

Investment Treaties: The Quest for Balance

Agenda

14 March 2016
OECD Conference Centre
Paris, France

- Many recent investment treaty developments have been driven by the quest for balance between investor protection and governments' right to regulate. Efforts to achieve balance have inspired innovation in treaty policy, led some countries to exit investment treaties perceived as outdated, and informed treaty policy and practice worldwide.

This second annual Conference on Investment Treaties will explore:

1. How governments are balancing investor protection and the right to regulate;
2. A case study on addressing the balance through substantive law in particular through approaches to the fair and equitable treatment (FET) provision;
3. The search for improved balance through new institutions or improved rules for dispute settlement including the new Investment Court System developed by the European Union.

A concluding session will consider how the OECD, working with other international organisations, can support constructive improvement of governments' investment treaty policies in this regard.

- A forum for exchanges between governments, international organisations, the private sector, civil society and academic experts

Since 2011, governments have been evaluating key aspects of investment treaties at regular bi-annual meetings of the OECD-hosted Freedom of Investment (FOI) Roundtable. This Conference will gather senior policy-makers and investment treaty negotiators from the 54 advanced and emerging economies participating in the Roundtable for exchanges with leading representatives of business, civil society and academia, as well as international organisations.

- Date, time and venue

14 March 2016, 8:30-18:00, OECD Conference Centre, CC12, Paris.

- Contact

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■ Draft agenda

8:30 – 9:15 *Registration of participants*

9:15 – 9:30 **Introductory remarks**

Gabriela Ramos, Special Counsellor to the OECD Secretary-General, Chief of Staff and Sherpa

9:30 – 11:30 **The search for balance between the protection of investors and governments' right to regulate**

The investment treaty system is both expanding – with major new treaties and many ongoing negotiations – and contracting – with some governments terminating treaties that they see as outdated. The development of innovative new models and approaches contrasts with growing convergence in some areas. With the growing public debate about investment treaties and investment disputes, governments are now frequently called on to explain their policy choices, in particular with respect to the balance between governments' right to regulate and the protection of foreign and domestic investors.

Suggested methods to address balance can include adjustments to substantive law including (1) defining or limiting individual treaty protections for foreign investors; (2) establishing carve-outs or special regimes for particular sectors; (3) incorporating general exceptions, right-to-regulate clauses or clarifications; (4) establishing or clarifying the existence of conditions on access to treaty benefits, such as compliance with domestic law; or (5) aligning the treatment of foreign and domestic investors. They can also include the design of dispute resolution mechanisms – see below.

In this panel, governments from different regions are invited to present their approaches to achieving balance in their investment policy. Experts from business, civil society, academia and international organisations will respond to the government speakers.

Chair

Elin Østebø Johansen, Ambassador of Norway to the OECD

Speakers

Lisa J. Kubiske, Deputy Assistant Secretary of State for International Finance & Development, Bureau of Economic and Business Affairs, US Department of State

Rupert Schlegelmilch, Director for Services, Investment, IPRs and Public Procurement, DG Trade, European Commission

TIAN Ya, Deputy Director, Department of Treaty and Law, Ministry of Commerce, China

José Henrique Martins, General Coordinator for Trade Policy, Secretariat for International Affairs, Ministry of Finance, Brazil

Yasser ElNaggar, Principal Deputy Minister of Investment, Egypt

Mustaqeem de Gama, Counsellor Economic, Permanent Mission of South Africa to the WTO

Ricardo De Urioste Samanamud, Advisor, Directorate General of International Economic Affairs, Competition and Productivity, Ministry of Economy and Finance, Peru

James Zhan, Director of Investment and Enterprise, United Nations Conference on Trade and Development (UNCTAD)

Winand Quaedvlieg, Chair of the BIAC Committee on International Investment and Multinational Enterprises

Hans-Jürgen Völz, Head, Economics, German Association for Small and Medium-sized Businesses (BVMW)

Thea Lee, Deputy Chief of Staff, AFL-CIO

Gaëlle Dusepulchre, Permanent Representative to the EU, International Federation for Human Rights (FIDH)

11:30 – 13:00 A case study on addressing the balance through substantive law – fair and equitable treatment (FET) provisions and substitutes

The fair and equitable treatment (FET) provision has leapt to prominence in the last 15 years as the principal ground of liability at issue in many if not most investment treaty arbitration claims. It is second only to ISDS as the most-cited provision in debates about the impact of treaties on the right to regulate.

