The Future of Investment Treaties (Track 2)

Directions for work under Track 2 of the programme on the Future of Investment Treaties
Priorities, scoping and sequencing of work ahead

OECD Secretariat research note
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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 was prepared for the meeting under Track 2 held on 7 November 2023 and was initially issued as DAF/INV/TR2/WD(2023)3/REV1. 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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Context, purpose, and structure of this note

1. The OECD-hosted work programme on the Future of Investment Treaties was launched at the 6th Annual Conference on Investment Treaties on 29 and 30 March 2021. The programme comprises two tracks and the initial work programme runs until the end of 2023.

2. In Track 1, government and non-government participants have initiated the first major sustained multilateral effort to consider climate policies for investment treaties, responding to growing demands to take action on the climate impacts of the investment treaty regime. Work under Track 1 focuses on the alignment of investment treaties with the Paris Agreement and net zero goals.

3. Track 2 considers whether and how to bring change to substantive provisions of a large number of mainly earlier generation treaties, issue by issue, to better align them with current designs and insights. Work scheduled under Track 2 during the initial period running up to end-2023 was to address 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 at the outset of the work programme because they play a significant role in Investor-State dispute settlement proceedings, are frequently interpreted in ways that do not reflect governments' intentions, and because treaty practice with respect to the three clauses had broadly evolved towards newer designs across many jurisdictions. These conditions were deemed to represent potential agreement on the substance of any intervention in existing treaties likely more successful.

4. The five rounds of discussions that took place between October 2021 and June 2023 documented a strong interest in work under Track 2, and in pursuing this work beyond 2023, specifically to deepen reflections on the initially discussed treaty provisions, and to expand the work thematically. The thematic expansion relates to broadening the substantive scope of the discussions to cover other treaty provisions, as well as reflections on operational approaches that would allow an implementation of any desirable adjustments to a potentially large number of treaties in an effective and efficient manner.

5. The initial duration of the work programme is coming to an end, and participating governments discussed at their meeting on 27 June 2023 how work under Track 2 should be carried forward, scoped, sequenced, and prioritised. This discussion was based on a note by the Secretariat that drew on expressions of interest that participants had advanced during earlier Track 2 meetings. The present document summarises the agreement among Track 2 participants on priorities, scoping and sequencing of the work under Track 2 that was

achieved at the meeting on 27 June 2023. The work programme in this note sets forth the areas of work that are planned for the next two years; however, Track 2 participants may decide on adjustments when priorities change or opportunities arise.

1. General approach

6. During their discussions of the priorities for future work under Track 2, participants expressed an interest in pursuing Track 2 work in several avenues:

- Some delegations held that it was important to consolidate findings of discussions on substantive clauses that had already been discussed – indirect expropriation, MFN with respect to dispute settlement arrangements, and FET – and to advance reflections on how interested governments could translate these findings into concrete steps to transition individual treaties or groups of treaties towards newer designs of these clauses;[1] some delegations expressed the desire that work on some high-priority clauses advance in an expedited manner as a priority and proposed that this approach be trialled on the FET clause (for its significance) or on indirect expropriation of MFN clauses (for the greater perceived consensus on the desirable substance of these clauses).
- Some delegates expressed the view that all substantive clauses of investment treaties should ultimately be reviewed under Track 2, and that work should not be limited to clauses where an implicit quasi-agreement on new approaches had already formed. Among these, some clauses were mentioned more frequently, such as those related to MFN beyond their interaction with dispute settlement arrangements; "full protection and security" clauses; as well as general exceptions clauses and instruments to secure treaty-bound host economies' right to regulate.

7. Delegates construed these approaches as complementary. They reflect different priorities under constraints of time and capacity in both participating jurisdictions and the Secretariat, and different implicit timeframes for the delivery of the work envisaged under Track 2.

2. Priorities for the near term

8. **Deepening reflections on the three initial clauses**. Delegates have at prior meetings expressed an interest in deepening reflection on the three substantive clauses that were initially included in the scope of Track 2 work. While understanding on developments and potential implications had been sharpened, further work is needed to address the material distance or proximity between currently pursued approaches in designs and outcomes; identify whether the remaining differences in approaches can be bridged or whether these approaches stand side-by-side as alternatives; and resolve the large diversity in details of the framing of clauses. This work is a precondition for any meaningful advancement towards a transition of individual treaties or groups of treaties from old to new designs, should individual jurisdictions wish to pursue this avenue.

