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**MAKING THE MOST OF INTERNATIONAL INVESTMENT AGREEMENTS:
A COMMON AGENDA**

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**NOVEL FEATURES IN OECD COUNTRIES'
RECENT INVESTMENT AGREEMENTS:
AN OVERVIEW**

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NOVEL FEATURES IN OECD COUNTRIES' RECENT INVESTMENT AGREEMENTS: AN OVERVIEW¹

I. Introduction

1. As major actors in the globalisation process, OECD countries have, as of July 2005, entered into 1,240 bilateral investment treaties (BIT) and 36 trade agreements with investment content (TAs) [hereafter referred to as international investment agreements (IIAs)] with some 140 non-Member countries. OECD IIAs account for over half of the agreements in existence. But how much foreign direct investment is actually protected by these agreements? And what are their most novel features?

2. This Note presents an overview of developments that have occurred during the last decade, and more particularly since 2000. Section II provides an assessment of how much investment is currently being covered by OECD IIAs as well as how much more investment is expected to be covered by agreements under negotiation or awaiting ratification (see also Annex 1). Section III highlights the most interesting trends in the main investment provisions found in a representative sample of IIAs. Annex 2 provides synoptic tables of their main features.

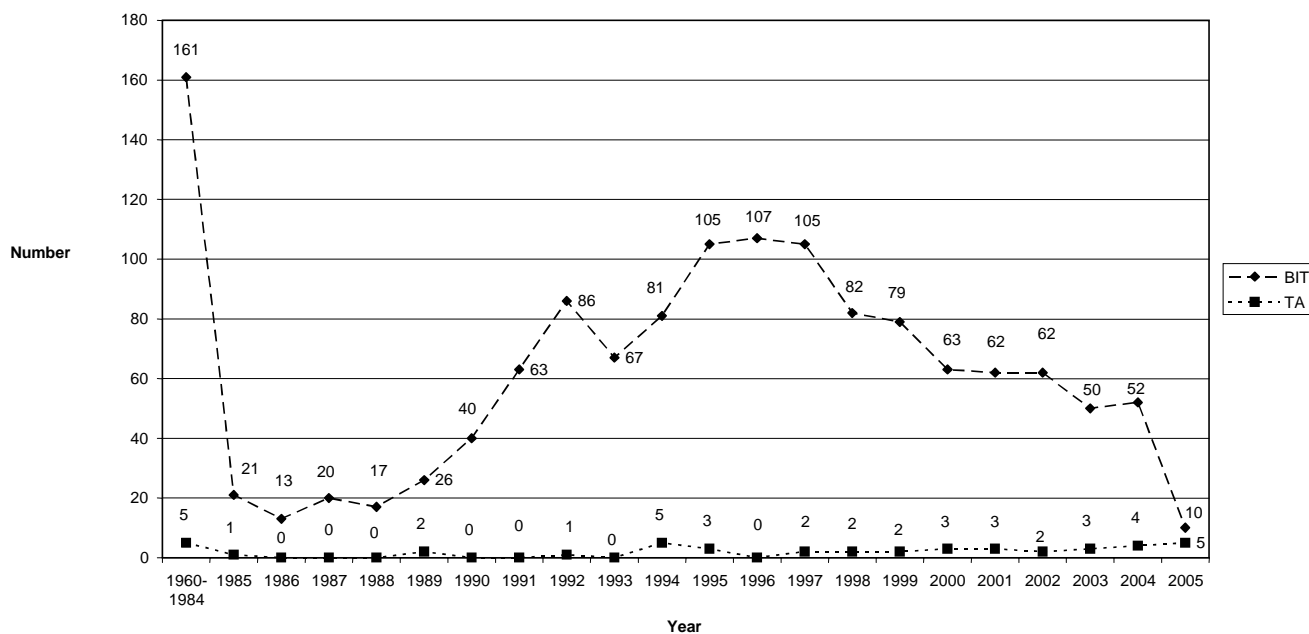
II. How much FDI is covered by OECD investment agreements?

