

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE**

**ENHANCING THE INTER-GOVERNMENTAL AND MULTI-STAKEHOLDER DIALOGUE ON
INVESTMENT TREATIES**

(Note by the Secretary-General)

Meeting of the Council at Ministerial Level, 1-2 June 2016

Background Document

Item 7 - Strengthening the Contribution of Trade and Investment to Productivity and Inclusiveness

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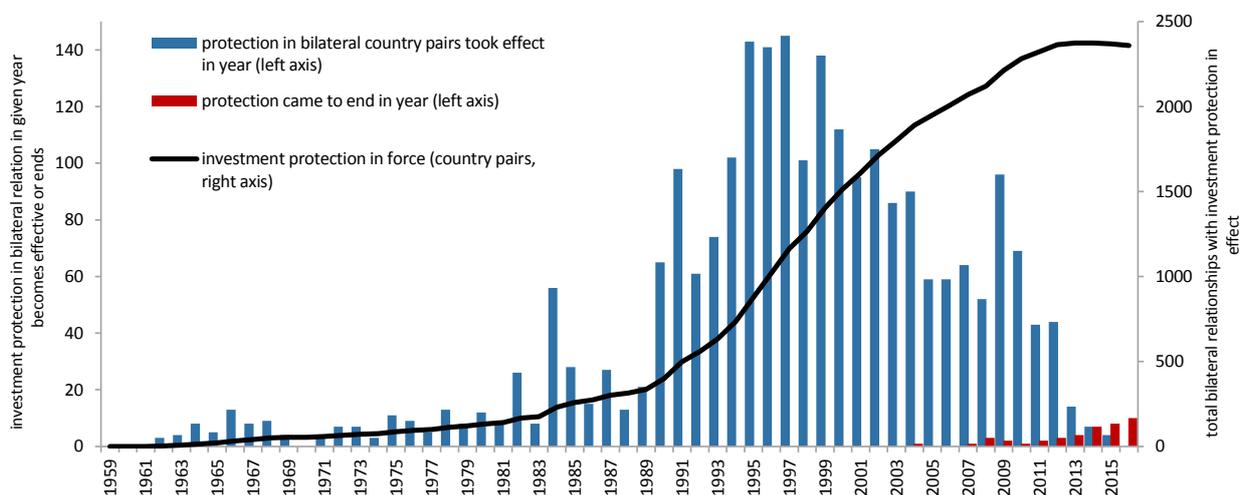
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Background

1. Ministers at the 2015 Ministerial Council Meeting (MCM) discussed the multi-faceted role of investment in promoting robust, inclusive, sustainable and resilient economic growth as well as the role that investment treaties play in this regard. They requested the Organisation to “increase international cooperation in the area of international investment” and “discussed how the OECD could enhance the inter-governmental and multi-stakeholder dialogue on investment treaties and on the global investment environment through the [Freedom of Investment Roundtable](#) (FOI).” They suggested that “the OECD explore options to make this process more inclusive, including by launching a knowledge-sharing platform on investment issues, involving emerging economies and cooperating with other international organisations”. They asked the OECD to deliver a progress update on these issues and to report to the 2016 MCM [Chair’s Summary, [C/MIN\(2015\)15](#), paragraph 11].

2. This call for international cooperation in the area of international investment comes as the investment treaty system shows early signs of transformational change. This system is both expanding – with major new treaties and many ongoing negotiations – and contracting – with some governments terminating treaties that they see as prejudicial (Figure 1). The international investment agreement (IIA) universe now consists of over 3,000 bilateral investment treaties (BITs), and a much greater number of bilateral relationships are covered by treaty protections. Mega-regional agreements like the Trans-Pacific Partnership (TPP) and potential future treaties such as the Transatlantic Trade and Investment Partnership (TTIP), which include comprehensive investment chapters, continue to add investment protection in additional bilateral relationships, even though fewer BITs are being concluded compared to the 1990s. TTIP, the Canada-European Union Free Trade Agreement (CETA), and TTP would also add a significant number of treaty-protected relationships between OECD Members; in the past, advanced economies only rarely concluded IIAs between themselves.

