BIAC key points for the OECD Investment Consultation

17 October 2017

1. OECD Code of Liberalization of Capital Movements

- The OECD Code of Liberalization is a key instrument for capital flow management and liberalization as it is the only multilateral agreement dedicated to openness and mutual accountability in capital flow policies. We welcome the increased attention given to the Code in the context of the implementation of the G20 conclusions which call for capital flow management measures to be transparent and properly communicated.

- So far, only OECD countries adhere to the Code. For a global level playing field, additional adherence will be essential and of mutual benefit to OECD countries and future adherents. The current and future accession discussions therefore highlight the importance of the Code. The implementation of the Code at the national level can lead to practical and concrete changes on the ground, with short and long-term positive effects of the economy. The Investment Committee therefore has a key role to play in the accession process.

- As far as the review of the Code is concerned, we welcome the call for strengthening cooperation with other international organizations to foster consistency and communication on the Code.

- Regarding the proposal to rebalance the list of operations subject to standstill and the list of operations that is not subject to standstill, we underline the importance of keeping high standards and considering changes to the list with great care.

- As a general rule, reservations should be temporary and subject to regular review. It is important to ensure observance of the Code through dialogue as well as peer reviews of the commitments. There needs to be a robust procedure in place to ensure that these restrictions are indeed related to exceptional macro-economic circumstances. Otherwise, it can place the countries that adhere to the Code, but do not introduce restrictions at a disadvantage to those that do so and countries that do not adhere to the Code.

- To maintain a global level playing, due attention also needs to be paid to the issue of shadow banking. It is important for the Code to apply uniformly to the same type of transaction undertaken by different types of institutions.
2. Strategic directions for the OECD investment work

- According to the UNCTAD World Investment Report 2017, there is a case for cautious optimism. However, the road to a full recovery for FDI remains bumpy. At the same time, the June 2017 OECD-WTO-UNCTAD report on G20 trade and investment measures, mentions a relatively greater proportion of restrictions to international investment over the reporting period. This, coupled with uncertainty in the area of certain investment agreements, underlines the importance of a strong role of the OECD in the area of investment.

- First, the OECD has a number of unique and specific instruments, in addition to the Code of Liberalization mentioned above:
  - The Declaration on International Investment and Multinational Enterprises, which is extremely important for global investment, among others thanks to its national treatment instrument under which countries agree not to discriminate against foreign investors established on their territory.
  - The Policy Framework for Investment, which recognizes that pro-investment policies require a whole-of-government approach. Effective implementation of this unique instrument is essential to help member and non-member countries attract domestic and foreign investment and create a pro-investment policy framework for business.

  BIAC is supportive of dedicated outreach efforts, additional adherence and effective monitoring of implementation of these key instruments.

- Second because the OECD provides important fact-based analysis of key policy trends, including its FDI statistics and the FDI Regulatory Restrictiveness Index, which measures statutory restrictions on foreign direct investment. This analysis is crucial to inform policy discussions.

- In addition, we call on the OECD to be more vocal in underlining the fundamental importance of an open international trade and investment environment, which is essential to generate much needed economic growth and job creation around the world. Private sector investment is also urgently needed to achieve the full potential of the Sustainable Development Goals. Business remains concerned about the negative tone and lack of balance in the current debate on freedom of investment and investment protection.

- Business will continue to advocate both for overall pro-investment policies and for specific investment agreements, which play a key role by strengthening the policy and legal environment for FDI. Investment protection provided by investment agreements is essential, including efficient enforcement mechanisms that investors can call upon.
• We welcome the fact that the OECD does not consider investment policies in a vacuum, but as a part of the fabric of domestic policies to ensure inclusive growth. At the same time, we underline that this should not take attention away from an ambitious, visible and focused strategy of the OECD on putting in place a pro-investment policy environment. The investment work must be given additional visibility in the overall OECD work.

• With regard to the current areas of work - i.e. keeping markets open, wider adoption of RBC standards, the contribution of international investment to SDGs, and improving our understanding of the social and economic impact of investment globalization – we underline that these overarching work areas remain important.

• At the same time, we believe that the OECD can play an important role in analyzing cross-cutting work, such as investment and digitalization, investment to address environmental challenges, and getting a better understanding of FDI in global value chains.

• We have consistently encouraged the OECD to embark on an ambitious, proactive investment program and to confirm the Organization’s leading role in ensuring that markets are kept open for foreign investment. BIAC will update its investment strategy paper and will present key recommendations for future work on investment early next year.

