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Treaty modification: legal framework and opportunities for investment treaties

Note by the OECD Secretariat

Jurisdictions participating in the Track 2 of the OECD-hosted work programme on the *Future of Investment Treaties* are reflecting on practical arrangements available to interested governments to transition investment treaties whose substantive provisions follow older designs to more current designs. Participants have discussed joint interpretations as a potential procedural avenue to implement such transition. The present note presents a further option: treaty *modifications*, in particular those that achieve a change of an earlier treaty through a successive treaty which alters legal arrangements between the State Parties without changing the initial treaty's text. The note discusses the legal framework for treaty modification under international law, the conditions and implications of this method and its opportunities for investment treaties. The note was discussed during the Track 2 meeting held on 5 November 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. Jurisdictions participating in Track 2 of the work programme on the *Future of Investment Treaties* are considering the merits and potentially means to transition[1] substantive clauses of investment treaties[2] with earlier designs to current approaches.

2. In 2023, Track 2 discussions began addressing how a transition of earlier-to-current designs could be achieved efficiently and for potentially large stocks of treaties. Participants have considered the potential of treaty amendments,[3] and have discussed the implications of using joint interpretations of treaties more recently.[4]

3. Besides amendments and joint interpretations, treaty *modifications* – as defined below – offer opportunities to achieve a transition of substantive investment treaty clauses. This note discusses the rules that govern treaty modifications under international law, sets out practical examples where modifications have been used, and summarises opportunities and implications of treaty modifications for the scenario at issue in Track 2 of the work on the Future of Investment Treaties.

4. A companion note, DAF/INV/TR2/WD(2024)9/REV2 sets out an example of potential language to illustrate how a modification agreement could be construed to transition fair and equitable treatment (FET) clauses that Track 2 participants have chosen to trial options for transitions that interested participants could consider.[5]

5. This note was drafted by the Secretariat in the specific context of Track 2 work to provide additional material for the consideration of practical means that allow interested governments to carry out a transition of investment treaties. It does not necessarily reflect views of governments of jurisdictions that participate in Track 2.

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1 The term "transition" is used as an umbrella term for any kind of intervention related to an existing treaty.

2 'Investment treaties' are understood to include bilateral investment treaties (BITs), multilateral and plurilateral investment treaties, and investment chapters included in bilateral or plurilateral preferential trade agreements (PTAs).

3 Summaries of Discussion of the Track 2 meetings of 27 June 2023 and 7 November 2023, publicly available on the Future of Investment Treaties' dedicated webpage https://oe.cd/foit2.

4 An in-depth consideration of implications and opportunities of the use of joint interpretations took place at the meetings held on 12 March 2024 and 30 May 2024.

5 The FET clause was suggested as a test clause to spearhead this reflection with the expectation that the findings could be applied to other substantive provisions that governments may want to transition. See, "Directions for work under Track 2 of the programme on the Future of Investment Treaties", Secretariat note, 7 November 2023.

Key takeaways

- Treaty modifications constitute a means to transition substantive clauses of investment treaties from older designs that are no longer pursued to designs that treaty parties now favour. They are achieved by the conclusion of a later treaty that alters existing rights and obligations between treaty parties without formally amending the initial treaty's text.
- Empirically, modifications of treaties are frequent. Multilateral modifying treaties have been used successfully to address many bilateral treaties in the past in various fields of law.
- Legally, modifications of treaties operate on the *lex posterior* rule as reflected in the Vienna Convention on the Law of Treaties (VCLT). Modifications by successive treaties are straightforward when their extent and scope are expressly set out in the instrument.
- Unlike joint interpretations that Track 2 participants have considered earlier, modifications allow for a change of treaty parties' rights and obligations and may enable transitions that joint interpretations cannot.
- For efficiency, modifications could be achieved in the context of a plurilateral agreement, even if the treaties that are subject to the modification are bilateral treaties. Bilateral arrangements can complement the plurilateral framework and allow parties to achieve a tailored outcome for each relationship and treaty.
- Given that modifications would be implemented through a new treaty, domestic procedures to effectuate the transition are likely to be more onerous than those required for joint interpretations in many jurisdictions.

Issues for discussion

- Do Track 2 participants view treaty modification as a suitable means to transition investment treaties with older designs to newer designs?
- What advantages does a treaty modification offer in comparison to other procedural tools available to governments to carry out such transition?
- What are the benefits and costs of a treaty modification in terms of domestic and international procedures in comparison to other procedural avenues?
- How can interested governments ensure that the outcomes of a potential modifying treaty are clear and predictable to treaty users?

1. What is a treaty modification?

1.1. Features of treaty modification

6. As described in this paper, treaty modification is achieved by the conclusion of a later treaty that alters the rights and obligations established between parties in an earlier treaty without formally amending the text of that earlier treaty.

