The Future of Investment Treaties (Track 2)

Summary of discussions of the Future of Investment Treaties Track 2 meeting of 30 November 2022

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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About this document

1. The OECD has hosted intergovernmental discussions on international investment policies for over six decades. Today, 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, this broad policy community has intensified its focus on investment treaties, their design and interpretation by treaty users, associated institutional arrangements, and the resulting 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 is concerned with a broader dialogue about the objectives that investment treaties could usefully fulfil and which content they would need to have to achieve these objectives, focusing, initially on 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 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 a large number of jurisdictions. It was agreed that in the interest of transparency to the public, the main traits of the substantial discussions would be made publicly available through a dedicated OECD webpage at https://oe.cd/foit.

5. The present document contains the main elements of discussions of the meeting under Track 2 that was held on 30 November 2022. 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 a Secretariat research note on "*The interaction between most-favoured-nation clauses and dispute settlement arrangements in investment treaties – a large-sample survey of treaty provisions*" that is likewise accessible through the website https://oe.cd/foit) that supported the discussions at the meeting. The interventions noted in the present document do not necessarily represent official government views nor those of the OECD.

1. Rationale and objectives of conversations under the Track 2 meeting of 30 November 2022

6. The original scoping of the Track 2 Project discussions during an initial two-year term mandates a focus on three specific clauses: indirect expropriation clauses (which the first two meetings considered in late 2021 and early 2022), most-favoured nation clauses insofar as they relate to dispute settlement arrangements, and fair and equitable treatment clauses. The rationale behind this choice of clauses is three-fold:

- The Secretariat's preliminary research and findings confirmed that there is convergence in treaty practice in textual designs relevant to these particular clauses, and near-systematic use of these new designs in more recent treaties concluded by participants to the Track 2 Project, with a common objective to clarify and frame treaty obligations;
- These clauses are deemed important in light of their importance in treaty-based litigation; and
- The majority if not all earlier generation treaties do not reflect new practices adopted and applied in practice with respect to these clauses.

[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.

7. The discussions at the meeting on 30 November 2022 focused specifically on the interaction between MFN clauses and dispute settlement arrangements, as per the initial agreement on the scoping of the Track 2 Project.[2]

8. The Chair outlined the meeting's agenda, which would in turn consider the following:

- The evolution of approaches to these clauses;
- Jurisdictions' own experiences and policy choices as to their treatment of the interaction between MFN clauses and dispute settlement arrangements;
- An overview of the designs and linguistic variations relevant to these clauses; and
- A consideration of the implications of evolving treaty practice in this particular field, as well as on the merits and opportunities of bringing change to MFN clauses that do not specify this interaction.

2. Developments in the approaches of "most-favoured nation" (MFN) clauses with respect to dispute settlement arrangements

9. The Secretariat presented the main findings of the background note prepared ahead of the meeting (The interaction between most-favoured-nation clauses and dispute settlement arrangements in investment treaties – a large-sample survey of treaty provisions) with respect to the evolution of MFN clauses in investment treaties insofar as they relate to dispute settlement arrangements.

10. In the 1990s, a small number of treaties were concluded that explicitly included dispute settlement arrangements in the scope of MFN.[3] The overwhelming majority of treaties at that particular point in time did not specify the relationship between MFN and disputes settlement arrangements. Starting in 2003, a growing number of treaties were concluded that provided an explicit exclusion of dispute settlement arrangements from the scope of MFN. The emergence of this practice was in all likelihood brought about by the *Maffezini* arbitral decision. A smaller number of treaties did not include MFN provisions altogether.

11. A steady trend is observed starting in 2003 for an explicit exclusion of dispute settlement arrangements from the scope of MFN (or alternatively, and in a significantly smaller subset of treaties, the non-inclusion of MFN clauses in newly concluded treaties). Almost all new treaties concluded in and after 2019 explicitly exclude dispute settlement arrangements from the scope of MFN. Some do not include an MFN clause at all.

12. To date, 84 jurisdictions out of the 99 invited to participate in the Track 2 Project have adopted this approach at least once; and many of these have – since first adopting the feature – subsequently adopted it consistently in all their newly-concluded treaties. The Secretariat's findings point towards a consistent and homogeneous treaty practice as to the relationship between MFN clauses and dispute settlement arrangements which leaves no room for ambiguity.

13. Nevertheless, more recent treaty practice does not address existing treaties concluded in the past. These earlier generation treaties would (even if all concluded treaties

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[2] The mandate did not encompass other aspects of MFN clauses. Consequently, the statistical background note prepared by the OECD Secretariat in support of the meeting's discussions does not address MFN clauses generally nor other specific aspects of MFN clauses.

