Roundtable on Freedom of Investment 16

20 March 2012

Summary of Roundtable discussions by the OECD Secretariat

Organisation for Economic Co-operation and Development
Investment Division, Directorate for Financial and Enterprise Affairs
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FREEDOM OF INVESTMENT ROUNDTABLE 16, 20 MARCH 2012, OECD, PARIS

SUMMARY OF DISCUSSION

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

The present document summarises the views and information contributed by participants at the FOI Roundtable 16, held on 20 March 2012. In addition to OECD members, Argentina, Brazil, PR China, Colombia, Egypt, Estonia, Morocco, Russia, Serbia, South Africa, Tunisia and the European Commission participated in this Roundtable. The International Centre for the Settlement of Investment Disputes (ICSID) and the United Nations Conference on Trade and Development (UNCTAD) were also represented at the Roundtable.

The discussions at Roundtable 16 included (i) a review of recent developments; (ii) consultations with experts with regard to investor-state dispute settlement (ISDS); and (iii) further discussion of ISDS by investment policy officials.[2]

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

1. Austria

Austria provided information on the introduction, on 8 December 2011, of a new investment screening mechanism for the purpose of safeguarding Austria's national security. The mechanism consists of a prior authorisation procedure for investments in specific sectors from outside the EU, the EEA and Switzerland. Reviews are either triggered by the filing by the investor, or *ex officio* where there is a suspicion that an investor is using a "straw-person" to circumvent the screening mechanism.

Austria also provided information on the "*Guideline to Strengthen the Sustainability of the Business Models of Large Internationally Active Austrian Banks*" that the Financial Market Authority (FMA) and the Austrian National Bank (OeNB) published on 14 March 2012. The Guideline seeks to improve the sustainability of Austrian banks' foreign operations, particularly in Central, Eastern and South-Eastern

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1 The adherents to the Declaration include all 34 OECD member countries, and 9 non-member countries: Argentina, Brazil, Colombia, Egypt, Latvia, Lithuania, Morocco, Peru and Romania.

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

Europe and to secure financial market stability in the Austrian banks' host countries and in Austria. The Guidance introduces three elements, one of which seeks to strengthen the local funding base of subsidiaries. The Austrian Financial supervisor will hitherto use the Loan-to-Local Stable funding ratio (LLSFR) as a monitoring tool. It considers that LLSFRs above 110% represents as high risk of not being sustainable and will place a particular monitoring focus on such exposed subsidiaries of Austrian banks.

2. Canada

In response to a question about an out-of court settlement of a lawsuit of the Canadian government against U.S. Steel, Canada referred to the press release by the Ministry of Industry.[3] According to this press release, U.S. Steel has given new and enhanced undertakings under the *Investment Canada Act* that provide the basis for the Government to settle its lawsuit against U. S. Steel. Canada had brought the lawsuit against U.S. Steel for an alleged breach of undertakings made in the course of a review under the *Investment Canada Act*. These initial undertakings were given when U.S. Steel acquired Canadian company Stelco in 2007 and relate to levels of employment, production and capital spending. In March 2009, US Steel temporarily shut down most of its Canadian operations.

3. China

China informed Roundtable participants about its recently introduced review for inward foreign investment. The reviews are carried out by a joint ministerial committee that scrutinizes planned foreign acquisitions of domestic firms with respect to potential threats to China's national security. New regulations for this procedure came into effect on 1 September 2011 and are available on the website of MOFCOM.[4] The National Development and Reform Commission (NDRC) and the Ministry of Commerce lead the committee, which is overseen by the State Council. Reviews assess the impact of a foreign acquisition on national defence, productivity, supply capacity of service, the national economy, public order, and research and development of key technologies. This includes facilities located near "major and sensitive military facilities". Also subject to the reviews are foreign acquisitions in sectors such as major agricultural products, major energy and resources, infrastructure, transportation services, key technologies and equipment manufacturers. The Ministry of Commerce may suspend the acquisition or order mitigation measures if the Commission identifies a threat to national security.

3 "*Industry Minister Paradis Reaches an Out-of-Court Settlement in the U. S. Steel Litigation*", Ministry of Industry press release, 12 December 2011.

4 "*Announcement No. 53 of 2011 of the Ministry of Commerce of the People's Republic of China Concerning the Provisions of the Ministry of Commerce for the Implementation of the Security Review System for Merger and Acquisition of Domestic Enterprises by Foreign Investors*", 8 September 2011.

Box 1. Austria's Submission on its Guidelines to Strengthen the Sustainability of the Business Models of Large Internationally-Active Austrian Banks

The sustainability package, which was developed in cooperation with the Oesterreichische Nationalbank (OeNB), is aimed at increasing the capitalization of these banking groups over the medium and long term and rebalancing the refinancing structure of exposed subsidiaries. Moreover, the guideline will ensure that banking groups have adequate recovery and resolution schemes in place that may be required in future periods of stress.

The sustainability package currently applies to Erste Group Bank, Raiffeisen Zentralbank and UniCredit Bank Austria, given their size, systemic relevance and the complexity of their business models, which also apply to a large number of subsidiaries.

The following three pillars will be implemented with respect to the above-mentioned banks:

- First, to strengthen the sustainability of banking groups' capitalization, the Basel III standards on common equity tier 1 (CET1) capital must be fully implemented from January 1, 2013, without any related transitional provisions. Furthermore, the banking groups will be subject to an additional capital surcharge of up to 3 percentage points of CET1 (depending on the riskiness of banks' business models) from January 1, 2016.

- Second, to strengthen the refinancing structure of banking subsidiaries and to ensure that it is well balanced, the supervisory authority will continually monitor and analyze - based on quarterly data (starting from end-2011) - the ratio of net new lending to local stable funding. The analysis of past experience has shown that exceeding a reference ratio of 110% can be considered an alarm signal. The results of this monitoring exercise will be discussed and assessed with the competent host and home supervisors in the supervisory colleges to agree on any necessary supervisory measures.

- Third, to ensure that, in the event of crisis, a bank can be reorganized swiftly, effectively and efficiently or, if need be, wound up in an orderly manner, parent institutions are required to submit group-wide recovery and resolution schemes to the supervisory authority by the end of 2012 to prepare for potential crisis situations.

The Austrian supervisory guidance is part of the European supervisory regime. The findings of the regular monitoring exercises will be analyzed and discussed with the competent host and home supervisors in the supervisory colleges and with the European Banking Authority (EBA). On this balance, appropriate risk mitigation measures may have to be adopted and implemented, which ensure a differentiated, market-specific approach.