3. *The amount of FDI covered by OECD IIAs is significant.* It is estimated that at the present time, OECD IIAs cover 18% and 14% of total OECD countries' outward and inward foreign direct investments (FDI) stocks, respectively. These seemingly modest percentages need to be seen, however, against the fact that a large proportion of OECD FDI inflows from and outflows to the world take place between OECD countries in the absence of investment agreements between them. At the same time, around 60% of the total FDI stock invested by OECD countries into the non OECD countries are covered by the OECD countries' IIAs with these countries (according to 2002- 2003 estimates). There are also important differences between countries and agreements, particularly when forthcoming new TAs are accounted for.

4. *A new dynamic in favour of trade agreements with investment content is emerging.* While BITs dominate the OECD IIA landscape in quantitative terms, TAs are rising in importance both in terms of numbers and volume of investment (Figure 1 and Annex 1). Only 10 new BITs have been contracted by OECD countries this year as compared to 107 BITs in the peak year of 1996. There are, however, 36 OECD TAs in place and 40 new TAs under consideration.

1. The present note covers bilateral investment treaties and bilateral and regional trade agreements with investment content concluded by OECD countries. It does not cover the investment provisions of the Treaty on European Union.

**Figure 1. BITs and TAs newly contracted by OECD countries
(as of July 2005)**



5. *European countries account for the largest number of BITs.* While European countries are responsible for the largest number of BITs, in many cases they cover less than 10% of their outward investment. But there are exceptions. Poland, Turkey, Hungary, Greece and the Slovak Republic on the other hand, direct a larger share of their investments outside the EU area and show a higher treaty coverage of their investment abroad – 88%, 66%, 64%, 49% and 48%, respectively. In Asia, Korea, whose BIT tradition goes back to 1967, also has a relatively high level of BIT protection – 53.5%. Japan, on the other hand, which very recently embarked on this process, records a comparatively lower percentage – 8%.

6. *Non-European countries are increasingly turning to TAs.* Mexico, the United States, Australia and Canada account for 90% in the increase of the number of OECD TAs. These agreements also constitute the main source of outward investment protection – namely 60% of outward investment in Australia, 44% in Canada and 20% in the United States (as compared with less than 5% in the case of BITs) – and more is in the making. New TAs could potentially increase the treaty coverage of the United States up to 24%, of Australia to around 61% and of Canada to 51%. New Zealand and Japan provide typical examples of the shift in favour of trade agreements from BITs. The proportion of outward investment to be captured by future New Zealand FTAs is to rise from 1.5 % to 61%. and new Japanese TAs from 3.8% to 12%.

7. *OECD countries are providing protection to a growing share of inward investment.* OECD agreements are not a one-way street. Apart from the new EU member states, BITs cover a very limited share of inward investment into Europe. At the same time, in respect of the direct investment received Mexico (86%), Norway (79%), Iceland (71%), Korea (65%), Canada (64%) and Hungary (60%) are committed to upholding treaty standards. The highest level is recorded by Poland's BITs however (94%). Future TAs are also expected to be the source of incremental treaty coverage, notably in New Zealand (by 46%), Australia (by 9%), Korea (by 5%) and Japan (by 4%).

III. What are the main novel features of recent OECD IIAs

8. *The pursuit of high standards.* The pursuit of high standards in investment policy has historically been a major driving force behind OECD investment agreements. Never before, however, has this quest been so far reaching than that of the OECD agreements negotiated in recent years. This can be assessed by the gradual broadening, deepening and clarification of the scope of application of the substantive and procedural provisions of the agreements, the increased attention paid to regulatory transparency, investment promotion and investment facilitation, and the inclusion of new liberalisation commitments. While this movement has largely been led by TAs, such as United States Free Trade Agreements (FTAs), Japan's "New Age" Economic Partnership Agreements (EPAs), Australia's FTAs and Chile-Korea FTA, it has also spread to path-breaking new BITs (Japan-Korea and Germany-China in the OECD survey's sample).