Figure 1: Development of protection of international investment: IIA-covered bilateral relationships (1959-2016)



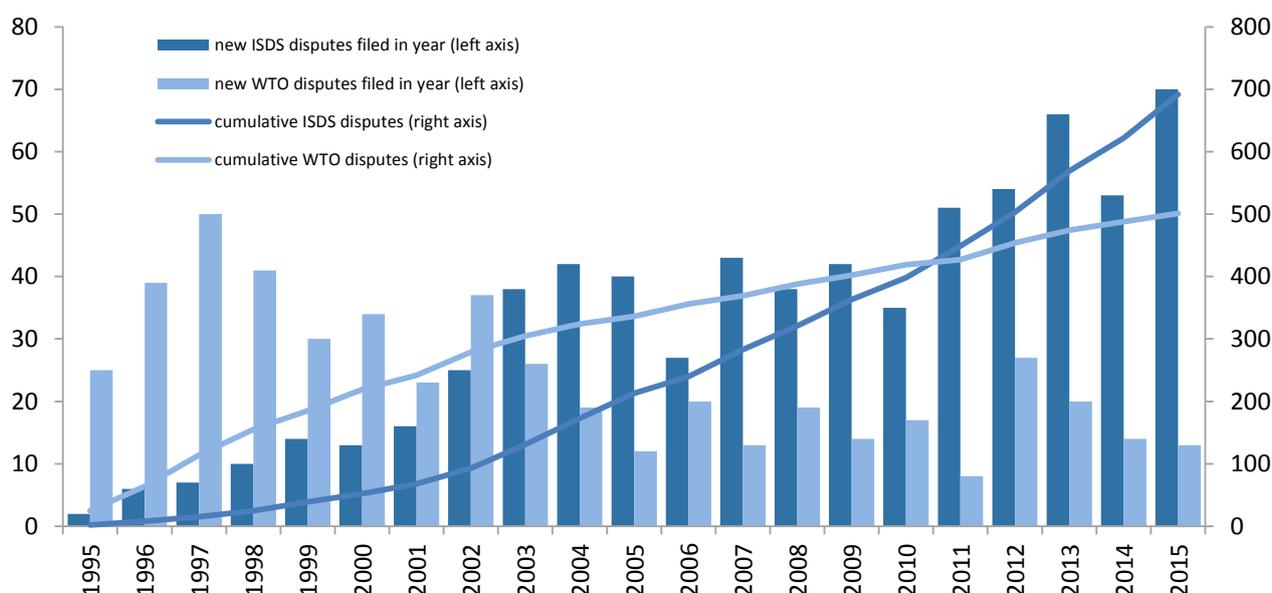
Source: OECD IIA database. Counts treaty relationships brought into force by the 57 economies invited to the OECD-hosted dialogue on international investment policy. Excludes Energy Charter Treaty. Data for recent years may require updating.

3. We currently witness major developments in investment treaty policy including: the signature of the TPP agreement, an approach inspired by North-American treaty design with a strong focus on transparency and balancing investment liberalisation with protection; the [proposal](#) by the European Commission of a new approach to investment protection and Investor-State dispute settlement (ISDS), based on an Investment Court System, which they envision would over time be replaced by a permanent,

multilateral International Investment Court, and the inclusion of this model in the European Union-Viet Nam FTA and the CETA between the EU and Canada; the publication by Brazil and India of new model investment agreements reflecting different approaches to investment protection, promotion and facilitation; the termination of a number of investment treaties by some countries (e.g. South Africa, Indonesia, India); the passing of an investment protection law by South Africa as an alternative to investment treaties; negotiations of bilateral investment treaties by the People's Republic of China with the United States and with the European Union; and continuation of negotiations between the European Union and the United States on the TTIP, in which issues like dispute settlement mechanisms have come to the fore in the public debate.

4. Investment agreements have become the subject of a growing public debate in many countries, and some governments have turned against the established system of international investment protection, while others have undertaken reforms to this system. This development is linked to growing public awareness of the increasing number of dispute settlement cases (Figure 2) and concerns regarding the balance between governments' right to regulate and the protection of investors and the mechanisms for adjudicating disputes.

