical BIT. This can be seen as a success story from the point of view of consistency of legal interpretation.

In contrast to ISDS, however, advanced national legal systems generally apply what has been called a "no reflective loss" principle to shareholder claims. Under this no reflective loss principle, shareholders generally cannot recover damages for reflective loss; only the company can claim for the loss. Shareholders can generally claim only for direct injury.

The Roundtable recognised that all of the advanced national law systems surveyed to date, including both leading common law and civil law systems, generally bar shareholder claims for reflective loss due notably to concerns about consistency raised by such claims. Some participants from countries with legal systems not surveyed in the background paper confirmed that their national law also generally bars shareholder claims for reflective loss. Additional government input in this area was encouraged, but there was a consensus about the widely-applied prohibition under domestic law. The general no reflective loss principle is also applied in customary international law and under the European Convention on Human Rights.

Preliminary policy analysis

Participants noted that national law barring shareholder claims for reflective loss is often explicitly driven by policy considerations relating to consistency. Courts have recognised that shareholders who suffer reflective loss have suffered a loss, but reject the claim for policy reasons.

Participants preliminarily considered several policy issues relating to consistency that are raised by shareholder claims for reflective loss. First, they considered the impact of shareholder claims on

predictability, the scope for treaty shopping by investors, and the settlement of disputes. It can be difficult to predict the applicable law to investment claims if shareholder claims are permitted because the nationalities of a company's shareholders are often unknown and frequently evolve; in contrast, the nationality of a company is generally known and rarely changes. Structuring ownership to include shareholders of different nationalities can facilitate investor treaty shopping if shareholder claims for reflective loss are permitted.

With regard to settlement, it was noted that national courts and commentators have rejected shareholder claims for reflective loss because they consider that the availability of such claims would make it harder to settle cases. Under the no reflective loss principle, a settlement between the government and the directly-injured company can completely resolve the dispute. In contrast, where shareholders can claim for reflective loss, consent from the company and all potential claimant shareholders is required in order to provide "real peace" for the government. Shareholder consent may be hard, expensive or impossible to obtain. A participant whose government has defended simultaneous shareholder and company suits noted that the existence and risk of multiple suits has complicated its settlement negotiations in practice. Another participant suggested that allowing potential multiple claims by shareholders and the company could have a positive effect by increasing a government's incentive to settle the matter with all relevant parties who could claim.

A second policy issue relating to consistency raised by shareholder claims is a risk of double recovery, highlighted for example by the UK House of Lords decision in *Johnson v Gore Wood & Co.*¹ and similar cases, and by commentators on national law. Efforts to avoid double recovery can also involve high-cost efforts to allocate losses among shareholders, creditors and other sufferers of reflective loss. Some ISDS investment tribunals have dismissed the problem as a non-issue without explanation; others have addressed it in more concrete terms by using creative remedies, such as fixing a price for a government acquisition of the claimant's shares. This goes beyond compensation and can involve high costs for governments.

A third policy issue is the societal interest in "judicial economy", i.e., reducing the number of cases needed to address the harm. A single case can resolve the dispute where only the company can bring a claim. Multiple claims are needed where shareholders (or other sufferers of reflective loss) claim separately. In addition to allowing shareholder claims for reflective loss, ISDS tribunals have found such shareholder claims to be autonomous from claims by the company so that both company claims and one or more shareholder claims can co-exist; this cannot occur under the no reflective loss principle. Multiple claims raise costs and create a risk of inconsistent decisions with regard to the same events. The availability of both shareholder and company claims may also allow a single beneficial owner of shares to have "two bites at the apple", i.e., to bring essentially the same case twice.

A fourth area is the impact of shareholder claims for reflective loss on creditors of the company and on potential ISDS claims by creditors. A core policy reason for the bar on shareholder claims for reflective loss under national law is that they can injure creditors of the company, such as bondholders, or other shareholders. As stated by a US court, such claims can allow shareholders "to bypass the corporate structure and effectively preference themselves at the expense of other persons with a superior financial interest in the corporation".² Company creditors, like shareholders, can suffer reflective loss when the company is injured and creditors may also seek to bring reflective loss claims in ISDS. Creditor claims in ISDS arising out of the same underlying injury, on top of shareholder claims, could exacerbate

¹ [2000] UKHL 65.

² *Gaubert v. United States*, 855 F.2d 1284, 1291 (5th Cir. 1989).

consistency-related concerns.³ Roundtable participants also preliminarily considered how the impact of shareholder claims on creditors and other shareholders might affect investor incentives.