4. Germany

In response to a question about press reports published in December 2011, according to which the German financial services supervisory authority *BAFIN* instructed *HypoVereinsbank*, a German bank owned by Italian bank *Unicredit*, to refrain from transferring capital to *Unicredit*, Germany informed

Roundtable participants that the financial services regulator *BAFIN* was, like other supervisory authorities, working on the question of the provision of "upstream loans". In this context, *BAFIN* assesses the provision of loans between affiliates, in Germany and abroad, both in terms of existing loan structures and any corporate and controlling relationships, and in terms of the specific risk and liquidity situation of the respective institutions. Germany was not in a position to provide specific details regarding individual institutions for reasons of confidentiality.

5. Korea and other countries with bank levies

At the December 2011 FOI Roundtable 15, Korea was asked to explain its bank levy on non-deposit foreign exchange liabilities of financial institutions. At that time, Korea expressed a preference for continuing dialogue on this matter by placing it in the context of other bank levy policies adopted by other Roundtable participants. In response to Korea's request for a broader consideration of bank levies, it was agreed that FOI Roundtable 16 should explore the general question of bank levies and, in that context, the particular question of Korea's levy.

Accordingly, the OECD Financial Markets Secretariat was invited to present updated information on bank levies, based on its 2010 study, "Systemic Financial Crises: How to Fund Resolution".[5] The study identified two main motivations for such policies: 1) revenue raising, which includes *ex ante* revenue raising in anticipation of future bank resolution financing requirements and *ex post* funding of past resolution programmes; and 2) corrective measures designed to discourage particular behaviours by financial institutions.

The study shows that many countries have adopted bank levy programmes. Table xx, which was updated to 2012, displays key attributes of these programmes for 11 countries and provides details on various policy settings, including rate, base, scope (which financial institutions are required to pay the levy) and allocation of funds. The table shows that a wide variety of bases are used in these policies, including uninsured liabilities (Sweden), assets (Hungary), total liabilities (Iceland) and "excess bonus payments" (the UK's one-off levy).

5 This 2010 paper by Sebastian Schich and Byoung Hwan Kim is available at: www.oecd.org/dataoecd/16/16/46681329.pdf.

Table 1. Key aspects of bank levies or taxes

	Sweden	United States	Hungary	Iceland	United Kingdom		Germany	France		Austria	Portugal	Slovak Republic	Italy
Name	Stability Levy (IDec2009)	Financial Crisis Responsibility Fee (proposal; Jan 2010)	Tax on financial institutions (Sep 2010)	Special Tax on Financial Institutions (Dec 2010)	Bank levy (Jan 2011)	Bank Payroll Tax (One -off levy, Dec 2009)	Bank Levy (Jan 2011)	Tax on Banks (Jan 2011)	Temporary Bonus Tax (Accounting year of 2009)	Stability levy (Jan 2011)	Bank levy (Jan 2011)	Specific Levy for selected financial institutions (Jan 2012)	Permanent Bonus Tax (Jan 2010)
Allocation	Stability Fund	General budget (recoup costs of TARP Fund)	General budget	General budget	General budget	General budget	Restructuring Fund	General budget	General budget (used for support for SMEs)	General budget	General budget	Separate off-budgetary account	General budget
Scope	Banks	Banks and other financial companies (with assets exceeding USD 50 billion)	Banks, insurance companies and other financial institutions	Banks	Banks and building societies with liabilities exceeding GBP 20 billion	Banks, investment companies, building societies	Banks	Banks and other financial companies with equity of more than EUR 500 million	Banks, credit institutions, investment firms	Credit institutions	Banks and credit institutions	Banks	Banks and other financial institutions
Base	Uninsured Liabilities	Assets minus Tier1 capital minus insured deposits	Assets. (the base is different for non -banks)	Total liabilities	Assets minus capital minus insured deposits	Excess bonus payments over GBP 25,000	Total liabilities minus customer deposits and equity Off-balance sheet derivatives	Minimum equity	Excess bonus payments over EUR 27,500	Assets , and nominal amount of derivatives	Liabilities minus Tier 1, 2 capital minus insured deposits/ Notional amount of derivatives	Liabilities minus equity and insured deposits	All bonuses exceeding three times fixed pay
Rate	0.036%	0.15%	0.53% of assets over HUF 50 billion and 0.15% on the part below the threshold	0.000975%	0.075% of short -term liabilities and 0.0375% of long -term liabilities	50%	Progressive 0.02%-0.04% 0.00015% on off-balance derivatives	0.25%	50%	0.055% or 0.085% for assets 0.013% for derivatives	0.05% for the tax base of liabilities, and 0.00015% for derivatives	0.4%	10%

Source: updated version of table presented in Schich and Kim, “Systemic Financial Crises: How to Fund Resolution.” OECD Journal: Financial Market Trends. Volume 2010. Issue 2.

None of the bank levies shown in the table are based on non-deposit foreign exchange liabilities, which is the base used for Korea’s bank levy. Box 2 presents the description and explanation given by Korea to FOI Roundtable participants of its policy. The description suggests that the measure is intended to be “corrective” – to discourage excessive short term foreign borrowing.

Box 2. Korea’s presentation on its bank levy

One salient feature of the Korean economy has been the volatility of capital flows. In the previous two crises, namely the 1997 Asian financial crisis and 2008 global financial crisis, the Korean economy faced systemic risks triggered by rapid outflows of capital, which had flowed into Korea during boom times. In particular, short-term borrowings in the banking sector were recognized to be the most volatile channel of capital movements. Korea’s bank levy aims to reduce such systemic risks caused by sharp swings of capital.

The bank levy is designed based on the principles of *A Fair and Substantial Contribution by the Financial Sector* agreed by G20 Leaders. The bank levy is charged on banks in consideration of the systemic and potential risks they pose to the financial sector. In Korea, the banking sector accounted for 96% of the total non-deposit foreign currency liabilities held by the financial institutions as of end of 2010. The levy will be reserved in the government fund (Foreign Exchange Stabilization Fund) and its proceeds will be used to provide liquidity to failing financial institutions in the event of a financial crisis.

The bank levy is charged on foreign currency liabilities of the banks, as sharp swings in foreign capital pose higher risks to the Korean economy. However, deposits in foreign currency are not subject to the levy, because they are covered by the deposit insurance scheme.

