Established in 1962, Business at OECD (BIAC) stands for policies that enable businesses of all sizes to contribute to growth, economic development and societal prosperity. Through Business at OECD, national businesses and employers’ federations representing over 7 million companies provide and receive expertise via our participation with the OECD and governments promoting competitive economies and better business.
Introduction

For decades, the liberalization of trade and investment has been a success story. Countries that have had sustained growth and prosperity have opened up their markets to goods and services trade and investment.

Business at OECD and its members, including the leading business federations in all 36 OECD member countries, are committed to a global rules-based trade and investment system that opens international markets and removes trade and investment barriers and unfair practices that impede fair competition around the world. We support policies that promote global trade and investment and establish a level playing field for business, while ensuring that open markets deliver the widest benefit to people and communities in OECD countries and beyond.

In recent years however, trade and investment liberalization at the multilateral level has decelerated considerably. The OECD-WTO-UNCTAD Reports on G20 Trade and Investment Measures show that protectionism has been on the rise: Between May and October 2018, G20 economies applied an average of eight new trade-restrictive measures per month, including tariff increases, import bans and export duties. Global FDI flows decreased by more than 9% in Q1 2018.

At the same time, the multilateral trading system is at a critical juncture and the vast majority of trade and investment regimes do not reflect modern business practices. For business, decisions on international trade and foreign investment are in many cases closely interlinked. As multinational enterprises (MNEs) including small and medium-sized companies (SMEs) base their business operations on global value chains (GVCs), it is increasingly important that trade and investment policies are not considered in isolation.

This paper proposes trade and investment priority topics for discussion, benefiting from the OECD’s unique setting that brings together like-minded market-based democracies. As Business at OECD was encouraged by the joint meeting of the OECD Trade Committee and OECD Investment Committee held in October 2018, we hope that future dialogue on cross-cutting trade and investment issues which are of particular value to the business community will continue.¹

Trade and investment governance

Progressively liberalized trade in goods and services is the backbone of international trade, and a key factor leading to global growth and prosperity. In an era of increased protectionism and unilateralism, the global liberal trading system must be defended.

The role of the World Trade Organization (WTO) is vital in bringing together countries to reach agreements on further opening global trade and investment, and constitutes the cornerstone of our rules-based trading system. We recognize and support the need for reform in implementing important updates and improvements to the WTO’s structure and operations, including with regards to rule making, monitoring, transparency and dispute settlement.

For business, decisions on international trade and foreign investment have always been closely interlinked. Reducing barriers and distortions to trade without liberalising foreign direct investments and vice-versa does not allow us to reap the full benefits of global value chains and decreases business efficiency.

¹ This paper draws on the practical experience of a wide and regionally diverse business constituency and provides a considered assessment of priority issues that affect its members’ ability to benefit from open, international trade. The topics mentioned in the following should be considered in addition to and complement those listed in other Business at OECD publications, including the Proactive Investment Agenda, Trade as a Priority for All, and The Future of the OECD Arrangement on Officially Supported Export Credits.
Free trade agreements – multilateral, plurilateral, and bilateral – that include investment provisions and Bilateral Investment Treaties (BITs) are vital to provide the structure for trade and investment to move across borders as efficiently as possible.

As investment protection remains a high-level priority for business, states should advocate for BITs and investment chapters with high levels of protection for foreign investment with an effective enforcement mechanism. In some trade agreements, the items related to investment protection and dispute resolutions have been carved out to deal with these issues separately. While this may cause a lack of coherence between trade and investment regulation in free trade agreements since provisions on investment protection risk being delayed for years, we highlight the importance of maintaining efficient ratification processes.

Ongoing international efforts to establish a multilateral dispute mechanism on investment protection should provide a modern and consistent framework for dispute resolution, which has the potential to effectively address investment issues and enjoy more confidence from the public.

An enabling business environment requires:

- A relevant and credible multilateral trading system.
- An integrated approach to trade and investment.
- A clear understanding of goods and services trade and investment interdependencies.

