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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE**

**The Future of Investment Treaties – Track 2: Summary of discussions of the
meeting of 5 November 2024**

Note by the OECD Secretariat

Delegates from 101 jurisdictions were invited to participate in the tenth Track 2 meeting of the OECD work programme on the Future of Investment Treaties. The meeting was held on 5 November 2024 in hybrid format. This note summarises discussions held during the meeting.

This note is made public to ensure transparency of government conversations under Track 2. Delegates had an opportunity to comment on this note before its public release. The note does not prejudge the outcomes of discussion under the Track 2 work programme.

The work on the *Future of Investment Treaties* is documented at <https://oe.cd/foit2>.

investment@oecd.org

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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, over a hundred jurisdictions from all continents are invited to participate in these conversations, which the OECD 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. Public concerns about these implications have increased in recent years, especially as treaties are being used to challenge public policy measures taken to address the climate crisis or other policy measures widely considered legitimate; there have been unintended interpretations and uses of treaties; and many treaties, especially older ones, do not include recent specifications that could be usefully agreed in investment treaties and would potentially lead to overall better outcomes.

3. In March 2021, governments decided to set their discussions on investment treaties and treaty policy on a new 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 how investment treaties might address the future investment challenges 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 transition¹ of substantive clauses in older treaties to current approaches in a pragmatic manner.

¹ 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

4. One hundred and one jurisdictions are invited to participate in this work programme.² In the interest of transparency to the public, the main traits and outcomes of substantial discussions are made publicly available on a dedicated OECD webpage (<https://oe.cd/foit2>).

5. Since the start of the work on the ‘Future of Investment Treaties’ in 2021, discussions in Track 2 have shown how most governments have changed the design of several substantive clauses commonly found in investment treaties, to frame the contours of substantive treaty obligations more clearly. Most jurisdictions apply the new approaches to key clauses consistently.

6. In meetings held between 2021 and end-2024, the evolution of investment treaty practice has been analysed and discussed for three substantive clauses – fair and equitable treatment (FET), indirect expropriation, and the interaction of most-favoured nation (MFN) treatment with dispute settlement arrangements. Governments have confirmed their intentions underlying recent investment treaty practices in past Track 2 meetings. Track 2 participants have also observed that their understanding of the contours of the obligations under these clauses is substantially similar, and that variance in treaty language does not necessarily reflect divergence of meaning.

7. Track 2 participants have also discussed potential means to transition older treaties with unspecific framings of substantive clauses to the approaches that they now consistently use. They have in particular considered the potential of Joint Interpretations to clarify the shared intent of treaty partners. In November 2024, Track 2 participants considered the potential of plurilateral treaty modifications as a means to transition older treaty clauses to today’s designs.

8. In 2023, France granted a financial contribution to the work of Track 2 for two years. This contribution enables an expeditious delivery and the production of further analytical material for the Track 2 Project and helps to facilitate the participation of representatives from developing countries in this work. France has provided a further voluntary contribution for this work at the end of 2024, that will contribute to the delivery of work in 2025.

9. The present document contains the summary of discussions of the meeting held under Track 2 on 5 November 2024. The summary was prepared by the Secretariat, and participating governments have had an opportunity to comment on the draft. The summary

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.

² 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, Democratic Republic of Congo, 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, Sierra Leone, 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.

follows the structure of the discussions, which covered the breadth of potential consensus among Track 2 participants on the scope and content of FET obligations that could be reflected in a plurilateral joint interpretation to clarify FET provisions in many older investment treaties (**section 1**). Participants also reflected on the opportunities and challenges of a plurilateral modifying treaty as a means to modify substantive clauses of investment treaties – initially still for FET provisions (**section 2**). Following these discussions, participants briefly considered near-term priorities for work under Track 2 (**section 3**).

1. Outcome of discussions on the scope of consensus on FET obligations

10. At the Track 2 meeting of 30 May 2024, participants considered language that they could potentially concur on in the context of a potential Joint Interpretation that would clarify the respective parties’ intent of FET in early-generation investment treaties.