The bank levy is charged at between 2~20 basis points, depending on the maturities of debt instruments, in order to reduce the highly volatile short-term liabilities and encourage long-term and stable sources of funding. A rate of 20 basis points is charged on short-term liabilities with maturity of one year or less, whereas a low rate of 2 basis points is charged on long-term liabilities with maturity of more than five years.

The bank levy in Korea is a macro-prudential measure, designed to enhance external soundness of banks by curbing their excessive foreign currency borrowings, which may potentially pose systemic risks to the Korean economy. As such, the levy does not restrict or prohibit individual financial transactions of banks. The levy is annually charged on banks' outstanding foreign currency borrowings from residents as well as non-residents. Therefore, the levy does not incur any discrimination between residents and non-residents.

6. United States

The United States government has issued for public comment the draft implementing regulation for the so-called "Volcker Rule" of the Dodd Frank Act of 21 July 2010. The Volcker Rule prohibits an insured depository institution from: i) engaging in proprietary trading; ii) acquiring ownership positions in a hedge fund or private equity fund or iii) sponsoring such funds. The draft regulation contains exemptions for certain operations conducted outside the United States by foreign entities[6].

High level financial officials from Canada, France, the European Union, Japan and the United Kingdom have publicly expressed concerns about the implementing regulation. Their concerns relate *inter alia* to: i) possible conflicting requirements involving this regulation and those prevailing in other jurisdictions; ii) extraterritorial impacts of US regulations; and iii) possible discriminatory, negative impacts on non-US government bond markets (which under the draft rules would be subject to trading restrictions while US government bonds would not). Cooperation on avoiding conflicting requirements[7]

6 The consultation document for this draft regulation is Federal Register/ Vol. 76, No 215/ Monday, November 7, 2011/ Proposed Rules of Implementation, page 68846, and attached questions at pages 68910 to 68912. This document clarifies the meaning of the draft regulations, including their treatment of foreign banks, and, in particular, explains exemptions relevant to foreign banks in relation to proprietary trading and taking positions in "certain funds and investments". For the exemption concerning proprietary trading, comments on Section 6(d) of the consultation document states (at page 68880): "Section I.6(d) of the proposed rule implements section 13(d)(1)(H) of the Bank Holding Company Act (BHCA), [footnote omitted] which permits certain foreign banking entities to engage in proprietary trading that occurs solely outside of the United States [footnote omitted]. **This statutory exemption limits the extraterritorial application of the prohibition on proprietary trading to the foreign activities of foreign firms, while preserving national treatment and competitive equality among U.S. and foreign firms within the United States.** Consistent with the statute, the proposed rule defines both the type of foreign banking entities that are eligible for the exemption and the circumstances in which proprietary trading by such an entity will be considered to have occurred solely outside of the United States." A similar text can be found in relation to "certain interests in, and relationships with, hedge funds and private equity funds" in comments on Section 13(c) of the proposed implementing rules (at page 68882 of the consultation document).

7 Countries adhering to the OECD Declaration on International Investment and Multinational Enterprises have agreed to co-operate so as to avoid or minimise the imposition of conflicting requirements on multinational enterprises.

and non-discrimination against investments in foreign securities[8] are values shared by the international investment policy community and reflected in OECD instruments.

In response to a request to provide additional information about draft implementing regulation, the United States noted that the policy formation process in the United States (of which this public comment procedure is a part) is complex. As a consequence, the outcomes of the process cannot be known at this time. The United States promised to provide further information when the development of the implementing regulation is more advanced.

Part II. Investor-State Dispute Settlement – Expert Consultations

The Roundtable welcomed Professors Catherine Rogers (Pennsylvania State University), Anne van Aaken (University of St. Gallen) and Shotaro Hamamoto (Kyoto University), together with Mr. Joachim Karl from UNCTAD. These experts provided further information about ISDS issues raised in earlier Roundtable discussions and in the Secretariat scoping paper.[9]

Professor Catherine Rogers discussed the selection and regulation of ISDS arbitrators. She emphasised that while some parties underestimate the critical importance of arbitrators to cases, arbitration specialists focus intensively on arbitrator selection because they see it as essential to success in ISDS cases. They seek to learn everything possible about each potential party-appointed arbitrator or chair. Prof. Rogers noted that parties will typically try to choose a party-appointed arbitrator with a favourable pre-disposition to their case. Well-advised parties want their party-appointed arbitrator to operate at two levels; to be well-disposed to their case as an individual and, as a member of the panel, to be able to interact with and convince others on the panel and in particular the chair.

Prof. Rogers underlined the problem of unequal information or "information asymmetries" between different parties with regard to arbitrator selection. Senior partners in law firms, for example, will typically have easier and better access to informal information exchange with colleagues with experience with particular arbitrators. In contrast, outsiders to the system, seeking the same information, would likely not elicit the same degree of information about a potential arbitrator. Information asymmetries at the level of parties and their lawyers can be compounded at the level of party-appointed arbitrators: a poorly-chosen party-appointed arbitrator will be less effective in selecting the chair. Arbitration institutions such as ICSID, PCA and the ICC also compete for arbitration business on the basis of their capacity to select arbitrators based on non-public information.

Information about arbitrators is thus a highly valuable commodity to which parties frequently have unequal access. Information on arbitrators is kept as proprietary information by law firms and arbitration institutions, giving rise to what Prof. Rogers described as a grey market in arbitrator information.

Some proposals that attempted to correct the market imperfections and improve information about arbitrators by suggesting the creation of a database of information had met strong opposition. Both top law firms, which in effect sell this information, and arbitrators, who frowned on the idea of being evaluated, were generally strongly opposed to the idea. Potential beneficiaries of improved information, including

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8 See Article 2 (Measures of Liberalisation) of the Codes of Liberalisation of Capital Movements. Members shall grant any authorisation required for the conclusion or execution of transactions and for transfers specified in an item set out in List A or List B of Annex A to this Code.

9 In addition to their presentations at the Roundtable, the three professors provided summary reports to the Roundtable, available at http://www.oecd.org/dataoecd/14/8/50241347.pdf?contentId=50241348.

parties and governments, had not had sufficient opportunity to react to the proposal to overcome the opposition.

Prof. Rogers also noted the link between arbitration selection methods and high ISDS case costs. With lawyer costs running to USD 1000 an hour, the intensive research on each potential arbitrator adds to high ISDS case costs.

