



Roundtable on Freedom of Investment 19

15-16 October 2013

Summary of Roundtable discussions by the OECD Secretariat

Organisation for Economic Co-operation and Development
Investment Division, Directorate for Financial and Enterprise Affairs
Paris, France

This work is published on the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Organisation or of the governments of its member countries or of other countries participating in the “Freedom of Investment” Roundtables.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

TABLE OF CONTENTS

Part I.	Launch of discussions on domestic arrangements and hidden investment protectionism.....	4
Part II.	Recent investment policy measures.....	6
	Australia.....	6
	Australia/New Zealand	7
	Austria.....	8
	Canada	9
	China/United States	9
	France.....	9
	Korea.....	10
	United Kingdom/United States	11
Part III.	Further consideration of shareholder claims in investor-state dispute settlement	12
Part IV.	Investment treaties over time – Treaty practice and nterpretation in a changing world	19
Part V.	Competitive neutrality	21

FREEDOM OF INVESTMENT PROCESS

Freedom of Investment Roundtable 19, 15-16 October 2013, OECD, Paris

SUMMARY OF DISCUSSIONS

The “Freedom of Investment” (FOI) Roundtable supports efforts to maintain and extend open, transparent and non-discriminatory policy frameworks for international investment and capital movements. It also helps countries to address concerns that may be raised by international investment (e.g. safeguarding 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.

The present document summarises the discussions at FOI Roundtable 19, held on 15-16 October 2013. Countries invited to the Roundtable included representatives of the governments of the 34 OECD members and the European Union, the eleven other governments that have adhered to the OECD Declaration on International Investment and Multinational Enterprises (Argentina, Brazil, Colombia, Costa Rica, Egypt, Latvia, Lithuania, Morocco, Peru, Romania and Tunisia) as well as government representatives from P.R. China, Jordan, Malaysia; the World Bank and of the United Nations Conference on Trade and Development (UNCTAD) also participated in the Roundtable.

The discussions at Roundtable 19 included: (i) a launch of dialogue on hidden investment protectionism; (ii) a tour de table on recent investment policy developments; (iii) further consideration of shareholder claims in investor-state dispute settlement (ISDS); (iv) a discussion of investment treaties over time and of the tools available to governments to influence interpretation of their investment treaties; and (v) a second round of dialogue on international investment by state-owned enterprises.

Part I. Launch of discussions on domestic arrangements and hidden investment protectionism

Invited expert, Professor Simon Evenett (University of Saint Gallen; coordinator of Global Trade Alert, GTA) launched the FOI Roundtables’ first broad consideration of “hidden protectionism” with a review of GTA’s monitoring work on the related concept of ‘murky protectionism’ Professor Evenett stressed the growing importance of non-traditional distortions in international trade and investment policies and noted that this trend has been particularly evident in policy responses to the economic and financial crisis.

Professor Evenett defined protectionism using his ‘Differential Treatment Standard’. Differential treatment refers to any policy measure that results in discriminatory treatment *vis-à-vis* a foreign or non-resident market participant, while liberalisation refers to any measure abolishing or lessening differential treatment. Professor Evenett also noted that some forms of protectionism is more ‘transparent’ than others – non-transparent, protectionist measures under the GTA methodology are labelled ‘murky protectionism’. The term ‘murky’ refers to measures associated with low transparency standards (e.g. because the measure involves heightened discretion for policy makers or because of security-related limitations on public reporting for certain types of measures such as national security).

GTA monitoring shows that non-traditional measures now account for about half of total protectionist measures adopted by countries. These include such policies as subsidies and other measures (e.g. expropriations without adequate compensation, security-related investment reviews). Professor Evenett

attributes greater recourse to such measures to the incentives to circumvent disciplines housed in the WTO and the OECD. This finding highlights the need to subject such measures to monitoring and disciplines.

After Professor Evenett's presentation, the OECD Secretariat described investment policy monitoring conducted in the "Freedom of Investment" Roundtables and in other OECD bodies relevant to monitoring investment measures. Such monitoring is based *inter alia* on the national treatment instrument¹ and the liberalisation commitments set forth in the Codes of Liberalisation, as well as Codes-based commitments to not create obstacles to outward investment flows. These instruments also provide for additional flexibility in relation to measures addressing national security concerns as well as prudential measures. These arrangements allow states some room to manoeuvre in addressing such concerns, but also provide for notification and follow up by other countries participating in OECD investment dialogue.

Thus, the differential treatment standard applied by GTA and the national treatment standard applied by the OECD both place non-discrimination at the core element for monitoring of inward investment measures. However, OECD practice differs from GTA practice in its handling of measures addressing dual purposes (e.g. investment measures that security related or that address prudential concerns). OECD practice recognises that such measures may be used for protectionist purposes and yet may also be needed to meet address legitimate public concerns. For this reason the OECD routinely monitors such measures, but isolates them in a separate category from other investment measures.

After these presentations, FOI participants offered the following remarks and questions:

UNCTAD noted that there is a negative connotation to the word "protectionism", but there is such a thing as "good protectionism," especially when it comes to national security, natural resources and cultural industries. According to UNCTAD, it is difficult to draw the line between 'good' and 'bad' protectionism.

The FOI Chair cited discussions at the Investment Policy Review of Myanmar, which took place the same week as FOI Roundtable 19. The contribution of international investment to sustainable development was an important theme in this discussion of Myanmar's investment policies. The Chair noted that the goal of sustainable development cannot be achieved without state intervention over and above that required to protect market competition; thus, there is legitimate scope for wider government action in some areas. The Chair asked whether the GTA methodology accounted for this in any way – for example, by measuring impacts (e.g. on investment flows, on GDP, on environmental outcomes). Professor Evenett answered that, when monitoring, it is useful to highlight any form of discrimination in trade and investment policy -- that way, users are informed about the discrimination and can assess for themselves whether it is justified. In his view, the real question is whether *discrimination* is the right way to achieve public goals. He also noted that there is, for now, no information on the effects of the measures monitored, but that could be the next phase of research.

Brazil agreed that murky protectionism is an important issue on the global economic policy scene and stated that more advanced economies are more likely to have recourse to such measures and to develop innovations in the design and implementation of such measures.

Costa Rica asked for information on which sectors have been most affected by the murky and non-traditional forms of protectionism and also for greater insights into the rationales for introducing such measures. He also wanted to why, if countries were circumventing its rules, the WTO is not addressing this circumvention. Professor Evenett answered that the GTA database allows the user to filter the measures by country adopting the measure, countries affected by the measures and by the sector targeted by the

¹ National treatment is defined as providing treatment to foreign investors that is not less favourable than the treatment provided to domestic investors under like circumstances.

measure. (e.g. agriculture, electronics). He noted that some of the motivation for recent policy moves included the recent slowing down of world economy, especially of emerging markets, but also highlighted the importance of ‘learning by doing’ and ‘copy-cat’ policy making as part of the protectionist policy process. WTO rules set different sets of rules, and they are differently tight. Also, some countries have foregone the leeway, while others have lots of room to impose tariffs without being against WTO rules.

