The Future of Investment Treaties (Track 2)

The interaction between most-favoured-nation clauses and dispute settlement arrangements in investment treaties

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The work on the Future of Investment Treaties is hosted by the OECD Investment Committee. Currently, 99 jurisdictions are invited to participate in the work.

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Context and purpose of this note

1. Investment treaties[1] concluded since the late 1950s almost universally include language that affords investors of the nationality of one contracting State "most favoured nation" (MFN) treatment, that is, treatment that is no less favourable than that accorded by a host State to other foreign investors from third States. Over 99% of the investment treaties concluded by the 99 jurisdictions[2] that are invited to participate in OECD-hosted work on the *Future of Investment Treaties* contain an MFN clause.[3]

2. As of the 1970s, governments began to provide investor-state dispute settlement (ISDS) mechanisms in their investment treaties.[4] These mechanisms allow investors to bring claims for alleged breaches of treaty obligations directly against host States. MFN clauses did not initially specify whether and to what extent their scope covered these dispute settlement arrangements, and thus whether investors could benefit, via a given MFN clause, from dispute settlement arrangements contained in an investment treaty that a host country had concluded with a third country.

3. In the context of investment disputes, the absence of specific and explicit language on the interplay between MFN and dispute settlement arrangements has led to uncertainty and hence costs for States and investors alike. Claimants in several investment disputes have argued before tribunals that treaties' MFN provisions allowed for the import of

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1 The terms 'investment treaties', 'international investment agreements' (IIAs) and treaty arrangements are used interchangeably in this note and include bilateral investment treaties (BITs), multilateral and plurilateral investment treaties, as well as investment chapters included in bilateral or plurilateral preferential trade agreements (PTAs) or free trade agreements (FTAs). Treaties of Friendship, Commerce and Navigation are not included in the sample of this survey. Detailed information about the sample composition is available in 3.4.Annex A and 3.4.Annex B.

2 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, 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, Peru, Philippines, Poland, Portugal, Qatar, Romania, Saudi Arabia, Senegal, Serbia, 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.

3 Twelve treaties in the sample of 2,429 treaties do not contain an MFN clause. In this note, all observations including but not limited to designs, approaches and trends in treaty language and conclusions drawn on that basis relate exclusively to data extracted from the surveyed treaty sample. The composition of the sample, the sampling method and other issues related to methodology and terminology are set out in Annex A.

4 See on the emergence and diffusion of ISDS mechanisms Pohl, J., K. Mashigo and A. Nohen (2012), "Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey", *OECD Working Papers on International Investment*, No.2012/02, OECD Publishing, Paris, https://doi.org/10.1787/5k8xb71nf628-en.

dispute settlement arrangements from third-party treaties.[5] Arbitral tribunals have decided such claims differently.

4. Throughout the 1990s, a few jurisdictions concluded treaties that explicitly provided that dispute settlement arrangements were *included* under the scope of the MFN provision. This approach remained marginal and short-lived and has not been observed in treaties concluded after 2011.

5. Some jurisdictions began to include specifications of the scope of MFN clauses through lists that describe to which aspects the MFN treatment applies. This approach is part of wider changes in treaty practice in relation to MFN clauses that started to emerge in 1993. Given that these lists do not explicitly mention dispute settlement arrangements, the approach does not settle the matter of whether dispute settlement arrangements are or not covered by the scope of an MFN clause. Some tribunals have held that dispute settlement arrangements were covered by items in such positive lists such as *"investment activity"*, among others.[6]

6. Starting in 2003, some governments began considering an explicit exclusion of dispute settlement arrangements from MFN clauses in response to an arbitral decision ("*Maffezini*"[7]). Subsequent treaties, beginning in 2004, implement this approach which has since then been adopted more broadly. Since 2004, the share of new treaties that provide for such an explicit exclusion of dispute settlement arrangements from the scope of MFN has grown steadily and has in recent years become an almost systematic feature in new treaties. In a parallel development, a few jurisdictions have stopped to include MFN clauses from some of their investment treaties, which also – albeit indirectly – resolves uncertainty as to the interaction between MFN and dispute settlement arrangements.[8]

7. The purpose of this note is to outline and analyse the evolution of the manner in which investment treaties have dealt with the question of importing dispute settlement arrangements from third-party treaties. It sets out:

- how the 99 jurisdictions that are invited to participate in the OECD-hosted Track 2 work programme on the *Future of Investment Treaties* design the interaction between MFN and dispute settlement arrangements in their treaties and which evolution this design have undergone over time;
- how newer approaches disseminate through the collective treaty population; and
- how these newer approaches are designed.

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5 In this note, references to *basic treaties* and third-party treaties refer respectively to treaties underlying a dispute and which contain an MFN clause, and to treaties entered into between a host State and a third-party State.

6 See below, section 1.

7 See below, paragraphs 16-17.

8 India and Brazil are among the jurisdictions that have not included MFN in some of their recent agreements, but other jurisdictions have also occasionally made this choice. See the EU-Singapore Investment Protection Agreement, India-Singapore FTA (2006) India-South Korea FTA (2009), India Model BIT (2015), First Protocol to amend the ASEAN-Japan CEPA (2019), Brazil-India BIT (2020), Brazil-Mozambique BIT (2015), and the India-Chinese Taipei BIT (2018). Two investment treaties have been found that do not provide for MFN and that precede the period: China-Syria BIT (1996) and Egypt-Uzbekistan BIT (1992). These two treaties do not match a pattern or reflect choices that the treaty parties have made for other treaties concluded at around the same time.

8. The purpose of this note is two-fold. First, to inform considerations among governments of the 99 jurisdictions invited to participate in the Track 2 of the work programme on the *Future of Investment Treaties* whether it would be better if substantive treaty provisions of older treaties were more similar to designs found and now almost systematically applied in newer treaties. Second, to consider which options are being pursued for the specific area of managing the interaction between dispute settlement arrangements and MFN clauses.

9. In order to address these objectives, the note is structured as follows: After a Summary of findings, the note describes in section 1 how earlier, now essentially abandoned designs of MFN clauses construed the interaction between dispute settlement arrangements and MFN. Section 2 retraces the emergence and dissemination of newer approaches that explicitly exclude dispute settlement arrangements from the scope of MFN or refrain from providing MFN from the treaty entirely. Section 3 describes in detail how the explicit exclusion of dispute settlement arrangements from the scope of MFN provisions is framed in treaty language. Annex A contains information about the survey sample and methodology applied for the study. Annex B contains a full list of treaties and related documents that were reviewed.

Summary of findings

10. This note summarises the findings resulting from a survey of treaty language in 2,429 investment treaties and related arrangements concluded or agreed upon between 1959 and 2022 by the 99 jurisdictions invited to participate in the Track 2 Project on the *Future of Investment Treaties*. The analysis focuses on how these agreements design the 'most-favoured treatment' (MFN) clauses with respect to its application to dispute settlement arrangements; the analysis does not dwell on the design of MFN clauses generally.

11. The analysis yields several observations that can be organised as follows.

Trends and approaches to specifying the scope of MFN with respect to dispute settlement arrangements

- Investment treaties concluded between 1959 and 2022 reflect different approaches to extending the scope of application of MFN clauses to dispute settlement arrangements. These choices are associated with distinct periods in time.
- MFN clauses in the large majority of treaties and all sample treaties concluded until the early 1990s are silent as to whether dispute settlement arrangements fall within the scope of MFN. Around 2000 treaties that have been assessed for this study feature this unspecified design.
- A small number of treaties, concluded between 1990 and 2011, explicitly state that dispute settlement arrangements are *included* in the scope of MFN clauses. This approach was short-lived and in the minority; it was all but abandoned over a decade ago. A few dozen treaties that feature this design are still in force today.
- An ever-growing share of treaties concluded since 2004 contain MFN clauses that display explicit language that *excludes* dispute settlement arrangements from the scope of these treaties' MFN clauses. This approach has spread quickly and is now adopted by a significant number of jurisdictions for their new treaties. Many jurisdictions have been applying the approach systematically for several years. In most recent years, almost every single new treaty has followed this approach.
- A smaller number of treaties concluded since 2002 do not feature MFN clauses at all, thereby indirectly resolving the issue of whether dispute settlement arrangements available in third-party treaties can be imported into the treaty relationship.[9]
- The approaches to exclude dispute settlement arrangements from the scope of MFN or to not include an MFN clause in a treaty has spread mainly through new treaties concluded in relationships that were not hitherto covered by bilateral investment rules at all or, to a lesser extent, in the context of wholesale replacements of older treaties. Plurilateral arrangements also play a very significant role for the spread of the feature. These are responsible for almost 70% of the treaty relationships in which the dispute settlement arrangements are explicitly excluded from the scope of MFN.

[9] The exclusion of certain types of dispute settlement arrangements, and specifically ISDS, from *all* treaties of a given jurisdiction could also be conceived to solve the matter, as no such procedures could be imported from any other treaty. The scope of dispute settlement arrangements that are excluded in many treaties goes beyond ISDS, however (see section 3.1 for more details).

Designs of explicit exclusion of dispute settlement arrangements from the scope of MFN clauses

- The explicit exclusion of dispute settlement arrangements from the scope of MFN is achieved through a single, structurally homogeneous approach. This language is composed of three elements:
  - The identification of the type of dispute settlement arrangements or types of treaties in which such mechanisms can be found that are targeted by this exclusion (*"investment agreements"*, *"dispute settlement procedures"*).
  - A characterisation of the textual nature of the exclusion (e.g., *"for greater clarity"*); and
  - A notion of *exclusion* of dispute settlement arrangements from the scope of MFN (*"shall not be construed"*, *"shall not apply"*).
- The exact language used to frame the exclusion varies in detail. These small linguistic differences lead to many variants to express the exclusion in treaties in the sample. Given that these differences in wording are small, they are unlikely to result in major differences in outcomes.
- Additional linguistic components that are included in recent treaties specify the scope, application, and interpretation of the MFN provision but do not appear to be geared towards specifying the interaction between MFN and dispute settlement arrangements.

