22nd Roundtable on Freedom of Investment

17 March 2015

Summary of Roundtable discussions by the OECD Secretariat

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FREEDOM OF INVESTMENT ROUNDTABLE 22

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SUMMARY OF DISCUSSIONS

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

The present document summarises views and information contributed by participants at Roundtable 22, held on 17 March 2015. Participants included representatives of governments of the 34 OECD members as well as the European Union, of the twelve other governments that have adhered to the OECD Declaration on International Investment and Multinational Enterprises (Argentina, Brazil, Colombia, Costa Rica, Egypt, Latvia, Lithuania, Peru, and Tunisia) as well as government representatives from P.R. China, India, Indonesia, and South Africa.

The discussions at Roundtable 22 addressed several topics including the Conference on investment treaties hosted by the Roundtable at the OECD on 16 March 2015, entitled Investment Treaties: Policy Goals and Public Support; ssocietal benefits of international investment agreements; and a discussion of recent investment policy developments in countries invited to the Roundtable.

1. The 16 March 2015 OECD Conference on Investment Treaties: Policy Goals and Public Support

On 16 March 2015, the day before Roundtable 22, the Roundtable hosted a Conference at the OECD entitled Investment Treaties: Policy Goals and Public Support. Through panel discussions, the Conference assessed opportunities and challenges associated with investment treaties and how these treaties can be improved. Building on Roundtable and OECD analysis, the main topics of the Conference were (i) the purposes, performance and ongoing changes to investment treaties; (ii) the scope of investment treaty protection including a case study on the types of shareholder losses that should be covered by treaties; (iii) strengthening public confidence in investment treaties through possible improvements in Investor-State Dispute Settlement (ISDS); and (iv) the scope for improved management of the large network of investment treaties and how the OECD, working with other international organisations, can support constructive improvement and modernisation of the treaty system.

In assessing the Conference during the Roundtable, Roundtable participants uniformly expressed strong appreciation for the event. Participants welcomed the high degree of interest in the Conference, as reflected in part through the participation of senior officials from many Roundtable jurisdictions and the full conference room throughout the day.

Participants expressed appreciation in particular for the quality of the agenda, the breadth of perspectives and the balance of speakers with different views. Some participants considered that the alternation of panels devoted to technical issues with those addressing broader policy issues was a key element of the interest of the Conference. It was noted that it is clear that reform is ongoing and the OECD should provide analysis, discussion and a forum to inform governments' policy choices and treaty negotiators. The active participation of other international organisations at the Conference was also welcomed and the value of enhanced cooperation and coordination between different international organisations was emphasised. The Conference was described as a valuable opportunity both to discuss Roundtable work and to exchange ideas with stakeholders, commentators and others.

2. Societal benefits of international investment agreements

At Freedom of Investment Roundtable 21 in October 2014, participants had suggested to review evidence of benefits and costs of investment treaties and requested that respective evidence be collected.[1] At their meeting in March 2015, Roundtable participants considered an initial note in response to this request – focussing on evidence of societal benefits of IIAs for treaty partners in the first instance – and discussed their countries' experience and views.

Based on a review of existing studies, the note discusses economic benefits, benefits for global and domestic governance, and contributions of IIAs to fostering strategic foreign policy objectives. It finds some evidence that IIAs may provide benefits both in economic and governance terms at least under certain conditions and in certain situations. It cautions however against overestimating or overstating these benefits. The study also finds that whether or not specific benefits accrue from a given IIA depends in most cases on the characteristics of the individual treaty. Finally, the study notes the absence of empirical evidence that would allow evaluation of IIA benefits more comprehensively.

