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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 14 February 2025**

**Note by the OECD Secretariat**

Delegates from 101 jurisdictions were invited to participate in the eleventh Track 2 meeting of the OECD work programme on the *Future of Investment Treaties*. The meeting was held on 14 February 2025 in virtual 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>.

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## *The Future of Investment Treaties – Track 2: Summary of discussions of the meeting of 14 February 2025*

### *Table of contents*

<b>Context and purpose of this document .....</b>	<b>2</b>
<b>1. Evolution of ‘full protection and security’ designs in investment treaties.....</b>	<b>4</b>
<b>2. Opportunities to clarify obligations in older treaties using a Joint Interpretation.....</b>	<b>5</b>
2.1. Scope of potential consensus on the contours and content of FPS obligations for a Joint interpretation .....	5
2.2. Opportunities to clarify the scope of MFN clauses in older treaties with respect to dispute settlement arrangements .....	6
<b>3. Future meetings associated with Track 2 .....</b>	<b>7</b>

### **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 research. Governments set the agenda and priorities for these conversations.

2. Since 2011, the OECD-hosted investment 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 in some cases to challenge measures taken to address legitimate public policy measures; there have been unintended interpretations and uses of treaties; and many treaties, especially older ones, do not contain recent specifications that might lead to 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 the challenges that investment treaties should address in the future as well as desirable changes to current approaches. This track has to date focused on investment treaties and climate change.
- Track 2 is a government-led effort to consider among peers the merits and options for the transition<sup>1</sup> of substantive clauses with outdated design in existing treaties in a pragmatic manner.

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<sup>1</sup> The notion of “transition” is used in this note as an umbrella term for any kind of action 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.

4. One hundred and one jurisdictions are currently invited to participate in this work programme.<sup>2</sup> 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](#).
5. In 2023, France granted a financial contribution to the work of Track 2 for two years and provided a further voluntary contribution for this work at the end of 2024. This contribution has enabled an expeditious delivery and the production of further analytical material for the Track 2 Project and has helped to facilitate the participation of representatives from developing countries in this work.
6. Since the start of the work in 2021, discussions in Track 2 have shown how several substantive clauses commonly found in investment treaties have evolved, carried by a shared intention to frame the contours of substantive treaty obligations more clearly. Most jurisdictions apply the new approaches to key clauses consistently.
7. Meetings between 2021 and end-2024 provided fora to analyse and discuss the evolution of treaty practice with respect to three substantive clauses – fair and equitable treatment (FET), ‘indirect expropriation’, and ‘most-favoured-nation’ (MFN) treatment obligations. Governments have explained their respective motivations underlying new treaty text for these clauses in past Track 2 meetings. Documents and discussion of substantive issues in the Track 2 discussions do not, by themselves, necessarily constitute all participating governments’ official interpretations of provisions and should not be cited as such.
8. Track 2 participants have also discussed procedural means to address unspecific framings in older agreements. They have in particular discussed the potential of Joint Interpretations to clarify the intention in older treaties; and, in the meeting of 5 November 2024, of plurilateral treaty modifications, using the FET clause to illustrate possible design options.<sup>3</sup>
9. The Track 2 meeting on 14 February 2025, on which this note reports, expanded work in two areas:

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<sup>2</sup> 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.

<sup>3</sup> See Secretariat research notes: “*Treaty modification: legal framework and opportunities for investment treaties*” [[DAF/INV/TR2/WD\(2024\)8/REV2](#)] and “*Design options for a plurilateral agreement to modify ‘fair and equitable treatment’ provisions in investment treaties*” [[DAF/INV/TR2/WD\(2024\)9/REV2](#)]; and the Summary of discussions of the meeting of 5 November 2024 [[DAF/INV/TR2/WD\(2024\)10/REV2](#)].

- Delegates explored a further substantive treaty clause – ‘full protection and security’ (FPS) – where a change from unspecified framings in earlier treaties to more precise framings in recent treaties has been observed (**section 1**); and
- Delegates assessed the breadth of potential consensus among them for two additional treaty-based obligations – FPS and MFN clauses – to further inform their considerations of the opportunities and merits of Joint Interpretations to clarify obligations in older treaties (**section 2**).

## 1. Evolution of ‘full protection and security’ designs in investment treaties

10. The Secretariat provided empirical evidence on the evolution of FPS designs in over 2,300 investment treaties concluded by Track 2 participants between 1959 and 2024.<sup>4</sup> The results of the Secretariat’s survey of FPS provisions are reflective of findings of surveys conducted on other provisions studied in the context of Track 2. It shows that FPS designs have broadly evolved in investment treaties, from unspecified framings in earlier treaties to specified framings in treaties since the early 2000s.