Business recommendations to OECD and governments:

- Ensure that trade and investment policies are not pursued in isolation, and foster a transparent and informed debate on multilateralism.
- Support the WTO modernization process, and provide analysis and general guidance.
- Continue the monitoring of the G20 trade and investment measures together with UNCTAD and WTO, and support implementation of the G20 Guiding Principles for Global Investment Policymaking.
- Assist the ongoing effort in UNCITRAL to establish a multilateral dispute mechanism on investment protection, ensuring that any substantive and procedural changes to the existing law effectively protect investors.
- Reform and enhance the OECD Arrangement on Officially Supported Export Credits in light of a changing landscape for trade and investment.

About 70% of RTAs signed since 2001 contain broad coverage of investment. Prior to that, it was less than 30% of RTAs signed.

• Develop new data, evidence and methodologies, that highlight the importance of trade and investment policy coherence, and coherence with other policies including in the areas of competition, environment and energy, and improve national implementation of global best practices on trade and investment.

• Identify the best ways to address trade and investment barriers with a special focus on the relationship between trade policy, industrial policy and competition law.

State-owned enterprises

The growing importance of state-owned enterprises (SOEs) that invest globally raises concerns regarding impacts for a global level playing field when preferential treatment granted by governments to SOEs gives them a competitive advantage.

Transparency is a crucial first step for addressing competitive distortions. We therefore support efforts by the OECD Working Party on State Ownership and Privatization Practices to enhance transparency and disclosure of SOEs and encourage the Trade and Investment Committees to contribute as appropriate. Increased transparency is required to identify and then address preferential treatment with distortionary home market and cross-border effects, including preferential financing, privileged access to information, market-distorting subsidies and practices, exemptions, mandatory joint ventures and preferential regulatory treatment, among other issues.

In the context of previous OECD work on SOEs, including the study on SOEs as Global Competitors, the Organization has taken a multidisciplinary approach, bringing together competition, investment, corporate governance and trade policy perspectives. While initial OECD analysis is available, including in the areas of SOEs as global competitors and most recently on the unique corruption risks related to SOEs, the emphasis now needs to be on addressing the concerns identified and ensuring a global level playing field with regard to trade and investment.

Trade, investment and competition policies and rules should apply on a non-discriminatory basis to companies irrespective of their ownership structure. In addition to trade and investment issues, due consideration should also be given to M&A cases involving state-owned and private companies.

22% of the world’s largest firms are now effectively under state control. This is the highest percentage in decades.


Of the world’s largest 204 SOEs, China is leading the list (70 SOEs), followed by India (30), Russia (9), the UAE (9) and Malaysia (8).


An enabling business environment requires:

• Predictable and transparent policies that apply to SOEs acting commercially in the same manner as to their private competitors.
• Elimination of policies that confer preferential treatment to SOEs such as “preferred supplier” status, access to market-distorting subsidies, government-financed capacity expansion and special exemptions from regulatory enforcement.

**Business recommendations to OECD and governments:**

• Building on the 2018 Ministerial Council Meeting, reinforce cross-committee work to further analyse market-distorting subsidies and other forms of government support provided to and by SOEs.

• Contribute to OECD work on increasing transparency on SOEs by identifying ways to eliminate unfair market distorting practices and addressing special treatment afforded to SOEs, if needed in cooperation with other international fora such as the WTO.

• Recognizing that transparency is only a first step, take concrete measures to address and eliminate preferential treatment accorded to SOEs at the global level.

**Policies related to national security**

Policies related to national security are not a new phenomenon. However, the acceleration of new measures considered or introduced calls for renewed international attention to this important issue. Countries both from within the OECD and beyond are currently considering trade and investment policies related to national security and/or national security tariffs.

While it is not always obvious to assess what constitutes a risk for the national security of a given country, this should not be a disguised restriction on trade, or a basis to address trade deficits or limit investment. The national security exceptions should remain narrowly focused and should be deployed deliberately and carefully against trading partners.

While there may be legitimate reasons for investment screening for the purpose of safeguarding national security - such as putting a brake on foreign ownership of critical infrastructure, the outflow of critical technologies and on technology diversion - business cautions against overly expansive or vague investment screening or the introduction of national security tariffs that could be used as a disguised form of protectionism or an improper instrument in trade negotiations.

Other policies often couched in terms of national security, such as data localization or source code disclosure requirements, raise serious concerns for investors and should be kept to a minimum of clearly defined areas. It is important to address legitimate security concerns while maintaining an open international trade and investment environment.