A participant asked about supply and demand for ISDS arbitral services, and the extent to which the supply of new arbitrators is an issue in light of the high degree of reliance on insider information in arbitrator selection. Prof. Rogers noted that market analysis with regard to arbitrators and information about arbitrators is very useful albeit sometimes controversial amongst arbitrators. Professor Rogers noted that the relatively small number of arbitrators could not be explained by a shortage of qualified arbitrators, as new arbitrators, including from other countries than the EU or the US, were now available on the market. Rather, the unwritten rules governing selection (e.g. having prior commercial arbitration experience) accounted for the small number of new entrants. Gender and ethnic diversity were lacking in part because of perceived risks in appointing an "unknown" arbitrator.

An ICSID representative noted in this regard that when ICSID is asked to select an arbitrator, it seeks to select qualified candidates with relevant experience (including public international law, investment law and arbitration) and makes a particular effort to identify qualified candidates who are female and/or who are from developing States. It regularly proposes such candidates on the ballot of potential arbitrators that it sends to the parties. Where parties cannot agree on a nominee proposed in the ballot, and in the case of ad hoc Committees (which decide on requests for annulment of awards), ICSID must select from the ICSID Panel of Arbitrators. The ICSID Panel of Arbitrators is comprised of State appointees (four per State) plus 10 selected by ICSID (known as the Chairman's list). In choosing from the Panel, ICSID considers all relevant factors (including expertise, potential conflicts of interest, language ability, and availability), while seeking to include appointees who are female or from developing States. The parties are then provided with the name and curriculum vitae of the arbitrator(s) proposed by ICSID, giving them an opportunity to raise any compelling concerns. The selection process is not a science, but rather an exercise of judgement based on the best available information.

In response to questions about empirical efforts to measure the impact of arbitral selection on the outcome in cases, Professor Rogers noted that the limited empirical research to date, as noted in the scoping paper, has primarily focused on general outcomes. In practice, however, lawyers frequently seek information on arbitrator attitudes to narrower procedural and substantive issues on which superior information can be very important. Parties that need to challenge the credibility of a key opposing witness will want to know about a potential arbitrator's views about the proper scope of lawyers questioning and cross-examination; in other cases, clients may have documents that would damage their case and counsel will want to know if the arbitrator will look favourably on requests for document production. Coupled with knowledge about an arbitrator's views about narrow or broad interpretation of treaty protections or of the particular provisions at issue, this type of knowledge can provide significant advantages to a party.

A participant noted the link between the need to improve transparency about ISDS and unequal information in arbitrator selection. While the current UNCITRAL negotiations over transparency are indicative of the general trend towards greater transparency, the negotiations do not, in his view, cover the full range of existing problems. He suggested that there is a role for continuing Roundtable work in this regard.

Participants also raised the issue of potential alternatives to ISDS arbitration. One participant was concerned by what he perceived as a drift in the discussion towards advocacy of a court-like system. He indicated it was important to consider fundamental questions such as whether States want to move to a court-like system and to a system with an appeal. Among other issues, this would raise the issue of the future of ICSID and other arbitration systems. His own view was that the arbitration system works well in general notwithstanding a few problems; only a few countries are unhappy with the system. He emphasised that the current arbitration system is a choice-based system in which investors typically can choose between arbitral fora. If a court-type system is at issue, it is necessary to consider how it would look.

Prof. Rogers noted that eliminating party-appointed arbitrators in ISDS, as advocated by some, would in effect go a long way towards instituting a court-like system. It could for example involve a limited range of arbitrators with appointments by a third party. Characterising herself as a "loyal opposition" with a reformist approach to the arbitration system rather than as an outright critic, she suggested it might be too early for a court because investment law is in flux. She noted that ISDS is criticised due to the broad interpretive power exercised by arbitrators, but she questioned whether States would want to give that degree of power to a court at this stage.

Prof. Rogers noted that she was less concerned about party-appointed arbitrators than some other commentators cited in the Secretariat scoping paper. While there were issues of concern, parties generally remain attached to the practice and party-appointed arbitrators can offer countervailing benefits. For her, the primary focus of attention in the short term should be on (i) reducing information asymmetries that give some parties advantages in the selection of both party-appointed arbitrators and the chair; and (ii) reducing the scope for strategic behaviour with regard to the selection of the chair, whose neutrality is key.

Professor Rogers also briefly addressed the regulation of arbitrators. She noted that many of the most serious concerns about ISDS arbitration, such as issue conflicts, are not addressed by existing ethical rules or standards. There is also an ideological divide in investment treaty arbitration that does not exist in commercial arbitration and is similarly not addressed by existing rules. For example, the emergence of pro-investor and pro-state arbitrators, and their repeated nomination by different parties on the same side of the investor-state divide, are not captured by rules or ethical standards developed for commercial arbitration that address only repeated appointments by the same company or law firm.

A participant questioned whether the ideological divide was a real problem. He analogised the developing ideological divide between arbitrators to other situations, such as lawyers for the different interests in medical cases: lawyers typically work only for doctors, only for insurers or only for pharmaceutical companies, and do not cross over. Their career path may be determined by their early experiences. This type of ideological divide is common. It is key to have a neutral chair.

Professor Rogers also noted the question of relationships between arbitrators on a given tribunal which is also not addressed in existing rules. For instance, she criticised the ICSID Convention for providing that challenges to an arbitrator are resolved in the first instance by the other two members of the same tribunal. It is personally awkward for colleagues to negatively judge one another. In effect, the two arbitrators charged with resolving the question of conflict of interest are themselves subject to a conflict.

Another participant noted that choice is at the centre of the existing arbitration system and a court-based system would not provide this choice. However, there are profound information asymmetries at the heart of the system. In a normal market, such asymmetries, which result in substantial unfairness, would attract prompt regulatory action. The Roundtable may wish to further consider this issue and what should be done. Incremental change to the system to address such deficiencies is advisable because it reduces the risk of exit by States from the system.

Professor Anne van Aaken addressed remedies in ISDS and how they compare with remedies for private parties against the State in domestic administrative law. Professor van Aaken's interest in comparative remedies arose from a puzzle: why do States accept to pay damages in ISDS while their courts rarely grant damages (except for expropriation) in domestic law cases against the State involving similar fact situations? She noted that ISDS contrasts not only with domestic law, which generally restricts remedies against the State to non-pecuniary primary remedies, but also with the rest of international law which also favours primary remedies over damages.[10] She was interested in identifying what would be an optimal remedial regime from an economic and legal perspective.