The UK noted that its government – including at the Ministerial level – is very familiar with and attuned to GTA policy monitoring. The UK representative asked, in relation to copy-cat measures, whether there is evidence of copy-cat liberalisation measures (and not just copy catting of discriminatory measures). Professor Evenett responded that there was some evidence of emulation in liberalisation, citing the case of sub-Saharan Africa. A similar dynamic might exist in subsidies, where the unwinding by one country might also lead to similar measures in other countries.

The FOI Chair asked Professor Evenett how he saw priorities for any further FOI work in areas touching on ‘murky protectionism’ Professor Evenett made several proposals. First, during the crisis, a number of state investment funds were create about which little is known (including investment policies and impacts). Shedding light on these and on the market failure that these state funds are supposed to address would be of great interest. Second, what about discriminatory measure not grounded on nationality, understand better how success are these measures, and do they create uncertainty and does this uncertainty have knock-on effects on international investment. Third, performance requirements need to be addressed. Where these measures are part of a package for domestic benefits, are there other ways of achieving these goals without the discriminatory aspect? How many foreign investors are deterred from investments as a result of these policies.

Part II. Recent investment policy measures

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

Australia

In 2013, Australia issued a new version of “Australia’s Foreign Investment Policy”,² which contains guidance by the Treasurer. The document contains, in its Annex 1, definitions, including on “Foreign Government Investors”. Since the last version, issued in 2012, this definition has been changed as follows (emphasis added to indicate changes):

² www.firb.gov.au/content/_downloads/AFIP_2013.pdf.

2012 version	2013 version
<p>Foreign government investors include:</p> <ul style="list-style-type: none"> • a body politic of a foreign country; • companies or other entities in which governments, their agencies or related entities more than an aggregate 15 per cent interest; or • companies or entities that are otherwise controlled by foreign governments, their agencies or related entities. 	<p>Foreign government investors include:</p> <ul style="list-style-type: none"> • a body politic of a foreign country; • entities – companies, trusts, and limited partnerships – in which governments, their agencies or related entities from a single foreign country have an aggregate interest (direct or indirect) of 15 per cent or more; • <i>entities in which governments, their agencies or related entities from more than one foreign country have an aggregate interest (direct or indirect) of 40 per cent or more; or</i> • entities that are otherwise controlled by foreign governments, their agencies or related entities, <i>and any associates, or could be controlled by them including as part of a controlling group.</i>

Australia was asked to explain the rationale behind the changes. In response, Australia noted that there has been no change to policies or law; the changes aim to align the Guidelines with what is actually done. When asked what conditions need to be met to assume that an entity “could be controlled” by foreign governments, Australia responded that no such a determination would be made on a case-by-case basis. When asked for more information on what criteria are applied to make this case-by-case determination, Australia agreed to provide further information on this matter in the future.

Australia/New Zealand

On 1 March 2013, the *Australia-New Zealand Closer Economic Relations Trade Agreement* (ANZCERTA) *Investment Protocol* entered into force. The protocol *inter alia* reduces barriers to investment flows by raising the thresholds at which investment projects may be reviewed in Australia and New Zealand (AUD 1.005 billion for New Zealand investments in Australia, up from AUD 231 million).

Asked at FOI Roundtable 14 in March 2011 how the change in the review threshold compares with Australia’s and New Zealand’s obligations under the Codes of Liberalisation, in particular their Article 9³, Australia stated that the Protocol constituted “a step towards liberalisation and that it endeavours to extend this liberalisation to more countries.”⁴ Roundtable participants then agreed to review progress made by Australia and New Zealand in this context in due course.

³ Article 9 (Non-discrimination) states: “A Member shall not discriminate as between other Members in authorising the conclusion and execution of transactions and transfers which are listed in Annex A and which are subject to any degree of liberalisation.”

⁴ “14th Roundtable on Freedom of Investment”, Summary of Roundtable discussions by the OECD Secretariat, page 5.

Australia and New Zealand were asked to describe any progress they may have made in aligning their review thresholds with their commitments and obligations under the OECD Investment Instruments, notably the Codes of Liberalisation. In response, New Zealand answered that the ANZCERTA is a milestone in the broader project of achieving a fully integrated economic block and, therefore, ANZCERTA is a bit more than a standard free trade agreement. Australia confirmed that the Agreement is another sign of the close cooperation and of a special relationship between the two countries. Both countries also emphasised that, in practice, their investment review boards rarely reject investments from OECD home countries (only once for Australia and never for New Zealand).

The FOI Chair recalled a similar conversation that was held in relation to the US-Australia FTA. He recalled that, at that time, Australia did not advance a similar argument of “special relationship” with the United States and he expressed doubts that this was really the full explanation. It was agreed that this matter would be taken up again at future FOI Roundtables.

Austria

Effective 26 February 2013, Austria amended its review mechanism for inward investment. The amendment modifies and clarifies elements of the review mechanism that Austria had initially introduced on 8 December 2011.

Austria was asked to explain the main features of the mechanism after the amendment and also to explain the rationale behind the change. Austria explained that changes to the policy were a response to queries raised during earlier FOI discussions and to experiences gained with implementation of the policy in its earlier form. The full Austrian response is reproduced in Box 1.

Box 1. Austria response on its amended review mechanism for inward investment

This is a follow-up to discussions at the Freedom of Investment Roundtable that took place last year in relation to prior authorisation requirements for some foreign takeover activities as established in the Austrian Foreign Trade Act 2011. Austria already informed members at the Investment Committee's meeting this March that the Austrian Parliament adopted a bill regarding amendments to the Austrian Foreign Trade Act of 2011, including a new wording of its queried article 25a. The amendment act was officially made public on 25 February, 2013 and entered into force on 26 February, 2013. Formal notification was forwarded to the OECD Investment Committee after finalising an English translation of the bill. You have this document in front of you.

On the rationale of the amendment. As experience accumulated with the implementation of the new provision and an increase in legal clarity was deemed necessary. Moreover, there was also careful consideration of concerns raised, among others, in the FOI roundtable, and a wish to address these concerns. Austria is of the view that with the new amendments, it meets all its obligations under international law and notably under the OECD investment instruments.

On the substance of the changes. The most important changes are as follows:

- A clarification that any authorisation procedure must be compatible with Austria's obligations under both European Union and international law. In the protocol of the Parliament to the bill, there is notably a reference to Austria's international obligations stemming from its OECD membership. In case of a conflict with international law, an authorisation process would not even be started but just a notification issued by the responsible Minister of Economy within the period of one month.
- A significant reduction of the list of sectors that are deemed strategically important.

