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

# Fair and equitable treatment: establishing the breadth of agreement on its contours and contents

**Note by the OECD Secretariat**

Treaty provisions related to "fair and equitable treatment" (FET) have been identified as a priority subject for consideration under Track 2 of the OECD-hosted work programme on the *Future of Investment Treaties*. It has been proposed that the FET clause be considered as a test clause to spearhead reflections on practical arrangements that are available to interested governments to implement transitions from older to current designs of substantive clauses in investment treaties. The present note supports these efforts by attempting to establish the breadth of agreement across Track 2 participants, based on their recent treaty practices, on the contours and contents of FET obligations to allow interested jurisdictions to gauge the merits of a potential plurilateral Joint Interpretation on FET for the large number of investment treaties that contain an unspecified reference to FET, and potentially investment treaties with other designs. This note was discussed during the Track 2 meeting held on 30 May 2024.

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.

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# Context and purpose of this note

1. The design of 'fair and equitable' (FET) provisions in investment treaties has undergone substantial change since the early 2000s, and newer designs that reflect obligations under FET more clearly are now used almost universally and consistently.[1] Additional linguistic elements that clarify further how the concept of FET is to be interpreted have appeared and spread.[2] Despite differences in treaty language and the approach to clarifying the standard, new designs of FET provisions suggest commonalities in participants' current intentions on the contours of FET.[3] Many older treaties contain no or almost no interpretive guidance on the contours of FET – about 80% of the treaties to which Track 2 participants are parties contain no textual clarification of the concept whatsoever ("bare" FET).

2. Participants in Track 2 of the OECD-hosted work on the *Future of Investment Treaties* have requested that practical means to achieve a transition of older treaties towards current approaches be considered, and that the FET clause be used as an example to assess options. At the meeting held on 12 March 2024, participants discussed the implications of Joint Interpretations as a means to achieve a transition.[4] At the same meeting, they discussed additional language found in recent treaties that further clarifies the contours of FET.

3. The present note, prepared for the meeting scheduled for 30 May 2024 draws on both elements of the discussion on 12 March 2024. Its purpose is to explore the breadth of the current consensus on the contours of FET among Track 2 participants that could inform an assessment of the merits of using a plurilateral Joint Interpretation among interested jurisdictions to transition FET clauses.[5] Knowledge of this scope of consensus on the contours of FET would show the potential – and limits – of a possible plurilateral Joint Interpretation that interested jurisdictions could agree on to clarify the contours of FET especially in treaties containing "bare" FET clauses as well as potentially treaties with contemporary designs of FET that do not contain all elements that describe governments' intent.[6]

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1 "*'Fair' and 'equitable' treatment provisions in investment treaties – A large-sample survey of treaty provisions*", research note by the OECD Secretariat, April 2023.

2 "*Designs of "fair and equitable treatment" provisions in recent investment treaties: an inventory of additional clarifications*", note by the OECD Secretariat, March 2024, DAF/INV/TR2/WD(2024)3/REV1.

3 "*The Future of Investment Treaties – Track 2: Summary of discussions of the meeting of 12 March 2024*", note by the OECD Secretariat, March 2024.

4 "*Approaches available under international law to transition from older to more recent designs in investment treaties – "subsequent agreements": the role of interpretive statements*", note by the OECD Secretariat, March 2024, DAF/INV/TR2/WD(2024)4/REV1.

5 For greater certainty, discussion of these issues does not prejudice any decision of whether such an interpretation or other intervention would be pursued at the OECD or which governments may adhere to such an interpretation.

6 For example, the use of 'negative' descriptions as contained in section 1 of this note may appear relevant for MST-FET provisions which define the content of the standard but do not necessarily address the limits of the scope of the obligation.

4. Judging from recent treaty practice, governments' intent on scope and content of FET is likely best described by 'positive' and 'negative' elements.[7] A list of 'negative' descriptions that delimitate the scope of FET and on which many jurisdictions appear to agree is presented in section 1, while section 2 contains a list of 'positive' elements that appears to reflect elements of a broadly, if likely not universally, shared description of the FET standard.