11. These discussions were based on a note by the Secretariat (“*Fair and equitable treatment: establishing the breadth of agreement on its contours and contents*”, [DAF/INV/TR2/WD\(2024\)6/REV1](#)) that assembles all elements – ‘positive’ and ‘negative’ framings of FET – on which jurisdictions may potentially concur, based on their recent investment treaty practice and earlier discussions under Track 2.

12. It is difficult to find common text that would positively describe the collective understanding of FET because of the two different drafting approaches that are used to describe FET obligations in recent treaties – one clarifies that the FET provision does not establish obligations beyond those under the minimum standard under customary international law (MST-CIL) and one sets out obligations under FET as a stand-alone measure in a closed list.

13. A few delegations noted that this limited textual similarity on FET in recent treaties raised the question whether a Joint Interpretation would be suitable to clarify obligations in older treaties. Also, if the limited scope of textual similarity on FET that appears from recent investment treaty practices may understate the extent of common views on FET. Other delegations opined that a Joint Interpretation would still be useful to define the contours of the standard even though it would cover only some aspects of FET.

14. Delegates concurred that the consideration of potential text for the purpose of Joint Interpretations was a useful exercise and requested that reflections on the opportunities for joint interpretations be replicated for other substantive provisions of investment treaties – without prejudice to any conclusions that might later be reached. Delegates requested that the Secretariat develop a synthesis on the breadth of potential consensus among Track 2 participants that emerges from their recent investment treaty practices with respect to these other provisions.

2. Opportunities of a plurilateral agreement to modify existing investment treaties

15. Participants are seeking to further reflect on the procedural means available to interested governments to transition investment treaties featuring older designs to designs that most of them now use consistently or near-consistently.

16. After previous discussions had focused on joint interpretative statements, participants next discussed treaty modifications as a further procedural means to transition

investment treaties.³ Exchanges covered the theoretical framework underpinning treaty modifications and their opportunities in the context of Track 2 (section 2.1); and on the practical implementation of a treaty modifying agreement, using the FET clause to illustrate possible designs (section 2.2).

2.1. Legal framework for treaty modifying agreements and opportunities for investment treaties

17. The Chair recalled that the purpose of this exercise was to explore opportunities and implications of different procedural means available to governments wishing to transition their early-generation treaties and that government engagement did not mean to prejudice a decision on whether such endeavour would be pursued.

18. The Secretariat presented its note on the legal framework for treaty modifications under public international law rules, as reflected in the Vienna Convention on the Law of Treaties (VCLT) ("*Treaty modification: legal framework and opportunities for investment treaties*", [DAF/INV/TR2/WD\(2024\)8/REV2](#)).

19. The Secretariat articulated a difference between treaty "modifications" and treaty "amendments". The VCLT refers to modifications of multilateral treaties between certain parties (Article 41). The Secretariat described that treaty amendments and treaty modifications differed in its view by their medium: while amendments are *formal* alterations of a given treaty's text, modifications – as described in its papers – rely on the conclusion of a separate, later agreement that changes *materially* rights and obligations under an existing agreement without formally amending its text. These successive modifying agreements – such as the BEPS Multilateral Instrument – operate based on the *lex posterior derogat priori* principle reflected in Article 30(3) of the VCLT. The Secretariat stated that the absence of specific references in the VCLT to modifications of bilateral treaties by successive bilateral or multilateral treaties was a deliberate choice of the Convention's drafters, as explained in the background note.

20. Delegates exchanged views on the opportunities of a plurilateral modifying agreement as related to existing investment treaties. Several delegations noted the significant efficiency gains of concluding a single agreement that would address large numbers of existing treaties – especially for small or developing economies which may not have the resources to pursue bilateral renegotiations of individual treaties – and noted that modifying agreements provide advantages in terms of flexibility and versatility.

21. While acknowledging the potential efficiency of treaty modifications, some delegates noted that a new agreement to modify existing agreements would be procedurally more time-consuming and costly than joint interpretations, as it would require legislative approval in most jurisdictions. One delegation questioned whether the political impetus is sufficiently strong among participants to pursue such endeavour.

