The Future of Investment Treaties (Track 2)

Summary of discussions of the Future of Investment Treaties (Track 2) meeting of 12 April and 27 June 2023

The work on the Future of Investment Treaties is hosted by the OECD Investment Committee. Currently, 99 jurisdictions are invited to participate in the work.

The present report summarises the discussions of the meeting under Track 2 held on 30 November 2022. Participants in the Track 2 Roundtable have agreed to its public release. The process is documented at https://oe.cd/foit; the material is also available in French at https://oe.cd/lati.

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The Future of Investment Treaties – Track 2: Summary of discussions of the meetings of 12 April and 27 June 2023

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Context and purpose of this document

1. The OECD has hosted intergovernmental discussions on international investment policies for over six decades. At present, 99 jurisdictions from all continents are invited to participate in these conversations, which the OECD Secretariat ("Secretariat") supports through independent research. Governments set the agenda and priorities for these conversations.

2. Since 2011, the OECD-hosted policy community has intensified its focus on investment treaties, their design and interpretation by treaty users, associated institutional arrangements, and the implications for policymaking. Concerns about these implications have grown rapidly in recent years, especially as treaties are being used to challenge public policy measures to address the climate crisis or other policy measures widely considered legitimate; courses and outcomes of disputes document unintended interpretations and uses of treaties; and treaties do not address important aspects that could be usefully agreed in investment treaties and would likely lead to overall better outcomes.

3. In March 2021, governments decided to refocus their discussions of investment treaties and treaty policy; set them on a new and accelerated footing; and called on the OECD to host these conversations on the *Future of Investment Treaties* in an inclusive format in two interrelated tracks.

- Track 1 discussions consider the challenges that investment treaties should address in the future as well as desirable changes to current approaches. Governments have focused the work in particular on investment treaties and climate change.
- Track 2 is a government-led effort to consider among peers the merits and options for the adjustment of existing treaties in respect of specific substantive provisions, and whether it would be better if specific substantial provisions used in the large number of earlier treaties should resemble more recent designs of such clauses, and if so, how this could be achieved.

4. Ninety-nine jurisdictions are currently invited to participate in this work programme,[1] which has an initial duration of two years. The inaugural meeting of the Track 2 Project took place in virtual format on 27-29 October 2021, bringing together treaty experts and policy makers from many jurisdictions. It was agreed that in the interest of transparency to the public, the main traits and outcomes of substantial discussions be made publicly available through a dedicated OECD webpage at https://oe.cd/foit.

5. The initially agreed work programme for Track 2 foresaw discussions of three substantive treaty provisions: indirect expropriation, most-favoured-nation (MFN) treatment with respect to dispute settlement arrangements, and 'fair and equitable treatment' (FET) clauses. These clauses were identified because of their important role in Investor-State dispute settlement proceedings, frequent interpretations that do not reflect governments' intentions, and because treaty designs of these three clauses had broadly evolved towards newer designs across many jurisdictions – conditions that may make potential agreement on the substance of any intervention in existing treaties likely more successful.[2]

6. In 2023, France granted a financial contribution to the work of Track 2 for two years. This contribution enables a swifter delivery and the production of further analytical material for the Track 2 Project and facilitates the participation of representatives from developing countries in this work.

7. The present document contains the summary of discussions of the meetings held under Track 2 on 12 April and 27 June 2023. The summary was prepared by the Secretariat, and participating governments have had an opportunity to comment on the draft. The summary follows the structure of discussions. It includes insights and data from three Secretariat research notes on "*'Fair' and 'equitable' treatment provisions in investment treaties*", "*Considerations on means to improve outcomes of designs of 'fair' and 'equitable' treatment clauses in investment treaties*" and "*Directions for work under Track 2 of the programme on the Future of Investment Treaties*".[3] The interventions reflected and summarised in the present document do not necessarily represent official government views nor those of the OECD.

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[1] Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Czech Republic, Denmark, Ecuador, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guinea, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Korea, Kosovo*, Kuwait, Latvia, Lithuania, Luxembourg, Malaysia, Mali, Mauritius, Mexico, Moldova, Mongolia, Montenegro, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Nigeria, North Macedonia, Norway, Oman, Pakistan, Paraguay, Peru, Philippines, Poland, Portugal, Qatar, Romania, Saudi Arabia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Türkiye, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Uzbekistan, Viet Nam, European Union.

[*] This designation is without prejudice to positions on status and is in line with United Nations Security Council Resolution 1244/99 and the Advisory Opinion of the International Court of Justice on Kosovo's declaration of independence.

[2] Track 2 participants discussed indirect expropriation clauses in October 2021 and April 2022; most-favoured nation clauses insofar as they relate to dispute settlement arrangements in November 2022; and fair and equitable treatment clauses in April and June 2023.