9. *High standards are spreading worldwide.* Developing countries are the main partners of OECD agreements. While diversity can be observed between agreements reflecting different country situations, developing countries' growing acceptance of OECD standards is contributing to the propagation of these high standards worldwide and is reflected in agreements concluded among non-OECD countries. This trend is also contributing to the improvement of countries' domestic investment policies as well as their investment policy capacity.

10. *More public interest safeguards have been introduced.* An increasing number of agreements refer to the role of governments to pursue other policy goals. Specific provisions have been incorporated, in particular, that address governments' regulation to pursue certain objectives such as health, safety, the environment and internationally recognized labour standards. This is the case, for example, with respect to recent TAs negotiated by Canada and the United States and BITs recently negotiated by Belgium-Luxembourg. Often these agreements also recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental or labour laws (US and Canadian TAs and preambles of Japan-Korea and Japan-Vietnam BITs).

11. There is also an increased recourse to various sorts of general exceptions pertaining to taxation, essential security, the protection of human, animal or plant life or health, the conservation of exhaustible natural resources, prudential measures for the financial sector and culture (European BITs, Canadian Model BIT, and US Model BIT as regards essential security...). Although not a generalized practice, greater use is also being made of safeguards affecting transfer obligations to deal with serious short-term balance of payments difficulties (French BIT Model, Mexico FTAs, Japan-Korea BIT and Japan-Singapore EPA).

12. *From the traditional focus of investment protection towards the inclusion of more extensive liberalisation disciplines.* The rise in recent IIAs standards can largely be attributed to the guarantees provided by recent TAs (and replicated in some BITs – Japan-Korea and Japan-Vietnam and US-Uruguay BIT) in the pre-establishment phase, as well to new liberalisation commitments such as in the agreements signed by the United States with the Dominican Republic and Central America (DR-CAFTA), the Singapore-Australia Free Trade Agreement (SAFTA) and the Australia-United States Free Trade Agreement (AUSFTA). In general, the guarantees apply to national treatment and MFN treatment and to other core provisions (key personnel and performance requirements) but there are exceptions (SAFTA, for example, does not contain an MFN treatment obligation and the obligations on pre-establishment are less demanding than on post-establishment).

13. Increased liberalisation is also promoted by the wider use of the negative list approach and the increased application of the standstill principle and ratchet effect to country exceptions – which facilitates broader coverage, progressiveness and transparency to liberalisation. Practically all IIAs contain provisions

on key personnel while the prohibition of certain performance requirements appears to be less frequent (mainly limited to the US, Canada or Japan IIAs). Interestingly enough, a relatively large number of BITs covering the post-establishment phase contain regional or economic integration clauses (notably all European BITs) while none of the TAs reviewed contain such clauses.

14. *New attempts have been made to provide greater precision to the asset-based definition of “investment”.* The broad asset-based definition of investment has now become the norm in recent IIAs. Because of its far reaching implications, however, there has been a move away from a totally open-ended definition so as not to cover operations which are not deemed to be “real” investments. Different approaches have emerged. The new US Model has adopted a circular definition which defines “investment” as those assets that have the characteristics of an investment (US-Chile FTA, AUSFTA...). At the other end, the 2004 Canada Model defines “investment” in terms of a finite list of categories of assets. Other BITs (such as the 2000 Mexico-Greece BIT) define investment as assets used for economic purposes.

15. *Key investment protection provisions have also been redefined.* The new Canadian and US Model BITs and recent TAs now define the protection accorded under the “fair and equitable standard” (and “full protection and security”) as not going beyond the minimum standard of treatment to aliens in accordance to customary international law. This clarification has been incorporated into some other FTAs (US-Singapore FTA, Mexico-Japan TA, DR-CAFTA) but not in others. Some other IIAs also link the standard with international law. But the fair and equitable standard is not included in all agreements. It has been included in AUSFTA and Thailand-Australia Free Trade Agreement (TAFTA) but not in SAFTA.