Figure 2: Development of the number of ISDS and WTO disputes filed by year (1995-2015)



5. Properly designed investment treaties can play a constructive role in fostering international investment. It is thus important that concerns be taken seriously to avoid that states drop out of the system altogether because they feel exposed to multiple claims, to excessive damages, and to uncertain or exceedingly broad interpretations of treaty obligations. Fostering a better understanding of the existing rules and approaches, of their shortcomings, and ways to address them through reform are thus crucial to ensure that appropriate rules continue to serve their vital function of investment protection.

6. Also, the Secretary-General's Strategic Orientations identify improving the enabling environment for trade and investment as a top priority for 2016-2017 [C/MIN(2016)1, paragraph 10]. In his "21 for 21" Proposal for Consolidation and Further Transformation of the OECD, the Secretary-General has emphasised the importance for the Organisation to foster a better understanding of the rules that have been developed to manage foreign direct investment (FDI), with a view to promoting coherence, including on investor-State dispute resolution in the context of BITs and multilateral agreements. In this context, the

Secretary-General also called for the Freedom of Investment Roundtable to strengthen its role as a global platform.

Enhancing an Inter-Governmental and Multi-Stakeholder Dialogue through the FOI Roundtable¹

7. In response to the Ministers' mandate, the Organisation has made comprehensive efforts to enhance its work on investment treaties. The Organisation broadened the scope of dialogue on investment treaties, enhanced its effectiveness, and made the process even more inclusive.

Providing evidence to support fruitful dialogue

8. Fruitful inter-governmental dialogue on investment treaties requires sound analysis and evidence, especially in an area as complex as international investment law.

9. Since 2010, the OECD has developed a strong body of analysis of key issues that have emerged in the public debate. It conducted thorough analysis of the ISDS system, including analytical papers, expert input and a public consultation. Analysis has also addressed issues such as government voice in the interpretive process and the unique scope for shareholder claims in ISDS. This analysis has been intensively discussed by governments and is used to inform and update governments' investment treaty policy.

10. In addition, the OECD has engaged in a systematic statistical mapping exercise of over 2,200 IIAs, bilateral and multilateral, representing approximately 70% of the global total. This database provides unique insights on actual treaty provisions, their development and evolution over time and offers evidence on features of the treaty system beyond individual IIAs. The mapping so far provides 500 distinct indicators for each treaty in six thematic areas: ISDS mechanisms, temporal validity of IIAs, treaty content related to Responsible Business Conduct, environmental concerns in IIAs, treatment of government controlled investors, and mechanisms that allow treaty parties to influence interpretation of their IIAs. The data also informs policy reviews of individual countries and underpins analysis of the role of treaties for international investment.

11. Since the 2015 MCM, the OECD analysis has been expanded to address the substantive provisions in investment treaties. OECD analysis now covers ways that permit governments to balance the right to regulate and investor protection, including by clarifying the intent of specific treaty protection standards such as the Fair and Equitable Treatment (FET) standard provision closely associated with challenges to governments' right to regulate. Further efforts undertaken since the 2015 MCM covered a review of evidence on societal benefits and costs of IIAs. Both issues are among the most pressing concerns in the international debate on investment treaties.

¹ As of April 2016, 57 economies participate in the Roundtable (Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Czech Republic, Denmark, Egypt, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, India, Indonesia, Israel, Italy, Japan, Jordan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, Netherlands, New Zealand, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Singapore, Slovak Republic, Slovenia, South Africa, Spain, Sweden, Switzerland, Tunisia, Turkey, United Kingdom, United States as well as the European Union).

Enhancing the impact of the policy dialogue on investment treaties

12. The impact of OECD analysis and dialogue depends not only on the relevance and timeliness of the topics it covers, but also on the audience and participating stakeholders. Since the 2015 MCM, the Organisation has made significant steps forward in these regards.

13. In 2015, the OECD launched two new formats to bring the analysis and dialogue closer to actual policy making and treaty negotiators: its Annual Conference series and the *Dialogue on Investment Treaties*.