7. A modification has similar effects to a treaty amendment but differs in its formal outcome: where an amendment results in changes to the text of the existing treaty,[6] modification results from the cumulative application of two or more separate treaty texts with the arrangements of the later treaty overriding incompatible arrangements contained in an earlier treaty.

8. Modifications – as described herein – also differ from treaty interpretation by subsequent agreement: while subsequent agreements regarding interpretations guide treaty users on the parties' common understanding of the rights and obligations established in that treaty,[7] modification by a later treaty *changes* those rights and obligations.

1.2. Rules governing treaty modifications

9. Part IV of the VCLT contains some rules addressing treaty amendments and modifications. With respect to modifications, the VCLT contains explicit rules for the modification of multilateral treaties by *some* of these treaties' parties (so-called '*inter se* agreements') in its Article 41. The modification of bilateral treaties by a successive bilateral or multilateral treaty is not explicitly mentioned.[8]

10. Treaty modification operates based on the *lex posterior derogat priori* principle governing the application of successive treaties relating to the same subject matter. This principle of customary international law is codified in Part III of the VCLT (Article 30),

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[6] See the ILC's Draft Articles on the Law of Treaties with commentaries (1966) which define "amendment" as the "formal amendment of a treaty intended to alter its provisions with respect to all the parties" (in *Yearbook of the International Law Commission, 1966*, vol. II, p.232).

[7] On the framework applicable to interpretation by subsequent agreement, see OECD (2024), "Approaches available under international law to transition from older to more recent designs in investment treaties – "subsequent agreements": the role of interpretive statements", A scoping paper by the Secretariat, 29 February 2024, DAF/INV/TR2/WD(2024)4/REV1. See also Gaukrodger, D. (2016), "The legal framework applicable to joint interpretive agreements of investment treaties", *OECD Working Papers on International Investment*, No. 2016/01, OECD Publishing, Paris.

[8] See the ILC's Draft Articles on the Law of Treaties with commentaries (1966) which explain that while an explicit reference to treaty "modification" by successive treaty had been added in the previous Convention's draft articles adopted in 1964, the ILC decided to dispense with the reference in its following version as it considered the scenario to be sufficiently covered by the provisions of the now Article 30(3) on the application of successive treaties relating to the same subject matter (*Yearbook of the International Law Commission, 1966*, vol. II, p.236).

which addresses conflicts between incompatible provisions of treaties relating to the same subject matter.[9]

11. The *lex posterior* rule, as set out in Article 30(3) of the VCLT, establishes that provisions of an earlier treaty only apply to the extent that they are compatible with those of the later treaty.

> **Vienna Convention on the Law of Treaties (1969), Article 30(3):**
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> 3. When all the parties to the earlier treaty are parties also to the later treaty but the earlier treaty is not terminated or suspended in operation under article 59, the earlier treaty applies only to the extent that its provisions are compatible with those of the later treaty.

12. The VCLT's *travaux préparatoires* of the mid-1960s reflect a presumption that governments intend to modify an existing treaty among or between them when they conclude a later treaty relating to the same subject matter, to the extent of the treaties' incompatibility.[10]

13. The modifying effect of a later treaty deliberately designed as a modification instrument of existing treaties would not require an assessment of the application of the *lex posterior* presumption.[11] The *lex posterior* principle applies *de jure* in the case of deliberate norm-conflicts.

[9] See the Conclusions of the work of the United Nations International Law Commission (ILC)'s Study Group on the Fragmentation of International Law (A/CN.4/L.702, 18 July 2006) that confirm the rationale of "harmonisation" underpinning the *lex posterior* rule in case of incompatible norms (p.8). Legal conflicts are defined as cases "where two norms that are both valid and applicable point to incompatible decisions" (p.7).

[10] See the ILC's Draft Articles on the Law of Treaties with commentaries (1966) which state that parties to an earlier treaty "are always competent to abrogate it, whether in whole or in part, by concluding another treaty with that object" and that when doing so, "they are to be presumed to have intended to terminate the first treaty or to modify it to the extent of the incompatibility" (in *Yearbook of the International Law Commission, 1966*, vol. II, p.215).

[11] For instance, the *lex posterior* presumption could be stymied where an earlier treaty's provisions reflect *lex specialis.* However, in the event of a deliberate norm-conflict, the later treaty's provisions would also appear to reflect *lex specialis* (see Conclusion (10) of the Report of the ILC's Study Group on the Fragmentation of International Law (A/CN.4/L.702, 18 July 2006, p.10). Further, the *lex posterior* presumption can only apply if the successive treaty does not terminate or suspend the earlier treaty by virtue of VCLT Article 59 (see the ILC's Draft Articles on the Law of Treaties with commentaries (1966), in *Yearbook of the International Law Commission, 1966*, vol. II, p.216). Such scenario would be implausible however in the case of deliberate norm-conflicts, where the parties' express modification intent would imply their intent *not to terminate or suspend* the earlier treaty.

