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**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE****Clarifying the scope of MFN clauses with respect to dispute settlement
arrangements: opportunities for a Joint Interpretation****Note by the OECD Secretariat**

This note sets out the breadth of agreement across participants on the exclusion of dispute settlement arrangements from the scope of MFN treatment obligations and the extent to which Track 2 participants could clarify related obligations in their older treaties using a Joint Interpretation reflecting this agreement. Discussions on this note were held on 14 February 2025.

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. Track 2 participants are exploring how interested governments could transition substantive provisions in their existing treaties featuring unclear descriptions to language that they currently use in their recent treaty practice. They have discussed the opportunities and implications of Joint Interpretations¹ and plurilateral treaty modifications² for that purpose.
2. Track 2 participants have noted that a plurilateral Joint Interpretation would require broad agreement on a consistent textual framing of their agreement. They have begun exploring how their agreement on the intent for individual substantive treaty clauses could be expressed textually with a view to a potential Joint Interpretation. The framing of their agreement is deduced from and inspired by the way they express their intentions – more clearly than in older treaties – in current treaty practice.
3. Treaties concluded since the early 2000s explicitly clarify that dispute settlement arrangements in third-party treaties are excluded from the scope of “most-favoured-nation” (MFN) clauses. This exclusion now appears almost systematically in new treaties. Treaty text employs very similar language to express this outcome,³ and governments have confirmed their common intention underlying this treaty practice.⁴
4. The present note provides an overview of corresponding language that governments participating in Track 2 use in their current treaty practice to deduct wording that interested jurisdictions may likely agree on and use for a Joint Interpretation to express their intention with respect to the interaction between MFN clauses and dispute settlement arrangements.
5. This note does not concern clarifications of the application and interpretation of MFN clauses to substantive obligations that many governments have introduced in their recent practice. This aspect would be subject to separate note.⁵

¹ “Approaches available under international law to transition from older to more recent designs in investment treaties – “subsequent agreements”: the role of interpretive statement”, note by the OECD Secretariat, 12 March 2024, [DAF/INV/TR2/WD\(2024\)4/REV1](#).

² “Treaty modification: legal framework and opportunities for investment treaties”, note by the OECD Secretariat, 5 November 2024, [DAF/INV/TR2/WD\(2024\)8/REV2](#).

³ See “[The interaction between most-favoured-nation clauses and dispute settlement arrangements in investment treaties](#)”, note by the OECD Secretariat, 30 November 2022.

⁴ [Summary of discussions of the Track 2 meeting of 30 November 2022](#).

⁵ Participants in Track 2 had an initial discussion on this matter on 1 February 2024.

Summary of findings

- New designs of MFN provisions explicitly clarify that dispute settlement arrangements are not covered under the scope of MFN provisions. Linguistic variations of this exclusion are minor and are unlikely to affect outcomes.
- The textual characteristics of these specifications and previous discussions suggest a longstanding understanding among Track 2 participants on the exclusion of dispute settlement arrangements from the scope of MFN treatment obligations, including in treaties that do not contain an explicitly clarification in this regard.
- A Joint Interpretation could likely clarify the intended exclusion of dispute settlement arrangements from MFN treatment obligations in over 97% of Track 2 participants' treaties that feature older MFN designs. The remaining treaties contain an exceptional design that the treaty parties intended for these specific treaties.

Issues for consideration

- Do participants agree that the explicit exclusion of dispute settlement arrangements from the scope of MFN clauses in recent treaties is a mere *confirmation* of a common understanding of MFN treatment obligations, including in earlier treaties that do not contain explicit language on such exclusion?
- Do participants believe that a Joint Interpretation would be a suitable option to clarify the exclusion of dispute settlement arrangements from MFN treatment obligations in their earlier treaties that do not contain express language to that effect?
- Would participants agree that a framing as follows would reflect past and present intentions regarding the application of the MFN clause with respect to dispute settlement arrangements where the treaties do not explicitly and exceptionally provide the opposite?