[3] These notes are available separately on the webpage https://oe.cd/foit.

1. Topics of the conversations at the meetings of 12 April and 27 June 2023

8. The discussions at the meetings on 12 April and 27 June 2023 focused on 'fair' and 'equitable' treatment provisions as provided in investment treaties; developments in approaches framing 'fair' and 'equitable' clauses; approaches to improving the designs of the clause; and country experiences and policy choices with respect to the specification of 'fair' and 'equitable' treatment clauses ("FET clause" or "FET clauses"). Delegates also discussed priorities for work under Track 2 of the programme on the Future of Investment Treaties beyond 2023.

2. Developments in the approaches framing FET clauses

9. The Secretariat presented the main findings of the background note that it prepared to support discussions *('Fair' and 'equitable' treatment provisions in investment treaties – a large-sample survey of treaty provisions*).[4] The note focuses on the design of FET clauses in past and current treaty practice, trends over time, and observed country preferences and policies in the light of discussions on treaty reform. It describes how the FET clause evolved over time and which opportunities arise from this evolution. It explores FET clauses in a sample of 2,670 investment treaties concluded between 1959 and 2023 by the 99 jurisdictions participating in the work on the Future of Investment Treaties. Almost 95% of the treaties in the sample contain references to 'fair' and 'equitable' treatment.

10. The most frequently observed approach – present in around 80% of the sample treaties – is characterised by a reference to 'fair' and 'equitable' treatment without specification as to the notion and contours of this obligation. The use of such unspecified (or 'bare') FET clauses has declined sharply in treaties concluded after 2003 and has all but ended for new treaties concluded after 2018. From 2001 onwards, a new approach emerged which limited the scope of obligations associated with 'fair' and 'equitable' treatment. The note sheds light as to how this limitation is achieved, namely through three different methods: a limitation of 'fair' and 'equitable' treatment to the minimum standard of treatment under customary international law, a specification of the scope of 'fair' and 'equitable' treatment through a closed list, and the non-inclusion of an obligation to accord 'fair' and 'equitable' treatment. Additional specifications are observed in the context of these approaches, which further clarify the meaning of the clause; these are also outlined in the note.

11. Among the 99 jurisdictions that are invited to the work programme, 87 jurisdictions have for some time consistently used one of the new FET clause approaches. However, treaties featuring these newer designs constitute a small minority of all investment treaties in force, and even if all recently negotiated treaties were to come into force, treaties containing earlier designs would still represent 77% of all investment treaties concluded by Track 2 participants. The spread of the feature in recent treaties thus only marginally contributes to the issue of addressing unspecified FET clauses in earlier generation treaties featuring older designs. As such, unless jurisdictions adopt a structurally different approach to incorporate the designs that they are now almost consistently using with regard to FET clauses into the stock of their existing treaties, unspecified or ambiguous designs of 'fair' and 'equitable' treatment obligations will continue to dominate the collective treaty population for a long time.

[4] The note is available on https://oe.cd/foit.

3. Country experiences and policy choices with respect to the specification of FET clauses

12. Delegates discussed their respective jurisdictions' policy choices and shed light on the reasons which spurred their governments to incorporate newer designs of FET clauses into their more recent treaties. Delegates recognised the dominance of the FET clause in investor-state disputes. They also agreed that bare FET clauses generally allowed, in the experience of their respective jurisdictions, for a very broad interpretation of the standard by arbitral tribunals that was not always intended. Several delegates emphasised the necessity of specifying the content of the 'fair' and 'equitable' treatment standard. According to several delegates, the adoption by their governments of specified FET clauses in their newly concluded treaties has emerged as a response to inconsistent arbitral practice which generated legal uncertainty, for States and investors alike. By adopting specified FET clauses, jurisdictions sought to strengthen legal certainty and predictability.

13. Preferences as to how such a specification is best achieved differ. Some delegates explained that their jurisdictions preferred a closed list of elements while others explained the rationale behind the link of the FET standard to the minimum standard of treatment of customary international law.

14. Some delegates explained that the preference for a closed list design resulted from the potentially greater legal certainty and predictability, as the contents of customary international law may evolve over time. Others saw the openness to evolution of the standard with custom as an advantage, and considered that the customary international law approach offered greater dynamism to adapt to later developments. It was recognised that any such evolution would be a rather slow process, however.

15. Several delegates noted that while the approaches may be formally distinct, their substantive scopes overlapped considerably in practice. Other jurisdictions suggested that both approaches were complementary, and that a closed list may need to be accompanied by an exact definition of what should be understood as 'fair' and 'equitable' treatment.