Additional changes include:

- A clarification with regard to the evaluation in case of a suspicion of circumvention; in this respect, the true economic content of a transaction will be taken into consideration.

- A clarification that the Federal Minister of Economy, Family and Youth shall issue, within one month of receiving an application, a written notification that no authorisation process is started because of a conflict with international law; if the investor does not receive a written notification within this period, the process would be deemed to have been authorised. This serves legal clarity.
- Clarifications regarding the computing of voting right shares in order to calculate an interest of 25 percent or more as well as what is meant by a controlling interest in an undertaking.
- The publication of the type of decision taken on any application. This is a new clause and serves the purpose of transparency.

Canada

On 26 June 2013, changes to the Investment Canada Act (ICA) came into effect. The changes make it possible for the Minister (Industry Canada) to decide that an entity is controlled by one or more state-owned enterprises even though it would qualify as Canadian-controlled under the criteria established by the Act; this decision can be made retroactively for any date after the 29 April 2013. The amendments also introduce a definition of the term “state-owned enterprise” for the purpose of the Act; a definition of State-owned enterprises had already been established on 7 December 2012 in a “*Statement Regarding Investment by Foreign State-Owned Enterprises*”, but the definition in the ICA expands the scope of SOEs further to include, *inter alia* individuals who are acting under the direction or influence of a foreign state.

The amendments to the ICA broaden the definition of SOE and increase discretion for the Government in its evaluation of whether or not a potential investor is Canadian for the purposes of the ‘net benefit’ review mechanism. Although these amendments relate to Canada’s ‘net benefit’ reviews and Canada has a separate national security review mechanism, some of the concerns addressed by the amendments (e.g. which individuals are acting under the direction of a foreign state?) appear to have some overlap with security risk management.

Canada was asked whether, in its opinion, the 2009 Recommendation of the Council on Guidelines for Recipient Country Investment Policies relating to National Security apply to these amendments. Canada responded that these clarifications do not change the national security provisions of the ICA.

China/United States

On 12 July 2013, it was announced that China and the United States have agreed at the occasion of the *fifth China-U.S. Strategic and Economic Dialogue (S&ED)* to begin negotiation of a bilateral investment treaty on the basis of pre-establishment national treatment with a “negative list” approach.

When asked whether they were in a position to provide more information on these negotiations, both stressed the importance that they attach to these negotiations and stated that they were not in a position to provide additional information to the Roundtable at the present time. They promised to do so in due course.

France

The Banque Publique d’Investissement (BPI), which since early 2013, assumed the roles of several French public investment funds, notably the former Fonds Stratégique d’Investissement (FSI), published its “*doctrine d’intervention*” in June 2013.

The doctrine essentially confirms the features of the former FSI’s investment approach, but also contains a general exception under which, if the situation warrants, the BPI could make investments

outside the framework of the doctrine. The Director General of the BPI explained to the French Parliament that this exception in the doctrine could be used to “defend Danone or Valeo if they were attacked, or to buy Eramet in the case that Areva would want to sell it.”⁵

France was asked to explain what kind of operation would be deemed to constitute an “attack” on the mentioned enterprises and what kind of “defense” the Banque Publique d’Investissement could envisage. France’s response broadly reiterated the investment goals of the BPI.

Korea

On 25 July 2011 – outside the current reporting period but not yet discussed in earlier monitoring sessions – Korea introduced Article 11-2 into the *Act on Prevention of Divulgence and Protection of Industrial Technology* (reproduced below). This amendment became effective on 26 January 2012.

The *Act on Prevention of Divulgence and Protection of Industrial Technology* contains rules that required Korean companies to obtain government approval if they wished to sell key technology developed with government funding to foreigners. The additional article 11-2 (reproduced in Box 2) extends the requirement to notify the government and obtain its approval for foreign investments, including mergers or acquisitions or joint investments with foreign entities. Takeover attempts by foreigners also need to be brought to the attention of the government. Moreover, if the Minister of Knowledge Economy deems that the divulgence of national core technology may seriously affect Korea’s national security, it may suspend, prohibit, or unwind the operation.

Box 2. Korea’s Amendments to Investment Law

Article 11-2 (Overseas Acquisition, Merger, etc. of Institutions Possessing Industrial Technology which Possess National Core Technology)

- (1) Where an institution possessing industrial technology which holds national core technology developed with government subsidies for research and development intends to proceed foreign investment (hereinafter referred to as “overseas acquisition, merger, joint venture, etc.”) of “overseas acquisition, merger, joint venture, etc.” which is determined by Presidential Decree, it shall report in advance to the Minister of Knowledge Economy.
- (2) Where an institution possessing industrial technology under paragraph (1) has noticed that overseas acquisition, merger, etc. is proceeding by foreigners determined by Presidential Decree, it shall immediately report such fact to the Minister of Knowledge Economy.
- (3) Where the Minister of Knowledge Economy deems that the divulgence of national core technology under paragraphs (1) and (2) may seriously affect national security, he/she may, after consulting with the head of the relevant central governmental administrative agency, order institutions possessing industrial technology to take measures, such as suspension, prohibition, restoration to original state, etc. with respect to overseas acquisition, merger, etc. through the deliberation by the Committee.
- (4) When a person who intends to proceed overseas acquisition, merger, etc. under paragraphs (1) and (2) has a question about matters of the following subparagraphs with respect to appropriate overseas acquisition, merger, etc., he/she may request to the Minister of Knowledge Economy to examine in advance, as prescribed by Presidential Decree:
 1. Whether the national core technology in question is related to national security;
 2. Whether the overseas acquisition, merger, etc. in question is subject to the reporting of paragraphs (1) and (2);
 3. Other questionable matters with regard to relevant overseas acquisition, merger, etc.

⁵ The four company names in the quote of the BPI Director General refer to specific operations by the French government or the FSI to prevent foreign takeovers.

- (5) Where an institution possessing industrial technology which holds national core technology fails to file a report under paragraphs (1) and (2), submits a false or unlawful means of report, and proceed overseas acquisition, merger, etc., the Minister of Knowledge Economy may request an examination to the head of the intelligence and investigation agency, after reporting the outcome of examination to the Committee, order the institution possessing industrial technology to take necessary measures, such as suspension, prohibition, restoration to original state, etc. with respect to overseas acquisition, merger, etc. through the deliberation by the Committee.
- (6) In any of the following cases, the Committee may listen to the opinions of an institution possessing industrial technology:
 1. Deliberation on the reporting under paragraphs (1) and (2);
 2. Deliberation on suspension, prohibition, restoration to original state, etc. with respect to overseas acquisition, merger, etc. which seriously affect national security pursuant to paragraph (3);
 3. Deliberation on damage of an institution possessing industrial technology according to measures of paragraph (3);
 4. Deliberation on suspension, prohibition, restoration to original state, etc. of overseas acquisition, merger, etc. with respect to failing to report or false report under paragraph (5).
- (7) The Minister of Knowledge Economy may require specialized committees by area to examine with regard to the reporting pursuant to paragraphs (1) and (2), request necessary cooperation of materials submitted, etc. to the head of a relevant central administrative agency or the head of an institution possessing industrial technology. In such cases, the head of a relative central administrative agency or the head of an institution possessing industrial technology shall cooperate therewith, unless any extenuating circumstances exist.
- (8) Detailed matters on measures, procedures, etc. of the reporting under paragraphs (1) and (2), and suspension, prohibition, restoration to original state, etc. shall be prescribed by Presidential Decree.

