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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE****Design options for a plurilateral agreement to modify “fair and equitable treatment” provisions in investment treaties****Note by the OECD Secretariat**

Jurisdictions participating in the Track 2 of the OECD Future of investment treaties work programme are considering potential means to transition their investment treaties featuring older designs to designs that are commonly used in recent treaties. The ‘fair and equitable treatment’ (FET) clause was suggested as a test clause to spearhead such discussions. Complementing a previous note setting out the theoretical framework of treaty modification by the conclusion of a successive treaty ([DAF/INV/TR2/WD\(2024\)8/REV2](#)), this note illustrates how a plurilateral modifying agreement can be designed to transition FET clauses in investment treaties. The note supported discussions among participants in Track 2 of the Future of Investment Treaties programme 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 prejudice 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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Summary

- A plurilateral agreement can modify the content of a large number of bilateral investment treaties. The scope of possible changes to the treaties is not limited. The modifying treaty constitutes a separate treaty to which interested jurisdictions that wish to modify or update existing bilateral or plurilateral investment treaties would become parties. The treaty could be designed to allow for later accession to additional parties (section 1.1).
- Parties to the modifying treaty would then identify existing investment treaties whose substantive clauses they wish to modify through the plurilateral instrument (1.2).
- They would also indicate, for each treaty that they have identified and for each substantive clause that they intend to modify, how they wish the rights and obligations to be modified and the modified clauses to read by applying the multilateral treaty alongside the existing bilateral investment treaty. The modification treaty would lay out how the preferences would be matched between the parties to the treaties under modification to foster agreement of the parties. Such agreement is the condition for the modification to materialise (section 1.3).
- The present note provides illustrative text for FET to show how the elements would work (section 2).

Context, purpose, and structure of this note

1. Jurisdictions participating in Track 2 of the work programme on the *Future of Investment Treaties* are considering the merits and potential means to transition¹ substantive clauses of investment treaties² that feature earlier designs to current approaches. In 2023, Track 2 participants began discussions of means available for such transition that could be applied to a potentially large stock of treaties. Participants have so far considered the potential of treaty amendments³ and joint interpretations.⁴ Treaty *modifications* are a further possible means.
2. Discussions on the implications and opportunities of treaty modifications are scheduled for 5 November 2024. A note ([DAF/INV/TR2/WD\(2024\)8/REV2](#)) presents the rules that govern treaty modifications under international law.
3. The present note complements the documentation for that meeting. Drawing on experience with existing multilateral modifying treaties⁵ and proposals for additional plurilateral instruments,⁶ the note illustrates how a plurilateral modifying agreement could be construed to modify substantive clauses of investment treaties. It uses the ‘fair and equitable treatment’ (FET) clause to illustrate the design options.⁷
4. This note was drafted by the OECD Secretariat. It is for illustrative purposes only and does not prejudice the outcomes of discussions under the Track 2 work programme. It does not necessarily reflect views of governments that participate in Track 2.

¹ The term “transition” is used as an umbrella term for any kind of intervention on treaties.

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](#).

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 [Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting](#) (BEPS Multilateral Instrument or MLI) concluded in November 2016 by over 100 jurisdictions and entered into force in July 2018 effectively modifies over 1,400 bilateral tax treaties notified by its parties to date. The Multilateral Instrument is expected to modify around 1,900 bilateral tax treaties once it is brought into effect by all of its current parties (see the [BEPS MLI Matching Database](#) which provides for detailed and up-to-date information on the Instrument’s effects and outcomes).

⁶ UNCITRAL (2024), “[Draft multilateral instrument on ISDS reform](#)”, Note by the Secretariat, 8 July 2024, A/CN.9/WG.III/WP.246. The draft multilateral instrument was discussed at the 49th session of the Working Group III (23-27 September 2024; see [annotated provisional agenda](#), A/CN.9/WG.III/WP.243).

⁷ 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: Priorities, scoping and sequencing of the work ahead](#)”, OECD Secretariat note, 11 October 2023.

1. Elements of a plurilateral modifying agreement

5. The following sections present the different elements of a possible plurilateral modifying agreement. These include the establishment of a modifying agreement (section 1.1); the identification, by this treaty's parties, of existing investment treaties that the modifying treaty would address (section 1.2); and the choice, for each of the identified treaties, of the modification that is desired and that is proposed to the other party or parties of the identified treaties (section 1.3).