5. The intention of the note is to explore the degree of consensus for a potential *forward-looking* exercise. It distills information on governments' intent from existing elements found in relatively recent treaty texts,[8] expressions of governments' intent in non-disputing party submissions (NDPs) and counter-memorials, and on information shared during discussions in Track 2 meetings where these have revealed a certain common view among participating jurisdictions.

6. For ease of reference during the discussion, 'positive' and 'negative' elements are numbered. When various options for a single element have been found in treaty practice, they are organised under the same number and distinguished by letters. In some cases, such options are mutually exclusive; in other cases, various options may be combined to further define the scope of FET.

[7] For an illustration of this structure in a Joint Interpretation, see the India-Bangladesh BIT (2009) - Joint Interpretive Agreement (2017) and the India-Colombia BIT (2009) – Joint Interpretative Declaration (2018).

[8] Data for section 1 are mainly derived from a note discussed at the Track 2 meeting on 12 March 2024, DAF/INV/TR2/WD(2024)3/REV1; data that inform section 2 were initially developed for the treaty survey *"'Fair' and 'equitable' treatment provisions in investment treaties – A large-sample survey of treaty provisions*". To the extent that the data are not already included in this note, they are taken from the sample of 2,617 treaties and related documents that was used for this research note. The methodological explanations contained in that note apply to the present note.

## Issues for consideration

- Do delegates agree that for a potential plurilateral Joint Interpretation, an ideally uniform description of the content of FET would be required?
- Section 1 contains a list of 'negative' descriptions that are used in recent investment treaties to delimitate the scope and effect of FET provisions. Which of the options is part of the description of the contours of FET that your government would likely agree with if it was interested in a clarification of FET clauses in existing treaties?
- Section 2 contains a 'positive' list of elements on which at least some participants could agree. Which, if any, of the options is part of the description of the contours of FET that your government would likely agree with if it was interested in a clarification of FET clauses in existing treaties?

Note: If delegates are unable to speak to their government's official views on a potential Joint Interpretation, they are nevertheless invited to comment on their level of substantive convergence in each of the elements 1 to 8.

# 1. 'Negative' list of elements that do not amount to a breach of FET

7. Track 2 participants' recent treaty practice appears to reflect a broadly shared understanding around specific 'negative' descriptions that indicate which circumstances *do not* in themselves amount to a breach of FET. Such limitations could be relevant to delimitate the contours of the standard in a potential Joint Interpretation. These clarifications can be grouped in three categories, in which different language is observed. The three categories relate to the link between illegality of a measure and FET (1.1), the link between expectations of an investor and FET (1.2), and the interaction between changes in regulations or administrative decisions and FET (1.3).

## 1.1. Illegality of a measure does not in itself constitute a breach of FET

8. Recent treaties concluded by a growing number of jurisdictions clarify that an illegality of a measure does not in itself amount to a breach of FET. Breaches of other provisions of the same treaty, other treaties and of the domestic law of one of the parties are referenced.

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| 1a | A determination that there has been a breach of another provision of this Agreement, of a separate international agreement does not establish that there has been a breach of fair and equitable treatment. |

9. Language appearing to express the same intention as the text presented above in **1a** is found in 147 investment treaties concluded by Track 2 participants. Recent treaty practice suggests the widely shared understanding that a breach of another provision or a separate international agreement does not in itself amount to a breach of FET: from among the 99 participating jurisdictions, 76 have included this element in at least one of their investment treaties.[9]

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| 1b | A determination that there has been a breach of domestic law, does not establish that there has been a breach of fair and equitable treatment. |

10. Investment treaties containing a specification similar to the text presented in **1b** include several agreements concluded by Canada, starting in 2016 with the CETA.[10] Canada, Ukraine, United Kingdom, Chile, and all EU Members States include this language in at least one of their treaties.

[9] Argentina, Australia, Austria, Bangladesh, Belgium, Benin, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Czechia, Denmark, Ecuador, Egypt, Estonia, Finland, France, Germany, Greece, Guinea, Hungary, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Korea, Kuwait, Latvia, Lithuania, Luxembourg, Malaysia, Mali, Mauritius, Mexico, Moldova, Mongolia, Morocco, Netherlands, New Zealand, Nigeria, Oman, Peru, Philippines, Poland, Portugal, Qatar, Romania, Senegal, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Thailand, Türkiye, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Uzbekistan, Viet Nam, European Union.