United Kingdom/United States

On 13 September 2013, a Final Rule by the United States Federal Deposit Insurance Corporation (FDIC) was issued; it is scheduled to come into effect on 15 October 2013. The Final Rule clarifies that deposits in branches of United States banks located outside the United States are not FDIC-insured deposits, even if these deposits are also payable at an office within the United States.⁶

The Final Rule was adopted in response to the release of a Consultation Paper by the United Kingdom Prudential Regulation Authority (PRA, formerly Financial Services Authority, FSA) issued in September 2012.⁷ The Consultation Paper addresses the implications of national depositor preference regimes in countries outside the European Economic Area (“EEA”). It proposes, among others, to forbid branches of firms from non-EEA jurisdictions that are subject to national depositor preference regimes from accepting deposits in the United Kingdom unless they take steps to ensure that United Kingdom depositors are not disadvantaged by it.

It would appear that the combination of these regulations would effectively prevent financial institutions from the United States from offering deposit-taking operations through branches in the United Kingdom. Both questions noted in their responses that the US changes is very recent and the UK measure is still only a proposal. They felt that a fuller assessment would only be possible at a later date.

⁶ “*Rules and Regulations*”, Federal Register Vol. 78, No. 178, 13 September 2013.

⁷ “*Addressing the implications of non-EEA national depositor preference regimes*”, Financial Services Authority, CP12/23, September 2012.

Part III. Further consideration of shareholder claims in investor-state dispute settlement

The Roundtable further considered shareholder claims in ISDS at the October 2013 Roundtable following its initial discussion of the issues in March 2013. The Roundtable noted that it had recognised in March 2013 that, for a series of policy reasons, advanced systems of domestic corporate law generally apply a “no reflective loss” principle to shareholder claims. Shareholders can claim for direct injury to their rights as a shareholder, but not for reflective loss incurred as a result of injury to "their" company. Only the directly-injured company can recover the loss. In contrast, many ISDS arbitral tribunals have found that shareholders are entitled to recover for reflective loss in ISDS under typical BITs.⁸ The March Roundtable requested further consideration of the issues in October.

The October Roundtable benefitted from a presentation on Reflective Loss by Professor Eilís Ferran of the University of Cambridge. The Roundtable also considered two additional Secretariat background papers on shareholder claims, one on corporate law aspects and one on investment treaty practice.

Professor Ferran entitled her presentation “Reflective Loss” -- rather than focusing only on shareholder claims -- in order to make clear that others, such as creditors, can also suffer and potentially seek to claim for reflective loss.⁹ The issue is not limited to shareholders.

Professor Ferran described to the Roundtable the treatment of claims for reflective loss in corporate law. Under corporate law, the corporation is considered to be a separate legal entity from its shareholders. A claimant can only recover compensation for its own loss and a shareholder cannot claim for loss incurred by the company because the latter is a separate legal entity. Only the company can recover its loss. The rule is based on policy considerations. It is also a matter of principle: there is no discretion in its application once it is determined that a loss is reflective.

In corporate law, where a company is injured, generally it is up to the company to sue. The company’s board of directors or management, rather than its shareholders, decides whether the company will sue. A shareholder cannot sue personally, for its own recovery, unless (i) it has an independent cause of action; and (ii) the harm it has suffered is independent from the harm to the company (no reflective loss). In very limited circumstances, a shareholder can bring a derivative claim on the company’s behalf. A derivative claim seeks compensation for harm to the company; compensation in such cases is paid to the company.

Corporate law thus stresses the distinction between the corporate entity and its shareholders. It is possible to pierce the corporate veil under corporate law, but such piercing is very rare. The corporate law emphasis on the importance of the corporate entity is consistent with general international law in the *Barcelona Traction* case as decided by the International Court of Justice. Professor Ferran noted that *Barcelona Traction* had recently been cited by the Supreme Court in the UK in a case rejecting an attempt to pierce the corporate veil under domestic law.¹⁰

Professor Ferran noted that reflective loss arises where both the shareholder and the company have a legal claim (cause of action). In such cases, the shareholder’s loss must be independent of the company's

⁸ For purposes of 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 is 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.

⁹ Professor Ferran’s powerpoint presentation is available here: <http://www.slideshare.net/OECD-DAF/ferran-oecdfoipresentation>

¹⁰ *Prest v. Petrodel Resources Ltd.*, [2013] UKSC 34.

loss or the claim is barred. Some losses are clearly reflective, such as a drop in value of shares or loss of a dividend. Reflective loss also extends to other payments the company would have made to a shareholder if it had not been injured. In some cases, distinguishing between reflective loss and direct loss may require fine judgments.

Professor Ferran also discussed the policy reasons for the no reflective loss rule in corporate law and whether they are persuasive. In her view, the rule is based on sound reasons. The strongest rationale for the rule is the importance of creditor protection and ensuring that the well-established hierarchy of claims against corporate assets is respected. This ensures that assets are paid out to those who are entitled to them.

The basic ranking of claims on corporate assets is well-established under corporate law. Shareholders are the last claimants on corporate assets -- they are at the bottom of the hierarchy of claims. Claims by ordinary shareholders come after claims by secured debtholders, unsecured debtholders, subordinated debtholders and preferred shareholders. Allowance of a shareholder claim for reflective loss would invert the normal hierarchy of claims. It would subordinate creditors to the claimant shareholder.

Professor Ferran explained that when a bank lends to a company, the company's claim against a third party aggressor is part of the assets on which the bank has a prior claim that ranks ahead of any shareholder claim. It is part of the pool of assets to which the bank is entitled to look to satisfy its claim. To allow a reflective loss claim by the parent company (shareholder) of the injured company would allow the parent company to in effect receive value back from the company ahead of the creditor. A creditor such as a bank would be structurally subordinated to a shareholder, contrary to the fundamental assumptions of how corporate law is meant to work. Shareholders should not be in a position where they can bypass the hierarchy by making personal claims.

A second important rationale for the no reflective loss principle is that it respects the principle of shareholder equality. Even if creditor injury is disregarded, the company claim still deserves to be prioritised because its recovery benefits all shareholders. The no reflective loss principle precludes one shareholder bypassing that equality and putting itself into a better position.