16. Several delegates noted that arbitral tribunals may not interpret even newer clauses in line with the intentions of the States parties, referring to recent research on the impact of treaty reform for arbitral interpretation. Some delegations also shared their experience as respondents in disputes involving claims brought under the 'fair' and 'equitable' treatment standard as capped at the minimum standard of customary international law; they reported that arbitral tribunals took liberties when postulating what had crystallised into customary international law, at times adding components to the 'fair' and 'equitable' treatment standard beyond jurisdictions' understanding of the standard – e.g., legitimate expectations, fundamental changes of the regulatory framework, etc.

4. Considerations on approaches to improve outcomes of current designs of FET clauses in investment treaties

17. Delegates participating in the meetings under Track 2 also considered preliminary issues regarding any potential transition of treaties whose FET clauses no longer correspond to current practices towards more recent designs. A Secretariat note supported this conversation (*Considerations on means to improve outcomes of designs of 'fair' and 'equitable' treatment clauses in investment treaties*).

18. The objective of the discussion was to start preliminary reflections on the considerations, options, and limitations of a transition from earlier to newer designs if and where individual governments wished to undertake such steps. It covered different types of interventions and instruments that may allow governments to clarify or adjust some of their earlier treaty arrangements – e.g., amendments, joint interpretations, or unilateral statements

– and parameters such as suitability and effectiveness that may influence a possible decision on which approach to pursue in a given scenario.

19. Delegates confirmed that the note raised appropriate and relevant considerations relating to potential avenues for transitions for individual treaties or groups of treaties and clauses, both for the FET clause – considered by some as the most pressing substantive clause that needed to be tackled – and other substantive treaty clauses. Some delegates expressed the view that the FET clause could be used to test and explore a transition exercise, while others suggested it could be easier to start the process with clauses on which greater homogeneity of views is observed, such as indirect expropriation clauses, or MFN clauses related to procedural provisions. They agreed that a balance had to be struck between the urgency of reform and the ease of arranging a transition.

20. Several delegations suggested that further discussions be prioritised to consider potential avenues to transition treaties whose designs no longer correspond to current practices towards more recent FET clause designs and approaches.

21. A number of delegates referred to the BEPS Project lead by the OECD in the area of taxation as an example of the Secretariat's expertise in crafting consensus on multilateral agreements, and suggested that this experience be mobilised for reflections under Track 2.

5. Topics and priorities for continued work under Track 2

22. A discussion on future work under Track 2 beyond the initially agreed two-year period until end-2023 concluded the conversations among participants. A Secretariat note (*Directions for work under Track 2 of the programme on the Future of Investment Treaties – Options for consideration in future topics and priorities*) summarised the outcomes of the four rounds of discussions that took place between October 2021 and April 2023. This work and the engagement with the substance documented a strong interest in pursuing work in the format of Track 2, and to continue the path by deepening reflections on the initially discussed treaty provisions and to expand the work in order to cover additional treaty provisions.

23. The Secretariat proposal, which built on expressions of interests at earlier meetings, suggested a consolidation of work and achievements on the three clauses that had been addressed for far; as well as a thematic broadening to include additional aspects of MFN clauses as well as "full protection and security" clauses.

24. Delegates reiterated their strong support for the continuation of the work programme in the format of Track 2. Delegates indicated that they wished to further explore substantive standards that have already been discussed in previous meetings, and to broaden considerations to include additional provisions as suggested by the Secretariat. Additional issues were also suggested, such as the right to regulate, potentially in connection with general exceptions clauses, national treatment, or the rules regarding damages – noting nevertheless that the last topic may overlap with work undertaken by the UNCITRAL Working Group III. Some delegations suggested that all substantive treaty clauses should be subject to reflection under Track 2.

25. Several delegates expressed their view that discussion of procedural means should be advanced in parallel so that a transition from earlier to newer designs in core clauses could be achieved in a not too distant future. They opined that such transition could then be implemented for individual treaties or groups of treaties by participating governments to any substantive provision.

26. In this regard, the Secretariat was asked to deliver further analysis on the various legal instruments available for jurisdictions to amend or interpret provisions that featured outdated designs, and to schedule discussions to enhance the collective understanding on the

degree of material overlap or distance between the new approaches to FET clauses observed in recent treaty designs.

27. Several delegations emphasised the complementarity of discussions on substance – i.e., the design of clauses – and on procedure – i.e., how a transition from earlier to newer designs may be carried out, and asked for these discussions to advance in parallel.

28. Delegates also touched upon the organisation of further work under Track 2 and the interaction with efforts undertaken in UNCITRAL WG III on the reform of Investor-State dispute settlement. They held that the processes were different in mandate and substance, and had begun at different times, and represented different dynamics and issues. Therefore, it was suggested that the work be kept separate, but that exchanges between the Secretariat and the UNCITRAL WG III continue to identify potential benefits and opportunities that may arise from the complementary processes.