For greater certainty, and unless a different intention is explicitly provided, the Parties agree that most-favoured-nation treatment does not encompass Investor-State Dispute Settlement procedures or mechanisms.

Note: If delegates are unable to speak to their governments' official views on a potential Joint Interpretation, they are nevertheless invited to comment on their level of agreement on the elements contained in this note.

1. Track 2 participants' recent treaty practice documents agreement on the exclusion of dispute settlement arrangements from the scope of MFN

Track 2 participants have broadly and consistently excluded dispute settlement arrangements from the scope of MFN clauses in their recent treaties

6. The explicit clarification that dispute settlement arrangements provided in third-party treaties are not within the scope of MFN obligations has become a widespread practice across Track 2 participants' treaties. An ever-growing share of treaties concluded since 2004 have displayed such explicit language; and in most recent years, almost every single new treaty has followed this approach.⁶

The exclusion is expressed in different ways, but linguistic and textual variance does not appear to lead to different outcomes

7. Most recent treaties that feature explicit language on the exclusion of dispute settlement from the scope of MFN identify 'investor-State dispute settlement procedures' or 'provisions' related to them as matters excluded from the scope of MFN treatment.⁷ While slight textual variances are observed, participants have confirmed that divergence in language does not lead to different outcomes.⁸

The exclusion appears to reflect a longstanding understanding on the scope of MFN obligations, including in treaties that do not contain an explicit specification

8. Most recent investment treaties frame the exclusion as a *clarification* or as a confirmation of the parties' common *intent*, or of their *agreement*.⁹

9. A number of Track 2 participants explained in a previous meeting that the exclusion of dispute settlement arrangements from the scope of MFN was a longstanding understanding, even in the absence of textual specifications in the treaties to that effect;¹⁰ and that the few treaties explicitly *including* dispute settlement arrangements within the scope of their MFN clauses and concluded over the 1990s constituted a now discontinued idiosyncratic design.

⁶ See "[The interaction between most-favoured-nation clauses and dispute settlement arrangements in investment treaties](#)", note by the OECD Secretariat, 30 November 2022, Figure 2.

⁷ See "[The interaction between most-favoured-nation clauses and dispute settlement arrangements in investment treaties](#)", note by the OECD Secretariat, 30 November 2022, section 3. For specific examples see, e.g., [Australia-China FTA \(2015\)](#), [Australia-Korea FTA \(2014\)](#). Similar wording appears in the following agreements: [Japan-United Kingdom CEPA \(2020\)](#); [EU-Japan Economic Partnership Agreement \(2019\)](#). [Mexico-Türkiye BIT \(2013\)](#); [Türkiye-Bangladesh BIT \(2012\)](#). [Argentina-Qatar BIT \(2016\)](#).

⁸ [Summary of Discussions of the Future of Investment Treaties Track 2 meeting of 30 November 2022](#), paragraph 29.

⁹ Clarifying language includes expressions and terms such as "*For greater clarity...*"; while treaties that confirm the intent of the Parties use language such as "*The Parties agree that...*".

¹⁰ [Summary of Discussions of the Future of Investment Treaties Track 2 meeting of 30 November 2022](#), paragraph 21.

2. In over 97% of Track 2 participants' earlier treaties, a Joint Interpretation could likely clarify the exclusion of dispute settlement provisions from the scope of MFN clauses

10. Despite occasional amendments and replacements of older treaties and the conclusion of new treaties with current designs, treaties featuring unspecified MFN clauses are predominant in the collective treaty population.¹¹ This will likely continue unless governments adopt a structurally different approach to diffuse clarifications and specifications into their existing treaty sets.

11. Jurisdictions that are interested in transitioning the MFN clauses of their older treaties to modern designs may wish to consider the merits and opportunities of Joint Interpretations or treaty modifications in this endeavour. Treaty interpretations and modifications offer different opportunities that result from applicable rules.¹² Specifically, Joint Interpretations can only achieve a clarification of existing treaty clauses within the ordinary meaning of the text of the clause.