Third, Professor Ferran underlined that the no reflective loss rule is also supported by important considerations of corporate governance. The board of directors and management of the company generally have responsibility to preserve corporate assets. Centralised management of the company by its board is an important principle of corporate law. The no reflective loss principle supports centralised management by ensuring that the decision whether to claim (or to settle) is taken by company management. Generally, shareholders should not re-open that corporate decision. Shareholders may have possible corporate law remedies such as seeking to change management if they disagree with the board's decision about how to proceed, but shareholders should not be able to re-open the corporate decision. In exceptional cases such as where the board of directors has a conflict of interest, a derivative action may be permitted. The no reflective loss principle thus supports centralised management and the smooth and efficient corporate governance of the company.

Fourth, Professor Ferran also considered that judicial economy considerations are also an important reason for the rule. Centralising the claim in the company avoids multiple overlapping or related claims arising out of the same facts.

Professor Ferran indicated that she finds some of the other policy reasons put forward for the no reflective loss rule to be less convincing. She noted that the rule provides justice for the defendant by shielding it from multiple suits for the same injury and protecting it from the risk of having to pay the same damages twice (double recovery). However, concerns about subjecting defendants to multiple suits or

double recovery could also be addressed through procedural reforms and devices such as consolidation of claims or waiver requirements.

Professor Ferran concluded that the no reflective loss principle has a strong policy basis. She pointed out that, as with any general rule, there are of course questions about qualifications and limits on it. One exception arises where the shareholder has a claim, but the company does not. A second possible exception may arise if the company cannot pursue its claim because of the wrongful act of the defendant; jurisdictions vary in their treatment of this scenario.

Professor Ferran underlined that in cases where company assets may be insufficient to satisfy all claims by creditors and others, respect for the hierarchy of claims is critically important. Thus, if the solvency of the company is in doubt, assets should be preserved for creditors, not paid out to shareholders. Where solvency is not in doubt, the creditor protection rationale is less of a concern. It has sometimes been suggested that the no reflective principle should be discretionary rather than a firm rule requiring dismissal of the claim. Under this approach, the court would engage in a case by case analysis based on the circumstances. This approach has not been widely accepted in domestic law.

It is also important not to consider the no reflective loss principle in isolation from related doctrines in corporate law. For example, a shareholder whose claim is barred by the rule may be able to invoke alternative shareholder remedies, such as a statutory claim for unfair prejudice or oppression. In the corporate law context remedies for oppression or unfair prejudice tend to be directed against the corporation itself or against corporate insiders such as directors or majority shareholders (the typical remedy being an order to buy out the claimant) although the empowering legislation may leave open other possibilities (such as a buyout order directed to a third party outsider).

Overall, Professor Ferran described the situation as one in which the corporate legal systems of developed economies are remarkably similar in their acceptance of the arguments for not permitting shareholders to pursue claims for reflective loss. There are some areas of uncertainty and some qualifications at the level of detail. However, the corporate world has reached a fairly settled position which is based on important policy considerations.

Professor Ferran then turned to ISDS. She noted that she was stepping outside of her area of expertise and was accordingly proceeding hesitantly. She noted that, like corporate law, the treatment of shareholder claims in ISDS is also characterised by a high degree of consistency. However, the outcomes in ISDS are very different from those under corporate law.

Shares are generally assets entitled to investment protection under investment treaties so that it is clear that shareholders can make claims. However, unlike the case in corporate law, shareholders can make claims under typical BITs for reflective loss as well as direct injury. The ability to make claims for reflective loss has been extended to indirect shareholders in many cases.

Professor Ferran stated that the results under typical BITs are surprising from a corporate law perspective. There are separate but overlapping shareholder claims arising out of the same injury to a company which cannot occur under the no reflective loss principle. There is much less emphasis than in the corporate sphere on the judicial economy considerations that lead to claims being centralised in the company. There is also a surprising lack of engagement, from a corporate law perspective, on the impact of shareholder claims for reflective loss on (i) the hierarchy of claims; and (ii) the issue of shareholder equality.

Professor Ferran observed that there are some provisions in investment treaties that are recognisable in broad terms as bearing some similarity to corporate law concepts. For example, NAFTA art. 1117

resembles a form of derivative action in some respects. Like a derivative action, art. 1117 allows a shareholder to bring an action on behalf of the company with recovery for the company. However, there are differences because derivative actions in domestic law are brought by minority shareholders whereas the NAFTA action is brought by a controlling shareholder.

Professor Ferran emphasised that she is conscious that international law is a different world from corporate law. A different policy context can provide good reasons for a different approach. It is important to analyse whether the underlying aims of the systems are different. If so, the existing differences may be justifiable.

Professor Ferran outlined a preliminary list of some important issues for consideration if governments are interested in considering whether corporate law analysis could inform inquiry into whether the no reflective loss principle should be given greater recognition in investment law. These include (i) whether the no reflective loss principle would bar only shareholder claims for reflective loss or whether it would also bar creditor claims; (ii) the definition of reflective loss; (iii) appropriate exceptions to the general rule; and (iv) procedural aspects such as whether reflective loss would be treated as a preliminary objection or only as part of the merits, as well as how it would be treated in the context of review of decisions. Careful analysis is needed because unthinking transplants from one system to another can create serious problems.

The Chair thanked Professor Ferran for her very informative and enlightening presentation. He noted that Professor Ferran had pointed out the similarity of approaches to reflective loss in advanced systems of corporate law. In ISDS, there is also a great deal of similarity in approaches under most BITs, but the outcomes were completely different from those under domestic law. He welcomed the explanations of the policy basis for the no reflective loss principle and the attention to possible qualifications and limitations to the general rule.

The Chair noted that Professor Ferran had stated that the principles generally barring claims for reflective loss are consistent in advanced systems. He inquired in particular whether there are differences between common law and civil law systems. Professor Ferran stated that while she is not an expert in civil law systems, several recent studies address the issue. European jurisdictions from both civil law and common law systems all treat reflective loss in a remarkably similar manner (despite differences in other areas of corporate law). The European Court of Human Rights has also reflected the same thinking and clearly distinguishes between companies and shareholders. The US generally applies the no reflective loss principle rule although there are some differences in detail between some cases. The corporate world has reached a fairly settled position in which the basic principle is very well-established.

A participant asked how a corporate lawyer would apply the no reflective loss principle in a context where the assets of the company are expropriated. Professor Ferran noted that the starting point in corporate law is that if it is the asset of the company that has been expropriated or wrongly appropriated, it is up to the company to seek to recover the assets or their value. In some cases, corporate insiders who remain in control of the company (such as directors) rather than outsiders may be responsible for the wrongful appropriation/expropriation of company assets. In this specific context, case law varies between some jurisdictions. In England, the courts have found an exception and have allowed reflective loss claims. Hong Kong China would still require payment to the company in order to protect creditors and others, and would make a derivative action available for this purpose.