1. Early treaty designs: ambiguity and uncertainty about the interaction between MFN and dispute settlement arrangements

12. Over 99% of the investment treaties concluded by the 99 jurisdictions invited to participate in the Track 2 of the work on the *Future of Investment Treaties* since 1959 grant "most favoured nation" treatment.[10] Around 95% of these provide for investor-state dispute settlement arrangements.[11]

13. A large bulk of the treaties in this broad sample of 2,429 treaties and related documents were concluded several decades ago. Characteristically, these do not contain any specifications as to the interaction between MFN and dispute settlement arrangements; more specifically, they do not clarify whether or not the scope of their MFN clauses cover such arrangements. Treaty language pertaining to MFN in the majority of IIAs is generally limited to stipulating that the parties' obligation to accord covered investors *"treatment"* not less favourable than that accorded to investors from third States. Treaty text in earlier treaty cohorts rarely, if ever, define or circumscribe the term *"treatment"*. When they do, open-ended or closed lists that define or specify to which aspects of investment the MFN *"treatment"* is to be applied do not explicitly refer to dispute settlement arrangements.[12] They hence contribute little to clarifying whether dispute settlement arrangements are included in the scope of such MFN clauses.

14. The absence of clarifications creates uncertainty and unpredictability about the legal obligations of treaty parties. It potentially levels differentiated arrangements for dispute settlement arrangements[13] and may run counter the nascent trend to not include investor-state dispute settlement provisions in investment treaties at all. Indeed, vague

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[10] Generally, the MFN clause is found in provisions titled "Most-Favoured-Nation Provisions", "Most-Favoured-Nation Clause", "Most-Favoured-Nation Treatment", "Most-Favoured-Nation Treatment with respect to the Promotion and Protection of Investments" (e.g., the New Zealand-Thailand CEPA (2005)),"Treatment of Investment", "Treatment", "National and Most-Favoured-Nation Treatment", "Non-Discriminatory Treatment" (e.g., the Australia-Hong Kong (China) BIT (2019) and Canada-Hong Kong (China) BIT (2016), which both refer to "Non-Discriminatory Treatment as Compared with a Non-Party's Investors"), or "Protection and Treatment". Some recent treaties (and some recent model treaties) do not include an MFN clause at all (e.g., the EU-Singapore Investment Protection Agreement, India-Singapore FTA (2006) India-South Korea FTA (2009), India Model BIT (2015), First Protocol to amend the ASEAN-Japan CEPA (2019), Brazil-India CIFA (2020), Brazil-Mozambique CIFA (2015), and the India-Chinese Taipei BIT (2018)).

[11] The most recent number that the OECD Secretariat has published in this regard – which stood at 96% of treaties that did feature investor-State dispute settlement provisions in the overall sample treaty population – are in Pohl, J., K. Mashigo and A. Nohen (2012), "*Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*", OECD Working Papers on International Investment, 2012/02, OECD Publishing, http://dx.doi.org/10.1787/5k8xb71nf628-en. This number refers to a smaller set of only 54 jurisdictions, fewer treaties (1,660) than were considered for the present study, and exclusively treaties concluded up to end-2011. The analysis underlying the study published in 2012 study has been continued, and the number presented here is a close estimate based on the extended sample.

[12] See, section 3.4 below.

[13] On the differences in dispute settlement arrangements in treaties see Pohl, J., K. Mashigo and A. Nohen (2012), "*Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*", OECD Working Papers on International Investment, 2012/02, OECD Publishing, http://dx.doi.org/10.1787/5k8xb71nf628-en.

MFN clauses may effectively be construed as providing access to such dispute settlement arrangements in instances where treaty parties had not intended to make them available.

15. The absence of explicit language as to this interaction has contributed to different interpretations and different arbitral decisions. Claimants have frequently in the context of investor-state arbitration disputes relied on silent MFN clauses – i.e., which do not explicitly circumscribe the relationship between MFN and dispute settlement arrangements – to argue that such arrangements fell within the scope of MFN. Claimants have also highlighted the broadness and/or the absence of a definition of the term *"treatment"* to claim that dispute settlement arrangements fell within the scope of MFN *"treatment"*.[14] Similarly, references to *"all matters subject to this agreement"* – as the scope of some treaties' MFN clauses are framed – have also been relied on to argue that an MFN clause also encompasses dispute settlement arrangements.[15] Further, claimants have relied on MFN clauses that contain positive lists specifying the notion of MFN *"treatment"* (without nevertheless explicitly circumscribing its scope with respect to dispute settlement arrangements) to argue that one or several items in such lists and/or references to *"activities related to the investments"* encompassed dispute settlement arrangements.[16]

16. The first published investment treaty-based arbitral award that permitted the incorporation of a provision from a separate, third-party treaty based on an MFN provision in a basic treaty is *Maffezini*. In this award, the tribunal held that the dispute settlement arrangements in a third-party treaty, which the foreign investor claimed where more favourable, could be imported into the base treaty for the benefit of the investor, namely

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[14] By way of example, claimants have sought the following in investor-state arbitrations (which together can be referred to as "importation" of procedural provisions through the *basic* treaty): circumventing conditions and pre-conditions to arbitration (including the obligation for the investor to exhaust domestic remedies; to hold-off from initiating arbitral proceedings during a specified "cooling-off" period; and to seek an amicable, negotiated solution to the dispute); circumventing provisions requiring investors to choose between domestic remedies and international arbitration (*fork-in-the-road*) provisions; obtaining access to ISDS for contractual claims in instances where the basic treaty does not include this possibility; obtaining access to dispute settlement for certain alleged treaty breaches that were not covered by the consent [to a particular dispute settlement mechanism] provided in the basic treaty; obtaining access to a specific forum and/or dispute settlement rule-set for which the basic treaty did not provide consent; and importing consent to ISDS into a basic treaty that did not provide for any such consent or offer to arbitrate. Arbitral tribunals have taken different positions in such cases. See e.g., *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004, in which the tribunal found that access to dispute settlement mechanisms was part of the "*treatment"* of investors and was an advantage accessible through the MFN clause; *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award, 21 June 2011, where the tribunal considered that the term *"treatment"* was wide enough to also apply to procedural matters such as dispute settlement.

[15] See e.g., *Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentina*, ICSID Case No. ARB/03/19, Decision on Jurisdiction, 3 August 2006, where the tribunal observed that dispute settlement arrangements fell within the scope of *"matters"* covered by the MFN treatment in question and absent any explicit exclusion to that effect, should be covered by the MFN provision. See also *Telefónica S.A. v. Argentina*, ICSID Case No. ARB/03/20, Decision of the Tribunal on Objections to Jurisdiction, 25 May 2006 and *Impregilo S.p.A. v. Argentina*, ICSID Case No. ARB/07/17, Award, 21 June 2011.

[16] See e.g., *Siemens A.G. v. The Argentine Republic*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004. For background, the MFN provision in the Argentina-Germany BIT (1991) refers to *"activities related to the investments"*, and the Protocol to the BIT defines activities as *"in particular, but not exclusively, the management, use, and enjoyment of an investment"*.

by foregoing the basic treaty's local court requirement, in the absence of any explicit wording that expressly allowed for this importation.[17]

17. Other tribunals, while not disagreeing with the interpretation of the tribunal in *Maffezini*, held differently on the basis of language and the basic treaty's MFN provision, e.g., considering that a clause was not wide enough to encompass dispute settlement arrangements.[18] Others yet rejected the possibility of importing dispute settlement arrangements absent explicit language to that effect, including by reference to the language of the basic treaty's MFN provision as well as the MFN provisions in the parties' subsequently concluded investment agreements.[19]

18. The characteristic vagueness of MFN clauses in earlier treaties with respect to dispute settlement arrangements remains a live matter. Investors continue to bring claims against host States that seek to rely on dispute settlement arrangements of third-party treaties based on their basic treaty's MFN provisions absent explicit language to that effect, and some of these succeed before arbitral tribunals.[20]

19. Separately, among this bulk of earlier treaties, a small and separate subset of 47 BITs – around 2% of the overall sample analysed for this study – displays treaty language that explicitly *includes* dispute settlement arrangements within the scope of MFN. The first treaty exhibiting such language was concluded in 1990.[21] Most other treaties containing this feature were concluded shortly after the emergence of this approach, predominantly between 1993 and 1995; and only eleven treaties with this feature were concluded post-2000. The model was shaped by the United Kingdom's treaty practice, and predominantly so in the 1990s. Out of the 47 treaties that include such language, 33 were concluded by the United Kingdom.[22] No treaty featuring this choice was concluded after 2011.

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[17] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision of the Tribunal on Objections to Jurisdiction, 25 January 2000. The Tribunal in *Maffezini* nevertheless noted *"important limits"* to such an extension of MFN provision, in respect of *"public policy considerations"*, paras. 62-63.

[18] *Salini Costruttori S.p.A. and Italstrade S.p.A. v. The Hashemite Kingdom of Jordan, ICSID Case No. ARB/02/13*, Decision on Jurisdiction, 9 November 2004.

[19] See e.g., *Plama Consortium Limited v. Republic of Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

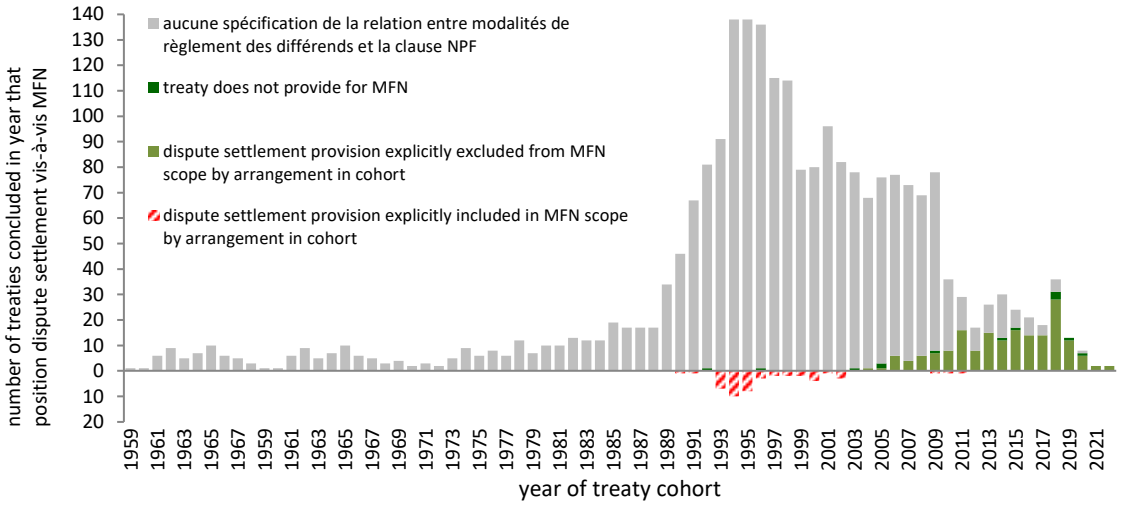
[20] See e.g., *Teinver S.A., Transportes de Cercanías S.A. and Autobuses Urbanos del Sur S.A. v. Argentine Republic*, ICSID Case No. ARB/09/1, Decision on Jurisdiction, 21 December 2021, where the tribunal accepted the claimant's claim to rely on the basic treaty's MFN clause (Argentina-Spain (1991)) to use the dispute resolution provision in a third-party treaty, absent explicit wording to that effect and based on the broad language of the basic treaty's MFN provision (*"all matters"*). See also, *UP and C.D Holding Internationale (formerly Le Cheque Dejeuner) v. Hungary*, ICSID Case No. ARB/13/35, Decision on Preliminary Issues of Jurisdiction, 3 March 2016, where the tribunal found that reference to *"activities"* and *"treatment"* in the basic treaty's MFN clause (France-Hungary BIT (1986)) encompassed the investor's recourse to dispute settlement. See also, *Hochtief AG v. The Argentine Republic*, ICSID Case No. ARB/07/31, Decision on Jurisdiction, 24 October 2011, where the tribunal held that the references in the basic treaty's MFN clause (Argentina-Germany (1991)) to *"the management, utilization, use and enjoyment of an investment"* and *"activity in connection with investments"* encompassed recourse to dispute settlement.

