The Future of Investment Treaties (Track 2)

Considerations on means to improve outcomes of designs of “fair and equitable” treatment clauses in investment treaties

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 27 June 2023 and was initially issued as DAF/INV/TR2/WD(2023)2. 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 Track 2 discussions held on 12 April 2023 in the context of the work on the Future of Investment Treaties, covered the evolution of the "fair and equitable" treatment ("FET") clauses in participating jurisdictions. A background note documents past and present approaches to designing clauses associated with FET and describes: how several earlier approaches to framing the clause have progressively been abandoned, how new textual framings have emerged and now dominate the design of FET clauses in newer treaties, and how several approaches are pursued and coexist in current treaty practice.

2. During this meeting, a number of participants suggested that initial discussions be arranged to consider potential avenues to transition treaties whose designs no longer corresponds to current practices towards more recent FET designs and approaches.[1] This exploratory reflection was suggested to spearhead and trial more general reflections on broader efforts to implement a transition with respect to additional, separate treaty provisions. The present note seeks to support an exploratory discussion on this matter at the meeting on 27 June 2023.

3. This note intentionally sets out only the structure of the issues. It is not exhaustive and does notably not address the legal framework, weight, or binding effect of certain approaches. The note also does not address specific substantive options for FET clauses, and the questions and considerations outlined below could also be used to reflect on future work on indirect expropriation clauses and most-favoured-nation clauses with respect to dispute settlement arrangements, among others. A revised version of this note could address these issues if deemed useful. Issues that are proposed for discussion are set out in section 2. of this note.

1. The transition from earlier to newer designs: considerations, options, and limitations

4. Around 1,600 investment treaties among Track 2 jurisdictions contain designs of FET clauses that are no longer pursued in current treaty practice. Many jurisdictions that participate in Track 2 have dozens of such treaties in their samples, and in some jurisdictions, treaties displaying various 'earlier generation' approaches are observed.

5. Treaty law offers States Parties several means to clarify or adjust the arrangements between themselves. These include for example amendments, joint interpretations, and

[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.

unilateral statements, among others.[2] When a government considers any action in relation to one or more existing treaty or treaties, it may consider several legal and pragmatic aspects, including:

- Is a given means **suitable** for a transition from a given start to a given endpoint?
- How **effective** is the solution to achieve the desired outcome?
- How **onerous** is a given approach in terms of international and domestic procedures?
- Can the same means be employed for **several treaties**, including if start- or endpoints of these treaties are different?
- Could the solution be applied in a **plurilateral fashion**?
- Can some of the solutions be applied in a **staged fashion** to obtain an interim result earlier?
- Could other processes, in particular work undertaken in UNCITRAL Working Group III provide an **opportunity** to apply one or more solutions?

6. Answers to these questions determine which international law instrument may be suitable, effective, and efficient to achieve a desired transition between the starting point of FET clauses in one or more earlier treaties and one or more desired endpoints.

7. **Suitability** as used here describes whether a given legal instrument allows for a given transition from '*earlier generation*' wording to a '*now favoured*' approach. For example, a joint or multilateral interpretation or interpretive agreements between treaty parties may lend themselves to clarify ambiguous treaty text where the interpretation is compatible with the ordinary meaning of the treaty text that is being interpreted.[3] This tool may not be suitable where the 'now favoured' approach is textually incompatible with the 'earlier generation' wording, among others (e.g. an unspecified 'bare' FET clause may not easily be interpreted as corresponding to a closed list of items that specifies the scope the FET obligation). Treaty amendments are likely suitable to implement transitions that cannot be achieved by interpretive means.

8. **Effectiveness** as used here describes the extent to which a given means achieves the desired transition with certainty. Different legal instruments have different effects on treaty interpretation: Some instruments may be binding on treaty interpreters, while others have to be taken into account (among other elements that support a given interpretation).

9. Different legal instruments require different domestic legal procedures to give effect to the intervention. Some procedures may be more **onerous** and take more time and uncertainty of success, for example where ratification or parliamentary approval of the intervention by the parties is required to bring the intervention into effect. These costs play a role in particular if an intervention needs to be made in many individual treaties.

10. As the survey of treaty practice with respect to FET clauses has shown, there have been different formulations of the clause over time. Several countries' treaty samples

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[2] See Gordon, K. and J. Pohl (2015), "*Investment Treaties over Time - Treaty Practice and Interpretation in a Changing World*", *OECD Working Papers on International Investment*, No. 2015/02, https://doi.org/10.1787/5js7rhd8sq7h-en.

[3] On joint interpretive agreements and their legal framework, see Gaukrodger, D. (2016), "*The legal framework applicable to joint interpretive agreements of investment treaties*", *OECD Working Papers on International Investment*, No. 2016/01, https://doi.org/10.1787/5jm3xgt6f29w-en.

reflect different framings of the clause. Also, individual jurisdictions may wish to implement different approaches to individual treaties in their sets – for example to accommodate different preferences of their respective counterparts. These choices and constraints refer to the use of a given instrument for a **change of several treaties** by a given jurisdiction, which may be a desirable option to facilitate or accelerate domestic procedures. Individual instruments may be more or less versatile to address this aspect.

11. Given that around 1 600 treaties among Track 2 participants feature designs that are no longer used, there may be benefits in a **plurilateral solution** to achieve a transition more efficiently. Again here, different start- and endpoints need to be managed. Different instruments under international law may be more or less suitable and economical to achieve a transition for a greater number of treaties in a plurilateral constellation.

12. Furthermore, it may be desirable to effectuate parts of a transition early, as an early but potentially partial harvest, while a further intervention, for instance an intervention that is more effective, can and needs to take more time. It may thus be desirable that the adaption of one or more treaties be made in **stages**, where an early achievement is followed by a later, more comprehensive measure. Such a sequenced intervention may use different international law instruments that would be used cumulatively rather than alternatively.

13. Work on the reform of Investor-State Dispute Settlement is taking place in the UNCITRAL Working Group III. This work is complementary to considerations of the OECD-hosted work under Track 2. Considerations in UNCITRAL Working Group III on the implementation of changes to dispute settlement arrangements may provide an **opportunity** to also apply adjustments of substantial provisions under the same process. Using the same procedural framework for procedural and substantial adjustments may bring significant efficiency gains, provided that a framework be devised that can accommodate the adjustments in both areas.

2. Issues for discussion

14. Participants in the work under Track 2 may want to consider the following aspects on how reflections on a transition from earlier to current designs could be advanced:

- Do the issues mentioned in section 1. of this note reflect the relevant aspects that need to be considered to implement a transition between older and current designs specifically for FET clauses in investment treaties?
- Should reflections continue initially with respect to a specific treaty clause – such as FET – or should the discussions be expanded to cover more clauses?
- How should work be organised to advance these reflections? Specifically, would background papers on individual legal instruments, invitations of experts, or other input support reflections of participating jurisdictions?