14. The *Dialogue on Investment Treaties* was launched in October 2015 to offer economies that participate in the FOI Roundtable a forum for government-led dialogue amongst treaty negotiators to exchange on experiences and practices outside a negotiating context. The first Dialogue focused on the role treaties could play to foster Responsible Business Conduct and on the implications of changing public perceptions on IIAs for treaty negotiations. Participants and in particular treaty negotiators welcomed the opportunity to foster knowledge-sharing and exchange on investment treaties in the informal setting of the *Dialogue*.

15. Furthermore, evidence and analysis of treaty policy are now also better integrated in OECD Investment Policy Reviews, based on the updated Policy Framework for Investment (PFI) [[C/MIN\(2015\)5](#)], addressed to individual governments to ensure that governments around the globe have access to policy analysis on investment treaties.

Enhancing the inclusiveness of the policy dialogue on investment treaties

16. Policy on international investment by its very nature calls for international cooperation. The Investment Committee has early on sought to involve a great number of Partners in its work, and has created the Freedom of Investment Project for the very purpose to allow for broad participation of Partners.

17. Since the 2015 MCM, the number of economies participating in the process has further increased, with Singapore and other ASEAN countries, as well as Paraguay, now listed as Invitees in the process, and Ukraine and Croatia being lined up to participate following their adherence to the Investment Declaration. In 2016, the number of economies invited to participate in the process is expected to exceed 60 – up from 54 at the time of the 2015 MCM –, including all G20 members. Actual participation and at the right level of expertise has also increased as the relevance and focus have been enhanced.

18. The *Annual Conferences on Investment Treaties* series has been launched to reach out more regularly to a broader group of stakeholders, including notably the business community, civil society, academia, international organisations and legal practitioners. The Conferences offer an interface for governments to communicate with these diverse stakeholders, obtain their views and communicate their policies.

19. The Organisation has also enhanced its cooperation with international organisations and involvement in the G20 process. Capitalising on its capacity to produce relevant analytical work in key areas of investment, including investment treaty policy and its capacity to feed this work into government-led dialogue, the OECD is supporting, in cooperation with UNCTAD, World Bank and WTO, the Chinese G20 Presidency in its efforts to develop its work on investment through the G20 Trade and Investment Working Group. OECD has developed, jointly with UNCTAD, the World Bank and the WTO, a report on the interrelationship between trade and investment and has provided informal inputs for the discussion at the G20 Trade and Investment Working Group, based on the OECD's work on investment treaties and the OECD Policy Framework for Investment (PFI).

Next steps

20. The Organisation will further step up its efforts to respond to the Ministers' request for enhanced international cooperation in the area of international investment. It will make its evidence-based dialogue on investment treaties more inclusive and show the links of IIAs with the broader investment environment. The aim is to strengthen the profile and visibility of this work and to establish the OECD as the 'go-to' international organisation for analysis, policy advice and constructive dialogue on international investment rules.

21. The Organisation will notably continue to deepen and broaden its analytical work on current and emerging areas of treaty policy, especially in the areas of ensuring governments' right to regulate and of ISDS, and will continue to enhance understanding of the role of IIAs in fostering investment. It will also continue and expand its analysis and documentation of treaty practice and innovation based on statistical analysis of existing agreements, an area where the Organisation already plays a leading role. This work could help foster a better understanding of the areas of substantive treaty provisions where there is convergence and divergence, as well as inform ongoing and future treaty negotiations in a manner that keeps pace with developments in this area.

22. Efforts will also be made to improve the communication and dissemination of this work, including notably by summarising for non-experts the key points and policy implications arising from it. These summaries can then be updated as new research emerges, with the aim of increasing the impact of this work among high-level policy-makers.

23. Building on this analytical work, the OECD will continue to support enhanced dialogue through its now established formats. In light of the success of the first *Dialogue on Investment Treaties*, a second *Dialogue* is scheduled for October 2016, while a Conference on Investment Treaties is envisaged in 2017, possibly in conjunction with the *Global Forum on International Investment* so as to further broaden the audience.

24. As part of ongoing efforts to build a more global and inclusive OECD, the Organisation continues to reach out to additional Partners, under the condition of mutual benefit and based on Members' consent, in the context of its work on investment treaties. Concretely, these efforts may be channelled through the OECD's regional programmes, work on country and region-specific Investment Policy Reviews, and by further increasing the participation of governments and stakeholders at the Investment Treaty Conferences.