16. *New language has been added to guide the application of the expropriation articles.* Virtually all new OECD IIAs contain clauses describing the conditions under which a lawful expropriation may be made and a standard for compensation of the expropriated property. There is a debate, however, on what degree of interference with property rights is required for a government action or a series of government actions to constitute an “indirect”, “creeping” or “de facto” expropriation. Recent Annexes in FTAs negotiated by the US, Singapore, Chile and Australia or those found in the new Canadian and US Model BITs identify criteria on how to distinguish between compensable and non-compensable regulatory actions on a case-by-case basis. The inclusion of interpretative notes and clarifications is concomitant to the growing body of experience with investor/state arbitration (see below).

17. *A more widely shared recognition of the values of transparency.* Until recently, transparency was limited to the exchange of information between States. More recent IIAs, notably those listing liberalisation commitments, also include obligations on the publication of laws and decisions respecting investment. They may, in addition, contain provisions to enhance the transparency of the regulatory process and provide a reasonable opportunity to interested investors to be consulted on proposed regulatory changes and to obtain from contacts points information on matters covered by the agreement (2004 Canada and US Model BITs). These latter obligations are typically not subject to investor-state dispute settlement however.

18. *Investment promotion and facilitation is becoming an important dimension of investment agreements.* An increasing larger number of agreements, notably European agreements and Japanese EPAs, provide for identification of investment opportunities and exchange of information, the establishment of mechanisms for the encouragement and promotion of investment and work towards harmonized and simplified administrative procedures.

19. *Investor-state dispute settlement (ISDS) is becoming more widely accepted.* Most recent OECD IIAs concluded with developing countries provide for “prior consent” without “prior exhaustion of local remedies” or establishing a “fork on the road” foreclosing recourse to international arbitration.

Furthermore, fewer exceptions are also applied to the ISDS coverage. This can represent a major shift of policy (as in the case of China in the Germany-China BIT). The Australia-US Free Trade Agreement, on the other hand, which is the second TA after the Canada-US FTA (1988) with substantive provisions on investment to have ever been concluded between two developed countries, contains no ISDS provisions.

20. The cumulative number of known treaty-based cases brought before ICSID or other arbitration facilities under IIAs in the last ten years was estimated at approximately 174 at the end of June 2005 as compared to two at the end of 1994. Well over half of the known claims were filed within the past three years. Almost all of them were initiated by investors. Some claims have involved large sums and the arbitration proceedings costs are usually very high.

21. *Innovations have also been brought to the arbitration process.* Three new trends are also emerging in the new generation of BITs and some other investment chapters of TAs (US-Singapore, US-Chile FTAs, US and Canada Model BITs). First, there is concern for greater predictability and control over the arbitration process by means of more detailed guidance on arbitral proceedings and binding interpretations on tribunals. Recent US agreements foresee, in addition, the possibility of creating an appeal mechanism. Second, judicial economy is encouraged by special provisions dealing with frivolous claims, multiple or parallel proceedings or consolidation of claims. Third, increased attention is being given to allowing civil society scrutiny through increased transparency of arbitral proceedings and awards, and the institutionalisation of the possibility of non-disputing parties to make their views known through “amicus curiae”.

Annex 1
Table 1. Coverage of OECD Outward and Inward Investment by IIAs 1)