12. This section provides a preliminary quantitative estimate of the share of treaties whose MFN provision could be clarified through Joint Interpretations, that is, where the transition to a clarified description of the scope of obligations remains within the ordinary meaning of the existing clauses. Section 2.1 below presents the methodology and preliminary assumptions of the quantitative estimate; and section 2.2 presents the results of the estimate.

2.1. Methodology and assumptions for the preliminary quantitative estimate of the availability of Joint Interpretations for a clarification of the scope of MFN

13. The preliminary quantitative estimate of the availability of Joint Interpretations to transition MFN clauses in older treaties to incorporate clarifications now near-consistently used in new treaties relies on several assumptions, summarised in Table 1.

14. Old-generation MFN clauses can be broadly categorised in two distinct groups:

- **MFN clauses that do not explicitly specify their scope** and for which a clarification appears to be accessible through a Joint Interpretation – the transition to a clarified framing would remain within the ordinary meaning of the current clauses;

¹¹ As the note by the OECD Secretariat "[The interaction between most-favoured-nation clauses and dispute settlement arrangements in investment treaties](#)" sets out in paragraph 46, even if all agreements concluded as of 31 October 2022 were to come into effect, and if all treaties that are planned or scheduled to be terminated exit the treaty population, and all negotiated treaty replacements come into force, the share of treaties that explicitly exclude dispute settlement from the scope of MFN would still represent less than 20% of the entire treaty population.

¹² Track 2 participants have discussed in previous meetings the legal framework for Joint interpretations (based on Secretariat note [DAF/INV/TR2/WD\(2024\)4/REV1](#)) and for treaty modifying agreements (based on Secretariat note [DAF/INV/TR2/WD\(2024\)8/REV2](#)), and have used the FET clause as a test clause to explore practical options to transition older generation treaties.

- **MFN clauses that explicitly *include* dispute settlement arrangements in their scope**, which constitute an exceptional design used in a few treaties in the overall sample and which would likely require an amendment if the States parties were interested in a change of the design of the MFN clause.

Table 1. Categories of older-style MFN designs and assumptions on the availability for a transition to new designs through a Joint Interpretation

desired end-point ►	MFN treatment obligation <u>excludes</u> dispute settlement arrangements	Number of occurrences in sample <i>(share in total number of treaties featuring old MFN designs)</i>
▼ design present in earlier treaties		
Scope of MFN treatment unspecified	Joint interpretation likely possible	1,808 <i>(97.5%)</i>
Scope of MFN treatment explicitly <i>includes</i> dispute settlement arrangements	Amendment likely required	44 <i>(2.5%)</i>

Note: Absolute numbers of treaties concluded in force or not, excluding treaties that were terminated or replaced. Treaties that do not contain MFN treatment obligations are not considered in this exercise.