Prof. van Aaken began by noting that ISDS arbitral tribunals almost invariably grant secondary remedies (damages) and do not grant primary remedies as final relief. She then addressed the arguments for and against this approach. Excluding primary remedies is sometimes understood as protecting States' sovereignty. However, Prof. van Aaken underlined that high damage awards can equally affect States' sovereignty. She also recalled that States have accepted primary remedies for private parties, including injunctions, in other areas of international law such as human rights.

Damages remedies satisfy investors' interests in obtaining quick decisions that are easily enforceable. It also corresponds to an exit option for investors. However, Prof. van Aaken noted that from an economic perspective, providing an easy exit option and a damages remedy may create a moral hazard, as investors seek to recover damages in ISDS for what are only at heart bad investment and business decisions. Questioned about empirical evidence on this moral hazard problem in the cases, she noted that many cases involve exit strategies, but that the moral hazard is a difficult question to determine empirically: company management will never admit to a bad business judgment. She noted that economists are much more likely than lawyers to see the moral hazard issue as a problem.

She further noted that primary remedies have several advantages. They can provide a better remedy and stronger protection for investors by restoring the initial situation, and they provide control over government action. She noted that historically, the development of primary remedies in domestic law constitutes one of the major cornerstones in achieving the rule of law. She added that States generally comply with primary-type remedies ordered by international courts such as the ICJ and the ECHR; she considered that States would also likely comply in investment cases due to reputational impact of non-compliance.

Turning to a comparison of national vs. international fora, Prof. van Aaken noted that the international fora provide several advantages. They are more independent from the State and their decisions are more enforceable internationally. State commitment to an international forum should also in theory lead to more investment, although she noted that the empirical evidence on this front is very shaky.

National procedures offer advantages because they may be quicker and cheaper, they involve self-control of the State and are familiar to States, and they may be more acceptable to the State. She considered that national courts can be unbiased and independent in many cases; it is not appropriate to base policy on the assumption that national courts are necessarily biased. They can grant primary remedies that satisfy an investor better than an ex post damages remedy.

[10] As noted in the Secretariat scoping paper, different legal systems have different names and categorisations for the various types of remedies for improper governmental action. A key distinction exists between (i) non-pecuniary remedies, which are also referred to as "primary" or "judicial review" remedies (eg., annulment or quashing of decisions, injunctions and declaratory relief); and (ii) pecuniary remedies (principally damages and interest), also referred to as "secondary" remedies. Common law systems frequently refer to non-pecuniary remedies against the State as judicial review remedies. In German law, the term primary remedies is more frequent. Such remedies are also referred to as public law remedies.

Prof. van Aaken suggested that an optimal solution would involve three aspects and combine both the national and international systems. It would give national procedures more importance than do current treaties or current interpretations of treaties by arbitral tribunals. It would first involve requiring respect for waiting periods to improve investor incentives for settlement. Waiting or "cooling-off" periods allow for negotiations and allow States to keep a degree of control on the settlement procedures; they may also result in full satisfaction for the investor if the State agrees to take corrective action (in effect providing a primary remedy in some cases, as in the case of Vattenfall). In that case, waiting periods can be functionally equivalent to procedures before domestic courts. Where tribunals ignore waiting period requirements or treaties omit them, it reduces the investor's incentive to engage in settlement negotiations. For treaty drafters, waiting period provisions could in some cases be drafted more explicitly.

Second, disputes should generally be brought to national courts before resort to international arbitration is permitted at a third stage. This would provide the investor with an avenue to seek primary and secondary remedies successively, a sequential approach similar to that applicable in many domestic law systems. Moreover, national courts would be operating in the shadow of possible future international proceedings; ISDS could then contribute to good governance in host states by helping improve the performance of local judicial and administrative systems. Queried about empirical evidence in this regard, Prof. van Aaken noted that solid data was lacking. A participant suggested that this complementarity between national and international fora might not work in some cases due to a risk of conflict between a national court decision and a tribunal decision leading to possible politicisation of the dispute. Prof. van Aaken responded that the system works well in the human rights context where claimants first seek national court remedies and then can obtain international review.

Prof. van Aaken noted that a number of ISDS arbitral tribunals, starting with *Maffezini v. Spain*, had found treaty clauses requiring prior recourse to national courts for 18 months before arbitration can be commenced to be "nonsensical" and had not applied them. She considers that the tribunals must have considered that 18 months was too short a time period to allow effective court action. However, available empirical evidence suggests that courts in most developed and developing countries generally resolve private law cases within 9 months. Public law cases are unlikely to take much longer. Prof. van Aaken welcomed two very recent court and arbitration decisions that applied treaty provisions requiring prior recourse to national courts for 18 months.

Prof. van Aaken stated that while prior recourse to national courts would be generally optimal, investors should have direct access to international arbitration in some exceptional cases. A first exception would be where a treaty has a fork in the road provision requiring an immediate choice between domestic and international forum. However, Prof. van Aaken criticised such provisions as counterproductive because they drive investors to immediate recourse to international arbitration and largely eliminate the potential for primary remedies: even the commencement of a domestic proceeding risks waiving recourse to arbitration. A second exception would be for serious cases of denial of justice by domestic courts. A third exception would be cases where a legislative act is at issue (and there is no domestic system of direct constitutional review). It is likely unrealistic to expect that a first-instance decision by a national court would lead to legislative reform by the parliament.

As an alternative to her proposed approach, Prof. van Aaken noted that international arbitral tribunals could also conceivably expand their use of primary remedies, citing the *Goetz v. Burundi* case as a rare example.[11] A participant noted that as a treaty negotiator, it was difficult to give that power to arbitrators. He noted that if foreign investors were given the power to obtain the annulment of part of a general regulatory regime through arbitration, while domestic investors were not given that possibility, it would raise serious concerns.

11 *Goetz v. Republic of Burundi*, Award Pt 1, ICSID (Sept. 1998).

Profs. van Aaken and Hamamoto noted that international tribunals do not have the power to annul national measures; however, they can declare a measure to be contrary to international law or issue an injunction requiring the State to take corrective action. Professor Hamamoto noted in this regard that the ECHR does not provide explicitly for primary remedies. Rather, Article 21 of the ECHR Convention states that "just satisfaction" shall be granted. Subsequent interpretation in the 1980s and 1990s expanded the court's remedial powers to include primary remedies, and domestic law was adapted to require governments to react to such orders. He stated that he did not think governments would accept such an approach in investment law which was different than human rights. In conclusion, Prof. van Aaken underlined that it was important to optimise rather than maximise investor protection. She opined that the pendulum may have swung too far toward investor protection; rather than have it swing back too far in the other direction, it is important to find a middle ground acceptable to all sides.