[10] This position has been expressed earlier by former NAFTA Parties in counter-memorials and non-disputing party submissions. See, for example, *Glamis Gold, Ltd. v. United States*, U.S. Counter-Memorial, 19 September 2006, pp. 223-226; *ADF Group v. United States*, ICSID Case No. ARB(AF)/00/1, Second Submission of Mexico, 22 July 2002, p.18.

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| 1c | A determination that there has been a breach of another provision of this Agreement, of a separate international agreement, or of domestic law, does not establish that there has been a breach of fair and equitable treatment. |

11. Text presented in **1c** combines both proposals (**1a** and **1b**) that have been found in recent treaties in the context of delimiting FET.[11] All three elements have been found in agreements concluded by Canada, Chile, United Kingdom, Ukraine, and all EU Member States.

## 1.2. Frustration of investor's expectations does not constitute in itself a breach of FET

12. The extent to which the investor's expectations are a relevant element of FET, if at all,[12] remains unclear, and diverse views are held by arbitral tribunals and treaty parties. Treaties concluded by a number of jurisdictions clarify that the frustration of an investor's expectations *does not in itself* establish a breach of FET.

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| 2a | The mere fact that a Party takes or fails to take an action in a manner that may be inconsistent with an investor's expectations, including its expectations on profits, does not constitute a breach of fair and equitable treatment, even if there is loss or damage to the covered investment as a result. |

13. A 'negative' description referring to the frustration of the investor's expectations such as the one presented in **2a** appears frequently in Australian investment treaties, but also at least in one investment treaty concluded by Argentina, Singapore, Hong Kong (China), Canada, Chile, Indonesia, Peru, United Kingdom, Uruguay, Japan, P.R. China, Singapore, Korea, the United States, New Zealand, Mexico, and all EU Members. A similar 'negative' description that refers to "legitimate expectations" also appears in the EU-Singapore Investment Protection Agreement (2018).[13]

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| 2b | When applying the fair and equitable treatment obligation, the Tribunal may take into account whether a Party made specific or unambiguous representations to an investor to induce a covered investment, that created a legitimate expectation, and upon which the investor reasonably relied in deciding to make or maintain the covered investment, but that the Party subsequently frustrated. |

[11] For example, text similar to the one set out here is found in the Canada-Ukraine Modernized FTA (2023) in subsequent items of article 17.9: "*2. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. 3. The fact that a measure breaches domestic law does not establish a breach of this Article*."

[12] Some jurisdictions, such as the United States and Canada, do not consider foreign investors' expectations, legitimate or otherwise, as a component of FET. See, for example, *Merrill & Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Counter-Memorial of the Government of Canada, 31 May 2008, p. 153; *Grand River Enterprises Six Nations, Ltd. v. United States of America*, UNCITRAL, Counter-Memorial of Respondent United States of America, 22 December 2008, p. 96; *Riverside Coffee, LLC v. Republic of Nicaragua*, ICSID Case No. ARB/21/16, Submission of the United States of America, 15 March 2024, para. 17.

[13] Article 2.4.3 is accompanied by a footnote that provides as follows: "*For greater certainty, the frustration of legitimate expectations as described in this paragraph does not, by itself, amount to a breach of* [fair and equitable treatment], *and such frustration of legitimate expectations must arise out of the same events or circumstances that give rise to the breach of* [fair and equitable treatment]".

14. Text presented in **2b** appears in Article 8.10.4 of the CETA and is completed by the Draft interpretative statement recently published by the CETA parties.[14] Although this description is not 'negatively' drafted, it has the effect to exclude unspecific and ambiguous representations from the possible origins of "legitimate expectations"; it is associated with a closed-list FET provision that does not include a reference to "legitimate expectations".

## 1.3. A regulatory change does not in itself constitute a breach of FET

15. Some additional elements of clarification have been included to address changes in the applicable legal framework in which the investor operates, such as changes of regulation or changes of administrative practices, including in relation to the withdrawal of subsidies.