1.1. Establishing a modifying treaty

6. As described in this paper, treaty modification operates by the conclusion of a further treaty. Its features and effects are governed by the law of treaties:⁸

- A modifying treaty applies in parallel to earlier treaties by modifying the rights and obligations set in its provisions. A single modifying instrument can modify sizable numbers of treaties without individual renegotiations.
- The modifying treaty does not terminate earlier treaties. Its provisions supersede or complement identified provisions in the concerned earlier treaties (*lex posterior derogat priori*).⁹
- Provisions contained in the earlier treaties that are not addressed by the modifying treaty remain applicable as they stand.
- Parties to the modifying treaty can clarify the interaction of this treaty with earlier treaties. Such clarifications could for instance address how the modifying text interacts with other treaty clauses (e.g., 'umbrella' clauses). Also, when identifying provisions in existing treaties that are to be superseded, they could specify which other standards or textual elements are encompassed by a given intervention.
- The modifying treaty only modifies contracting parties' treaties (as explained in section 1.2 below) and does not alter rights or obligations that a treaty party has with a third-party to the modifying treaty.
- The instrument can be designed for later accession: jurisdictions can accede to the instrument at any time.

1.2. Selecting individual existing treaties that would be addressed by the modifying treaty

7. Parties to the modifying treaty choose individually which treaties they wish to modify and notify them to a designated depositary which informs all the other parties to

⁸ On the general legal framework applicable to treaty modifications, see "Treaty modification: legal framework and opportunities for investment treaties", Note by the Secretariat, [DAF/INV/TR2/WD\(2024\)8/REV2](#).

⁹ See for details "Treaty modification: legal framework and opportunities for investment treaties", Note by the Secretariat, [DAF/INV/TR2/WD\(2024\)8/REV2](#).

the modifying treaty.¹⁰ This notification approach has been relied on in recent treaty modifying instruments to enhance the transparency and predictability of outcomes.¹¹ Parties to the notifying treaty can change their notifications and add additional treaties later.

1.3. Selecting individual changes for individual treaties through a menu of options

8. The interactions of a modifying instrument with earlier treaties can be specifically tailored. Several design options simplify negotiations and introduce flexibility to allow tailored outcomes:

- **Parties can choose for each treaty which provisions they want to address, and which modifications they wish to make.** The treaty can provide for certain changes to be applicable by default, while allowing parties to opt out from these changes. The treaty can also provide for modifications that parties can choose to apply on an opt-in basis.¹²
- **Parties can choose for each treaty or each provision the type of modification they wish to make.** They can add to, replace, or complement existing treaty provisions.¹³
- **Parties can choose for each provision which new text they want to apply.** Modifications can be proposed based on alternative formulations set out in the modifying treaty. Options can be alternative or apply cumulatively. Options can be complemented by individual arrangements where desirable.
- **Parties can determine the outcomes of the modifying instrument.** Depending on preferences of individual parties, modifications of agreements can result from matching choices for individual clauses for individual treaties, as long as both

¹⁰ Some modifying agreements – especially earlier ones – *indirectly* identify the treaties subject to modification, using broad functional definitions. See, e.g., 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 (Article 11(1)) without individually identifying them.

¹¹ The [BEPS Multilateral Instrument](#) for instance requires parties to notify the bilateral tax treaties they wish to modify, “to avoid confusion or uncertainty about the scope of agreements covered”. More recently, the UNICTRAL Secretariat has also proposed a notification-based system in its [draft multilateral instrument](#) to implement the ISDS reforms in the context of its Working Group III.

¹² Opt-out mechanisms allow parties to reserve some or all of their covered agreements from the proposed modifications; whereas opt-in modifications only operate if parties choose to specifically apply these modifications to some or all their covered agreements. [The draft multilateral instrument on ISDS reform](#) tabled by the UNCITRAL Secretariat in July 2024 relies on *optional* protocols that contracting parties may opt in individually to bring about the reforms negotiated in the context of the Working Group III.

¹³ See, e.g., the [Agreement on extradition between the European Union \(EU\) and the United States of America \(2003\)](#), Article 3(1) which specifies how each of the Agreement’s provisions relate to the provisions in existing bilateral extradition treaties concluded by the United States with EU Member States.

parties to an individual treaty agree. Asymmetric outcomes could also be envisaged where modification preferences do not match.¹⁴

¹⁴ Such scenario is envisaged for instance in the [BEPS MLI](#), Article 5(1), in case the contracting parties to a covered agreement choose different alternative provisions (options) proposed by the article: “Where each Contracting Jurisdiction to a Covered Tax Agreement chooses a different Option (or where one Contracting Jurisdiction chooses to apply an Option and the other chooses to apply none of the Options), *the Option chosen by each Contracting Jurisdiction shall apply with respect to its own residents*”. In investment treaties, asymmetric provisions are generally rare, except with regard to investor definitions and market access obligations, where asymmetric designs are frequently observed.