2. Experiences with plurilateral treaty modifications

14. Multilateral modifying arrangements have been long used to successfully address many bilateral treaties in various treaty fields, such as extradition,[12] mutual assistance in criminal matters,[13] the law of the sea,[14] or maritime navigation.[15]

15. More recently, multilateral modifying agreements have been used as instruments to modify large stocks of bilateral treaties in the areas of investment and related fields such as taxation. Two examples, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (BEPS MLI) [OECD/LEGAL/0432] and the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration 2014 (Mauritius Convention) provide recent examples of their use, functioning, and potential.

2.1. The BEPS Multilateral Instrument

16. The OECD/G20 Inclusive Framework on Base Erosion and Profit Shifting's 15-point Action plan aimed at developing a self-standing agreement to modify the existing network of over 3,500 bilateral tax treaties in order to address tax planning strategies that exploit gaps and mismatches in tax rules to artificially shift profits to low or no-tax locations. Jurisdictions negotiating the Inclusive Framework on BEPS sought "one negotiation, one signature, and one ratification" to overcome the challenges of bilateral renegotiations.

17. In November 2016, the Ad hoc Group composed of over 100 jurisdictions concluded its negotiations and adopted the text of the BEPS MLI as well as its accompanying Explanatory Statement. The agreement entered into force in July 2018. To date, it modifies over 1,400 bilateral tax treaties. This number is expected to grow, as more jurisdictions sign the agreement, and it enters into force for them.[16]

18. Modifications result from the matching of parties' respective notifications and reservations ("MLI positions"). The BEPS MLI Matching Database provides for detailed

[12] The European Convention on Extradition (1957) for example supersedes the provisions of any bilateral treaties, conventions or agreements governing extradition between any two of its Contracting Parties (Article 28(1)).

[13] Article 11(1) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988)

[14] Article 311(2) of the United Nations Convention on the Law of the Sea (UNCLOS) (1982) expressly stipulates that the rights and obligations arising from existing treaties concluded by its Contracting Parties are not affected by the UNCLOS to the extent that they are compatible with the multilateral instrument, implying that its provisions shall prevail over those in these existing treaties with which they are incompatible.

[15] Article 11(1) of the Convention for the Suppression of Unlawful Acts against the Safety of Maritime Navigation (1988) which supplements provisions relating to "extraditable offences" of extradition treaties concluded between its Contracting Parties.

[16] See the BEPS MLI Matching Database. The Multilateral Instrument is expected to modify around 1,900 bilateral tax treaties once it is in force for all anticipated participants.

and up-to-date information on the MLI's effects and outcomes.[17] To enhance transparency and clarity, many jurisdictions have published – or are in the process of publishing – synthetised versions of their tax treaties as modified by the BEPS Multilateral Instrument.[18]

2.2. The Mauritius Convention

19. In the field of investment treaties specifically, the Mauritius Convention adopts a different approach to modification. The Mauritius Convention avoids a treaty-by-treaty approach and modifies its parties' investment treaties by supplementing their provisions related to transparency in investor-state dispute settlement (ISDS) proceedings.[19]

20. The Mauritius Convention applies the United Nations Commission on International Trade Law (UNCITRAL)'s Rules on Transparency in Treaty-based Investor-State Arbitration to ISDS proceedings lodged under investment treaties concluded by the Convention's parties before 1 April 2014.

21. In the case of conflicts between the UNCITRAL Rules on Transparency and provisions in investment treaties, the Mauritius Convention gives a priority of application to the UNCITRAL Rules. It also provides that the use of 'most favoured nation' provisions may not allow parties to circumvent the application of the UNCITRAL Rules where they are applicable in virtue of it.

22. So far, the Mauritius Convention has been signed by 25 jurisdictions – the latest signatories being Panama in January 2025,[20] and the European Union in early July 2024[21] – and ratified by nine jurisdictions.[22]

23. At the request of the Working Group III on ISDS reform, the UNCITRAL Secretariat has also recently tabled a draft multilateral instrument to bring into force

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17 The database includes aggregate statistics on the number of notified and matched tax treaties that are subject to modification, the specific matching outcomes under the MLI, and an overview of reservations and choices made by the parties.

18 See e.g., Belgium, Finland, France, United Kingdom, etc. The agreements' initial texts are usually presented alongside the Multilateral Instrument's provisions that effectively modify them, in accordance with the match between the parties' respective MLI positions. In some instances, these consolidated texts are prepared conjointly by the treaty partners' competent authorities and represent the parties' common understanding on the modifications made to each agreement by the MLI. The OECD Secretariat has set out guidelines and suggestions for jurisdictions developing synthetised texts of their tax treaties modified by the MLI.