Professor Shotaro Hamamoto also discussed the question of remedies in ISDS and domestic law, including providing a Japanese perspective. Professor Hamamoto's presentation focussed first on the international level and on whether ISDS arbitral tribunals should grant primary remedies. He provided three reasons for States preferring secondary, damages remedies in ISDS arbitration. First, certain types of primary remedies are sometimes not available or applicable. For instance, an investor may be seeking an annulment, but annulment cannot be granted in the absence of a prior administrative act. Problems such as physical intimidation, as seen in some ISDS cases, are not susceptible to remedy through annulment.

Second, Prof. Hamamoto stated that foreign and domestic investors often have different remedial interests: as long-term players in the market, domestic investors can be interested in primary remedies that will correct the situation going forward; in contrast, foreign investors who have recourse to arbitration are generally seeking to exit the market and want compensation.

Third, primary remedies issued by arbitral tribunals can create problems for governments. Tribunal decisions can require that the government convince a particular ministry or even Parliament to take action which can be very difficult. Arbitration cases providing for primary remedies with regard to domestic court decisions also create problems: if an arbitral award obliges the host State to annul a judicial act, the arbitral tribunal will be considered to be acting as an appeals court for domestic court decisions. Prof. Hamamoto also underlined that remedies are determined by treaty provisions; most of the recent Japanese investment treaties preclude arbitrators from issuing primary remedies.

Prof. Hamamoto then addressed Japanese domestic law on state liability. He noted that no claim for damages has ever been brought by a foreign investor to a Japanese court; nor has any foreign investor sought judicial review remedies. His research to date had located some interesting cases which were summarised in his report.[12] No case located to date involved a claim for substantial damages by a domestic investor.

Prof. Hamamoto noted that the applicable Japanese statute on state liability for damages, as applied by the courts, imposes a higher burden on claimants for damages than do investment treaties.[13] In particular, the courts require that a claimant establish that the damage was caused negligently or intentionally in order to obtain damages; investors are not required to prove this mental state element under international investment law. In this respect, foreign investors are better protected under investment treaties than are domestic investors under Japanese law.

In the discussion, one participant noted that he shared Prof. van Aaken's favourable view of primary remedies: they were both economically preferable in that they discouraged exit strategies and legally

12 See http://www.oecd.org/dataoecd/14/8/50241347.pdf?contentId=50241348.

13 State Redress Act (Act No. 125 of 1947).

consistent with general international law principles favouring restitution in kind. The WTO was cited as an example in this regard in an area of law closely connected to investment law; the *Texaco v. Libya* case was another example.[14] He also expressed interest in the proposal to increase the role of domestic courts in ISDS. He suggested that the practically exclusive focus on damages in ISDS could be explained for the very high legal and arbitral costs in ISDS as well as the investor's need to obtain funds to pay for them.

Prof. van Aaken agreed that it was important to ask why damages are so dominant in ISDS in comparison with domestic law and other international law, but she did not think it was linked to the need to pay high legal and arbitral fees. Tribunals could award costs to the winning party in conjunction with primary remedies.

Prof. Hamamoto stated that cases of restitution in kind in international law were common with regard to human rights claims other than property rights claims, but were rare with regard to claims based on property rights. *Texaco v. Libya* was an exceptional case in that regard. The WTO is not really an exception since it does not provide restitution in kind as a remedy; rather, its remedies are forward-looking. He considered that with regard to property rights, States prefer damages to restitution in kind.

Participants raised a number of points with regard to Prof. van Aaken's criticism of fork in the road provisions. One participant suggested that the clauses are designed to address the risk of slow proceedings in domestic courts. A number of other participants recognised the validity of Prof. van Aaken's concern about the fork in the road clause dissuading recourse to domestic courts and primary remedies. However, they noted that the clause seeks to limit the ability of an investor to "game" the system; it seeks to prevent the investor from having an opportunity to try the national courts first, seeing how its case proceeds, and then having the opportunity to withdraw its domestic case and jump to international arbitration at any point if its national court case is not going well. One participant noted that this two-pronged scenario, in the absence of a fork in the road clause, had cost its government millions of dollars of legal fees. In this sense, the clause reduces the potential for investor forum shopping.

Prof. van Aaken responded that there is no potential for forum shopping where the investor is required to seek primary remedies in domestic courts first. When recourse to domestic courts is required, and the requirement is actually applied by the tribunal, investors cannot game the system and international review operates as it does under other systems. Under those conditions, international review provides an additional layer of review rather than providing scope for forum shopping.

Questions were also raised about the impact of cooling-off periods or national court requirements on the overall length of proceedings. Prof. van Aaken responded that they can make the process longer, but that they can also make it shorter. The purpose of national courts is to resolve disputes and referral of the matter to them may resolve it; similarly, if a cooling-off period leads to settlement, the case is resolved quickly and cheaply. Ultimately, the impact on case length is an empirical question. With regards to whether the length of required cooling-off periods in treaties affects the likelihood of settlement, Prof. van Aaken said that empirical data is lacking; she reiterated that if tribunals do not take the clauses seriously, investors have less incentive to settle.

Participants also considered whether expanded use of State-State proceedings under investment treaties could help address some existing issues. It was suggested that State-State proceedings could be used to seek primary remedies in the first instance. For example, a State could seek repeal of a measure on behalf of several similarly-situated mid-sized investors. A broader view of the role of BITs in facilitating investment, rather than a narrow focus only on dispute settlement, could be helpful. Prof. van Aaken noted

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[14] *Texaco Overseas Petroleum Co. v. Libyan Arab Republic*, ad hoc award (19 Jan. 1977), IV Yearbook of Commercial Arbitration 177 (1979).

she had not considered the idea especially with regard to SMIs, but she had reservations about a risk of politicisation of the dispute.

A participant noted that settlement, including through alternative dispute resolution (ADR), is preferable to arbitration because in her experience, arbitration is associated with the end of the investment relationship. Settlement can allow the relationship with the investor to be maintained. The Chair noted that UNCTAD would present its recent work on ADR later in the discussion (see below).

Questions were also raised about the appropriate ISDS policy assumption with regard to expected national court performance. One participant suggested that national courts are presumptively biased against foreigners; such expected bias is the rationale for the ISDS system. Another suggested that because national courts are usually cheaper, quicker and more efficient, it would be logical to conclude that there is no need for the ISDS system. Prof. van Aaken disagreed with these views. She first noted that national courts are not necessarily quicker than arbitration although they are certainly cheaper. She rejected the premise that national courts are generally biased. Noting that one of their functions is to control governments and legislatures, she said they could also carry out that function for foreign investors. At the same time, the availability of international review is an important protection for investors and may improve domestic court performance.