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[1] The term "transition" is used in this note as an umbrella term for any kind of intervention that seeks to bring older treaty designs more in line with current approaches or improve the outcomes of certain treaty clauses in other ways. A "transition" could for instance be achieved through an interpretive instrument of an amendment of the text of a treaty.

9. Work in this area would lead to consolidating progress made in respect of the three specific clauses during the first two years of Track 2 work. It would also provide methodological insights as to how additional treaty clauses not yet covered to date should be addressed.

10. **Developing practical means for a transition**. Delegates have also emphasised that consolidation of progress on the three initial clauses needed to include a consideration of the practical means to achieve a transition. Track 2 had indeed from the outset been construed as an avenue for interested governments to address their large number of earlier generation treaties which feature outdated designs of substantive clauses where jurisdictions held that it would be better if these treaties resembled more closely designs that are reflected in current treaty practice.

11. First steps in this area have begun with respect to the FET clause in June 2023, and are scheduled to continue in November 2023. This work explores the legal instruments to achieve a transition as well as preliminary reflections that would need to be considered for a choice among these instruments for a given scenario. While currently specific to FET clauses, insights can likely be transferred to other clauses as well.

12. **Cautious broadening of the scope of clauses under review**. Dissatisfaction with past design approaches in investment treaties exist beyond the three initially considered clauses, and there is wide agreement that other substantive treaty provisions should be addressed under Track 2. Views on how this thematic expansion should be sequenced, and which clauses should be treated as a priority, are less uniform.

13. Capacity constraints preclude an immediate broad expansion of the substantive scope of Track 2 discussions, especially if considerations on the three initial clauses and the practical means to achieve transitions should also be advanced in parallel. A few areas where a thematic expansion could nonetheless be considered were mentioned explicitly. These include the MFN provision more broadly; the "full protection and security" provision; and rules associated with general exceptions and the right to regulate – areas that have played a sizable role in disputes as the other clauses that had been identified earlier. Work in these areas appears possible in the near term.

14. During the discussion on the interaction between ***most-favoured-nation clauses*** and dispute settlement arrangements in investment treaties on 30 November 2022, participants suggested that MFN clauses raise broader aspects than those exclusively related to the interaction with dispute settlement arrangements. These issues relate in particular to the interpretation of the notion of 'treatment' and whether the mere fact that a third-party treaty features a higher standard of protection constitutes 'treatment' that could be incorporated through an MFN clause in the basic treaty. Some arbitral tribunals have allowed investor-claimants to import treaty provisions from one or more third-party treaties concluded by the respondent, a practice sometimes referred to as "cherry picking" or treaty shopping.[2] Only a few recent treaties contain explicit clarifications that prevent such an interpretation,[3] and explicit language could clarify the intentions of States parties. A consideration of this matter could be based on recent treaty practice and on empirical

[2] See OECD (2018), Treaty shopping and tools for reform, Conference agenda and background material, pp. 9-11 (analysis of treaty shopping in ISDS using MFN clauses).

[3] See for example *CETA*, Article 8.7, which states "Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute 'treatment', and thus cannot give rise to a breach of this Article, absent measures adopted or maintained by a Party pursuant to those obligations."

information on government intent, based primarily on party submissions in litigation contexts. This would provide information on the state of agreement on the matter and on potential textual solutions that could provide desired clarity.

15. Separately, most investment treaties feature an obligation to accord *"**full protection and security**"* to investors of the other party. This clause is occasionally interpreted as to also cover what is termed as "legal" protection (e.g., access to effective judicial review), in addition to "physical" protection. Many recent treaties feature specific clarifications that (1) limit what is required under the clause to the international minimum standard of treatment under customary international law and/or (2) specify that protection and security applies to physical protection only. Some recent treaties exclude FPS explicitly from the scope of the treaty's obligations. A clarification of the notion and obligations under FPS clauses in treaties that currently lack such explicit clarifications may be desirable and could be considered under Track 2, to the extent participating jurisdictions are interested.

16. Finally, ***general exceptions and the right to regulate*** is further area singled out explicitly in the context of Track 2 discussions. Unlike other topics currently covered by Track 2 work, the right to regulate is not directly associated with a traditional treaty clause, while general exceptions clauses are one among several instruments that can contribute to safeguarding State-parties' right to regulate. Under these circumstances, it appears difficult to approach the subject matter in the same manner as has been used for more traditional treaty clauses such as FET, (indirect) expropriation, and MFN. A scoping paper that sets out the interaction between general exceptions clauses, other clauses, and the right to regulate would thus precede an analysis of the current state of agreement on the matter.

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