2. Illustration of design options for a modifying agreement on FET

9. Drawing on the elements set out in sections 1.2 and 1.3, this part illustrates design options for a plurilateral modifying instrument on FET. Drawing on earlier discussions among Track 2 participants, it illustrates examples of possible treaty text. It shows how:

- Parties can identify the investment treaties that they wish to address through the instrument (section 2.1);
- Parties can clarify the obligations under FET by choosing to *replace* existing FET provisions of individual treaties *either* by a minimum standard of treatment' under customary international law approach (MST-CIL approach) *or* a closed-list approach (section 2.2); and
- Parties can choose to *complement* individual FET provisions in individual treaties by *opting-in* additional clarifications (section 2.3).

10. The modifications proposed in the following sections are designed to be structurally independent from each other and to accommodate the diversity of modification preferences. They offer illustrations of what modifications are possible for FET under a treaty modifying instrument and show how such an instrument could work in practice. Proposed language is illustrative and subject to further discussions. Considerations could in particular concern: which FET modifications an instrument could offer to interested jurisdictions; which effects such modifications could have on other substantive provisions of investment treaties (such as 'full protection and security'); how to ensure effectiveness of modifications; and similar issues.

2.1. Illustration of the notification of agreements covered by the modifying treaty

11. Parties are free to determine the formal scope of modifications. They can *notify any treaty that contains investment-related provisions they wish to be covered by the instrument*. This can include bilateral or plurilateral investment treaties and bilateral or plurilateral preferential trade agreements containing investment-related chapters. As long as the modification is not prohibited by the treaty in question, bilateral and multilateral treaties can be modified provided all parties whose rights and obligations are affected by the modification agree to it.

Article [...] Definitions

For the purpose of this Convention, the term "Covered Investment Treaty" means:

- i) any treaty, bilateral or multilateral, concluded between two or more Parties which contains provisions on the protection of investments or investors; and*
- ii) with respect to which each such Party has made a notification to the Depositary listing the agreement (as well as any amending or accompanying instruments thereto) as an agreement which it wishes to be covered by this Convention.*

Sample notification of agreements covered by the instrument

Pursuant to Article [...] of the Convention, [Contracting Party A] wishes the following agreements to be covered by the Convention:

No	Title	Other Contracting Jurisdiction	Original/related instrument	Signature date/ Entry into force date
1	Agreement between [Contracting Party A] and [Jurisdiction B] on the reciprocal promotion and protection of investments	Jurisdiction B	Original	[DD/MM/YYYY] / [DD/MM/YYYY]
2	Agreement on the promotion and protection of investments between [Contracting Party A] and [Jurisdiction C]	Jurisdiction C	Original	[DD/MM/YYYY] / [DD/MM/YYYY]
			Protocol	[DD/MM/YYYY] / [DD/MM/YYYY]
3	Agreement on the promotion and reciprocal protection of investments between [Contracting Party A] and [Jurisdiction D]	Jurisdiction D	Original	[DD/MM/YYYY] / [DD/MM/YYYY]
...

2.2. Illustration of a replacement: “replacing existing FET provisions with either the MST-CIL or a list-based approach”

12. Most recent treaties associate FET with the MST-CIL approach; others specify the scope of FET using a closed list.¹⁵ Although some jurisdictions have both designs within their treaty cohorts, both designs are used separately in individual treaties. Different designs are observed in older treaties, including references to “principles of international law” or “international law”, open-ended illustrative lists, and unspecified references to FET.

13. The design option below illustrates how parties can choose to *replace* such FET clauses in their existing treaties by either an MST-CIL based approach or a closed list approach. In the design proposed as illustration, parties *choose* for each treaty which option they want to apply *in place of* existing FET provisions (they can also exempt some or all their notified agreements from the proposed modification if they choose to keep the current design). In the example and based on earlier discussions, the illustration presents these options as *mutually exclusive* and that they apply only when all affected parties to a covered agreement choose the same option.

¹⁵ See [“‘Fair’ and ‘equitable’ treatment provisions in investment treaties: A large-sample survey of treaty provisions”](#), Secretariat research note.