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| 3a | A change of the regulation of a Contracting Party does not constitute by itself a violation of fair and equitable treatment. |

16. The design presented above in **3a** is inspired by specifications contained in a small number of investment treaties, such as the Colombia-Japan BIT (2011), the India-Chinese Taipei Agreement (2018) or the Japan-Morocco BIT (2020). It confirms that regulatory changes in themselves are not sufficient to breach FET.

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| 3b | Non-discriminatory and non-arbitrary legislative or regulatory measures adopted by either Party to protect public policy objectives, such as public order, public health, public security, environmental protection and economic policy, shall not be deemed to breach fair and equitable treatment. |

17. The provision presented in **3b** appears to prevent measures that pursue public policy objectives that respect certain criteria as being interpreted as a breach of FET. Investment treaties that contain such language generally provide that the measure taken in application of these objectives must be "non-discriminatory" and "non-arbitrary".[15] A number of Track 2 participants expressed their interest in ensuring that treaty standards like FET are not interpreted to limit their ability to change their regulatory framework to introduce new climate-related policies.[16]

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[14] The interpretative statement provides that "*[l]egitimate expectations cannot arise from representations if a prudent and informed investor would not have reasonably relied upon the representations in making the investment, notably because the representations were not sufficiently specific and unambiguous and did not have the requisite degree of formality, for example because they were not made in writing by the competent authority of a Party*"

[15] Colombia-Israel FTA (2013), Colombia-Türkiye BIT (2014), Argentina-United Arab Emirates BIT (2018). More rarely, some investment treaties contain a similar specification but that does not exclude a breach of FET. Instead, it excludes the right to compensation for the damages caused by the measure. See, for example, the India-Colombia BIT (2009) – Joint Interpretative Declaration (2018) that provides: "*For further clarification, "fair and equitable treatment" standard under Article 3 does not require compensation for measures designed or applied to further public policy objectives including but not limited to: a. protection or improvement of national resources and the environment; b. human animal or plant life or health; c. human capital conditions of work and human rights; d. protection or improvement of economic conditions and the integrity of the financial system; e. implementation of fiscal policy measures, including taxation*".

[16] For a negative description related to the objective predictability of a measure, see the Argentina-United Arab Emirates BIT (2018) provides that "*[n]on-discriminatory and non-arbitrary legislative or regulatory measures adopted by either Party to protect general welfare objectives, such as public order, public health, public security, environmental protection and economic policy, and which give an investor of the other*

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| 3c | The mere fact that a subsidy or a grant has not been issued, renewed or maintained, or has been modified or reduced by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result. |

18. 'Negative' descriptions related to the issuance, renewal or maintenance of a subsidy similar to the text presented in **3c** are often combined with other clarifications including with respect to the frustration of an investor's expectations,[17] and reflect the intention that was expressed in investment treaties concluded by Australia, Brunei, Canada, Chile, Hong Kong (China), Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United Kingdom, Uruguay, and Viet Nam.[18]

*Party the same treatment as that accorded to its own investors or to investors of third States in like circumstances, shall not be deemed to breach the minimum standard of treatment*".

[17] For instance, Article 8.6 of the Australia-Peru FTA (2018) provides as follows: "*3. A determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article. 4. For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result. 5. For greater certainty, the mere fact that a subsidy or grant has not been issued, renewed or maintained, or has been modified or reduces, by a Party, does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.*"

[18] This specification appears in the following agreements: Australia-Peru FTA (2018), Australia-Singapore FTA (revised version of 2016), Australia-United Kingdom FTA (2021), Australia-Uruguay BIT (2019), Canada-Chile FTA (1996) - Amendment (2017, CPTPP (2018), Mexico-Hong Kong (China) BIT (2020), New Zealand-Singapore CEPA Protocol (2019).

## 2. 'Positive' list of elements that potentially constitute a breach of FET

19. Based on Track 2 participants' treaty practice, some elements can be identified as components of FET, either because they are characterised as part of customary international law or because they are expressly included in a list of elements in treaties containing a closed-list FET provision. If Track 2 participants agree that some of these elements describe at least part of the content of FET, this agreement could inform the content of the standard in a potential Joint Interpretation. Components of FET clauses that appear most frequently in treaty practice are the prohibition of denial of justice (2.1) and the breach of due process (2.2). Other components appear less frequently but have been added in recent treaties containing new designs of FET clauses, which could indicate that a number of Track 2 participants recognise the inclusion of these components as part of FET. These components are the prohibition of manifest arbitrariness (2.3), discrimination on wrongful grounds (2.4), and harassment, coercion, and abuse of power (2.5).