Country	Number of agreements						Outward FDI positions covered by BITs and TAs 2)						Inward FDI positions covered by BITs and TAs 2)					
	existing agreements			future agreements 3)			existing agreements			future agreements 3)			existing agreements			future agreements 3)		
	BITs	TAs	Total	BITs	TAs	Total	BITs	TAs	Total	BITs	TAs	Total	BITs	TAs	Total	BITs	TAs	Total
	(as % of total outward FDI positions)						(as % of total inward FDI positions)						(as % of total inward FDI positions)					
Australia	19	4	23	6	4	10	2.6	60.1	62.7	-	1.1	1.1	1.3	32.3	33.6	-	8.8	8.8
Austria	55	-	55	2	-	2	37.2	-	37.2	-	-	-	3.8	-	3.8	-	-	-
BELU	57	-	57	63	-	63	4.2	-	4.2	0.3	0.3	0.3	2.0	-	2.0	0.1	-	0.1
Canada	22	4	26	5	9	14	4.1	43.5	47.6	0.2	7.5	7.7	-	63.9	63.9	0.2	3.1	3.3
Czech Republic	72	-	72	12	-	12	5.6	-	5.6	-	-	-	8.9	-	8.9	-	-	-
Denmark	43	-	43	7	-	7	10.6	-	10.6	1.1	1.1	1.1	1.1	-	1.1	-	-	-
Finland	50	-	50	5	-	5	5.6	-	5.6	0.3	0.3	0.3	1.1	-	1.1	-	-	-
France	84	-	84	12	-	12	6.1	-	6.1	1.1	1.1	1.1	0.9	-	0.9	0.03	-	0.03
Germany	115	-	115	21	-	21	12.4	-	12.4	0.9	0.9	0.9	1.0	-	1.0	0.1	-	0.1
Greece	33	-	33	14	-	14	49.3	-	49.3	0.1	0.1	0.1	10.4	-	10.4	0.03	-	0.03
Hungary	52	-	52	6	-	6	64.2	-	64.2	0.04	0.04	0.04	60.2	-	60.2	0.01	-	0.01
Iceland	2	2	4	0	1	1	0.6	79.4	80.0	-	-	-	0.8	70.7	71.5	-	-	-
Ireland	1	-	1	0	-	0	-	-	-	-	-	-	-	-	-	-	-	-
Italy	70	-	70	21	-	21	5.5	-	5.5	1.3	1.3	1.3	0.9	-	0.9	0.1	-	0.1
Japan	11	2	13	0	14	14	7.8	3.8	11.6	-	12.3	12.3	2.4	1.2	3.6	-	3.8	3.8
Korea	55	1	56	9	7	16	53.5	0.1	53.6	0.9	2.4	3.3	64.4	-	64.4	0.02	4.9	4.9
Mexico	17	12	29	1	1	2	n.a.	n.a.	n.a.	n.a.	n.a.	n.a.	18.6	67.7	86.3	0.03	3.5	3.6
Netherlands	79	-	79	12	-	12	8.9	-	8.9	1.7	1.7	1.7	0.6	-	0.6	0.1	-	0.1
New Zealand	2	1	3	1	7	8	0.3	1.5	1.8	-	60.6	60.6	1.2	2.1	3.3	-	45.6	45.6
Norway	16	2	18	0	-	0	2.0	70.4	72.4	-	-	-	-	78.5	78.5	-	-	-
Poland	56	-	56	5	-	5	87.7	-	87.7	1.5	-	1.5	94.4	-	94.4	2.5	-	2.5
Portugal	35	-	35	8	-	8	3.9	-	3.9	27.1	-	27.1	7.3	-	7.3	1.7	-	1.7

Country	Number of agreements						Outward FDI positions covered by BITs and TAs (as share of total outward FDI positions)						Inward FDI positions covered by BITs and TAs (as share of total inward FDI positions)						
	existing agreements			future agreements 3)			existing agreements		future agreements 3)		existing agreements		future agreements 3)		existing agreements		future agreements 3)		
	BITs	TAs	Total	BITs	TAs	Total	BITs	TAs	Total	BITs	TAs	Total	BITs	TAs	Total	BITs	TAs	Total	
Slovak	37	-	37	3	-	3	48.4	-	48.4	-	-	-	91.5	-	91.5	-	-	-	
Spain	47	-	47	23	-	23	24.8	-	24.8	1.4	1.4	1.4	1.5	-	1.5	0.1	-	0.1	
Sweden	54	-	54	2	-	2	6.2	-	6.2	-	-	-	0.04	-	0.04	-	-	-	
Switzerland	102	2	104	5	1	6	8.3	43.6	51.9	0.9	1.9	2.8	-	56.5	56.5	-	0.6	0.6	
Turkey	54	7	61	17	12	29	66.2	3.7	69.9	0.2	-	0.2	82.3	3.6	85.9	0.01	-	0.01	
United Kingdom	93	-	93	7	-	7	6.9	-	6.9	0.7	0.7	0.7	1.6	-	1.6	0.01	-	0.01	
United States	39	6	45	8	8	16	1.3	20.6	21.9	0.1	3.1	3.2	-	10.2	10.2	-	0.4	0.4	
Gross Total	1372	43	1415	275	64	339													
Net Total (5)	1240	36	1276	273	40	313													