The Roundtable also considered a background paper that placed reflective loss claims in a broader context of purposes of advanced systems of corporate law notably as derived from the work of a major

comparative corporate law project involving leading scholars from several countries (Germany, Italy, Japan, Switzerland, United Kingdom, United States).¹¹

Three important functions of corporate law were identified in the background paper: (i) providing business enterprises with easily-usable and recognisable legal forms that have known attributes; (ii) reducing the costs of organising business through the corporate form; and (iii) permitting companies to serve efficiently as distinct contracting parties. The distinctive features of the business corporation - the most widely used organisational form for large-scale enterprise in all advanced corporate law jurisdictions – were described, including in particular its separate legal personality, the limited liability of its shareholders, the transferability of its shares and its delegated management through a board.

Separate legal personality refers to a number of key attributes of the corporation that allow it to serve as an efficient contracting party. In addition to the ability of the company to sue and be sued in its own name and rules regarding who has authority to act in the name of the company, these include “entity shielding” – protection of the company’s assets from its shareholders and the personal creditors of those shareholders.

Entity shielding is achieved through rules that give creditors *priority* over shareholders for access to company assets and that provide *liquidation protection* to the entity by preventing shareholders from withdrawing their share of firm assets at will. Entity shielding permits the firm to make contractual and other commitments that are credible because they are bonded by company assets; facilitates and lowers the cost of the company’s access to credit; and, together with limited liability, greatly simplifies both company and individual shareholder insolvency. Together, owner shielding (limited liability) and entity shielding set up two separate pools of assets: business assets are pledged as security to business creditors, while the personal assets of shareholders are reserved for those shareholders’ personal creditors. Corporate law scholars have suggested that the corporate law rules creating the company’s separate legal personality in advanced jurisdictions are value-enhancing for the company and cannot be replicated by contract.

The background paper suggested that for creditors (and non-claiming shareholders), the availability of shareholder claims for reflective loss in ISDS may mean that regulatory risk is compounded by (i) liquidation risk because shareholder claims for reflective loss may prevent the company from reconstituting its assets following the government injury; (ii) priority risk because it may be unclear whether ISDS arbitrators will be able to prioritise creditor claims adequately; and (iii) interference with governance of the company by the board because each covered shareholder can unilaterally decide to bring a claim for reflective loss at any time, based on its own view of government action, with uncertain consequences for the company. Shareholder claims for reflective loss also introduce variations in the rights of shareholders which may raise policy issues relating to the transferability of shares.

The background paper also considered possible responses by investors to the availability of shareholder claims for reflective loss in ISDS. Some corporate constituencies and in particular covered shareholders with significant investments benefit from exceptional remedies through shareholder claims for reflective loss in ISDS and can be expected to increase their investments. Others face new risks. Creditor reactions to the new risks may range widely to include modified lending practices, demanding higher prices for credit or attempts to bring reflective loss claims as creditors. Creditor losses may be concentrated among smaller unsophisticated creditors.

A second background paper responded to Roundtable interest in more analysis of treaty practice relating to shareholder claims in ISDS. The paper first considers treaty regimes for shareholder claims and company recovery. The ability of shareholders to claim under an investment treaty derives from the

¹¹ Reinier Kraakman et al., *The Anatomy of Corporate Law* (2d ed. 2009).

widely-recognised status of shares as an investment. It is generally accepted that shareholders can claim in ISDS for injury to their direct rights, such as the right to vote. Treaties generally do not explicitly address the question of reflective loss. ISDS arbitral tribunals have consistently found that shareholder claims for recovery of reflective loss are admissible under typical BITs.

The status of the company and its recourse is of central importance in considering shareholder claims. The background paper further analyses the two main regimes for recovery in ISDS by foreign-controlled domestic companies: (i) deeming the company to be foreign so that it can claim in ISDS on its own behalf; and (ii) permitting a derivative action in which a controlling foreign shareholder claims on behalf of the company. Some treaties further extend coverage beyond domestic companies to include coverage of complete corporate chains of home-state controlled entities. Treaties use varying control-related criteria to regulate access to company recovery.

The second part of the paper analyses how selected treaty provisions addressing consistency issues interact with the shareholder and company recovery regimes. First, some treaty provisions (waiver requirements, so-called “no u-turn” regimes or forks in the road) seek to limit overlapping claims, defined as multiple claims arising out of the same injury by shareholders and/or the company who have common ownership. Consolidation provisions typically regulate the possible joinder of overlapping or related claims in a single consolidated proceeding and provide for a fair selection process for arbitrators. Denial of benefits clauses may allow governments to limit the types of companies that can bring claims.

The paper suggests that the effectiveness of these clauses in controlling consistency risks generally may largely depend on whether claims for reflective loss are available. For example, many of the clauses designed to limit claims in alternative fora are addressed only to the claimant. Those provisions will be effective in limiting claims if the claimant is the only party that can bring the alternative claims, but will not reach claims in alternative fora by related parties, such as a shareholder of the claimant. Where shareholder claims for reflective loss is available, it appears that these provisions are unlikely to provide effective legal controls on overlapping claims or multiple claims, or to ensure fair procedures for the orderly consolidation of related proceedings.

The paper also addressed regimes for objections to shareholder claims. Under many domestic law systems, the courts regularly dismiss shareholder claims for reflective loss early in a case. This can reduce legal costs. In ISDS, challenges to shareholder claims for reflective loss fit uncomfortably into traditional limitations to preliminary objections in arbitration; they have been variously characterised as going to jurisdiction, admissibility or the merits. Most treaties do not address preliminary objections. However, some treaty provisions and the ICSID arbitration rules allow governments to require the tribunal to preliminarily rule on legally meritless claims. By expressly allowing such preliminary objections, they establish a procedural mechanism akin to the early dismissal mechanisms available in domestic law.

Treaties have not expressly addressed the scope of review of arbitral decisions to allow or deny shareholder claims for reflective loss under the treaty. Nor have they characterised the issue as jurisdictional or otherwise to define the scope of review under the general provisions of the ICSID and New York Conventions.

Some additional practical consequences of the availability of claims for reflective loss were also considered during the discussion. With regard to treaties, for example, they affect whether government injury to a domestic company is likely to give rise to a claim. If claims for injury to a company are centred in the company as under domestic law, injury to a domestic company does not give rise to a treaty claim. If the corporate entity is disregarded, injury to a domestic company can give rise to reflective loss claims. Many large domestic companies in OECD and other countries now have significant foreign shareholders.

Reflective loss claims also affect (i) the practical effect of treaty coverage of minority and indirect shareholders; and (ii) investor protection and consequently the type of investment that is encouraged.