Recently, several contrasting approaches to FET have become clearer in governments' treaty practice. The recently-concluded TPP (between countries that account for approximately 40% of world GDP and a third of international trade) expressly limits FET to the minimum standard of treatment of aliens under customary international law ("MST-FET"). A similar approach is found in a growing number of recent treaties (including the PR China-Korea FTA, the recent Pacific Alliance agreement as well as in Canadian and US model BITs and treaties). It harkens back to the 1967 OECD Draft Convention and closely resembles NAFTA as authoritatively interpreted by the NAFTA governments.

In terms of content of the MST-FET standard, the only rule specifically listed under MST-FET in the TPP is the obligation not to deny justice in adjudicatory proceedings (TPP art. 9.6(2)). Denial of justice is sharply limited in domain compared to many arbitral interpretations of FET (e.g. applying only to adjudicatory proceedings rather than to all governmental legislative, regulatory and other action). This approach is also reflected in the recent Pacific Alliance agreement and CAFTA-DR.

Additional MST-FET norms beyond denial of justice are contemplated in the TPP. But the TPP expressly clarifies that the foreign investor claimant's burden to prove all elements of its claim includes the burden to establish the existence of any asserted additional rule of customary international law through evidence of (i) state practice that (ii) states follow from a sense of legal obligation (*opinio juris*). (Annex 9-A; art. 9.22(7)). Previous government statements suggest that the TPP approach to FET seeks to preclude investors or ISDS arbitrators from simply relying on previous arbitration cases that have not examined the customary international law basis for an obligation or that interpret autonomous FET obligations. It seeks to exclude reliance on subjective views about what is fair in applying the MST-FET provision.

This relatively narrow view of MST-FET contrasts with other approaches to FET. In ISDS arbitral decisions and commentary, FET has frequently been seen as a broad and general obligation that gives rise through arbitral interpretation and analysis to extended lists of more specific rules, standards or norms in different contexts. For example, a recent survey of FET, based on a review of arbitral decisions, refers to the standard extending to good faith, consistency of conduct, transparency of rules, recognition of the scope and purpose of laws, due process, prohibition of harassment, a reasonable degree of stability and predictability of the legal system, recognition of investors' legitimate expectations, and prohibitions of arbitrariness and discrimination.

The recent EU proposal on FET for TTIP (which is closely modelled on the Canada-EU CETA agreement) reflects what could be described as a middle ground between some expansive interpretations of FET and the relatively narrow TPP/NAFTA style approach. The provision does not limit FET to the MST under customary international law. It provides for a closed list of elements that can only be extended by agreement of the treaty parties. The EU approach lists denial of justice as an element of FET. It also lists several other elements including a fundamental breach of due process, manifest arbitrariness, targeted discrimination on manifestly wrongful grounds, harassment, coercion or abuse of power. While appearing narrower than some arbitral interpretations of FET, it appears to be significantly broader than MST-FET as set forth in the TPP.

A fourth approach does not refer to FET as a component of investor protection. It is notably illustrated by the December 2015 Indian model investment treaty. The new model protects covered investors from violations of customary international law (as established through a general and consistent practice of States that they follow from a sense of legal obligation)

through denials of justice, fundamental breaches of due process, targeted discrimination on manifestly unjustified grounds, or manifestly abusive treatment, such as coercion, duress or harassment. (art. 3(1)). The Indian approach thus identifies some similar elements to the EU proposal for TTIP, but does not refer to FET and requires that rules in each area be established as part of customary international law under a test similar to that in the TPP. Recent South African domestic legislation also excludes any reference to FET.

The differing approaches to FET are particularly noticeable with regard to the degree of protection, if any, based on foreign investors' "legitimate expectations". Few if any investment treaties in force expressly refer to legitimate expectations, but failure to protect legitimate expectations has become a frequent basis of claims and government liability in arbitration cases under FET provisions. In addition to its general requirements with regard to proof that a rule exists in customary international law, the TPP expressly excludes findings of breach of MST-FET based only on actions inconsistent with a covered investor's expectations. The new Indian model treaty excludes references to FET, as noted, and also does not refer to legitimate expectations. The EU's proposal provides that the investment court may "take into account" certain legitimate expectations of covered foreign investors (art. 3(4)); CETA is similar.