1) The number of BITs and TAs are based on available information as of July 2005.

2) Stock positions are based on OECD data available for the most recent year available, 2002 or 2003. Data for BELU, Mexico (inward), Spain, Norway (Outward) and Korea(Inward) accumulated FDI flows.

3) "Signed" but not "ratified" or under "negotiation" or "scheduled or envisaged".

4) Gross total: BITs between OECD countries are counted twice and TAs are counted according to the number of parties involved.

5) Net total: BITs and TAs between OECD countries are counted only once to avoid double counting.

Source: OECD Investment Division, International Direct Investment database

Annex 2
SUMMARY TABLES OF SUBSTANTIVE AND DISPUTE INVESTOR-TO STATE
PROVISIONS IN IIAs (SAMPLE)*

* Among the criteria used for the selection of the sample were the following: the date of the agreements (concluded after 2000), the relative importance of the partner countries (as host or home country of investment), including their regional or cross continental dimension; differences between the levels of development of the contracting parties; the 2005 German Model BIT has been examined because Germany was the first country to enter into such agreements and has today the largest number of BITs; a special attempt has been made to include major players in non-Member countries, such as Singapore, India and China.

Table 1. Substantive provisions in recent BITs

	Definitions/Scope/Coverage				Umbrella clause	Admission			Post Admission			Investment Protection			
	Asset based		Investment			NT	MFN	Performance requirements	NT	MFN	Performance requirements	Standard of treatment	Transfers	Expropriation	
	Open list	Closed list	Direct	Indirect										Direct	Indirect
German Model	+				+				+	+		+	+	+	+
French Model	+		+	+					+	+		+	+	+	+
Belgium-Luxembourg Model	+		+	+	+				+	+		+	+	+	+
Canadian Model		+	+	+		+	+	+	+	+	+	+	+	+	+
US Model	+		+	+		+	+	+	+	+	+	+	+	+	+
Germany-China BIT	+		+	+	+				+	+		+	+	+	+
Germany-India BIT	+				+				+	+		+	+	+	+
Japan-Korea BIT	+		+	+		+	+	+	+	+	+	+	+	+	+
Mexico-Korea BIT	+								+	+		+	+	+	+

	Key personnel	Transparency	Exceptions					Financial Services	Taxation	Environment	Labour	Investment facilitation	CR
			EIA ¹	General Exceptions	Security Interests	Prudential measures	Country exceptions						
German Model	+		+					+					
French Model	+		+				2	+					
Belgium-Luxembourg Model	+		+		+			+	+	+			
Canadian Model	+	+		+	+	+	+	+	+	+			
US Model	+	+			+	+	+	+	+	+	+		
Germany-China BIT	+		+					+					
Germany-India BIT	+		+	+	+			+					
Japan-Korea BIT	+	+	+	+	+	+	3	+	+	+			
Mexico-Korea BIT			+				4		+				

Notes:

1) Economic Integration Agreements (i.e. membership or association with a custom or economic union, a common market or a free trade area).

2) Article on BOP (Balance of Payment) safeguards.

3) The same Article also includes a BOP Clause.

4) BOP Clause provided in the Protocol.