### 2.1. Denial of justice

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| 4a | A Party breaches the obligation of fair and equitable treatment if a measure or series of measures constitutes denial of justice in criminal, civil, and administrative proceedings. |

20. Denial of justice as defined in the text presented in **4a** is considered as a component of fair and equitable treatment regardless of the approach chosen in the design of FET provisions. It has been explicitly recognised in investment treaties concluded by most Track 2 participants, whether in FET clauses linked to MST[19] or closed-list FET provisions.[20] Overall, 55 Track 2 participants concluded at least one investment treaty containing an FET provision that expressly refers to denial of justice as a component of the standard. Some treaties that explicitly exclude FET from the scope of investment protections include protection against denial of justice.[21] In most cases, the notion of denial of justice is related to criminal, civil or administrative proceedings.

[19] Track 2 participants that concluded an investment treaty in which an MST-FET provisions contains a reference to denial of justice are the following: Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czechia, Denmark, Ecuador, Estonia, Finland, France, Germany, Greece, Hungary, India, Indonesia, Ireland, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mauritius, Mexico, Morocco, Netherlands, New Zealand, Oman, Peru, Philippines, Poland, Portugal, Romania, Singapore, Slovakia, Slovenia, Spain, Sweden, Thailand, United Arab Emirates, United Kingdom, United States, Uruguay, Viet Nam, and the European Union. This represents 53 jurisdictions over 99 participating to the work programme. See, for example: Australia-United Kingdom FTA (2021), Canada-Chile FTA (1996) - Amendment (2017), China-Singapore FTA (2008) - Protocol (2018), New Zealand-Singapore CEPA Protocol (2019), ASEAN-Hong Kong (China) Investment Agreement and the ASEAN-Korea FTA.

[20] Track 2 participants that concluded investment treaties containing a closed-list FET provisions referring to "denial of justice" are the following: Austria, Belgium, Bulgaria, Canada, China, Colombia, Croatia, Czechia, Denmark Estonia, Finland, France, Germany, Greece, Hungary, Indonesia, Ireland, Italy, Latvia, Lithuania, Luxembourg, Malaysia, Netherlands, Oman, Philippines, Poland, Portugal, Romania, Serbia, Singapore, Slovakia, Spain, Sweden, Thailand, Türkiye, United Arab Emirates, Viet Nam. See, for example, the CETA, EU-Singapore Investment Protection Agreement, Czech-Iran BIT (2017), Hungary-Oman BIT (2022) and the Türkiye-Serbia BIT (2018).

[21] See, for example, the AfCFTA Protocol on Investment.

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| 4b | Fair and equitable treatment includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings, in accordance with the principle of due process embodied in the principal legal systems of the world. |

21. In a number of cases, the obligation not to deny justice includes a reference to the principle of due process (**4b**).[22]

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| 4c | For greater certainty, the mere fact that the covered investor's claim has been rejected, dismissed or unsuccessful does not in itself constitute a denial of justice. |

22. In some investment treaties such as the EU-Singapore Investment Protection Agreement, a 'negative' description further clarifies that the mere rejection, dismissal or unsuccessfulness of an investor's claim in criminal, civil, or administrative proceedings, does not in itself amount to denial of justice (**4c**).[23]

## 2.2. Fundamental breach of due process in judicial and administrative proceedings

23. Depending on the design of FET clauses, this component may either be associated with the prohibition of denial of justice[24] or constitute a separate component of FET.[25]

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| 5a | A Party breaches the obligation of fair and equitable treatment if its measure or series of measures constitute a fundamental breach of due process in judicial and administrative proceedings. |

24. A similar intent to the text displayed above in **5a** appears in the EU-Singapore Investment Protection Agreement and a fairly high number of investment treaties concluded by Track 2 participants contain a reference to the principles of due process, whether associated to the denial of justice or as a stand-alone component.[26] Overall, 52 Track 2 participants have signed at least one

[22] See, for example: Australia-United Kingdom FTA (2021), Canada-Chile FTA (1996) - Amendment (2017), China-Singapore FTA (2008) - Protocol (2018), New Zealand-Singapore CEPA Protocol (2019), ASEAN-Hong Kong (China) Investment Agreement, Mexico-Central America FTA, Pacific Alliance FTA.