[21] See for example, the United Kingdom-Burundi BIT (1990).

[22] Other treaty arrangements which contain this feature and that do not include the United Kingdom as a party nevertheless include at least one party that had previously concluded a treaty with the United Kingdom, and which contained this feature. For instance, Cuba has concluded five

20. As of 2003, the approach that governments adopted to specifying the interaction between dispute settlement arrangements and MFN clauses changed quite significantly: MFN provisions that explicitly *excluded* dispute settlement arrangements from the scope of MFN clauses appeared with increasing frequency. These developments are set out in the following sections. The overall time profile that indicates the number of treaties that were concluded between 1959 and 2022 is shown in Figure 1.

Figure 1. Time profile of treaty cohorts and different approaches to specifying the relationship between dispute settlement arrangements and MFN (1959-2022)



Source: OECD Investment Treaty Database.

investment treaties with explicit language including dispute settlement arrangements in the scope of MFN: After having concluded on 30 January 1995 the BIT with the United Kingdom, which contained the feature, Cuba concluded further BITs with this design with South Africa (8 December 1995), Slovakia (1997), Peru (2000) and Paraguay (2000). Three investment treaties in this subset of treaties fall outside of these two categories (i.e., they were neither concluded by the United Kingdom nor by a jurisdiction that had previously concluded a treaty with the United Kingdom containing this feature). These are the Denmark-Kuwait BIT (2001), Portugal-Republic of Congo BIT (2010) and the Portugal-Senegal BIT (2011).

2. Newer treaty designs: exclusion of dispute settlement arrangements from the scope of MFN clauses and non-inclusion of MFN in the scope of treaties

21. Starting in the early 2000s, treaty practice with respect to MFN began to shift. Some treaties no longer included MFN provisions that apply to post-establishment. Where they do, treaty text for MFN provisions began to explicitly exclude dispute settlement arrangements from the provision's scope (section 2.1).

22. The dissemination of this new approach began slowly but has steadily gained ground in newer treaties. The feature is principally introduced into the global treaty population through new treaties rather than amendments to existing treaties. Plurilateral arrangements have played a significant role in the dissemination of the new designs (section 2.2).

23. Despite the near-consistent use of the feature in recent treaty practice, most jurisdictions still have a large number of treaties in place that contain MFN clauses that do not excluded dispute settlement arrangements from their scope. The number and share of these treaties in individual jurisdictions' treaty sets varies on a large spectrum. Collectively, the number and share of these treaties with designs that are no longer used is large. Even once all recently concluded treaties have entered into force and treaties scheduled for termination are no longer in force, the share of older and unspecified treaties that do not explicitly exclude dispute settlement arrangements from the scope of MFN would still stand at around 80% of the overall treaty population (section 2.3).

2.1. Emergence and dissemination of explicit language excluding dispute settlement arrangements from the scope of MFN

24. Starting in 2003, several governments started considering how to address uncertainty as to the scope of MFN with respect to dispute settlement arrangements. Specifically, they began to consider excluding dispute settlement arrangements from the scope of their MFN clauses. These considerations were, as negotiation history reveals, triggered by the contemporaneous *Maffezini* arbitral decision.[23]

25. This effort was initially spearheaded during negotiations of the Third Draft Agreement for the Free Trade Area of the Americas (FTAA) (2003), a draft of an agreement among over thirty parties that was never concluded. A footnote to the draft *Most-Favored-Nation Treatment* article in the third draft of the FTAA Agreement introduced the following language:

"[t]he Parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most favoured nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures […] By contrast, the Most-Favored-Nation Article of this Agreement is expressly limited in its scope […] The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C.2.b. [of the draft] (Dispute settlement between a Party and an Investor of Another Party) of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case."[24]

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[23] *Emilio Agustín Maffezini v. The Kingdom of Spain*, ICSID Case No. ARB/97/7, Decision on Objection to Jurisdiction, 25 January 2000. See for more details paragraph 16, above.

[24] Third Draft of the agreement of the FTAA (2003), 21 November 2003, footnote 13.

26. This language is understood to reflect the shared agreement of the 34 negotiating parties at the time as to the scope of the draft *Most-Favored-Nation Treatment* Article. The footnote to the draft provision also provided that *"[o]ne delegation"* proposed that the footnote be *"included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Article and the Maffezini case."* The footnote was nevertheless omitted in later versions of the text,[25] and negotiations for the FTAA ultimately failed to materialise into a binding agreement.

27. In early 2004, the United States, Costa Rica, El Salvador, Guatemala, Honduras, Nicaragua, and the Dominican Republic – all of which participated in the negotiations of the draft agreement on the FTAA – agreed on a similar understanding in a footnote to the MFN clause of the final Draft CAFTA-DR (2004), which also explicitly referred to the *Maffezini* decision.[26] As with the earlier Third Draft of the agreement of the FTAA (2003), while the footnote appears in the official negotiation history of the Draft CAFTA-DR (2004), it does not in its final text, and its MFN clause does not explicitly circumscribe its scope with respect to dispute settlement arrangements.

28. The first binding formal treaty arrangement to provide an explicit exclusion of dispute settlement arrangements from the scope MFN was concluded in 2004. It appeared in the Exchange of Letters interpreting the Agreement between the Republic of Argentina and the Republic of Panama for the Reciprocal Promotion and Protection of Investments of 10 May 1996 of 15 September 2004 (the "Exchange of Letters (2004) concerning the Argentina-Panama BIT (1996)").[27]

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[25] Third Draft of the agreement of the FTAA (2003), 21 November 2003, Chapter XVII (Investment), Article 5 (MFN), footnote 13 states: "*Note: One delegation proposes the following footnote to be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Article and the Maffezini case. This footnote would be deleted in the final text of the Agreement: The Parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad most favored nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. See Decision on Jurisdiction §§ 38-64 (January 25, 2000), reprinted in 16 ICSID Rev. – F.I.L.J. 212 (2002). By contrast, the Most-Favored-Nation Article of this Agreement is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C.2.b. (Dispute Settlement between a Party and an Investor of Another Party) of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case.*"

[26] The Draft CAFTA-DR (2004), Article 10.4(2), Footnote 1 states: "*The parties note the recent decision of the arbitral tribunal in Maffezini (Arg.) v. Kingdom of Spain, which found an unusually broad MFN clause in Argentina-Spain agreement to encompass international dispute settlement procedures. See Decision of Jurisdiction §§38-64 (Jan. 25, 2000) By contrast, the MFN of this Agreement is expressly limited in scope to matters 'with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.' The parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section C of this Chapter, and therefore could not reasonably lead to a conclusion similar to that of the Maffezini case*."

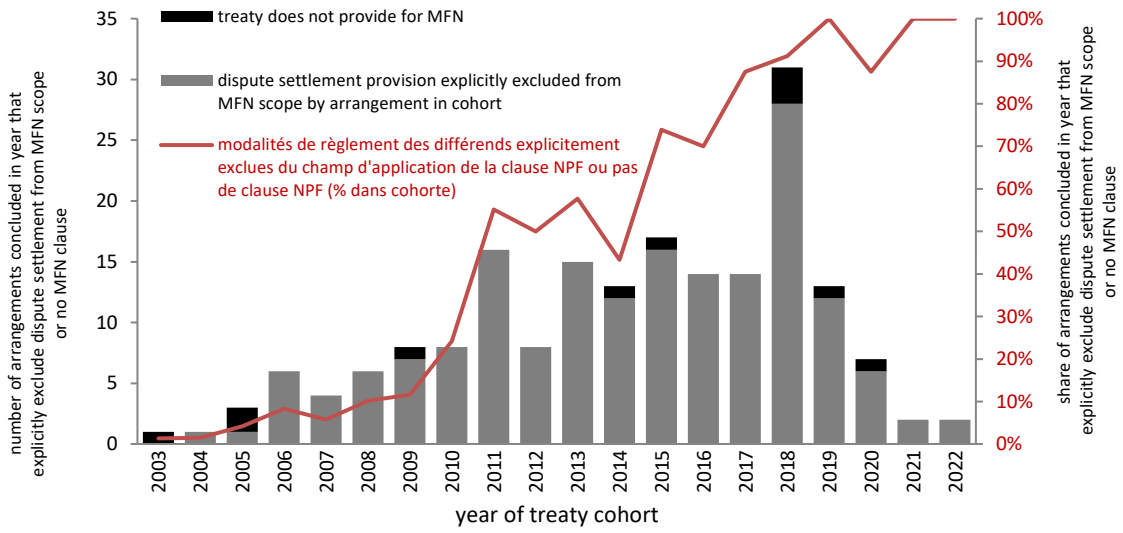
[27] The tribunal in *National Grid v The Argentine Republic* (UNCITRAL, Decision on Jurisdiction, 20 June 2006, para. 85) suggested that the Exchange of Letters (2004) concerning the Argentina-Panama BIT (1996) was prompted by *Siemens A.G. v. Argentina*, ICSID Case No. ARB/02/8, Decision on Jurisdiction, 3 August 2004; nevertheless, the text of the Exchange of Letters (2004) concerning the Argentina-Panama BIT (1996) does not explicitly corroborate this.