19 See the United Nations Secretary-General's address to the International Council for Commercial Arbitration (ICCA) Congress held in Mauritius on 9 May 2016 (SG/SM/17738) which states that the Convention "can bring greater efficiency and coherence to a system currently based on more than 3,000 treaties".

20 See UNCITRAL, "Panama signs the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration", Press Release, UNIS/L/369, 14 January 2025.

21 Following the approval of the Council, the European Union signed the Convention on 2 July 2024. Once it enters into force for the EU following its ratification, the Convention will bring about 1,200 IIAs involving EU Member States under its scope (see European Commission, Directorate-General for Trade, "Council approves EU signature of convention on transparency for dispute settlement", News Article, 25 June 2024).

22 For up-to-date information about the parties to the Convention as well as signatories, see its status page.

investment treaty reforms negotiated in the context of the Working Group. The draft Multilateral Instrument is designed as a "framework convention" with optional protocols that would modify the investment treaties identified by its Parties in their respective notifications.[23]

[23] See UNCITRAL, "*Possible reform of investor-State dispute settlement: Draft multilateral instrument on ISDS reform*", Note by the Secretariat, 8 July 2024, A/CN.9/WG.III/WP.246, p.2.

3. Opportunities of treaty modification for investment treaties

24. Around 1,600 investment treaties among Track 2 participants contain designs of substantive clauses that are no longer pursued in current investment treaty practice. Many Track 2 participants have dozens of such treaties, and in some jurisdictions, treaties displaying various 'earlier generation' approaches are observed.[24] The merits of treaty modification can be considered by interested governments as a procedural tool to transition these older designs in their investment treaties to more recent designs.

25. Several legal and practical considerations may influence governments' decision to opt for one procedural means over another. In considering the relative merits and opportunities of treaty modification for large bilateral treaty networks, governments may wish to consider factors such as efficiency as well as costs and practicability in terms of international and domestic procedures, among others.[25]

26. A companion note (DAF/INV/TR2/WD(2024)9/REV2) illustrates specifically the opportunities of treaty modification for transitioning of FET provisions contained in 'early generation' investment treaties.[26]

3.1. Efficiency: a single instrument to transition large networks of bilateral treaties

27. As described herein, treaty modification offers an opportunity for governments to transition a large stock of bilateral treaties using a single plurilateral instrument, rather than individually amending treaties with their respective partners. A plurilateral agreement has the advantage of possibly offering a single process in domestic settings to address potentially multiple treaties.

3.2. Agency: multilateral processes allow for participation on an equal footing

28. A multilateral setting allows for a better and more inclusive participation, especially of developing countries who may not always be able to attract attention of their treaty partners on the merits of reform of individual treaties. Developing countries have reported difficulties with initiating treaty (re)negotiations with their treaty partners, in particular with developed economies. A multilateral instrument offers an opportunity for small or developing countries to participate on an equal footing in the process and reap the benefits of collective efforts.

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24 For the example of FET clauses, see "'Fair' and 'equitable' treatment provisions in investment treaties: A large-sample survey of treaty provisions", Secretariat research note.

25 "Considerations on means to improve outcomes of designs of "fair and equitable" treatment clauses in investment treaties", Note by the Secretariat, 19 June 2023.

26 The FET clause was suggested as a test clause to spearhead reflections on practical means for investment treaty transition, with the expectation that the findings could be applied to other substantive provisions. See "Directions for work under Track 2 of the programme on the Future of Investment Treaties", Secretariat note, 7 November 2023.

3.3. Versatility: the extent and scope of possible modifications

29. As described herein, treaty modifications potentially allow for any changes to obligations under existing agreements, especially in comparison to interpretation by subsequent agreement which is limited by the interpreted treaties' texts. To the extent the parties to bilateral treaties agree, jurisdictions can also decide individually which treaties and which provisions in each treaty they would want to modify, and which design should apply in a given bilateral relationship –opportunities that interpretive statements do not offer.

30. Past experiences have shown the versatility of modifying treaties. The BEPS MLI for instance allows for four types of modifications to accommodate the variety of designs and approaches in the tax treaty network: *replacements* (the MLI provision applies "in place of" covered tax treaties' provisions), *complements* (the MLI provision "applies to" or "modifies" the tax treaties' existing provisions without overwriting them), *additions* (the MLI provision applies "in the absence of" existing provisions in the covered tax treaties) and *hybrid modifications* (the MLI provision applies "in place of or in the absence of" existing provisions).

3.4. Adaptability: accommodating different treaty policies and designs

31. Existing investment treaty designs are quite varied, with different wording in different treaties and often different authentic languages. Modifications can reference substantive clauses without the need to identify *textually* which exact part of the older treaty is addressed by the modification – a feature that helps overcome the difficulties resulting from linguistic variation especially for a plurilateral solution.

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