An apparent contrast was noted between the substantial impact of the availability of claims for reflective loss in ISDS on treaties, investors and companies on the one hand, and the lack of express regulation of reflective loss in treaties on the other hand. It was suggested that the lack of attention to reflective loss in treaties, however, may not be as surprising as first appears because of the lack of domestic law models to draw on. There are few if any statutory schemes governing reflective loss claims under advanced systems of national law, even in systems with lengthy and detailed corporate law statutes. The issue is generally left for the courts. In the absence of national law statutes, it is difficult for treaty drafters to develop rules and exceptions in this area in treaty form. Arbitral case law in ISDS under typical BITs has gone in a different direction from the decisions of domestic or international courts on reflective loss. Governments may benefit from input from experts in considering the new issues that are raised.

The Chair noted that Professor Ferran had noted that there can be no easy borrowing from one system to another. On the other hand, it is important to explain the reasons for the different approaches taken by governments in their domestic law and in their BITs. Explanations are particularly important because the differences between corporate law and ISDS are not a question of nuance; the approaches are completely different. Many countries are taking a completely different approach to shareholder claims in ISDS and in their domestic systems.

A participant noted the similarities between corporate law and customary international law. The International Court of Justice distinguished in *Barcelona Traction* between the rights of a company, which can provide the basis for a claim, and the interests of shareholders, which cannot. There are also systems in ISDS like the NAFTA system that build on corporate law. What is missing in ISDS are more precise rules for determining in which scenario the shareholder should claim or the company should claim. Case law has often found that both options are available. It was suggested that a looser approach to corporate governance principles might be justified in ISDS because it applies to different national legal systems which do not always uphold principles of corporate governance. It was also suggested that cases of government interference with companies might differ from cases considered in corporate law.

Professor Ferran responded by noting that differences between the domestic law and international law context need to be identified and taken into account. She is continuing to reflect about this and her views are preliminary at this stage. She suggested that the importance of ensuring a remedy in the international context could justify in some cases broader regimes for company recovery in ISDS, eg. through a derivative claim. However, while company recovery might be expanded, there does not seem to be any policy reason that justifies individual shareholder recovery of reflective loss.

The Chair noted that many policy reasons for the bar on reflective loss had been identified in Professor Ferran's presentation, the background papers and the discussion. In no particular order, these included the risk of inconsistent decisions, exposure to double recovery, the impact on predictability, hindering settlement, facilitating treaty shopping, and upsetting the hierarchy of claims so that a claimant gets better treatment than under normal legal principles. The Chair suggested that these policy issues raised by shareholder claims for reflective loss all seem to also be relevant to ISDS. Indeed, many of the issues raised by shareholder claims, such as inconsistencies, treaty shopping and double recovery, are frequently at the core of government discussions about ISDS generally.

Given the policy issues raised by claims for reflective loss, it is important to identify countervailing policy arguments that would support the availability of shareholder claims for reflective loss because they are widely available under current law. The Chair invited the group to identify the reasons that could explain the allowance of such claims in ISDS. Discussing the issue, no strong arguments were put forward

to explain the differences taken in investment treaties versus the approach taken by the same countries in their corporate law systems. The lack of an identifiable policy rationale for existing law was an important finding and merited further attention.

Professor Ferran was asked whether she could imagine any policy reasons why investment treaty drafters might want to adopt a different approach than under traditional corporate law. She noted that a background paper had noted that some governments might be interested in lowering their damages exposure compared to company recovery. An approach allowing defendants to pay only some shareholders for their losses in order to respond to a policy interest in reducing defendants' damages exposure has not been considered in corporate law. However, it was an interesting aspect to consider.

The Chair thanked Professor Ferran again for her presentation and her answers to questions.

Part IV. Investment treaties over time – Treaty practice and interpretation in a changing world

FOI began their discussions of this subject by noting that investment treaty law, like all systems of law, embodies a tension between stability and flexibility. Stability nurtures predictability and compliance, while flexibility helps legal systems stay aligned with changing circumstances and evolving needs. A background paper prepared by the Secretariat reviews treaty partners' options as they attempt to find the right balance between stability and flexibility and to ensure that their intentions are as clear to arbitration panels who interpret treaties and others (e.g. investors) who might want to use the treaties for dispute settlement. These options were divided into two categories – 'exit' and 'voice'.

Exit involves the radical move of leaving the treaty system entirely (e.g. by renunciation of treaties), thereby eliminating the need for treaty interpretation. The background paper found the following in relation to exit as an option for treaty partners:

- ***Exit is rare, at least for now.*** To date, unilateral exit from investment treaty obligations has been exceptionally rare, with only ten treaties known to have been terminated unilaterally.
- ***Investment treaties lock state parties into obligations for extended periods of time.*** In order to investigate how long treaty commitments last, the Secretariat ran a simulation using a scenario of immediate and unilateral termination all of the 1900 treaties in the FOI treaty sample as soon as such termination is permitted under the treaty. The simulation uses as inputs more than 2000 treaties' provisions on validity periods (these prohibit unilateral termination by treaty partners for a fixed period of time) and survival clauses (which extend certain treaty protections for specified – usually already made – investments). The simulation shows:
 - ***Long survival periods for investment treaty obligations.*** Ninety per cent of the treaties in the sample would continue to have some binding effect until at least 2024 – that is, at least some investments would continue to benefit from protections provided under the treaties until that date. Thus, investment treaties appear, on average, to provide for significant stability in treaty-based protections for covered investors via their validity and survival clauses.
 - ***Expanding potential for treaty renunciation.*** The scope for legal, unilateral renunciation of treaties is now high. Simulations run by the Secretariat show that two thirds of ***treaties*** in the sample could be unilaterally terminated within a year's time – that is, by the end of 2014.

The second option explored in the Secretariat background paper for countries influencing investment treaty interpretation is ‘voice’. Voice refers to the use by treaty partners of unilateral or multilateral tools to influence the use and interpretation of their investment treaties. The paper examines treaty parties’ options for voice and maps relevant treaty practice and produces the following findings.

- ***Options for voice are numerous.*** Options for voice include: crafting of clear treaty language during negotiations, amicus curiae filings for ISDS cases, other evidence of state practice such as model treaties, authoritative interpretations and other statements clarifying the meaning of treaty provisions, treaty amendments and protocols and treaty replacement through renegotiation.
- ***Silence is the dominant approach.*** The survey of treaty practice shows that by far the most common approach is silence on partners’ options for influencing treaty interpretation.
- ***Very few countries avail themselves of their options for voice.*** Although there are a large range of options for exercising voice, recourse to these options appears to be numerically small. Very few countries provide for filings by non-respondent treaty partners during ISDS proceedings and for authoritative interpretations by treaty partners of treaty texts – fewer than 1 per cent of the total treaty sample in both cases and these few cases tend to involve at least one signatory locate in the Americas.
- ***Treaty renegotiation is rare.*** A survey of investment treaty replacement through renegotiation shows that this is also very rare. However, renegotiation of treaties has, to a limited extent, made treaties both more detailed and more similar to one another.

