

5th Annual Investment Treaty Conference

Investment treaties and level playing fields

Agenda

11 March 2019

OECD Conference Centre,
Paris, France

A Conference hosted by the Freedom of Investment Roundtable

■ About the Annual Investment Treaty Conference

This annual conference brings together senior policy makers and investment treaty negotiators from around the world for exchanges with leading representatives of business, civil society, academia and international organisations.
www.oecd.org/investment/conference-investment-treaties.htm

■ About the Freedom of Investment (FOI) Roundtable

The FOI Roundtable, an intergovernmental forum hosted since 2006 by the OECD, brings together over 55 governments from around the world to exchange information and experiences on investment policies. Since 2011, governments have been evaluating key aspects of investment treaties at the Roundtable. The following economies are invited to participate: Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, Ukraine, United Kingdom, United States and the European Union. Participation may vary depending on the issues being discussed. www.oecd.org/investment/foi.htm

■ Contacts

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This is a draft agenda. Additional governments and other organisations are finalising possible arrangements for speakers and may be added to the agenda. Other changes may also be made. Speakers are listed but the order of speakers has not been determined.

■ Outline of Topic

Calls for a level playing field are a growing challenge for trade and investment treaty policy makers. At the Fifth Annual OECD Investment Treaty Conference, governments, stakeholders and experts will debate how level playing field concerns interact with investment policy.

Pressures for a level playing field have emerged from an evolving environment for international investment. Key evolutions include increased government competition for investment and concerns about delocalisation; the development of State-owned enterprises (SOEs) as major international investors and concerns about competitive neutrality; greater attention to business and investor responsibilities with regard to human rights; and growing inequalities in many economies.

As calls for a level playing field have intensified in this new environment, several aspects of investment treaty policy have become controversial or important. The Conference will first examine preferences for investment treaty-covered investors over non-covered investors (including arbitral interpretations giving rise to preferences). The expansion of the investment treaty network in the 1990s and of ISDS starting in the early 2000s saw the development of preferential rules and interpretations for covered investors, giving them regulatory and other advantages over domestic and other non-covered investors. These preferential approaches – which can sit awkwardly with the market-based rationale for national treatment and most-favoured nation rules -- are increasingly contested and rejected in a number of jurisdictions, and in some cases governments have exited treaties or committed to exclude preferential approaches in light of concerns about a level playing field. In addition to substantive law, access to ISDS has been identified as a preference requiring justification or reform in some cases. While preferential approaches are increasingly contested, they are still seen as valuable to seek to attract FDI in some jurisdictions. The Conference will examine how evolving investment treaty policies are interacting with level playing field concerns in this area.

Second, recent years have seen growing concerns about a level playing field with regard to state-owned enterprises (SOEs). Leaders and ministers from major economies have issued joint calls for work to develop effective rules to address harmful subsidy practices and market-distorting behaviour of state enterprises. Business groups, such as the B-20, have similarly identified addressing such competitive distortions as a top priority. Conversely, concerns about restrictions and screening mechanisms against SOEs active abroad being discriminatory have also been expressed, in a context where

several recipient governments have modified their policies. Accompanying and reflecting these developments, recent trade and investment treaties, such as the CPTPP, USMCA or recent EU agreements, have begun to focus increased attention on SOEs as actors affecting both trade and investment; in parallel, governments, including at the FOI Roundtable, have been engaged in broader analysis and discussion of competitive neutrality and investment restrictiveness at the OECD. Some governments have taken recent measures to address concerns about competitive neutrality of their SOEs with other enterprises. The Conference will allow governments, experts and stakeholders to exchange views on policies in this important area including on the potential role of investment treaties and other policies.

In addition to concerns about treaties generating preferences for treaty-covered investors or being needed to discipline preferences for certain enterprises, recent years have seen broader complaints that investment treaty protection tilts the competitive playing field for the distribution of government benefits and burdens towards investor interests and away from other societal interests including labour and the protection of human rights. Governments are increasingly called on to explain the rationale for protecting investors in their treaties at government expense in preference to other constituencies or for supplying only investors with direct access to international recourse. The specificities of investment and its benefits and costs are being actively discussed as governments consider their investment policies as part of their policy mix. The current rationale for investment treaty policy as well as government policies to target treaties more precisely or to rebalance interests will be considered.

A concluding session will identify issues and views raised in the discussion and consider potential ways forward.

■ Agenda

8:45 – 9:30 *Registration of participants*

9:30 – 9:45 **Opening remarks**

Masamichi Kono, Deputy Secretary-General, OECD

9:45 – 11:15 **Preferences for Investment-treaty-covered investors**

This session will discuss the pros and cons of various preferences for covered investors created by investment treaties and their interpretation. While most treaties protect covered investors from discrimination, few if any treaties place express limits on preferential readings of often broadly-worded protections for covered investors. Given limited time the focus will be primarily about the effects and desirability of treaty preferences, as well as efforts by some governments to address them, rather than on debate over their precise scope.