[3] See, OECD Secretariat background note (2022), *The interaction between most-favoured-nation clauses and dispute settlement arrangements in investment treaties*.

were to come into force and all terminated treaties were to effectively terminate) together make up about 80% of the treaty population sample – 2,429 treaties and related documents – analysed by the Secretariat for the purposes of the background note. To the extent there is ambiguity over the interpretation of MFN provisions in these earlier generation treaties which represent the majority of the population of treaties in force, the interaction between MFN and dispute settlement arrangements would have to be clarified to align with the model that is almost universally used in newer treaties.

3. Experience and policy choices of jurisdictions with respect to the interaction between MFN and dispute settlement arrangements

14. Delegates discussed their respective jurisdictions' policy choices and shed light on their treaty practices on MFN with respect to dispute settlement arrangements.

15. Reasons behind the adoption by governments of an explicit exclusion of dispute settlement arrangements from the scope of their MFN clauses varied and overlapped. One delegate noted that its government had in recent years concluded a BIT that showcases this feature and explained that this policy choice was not so much rooted in any ISDS experience but rather reflected a decision to address legal uncertainty and ambiguity and the question of treaty shopping. Another delegate highlighted that their government had in fact always sought to oppose attempts by investors to import procedural and substantive provisions via its basic treaties' MFN clauses, and for this reason decided to explicitly excluding dispute settlement arrangements from the scope of its new treaties' MFN clauses in its treaty practice as of the early 2000s.

16. Several treaty experts representing EU Member States noted that their jurisdictions' practices were aligned with that of the EU, namely: a clarification that explicitly excludes dispute settlement arrangements from the scope of MFN. Some delegates also noted that their respective governments had introduced further carve-outs to the scope of application of MFN clauses in their newer treaties, namely in respect of treaty definitions and substantive standards. A treaty expert confirmed that the EU's current and future practice was developed both to address treaty shopping practices and investor claims that sought to import both substantive and procedural provisions on the basis of earlier generation treaties that did not provide for explicit clarification of the scope of MFN.

17. Similarly, a delegate noted that their government's new model foreign investment promotion and protection agreement carved-out both dispute resolution procedures and substantive standards of protection, by specifying that MFN "treatment" does not refer to treaty standards or provisions. The delegate pointed to recent examples in their government's treaty practice that implemented this approach. Delegates from many jurisdictions urged the Secretariat to consider these innovations and features of MFN clauses in the course of the Track 2 Project.

18. A delegate from another jurisdiction noted that their jurisdiction's earlier practice had evolved significantly over time, in line with jurisprudence developments, and while some of its earlier treaties included dispute settlement arrangements in the scope of MFN (the result of case-by-case negotiations with treaty partners),[4] its current practice excluded such arrangements from the scope of MFN. The delegate also noted that this shift was intended to provide further clarity in its treaty practice. In that regard, another delegate noted that while their jurisdiction's model BIT explicitly included within the scope of its MFN provision

[4] See, OECD Secretariat background note (2022), *The interaction between most-favoured-nation clauses and dispute settlement arrangements in investment treaties*.

dispute settlement arrangements, the jurisdiction had not concluded any treaty based on that model and was no longer pursuing this model.

19. Other treaty experts also reflected on developments in their government's treaty practice that do not include any MFN provisions from newly concluded treaties.

20. A significant number of delegates nevertheless acknowledged that while the new practice to exclude dispute settlement arrangements from the scope of MFN features in their jurisdictions' newer treaties (and for some jurisdictions, as noted by a delegate, in their model BITs), that explicit language was not included in the large bulks of their earlier treaties.

21. A significant number of delegates also indicated that they viewed language that explicitly excludes dispute settlement arrangements from the scope of MFN as a mere clarification of treaty language in existing treaties and confirmed that unspecified MFN clauses in their jurisdictions' earlier generation treaties should not be interpreted as to include dispute settlement arrangements in the scope of MFN. In that regard, several delegates also explained that their governments did not insist on systematically adding such clarifying language in all of their new treaties as they deemed that their earlier treaty language on MFN – even when dispute settlement arrangements are not explicitly excluded from the scope of MFN – was clear enough.

4. Designs of MFN clauses as they relate to dispute settlement arrangements

22. The Secretariat summarised the note's empirical findings on specific designs of MFN clauses that explicitly exclude dispute settlement arrangements from the scope of MFN and the observed linguistic variation in detail. The Secretariat explained that the purpose of the analysis was to de-construct MFN clauses that explicitly exclude dispute settlement arrangements from their scope in order to identify constitutive elements that could be relevant in the context of a retrofit solution.

