The Future of Investment Treaties (Track 2)

Summary of discussions of the Future of Investment Treaties (Track 2) meeting of 7 November 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 7 November 2023. Participants in Track 2 have agreed to its public release. This document was initially released under the cote DAF/INV/TR2/WD(2023)6. The process is documented at https://oe.cd/foit; the material is also available in French at https://oe.cd/lati.

Contact: investment@oecd.org

The Future of Investment Treaties – Track 2: Summary of discussions of the meeting of 7 November 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] 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]

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 7 November 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. The discussions at the meeting on 7 November 2023 continued discussions initiated at the April 2023 Track 2 meeting; it continued the consideration of "fair and equitable treatment" (FET) clauses as provided in investment treaties and supported by expert interventions and, on a preliminary basis, which instruments could be required to transition FET clauses in earlier generation treaties towards current design approaches, as well as treaty amendments as a mechanism to implement transitions in IIAs.[3]

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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 webpage https://oe.cd/foit.

[3] The notion of "transition" is used 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.

1. Continuing discussions on the evolution of designs and approaches to FET clauses in investment treaties

8. At the preceding Track 2 meetings of 12 April and 27 June 2023, several delegations had expressed an interest in better understanding the implications of the evolution of the design of FET clauses towards those approaches that are now almost consistently used across jurisdictions, and what practical implications, if any, the use of these newer approaches may have. Three experts were invited to offer their views on this matter: Professor Patrick Dumberry (Professor, University of Ottawa, Canada); Professor Jansen Calamita (Centre for International Law, National University of Singapore); and Ms Roslyn Ng'eno (Senior Investment Expert, Secretariat of the African Continental Free Trade Area (AfCFTA)).

9. **Professor Patrick Dumberry** presented his research and findings on the interpretation and outcomes of different FET designs – including unspecified FET clauses and newer approaches to FET clauses – in Investor-State dispute settlement (ISDS), based on publicly available ISDS arbitral awards.[4] The study focuses on three points:

- the reasoning and findings of arbitral tribunals on the relationship between the standard of treatment of unspecified FET clauses, on the one hand, and the standards under "international law", the "minimum standard of treatment" (MST) and customary international law (CIL) on the other;
- arbitral tribunals' findings of the content of the FET standard under the different treaty designs; and
- whether differently designed FET clauses in underlying IIAs lead to different outcomes on liability of respondent-States in ISDS and quantum.

10. Professor Dumberry noted that a majority of tribunals had interpreted unqualified FET clauses – the design that is observed in around 80% of IIAs in force[5] – by explicit reference to their 'autonomous' status. This meant the inclusion of elements such as obligations of transparency and the protection of investors' legitimate expectations, resulting in a higher degree of protection under unqualified FET clauses as when compared to protection under the CIL's MST. A minority of arbitral awards have not specifically addressed the question of the status of an FET clause vis-à-vis its relationship with international law, custom or MST, but tribunals have in such instances also similarly broadly interpreted the FET standard. Tribunals in about 50% of the 120 sample awards based on treaties with unqualified FET clauses found in favour of claimants in respect of claimants' FET-based claims (breaches of other standards had also been alleged in these cases). Professor Dumberry concluded that stand-alone FET clauses were frequently interpreted broadly, leading tribunals to decide in favour of claimants.

11. Professor Dumberry examined a second category of clause in his research, namely FET clauses where FET is associated with "international law" or "principles of international law".[6] He found that FET clauses that require that treatment accorded to investors must be "in

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[4] "The cost of inaction: arbitral practice in respect of earlier generation FET clauses and current approaches to FET clauses" (DAF/INV/TR2/RD(2023)1/REV1), Presentation by Professor Patrick Dumberry (University of Ottawa, Canada (updated), 19 December 2023.

[5] "'Fair' and 'equitable' treatment provisions in investment treaties – a large-sample survey of treaty provisions", OECD Secretariat research note, 12 April 2023, publicly available at https://oe.cd/foit-fet.