- Competition and investment treaty policy.
- Treaty preferences and the impacts on inward and outward foreign investment.
- Assessment of high profile preferences:
 - Covered shareholder access to recovery for reflective loss
 - Access to recovery of lost profits
 - Scope of recovery for expropriation
 - Direct access to ISDS
 - Legitimate expectations
- Investment treaty policy and different level playing field theories; relationship to competition. Evidence of preferences for and discrimination against foreign investors and other constituencies.
- Getting access to preferences: foreign investors and "foreign" investors (treaty shopping, roundtripping, etc.) Assessment of corporate nationality as a proxy for quality investment and preferences.
- Distributive impacts: winners and losers from treaty preferences.
- Recent treaties and methods to preserve, eliminate or limit preferences in practice.

Chair **Jan Kleinheisterkamp**, Associate Professor of Law, London School of Economics

Speakers

- **Jens Benninghofen**, Federal Ministry for Economic Affairs and Energy, Germany
- **Pedro Mendonça Cavalcante**, Secretary, Assistant to the Delegate of Brazil to International Economic Organizations in Paris; former investment treaty negotiator at the Ministry of Foreign Affairs, Brazil (tbc)
- **Tanja Buzek**, Senior Policy Advisor, Ver.di trade union, Germany; member of the European Economic and Social Committee
- **Lauge N. Skovgaard Poulsen**, Associate Professor in International Political Economy and Director of Graduate Studies in Political Science, University College London
- **Jeremy K. Sharpe**, Shearman & Sterling; former Chief of Investment Arbitration in the Office of the Legal Adviser of the U.S. Department of State
- **Lise Johnson**, Columbia Center on Sustainable Investment (CCSI)

11:15 – 11:30 *Coffee break*

11:30 – 13:00 State-owned enterprises, level playing fields and investment treaties

Overview of competitive neutrality issues between SOEs and other enterprises

- Definitions of SOEs and scope issues.
- Preferences for SOEs
- Transparency
- SOEs and market access

Competitive neutrality and related provisions for SOEs in SOE chapters in recent trade and investment agreements; evaluation of coverage

- Scope and definition of SOEs; recognition of right to establish SOEs
- Coverage of both trade and investment aspects – integrated approach; state to state dispute settlement.
- Relationships between SOE chapters and investment chapters.
- Non-discrimination provisions and requirements that SOEs act in accordance with commercial considerations; impact of public service mandates.
- Non-commercial assistance to SOEs; non-commercial assistance by SOEs to other SOEs
- Application in third country markets
- Transparency and disclosure requirements.

Investment chapters and possible level playing issues

- SOEs as ISDS claimants
- SOEs as a basis for government liability

What can be done?

- Trade and investment agreements and other tools to address preferences, transparency, and market access for SOEs
- Cooperation in international organisation work on SOEs
- Creating trust in a level playing field

Chair

Antonio Capobianco, Acting Head of Competition Division, OECD

Speakers

- **Sylvia Baule**, Deputy Head of Unit, Investment Unit, DG Trade, European Commission
- **Lauren Mandell**, Deputy Assistant United States Trade Representative for Investment, Office of the United States Trade Representative
- **Rebecca Fatima Sta Maria**, Executive Director, Asia-Pacific Economic Cooperation (APEC) Secretariat
- **Shaun Donnelly**, United States Council for International Business (USCIB)
- **Sara Sultan**, Corporate Affairs Division, OECD

13:00 – 15:00 *Lunch break*

15:00 – 16:30 Investment treaties and the competitive playing field for the distribution of government benefits and burdens

This session will allow an overview of some recent debates and policy developments with regard to the impact of investment treaty protection on the competitive playing field for government benefits and burdens in domestic law and policy; and broadening the role of trade and investment agreements to help address harms to other constituencies.

- Rationale for providing covered investors with international protection and the protection of other groups.
- The competition for government benefits and burdens, and the impact of investment treaties.
- Responsible business conduct and trade and investment agreements: current debates and recent policies. Contribution of trade and investment agreements to the fight against corruption.

Chair

Jan Wouters, Professor of International Law and International Organizations, Director of the Institute for International Law and of the Leuven Centre for Global Governance Studies

Speakers

- **Julie Boisvert**, Deputy Director, Trade Policy Bureau, Canada (tbc)
- **Ralf van de Beek**, Ministry of Foreign Affairs, Netherlands
- **Boaz Fleischman Alaruf**, Director, Investment and Trade Agreements Division, Chief Economist Department, Ministry of Finance, Israel
- **Helena Peltonen-Gassmann**, Member of the Board, Transparency International Germany
- **Nathalie Bernasconi**, International Institute for Sustainable Development (IISD)
- **Nikos Lavranos**, European Federation of Investment Law and Arbitration (EFILA)

16:30 – 17:00 *Coffee break*

17:00 – 18:00 Conclusion and next steps

The concluding session will consider future steps in light of the discussion of level playing field issues. Options to further explore issues that have been identified will also be discussed.

Chair

Ana Novik, Head of Investment Division, OECD

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- **Sylvia Baule**, Deputy Head of Unit, Investment Unit, DG Trade, European Commission
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- **Shaun Donnelly**, United States Council for International Business (USCIB)
- **Tanja Buzek**, Senior Policy Advisor, Ver.di trade union, Germany; member of the European Economic and Social Committee
- **David W. Rivkin**, Debevoise & Plimpton LLP; former president of International Bar Association
- **Lauge N. Skovgaard Poulsen**, Associate Professor in International Political Economy and Director of Graduate Studies in Political Science, University College London
- **Lise Johnson**, Columbia Center on Sustainable Investment (CCSI)