This panel will explore governments' rationale for adopting these and other approaches to FET in current treaty policy. They will also consider how particular approaches in existing treaties affect the balance in their treaty and investment policies. The discussion will also explore views about the relative importance of treaty rules as opposed to dispute resolution systems and adjudicators in achieving balance and fulfilling governments' intent. Stakeholders and experts will respond to the government views.

Chair

David Gaukrodger, Senior Legal Adviser, Investment Division, OECD

Speakers

Carlo Pettinato, Deputy Head of Investment Unit, DG Trade, EU Commission

Danielle Yeow, Senior State Counsel, International Affairs Division, Attorney-General's Chambers, Singapore

Karin Kizer, Attorney-Adviser, Office of Economic and Business Affairs, Department of State, United States

Ricardo De Urioste Samanamud, Advisor, General Directorate for International Economy, Skills and Productivity, Ministry of Economy and Finance, Peru

Christophe Bondy, Partner, Volterra Fietta, London; former Senior Counsel and Deputy Director, Department of Foreign Affairs and International Trade, Canada

Lise Johnson, Head, Investment Law and Policy, Columbia Center on Sustainable Investment (CCSI)

Rudolf Dolzer, Professor emeritus, University of Bonn, Germany; McNair Chambers

Jansen Calamita, Director, Investment Treaty Forum, British Institute of International and Comparative Law

13:00 – 14:30 *Lunch break*

14:30 – 17:00 The search for balance and strengthened legitimacy through new institutions or improved rules for dispute settlement: permanent investment courts, appellate tribunals and other ideas

The recently concluded EU-Vietnam and EU-Canada trade and investment agreements contain a striking institutional innovation in investment treaty practice: a permanent court and an appellate tribunal to resolve investor-state disputes. The EU has also proposed a similar standing two-tier investment court system (ICS) for TTIP. The EU has additionally indicated that it will seek to achieve broader multilateral agreement on a permanent court and appellate tribunal to replace ad hoc investor-state arbitration across many existing and future treaties; both CETA and the EU-Vietnam FTA provide for the Parties engaging in broader efforts to negotiate or pursue the establishment of a multilateral investment tribunal and appellate mechanism. The new agreements and proposals have generated intense interest and commentary.

This innovation results from an EU public consultation on the investment provisions in TTIP, extended public debates about ISDS, and input from the European Parliament and national Parliaments in Europe. The European Commission presents the court as a response to “a fundamental and widespread lack of trust by the public in the fairness and impartiality of the old ISDS model”.

As described by the EU, the ICS is a way to help “enshrine government’s right to regulate”. The ICS proposal continues to allow for claims against governments by covered foreign investors. It seeks to address legitimacy issues associated with such claims in arbitration by “introducing the same elements that lead citizens to trust their domestic courts”. These include judges publicly appointed in advance by governments, removal of certain perceived economic incentives and conflicts of interest among adjudicators and appointing authorities, transparency of dispute settlement, and elimination of foreign investor input into the selection of judges in individual cases. The ICS proposal contains further innovations to help investors by accelerating the treatment of claims and facilitating access to dispute settlement for SMEs.

Commentators have raised a number of issues about the court proposal, concerning the enforcement of awards, the selection of judges and appellate members, the functioning in light of the expected flow of cases, and how individual treaty versions of the ICS could evolve into a broader multilateral ICS that would apply to many treaties.

Other ideas about potential improvements to ISDS have been included in recent treaties or are under consideration. Others consider that the basic structure of the current ISA system is fundamentally sound and that improvements could be most usefully directed at issues like better treaty drafting, governmental capacity to prevent disputes and defend cases, or expanding the pool of arbitrators. Still others reject the premise of ISDS and prefer state-to-state dispute settlement, the domestic courts or individual commercial arbitration agreements to resolve investor-state disputes.

This panel will allow the EU and others to present their new ICS policy. Other governments, stakeholders and experts will discuss the ICS and/or present alternative means of dispute settlement. The latter may include other ways of improving ISDS, alternative approaches to dispute resolution or remaining with the basic structure of the existing system.