Joachim Karl, Chief of the UNCTAD Policy Research Section, discussed recent UNCTAD work on alternative dispute resolution (ADR) including a recent UNCTAD publication on the subject. He noted that interest in ADR has grown in part of out of perceived problems with ISDS arbitration including inconsistent outcomes and high costs. Interest in ADR was one of several responses, which also included clarification of individual treaty provisions that frequently give rise to disputes, withdrawal from treaties or from ICSID in a few cases, and Australia's decision to no longer seek to include ISDS provisions in its trade agreements.

He first distinguished between dispute prevention and dispute resolution. Efforts to prevent disputes are of key importance and include efforts to improve good governance; early alert systems that work across different ministries in the government; state monitoring of sectors that are prone to investor–state conflicts; providing fora for investors to voice their concerns and obtain administrative review of disputed measures; and preventive diplomatic exchanges. It is also important for States to consider their dispute preparedness. Some States have set out their dispute prevention policies.

Mr. Karl noted that there are different forms of ADR; mediation which is generally informal can be contrasted with conciliation which is usually governed by pre-existing rules, such as those of ICSID, UNCITRAL or the ICC. Mr. Karl suggested that generally, pre-conditions for a successful ADR include the parties' desire to continue their relationship and their uncertainty about the outcome of the dispute. In addition, the people participating in the ADR must have both the flexibility and the legal authority to settle the matter.

Mr. Karl also addressed the pros and cons of ADR. ADR is more flexible, faster, and cheaper than arbitration. In addition, ADR does not preclude later arbitration, and it can enable parties to avoid the unsatisfactory precedent of an arbitral award. On the other hand, ADR requires time and money and is not always successful. Moreover, it is non-transparent so that there is little public data about it and the extent to which it is used in ISDS disputes. The outcomes of ADR can be difficult to implement since compliance is voluntary.

Mr. Karl noted that investment treaties usually require parties to an investment dispute to first consult each other before starting binding arbitration; some treaties explicitly mention ADR as an alternative to arbitration. He identified institutions and rules for the resolution of disputes through ADR. Overall, he concluded that ADR is an option that parties should consider when facing an investment dispute.

A participant noted that he had observed a practice to create a separate government entity such as an ombudsman able to address investor concerns across government. Asked about whether UNCTAD had analysed the practice, Mr. Karl noted that UNCTAD has a technical assistance program which addressed that issue and helped countries. The practice is growing but there are no statistics on how many countries use it.

Another participant noted that the discussion on remedies had led to broader consideration of the purpose of the ISDS system. An ISDS system initially conceived of as a last resort has evolved to become practically a default solution for investor disputes. It is unclear whether the change has occurred intentionally or negligently. However, routine use of a system not designed for such use causes some problems. He further stated that discussion of the system has frequently been framed simplistically in binary terms: international or domestic fora; primary or secondary remedies; providing incentives for investors to remain vs. facilitating exit strategies. Less attention has been given to how the different aspects interact: the goal should be to optimise results rather than maximise investor protection. For this, it is important to see how the different elements, including dispute prevention and ADR, can fit together.

Part III. ISDS – Further discussion by investment policy officials

Continuing their scoping level discussion of ISDS, FOI participants considered some new or expanded sections of the Secretariat scoping paper on ISDS, and in particular third party financing, forum shopping and treaty shopping. They also discussed a large-scale Secretariat survey of provisions on ISDS found either in expropriation clauses or in sections on ISDS in over 1600 investment treaties signed by Roundtable participant countries.

Third party financing

Participants recalled from their December 2011 Roundtable discussion that third party litigation funding is a recent development both in domestic jurisdictions and in ISDS. It is primarily composed of institutional investors who invest in litigation by providing funding for a claim in exchange for a percentage of any recovery. It is subject to differing regulation in national systems ranging from a permissive approach to prohibition.

As during the December 2011 Roundtable, participants noted that the availability of third party financing could provide benefits and in particular improve access to justice for investors in ISDS. At the same time, it raises a number of policy issues. Participants discussed the impact of funding on incentives for investors with regard to the likelihood and types of settlements of ISDS cases and the likelihood of investor exit from the host state. It was noted that funders have little interest in non-pecuniary primary remedies because they do not provide any return on the funder's investment in the case. Accordingly, investors who used funding would likely only seek damages. The claimant's degree of economic interest in the claim, the impact of funding on transparency and the link between third party funding and mass claims were also seen as of systemic interest by some participants. Some participants suggested that issues such as improper relationships between undisclosed funders and arbitrators, and the risk of funder misconduct could be appropriately addressed by regulation in arbitration rules or treaties.

Forum shopping and treaty shopping

Forum shopping involves efforts by disputing parties to have the dispute resolved in what they believe is the most favourable forum for their interests. Parties compare possible fora with respect to a range of variables including likely decision-makers; the integrity of the adjudication process; the applicable law for considering the merits of the cases; the degree of transparency of proceedings; and the impact of the choice of forum on execution and enforcement. Parties also have to consider the likelihood of each forum accepting their case.

Forum shopping in investment law can arise in various scenarios, but the discussion focused on investor choice from among multiple international arbitration fora as provided for in many investment treaties. Fifty six per cent of investment treaties in the OECD survey of ISDS provisions in investment treaties offer to investors a unilateral choice of forum and this proportion has risen over time. Thus, many of the 52 States considered in the treaty sample have a policy of facilitating forum shopping by explicitly providing options for investors.

Treaty shopping under international law occurs when an investor structures an investment (e.g. by creating an intermediate subsidiary) in order to seek to qualify for protections conferred by particular investment treaties. The practice typically involves establishing an intermediate corporate entity in a State that is party to a targeted treaty so that the entity can be the claimant. For example, a US investor may wish to benefit from investment protections for its investment in Zimbabwe, even though the US does not have an investment treaty with Zimbabwe. By structuring the investment through another country that does have such a treaty – for example, the Netherlands – the investor may be able to benefit from the protections provided in the Netherlands-Zimbabwe BIT (1996).

Treaty shopping is facilitated to the extent that the rules enabling an investor to claim protections are interpreted as being permissive. Mapping the scope for investment treaty shopping is a difficult task, in part because many of the relevant concepts have yet to be clarified in treaties and in case law.