Company recourse

The no reflective loss principle in domestic law is based on the assumption that the company has the power to recover the loss (although it may not do so for a variety of reasons) and is better placed to do so. In domestic law, the company generally has access to the same court system as shareholders. In a substantial number of ISDS cases, however, the operating company may not have access to effective recourse in the domestic courts due to, for example, a denial of justice (eg. government interference with the judiciary leading to denial of the claim). The status of the company and its recourse is of central importance in considering shareholder claims and consistency issues in ISDS.

Roundtable participants first gave some initial consideration to two different existing systems which allow more foreign-controlled companies to bring claims and recover in ISDS: (i) the derivative action in NAFTA art. 1117; and (ii) the ICSID art. 25(2)(b) system which allows certain domestically-incorporated companies to be deemed to be foreign companies for purposes of access to ISDS. It has been suggested that the expanded availability of recovery for the company in ISDS may reduce or eliminate the rationale for shareholder claims for reflective loss.

Participants also considered the variety of situations of companies and their potential relevance for shareholder claims. The company may have effective recourse, such as where the company has access to ISDS or to effective primary remedies under domestic law. There are other situations where the company has no real recourse, as may happen when a government expropriates all of the company's assets. There are also a variety of intermediate scenarios.

In its discussion, the Roundtable generally recognised that shareholder claims for reflective loss raise important policy issues relating to consistency. One participant noted that his government had not yet faced an ISDS claim from a shareholder, but recognised that shareholder claims could have significant impact on governments. He and other participants suggested that it was also important to further explore investor perspectives on shareholder claims and consistency.

While there was a consensus that the analysis demonstrated that, in contrast to ISDS, advanced national law systems generally bar shareholder claims for reflective loss, participants expressed varying preliminary views on the relevance of national law to ISDS in this area. One participant suggested that analysis of domestic law was only useful to a limited extent because investment treaties are agreements between different governments and do not merely reflect domestic law solutions. At the same time, he noted that his government's model treaty, following the NAFTA approach, limits shareholder claims for reflective loss and seeks to address the policy issues they raise: (i) such claims can only be brought by shareholders acting on behalf of a company that they own or control, and the company recovers any reflective loss damages; (ii) in such cases, both the home state investor and the company must waive rights to make claims in other fora. Another participant also suggested that domestic law and investment law were different, noting for example that investment treaties typically established a different and higher standard for compensation for expropriation than under domestic law.

Other participants suggested that the policy issues raised by shareholder claims for reflective loss in domestic law and ISDS were the same, including the impact on consistency, predictability, the risk of double recovery, and the likelihood of multiple claims arising out of the same injury. They considered that they should be addressed in a similar manner in ISDS and domestic law. They suggested further work

³ No view is expressed about the likelihood of success of such claims at any stage.

should be done on the case law to corroborate the existence of the consistency issues in practice, and then the Roundtable should take steps to improve the situation. A participant whose government has faced shareholder claims stated that they had raised policy concerns in practice, including contradictory decisions, multiple proceedings, and a risk of double recovery. Another contrasted the national law prohibition with ISDS allowance of shareholder claims for reflective loss and concluded, based on the policy issues raised by shareholder claims, that the national law approach was preferable.

Other participants recognised that shareholder claims raised a number of consistency issues, but suggested that the analysis should more clearly distinguish between cases where a company and a shareholder both have access to ISDS, and those where the company is a host-state operating company with access only to the domestic courts. The first scenario recreates a close parallel to domestic law, in which the company has access to the same legal system as shareholders. It was important to further study the NAFTA-type and ICSID systems for expanding company access to ISDS and their relevance to the value of shareholder claims in ISDS. In contrast, the second situation was considered to be less directly comparable, because the company only has recourse to the domestic courts. It was noted that this latter scenario raised the issue of the appropriate working assumptions with regard to expectations of domestic court performance, a question previously considered by the Roundtable in its work on ISDS.

It was widely recognised that analysis of domestic law was useful in the first instance to identify policy consequences of allowing shareholder claims for reflective loss. Analysis of these consequences was not well developed in most ISDS case law or commentary on shareholder claims. Arbitrators have generally considered that the issue is resolved by the inclusion of shares in the definition of investment in the typical BIT, and by arbitral precedent. However, while analysis of domestic law was useful, drawing analogies between national law and investment law or trying to determine which was the better approach were issues that merited further discussion and required further consideration of the purposes of the systems.