29. A year later, in 2005, language explicitly excluding dispute settlement arrangements from the scope of an MFN clause appeared for the first time in treaty text. The New Zealand-Thailand CEPA (2005) is the earliest treaty in the sample to contain such language,[28] followed in 2006 by the Colombia-Switzerland BIT (2006), the Canada-Peru BIT (2006), the Chile-Colombia FTA (2006), the Peru-United States FTA (2006), and the Colombia-United States FTA (2006), which have also employed such language in treaties concluded in 2006.

30. The new treaty practice in this area initially spread slowly but was taken up more widely and more consistently starting in 2011. On 31 October 2022, language explicitly excluding dispute settlement arrangements from MFN was observed in IIAs concluded by 85 of the 99 jurisdictions invited to participate in Track 2 work. Since 2013, more than half of the IIAs in any annual cohort display explicit language that dispute settlement arrangements are not covered by the scope of MFN.

31. Also since 2003, some jurisdictions began to conclude investment treaties that do not feature an MFN provision that applies to post-establishment at all. The first treaty to feature this design was the Australia-Singapore FTA (2003), which was signed on 17 February 2003. This approach also prevents the import of dispute settlement arrangements from third-party treaties. The number of treaties that do not provide for any post-establishment MFN clauses is growing but remains small overall: In the sample, this approach was chosen in 13 treaties, of which four are plurilateral treaties. Given these plurilateral treaties, the approach applies to 77 individual treaty relationships. 39 jurisdictions have concluded at least one agreement that does not provide for post-establishment MFN clauses.

Figure 2. Evolution of the presence of language excluding dispute settlement arrangements from the scope of MFN or the non-inclusion of MFN clauses in IIAs (2003-2022)



[28] See, the New Zealand-Thailand CEPA (2005), which provides at its Article 9.8 that: *"For the purposes of the promotion and protection of investments, with the exception of Article 9.16* [Settlement of Disputes between a Party and an Investor of the other Party]*, each Party shall accord to: (a) investors of the other Party, treatment no less favourable than that it accords, in like circumstances, to investors of any non-Party; and (b) all covered investments treatment no less favourable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party. […]"*.

Note: Data limited to treaties that were accessible to the OECD Secretariat by end-October 2022 and have thus been included in the sample. Includes treaties that replace previous agreements and considers changes that result from arrangements outside the initial treaty document (e.g. later amendments) as if they were a new treaty. Plurilateral treaties are counted once, regardless of the number of bilateral relationships in which they create rights and obligations.
Source: OECD Investment Treaty Database.

32. Individual jurisdictions have adopted the practice to explicitly exclude dispute settlement arrangements from the scope of MFN clauses or the non-inclusion of MFN at different times. Figure 3 shows when individual jurisdictions adopted either of these practices for the first time and when either practice became consistent, i.e., it was used in all subsequent agreements.

33. Model BITs that some jurisdictions have developed in recent years typically contain language that either explicitly excludes dispute settlement arrangements from the scope of MFN[29] or does not include an MFN clause in the treaty.[30] Similarly, the European Union has declared in 2015 in the context of the (later abandoned) TTIP negotiations that one of its objectives was to clarify that the MFN clause does not allow procedural or substantive provisions to be imported from other agreements.[31]

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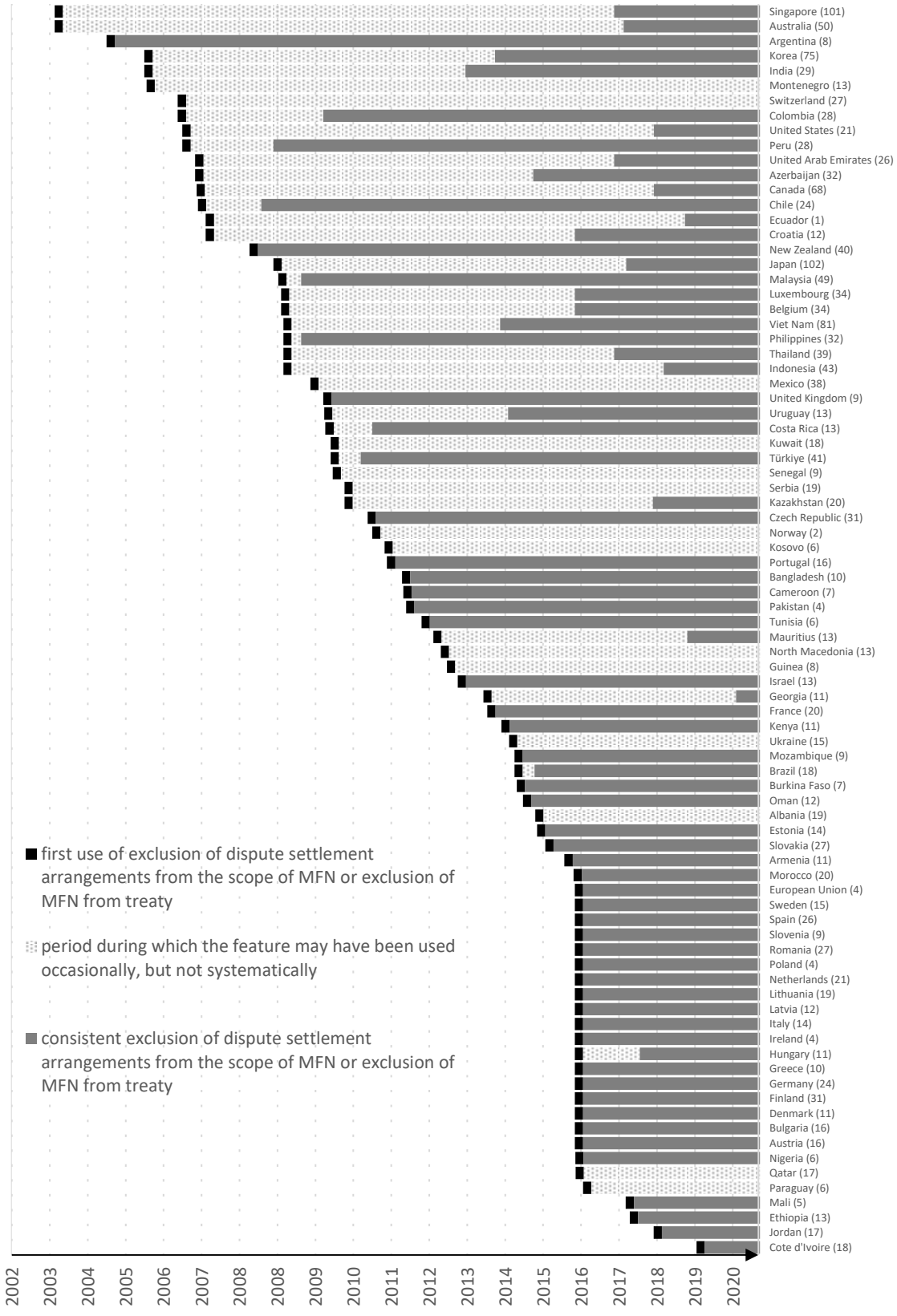
29 See for example, the Canada Model FIPA (2021), which excludes from the scope of MFN *"procedures for the resolution of investment disputes between investors and States provided for in other international investment treaties and other trade agreements"*. The Netherlands Model BIT (2019) contains similar language.

30 See e.g., the India Model BIT (2015).

31 European Commission, Commission Staff Working Document, *Report – Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP)*, Brussels, 13.1.2015 SWD(2015)3 final, p.47.

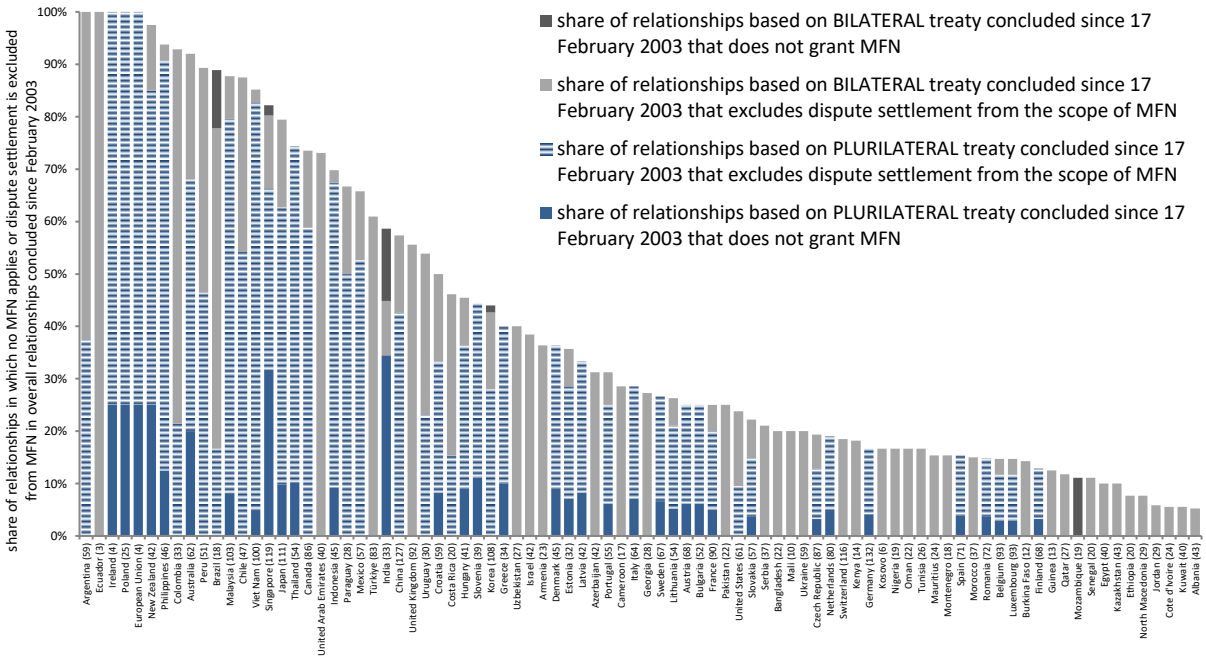
Figure 3. First adoption and consistent use of exclusion of dispute settlement arrangements from the scope of MFN or non-inclusion of MFN in treaties



Note: Figure only shows jurisdictions that have either explicitly excluded dispute settlement arrangements from the scope of MFN or have not included MFN in at least one treaty arrangement concluded since 17 February 2003. The number in brackets next to a given jurisdiction's name indicates with how many jurisdictions treaty arrangements have been concluded since 17 February 2003 within the sample. Treaty amendments or separate interpretative agreements are considered for the analysis as if they were a later treaty.
Source: OECD Investment Treaty Database.