Participants in FOI Roundtable 19 made a number of points about exit and voice in an investment law context:

Silence may be golden. One country stated its view that governments should use their treaties to establish principles that guide treaty interpretation, but, once ratified, countries should abstain from intervening. Such intervention, under this perspective, looks like *de facto* amendment of the investment treaty. In this countries’ view, the key is to develop clear treaty drafting from the outset in order to preserve government neutrality in the dispute resolution process. Thus, with respect to opportunities to participate in ongoing interpretations, this country generally prefers to maintain silence so as to preserve neutrality.

Clarity of treaty drafting is a cornerstone for an effective system of investment treaty law. A number of countries stressed the importance of clear drafting of treaties. One country noted that it had consistently made use of voice mechanism, clarifying the state interpretation on the content of many treaties and stated that this practice should become more widespread. Another country offered the view that longer and more detailed treaties are not necessarily clearer treaties.

Legal certainty (e.g. through clear treaty drafting) can be difficult to achieve since not all scenarios can be anticipated. Some FOI participants highlighted the limits to how much clear treaty drafting can help in producing more predictable treaty interpretations. They identified a number of difficulties. First, it is difficult or even impossible to foresee all of the legal issues that are likely to arise as a treaty is used by investors, arbitrators and counsel. One country clearly expressed skepticism that treaty drafting could reasonably be expected to provide a sufficient level of legal certainty for state parties and concluded that some amount of subsequent interpretation (post-ratification) is likely to be necessary. Another country noted that it exports capital to one group of countries, but imports it from another group of countries. While this country proposes one model to all negotiating partners, it is not confident that all issues that might arise – either for its investors as claimants or for its government in responding to claims -- are covered in its treaties and model.

Different treaty practice for FTAs and BITs. One country noted that it had replaced some of its BITS with FTA with investment chapters. Treaty practice for FTAs are substantially different that the treaties they replaced.

Clarifying the relationship between older treaties with older language and treaty interpretation. One country noted that, if countries have lots of treaties, fixing one treaty (e.g. through re-negotiation) cannot be expected to solve problems of interpretation because the interpretation of the other treaties is unaffected.

Another representative advanced the view that it is ***a pity that States are not more active in influencing how their treaties are interpreted***, since they are the major actors in the investment law ‘system’– both as treaty drafters and respondents to treaty based investor claims. This participant wondered with government silence on this matter was not due to either a lack of ability and capacity of states to participate in dialogue on investment treaty law.

Request for more work on state-to-state consultations on treaty application. One country asked the Secretariat to extend its survey treaty provisions to cover treaty texts that call for state-to-state consultations on how treaty language establishing special treatment of prudential, financial, tax measures in the context of the treaty. If the respondent invokes some of these areas as a defense, then the proceedings are suspended and the treaty partners attempt to reach an agreement on whether the special provision applies (e.g. whether the measure is a prudential measures).

The ***importance of encouraging UNCITRAL transparency rules***, was noted. In particular, some FOI participants emphasized the value of providing non-disputing parties (e.g. home-states) with the right to make submissions to ISDS proceedings. As the modified rules may become retroactive, they may in the future cover more than 1% of the treaties (the percentage of Secretariat treaty sample that provide for submissions by respondents).

Part V. Competitive neutrality

At the previous FOI Roundtable 18 held in March 2013, the FOI participants asked the Secretariat to continue to work on the issue of international investment by state-owned enterprises (SOEs) and deepen the analysis of this issue based on additional information and data. In response to this request, the Secretariat prepared and presented a paper discussing an empirical analysis of recent trends and patterns in the international investment activities of SOEs as well as an extended survey of international and domestic approaches for dealing with international investments by SOEs. [DAF/INV/WD(2013)14]

With respect to the analysis of recent international investment activities of SOEs, the main findings include the following:

- Five years after international investments by SOEs began to grow rapidly during the global financial crisis, governments continue to play a significant role in global investment flows.
- IM&A transactions by SOEs are four times larger than those by privately owned firms on average. This would not seem to owe to either sectoral effects (e.g. SOEs investing more in sectors where deals tend to be bigger) nor to strategic factors (e.g. SOEs acquiring larger equity stakes in their targets).
- The sectoral patterns of IM&A by SOEs differ significantly between the listed and non-listed firms. In the case of listed SOEs, over 70% of their investments went into transportation and

public utilities and manufacturing. In the case of non-listed SOEs, over half of their IM&A was in finance, insurance and real estate. This finding shows that SOEs are more industrially diversified than was found in the earlier Stock-taking.

With respect to an extended survey which examined provisions relating to state ownership in international investment agreements as well as domestic policies on inward investments by foreign SOEs, the main findings include:

- Although a relatively new phenomenon, the general trend in International Investment Agreements (IIAs) and domestic policies is towards putting in place measures that specifically address policy concerns associated with international investments by SOEs.
- The majority of the IIAs do not expressly refer to SOEs in the definition of investor. However, more recent IIAs are more likely to contain a specific reference to SOEs. The IIAs of Australia, Canada, and the United States most frequently refer to SOEs in their coverage. A few more recent IIAs contain provisions aimed at supporting competitive neutrality.
- Other international agreements including OECD instruments are, in general, ownership-neutral and do not explicitly distinguish on the basis of ownership.
- Few countries have adopted policies at the domestic level which differentiate between SOE and private investors. Four countries (Australia, Canada, the Russian Federation, and the United States) have rules specifically aimed at international investments by SOE in their foreign direct investment (FDI) review mechanisms. Canada and Australia have recently introduced changes in their policies towards inward investment by SOEs that seem designed to allow for more careful scrutiny of those investments.

FOI participants provided comments and questions and shared views on the direction for future work. Several participants stated that it would be too early to form policy guidance on this issue yet, while a participant expressed interests in initiating a preliminary discussion on policy guidance at the next Roundtable. Based on the options for possible future work presented by the Secretariat and the requests addressed by the participants, the Chair summarised that there is not still sufficient information to draw a conclusion on this issue and the additional data and analysis would be useful. In this regard, the future work would cover the data and analysis including (i) differences in how SOEs and private firms finance their international investments, (ii) differences between SOEs and private firms with respect to the social and economic impact of their international investments, and (iii) differences in the sectoral and spatial patterns of SOE and private international investments. The Chair also noted that case studies of the investment projects involving SOEs would be beneficial.

On the policy side, several participants stated that it is not still clear why the countries maintaining domestic policies which differentiate SOE investments from private ones make such policy and how they apply the standards in practice. In this respect, a participant noted that it would be useful to monitor the domestic policies dealing with investments by foreign SOEs including a presentation by a participant country on their policy approaches to SOE investments.