Beyond the question of comparing national law and ISDS approaches to shareholder claims, the analysis should also be extended to further consider the impact of a range of treaty provisions on the issues. Consistency issues raised by shareholder claims may be addressed or affected by treaty provisions that address a number of matters, such as: waiver and consolidation; forks in the road, denial of benefits; the rights of direct and indirect shareholders; and the role of non-disputing governments and of governments generally under treaty. In addition, it was suggested that clearer drafting of substantive protections in the treaty also promotes consistency. It was important to remember the goal of providing fair, expeditious and depoliticised resolution of disputes. A participant noted that treaty-based solutions are dependent upon whether arbitrators properly interpret treaties and contended that there are significant problems in this area.

Some participants also suggested that the general prohibition of shareholder claims for reflective loss in most if not all advanced systems of domestic law reaffirmed that the prohibition was a general principle of international law, as had been held by the ICJ in *Barcelona Traction*. This also raised broader questions about why ISDS arbitrators were coming to a different conclusion, their approach to applying international law, and the lack of attention to policy consequences or even common sense in some arbitral decisions.

A participant underlined that it is important for shareholders to have protection because, for example, minority shareholders can be squeezed out by a majority shareholder with host government complicity. A shareholder's ability to enter the country to vote at meetings may be interfered with by the government. However, it was noted that these scenarios, involving expropriation of shares or interference with voting rights, would likely be considered to involve direct injury. A bar on reflective loss claims does not affect the ability of shareholders to recover for direct injury.

It was recognised that shareholder claims for reflective loss raised important issues with regard to consistency which deserved further analysis and discussion before consideration of the need, if any, for Roundtable action. It was noted that given the consensus in the Roundtable recognising that national law and ISDS approaches to shareholder claims were different and that such claims raised policy issues, it was important to investigate the reasons for the differences. It was noted that the background paper was primarily focussed on identifying policy issues and that detailed attention to treaties and ISDS case law had been deferred. The broader universe of treaty practice and case law should be considered. It was also important to focus in particular on the impact of shareholder claims for reflective loss on the dispute settlement system, including the likelihood of settlement.

Strategic Objectives of Investment Treaties: Investment Promotion and Good Public Governance

At the FOI Roundtable 17 held in October 2012, participants asked the Secretariat to explore additional considerations relating to how treaty-based investor state dispute settlement fits into broader institutional and policy frameworks and to extend its examination of the effects of international investment treaties.

Econometric findings on investment treaties and investment promotion

Participants at FOI Roundtable 18 began their discussion of this issue by reacting to a Secretariat note reviewing the findings of econometric studies of the relationship between investment treaties and FDI flows. The studies shed light on the degree to which such treaties succeed in promoting international investment flows. The chief overall finding of the note was that the econometric findings viewed as a whole, are inconclusive – some find significant positive effects of investment treaties on investment flows while others find no such effect.

Several FOI participants expressed scepticism about the importance and validity of such findings – they noted that investment is influenced by a variety of factors (macroeconomic and domestic policy developments). While these econometric studies attempt to account for relevant macroeconomic, structural and political developments, some participants felt that their ability to do so reliably was in doubt.

Others participants questioned whether investment promotion was, indeed, a primary objective of investment treaty making. They referred to other major goals such as de-politicisation of investor-state disputes, investment protection for home country investors and enhancing the rule of law. Several participants expressed interest in surveys of international investors that might help clarify the extent of investor awareness of investment treaties as well as the extent to which treaty protections weigh in their investment decisions.

The Secretariat background note also reviewed econometric findings that investment treaties may have investment promotion effects that go beyond the bilateral relationship covered by a BIT. That is, the investment treaty-making process is interpreted as being part and parcel of a more general process of creating an environment that is conducive to cross border investment flows. A number of delegates expressed both the belief and the hope that this finding is an accurate depiction of reality.

Investment treaty making and good public governance principles

A second thrust of FOI discussions during this session focused on how well international investment law principles fit with those of the public governance policy developed in the context of discussions at the OECD, APEC and the IMF. The good governance and investment law communities share the same *problématique*, with both groups seeking to combine -- in rules and in practice -- a degree of flexibility for governments that allows them to be able to pursue their positive mission (policy making in the public interest) while constraining their ability to abuse the powers conferred upon them. The public governance

community views policy making as being, ideally, a cycle of continual improvement involving policy design, evaluation and adaptation to changing circumstances and to incoming information on how policy is affecting various parts of society.