[23] Additional specifications also appear in a limited number of instruments such as the Draft interpretative statement published by CETA Parties that provides the following: "*A claim of denial of justice […] requires prior exhaustion of local remedies except if there are no reasonably available local remedies to provide effective redress, or if the local remedies provide no reasonable possibility of such redress. In determining whether there is a denial of justice, the Tribunal should be mindful that it is not a court of appeal of domestic court decisions and should not engage in reviewing the merits of domestic court decisions.*"

[24] See, for example, CAFTA-DR (2004), Australia-United Kingdom FTA (2021), Mexico-Hong Kong (China) BIT (2020), New Zealand-Singapore CEPA Protocol (2019), USMCA, Pacific Alliance FTA and Japan-Morocco BIT (2020).

[25] See, for example, the CETA, Colombia-France BIT (2014) with Joint Interpretative Declaration (2020), EU-Viet Nam Investment Protection Agreement, Türkiye-Serbia BIT (2018), and the India-Colombia BIT (2009) – Joint Interpretative Declaration (2018). It also appears a stand-alone obligation in investment treaties that exclude FET from the scope of investment protections, such as the AfCFTA Protocol on Investment.

[26] See, for example, Argentina-Chile FTA (2017), Argentina-Japan BIT (2018), Argentina United Arab Emirates BIT (2018), Australia-United Kingdom FTA (2021), Australia-Uruguay BIT (2019), CAFTA-DR, Canada-Chile FTA-Amendment (2017), CETA , China-Mauritius FTA (2019), China-Singapore FTA (2008) – Protocol (2018), Colombia-France BIT (2014) with Joint Interpretative Declaration (2020), Colombia-Singapore BIT (2013), Costa Rica-United Arab Emirates BIT (2017), CPTPP, EU-Viet Nam

investment treaty in which FET refers to due process.[27] In most cases, investment treaties that include the principle of due process as a stand-alone component of FET refer to this principle in the context of administrative and judicial proceedings.[28]

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| 5b | A breach of the obligation of fair and equitable treatment may be found where a measure or series of measures constitutes fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings. |

25. Unlike the text displayed in **5a**, the language presented in **5b** includes a reference to transparency. Although transparency is generally not considered as a stand-alone component of the FET standard,[29] some jurisdictions consider it as an element that may be taken in consideration in the establishment of a breach of due process.[30]

## 2.3. Manifest arbitrariness

26. Most treaties do not explicitly include manifest arbitrariness as part of FET, and many older treaties include it in parallel to the FET standard as a stand-alone obligation.[31] However, a number of recent treaties appear to include manifest arbitrariness as a component of FET.

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| 6a | A Party breaches the obligation of fair and equitable treatment if a measure or series of measures constitutes a case of manifest arbitrariness. |

Investment Protection Agreement, EU-Singapore Investment Protection Agreement, Hungary-Oman BIT (2022), Hungary-United Arab Emirates BIT (2021), Japan-Morocco BIT (2020), Mexico-Hong Kong (China) BIT (2020), New Zealand-Singapore CEPA Protocol (2019), Singapore-Myanmar BIT (2019), Singapore-Rwanda BIT (2018), Singapore-Sri Lanka FTA (2018), Slovakia-Iran BIT (2016), Türkiye-Serbia BIT (2018), Uruguay-United Arab Emirates BIT (2018), USMCA, Colombia-Northern Triangle FTA, Korea-Central America FTA, Mexico-Central America FTA, Pacific Alliance FTA, First Protocol to amend the ASEAN-Japan CEPA, PACER plus.

[27] Argentina, Australia, Austria, Belgium, Bulgaria, Canada, Chile, China, Colombia, Costa Rica, Croatia, Czechia, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Indonesia, Ireland, Italy, Japan, Korea, Latvia, Lithuania, Luxembourg, Malaysia, Mauritius, Mexico, Morocco, Netherlands, New Zealand, Oman, Peru, Philippines, Poland, Portugal, Serbia, Singapore, Slovakia, Slovenia, Spain, Sweden, United Arab Emirates, United Kingdom, United States, Uruguay, Thailand, Türkiye, Viet Nam, European Union.