3. Societal costs and benefits of IIAs

• In December last year, BIAC submitted detailed comments on the previous version, underlining that overall the report was missing a clear and well defined message. We also underlined that a number of qualifiers need to be highlighted, and we thank the Secretariat for doing so in the executive summary.

• However, given these reservations mentioned in the report, i.e. the fact that very few of the claims have been empirically tested, analysis related to older treaties, etc., we still believe that the report has not yet a clear and well-defined message. We therefore do not believe that it is a productive way forward to publish the report, which clearly underlines that “statements of the societal costs and benefits of IIAs should be made with great caution.”

• The lack of clarity is highlighted among others by the following:
  - Page 20: “the vast majority of the existing studies do not offer a satisfying answer to the question whether IIAs influence capital allocation in treaty partners”.
  - Page 29: “several dozen econometric studies that have tested whether there is a correlation between the existence of IIAs and FDI inflows to developing countries show diverse and at time contradicting results”.

The Business and Industry Advisory Committee to the OECD
Comité consultatif économique et industriel auprès de l’OCDE
‒ Page 43: “claims that IIAs either correct or generate market distortions are not currently supported by conclusive empirical evidence”.

‒ Page 61: “Whether legal obligations contained in IIAs drive or hinder general governance improvements in treaty parties in the context of engaging in new IIAs remains an open question as long as empirical evidence in support for the opposing arguments is unavailable”.

‒ Page 67: “Given the absence of sufficient information on whether, to what extent, and how IIAs influence, governance, legislation, regulation or enforcement in host States, a definitive assessment of whether any of the discussed phenomena present societal benefits of costs is impossible”.

• We would also like to express concerns about the section of “business awareness about IIAs” (p. 33-35). The section wrongfully gives the impression as if only large companies attach great importance to IIAs, and even characterizes BIAC as a business organization dominated by large companies, which is wrong given that our national member organizations represent companies of all sizes, including a great number of SMEs, many of which are active at the global level. This must be firmly clarified.

• In particular, in the current climate where public opposition to and misconceptions of IIAs are widespread and given the lacking empirical evidence, it is more important than ever to recall and highlight to policy makers, and the public at large, why international investment agreements matter, and how they contribute to economic prosperity worldwide.

• In light of these arguments, we recommend not to publish the paper in its current form and to turn to more practical work areas, where the OECD can produce forward-looking and concrete advice. It might therefore be considered to rather look at some specific best practice examples where investment treaties have demonstrated a positive role so that they can be shared and inform discussions going forward.

4. ISDS related issues

• BIAC would like to reiterate that the ISDS mechanism is a key component of IIAs, as it ensures effective enforcement of the substantive provisions provided in the agreements. It provides access to a neutral forum for resolution of a dispute involving a state and a foreign investor (see BIAC IIA paper and ISDS paper).

• BIAC would also like to submit the following comments on background papers: (1) Economic considerations in dispute settlement: Adjudicator compensation systems, and (2) Arbitrators in Investment Arbitration.
Overarching comments

- Both papers are particularly critical with the ISDS arbitration system included in most IIAs, highlighting among others the lack of transparency during the arbitrator’s selection by the appointing authorities, the associated costs to the arbitral proceedings (especially to the arbitrator’s fee) or the relevance of the external advisors and their influence over the arbitration tribunal. Although the papers provide data and statistics regarding both topics, we consider that they do not support the objections in a solid and sustained manner, nor do they suggest any alternative.

Economic considerations in dispute settlement: Adjudicator compensation systems

- The paper tends to compare ISDS arbitration systems with domestic courts, placing the latter as a reference to follow, although it does not provide any clear benefit that this might bring (e.g., a significant cost reduction of the proceeding).

- Not all national courts have the same level or identical resources, which makes it impossible to standardize and firmly confirm that litigation in national courts implies greater guarantees and cost savings for investors.

- The opacity of the arbitrators’ fees is strongly questioned. Although we do not see any objection to increasing transparency regarding remuneration, we believe that it should not apply to the detriment of the freedom of each party to designate the arbitrator who is considered to be more qualified for a concrete case. The technical complexity of many arbitrations requires the selection of highly qualified arbitrators not only in strictly legal matters but also with regard to business aspects. These profiles necessarily entail higher costs. Companies should be the ones who should assess whether those costs are acceptable or not.