International treaty making and the associated offer of investor state arbitration is one institutional tool among the many used in this policy making cycle. Thus, the values and principles developed by the public governance community should be relevant for investor state arbitration and investment treaty law. The OECD, APEC and IMF good practice guidelines include references to such principles as: non-discrimination, transparency, the value of ex post, administrative or judicial review of government decisions and “whole of government” approach to policy making. FOI participants reflected on how well these four principles fit with investment treaty law and arbitration.

Non-discrimination. FOI participants agreed that a clear area of shared values can be found in the central importance that both policy communities attach to non-discrimination and to even-handed treatment of the individuals and organisations that are affected by policies. This is a goal shared by all. One country noted that, however, while non-discrimination is important, it is not the only consideration underpinning government policies and it may be over-ridden by other considerations.

Public sector transparency. The Secretariat’s background paper identified public sector transparency as a possible area where there is incomplete congruence between investment treaties and good practice guidelines for public governance. For example, the IMF Code of Fiscal Transparency calls for a high standard of transparency to be applied in policy areas entailing high fiscal impacts and risks. Investment law, as embodied in both treaties and in arbitration rules, does not seem to fully conform to this principle inasmuch as it often permits non-disclosure of information regarding dispute resolution procedures that past cases have shown involve very high claims for damages and that can result in high monetary compensation having to be paid by the respondent state.

Many FOI participants agreed that transparency is “vital” for the proper functioning of ISDS system and for the systems’ stakeholders. They noted progress in this field – notably the recent draft proposals for UNCITRAL rules and the evolution of transparency texts in US treaties (e.g. from NAFTA to the most recent US model BIT). Many participants supported further work on transparency for international arbitration procedures, noting its benefits for strengthening their credibility, legitimacy and usefulness. Some participants stressed, in particular, the need to move toward more transparent practices in all arbitration fora available to investors (that is, not just in ICSID and UNCITRAL), in order to avoid a situation in which disclosure rules become a major driver of forum shopping in international investor state arbitration.

Administrative and judicial review of policy in the domestic and international spheres. FOI participants discussed the relationship between investment treaties and the domestic procedures used to ensure that governments do not abuse their powers (including review of government decisions under administrative law). Domestic administrative review procedures are an important way for the government to obtain information on the effects that its policies are having on the people and organisations affected by them. The background paper asked for FOI participants’ views on the interface between these two systems – that is, whether domestic procedures are strengthened by international treaty law or, on the contrary, undermined by it. A participant stated that, based on his country’s experience, most investment treaties ignore domestic procedures entirely and that international arbitration does nothing to support or reinforce domestic procedures. Another participant stated that recourse to domestic remedies should not be discouraged by investment treaty law and that further work in this area was needed (e.g. how might treaty language, for example in relation to exhaustion of local remedies, be used to support domestic dispute settlement procedures).

Whole of government approach. Finally, FOI participants noted that many good practice guidelines for regulatory governance support the use of “whole of government” approaches to regulatory policy making which seeks to involve all relevant public sector actors in a particular policy making problem. In particular, FOI participants considered whether a “whole of government” approach is applied to investment treaty making and to investment treaty compliance. One participant noted that many parts of his government are involved in investment treaty making, while another described the generally “supportive” attitude of other government departments in relation to promoting investment treaty compliance. The FOI Chair agreed that whole of government approach to investment treaty making and compliance is an interesting subject about which relatively little is known and asked the Secretariat to seek ways to include this theme in future Roundtable agendas.

Part II. Competitive Neutrality

At the FOI Roundtable 17 held in October 2012, participants agreed to consider the preliminary results of an empirical stocktaking and a more detailed proposed work programme from the Secretariat on competitive neutrality. In response to this, the Secretariat presented a preliminary analysis of international investment by state-owned enterprises (SOEs) and of relevant elements of national and international policy frameworks. [DAF/INV/WD(2013)5]

The preliminary findings of this survey include: international investment by SOEs is a relatively new phenomenon and the majority of SOEs are either domestic or still in the early stages of internationalisation, although the trend is in upward direction. On the policy side, countries seem to be more sensitive to SOE investments. For instance, several countries have introduced differential rules for SOE investors in their FDI review mechanisms. At international level, international agreements/instruments do not generally contain texts focusing on the nature of ownership, although a few recent international agreements have specific provisions pertaining to SOEs.

FOI participants provided comments and questions on this issue and discussed possible next steps. Several participants expressed interest in the policies of home countries, including their approaches for outward investments by their SOEs, as well as the study of SOEs competing with private companies in a third market. With regard to the policies of host countries vis-à-vis SOE investments, some participants thought that an understanding of objectives and motivations of government activities dealing with those investments would be important. Many participants noted that further analysis of factual evidence on international investments by SOEs would be beneficial.