[28] AfCFTA Protocol on Investment, CETA, Colombia-France BIT (2014) with Joint Interpretative Declaration (2020), EU-Viet Nam Investment Protection Agreement, Türkiye-Serbia BIT (2018).

[29] For example, Canada has taken the position that transparency is not a stand-alone obligation part of the MST. See *Merrill & Ring Forestry L.P. v. Canada*, ICSID Case No. UNCT/07/1, Counter-Memorial of the Government of Canada, 31 May 2008, p. 159.

[30] A wording in that sense is observed in the CETA, Czechia-Iran BIT (2017), the Hungary-Oman BIT (2022), and the Hungary-United Arab Emirates BIT (2021).

[31] If an investment treaty contains a stand-alone provision on manifest arbitrariness and, in parallel, a provision on FET, the inclusion of "manifest arbitrariness" as a component of FET could appear redundant. In such case, the insertion of a 'negative' description as contained in **1a** may create a confusing situation in which "manifest arbitrariness" cannot amount to a breach of FET as a stand-alone provision but may amount to a breach of FET as a component of the standard.

27. Most Track 2 participants that expressly include the notion of manifest arbitrariness as a component of FET do not define the meaning of the notion as reflected in the text displayed in **6a**.[32]

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| 6b | A measure is manifestly arbitrary when it is evident that the measure is not rationally connected to a legitimate policy objective, such as where a measure is based on prejudice or bias rather than on reason or fact" |

28. Text presented above in **6b** contains a definition of the notion of "manifest arbitrariness". Although this notion is generally unspecified in Track 2 participants' recent investment treaties, it was clarified in the draft interpretative statement published by CETA Parties.

## 2.4. Discrimination on wrongful grounds such as gender, race, or religious beliefs

29. Discrimination on wrongful grounds such as gender, race, or religious beliefs reflects an intention expressed in a number of investment treaties recently concluded by Track 2 participants.[33]

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| 7 | A breach of the obligation of fair and equitable treatment may be found where a measure or series of measures constitutes targeted discrimination on manifestly wrongful grounds such as gender, race or religious belief. |

30. When included as a component of FET, the reference to discrimination is generally carefully drafted in order to avoid any redundancy with other provisions related to discrimination such as national treatment or most-favoured-nation treatment. For this reason, a discrimination may amount to a breach of FET only when related to specifically identified motives such as illustrated in the text presented above (**7**).

## 2.5. Harassment, coercion, or abuse of power

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| 8 | A Party breaches the obligation of fair and equitable treatment if a measure or series of measures constitutes an abusive treatment of investors, such as coercion, constrain and harassment. |

31. The text presented above (**8**) appears in a few treaties that likewise cover abusive treatment, such as coercion, constrain and harassment. Such wording does not refer to any "bad faith conduct" in order to avoid the use of controversial good faith elements, and only refers to specific elements.[34]

[32] This is the case in the Colombia-France BIT (2014) with Joint Interpretative Declaration (2020), Colombia-United Arab Emirates BIT (2017), Czech-Iran BIT (2017), Hungary-United Arab Emirates BIT (2021) and the Slovakia-Iran BIT (2016). This element is also contained in the AfCFTA Protocol on Investment, the Modernisation Project of the EU-Mexico Global Agreement and the India-Colombia BIT (2009) – Joint Interpretative Declaration (2018).

[33] It appears in the CETA, Colombia-France BIT (2014) with Joint Interpretative Declaration (2020), Czechia-Iran BIT (2017), Hungary-Oman BIT (2022), the Türkiye-Serbia BIT (2018),the Modernisation Project of the EU-Mexico Global Agreement or the India-Colombia BIT (2009) – Joint Interpretative Declaration (2018).

[34] This wording appears in the CETA, the EU-Viet Nam Investment Protection Agreement, Hungary-Oman BIT (2022), the Türkiye-Serbia BIT (2018), the Modernisation Project of the EU-Mexico Global Agreement and the India-Colombia BIT (2009) – Joint Interpretative Declaration (2018).

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