34. Figure 4, shows to what extent the features of the approach are present in treaty arrangements – bilateral or plurilateral – that have been concluded or amended since 2002, the year at which the non-inclusion of an MFN clause was first observed, and until end of October 2022. Figure 4 also documents the significant role that plurilateral treaty arrangements have had in the dissemination of the feature in the treaty sample (see for more detail section 2.2.2). Language that excludes dispute settlement arrangements from the scope of MFN or the non-inclusion of an MFN provision appears relatively more frequently in plurilateral arrangements and in comprehensive preferential trade agreements than in bilateral or stand-alone investment treaties.

Figure 4. Distribution of approaches to exclusion of dispute settlement arrangements from MFN by way of explicit excluding language or non-inclusion of MFN clauses across the treaty sample (2003-2022)



Note: Sample for this assessment only covers arrangements concluded or amended on or after 17 February 2003, regardless of whether the underlying arrangement is in force. Numbers in brackets next to the names of jurisdictions indicate the number of overall relationships in the sample that were concluded, amended, or otherwise complemented by the jurisdiction through either a bilateral or a plurilateral instrument since 17 February 2003, irrespective of whether or not these arrangements provided for an explicit exclusion of dispute settlement arrangements from the scope of MFN or if they grant MFN.
Source: OECD Investment Treaty Database.

2.2. Parameters of dissemination of the new treaty practice

35. The newer design approach disseminates throughout the global treaty population through different channels. Most frequently, the new practice is introduced into the global treaty population in new treaties covering new relationships that had not hitherto been

covered by a treaty at all or where a wholesale treaty replacement took place (section 2.2.1). Plurilateral treaties also play a major role in the dissemination of the feature (section 2.2.2).

2.2.1. The new treaty practice spreads mainly through treaties in relationships that were not hitherto covered by a treaty or in wholesale replacement of treaties

36. The dissemination of the new treaty practice to explicitly exclude dispute settlement arrangements from the scope of MFN or to not provide for an MFN clause has developed gradually, and different means have played different roles in this process.

37. The conclusion of new treaties in relationships that had not hitherto been covered by an investment treaty is the most important contributor to the spread of the new practice overall. Among the 191 treaties in which dispute settlement arrangements are explicitly excluded from the scope of MFN or in which an MFN clause is not provided, 112 treaties were concluded in bilateral relationships that were not hitherto covered by any investment treaty. In 62 occurrences, the feature was introduced in the context of a wholesale replacement of an existing treaty.[32]

38. Partial interventions on existing treaties – amendments[33] and interpretative side-agreements[34] – have played a relatively minor role in the dissemination of the feature. In the sample, 54 occurrences of such partial interventions are known to have taken place after in or after February 2003; of these, only seven were at least also used to explicitly exclude dispute settlement arrangements from the scope of MFN, four of which were treaty amendments.[35] In one of these, the initial treaty did not provide for MFN, but the

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[32] For the purposes of this note, a treaty replacement is deemed to have occurred when an investment treaty has been concluded in a relationship where an earlier investment treaty had previously existed but ceased to exist before or simultaneously with the entry into force of the replacing treaty. Multiple coverage of a given bilateral relationship by distinct treaties, which are or were contemporaneously in force, is not included in this understanding of a treaty replacement. These occurrences are discussed separately. Some plurilateral treaties, most notably treaties that were recently concluded by the European Union, replace or will replace a number of earlier bilateral treaties. The number expressed here refers to the number of treaties that have been or will be replaced, rather than the number of replacing treaties (which in the case of a multilateral or plurilateral replacement treaty would be one).

[33] For the purposes of this note, a treaty amendment concerns instances where certain elements of an existing treaty are textually replaced in a formal process that leaves some investment content of the original treaty in place. This may include cases in which treaty text is added without subtracting or replacing earlier text. Amendments as understood here are distinguished from other interaction of governments in relation to an existing treaty by the formal process of bringing the change into effect. Examples where an amendment led to the introduction of the feature into an existing treaty include the Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) Investment Protocol (2011) , Australia-Singapore FTA (2003) – Amendment (2016), Canada-Chile FTA (1996) – Amendment (2017), China-Singapore FTA (2008) – Protocol (2018), and the Estonia-Georgia BIT (2009) – Protocol (2015).

[34] For the purposes of this note, an interpretative side agreement of a treaty concerns instances where a treaty text is not altered but *complemented* by additional text that is added *after* the conclusion of the related agreement. Protocols and side agreements that are concluded simultaneously with the main treaty and brought into effect under the same process as the main treaty are, for the purpose of this note, *not* treated as joint interpretations as they do not constitute "reform" but rather "form" the understanding of the treaty parties from the beginning.

[35] See, the Canada-Chile FTA (1996) – Amendment (2017), China-Singapore FTA (2008) – Protocol (2018), Croatia-Ukraine BIT (1997) – Protocol (2016), and the Estonia-Georgia BIT (2009) – Protocol (2015).

amendment introduced an MFN clause which explicitly excluded dispute settlement arrangements from its scope.[36]

39. Three joint interpretations that clarify the exclusion have been observed during the same timeframe, starting with the pioneering Exchange of Letters (2004) to Argentina-Panama BIT (1996).[37]

2.2.2. Plurilateral treaties play a significant role in the dissemination of the new approach

40. Plurilateral treaties play a significant role in the spread of the feature through the treaty population. The 17 plurilateral arrangements in the sample that explicitly exclude dispute settlement arrangements from the scope of MFN (13 treaties)[38] or do not provide MFN (4 agreements)[39] introduce the feature into 392 bilateral relationships – over twice as many as the 174 bilateral relationships in which one of these features is present.

2.3. Despite the frequent use of the feature in new treaties, a large stock of treaties with unspecified MFN clauses remains in place

41. Despite the frequent use of explicit exclusion of dispute settlement arrangements from MFN or non-inclusion of MFN in new treaties, around 2000 investment treaties concluded in earlier periods and that do not explicitly exclude dispute settlement arrangements from the scope of their MFN clauses remain in force.

42. This results from the relatively small number of replacements of treaties that do not specify the relationship between MFN and dispute settlement arrangements. Treaties that are added to the global treaty population in relationships previously not covered by treaties do not reduce the number of existing treaties with older, unspecified designs. Only replacements, amendments, or terminations of existing treaties achieve this outcome, but none of these are very frequent[40] when compared to the large number of treaties with old designs in force.

43. As a result of the large stock of treaties with unspecified designs of the MFN clause with respect to dispute settlement arrangements, the proportion of treaties that do not

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36 See, the Australia-Singapore FTA (2003) – Amendment (2016), Article 5(3).

37 See, the Argentina-Panama BIT (1996) – Exchange of Letters (2004), Colombia-India BIT (2009) – Joint Interpretative Declaration (2018), and the India-Bangladesh BIT (2009) – Joint Interpretive Agreement (2017).

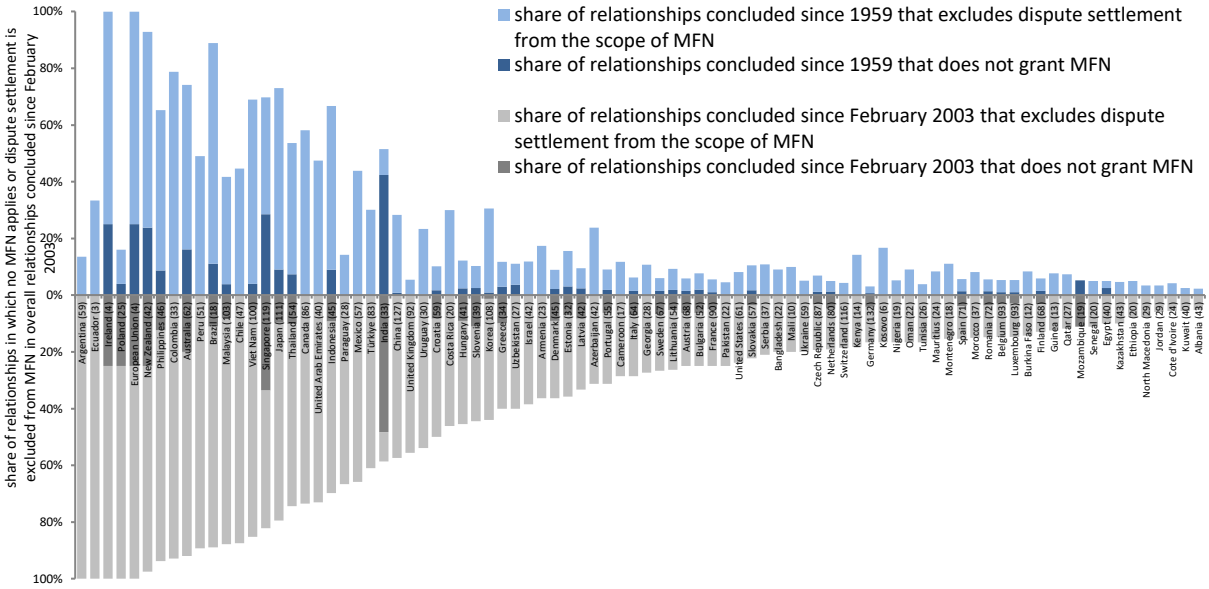
38 These are: EU-Japan Economic Partnership Agreement (2018), Canada-EU Trade Agreement (CETA) (2016), EU-Viet Nam Investment Protection Agreement (2019), Agreement between the USA, Mexico and Canada (USMCA) (2018), Colombia-Northern Triangle FTA (2018), Korea-Central America FTA (2018), Mexico-Central America FTA (2011), Pacific Alliance FTA, MERCOSUR Protocol on Investment Cooperation and Facilitation (2017), ASEAN-China Investment Agreement (2009), China-Japan-Korea trilateral investment agreement (2012), Regional Comprehensive Economic Partnership (2020) (RCEP), and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018).