In summarising the discussions by participants, the Chair emphasized that policy analysis of this issue in international investment context is important and noted that it is too early to draw conclusions on this issue. In conclusion, FOI Participants agreed that the Secretariat should deepen its analysis of this issue based on additional information and data in a variety of areas including the international investment activities of SOEs, the potential impact of these SOE activities, and trends in policy responses by both host and home countries. The Chair invited FOI participants to submit information relevant to competitive neutrality.

Part III. Monitoring of Recent Policy Developments and Other Investment Issues

FOI Roundtables routinely feature discussions of recent policy developments. The Secretariat produces a monitoring document in support of these discussions that reviews main policy developments for the 54 countries invited to participate in the Roundtable. These documents can be found on the FOI webpage at www.oecd.org/daf/inv/investment-policy/g20.htm.

Canada

Canada provided information on several clarifications and changes to the country's foreign investment review process. Among the changes that were announced on 7 December 2012. The clarifications and changes expanded the definition of SOEs, which henceforth includes foreign companies that are "influenced" by a foreign state. While a SOE was previously defined in the Guidelines for the net-benefit assessment for investments by State-owned enterprises as "an enterprise that is owned or controlled directly or indirectly by a foreign government", the new Guidelines define an SOE as "an enterprise that is owned, controlled *or influenced*, directly or indirectly by a foreign government".

The new policies also refer specifically to oil-sands businesses: The Guidelines state that while "*As a general rule, non-controlling minority interests in Canadian businesses proposed by foreign SOEs, including joint ventures, will continue to be welcome, while investments by foreign SOEs to acquire control of a Canadian oil sands business will be found to be of net benefit on an exceptional basis only.*"

Costa Rica

On 21 January 2013, a bill on "the discouragement of the entry of foreign capital" was introduced in the Costa Rican parliament. The bill seeks to address macroeconomic imbalances and external vulnerability that may result from strong inflows of foreign capital in Colones-denominated debt instruments. The bill introduces two mechanisms: it authorises the Board of the Central Bank to increase, for a period of 24 months renewable, by 30 percentage points the deductions on remittances on income on investments by non-residents. The second mechanism is the authority to impose a non-interest bearing deposit of up to 25% at the Central Bank of capital by non-residents.

Costa Rica explained that it had experienced a significant surge in capital inflows during the months of October 2012 to January 2013 as a result, among other factors, of its strong economic performance (5% growth, low inflation, strong export growth) and its successful incursion in the international sovereign bonds market after many years of absence.

Costa Rica further explained that this surge in capital inflows led to a challenging environment for the conduct of monetary and financial policies and has increased authorities' concerns about short-term capital inflows. Moreover, it raised competent authorities' awareness regarding sudden surges in capital inflows that may impact macroeconomic stability due to their sheer volume and speed of entrance.

In this context, the Government submitted a bill of law to Congress that would increase the authorities' ability to discourage such inflows when deemed necessary for macro stability purposes. In particular, this law would allow the Government to increase the tax on interest paid to non-residents by up to 30 additional percentage points and/or to impose reserve requirements of up to 25% on foreign inflows channeled to purchase bonds and securities in the domestic market. These measures could be implemented for six-month periods which would be renewable.

Costa Rica highlighted that implementation of such measures as well as their renewal after six months would require a qualified majority of the Central Bank Board of Directors to declare the existence of an external disequilibrium caused by capital inflows.

Costa Rica further stated that the partnership with foreign capital has been and will continue to be key to the development of the Costa Rican economy and we appreciate the support received from investors, including over the last few months. The bill that is now in Congress will not impact investments in domestic instruments that have or will take place before such measures are implemented or after their expiration, and will not impact foreign direct investment. The bill, if approved, will not affect bonds placed

in the international market in the past or in the future by the Central Government or entities of the non-financial public sector of Costa Rica.

Costa Rica also explained how the proposed deduction on remittances compare with rates of capital taxation on domestic investors. Costa Rica stated that the measures that the bill of law enables the government to increase up to 30 percentage points on the tax rate on investments by non-residents in financial securities issued in the Costa Rican market; stocks are excluded. This can increase the average difference between rates of capital taxation on non-resident versus resident investors.