The note notably laid out the following preliminary findings:

- Studies analysing economic effects suggests that investment protection granted by IIAs may reduce perceived risk and may induce increased FDI flows to countries with weaker institutions. However, methodological issues challenge the validity of these findings for the intended purpose: FDI statistics used for the econometric analysis do not show the relation of flows from the ultimate investing country to the final destination of flows, but count flows through transit countries multiple times, and include round-tripping investment, resulting in a mismatch of FDI flows and IIA protections and an overstatement of the volume of flows. Business attitudes and non-commercial risk insurance policies suggest that IIAs could generate a potential increase in FDI flows to countries associated with non-commercial risk. Liberalisation obligations in IIAs – still exceptional and mainly found in FTAs with investment chapters – have been found to trigger greater FDI flows. Whether the potentially greater FDI flows bring societal benefits for home and host societies depends on multiple factors that the note has not considered in detail.

- IIAs may bring some benefits for global and domestic governance. The availability of ISDS, now the norm in IIAs, can depoliticise disputes. The limited available evidence suggests however that States make little use of this potential to depoliticise disputes and continue to engage in disputes even where treaties would allow them to refer investors to ISDS. Depoliticisation also represents an opportunity for investors that cannot garner government support for their case, thus achieving somewhat fairer competitive conditions among different enterprises from a given country and enterprises from countries with differing levels of influence.

- IIAs can also potentially improve aspects of governance within host States: Their dispute settlement mechanism may contribute to deterring governments from mistreatment of foreign investors. Moreover, some IIAs could foster transparency and respect of internationally recognised environmental, labour, human rights and anti-corruption standards and generate stronger competition law due to explicit treaty obligations to this effect. To date, most treaties, especially

[1] See Summary of Roundtable discussions, Roundtable on Freedom of Investment 21, p. 8.

traditional treaties, do not have the features that would generate these benefits, unlike some of the more recently concluded treaties, especially FTAs. Evidence that would attest IIAs a more general role in institution building is limited to a few examples related to advanced economies.

- Finally, IIAs are occasionally credited with the potential to advance strategic foreign policy objectives, such as forging or deepening alliances. While this objective occasionally motivates the conclusion of IIAs, in particular FTAs, research with empirical evidence has not yet been generated that would confirm any effect of IIAs in this regard.

Numerous Roundtable participants shared their views on the findings of the note as well as their own experience and views. Several participants, especially from transition economies, explained that although the benefits of IIAs may not have been confirmed by evidence, they were convinced of their usefulness to generate an attractive environment for foreign investors, in conjunction with other measures. Some delegations, especially from advanced economies, emphasised their belief that treaties contributed to provide comfort for investors; some reported that the business community had approached them to demand the conclusion of IIAs for investment destinations. They also expressed their belief that ISDS had a deterrent effect against discrimination of foreigners and generated benefits for the rule of law.

Roundtable participants concluded that further efforts should be made to determine the societal costs as well as the benefits of IIAs and the investment treaty system. They recognised the difficulties of measurement in certain areas and suggested that closing research gaps were priorities for future work. Particular interest was expressed on the issue whether specific sectors were more responsive to IIAs than others, whether IIAs had an impact on the quality of investment, and in this context, what role treaty content related to responsible business conduct was playing.

3. Recent investment policy developments

Roundtable participants also discussed recent investment policy developments that had occurred in the six months preceding the Roundtable. The discussion was based on an inventory of measures taken 16 September 2014 to 15 February 2015.

Brazil informed Roundtable participants of its new approach to investment treaties and its new model agreement. Its context and features are laid out in a presentation that Brazil delivered at the Roundtable. Participants expressed appreciation for the information provided by Brazil.

P.R. China informed Roundtable participants about the *China (Shanghai) Pilot Free Trade Zone* (FTZ), which had been inaugurated on 29 September 2013, as well as on the rules that apply for investors in the FTZ. P.R. China explained that the *Pilot Free Trade Zone* allowed the authorities to test new policies before applying them at a greater scale or at national level. One of the many new policies that were tested in the *China (Shanghai) Pilot Free Trade Zone* was the negative list approach for the approval of foreign investment. Foreign investors in the zone only needed to submit information to authorities rather than request authorisation for their projects. Authorisation is still required if the activity falls under an item in the negative list. This list has been progressively shortened. P.R. China also informed Roundtable participants that the creation of several additional zones following the approach applied in the FTZ had been announced.