39 These are the First Protocol to amend the ASEAN-Japan CEPA (2019), Agreement on Investment under the ASEAN-India CECA, and the ASEAN-Australia-New Zealand FTA (AANZFTA) (2009).

40 The termination of intra-EU BITs temporarily increases the number of terminations without replacements, and a few jurisdictions have terminated a sizable number of their treaties in recent years.

explicitly exclude dispute settlement arrangement from the scope of their MFN clauses is typically considerably higher in individual jurisdictions' treaty stocks than in their subsets of recent treaties. Figure 5 documents that even many jurisdictions whose recent treaties predominantly explicitly exclude dispute settlement arrangements from the scope of MFN *or* do not include MFN still have a higher number of treaties that feature old designs in force.

Figure 5. Share of individual countries' treaty relationships that explicitly exclude dispute settlement arrangements from the scope of MFN or that do not include MFN in post-February-2003 treaty sets versus their respective entire treaty population



Note: Column segments shown in grey shades relate to individual jurisdictions' treaty subsets composed of agreements concluded since 17 February 2003, when the policy change to explicitly exclude dispute settlement arrangements from the scope of MFN or the non-inclusion of MFN first emerged in the treaty sample. Treaty amendments or interpretative side agreements that achieve this outcome are treated, for the purpose of the graph, as treaties concluded in this period. Column segments in blue shades indicate the share of treaties with the abovementioned design features in the entire sample of a given jurisdiction's treaties that are either in force or are expected to enter into force in the future. The indicated proportions relate to treaty relationships, not treaties, hence counting participation in plurilateral arrangements as often as these arrangements create bilateral relationships. Numbers in brackets next to names of jurisdictions indicate the number of relationships that are included in the sample for these jurisdictions.
Source: OECD Investment Treaty Database.

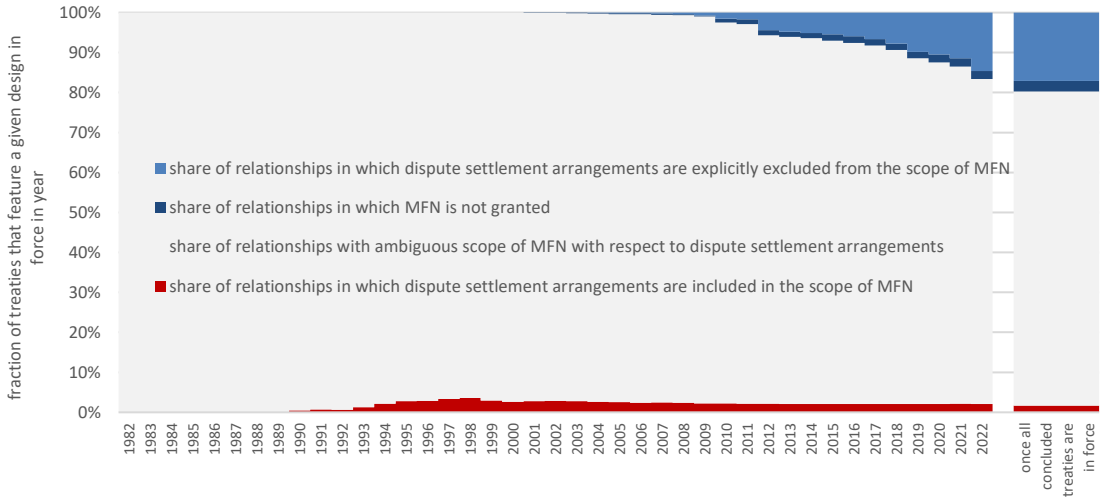
44. The significant discrepancies that characterise treaty stocks of some jurisdictions, shown in Figure 5, result from differences in treaty-making activity at different periods of time and from varying efforts to update, replace or terminate older treaties in recent times. Early adoption – and early consistent adoption – of the new approach is a further factor that explains the different degrees of occurrence of the feature in the treaty sets of individual jurisdictions.

45. Even though the change in approaches to MFN has now become almost systematic in newly concluded treaties concluded by the 99 jurisdictions covered by this study, the feature remains relatively rare in the overall stock of treaties concluded since 1959 and still in force or expected to come into force. Because of this large stock of earlier treaties that do not contain language that explicitly excludes dispute settlement arrangements from

MFN clauses or does not offer MFN clauses, the proportion of treaty relationships with one of these features grows only slowly (Figure 6).

46. Unless jurisdictions adopt a structurally different approach to incorporate the designs that they are now almost consistently using with regard to MFN into the stock of their existing treaties, the outlook in the medium term suggests relative stasis. 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 arrangements from MFN or not offer MFN would still be relatively low, at under 20% of the entire treaty population.

Figure 6. Diffusion of language explicitly excluding dispute settlement arrangements from the scope of MFN or that do not include MFN throughout the overall treaty population (1982 to 2022)



Source: OECD Investment Treaty Database.

3. Design components of treaty language to explicitly exclude dispute settlement arrangements from the scope of application of MFN clauses

47. The explicit exclusion of dispute settlement arrangements from the scope of MFN clauses – the non-inclusion of MFN clauses is not discussed in this section – is achieved through a single approach that is structurally homogeneous. The specific wording used for the clauses varies in detail. This variation is however unlikely to lead to substantially different outcomes. This section describes the components of treaty language to exclude dispute settlement arrangements from the scope of MFN and the linguistic variation that is observed among the treaties.

48. Linguistic variation is observed with respect to three main elements, of which one introduces some actual substantive difference, while the remaining two appear to be merely linguistic variations. Two additional secondary elements define the scope of MFN more generally rather than specifically with respect to the interaction between MFN and dispute settlement arrangements; as it cannot be excluded that they have some bearing on the interaction between MFN and dispute settlement arrangements. These aspects are briefly presented as well.

49. One element brings substantive variation, namely:

- The framing of the types of dispute settlement arrangements that are excluded (section 3.1).

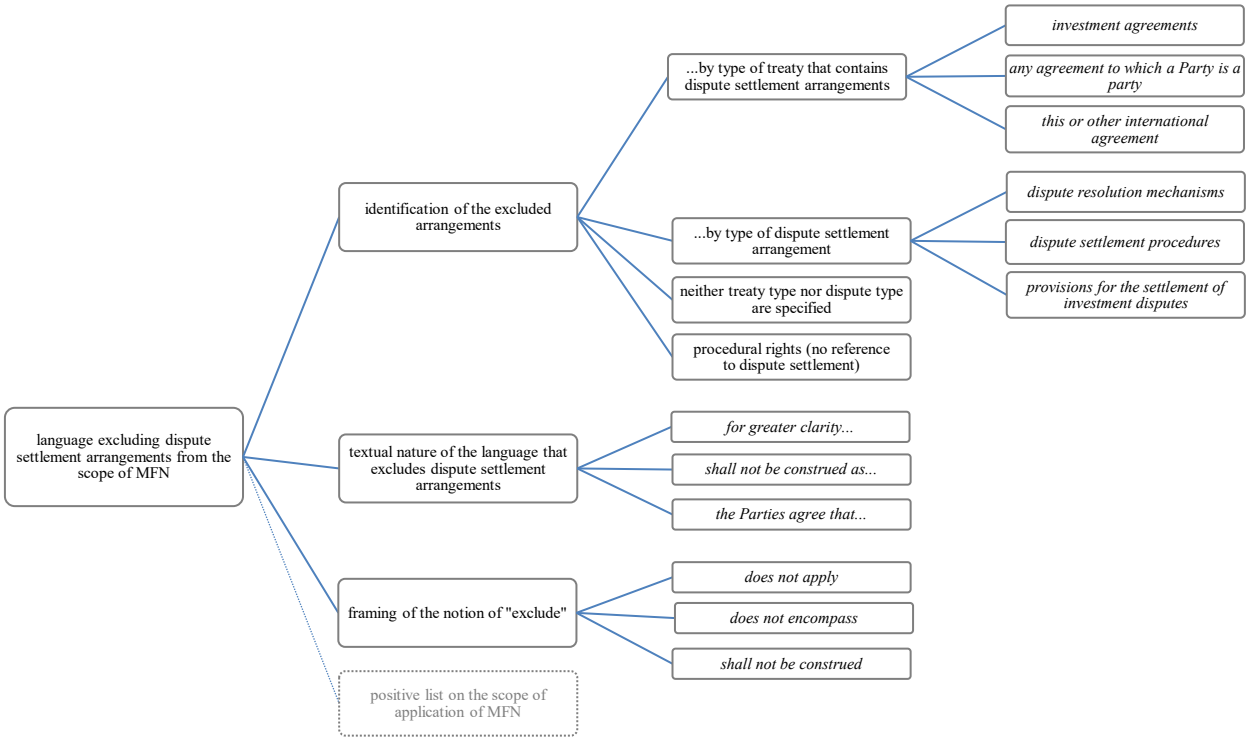
50. Two elements bring linguistic variation and describe:

- A characterisation of the textual nature of the exclusion (section 3.2); and
- The term that articulates or frames the exclusion (section 3.3).

51. Finally, one additional secondary element is found in a number of treaties contain and relate to the general scope of the application of the MFN clause. It does not appear to be designed specifically to clarify the interaction between MFN and dispute settlement arrangements. Many treaties contain an open or closed positive list of aspects that are covered by the MFN treatment obligation. In none of these however are dispute settlement arrangements *explicitly included* in the positive list. In a few treaties, the scoping of the application of the MFN treatment is textually complemented by a *negative* list that mentions dispute settlement arrangements. These positive lists are seemingly not directly linked or designed by reference to dispute settlement arrangements (see section 3.4).

52. A simplified visualisation of the elements that together constitute the explicit exclusion of dispute settlement arrangements from the scope of MFN is set out in Figure 7.

Figure 7. Simplified structure of textual elements that constitute the exclusion of dispute settlement arrangements from the scope of MFN



Note: This simplified structure of textual elements only visualises the main structural elements that are used to compose clauses that explicitly exempt dispute settlement arrangements from the scope of MFN. Textual examples are a subset of the observed linguistic variants and are set in *italics*. Rare designs are not displayed.
Source: OECD Investment Treaty Database.