22. Delegates then took note of a brief intervention by the Secretary of the United Nations Commission on International Trade Law (UNCITRAL), Ms. Anna Joubin-Bret (the Secretary), on the work currently undertaken at the UNCITRAL Working Group III on a draft multilateral instrument to implement ISDS reforms. The Secretary highlighted

³ Participants heard two expert inputs (on the BEPS Multilateral Instrument and the Mauritius Convention on transparency) at an earlier Track 2 meeting of 7 November 2023, to allow a better understanding of the implications of and experience with the use of treaty modifications, and lessons derived from such experience. See Summary of Discussions – [November 2023](#).

the complementarity of this work undertaken at UNCITRAL with the current discussions hosted by the OECD under the Track 2 process, and the advantages of coordinating these efforts. The Secretary also emphasised that an important degree of flexibility in reform efforts was necessary, to allow countries to choose their preferred approaches to modifying their investment treaties among a palette of options, and to ensure that reform outcomes are clear to treaty users so as not to generate more disputes.

23. Delegates shared views on the merits of further reflections on the feasibility and opportunities of different procedural means to transition investment treaties and on the scope of potential interventions.

2.2. Illustration of design options for a plurilateral modifying agreement on FET

24. The Secretariat presented its research note on “*Design options for a plurilateral agreement to modify ‘fair and equitable treatment’ provisions in investment treaties*” ([DAF/INV/TR2/WD\(2024\)9/REV2](#)). The Chair recalled that this exercise is meant to illustrate concretely what a treaty-based modification for investment treaties could look like, initially with respect to the FET clause, the clause that Track 2 participants have chosen as a pilot to assess different procedural options for transitions.

25. Delegates welcomed the exploration of concrete options available to interested governments to transition older treaties through a modifying instrument. Delegates noted the flexibility of the means and the resulting possibility to accommodate all modalities, preferences and policies.

26. It was suggested that the scoping exercise be broadened to other substantive clauses of investment treaties beyond FET help consider the feasibility of a treaty modifying instrument. Other delegates opined that further reflections on substance were needed before specific design options for a plurilateral modifying instrument on FET were discussed.

3. Preliminary conclusions and near-term priorities for continued work under Track 2

27. Delegates decided to pursue their reflections on substantive convergence with regards to those treaty clauses that they have already discussed in the context of Track 2 (provisions related to ‘indirect expropriation’ and those describing interactions between most-favoured-nation (MFN) treatment and dispute settlement arrangements).⁴ Several delegations noted that convergence on several clauses would make reflections on means of transitions more meaningful.

28. Several delegations requested that the evolution of ‘full protection and security’ (FPS) provisions be studied to assess the degree of convergence on new approaches that clarify the contours of this clause.⁵ It was also suggested that earlier discussions on the designs of MFN clauses beyond their interactions with dispute settlement arrangements be

⁴ Previous exchanges in the context of Track 2 documented a sizeable degree of convergence in participating jurisdictions’ recent treaty designs of ‘indirect expropriation’ provisions (see Summary of discussions – [October 2021](#)) and of the scope of MFN clauses with respect to dispute settlement arrangements in third-party treaties (Summary of discussions – [November 2022](#)).

⁵ FPS provisions have already been included in the Track 2 work programme for 2024-2025 and discussions on this topic in Track 2 are scheduled to take place in February 2025.

expanded.⁶ Delegates also proposed that provisions related to ‘national treatment’ and the right to regulate be studied under Track 2. It was also suggested that the definition of investors under the scope of treaty protection be explored, in particular with a view to address the issue of treaty use by letter-box companies.

29. It was also suggested that Track 2 efforts be closely coordinated with parallel efforts on dispute settlement provisions at UNCITRAL Working Group III, that more jurisdictions be encouraged to participate in Track 2 meetings, and that meetings be scheduled more frequently and timed more generously.

30. Participants noted that the next Track 2 meeting will be convened in virtual format in February 2025. The Secretariat closed the meeting by announcing the Annual OECD Investment Treaty Conference (10th edition) scheduled to take place in Paris on 31 March 2025 and organised jointly with UNCITRAL and UNCTAD. Discussions are expected to focus thematically on investment treaty reform. Further details on the event (agenda, speakers, and logistics) will be circulated by the three Organisations in due time.

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⁶ The variety of approaches with respect to MFN clauses and the importation of substantive provisions from third-party treaties were discussed 1 February 2024 (Summary of discussions – [February 2024](#)).