[6] See, "The cost of inaction: arbitral practice in respect of earlier generation FET clauses and current approaches to FET clauses" (DAF/INV/TR2/RD(2023)1/REV1), Presentation by Professor Patrick Dumberry (University of Ottawa, Canada (updated), 19 December 2023, section 2.

accordance with" international law, were virtually in all awards interpreted as: not referring to MST under CIL; and constituting a minimum or "floor" of treatment standard. Accordingly – and in line with awards rendered in respect of stand-alone FET clauses – arbitral tribunals have in such instances held in favour of claimants and awarded large amounts of compensation. In contrast, where FET clauses provide that treatment accorded to investors must be "no less" than that required by international law, arbitral tribunals have been evenly divided in their findings: about half have held that this design offers the same level of protection as autonomous FET clauses (a "floor"-type of standard), resulting in findings of liability and compensation awards. The other half has held that this design refers to MST under CIL, and thus granted investors the same level of protection as afforded under MST as per CIL. In the awards which they have rendered, these latter tribunals have adopted a narrower interpretation of the content of FET, and the vast majority of them found no breach on that basis. Professor Dumberry concluded on this basis that arbitral tribunals generally adopted, on the basis of claims brought under stand-alone FET clauses but also clauses which refer to "international law", broad interpretations of the standard and thus held in favour of claimants on that basis.[7]

12. The third and last category of FET clauses examined by Professor Dumberry in his research refers to FET clauses linked to MST under CIL.[8] He found that NAFTA tribunals, further to the Free Trade Commission's 2001 Note of Interpretation, upheld that the FET standard referred directly to MST, and that such standard is to be defined narrowly and only incorporates a limited number of elements of protection. Accordingly, NAFTA tribunals have found a breach of the FET standard in only 25% of investor claims for breach of the standard. Separately, awards rendered in respect of claims brought for breaches of FET clauses linked to MST under other IIAs also document a narrow interpretation of the standard. He concluded that FET clauses explicitly associated with MST significantly reduce the possibility that tribunals adopt a broad interpretation of the FET standard and awarding large compensation. He noted in that regard, addressing a query from a delegation, that based on his research, arbitral tribunals have generally held that stand-alone FET clauses include an obligation for the host State to protect the legitimate expectations of investors, whereas tribunals hearing disputes arising out of MST-linked FET clauses will generally consider an investor's expectations as a factor to be taken into account rather than as an obligation in and of itself.

13. One delegation remarked, further to Professor Dumberry's presentation, that the high cost of inaction highlighted by the large stock of existing earlier generation treaties featuring unspecified, stand-alone FET clauses, further confirmed the necessity to modernise such treaties in light of newer approaches to standards of protection.

14. **Professor Jansen Calamita** shed light on the effective material distance or overlap between the two principal approaches to FET designs in newer treaties, namely: the closed-list approach, and the association of FET with MST under CIL. Professor Calamita presented State positions with respect to MST-based FET provisions and those of arbitral tribunals. He noted that the NAFTA States' consistent litigation practice – as respondents and in the context of non-disputing party submissions – have shaped an MST-FET conception that is narrow in scope and tied sharply to specific rules or principles that have been crystallised as a matter of CIL, namely,

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[7] See, "The cost of inaction: arbitral practice in respect of earlier generation FET clauses and current approaches to FET clauses" (DAF/INV/TR2/RD(2023)1/REV1), Presentation by Professor Patrick Dumberry (University of Ottawa, Canada (updated), 19 December 2023, sections 1 and 2 and Professor Dumberry's empirical analysis in that regard.

[8] See, "The cost of inaction: arbitral practice in respect of earlier generation FET clauses and current approaches to FET clauses" (DAF/INV/TR2/RD(2023)1/REV1), Presentation by Professor Patrick Dumberry (University of Ottawa, Canada (updated), 19 December 2023, section 3.

denial of justice in criminal, civil, or administrative adjudicatory proceedings, and, separately, manifest arbitrariness. The textual evolution and diffusion of such clauses has highlighted how the provision and the standard evolved in treaties, from NAFTA – including its Note of Interpretation of 2001 – to CPTPP, and RCEP.

15. Professor Calamita's presentation continued with a review and textual analysis of IIA text of closed-list FET provisions, by reference to the CETA. He highlighted that the content of the CETA provision appears to have largely been inspired by the practice of NAFTA tribunals interpreting the MST. He recalled however that IIAs featuring this approach to FET are not yet in force, and no arbitral practice resulting from claims brought under such treaties existed.