53. Only very few treaties construct the explicit exclusion of dispute settlement arrangements from MFN differently. The New Zealand-Thailand CEPA (2005), for example, designates the arrangement's disputes settlement provision as an *exception* to the MFN clause. Further, the Canada-Cameroon BIT (2014) specifies that the section that contains the clause on the settlement of disputes between investors and the State is not subject to the application of MFN.

54. The following subsections present the linguistic variants that jurisdictions that participate in the Track 2 process have included in their treaties to explicitly exclude dispute settlement arrangements from the scope of MFN clauses.

3.1. Identification of the excluded dispute settlement arrangements

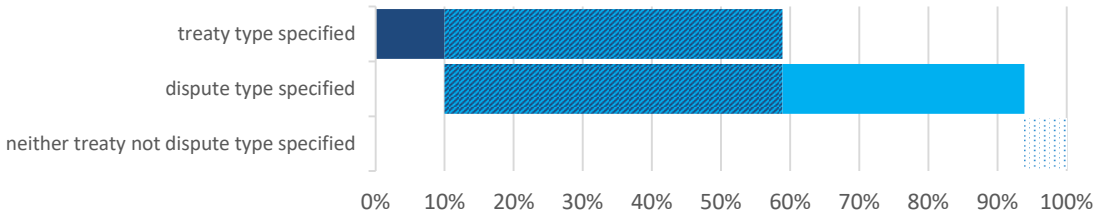
55. The most consequential element in treaty language in the sample which explicitly excludes dispute settlement arrangements from the scope of MFN relate to the *identification* of the excluded dispute settlement arrangements. These dispute settlement arrangements are identified through:

- a reference exclusively to the *type of treaty* whose dispute settlement arrangements are excluded from the scope of MFN;
- a reference exclusively to the *type of dispute settlement arrangement* are excluded from the scope of MFN;

- a combination of both of these elements which excludes dispute settlement arrangements that meet *either* criterion;
- a combination of both of these elements which excludes dispute settlement arrangements that meet *both* criteria;
- a reference only to *"procedural"*, *"jurisdictional"*, or *"judicial matters"* or a combination of these; and
- no specification of neither type of treaty nor type of dispute settlement arrangements but a wholesale exclusion of dispute settlement arrangements.

56. These approaches are used with different frequency as shown in Figure 8: 10% of the treaties refer to the *type of treaty only*, 35% to the *type of dispute settlement arrangement only*, and 49% cumulatively the two. The remaining 6% of the treaties specify neither of the parameters or reference "procedural", "jurisdictional", or "judicial matters" or a combination of these.

Figure 8. Frequency of reference to *treaty* and *dispute* type(s) for the purposes of identifying the excluded dispute settlement content in treaties that explicitly exclude dispute settlement arrangements from the scope of MFN clauses



Source: OECD Investment Treaty Database.

3.1.1. Exclusion of dispute settlement arrangements identified by the type of treaties containing the arrangements

57. More than half of the treaty arrangements in the sample that explicitly exclude dispute settlement arrangements from the scope of MFN clauses – 106 treaties out of the 180 that together cover 354 bilateral relationships – identify the *types of treaties* whose disputes settlement arrangements are excluded from the scope of MFN.

58. There is a broad range of linguistic variance that can be classified by the identification of characteristics of the treaties, by temporal elements associated with these treaties, and by the number of parties to the treaties. These are briefly outlined below, in turn.

59. With regard to the treaty types, three groups of references can be distinguished.

- **Language which specifies – or not – the type of the treaties covered by the exclusion**. Such language appears in one of three ways. First, treaty language may

refer to *"any agreement"*,[41] any *"other agreement to which a Party is a party"*,[42] and some to both *"any"* and *"other"* agreements.[43] Second, language may qualify the types of treaties covered by the exclusion by reference to treaties with respect to their subject matter in absolute terms, such as *"investment agreements"*, *"trade agreements"* and/or *"commercial agreements"*, and/or *"agreements including an investment chapter"*.[44] And third, language may identify the treaties with respect to their subject matter in relative terms in relation to the agreement that contains the MFN clause or similar agreements. Some language refers to provisions concerning dispute settlement procedures *"laid down simultaneously by this agreement and other similar agreement"* or *"in this or other international agreement"*.

- **Pre-existing or later treaties**. These can specify for example that MFN does not apply to dispute settlement provisions found in "*treaties entered in force prior to this agreement*" or "*agreement of which a Party of this Agreement is a party before the entry into force of the Agreement*" or in *"other IIAs"*, *"existing"* or *"future"* agreements or treaties.

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41 See for example, the Argentina-Japan BIT (2018) excludes "international dispute settlement procedures or mechanisms under any international agreement". Similarly, the Japan-Jordan BIT (2018) excludes *"the provisions on dispute settlement contained in any bilateral or multilateral international agreement"*; and the Australia-Hong Kong (China) BIT (2019) excludes *"dispute resolution procedures or mechanisms provided under any bilateral or multilateral agreements or arrangements"*.

42 See for example, the Singapore-Myanmar BIT (2019), ASEAN Comprehensive Investment Agreement (2009).

43 Nine different linguistic variants and combinations are observed in the treaty sample. These are: *"any international agreement"*; *"any bilateral or multilateral agreement or arrangement"*; *"any international agreement or written agreement"*; *"any bilateral or multilateral international agreement"*; *"any other bilateral regional or multilateral agreement"*; *"other international agreement"*; *"other agreement; other international bilateral or multilateral agreement"*; and *"other agreements to which a Party is a party"*.

44 See for example, the Colombia-Northern Triangle FTA (2018), which refers to *"dispute settlement mechanisms under international investment treaties or agreements"*; the USMCA (2018), which refers to *"provisions in other international trade or investment agreements that establish international dispute resolution procedures"*; and the Brazil-Ethiopia CIFA (2018) which refers *"Provisions relating to investment dispute settlement contained in an investment agreement or an investment chapter of a commercial agreement"*.

In all, 13 different linguistic variants and combinations are observed in the treaty sample; these are: *"treaties or international investment agreements"*; *"international treaties or commercial agreements"*; *"investment agreement or an investment chapter of a commercial agreement"*; *"international treaties or trade agreements"*; *"other international investment agreements"*; *"international treaties, including commercial or investment agreements"*; *"other international treaties or commercial agreements"*; *"other international treaties or trade agreements"*; *"other treaties or commercial agreements"*; *"other international commercial or investment agreements"*; *"other international treaties or investment agreements"*; *"other treaties or international investment agreements"*; *"international commercial agreement or investment agreements"*; and *"any other international agreement or trade agreements"*.

- **The nature of the treaties**. Some treaty language can specify for example, that the treaties covered are *"international"* and/or *"bilateral"*,[45] *"bilateral and multilateral"*[46] or *"bilateral, regional and multilateral"*[47] agreements.

3.1.2. Exclusion of dispute settlement arrangements identified by the type of dispute settlement arrangement

60. A significant number of treaties refer identifies the exclusion by reference to the *types of dispute settlement arrangements*. This approach is reflected in 84% of the treaties that feature an exclusion of dispute settlement arrangements from the scope of MFN (151 treaties, covering 471 bilateral relationships, equivalent to 93% of the relationships in which an explicit exclusion of dispute settlement arrangements is observed).

61. While a considerable number of linguistic variants are observed in the treaty sample, language in most treaty arrangements refers to *"dispute resolution mechanisms"*, *"dispute settlement mechanisms"*, *"dispute settlement provisions"*, *"dispute settlement procedures"*, *"mechanisms for [the] settlement of investment disputes"* and *"provisions for the settlement of investment disputes"*. Some treaties do not specify any dispute settlement arrangements.[48]

62. These references can again be categorised along three parameters which are typically combined to define the type of dispute settlement arrangements referenced in the exclusion of the application of MFN:

- ***Parties* to the dispute**. More than two thirds of the treaty arrangements of those treaties that exclude dispute settlement arrangements from the scope of MFN reference the dispute settlement procedures based on the *parties* to the dispute. The overwhelming majority of these treaties – 123 in 125 occurrences of this parameter in the sample – exclude investor-state dispute settlement (ISDS) as a dispute settlement procedure from the scope of MFN.[49] Fourteen treaties exclude State-to-State dispute settlement (SSDS) provided for in third-party treaties from the scope of MFN, in addition to ISDS.[50]

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45 See for example, the India-United Arab Emirates BIT (2013), Mexico-United Arab Emirates BIT (2016), Paraguay-United Arab Emirates BIT (2017) and the Serbia-United Arab Emirates BIT (2013).

46 See for example, the Australia-Hong Kong (China) (BIT) 2019, Japan-Jordan BIT (2018), Japan-Ukraine BIT (2015) and the Japan-United Arab Emirates BIT (2018).

47 See for example, the EU-Viet Nam Investment Protection Agreement (2019).

48 See for example, the Malaysia-Australia FTA (2012), which states that its MFN provision *"does not apply to dispute settlement procedures"*.

49 See for example, the Argentina-Qatar BIT (2016) provides that its MFN Article *"shall not apply in order to invoke the fair and equitable treatment and the dispute settlement provisions accorded to investors of any Third State under treaties signed by one of the Contracting Parties prior to the entry into force of this Treaty"*.

50 See for example, the China-Colombia BIT (2008), which provides that *"The most favourable treatment to be granted in like circumstances referred to in this Agreement does not encompass mechanisms for the settlement of investment disputes, such as those contained in Articles 8 [Settlement of disputes between the Contracting Parties] and 9 [Settlement of Disputes between of this Agreement, which are provided for in treaties or international investment agreements"*.

- ***Nature* or *subject matter of the dispute***. Treaty language in some arrangements refers explicitly to the type of disputes that are excluded from the scope of MFN, and specifically to investment disputes.[51]

- ***Nature of the procedure***. Treaty language in some arrangements specifies the type of dispute settlement procedures that are explicitly excluded from the scope of MFN. The Argentina-Japan BIT (2018), Armenia-Japan BIT (2018), Côte d'Ivoire-Japan BIT (2020) and Morocco-Japan BIT (2020) for example all refer to *"international dispute settlement procedures or mechanisms"*. Other treaties separately refer to *"international dispute settlement procedures"*, to *"international dispute resolution mechanisms"*, or to *"provisions that establish international dispute resolution procedures"*. The parameter is expressed in one of three ways: (1) a reference to an unqualified category of dispute settlement procedures;[52] (2) a direct reference to the type of procedures targeted by the exclusion ("*investor-state dispute settlement*");[53] or (3) a reference the procedures available under the basic treaty (e.g., no procedures *"other than those set out in this Agreement"*).[54]

63. Significant linguistic variation is observed across this subset of treaties: For this parameter in the subset of treaties alone, 33 different expressions are observed.[55]

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[51] Examples include Argentina-Qatar BIT (2016) "dispute settlement provisions accorded to investors", Colombia-Switzerland BIT (2006) "investment dispute resolution mechanisms", *Türkiye-Uzbekistan BIT (2017)* "settlement of disputes between one Contracting Party and investors of the other Contracting Party".