Source: OECD Investment Division

Table 2: Substantive provisions in investment chapters of recent TAs

	Definitions/Scope/Coverage				Umbrella clause	Admission			Post Admission			Investment Protection			
	Asset based		Investment			NT	MFN	Performance requirements	NT	MFN	Performance requirements	Standard of treatment	Transfers	Expropriation	
	Open list	Closed list	Direct	Indirect										Direct	Indirect
SAFTA	+		+	+		+			+	+			+	+	+
AUSFTA	+		+	+		+	+	+	+	+	+	+	+	+	+
TAFTA	+		+			+			+	+		+	+	+	+
US-Singapore FTA	+		+	+		+	+	+	+	+	+	+	+	+	+
JSEPA	+		+	+		+		+	+		+	+	+	+	+
Japan-Mexico EPA		+	+	+		+	+	+	+	+	+	+	+	+	+
US-DR-CAFTA	+		+	+		+	+	+	+	+	+	+	+	+	+
Chile-US FTA	+		+	+		+	+	+	+	+	+	+	+	+	+
Chile-Korea FTA	+		+	+		+		+	+	+	+	+	+	+	+

	Key personnel	Transparency	Exceptions					Financial Services	Taxation	Environment	Labour	Investment facilitation	CR
			EIA	General Exceptions	Security Interests	Prudential measures	Country exceptions						
SAFTA		+		+	+	+	+						
AUSFTA	+				±	±	+	±	±	+	±		
TAFTA						1							
US-Singapore FTA	+				±	±	+	±	±	+	±		
JSEPA				+		2	+		3				
Japan-Mexico EPA	+					4	+			+			
US-DR-CAFTA	+				±	±	+	±	±	+	±		
Chile-US FTA	+				±	±	+	±	±	+	±		
Chile-Korea FTA	+					+	+			+			

Note:

- 1) A BOP clause is contained in Chapter 16 as an exception to Chapter 8 (Trade in services) and Chapter 9 (Investment).
- 2) Separate BOP clause also included.
- 3) Article 87 on Taxation Measures as Expropriation.
- 4) BOP clause included.

± These provisions are located in other chapters, but apply or relate to investment.

Source: OECD Investment Division

Table 3A. Dispute Settlement in recent BITs

		Specific Investor/ State provisions															
State/ State	Investor /State	Claims by an investor of a Party on its own behalf and on behalf of an Enterprise	Prior Consent	Waivers of initiating/continuing a proceeding before local courts/ Non- Exhaustion of local remedies	Participation by the non-disputing Party	Transparency (access to filing, minutes, transcripts and decisions)	Open hearings	Protection of sensitive information	Amicus curiae submissions	Monetary awards and No punitive damages	Comment period before effectiveness of awards/ delay of enforcement	Enforcement	Interim measures	Experts	Consolidation	Applicable law	
German Model	+											+					
French Model	+																
Belgium-Luxembourg Model	+		+	+ (Non- Exhaustion of host state remedies)								+					
Canadian Model	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
US Model	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+	+
Germany-China BIT	+											+					
Germany-India BIT	+											+					
Japan-Korea BIT	+		+									+					
Mexico-Korea BIT	+	+	+	+							+	+			+		+

Table 3B. Dispute Settlement in recent TAs

State/ State	Investor /State	Specific Investor/ State provisions														
		Claims by an investor of a Party on its own behalf and on behalf of an Enterprise	Prior Consent	Waivers of initiating/ continuing a proceeding before local courts/ Non-Exhaustion of local remedies	Participation by the non-disputing Party	Transparency (access to filing, minutes, transcripts and decisions)	Open hearings	Protection of sensitive information	Amicus curiae submissions	Monetary awards and no punitive damages	Comment period before effectiveness of awards/ delay of enforcement	Enforcement	Interim measures	Experts	Consolidation	Applicable law
SAFTA	+		+									+				
AUSFTA	+															
TAFTA	+															+
US-Singapore FTA	+		+	+			+					+		+		+
JSEPA	+		+									+				
Japan-Mexico EPA	+		+	+								+		+		+
US-DR-CAFTA	+		+	+								+		+		+
Chile-US FTA	+		+	+								+		+		+
Chile-Korea FTA	+		+	+								+		+		+

Source: OECD Investment Division