This panel will also explore views about the relative importance of treaty rules as opposed to dispute resolution systems and adjudicators in achieving balance and fulfilling governments’ intent. The discussions will help inform the OECD investment Roundtable’s forthcoming renewed discussions about dispute settlement.

Chair **Hélène Ruiz Fabri**, Director, Max Planck Institute Luxembourg for International, European and Regulatory Procedural Law

Speakers **André von Walter**, Legal Counsel, Unit for Dispute Settlement and Legal Aspects of Trade Policy, DG Trade, EU Commission

Azusa Kikuma, Deputy Director, Economic Partnership Division, Economic Affairs Bureau, Ministry of Foreign Affairs, Japan

Jai Motwane, Senior Director for Services and Investment in the Office of the United States Trade Representative (USTR)

Pedro Mendonça Cavalcante, Secretary, Trade in Services Division, Ministry of External Relations, Brazil

Aurelia Antonietti, Team Leader/Legal Counsel, International Centre for Settlement of Investment Disputes (ICSID)

Dirk Pulkowski, Senior Legal Counsel, Permanent Court of Arbitration (PCA)

Shaun Donnelly, Vice-President, Investment and Financial Services, United States Council for International Business

Thea Lee, Deputy Chief of Staff, AFL-CIO

Nathalie Bernasconi-Osterwalder, Group Director, Economic Law & Policy, International Institute on Sustainable Development (IISD)

Nikos Lavranos, Secretary General, European Federation for Investment Law and Arbitration

Robert Howse, Lloyd C. Nelson Professor of International Law, New York University School of Law

17:00 – 18:00 Improving investment treaties

Where should investment treaty policies go from here and how can the OECD help?

The closing discussion will gather themes from the discussions, summarise some prevailing trends in treaty practice and address the constructive improvement and modernisation of investment treaties. The discussion may also include consideration of how to address emerging issues such as the broader use of investment treaties to foster investment liberalisation, the interaction between trade and investment provisions, or approaches to introducing now-prevailing treaty principles into the large number of older investment treaties.

Keynote

Manfred Schekulin, Chair of the OECD Investment Committee and FOI Roundtable

Chair

Ana Novik, Head, Investment Division, OECD

Speakers

Rodrigo Monardes, Counsellor, Chilean Delegation to the OECD, former Head of the Services, Investment and Air Transport Division, Ministry of Foreign Affairs of Chile

Natalia Porras, Coordinator, Foreign Investment, General Directorate of Foreign Trade, Costa Rica

Mathieu Raux, Deputy Head of Unit, Investments agreements and international trade rules
French Treasury

Thea Lee, Deputy Chief of Staff, AFL-CIO

Winand Quaedly, Chair of the BIAC Committee on International Investment and
Multinational Enterprises

Lise Johnson, Head, Investment Law and Policy, Columbia Center on Sustainable Investment

18:00 – 20:00 *Cocktail reception*

Background documents

Treaties and treaty material

[Brazil-Malawi Investment Cooperation and Facilitation Agreement \(2015\)](#)

[China-Korea FTA \(2015\)](#)

[Comprehensive Trade and Economic Agreement \(CETA, 2016\)](#)

[Dominican Republic-Central America Free Trade Agreement \(CAFTA-DR, 2004\)](#)

[Dutch model BIT \(2004\)](#)

[EU investment chapter proposal for TTIP \(2015\)](#)

[EU-Viet Nam investment chapter \(2016\)](#)

[German model BIT \(2008\)](#)

[Indian model BIT \(2016\)](#)

[OECD Draft Convention on the Protection of Foreign Property \(1967\)](#)

[Pacific Alliance, Additional Protocol to the Framework Agreement of the Pacific Alliance \(2014, in Spanish\)](#)

[Trans-Pacific Partnership Agreement \(TPP, 2015\)](#)

Other material

[South African Protection of Investment Act \(2015\)](#)

[Blog by Cecilia Malmström on Proposing an Investment Court System \(2015\)](#)

[Blog by Angel Gurria on the growing pains of investment treaties \(2014\)](#)

[D. Gaukrodger and K. Gordon \(OECD 2012\), "Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community"](#)

[J. Pohl, K. Mashigo and A. Nohen \(OECD 2012\), "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey"](#)

[R. Dolzer, "Fair and Equitable Treatment: Today's Contours" \(2014\)](#)

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