16. Professor Calamita then presented a structural comparison between MST-based FET and the closed-list approach. He noted that NAFTA parties had successfully defended their claims and maintained a narrow interpretation of the NAFTA standard owing to vigorous and consistent litigation practice. He also noted that only one joint interpretation had been made under NAFTA, which he contrasted with the closed-list integrated review mechanism available under CETA, by way of example, to control and correct interpretations of the FET standard.

17. Several delegations submitted follow-up questions to the experts' presentations pertaining to the effective scope of coverage of the closed-list approach. The experts noted that this approach presented less "risk" to defendant States than unspecified FET provisions.

18. Another delegation queried in that regard as to whether a closed-list approach to FET, by specifically enumerating the elements which make up the scope of coverage of the standard, effectively decreased legal uncertainty and unpredictability in the context of ISDS. Professor Calamita noted that the question remained open as indeed the closed-list approach had not yet yielded any arbitral practice. He also commented that arbitral tribunals may indeed end up relying on MST by reference to CIL when called upon to understand closed-list elements and interpret and apply closed-list FET clauses such as the CETA's. In that regard, a number of delegations expressed the view that both approaches largely converge towards the same objective – namely, limiting the discretionary power of arbitral tribunals – as well as in substance – both approaches present common features, e.g., the respect for the rule of law or access to justice and the establishment of a minimum severity threshold to establish a violation. They remarked in that regard that the coexistence of the two approaches should not be viewed as an obstacle to continuing discussions on FET clauses and how older designs to FET clauses, such as stand-alone clauses, should be addressed in earlier generation treaties.

19. **Ms Roslyn Ng'eno** presented the African Union's approach to the matter as reflected in the Protocol on Investment to the Agreement establishing AfCFTA (Protocol), adopted in February 2023. Ms Ng'eno noted that the Protocol modernised the investment treaties of African States, balancing the countries' developmental interest with interests of investors, while also affirming the rights of States to regulate investments in the public interests. She explained that the solution also addressed concerns that these countries had based on experience under their existing investment agreements.

20. Ms Ng'eno highlighted that the Protocol's formulation of the standard of "Administrative and Judicial Treatment" reflected best practices and trends of reasoned investment policy as formulated by regional economic communities. Ms Ng'eno described this approach as a "deviation" from the FET standard that was viewed by the treaty parties as too broad and including investors' legitimate expectations. Ms Ng'eno explained that the Protocol sought to provide greater predictability and clarity and limits clarifies to the substantive protection. The standard considers the fundamental aspects of protection for investors and investments, including due process in criminal civil and administrative proceedings. Referring to the presentation of Professor Dumberry, Ms Ng'eno noted that the Protocol's clause "mixed"

elements of a list while also referring to MST as per CIL with the intention to limit the margin of appreciation in litigation.

2. FET provisions in investment treaties: An attempt at quantifying instruments available for transitioning earlier designs towards current approaches

21. The Secretariat presented the main findings of a background note on the means likely available to transition older generation FET designs towards newer designs. The note provides a quantitative estimate of which international law instruments would likely be available for a transition on the basis of a treaty-by-treaty approach. Based on a set of preliminary assumptions set out in the note, about 85% of investment treaties currently in force and concluded by jurisdictions participating in Track 2 and which feature FET designs that are no longer used could probably be transitioned via an interpretive instrument. The remaining 15% of treaties currently in force would likely require an amendment to achieve a transition towards a newer design.

22. The Chair recalled the preliminary and general nature of these findings, and that specific issues such as the substance of any potential interpretation would also likely determine the means available to transition treaties' content to reflect newer designs.

23. Delegates noted the merits of the approach as providing an order of magnitude, jurisdictions would also have to keep in mind the specificities of each individual treaty when carrying out a transition. The specificity of each investment treaty negotiation, the party's discretion in choosing whether or not to make a transition, as well as the means to achieve any transition were recalled.

24. Several delegations highlighted the benefits of a plurilateral approach to transitioning FET clauses and more generally the modernisation of the content of investment treaties. Some stated that the elaboration of a common solution would be more efficient than individual transitions for each investment treaty through amendments or joint interpretations. It was also mentioned that there transitioning treaties which featured older approaches and designs of FET clauses was urgent, that a multilateral solution may take more time than individual treaty transitions. It was also pointed out that these two approaches – multilateral and individual – were not mutually exclusive and could be considered and conducted in parallel.