11. Specifications in recent treaties systematically address two aspects of the scope and content of FPS obligations: They identify FPS obligations as relating to the ‘police’ or ‘physical’ protection or security of investments; and limit obligations to the customary international law minimum standard of treatment (MST-CIL). Most recent treaties specify both elements cumulatively. Almost all Track 2 participants have included these specifications consistently in their recent treaties.

12. Delegates provided insights on their jurisdictions’ investment treaty practices with respect to FPS provisions, and specifically on the drivers of change in FPS designs. Delegates confirmed the Secretariat’s empirical observations and explained that the consistent use of specified framings of FPS in their recent treaties was mainly driven by three factors:

- *First*, claimants have cited the absence of specifications of FPS in older treaties to interpret expansively FPS obligations as providing for ‘legal’ protections to investments and not physical or material harm. They noted that the FPS specifications in recent treaties limited the potential for misinterpretations of their treaties by claimants.
- *Second*, participants explained that their specific framing of FPS responded to some interpretations by investment treaty tribunals of their own or other jurisdictions’ treaties that did not correspond to their intended interpretation of FPS obligations. They noted that more recently, most tribunals have moved away from an interpretation of FPS as providing for ‘legal’ protections of investments.
- *Third*, they noted that the explicit identification of FPS obligations as relating to the physical protection of investments in recent treaties corresponds to the ordinary meaning of the terms full ‘protection’ and ‘security’ and preserves FPS provisions’ effectiveness (*effet utile*) by delineating their respective scope from other investment treaty obligations which, in some delegations’ views, provide for sufficient legal protections to covered investments.

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<sup>4</sup> “‘Full protection and security’ provisions in investment treaties: A large sample survey of treaty provisions”, Note by the Secretariat [[DAF/INV/TR2/WD\(2025\)1/REV1](#)].

13. One delegation requested that the Secretariat provide further analysis on FPS, specifically on its interaction with provisions related to the compensation for loss that also provide protections to investments from physical harm.

## 2. Opportunities to clarify obligations in older treaties using a Joint Interpretation

14. Delegates also discussed the potential scope of their common understanding of obligations under two key substantive investment treaty clauses – FPS (section 2.1) and MFN clauses in relation to the application of dispute settlement arrangements (section 2.2) – to inform their assessment of the opportunities and merits of clarifying related provisions in their older treaties.

15. These discussions were exploratory, and delegates did not necessarily present or reflect the position of their government on concrete instruments to address older treaties at this stage. Rather, the discussions were intended to inform the possible content of a joint interpretation among interested jurisdictions; this content is deduced from the way that governments textually frame their understanding of obligations in their recent treaties and can illustrate what a joint interpretation can potentially achieve for jurisdictions that wish to pursue this avenue.

### 2.1. Scope of potential consensus on the contours and content of FPS obligations for a Joint interpretation

16. The Secretariat treaty survey showed that despite the broad and consistent use of updated FPS language by many Track 2 participants in their recent treaties, older FPS designs remain predominant in the global treaty population.<sup>5</sup> The note also showed a scope of potential consensus among participants on the contours and content of FPS obligations that can inform the content of a joint interpretation. This scope contains three elements: FPS obligations are (1) broadly understood as ‘due diligence’ obligations (2) prescribed by the customary international law minimum standard of treatment (MST-CIL) (3) relating to the protection of investments against physical harm.<sup>6</sup> The Secretariat estimates that 95% of bilateral investment treaties concluded by Track 2 participants and featuring older FPS designs could likely be clarified by a joint interpretation reflecting these three elements.

17. Delegates generally noted that these three elements reflected their understanding of the content and scope of FPS obligations. Delegates commented on the potential textual framing of these three elements in a possible joint interpretation:

- It was suggested that the nature of FPS obligations be textually framed as requiring parties to take all measures ‘reasonably necessary’ – as featured in some recent treaties – rather than as ‘best efforts’ obligations. This could avoid the misinterpretation as implying a higher threshold than the level of protection required by FPS that governments intend for.
- Delegations reflected on whether the express mention of the MST-CIL would provide additional clarity or if the two other elements – the ‘due diligence’ nature

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<sup>5</sup> “‘Full protection and security’ provisions in investment treaties: A large sample survey of treaty provisions”, Note by the Secretariat, [DAF/INV/TR2/WD\(2025\)1/REV1](#).

<sup>6</sup> “Clarifying ‘full protection and security’ obligations in investment treaties: opportunities for a Joint Interpretation”, Note by the Secretariat, [DAF/INV/TR2/WD\(2025\)1/ADD/REV1](#).

of FPS obligations and their express identification as relating to the physical protection of investments – would be sufficient in delineating FPS obligations.