Case law is emerging on many issues relevant to the scope for treaty shopping. For example, on several occasions, tribunals have considered disputes involving host States and entities controlled by their own nationals.[15] At least two other recent cases have raised the issue of the temporal aspect of treaty shopping due to allegations that investors restructured their investments in order to seek to benefit from particular treaty protection *after* the dispute had arisen.[16]

FOI participants expressed a variety of views about forum and treaty shopping:

- ***Forum shopping***. It was noted that most States seek to limit forum shopping in domestic legal systems whereas many States actively provide for forum shopping in ISDS. Participants considered possible reasons for the different policies. One participant noted that his country's treaties excluded forum shopping; they provided for ICSID arbitration rather than commercial arbitration fora because ICSID is specifically designed for investor-state disputes. However, this lack of choice had raised difficulties in some cases after some States sought to withdraw from ICSID. Another participant suggested that forum shopping clauses are acceptable in ISDS because their impact was in his view limited to procedural matters. Because nothing important

15 See, e.g. *Rompetrol v. Romania*, ICSID, Decision on Jurisdiction (2008).

16 See *Yukos Universal Ltd. (Isle of Man) v. Russia*, UNCITRAL, Interim Award on Jurisdiction and Admissibility (2009); *Philip Morris Asia Ltd. v. Australia*, UNCITRAL, Australia's Response to the Notice of Arbitration (21 Dec. 2012).

was at issue in the choice, other than the system for enforcement of the award, it was acceptable to allow investors to choose. It was also suggested that forum shopping clauses are not that significant in attracting investment.

- ***Treaty shopping – scope of benefits, reciprocal benefits and free riding***. It was noted that where investors can engage in treaty shopping, States parties to investment treaties cannot be sure of the exact scope of their commitments under these treaties; this increases the legal uncertainties countries face in relation to these treaties. Some participants stated that their governments had no misgivings about treaty shopping and they sought to make their investment treaty protections available to a wide range of investors. In contrast, other participants expressed concerns about treaty shopping. One noted that if treaty shopping into a bilateral treaty by an investor from a third country is allowed, then that eliminates the incentive for that third country to negotiate treaties. In his view, States may want to restrict rights to investors from the treaty partner country in order to avoid free riding; that is, to avoid a situation in which the country's investors are able to enjoy the benefits of investment treaties without the government having to submit to the disciplines imposed by investment treaties. Another participant noted that to reduce uncertainty his government's recent treaties have sought to define more precisely the scope of protections (including by limiting treaty shopping) through, inter alia, denial of benefits clauses and clarifying that MFN clauses do not apply to procedural matters.

- ***Treaty shopping and the issue of a level playing field between domestic and foreign investors***. Roundtable participants noted that some ISDS cases involve efforts by domestic investors to use treaty shopping to get access to investment treaty arbitration (rather than being limited to their domestic courts). They noted that this raises the question of whether there is a level playing field between domestic and international investors. Participants considered why their ISDS policies would deny benefits to domestic investors that are provided to foreign investors and whether there were policy reasons for these differences in treatment. Some stated that the exclusion of domestic investors from ISDS was primarily due to the historical development of investment law and that they had not frequently considered the issue of the comparative treatment of foreign and domestic investors in recent years. At the time of the negotiation of the 1965 ICSID Convention, for example, States decided to limit access to the ICSID system to foreign investors. One participant suggested that the differential treatment could seem "bizarre" although it has a historical basis. It was also suggested that where the government gives preferential treatment to foreign over domestic entities, it may pose constitutional issues under equal rights clauses in some countries. The possibility of domestic court bias against foreigners was cited as a reason for excluding domestic investors from the system and its protections. Domestic investors were likely to be familiar with their domestic courts. A number of participants viewed the different treatment as reflecting a desire to attract foreign investment or noted that their treaties were primarily focused on protecting outward investment.

Survey of ISDS provisions in investment treaties

Participants also considered a large-scale Secretariat survey of provisions on ISDS found either in expropriation clauses or in sections on ISDS in over 1600 investment treaties signed by Roundtable participant countries. It is a factual analysis of treaty texts to identify the development of certain features and provisions over time.

Ninety-six percent of treaties in the sample provide for international arbitration. A participant noted that looking at the treaty practice is important to ground the Roundtable discussion and for drawing conclusions. The wide acceptance of arbitration suggests that it is effective; countries who reject it outright could reconsider their views in light of this evidence. At the same time, the system is not perfect and there is room for improvement.

The survey demonstrates that many countries only lightly regulate ISDS in their treaties and rely heavily on arbitral rules, principally the ICSID system or the UNCITRAL rules. However, the degree of regulation of ISDS has increased over time and a few countries thoroughly regulate ISDS. Light regulation leads to some significant differences when compared to features of domestic systems. For example, although time limits such as statutes of limitations are uniformly present in domestic law governing claims against the State, they are frequently not included in investment treaties; nor are they found in arbitration rules. States have not articulated their policy reasons for these differences in some cases.

One participant indicated that its light regulatory approach was due to its trust in arbitrators and the arbitration system. Moreover, because each case is different, regulation is difficult. Another participant indicated that while his country also trusts the arbitration system, the trend towards more regulation of ISDS is noteworthy. A quarter of the treaties signed in 2010 contained detailed regulation. Moreover, some other recent agreements excluded ISDS entirely which was not a good approach. Further reflection is appropriate to determine whether more regulation of ISDS might help the long-term survival of the system.

The survey also shows that ISDS is subject to highly varied regulation. The survey estimates that there are over 1200 different sets of ISDS provisions in the sample of 1600 investment treaties. A participant indicated that while it could be argued that these differences are specifically tailored to country needs, his own extensive experience in treaty negotiations leads him to conclude that many differences in wording occur merely because no one is charged with eliminating them. His own experience with seeing those treaties interpreted in cases suggests that such differences give unintended room for interpretation to arbitrators; the interpretations frequently do not correspond to the negotiating intent, but they can become influential. Solving the problem of excessive variation is not easy. It is important to consider whether some provisions are genuinely better than others and whether some pose systemic risks. Attention to the system is important in order to preserve it.

Further work and a public consultation on ISDS

The Roundtable discussed its future work and agreed to continue its exploration of ISDS. It also agreed to engage in a broad electronic consultation based on the scoping paper, including its questions for discussion. The treaty survey will also be made available on the electronic consultation website. The aim will be to engage in an open and inclusive consultation with a broad range of participants in order that the Roundtable may benefit from a wide range of input for its further consideration of the system and how it might be improved.