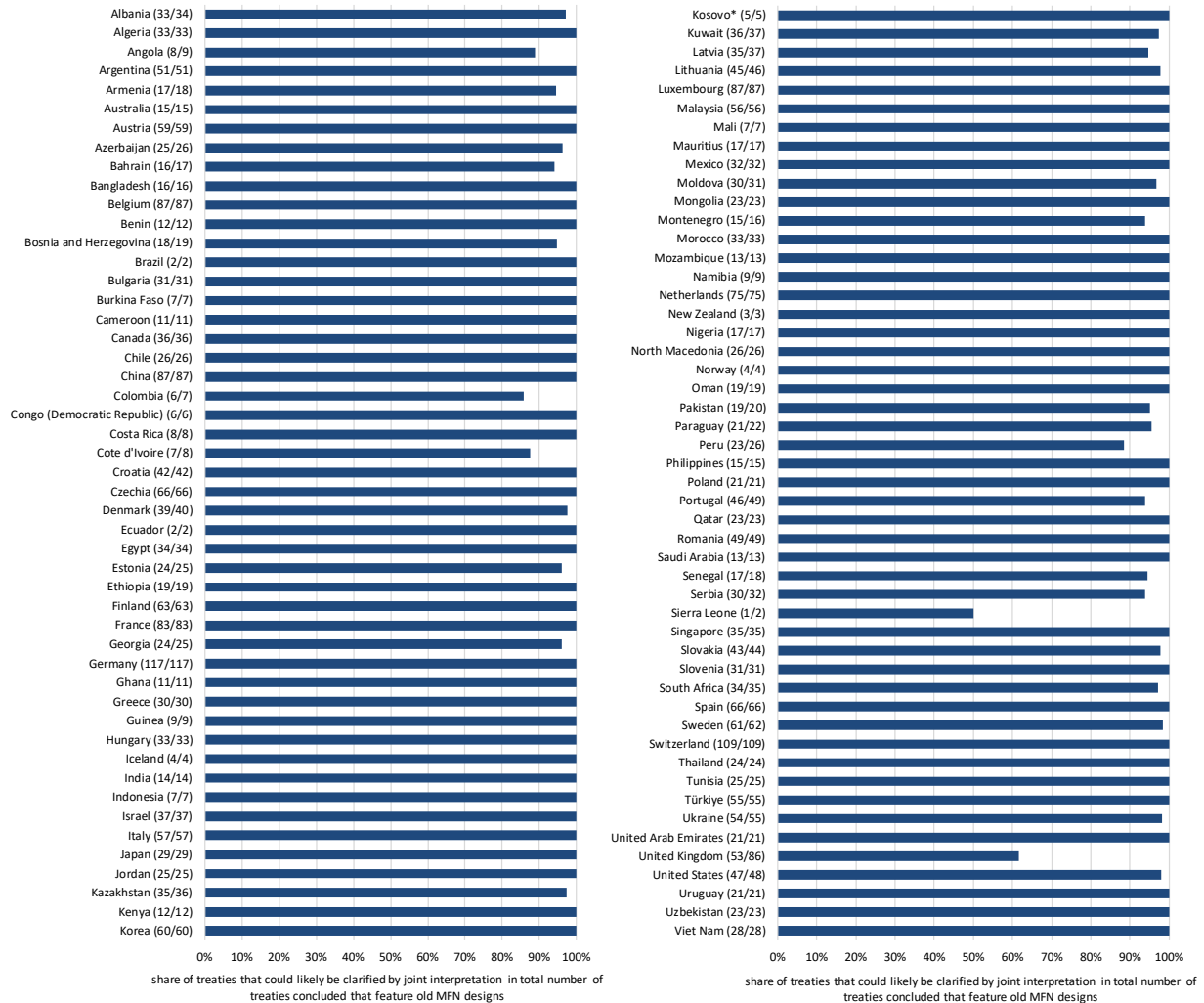
Source: OECD.

2.2. Preliminary findings: a Joint Interpretation could likely clarify MFN obligations in over 97% of Track 2 participants' treaties with older designs

15. In aggregate, a Joint Interpretation can likely clarify MFN treatment obligations with respect to dispute settlement arrangements in over 97% of Track 2 participants' bilateral treaties featuring older designs. Just under 3% of treaties would likely require an amendment or modification if States parties were interested in changing the design of the MFN clause.

16. The share of treaties that can likely be transitioned through a Joint Interpretation under the abovementioned assumptions is different for individual jurisdictions. Nearly all jurisdictions participating in Track 2 can likely transition all or almost all of their old treaties featuring older unspecified MFN designs. Figure 1 shows for each participating jurisdiction the share of treaties featuring older MFN designs that can likely be transitioned through a Joint Interpretation.

Figure 1. Share of treaties that do not specify the scope of MFN treatment obligations with respect to dispute settlement arrangements and that could likely be clarified by Joint Interpretation (aggregates by jurisdiction)



Note: Jurisdictions are listed in alphabetical order. Numbers in brackets next to individual jurisdictions' names refer to the total number of their treaties included in the sample that feature older MFN designs that can likely be clarified by a Joint Interpretation. The second number in brackets indicates how many of their treaties in the sample have old designs of MFN clauses.

* 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.

Source: OECD Investment Treaty database.

Acknowledgements

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