Costa Rica cautioned however that the average difference in rate of capital taxation for residents and non-residents and the impact of this bill on these average tax rates are difficult to assess, as differences in tax treatment depend on the type of investment and the tax regime in which the investment falls. It should be noted, though, that significant channels for investment by nonresidents are not being affected by the proposed bill of law. For example, loans to domestic firms (financial and non-financial) by first order international banks and other financial entities seen as regularly carrying out financial operations with Costa Rica are exempt from income taxes both under the current law and in the bill of law (while domestic banks are subject to income taxes in Costa Rica under the current law). Similarly, free trade zones are exempt from income tax under the current law and are not impacted by the proposed bill either. Both channels represent a very significant proportion of total investment by non-residents in Costa Rica.

France

France informed Roundtable participants about a change in its defence and national security review mechanism. France states that on 9 May 2012, the *decree n°2012-691 of 7 May 2012 on foreign investments subject to prior authorisation* entered into effect. The decree, which amends Article L151 of the *Code monétaire et financier* further specifies the scope of the limited number of sectors in which foreign investment is subject to prior authorisation. The amendment abolishes all reference to the notion of “indirect control” by an investor and suppresses casinos from the list of items – France considers that the control over casinos under the anti-money laundering legislation is a sufficient mechanism for control in this area.

Italy

Italy has notified the OECD of its new law establishing a mechanism for government review of transactions regarding assets of companies operating in the sectors of defence or national security, as well as in strategic activities in the energy, transport and communications sectors.

The new law abolishes Italy’s so-called “golden share” rules and replaces them with a new legal framework for national security and strategic industries. The new framework accords special powers to the Government, in cases where an acquisition or other form or transaction triggers a threat of severe prejudice to essential interests of the State, based on objective and verifiable conditions, in compliance with European Law and according to the principle of proportionality.

Contrary to the previous Italian legislation on “golden shares”, which was applicable to companies operating in the defence, energy, transport and communication sectors, directly or indirectly controlled by the State, the new rules and special powers apply to all companies operating or owning strategic assets in specific sectors, irrespective of whether the State is their shareholder.

Special powers are exercised by the Government in cases where an acquisition or other form or transaction triggers a threat of severe prejudice to essential interests of the State.

The new rules have been adopted in light of the following principles:

- the exercise of the special powers applies potentially to all companies, depending on the seriousness of the threat to national interests;
- the new discipline applies regardless of the nationality of the subject, except for the case of a buyer from outside the EU taking control of a company in the energy, transport and communications sectors (where the government has the right to oppose the acquisition by non-EU investors; see Italy's notification for more detail);
- the seriousness of the threat must be real and appraised case-by-case on the ground of the objective and specific criteria predetermined in detail by the Decree-Law n. 21/2012;
- the depth of State intervention is different depending on whether the sectors of national defence and security, or the sectors of energy, transports and communication, are concerned (see below);
- the special powers must always be exercised according to the principle of proportionality;
- the special powers are put upon the Government as a whole;
- the mechanism of subsequent eventual opposition of the Government replaces the mechanism of previous authorization.

The law sets out which authorities carry out the risk assessment and the criteria to follow for it and it defines timeframes and obligations on companies to provide information to the Government about the investment project.

United States

On 8 October 2012, the U.S. House of Representatives published the *House Permanent Select Committee on Intelligence Investigative Report on the U.S. National Security Issues Posed by Chinese Telecommunications Companies Huawei and ZTE*. The report suggests that “China has the means, opportunity, and motive to use telecommunications companies for malicious purposes” and that “Suggested ‘mitigation measures’ cannot fully address the threat posed by Chinese telecommunications companies providing equipment and services to United States critical infrastructure”.

The report concludes with recommendations that include that “The United States should view with suspicion the continued penetration of the U.S. telecommunications market by Chinese telecommunications companies. The Committee on Foreign Investment in the United States (CFIUS) must block acquisitions, takeovers, or mergers involving Huawei and ZTE given the threat to U.S. national security interests. Legislative proposals seeking to expand CFIUS to include purchasing agreements should receive thorough consideration by relevant Congressional committees.” (Recommendations 1 and 2) and “U.S. network providers and systems developers are strongly encouraged to seek other vendors for their projects. Based on available classified and unclassified information, Huawei and ZTE cannot be trusted to be free of foreign state influence and thus pose a security threat to the United States and to our systems.

The United States explained that the House Permanent Select Committee on Intelligence Investigative Report was drafted by an independent authority and reflects only the viewpoint of this individual committee. Although it included recommendations on CFIUS, it does not propose any changes to respective legislation, which has been unchanged since 2008. The report does not bind the United States to change its legislation regarding CFIUS in the future.