3. Approaches to transitioning earlier designs to current approaches of FET clauses: treaty amendments

25. At the previous Track 2 meeting of 27 June 2023, several delegations expressed an interest in continuing discussions on the legal instruments potentially available to implement a transition from earlier designs to newer approaches, with a particular focus on plurilateral treaty amendments. These discussions were seen to allow a better understanding of the implications of and experience with their use, and lessons derived from such experience. Two experts provided input, Ms Claire Marguerettaz (OECD Directorate for Legal Affairs) and Mr José Angelo Estrella Faria (Principal Legal Officer, UNCITRAL Secretariat).

26. **Ms Claire Marguerettaz** presented the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS MLI). She recalled that the purpose of the agreement was to address base erosion and profit shifting strategies which seek to exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations, where there is little or no economic activity, to reduce overall corporate tax and that the efforts to counter BEPS included a number of measures, one of which were related to tax

treaties and sought to establish a number of minimum standards. She highlighted that many of the issues that are currently being considered by Track 2 participants were similar to those that tax negotiators had considered at the outset of BEPS discussions, namely, considerations on how to address issues arising from thousands of (older) existing bilateral tax treaties.

27. Ms Marguerettaz explained that bilateral renegotiations of tax treaties and the adoption of a model protocol had initially been considered as options to implement these measures but were excluded due to the important challenges – resource- and time-consuming processes which would have entailed a bilateral renegotiation of tax treaties – they represented. Instead, governments chose to give effect to the political agreement to address BEPS through an innovative, multilateral instrument (MLI) that would modify over 3.000 treaties. The MLI was negotiated relatively quickly, benefitting from the political agreement: the negotiations began in 2015, the BEPS MLI and its Explanatory Statement were adopted in 2016 and entered into force in July 2018.

28. Ms Marguerettaz explained how the BEPS MLI operated. Given that negotiating parties had asked for "one negotiation, one signature, and one ratification" to modify their existing bilateral tax treaties, the MLI was construed as a self-standing agreement which *modifies* – rather than *amends* – existing tax treaties. While an amending treaty changes the text of the treaty and thereafter ceases to exist, the "modifying" MLI continues to modify the application of existing treaties. Separately, Ms Marguerettaz highlighted that the MLI provides signatory parties considerable flexibility, taking into account that different treaties feature different needs and issues, e.g., with respect to meeting minimum standards. Further, jurisdictions may also choose to opt-out of non-minimum standard-related provisions, among others. She also explained the various mechanisms through which clarity and transparency as to how the BEPS MLI applies to different bilateral tax treaties is ensured and pointed to the OECD website[9] for more detailed information.

29. **Mr José Angelo Estrella Faria** presented work that UNCITRAL Working Group III was undertaking to explore multilateral solutions and instruments to implement investment treaty reforms. He highlighted the diversity of options under consideration and the study of experiences in inter-party modifications of pre-existing treaties, namely, the *United Nations Convention on Transparency in Treaty-based Investor-State Arbitration* (2014) ("Mauritius Convention on Transparency") and the Convention on the Use of Electronic Communication in International Contracts. Mr Estrella Faria provided an overview of a potential structure of a single multilateral ISDS reform agreement, which would contain individual protocols and annexes with an opt-in mechanism available for governments to choose the reforms that they wished to apply to their treaties. He noted that UNCITRAL's Working Group III had started considering which issues and reforms should be included in the core instrument, and which would be included in the annexes, as well as the question of reservations, and would continue these considerations in the 2024 sessions.

30. Delegates noted the direct relevance of these examples for Track 2 discussions.

4. Topics and priorities for continued work under Track 2

31. Participants took note of the revised note on *Directions for work under Track 2 of the programme on the Future of Investment Treaties – Options for consideration in future topics and priorities* that incorporated views that Track 2 participants had expressed at the meeting of

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9 https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm.

27 June 2023.[10] Several delegations reiterated their support for work under Track 2. They requested

- That future discussions should encompass aspects on which little or no consensus had yet emerged in treaty practice such as the right-to-regulate;
- Further analysis on the manner in which tribunals consider interpretive instruments in their awards in light of the Vienna Convention on the Law of Treaties; and
- That more time for discussion and exchange be provided in more frequent or more generously timed meetings.

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[10] This note is publicly available at https://oe.cd/foit.