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**The share of inward FDI flows subject to cross-sectoral screening procedures has now reached around 50% of global FDI inflows.**


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**An increasing number of the 58 countries participating in the OECD-hosted dialogue on international investment policies is introducing explicit policies that may allow them to halt investments that they believe may impair their national security or public order.**
An enabling business environment requires:

- Ensuring that such measures are essential to national security concerns, based on well-defined criteria.
- A policy environment that ensures policies put in place to address security concerns are guided by the principles of non-discrimination, transparency, predictability and proportionality.
- Standards when applying trade restricting regulations under national security (GATS Article XIV bis).

Business recommendations to OECD and governments:

- Improve knowledge sharing, exchange of experience and multi-lateral dialogue in the Trade and Investment Committees and the Freedom of Investment Roundtable to ensure that measures taken meet their need to safeguard national security while reducing impacts on free trade and investment.
- Ensure follow-up to the OECD Guidelines for Recipient Country Investment Policies relating to National Security to help countries design and implement policies that allow them to achieve national security goals with minimal impact on investment flows.

Intellectual property & forced technology transfer

Economies flourish and the public prospers when governments recognize the value of placing a robust intellectual property (IP) system at the core of their legislative, regulatory, and judicial frameworks. Where markets are open and IP is protected and enforced, innovators have the predictability and certainty they need to share knowledge and intangibles with external partners, engage in research collaboration or international licensing agreements, and invest in markets.

However, increasingly governments are implementing policies that undermine IP which harms innovation and threatens new technologies from entering the marketplace. Business recognizes a growing trend of deterioration of international standards of IP protection and enforcement in markets around the world, including within OECD member countries, and within global institutions.

In these five industries, at least 20% of business respondents reported having to transfer technology in exchange for market access, when the European Chamber of Commerce in China conducted a survey in 2017. In high tech sectors these figures are even higher.


Business at OECD and its members are deeply concerned about policies and measures that force technology transfer by restricting market access, or compulsory technology transfer to obtain investment approval or contracts for public procurement. It is important that government
procedures including in the context of business registration, certification and approval, as well as product and technology licensing, do not unnecessarily request sensitive proprietary information or require source code disclosures – whether formally or informally. Technology-related performance requirements that impose local sourcing and local content requirements or data localisation may also compel involuntary technology transfers. Joint venture requirements should be prohibited as a condition for market access.

The OECD should reinforce its analysis in the area of intellectual property and forced technology transfer, including in its work with selected member and non-member economies.

An enabling business environment requires:

- Greater assurance that intellectual property rights will be respected and enforced.
- Domestics and international legislation, trade agreement negotiations, and multilateral discussions that foster a healthy global innovation and creative environment.

Business recommendations to OECD and governments:

- Guarantee non-discriminatory protection of intellectual property rights, including complying with commitments established in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).
- Quantify the negative impact of forced technology transfer on trade and investment, individual sectors and OECD economies.
- Work across OECD bodies to identify best practices in policy formulation to avoid eroding IP protection, and quantify the impact of illicit trade in collaboration with the OECD Governance Committee and the Task Force on Countering Illicit Trade to strengthen IP enforcement.
- Analyze policies instituted under the guise of cybersecurity that significantly disadvantage and weaken the global competitiveness of OECD businesses.
- Require that countries acceding to the OECD recognize the importance of intellectual property and do not have laws or regulations in place that undermine IP rights or discriminate based on the field of technology.

Trade, investment and regulatory policy

A broad spectrum of regulatory policies influences trade and investment performance. The proliferation of national standards and regulations can result in duplicative or conflicting regulations that impede business activity, and shape trade and investment flows globally.

Greater clarity of regulatory standards will lead to savings — of both time and money — for business and governments. Moreover, it will also strengthen the achievement of policy objectives in various areas, for example related to the environment, health and safety, innovation, or financial stability.

A recent survey by Business at OECD and the International Federation of Accountants (IFAC) found that inconsistencies in regulation between different jurisdictions costs financial institutions between 5 to 10% of annual revenue turnover. This also exacerbates risks in the financial system, as over 51% of financial institutions have had to divert resources away from investment in risk management activities, including senior management time and capital.
An enabling business environment requires:

- Policy coherence to help businesses and authorities manage effective outcomes in the national and international arena.
- Effective and proportionate regulation that fosters trade and investment, and inclusiveness, predictability, and transparency across policy areas.

