The Future of Investment Treaties (Track 2)

Summary of discussions of the Future of Investment Treaties (Track 2) meeting of 12 March 2024

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 12 March 2024. Participants in Track 2 have agreed to its public release. This document was initially released under the cote DAF/INV/TR2/WD(2024)5. 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 meeting of 12 March 2024

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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 on 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, including 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] 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 (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 (ISDS), 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] The work programme was extended and now covers additional aspects of MFN clauses as well as clauses related to full protection and security (FPS). Furthermore, participants have called for an early consideration of practical means that allow interested governments to transition substantive clauses that feature designs that are no longer used to more recent designs. The FET clause was suggested as a test clause to spearhead this reflection with the expectation that the findings could be applied to other substantive provisions that governments may want to transition.

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 meeting held under Track 2 on 12 March 2024. 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 the discussions. The discussions at the meeting on 12 March 2024 covered additional clarifications on the contours and contents of "fair and equitable

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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, Czechia, 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. Summarises of these discussions are available on the work programme's dedicated webpage https://oe.cd/foit.

treatment" provisions observed in recent investment treaties, approaches to transitioning[3] from currently observed designs in older treaties to more recent designs, and a follow-up on the continuation of the Track 2 work, including on the issue of interaction of investment treaties through most-favoured-nation clauses.

1. Designs of "fair and equitable treatment" provisions in recent investment treaties: an inventory of additional clarifications

8. The Secretariat presented the main findings of the background note that it prepared to support discussions ("*Designs of "fair and equitable treatment" provisions in recent investment treaties: an inventory of additional clarifications*"). The note focuses on additional linguistic elements added in recent treaties to further specify the scope and effects of FET provisions. The objective of this effort is to create a common understanding on the purpose and merits of additional clarifications to inform interested jurisdictions on possible endpoints of a potential effort to transitioning FET clauses of older investment treaties.

9. Delegates discussed their respective jurisdictions' policy choices with respect to the additional clarifications and shed light on the reasons which spurred their governments to incorporate additional clarifications and limitations to the scope and effect of FET clauses. The exchanges reflected a common intent to provide more guidance for the application of FET provisions by arbitral tribunals and avoid ambiguous or broad interpretations of the standard.

10. In particular, delegations emphasised the benefits of the use of negative descriptions – specifying that a breach of another provision, another agreement, or of domestic law do not in themselves amount to a breach of FET. Jurisdictions that already include such additional language expressed the view that they are useful in preserving their right to regulate, in particular in light of public policy matters such as climate change. Delegates from several governments that do not include this language in their treaties expressed an interest in these additional features.

11. Delegates also shared their experience and views on the efficiency of mechanisms specific to the choice of design of FET clauses. In particular, the clarification of the content of customary international law was described as helping to avoid an autonomous interpretation of FET provisions but not fully sufficient to avoid decisions that under the claim to apply customary international law derive standards from prior arbitral awards without ensuring that these awards rely on a consistent practice from States and *opinio juris*, or that extend the standard to broader protections such as "legitimate expectations" whose crystallisation into customary law is widely contested among governments. Some delegations noted an increasing consistency in the interpretation of FET provisions in this regard.

12. Jurisdictions welcomed the exchange of information around policy preferences and methods of clarification. Several delegates expressed their interest in specific consideration

[3] The notion of "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, a modification, or an amendment of the text of a treaty.

of textual elements on which broad agreement existed and that could be considered as potential endpoints of transitions of FET clauses.

2. Approaches to transitioning from designs in older treaties to more recent designs: subsequent agreements and interpretive statements

13. The Secretariat presented the main findings of the background note prepared ahead of the meeting ("*Approaches available under international law to transition from older to more recent designs in investment treaties – 'subsequent agreements': the role of interpretive statements*"). The note addresses the potential of interpretive statements as a means to transition substantive treaty clauses in the context of Track 2 work.

14. Jurisdictions shared their views on whether interpretive statements constitute an effective and efficient tool to transition earlier designs of substantive treaty clauses to current ones, in particular with respect to FET. They also expressed views on whether transitioning "bare" (unspecified) FET clauses, which make up about 80% of FET clauses in treaties in force in Track 2 participants, to modern designs would amount to a treaty amendment.

15. Several jurisdictions highlighted that a plurilateral interpretative statement regarding the FET provision could be useful to clarify the intentions of treaty negotiators and would require shorter processes than an amendment. Some delegates considered that a joint interpretation could be particularly effective if drafted in line with the Vienna Convention on the Law of Treaties (VCLT) – in particular, on the condition that it does not alter the original meaning of the treaty, which would otherwise amount to an amendment.

16. Other delegations recalled that a joint interpretation does not compel arbitral tribunals to apply a certain interpretation of the existing agreement. A few jurisdictions expressed a preference for an amendment as it is legally more robust and binding than an interpretive statement. Additionally, a modification or amendment may prove more useful to modify the content of provisions for which a joint interpretation may not suffice.

17. Some delegations also shared which procedures applied under their domestic laws for adopting interpretative statements as compared to treaty amendments. It appears that in some jurisdictions, the adoption of a joint interpretation does not require the approval of any legislative body and could be achieved by an executive decree, while in others, interpretative statements and amendments both must be ratified by the parliament.

18. Some delegations noted that an agreement on the substance of FET provisions would help in deciding on which approach would allow an effective implementation of a transition.

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