18. Several delegates emphasised that a potential plurilateral joint interpretation to clarify FPS obligations in older treaties had merits. They considered that the broad scope of potential consensus on FPS made it likely that a joint interpretation on FPS could be agreed upon as a potential outcome of Track 2.

19. It was also noted that a plurilateral modifying agreement – as discussed during the previous Track 2 meeting of 5 November 2024,<sup>7</sup> and following a similar model as the Draft multilateral instrument on ISDS reform currently being negotiated by the UNICTRAL’s Working Group III – would offer the opportunity for a more comprehensive modernisation of older treaties than joint interpretations.

## 2.2. Opportunities to clarify the scope of MFN clauses in older treaties with respect to dispute settlement arrangements

20. Delegates reflected on the opportunities of joint interpretations to clarify obligations in older treaties with respect to MFN treatment obligations and their interaction with dispute settlement provisions. As a large sample survey of MFN provisions discussed by Track 2 participants in November 2022<sup>8</sup> had shown, participants have, in recent treaties, consistently specified that dispute settlement arrangements are not included within the scope of MFN treatment obligations. Under preliminary assumptions set out in a Secretariat note,<sup>9</sup> it appears that a joint interpretation could likely clarify the scope of MFN treatment in this respect in 97% of bilateral investment treaties concluded by participants that feature older MFN-clause designs. Delegates also considered illustrative language on the matter that could be used for a possible joint interpretation.

21. Delegates reiterated that the exclusion of dispute settlement arrangements from the scope of MFN treatment obligations in recent treaties corresponds to a longstanding understanding of MFN treatment obligations – including in their older treaties that do not contain express language – and that these specifications in recent treaties are merely intended as *clarifications* of the respective treaty parties’ intent.

22. Delegates exchanged on the merits of concluding a joint interpretation to explicitly clarify the scope of MFN treatment obligations in their older treaties in this regard. Several delegations noted that the clarification of MFN treatment in older treaties would be an opportune and desirable outcome of Track 2 discussions, and that a joint interpretation could achieve this outcome. They noted that jurisdictions regularly face expansive interpretations of MFN treatment obligations put forward by claimants in the context of

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<sup>7</sup> See Secretariat research notes “*Treaty modification: legal framework and opportunities for investment treaties*” [[DAF/INV/TR2/WD\(2024\)8/REV2](#)] and “*Design options for a plurilateral agreement to modify ‘fair and equitable treatment’ provisions in investment treaties*” [[DAF/INV/TR2/WD\(2024\)9/REV2](#)]; and the Summary of discussions of the meeting of 5 November 2024 [[DAF/INV/TR2/WD\(2024\)10/REV2](#)].

<sup>8</sup> See, “[The interaction between most-favoured-nation clauses and dispute settlement arrangements in investment treaties](#)”, Note by the OECD Secretariat, 30 November 2022. See also, Summary of discussions – [November 2022](#).

<sup>9</sup> “*Clarifying the scope of MFN clauses with respect to dispute settlement arrangements: opportunities for a Joint Interpretation*”, Note by the OECD Secretariat, [DAF/INV/TR2/WD\(2025\)2/REV1](#).

disputes, even though they had observed that tribunals were generally interpreting MFN clauses as to not apply to dispute settlement provisions, in particular in recent cases.

23. Several delegations emphasised the merits of a plurilateral joint interpretation to achieve a clarification of this point in a large number of older treaties. One delegation noted however that individual treaties' specificities would need to be considered if jurisdictions wished to clarify the scope of older treaties' MFN clauses using a plurilateral joint interpretation.

24. On the illustrative language of a potential joint interpretation on MFN with respect to dispute settlement arrangements that had been put to delegates, it was suggested that the type of dispute settlement arrangements concerned by the exclusion should be specified, and that the textual framing should reflect the *clarifying* nature of the interpretation, which merely confirmed the intent of the respective parties to the interpreted treaties.

### 3. Future meetings associated with Track 2

25. The Secretariat presented on plans for the 2025 OECD Annual Investment Treaty Conference. This tenth edition was a joint effort by the OECD, UNCITRAL and UNCTAD and scheduled for 31 March 2025 in Paris. Delegates noted the agenda of the Conference, speakers, and objectives of the event.

26. Track 2 discussions were set to continue on 1 April 2025 (in hybrid format). The meeting gives an opportunity to provide feedback on the Investment Treaty Conference and to reflect on priorities in the medium-to-long term for Track 2, a process that would inform the content of a work programme under Track 2 for 2026-2027. Delegates would also continue discussions on the scope of potential convergence on 'indirect expropriation' to further explore the opportunities of a joint interpretation to clarify related obligations in older treaties.<sup>10</sup>

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<sup>10</sup> Discussions under this item were initially scheduled for the 14 February 2025 meeting, but due to time constraints, discussions were postponed to 1 April 2025.