Article [...] Fair and equitable treatment

1. For the purposes of this Article, 'fair and equitable treatment' encompasses references to 'fair and equitable' treatment or similar wording in any part or the treaty, as well as references to 'arbitrariness', [...] found in conjunction with these clauses. Parties can specify in a notification which linguistic elements of a given treaty they deem to be part of 'fair and equitable treatment'.
2. A Party shall apply either paragraph 3 (**Option A**) or paragraph 4 (**Option B**) to its Covered Investment Agreements.

Where both Contracting Jurisdictions to a Covered Investment Agreement apply the same Option, the chosen Option applies in place of the fair and equitable treatment provisions of the Covered Investment Agreement.

Option A. Minimum Standard of Treatment

3. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment.

Paragraph 3 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concept of "fair and equitable treatment" does not require treatment in addition to or beyond that which is required by that standard, and does not create additional substantive rights.

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.

Option B. Treatment of investors and of covered investments

4. Each Party shall accord in its territory to covered investments of the other Party and to investors with respect to their covered investments fair and equitable treatment.

A Party breaches the obligation of fair and equitable treatment if a measure or series of measures constitutes:

- a. denial of justice in criminal, civil or administrative proceedings;
- b. fundamental breach of due process, including a fundamental breach of transparency, in judicial and administrative proceedings;
- c. manifest arbitrariness;
- d. targeted discrimination on manifestly wrongful grounds, such as gender, race or religious belief;
- e. abusive treatment of investors, such as coercion, duress and harassment.

Reservation

5. A Party may reserve the right:
- a. for the entirety of this Article not to apply to all of its Covered Investment Agreements;
 - b. for the entirety of this Article not to apply to its Covered Investment Agreements that it has explicitly identified for this purpose.

Sample opt-out notification

1. General reservation

Pursuant to Article [...] paragraph 5(a) of the Convention, [Contracting Party A] reserves the right for Article [...] not to apply to its Covered Investment Agreements.

2. Specific reservation

Pursuant to Article [...] paragraph 5(b) of the Convention, [Contracting Party A] reserves the right for Article [...] not to apply with respect to them:

Listed Agreement No	Other Contracting Jurisdiction
7	Jurisdiction H
14	Jurisdiction O
20	Jurisdiction U

2.3. Illustration of opt-in complements: “clarification of circumstances that do not by themselves constitute a breach of FET”

14. Additional specifications are usually added in recent treaty designs to further specify the scope of obligations of FET. Most of these specifications identify circumstances that do not by themselves constitute a breach of FET.¹⁶ A modifying agreement can offer parties the option to *complement* their covered treaties’ FET provisions with these additional specifications which would only apply if parties expressly opt-in to these provisions. Any additions are independent from whether a party has chosen to modify the contours of FET as illustrated in section 2.2 above.

15. Drawing on examples found in treaty language, the proposed provision below illustrates how parties may *opt-in* to these additional clarifications to *complement* FET provisions within their covered treaties. Two clarifications are proposed below – relating to the ‘illegal’ measures and regulatory changes under the FET standard – that parties may choose to apply *alternatively or cumulatively*. The provision(s) chosen would apply only to the extent that *all affected parties* to a covered agreement *choose* to apply it/them, and

¹⁶ See “Fair and equitable treatment: establishing the breadth of agreement on its contours and contents”, Note by the Secretariat, 16 May 2024, [DAF/INV/TR2/WD\(2024\)6/REV1](#).

their inclusion is *independent* from the other modifications that the instrument may propose.

Article [...] Circumstances that do not by themselves constitute a breach of fair and equitable treatment

1. A Party may choose either to apply one or both of the provision(s) in paragraphs 2 (**Provision A**) and 3 (**Provision B**) to its Covered Investment Agreements or may choose to apply none of the provisions.

Provision A (Illegality of measures)

2. 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.

Provision B (Regulatory changes)

3. A change of the regulation of a Contracting Party does not constitute by itself a breach of fair and equitable treatment.
4. Each Party that chooses to apply paragraph 2 and/or 3 to its Covered Investment Agreements shall notify the Depository of its choice. Such notification shall include the list of its Covered Investment Agreements and the choice of provisions that it wishes to apply it/them to.
5. A paragraph shall be applied to a Covered Investment Agreement only where all Contracting Jurisdictions have chosen to apply that paragraph and have made such a notification with respect to the Covered Investment Agreement.
6. Where all Contracting Jurisdictions to a Covered Investment Agreement choose to apply the same paragraph(s), the chosen paragraph(s) applies (apply) to the provisions of the Covered Investment Agreement.

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