

The Future of Investment Treaties Track 2

Work on the Future of Investment Treaties in the Track 2 Project – Frequently Asked Questions

Note by the Secretariat

7 October 2022

The Investment policy community at the OECD launched a work programme on the *Future of Investment Treaties* in March 2021. Track 2 of this work programme is concerned with consideration of whether it would be better if specific substantial provisions of older treaties should resemble more recent designs of such clauses that are now consistently used, and if so, how this could be achieved. Ninety-nine jurisdictions are invited to participate in these considerations.

This note prepared by the OECD Secretariat summarises the context, underlying rationale, and logistical information for this work. This note reflects information as of 7 October 2022

1. Why consider the *Future of Investment Treaties*?

Investment treaties have been an essential component of many countries' international investment policies for the past half century. Over the past decade, however, doubt has emerged in some countries about the design of some of these treaties, about the interpretation and use of certain clauses, and in this context the overall outcomes of the treaty system. The necessity for governments to respond to new challenges, in particular the climate crisis, pandemics and other emergencies, has shed new light on the interpretation of certain treaty provisions.

Governments are also reflecting more generally on what they want to achieve with investment treaties and what aspects should be included in treaties on investment that they may conclude in the future.

These aspects are the subject of considerations on the *Future of Investment Treaties* that governments have agreed to carry out under a two-year work programme launched in March 2021.

2. Why is this work hosted at the OECD and how does it relate to efforts at UNCITRAL and in other fora?

The OECD has hosted the international investment policy community for decades and has brought together 62 advanced and economies-in-transition twice yearly since 2006.¹ The *Future of Investment Treaties* builds on this community and now brings together treaty policy-makers from 99 jurisdictions. Hosting the work at the OECD allows:

- Policy communities of experts in their respective policy fields to discuss and exchange views, supported by evidence, analysis, and expertise of the Secretariat;
- Governments to set priorities and orientation of the work; and
- Governments to build strong relationships with “peers” around the globe and link investment policies with other policies to support them in designing “better policies for better lives” of their citizens.

This work does not compete with, duplicate, or substitute efforts undertaken in other organisations on similar matters but instead complements those efforts. In particular, it does not overlap with work undertaken at UNCITRAL Working Group III (which is focused on Investor-State Dispute Settlement reform) or ICSID (which is concerned with updating rules of procedure); work undertaken under Track 1 is to reflect more broadly on the future of investment treaties, and Track 2 only addresses specific substantive clauses of investment treaties. Also, this work does not compete with but rather complements and builds on work undertaken at UNCTAD, for example.

3. Who is participating in this process?

Work on Track 2 is conceived as an **inclusive process** to which government representatives from **99 jurisdictions** from all continents are invited. They include Albania, Algeria,

¹ Work on this policy area is available through the webpage <https://www.oecd.org/daf/inv/investment-policy/foi.htm>.

Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Czech Republic, 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, People's Republic of China, Peru, Philippines, Poland, Portugal, Qatar, Romania, Saudi Arabia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Arab Emirates, United Kingdom, United States, Uruguay, Uzbekistan, Viet Nam and the European Union,

The work is in principle open for participation of government officials from other interested jurisdictions.

4. What distinguishes this initiative from other work on investment treaty reform?

The Track 2 Project is a **government-led effort** to consider among peers from around the world the merits and options for adjustments of treaties. The rationale of the Project is based on several observations:

- Governments are managing a large number of treaties that have been concluded in earlier decades and that may no longer aligned with their current treaty practice;
- Insights on treaty interpretation gained from dispute settlement, changing perceptions of needs, and evolving societal expectations may imply a need for adjustments and policy responses;
- Empirical observations of trends and diffusion of treaty designs show that treaties concluded more recently take a different approach compared to earlier treaties, and an application of newer designs to older treaties may be beneficial; and
- Implementing adjustments treaty-by-treaty can be costly and time-consuming, and more efficient processes may be available.

Work under the Track 2 Project considers:

- Whether it might be advantageous if designs of certain key provisions in investment treaties – that have over time changed for the purpose of calibrating and clarifying treaty-based obligations – not only feature in new agreements but also in existing ones in order to align the content of older treaties with current treaty practice; and
- Whether an issue-by-issue consideration of certain key clauses where similar practice and alignment is emerging could underpin collective **reform efforts**.

The purpose of the Project is for governments to deepen their understanding of the designs of substantive treaty provisions and the implications of specific designs. This is achieved by the exchange of information to evaluate treaty design options, especially for treaty provisions frequently relied upon in the dispute settlement context, and detailed evidence

* 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.

on policy evolutions. The discussions also allow identifying whether any specific action could be undertaken that builds on these insights outside or within the Project.

Conversations during the initial two-year work programme focus on clauses related to “indirect expropriation” (in October 2021 and April 2022), the scope and application of “most-favoured nation” (MFN) provisions in relation to dispute settlement arrangements (scheduled in November 2022) and “fair and equitable treatment” clauses (scheduled in March 2023). Track 2 meetings are supported by Secretariat background notes. Additional topics at the end of this initial two-year programme could be considered depending on governments’ preferences and available resources.

The initiative does not aim, at this stage, to identify any “best practice”, advise on what governments should or could do, or negotiate any text or models.

5. How are meetings conducted?

The OECD has hosted intergovernmental government exchanges since its creation in 1961. It is conceived as a forum where governments’ experts in their respective fields **exchange among peers**. Meetings under Track 2 are held in principle **in private** among governments unless non-governmental participation is explicitly sought.²

This format encourages and results in **frank exchanges** on a technical level in a cordial and collegial atmosphere. Governments contribute their expertise freely and informally.

A **chair** guides the discussions of OECD working groups in an impartial manner. Ms Sylvie Tabet has been designated for this role for the Track 2 Project.³ Ms Tabet is an investment lawyer in the Canadian Government. In her role as the Chair of this process, she does not represent the Canadian government or Canadian interests.

Given remaining restrictions due to the pandemic and to allow broad participation from governments around the world, meetings under the Track 2 Project are held in a **virtual format** through Zoom.

The meeting languages are **English and French**. Simultaneous translation is being provided. Documentation will also be in principle made available in both languages; however, due to the complexity of some of the documents, translations into French may not always be immediately available.

6. How long is this Track 2 work programme scheduled to run?

This work programme has initially been scheduled for a 2-year period. The first meeting was held in October 2021, and a subsequent meeting was organised in April 2022. Upcoming meetings are scheduled to be held in November 2022, March 2023 and October 2023.

² Meeting recordings are occasionally made for internal purposes but are not made available outside the Secretariat.

³ Earlier meetings had been chaired by Ms Maureen Klar from Australia until her resignation from the role.

7. Is it possible for other colleagues from my government to participate?

Individual governments can participate with several experts. Please contact the Secretariat with contact details so that registers can be updated and information shared in a timely manner.

8. What are the costs of participating?

The OECD Secretariat and work is funded by Membership fees. Participation in the Track 2 Project is free of charge.

9. How do I receive documentation and logistical information?

The OECD distributes documents through a secure document server called [O.N.E.](#) Sign-up is personal and may take a while to be processed. The Secretariat circulates documents systematically via e-mail.

The Secretariat also kindly invites delegates to consult [The Future of Investment Treaties - OECD](#) portal, on which will regularly be posted documents for public release prepared in the context of the work programme, including meetings' Summaries of Discussions and background statistical papers prepared by the Secretariat to support discussions on substantive clauses (upon receipt of delegates' prior consideration).

The Secretariat (joachim.pohl@oecd.org and rima.bugaighis@oecd.org) stands ready to provide answers and assistance.