23. The Secretariat's analysis documents that there is a single approach to the exclusion of dispute settlement arrangements from the scope of MFN, with linguistic variations arising therefrom. A total of 180 treaty arrangements in the analysed sample contain MFN clauses which explicitly exclude dispute settlement arrangements from their scope. Treaty language in that regard is composed of three main elements: (i) identifying the dispute settlement arrangements that are excluded; (ii) identifying the language that excludes dispute settlement arrangements from the scope of MFN; and (iii) framing of the exclusion itself.

24. The linguistic variations that arise out of these elements – while numerous – are relatively minor do not likely lead to significantly different outcomes except potentially in respect to the framing of the object of the exclusion (the type of dispute settlement arrangements, see (i) in para. 23 above). Out of the 180 treaty arrangements which do explicitly exclude dispute settlement arrangements from the scope of MFN clauses, 22 different linguistic variations that define the *type of treaty* from which dispute settlement arrangements cannot be imported were identified, as well as a total of 33 descriptions of *dispute settlement arrangements* that cannot be imported through the MFN clause, and 36 different designs setting out the exclusion as a "*clarification*" of the intention to exclude dispute settlement arrangements from the scope of MFN.[5]

25. The use of a single approach across the sample to clarify the scope of MFN with respect to dispute settlement arrangements – notwithstanding linguistic variation – is a useful starting point should governments decide to retrofit an explicit exclusion of dispute

[5] See, OECD Secretariat background note (2022), *The interaction between most-favoured-nation clauses and dispute settlement arrangements in investment treaties*.

settlement arrangements in MFN clauses in the large bulk of their earlier treaties that do not clarify the interaction between MFN and dispute settlement arrangements.

26. Several treaty experts referred to the use of specific language in MFN clauses excluding dispute settlement arrangements from their scope explicitly referring to the fact that it constitutes a clarification of an existing treaty practice (e.g., *"for greater certainty…"*) in respect of earlier generation treaties.

27. Treaty experts also exchanged on the *locus* of these exclusions in treaty language, e.g., in specific paragraphs or footnotes to MFN clauses; as well as the language pertaining to the excluded object (e.g., *"mechanisms"*, *"procedures"*, etc). In that regard, many delegates noted that their respective governments were flexible as to the design and location of the carve-out, as long as an explicit clarification on the interaction between MFN and dispute settlement arrangements was included in treaty language, thereby confirming that the linguistic variations in designs all do achieve the same objective.

5. Preliminary conclusions and implications of evolving treaty practice with respect to the interaction between MFN clauses and dispute settlement arrangements, and the merits and opportunities of bringing change to unspecified MFN clauses

28. The Secretariat's background paper and the meeting's discussions confirmed that while almost all treaties concluded in recent years explicitly exclude dispute settlement arrangements from the scope of MFN or do not include any MFN clause in the scope of treaties' post-establishment protections, a large number of earlier treaties in force do not display this feature. In the concluding session to the meeting, delegates discussed some implications of this evolving treaty practice.

29. A number of delegates took the floor. First, they agreed that explicit exclusions of dispute settlement arrangements from the scope of MFN clauses (or the non-inclusion of MFN clauses in treaties) reflected their jurisdictions' current, and likely future, treaty practices. Second, delegates across the board agreed that clauses that explicitly exclude dispute settlement arrangements from the scope of MFN are similar in substance and effect, despite observed differences in language. And third, the overwhelming majority of these delegates also agreed that it may be desirable to align earlier generation treaties with models and approaches used consistently in newer generation treaties to avoid any enduring ambiguity with respect to the earlier treaties. Several delegates pointed that agreement on these points created fertile ground for a reform of existing treaties.

30. As to how such an adjustment could be achieved, a plurilateral solution was – without nevertheless prejudging future discussions or committing to any solution at this stage – considered by a number of jurisdictions as one favourable and suitable route to reflect a shared objective (i.e., more clarity in earlier generation treaties) and convergence towards one or several common approaches. Delegates mentioned that a binding declaration, a convention or a common joint interpretation, among others, could be explored, but that this matter required further in-depth consideration.

31. Delegates thereupon called upon the Secretariat to consider arrangements on this particular matter for 2023 and 2024, in addition to planned discussions on substantive provisions. Delegates also called on the Secretariat to prepare information on other explicit carve-outs from the scope of MFN clauses, including with respect to substantive provisions for discussion under the Track 2 work programme. The Chair concluded the meeting by proposing that the next meeting under Track 2 of the work on the *Future of Investment Treaties* be dedicated to the fair and equitable treatment (FET) clauses.