Business recommendations to OECD and governments:

- Provide policy makers with an understanding of the trade and investment costs of regulatory divergence and the strategies for lowering these costs while fostering the achievement of public policy objectives.
- Analyze how regulatory policy in certain cases impedes trade and investment flows.
- Ensure that trade and investment recommendations are coherent with policies for responsible business and government conduct.
- Promote best practices and guidance to strengthen effective international regulatory cooperation and evidence-based policy-making that do not hinder sound trade and investment flows.

Inconsistencies in regulation between different jurisdictions costs financial institutions between 5 to 10% of annual revenue turnover, which means USD $780 billion annually.

Businesses in the financial sector associate divergence in various regulatory areas with material or very material costs.

USD 780,000,000,000

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Digital trade and investment

In today’s world, digital trade and investment policies dramatically impact the way companies do business around the world. As businesses across sectors and at all stages of global value chains increasingly rely on data transfers in support of their activities, companies require consistent policies regarding data flows in order to effectively operate globally. Forced localization policies and other restrictive measures foster inefficient operations, harm customer welfare, create an un-level playing field and lead to increasing market fragmentation.

We oppose policies and regulations that create barriers to digital trade, while acknowledging the necessity to protect privacy including through technological solutions and processes. Across countries there is an urgent need to adopt better, interoperable regulations on protections of personal data, which often may be unclear and make business-to-business data transfers subject to overtly strict requirements. We oppose governmental requests related to trade secrets and source codes.

Modern trade agreements are beginning to include provisions on digital trade, but greater development of a global policy framework is necessary. A modernized and high ambition agreement, including within the context of WTO e-commerce negotiations, would create the needed degree of certainty on the world market for trade and investment in new business models across borders. All countries should agree to prohibit customs duties on electronic transmissions and make the WTO Moratorium permanent. Countries should also prohibit the application of customs processes and procedures to electronic submissions. In addition, taxation requirements should be non-discriminatory across all products and services – including digital.

An enabling business environment requires:

- The creation of a competitive level playing field for providers of cross-border business communications, digital products and ICT solutions.
- A supportive policy and regulatory environment for the future of the digital economy including enhanced connectivity for all market players, and sectors that create demand for ICT infrastructure.
- An inclusive, predictable, transparent and evidence-based regulatory development process.

Since 2005, the amount of data flowing between countries has grown more than 45 times larger, and may now have a bigger impact on GDP growth than traditional trade in goods.


At the same time, businesses in OECD countries and beyond may need to comply with a strongly increasing number of almost 250 regulations relating to data transfers and local storage, which continue to be further developed and constantly modified.

**Business recommendations to OECD and governments:**

- Following the 2018 OECD Global Forum on Trade in the Digital Era, continue to foster discussions on how to avoid digital protectionism.

- Inform trade policy-makers about the emerging cross-border data landscape and challenges associated with different policy approaches to cross-border data flow regulation and data localization requirements, which can be an importance resource for WTO e-Commerce negotiations.

- Deepen analysis on how localization barriers to trade undermine the ability of international business to undertake long-term investments beneficial to both host countries and investors.

- Inform trade policy-makers about the challenges associated with applying customs processes and procedures to electronic submissions, and drive towards a global agreement to prohibit the implementation of customs duties on electronic transmissions.

- Build on the excellent work of the Digital STRI, which shows a tightening and diverse global regulatory environment affecting trade in digitally enabled services.

- Further develop work on the impact of regulatory policies that are more trade restrictive to digital trade and investment than necessary.

- Support enhanced coordination on security standards to prevent regulatory divergence and align national regulations with international standards and best practices.

- Support an OECD-driven approach to digital taxation issues while avoiding taxation measures that discriminate against digital services or are not technologically neutral.

- Facilitate the digital transformation and innovation in our economies without undermining strong protection of sensitive and private data.

- Build on existing OECD guidance, such as the OECD Guidelines on the Protection of Privacy and Transborder Flows of Personal Data, to develop global minimum standards on protection of personal information.