- In addition, we understand that proposing the State to be the only one responsible for remunerating the arbitrators would adversely affect the principle of neutrality that should prevail in any arbitration procedure, and may even question the independence of the arbitrators.

Appointing Authorities and the Selection of Arbitrators in Investor-State Arbitration

- Apart from invoking a lack of transparency in the selection process of arbitrators and the existence of different levels of disclosure by appointing authorities, the paper does not clearly identify the adverse consequences that these factors might have in practice,
although it seems to link them with the lack of training or impartiality of the panel of arbitrators appointed by each arbitral institution.

- It should be kept in mind that transparency and training or impartiality are clearly differentiated issues, and that all procedural rules include measures designed to ensure the (technical) competence and impartiality of judgment of the arbitrators appointed by the parties, allowing the substitution and challenge of any member of the court.

- Although not expressly stated, the report appears to be inclined to replace the current system of appointment of arbitrators by a closed panel of arbitrators designated by the States (as in the case of the Investment Court System). We believe that this proposal, if implemented, would seriously damage the defense of the investor, who would be forced to choose an arbitrator among those previously selected by the States (probably with a "pro-state profile"), impairing the neutrality of the process.

- At the same time, if the panel of arbitrators is configured exclusively with ex-officials, academics or ex-magistrates, one of the major benefits of arbitration against traditional judicial systems would be lost, i.e. the industry's expertise and knowledge expected from these professionals.

- While recognizing that certain improvements might be considered, it is a priority to guarantee the legality and legal certainty of the procedure. Some of the positive measures considered in the papers do not take into account the different levels of reliability that local judicial systems offer to the investor, being able to put at risk the very essence of the investment arbitration that is intended to ensure a neutral forum for the settlement of disputes.

5. PFI implementation and indicators

- BIAC reiterates its strong support for the PFI and its key objectives, i.e. address barriers to markets and mobilize private investment that supports economic growth and sustainable development. The PFI is a key tool that should be used by governments to create an attractive, robust and competitive environment for domestic and foreign investment, recognizing that pro-investment policies require a whole-of-government approach.

- Monitoring is critical to effective implementation. From the business perspective, it is concrete results that matter. We therefore support the OECD’s initiative to identify and develop PFI indicators with the aim of strengthening the empirical basis for recommendations on investment policy reform, and support the option of selecting a set of existing indicators, allowing a benchmarking of countries of key investment policy areas.
• To the extent possible, monitoring should be concrete and focus on measurable outcomes. Indicators such as number of jobs created, total employment or production, tax receipts, etc. might be easier to develop and interpret than general concepts like quality of jobs.

• Among the key indicators for the PFI will be those linked to investment, given that the objective of the PFI is to foster investment. Many ancillary benefits (jobs, tax revenue...) flow from this investment. So indices on levels of investment, numbers of new investments, etc. should figure prominently as part of the PFI indicators. The focus should be on creating a framework supporting FDI openness and market access, facilitating market entry of foreign investors, promoting fair competition and encouraging international trade, including in services. Given the already extensive OECD work on inclusive growth, the added value of the PFI should in our view focus on measurable investment outcomes.

• With regard to the policy issues in the investment policy chapter, all points are important: transparency, market access, non-discrimination, protection of property rights, and investment treaty policy. We note that coverage is currently more partial in some areas, such as “FDI openness and market access”, protection of expropriation, and investment treaty policy. It is important to identify the gaps and explore how to fill them, given the fundamental importance of the investment policy chapter, which is a cornerstone of the PFI.

6. OECD outreach to non-member countries

• As mentioned earlier, BIAC is very supportive of the OECD outreach work, to share best practice, include non-member countries in the statistical frameworks and foster open and competitive markets around the world.

• We were pleased to participate as active partners in the recent MENA trade and investment meeting. We consider the MENA competitiveness program as an important platform to help mobilize investment, trade, private sector development and entrepreneurship. The BIAC Chair also participated in the recent high level South-East Asia Forum in Bangkok, where we co-signed a business statement with the ASEAN business advisory council.

• In this context, the OECD investment instruments, including the OECD Declaration on International Investment and MNEs, the PFI, but also other instruments which are important for creating a level playing field, such as the OECD Anti-Bribery Convention, are key for both OECD and non-OECD countries. We encourage broader adherence to these instruments, which should go hand in hand with capacity building and dedicated follow-up and monitoring processes.