[52] See for example, the Australia-Indonesia CEPA (2019), which states that the MFN treatment *"shall not encompass international dispute resolution procedures or mechanisms, such as those included in Section B (Investor-State Dispute Settlement)"*. In the same vein, the Chile-Hong-Kong (China) BIT (2016) provides that *"For greater certainty, the treatment referred to in this Article does not encompass dispute resolution mechanisms, such as those in Section C (Settlement of Disputes between an Investor and the Host Party)"*.

[53] Canada-Korea FTA (2014).

[54] See for example, the Mexico-Singapore BIT (2009), which specifies that investors cannot claim *"options or procedures for the resolution of disputes other than those indicated in this Agreement"*; and the Australia-Chile FTA (2008) which excludes *"dispute settlement procedures set out in Section B of this Chapter"* from the scope of the MFN provision.

[55] The full list of framings includes: "dispute resolution mechanisms"; "dispute resolution mechanisms and procedures"; "dispute resolution procedures"; "investment dispute resolution mechanisms"; "dispute settlement mechanisms"; "dispute settlement mechanisms or any procedural or legal matters as well as guarantees relating to the contractual obligations of the receiving State"; "dispute settlement mechanisms and procedures"; "dispute settlement provisions"; "dispute settlement provisions accorded to investors"; "dispute settlement procedures"; "dispute settlement mechanisms and procedures"; "International dispute settlement procedures or mechanisms"; "International dispute resolution procedures or mechanisms"; "investor's rights to submit disputes arising under this Agreement to any dispute settlement procedure"; "investor's right to submit dispute arising under this Agreement to any dispute settlement procedure other than that provided by this Agreement"; "investor state dispute settlement procedures and mechanisms"; "investor state dispute settlement mechanisms"; "investor state dispute settlement procedures"; "mechanisms for dispute settlement"; "mechanisms for settlement of investment disputes"; "options or procedures for the resolution of disputes"; "options or procedures for the settlement of disputes"; "provisions on dispute settlement"; "provisions for the resolution of investment disputes"; "provisions in other international trade or investment agreements that establish international dispute resolution

3.1.3. Exclusion of dispute settlement arrangements without specification of neither type of treaty nor type of dispute settlement arrangements

64. Seven bilateral investment treaties and one plurilateral treaty, together covering 12 treaty relationships, provide for a wholesale exclusion of dispute settlement arrangements, without any specification of neither the type of treaty nor the type of dispute settlement arrangements that are targeted by this exclusion.[56] For example, the Australia-Malaysia FTA (2012) provides, in a footnote to its MFN provision: "*For greater certainty, this Article does not apply to dispute settlement procedures*".

3.1.4. Exclusion of other procedural and/or jurisdictional and/or judicial matters

65. Eight treaties take a different approach and do not refer to dispute settlement arrangements but rather specifically to *procedural* and/or *jurisdictional* matters.[57] The *Argentina-United Arab Emirates BIT (2018)* for example provides that *"For greater certainty, the treatment referred to in this Article does not apply to procedural or jurisdictional matters"*. Three treaties in this subset *only* refer to an exclusion of procedural and/or jurisdictional and/or judicial matters; the remaining five combine this exclusion with a reference to the *types of treaties* whose disputes settlement arrangements are excluded from the scope of MFN.[58]

3.2. The textual nature of language that excludes dispute settlement arrangements

66. Over two thirds of the treaties or treaty arrangements (70%) that explicitly exclude dispute settlement arrangements from the scope of MFN frame the exclusion explicitly as a "*clarification*" or as a confirmation of the "*agreement of the parties*" on the scope of MFN – thus reproducing the textual character of the definition of the scope of MFN with respect to dispute settlement arrangements in the earliest clarifications in the Third Draft Agreement on the FTAA and the Exchange of Letters (2004) to Argentina-Panama BIT

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procedures"; "provision for the settlement of investment disputes"; "provision for the resolution of investment disputes"; "questions provided for in article […] concerning the settlement of disputes between an investor and the Contracting Party receiving the investment"; "procedures for the settlement of investment disputes"; "resolution of disputes"; "settlement of disputes between one Contracting Party and investors of the other Contracting Party"; "settlement of investment disputes between an investor and a contracting party"; "investment dispute resolution mechanisms".

56 These are the Australia-Malaysia FTA (2012); Australia-New Zealand Closer Economic Relations Trade Agreement (ANZCERTA) Investment Protocol (2011); Australia-United Kingdom FTA (2021); Portugal-United Arab Emirates BIT (2011); Slovakia-Iran BIT (2016); Albania-United Arab Emirates BIT (2015); Philippines-Chinese Taipei BIT (2017); and MERCOSUR Protocol on Investment Cooperation and Facilitation.

57 This language is observed essentially in treaties concluded by the United Arab Emirates and to a lesser extent by Türkiye. These are: the Argentina-United Arab Emirates BIT (2018), Azerbaijan-United Arab Emirates BIT (2006), and the Kenya-United Arab Emirates BIT (2014).

58 These are Mexico-United Arab Emirates BIT (2016), *Paraguay-United Arab Emirates BIT (2017)*, Türkiye-United Arab Emirates BIT (2005), Türkiye-Senegal BIT (2010), and Serbia-United Arab Emirates BIT (2013).

(1996). The remainder of the treaties uses more direct language such as "*This Article shall not be construed as…*".[59]

67. Clarifying language includes expressions and terms such as *"for greater certainty"*[60] or *"for the purpose of clarification*".[61] Treaties that inform of an understanding of the parties use language such as *"the parties agree that"*, *"the Contracting parties note their agreement"* or "*it is understood that*", among others.

68. Some treaties combine both framings. For example, the Japan-Ukraine BIT (2015) provides that *"for greater certainty, it is understood that the [MFN treatment] does not include treatment accorded to investors of a non-Contracting Party and their investments by provisions concerning the settlement of investment disputes"*. Similarly, the Joint Interpretative Declaration between Colombia and India (2018) provides that *"for greater certainty, the Contracting Parties note their agreement that the MFN obligation does not apply"* to dispute settlement mechanisms. The Israel-Myanmar BIT (2014) notes that *"For the sake of avoiding misunderstanding, it is further clarified that"* the MFN treatment does not apply to mechanisms for dispute settlement. Finally, the Chile-Uruguay BIT (2010) notes that "*For greater certainty, the Parties agree that the Article is not applicable to procedural or jurisdictional matters, such as those included in section B of this agreement*".

69. Again here, broad linguistic variation is observed in the treaty sample. In all, 36 different framings are used to express the notion that the exclusion of dispute settlement arrangements from the scope of MFN constitutes a clarification or reflects a shared understanding of the parties.

3.3. The framing of the exclusion

70. In the majority of instances, language specifying that the MFN article, section, the treatment or other defined term does not *"apply*" to dispute settlement arrangements, does not *"encompass"* dispute settlement arrangements, does not *"include"* dispute settlement arrangements, or cannot be *"construed as an obligation [to grant or to require a party to grant the benefit of any treatment arising from provisions relating to dispute settlement arrangements]"*. Expressions most predominantly observed across the sample are the following: *"shall not apply"*, *"shall not be construed"*, *"does not apply"*, *"does not encompass"* and *"does not include"*.

71. Where treaty language refers specifically to *"this article"* (or *"the provisions of paragraphs… of this Article"*), it predominantly specifies that it either *"shall not apply"* to dispute settlement arrangements or that it *"shall not be construed as an obligation to grant or to require a party to grant the benefit of any treatment arising from provisions relating to dispute settlement"*.

72. Separately, where treaty language refers specifically to "*the treatment referred to in this Article*" or "*Treatment with respect to… [positive list of elements]*" treaty language

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[59] See for example, to date, all but one of Brazil's CIFAs exclude dispute settlement arrangements from the scope of MFN: the Brazil-Chile CIFA (2015), Brazil-Chile FTA (2018), Brazil-Colombia CIFA (2015), Brazil-Ecuador CIFA (2019), Brazil-Ethiopia CIFA (2018), Brazil-Guyana CIFA (2018), Brazil-Mexico CIFA (2015), Brazil-Morocco CIFA (2019) and the Brazil-Suriname CIFA (2018).

[60] See for example, the Canada-Hong Kong (China) BIT (2016); *CETA (2016)*.

[61] See for example, the Colombia-France BIT (2014) (translation from French by the authors).

most frequently specifies that the said treatment "*does not encompass*" or "*does not include*" dispute settlement arrangements. More rarely, treaty language refers to "treatment" that "*shall not apply*" or that "*does not apply*" to dispute settlement arrangements.

73. Over half of the treaties that explicitly exclude dispute settlement arrangements explicitly excluding dispute settlement arrangements from MFN refers specifically to "treatment". The use of this term varies however from one treaty arrangement to another:

- A first subset of treaties displays language where the term *treatment* is used to define one of the different manners in which States are required to behave with investors or investments. Treaty arrangements in this subset may provide the following wording: *"this article shall not be construed to require a Party to grant to an investor of another Party or their investments the benefit of any 'treatment', preference or privilege arising from provisions relating to investment dispute settlement contained in an [investment treaty] […]"*;[62]
- A second subset of treaties employs the term *treatment* as an umbrella term, where dispute settlement arrangements are excluded from the scope of the MFN clause without language specifying whether dispute settlement arrangements are deemed a *treatment*. In that regard, some language refers to the "*treatment*",[63] while in other instances the following expression is used: *"the treatment with respect to […]"*, followed by a list of what elements are covered by the term treatment;[64] and
- A third subset employs the term *treatment* with direct reference to dispute settlement arrangements, thereby expressly considering dispute settlement arrangements as constituting *treatment.*[65]

3.4. The scope of the MFN treatment – lists of investment aspects

74. Roughly a quarter of the treaties in the sub-sample of treaties which exclude dispute settlement arrangements from the scope of MFN clauses specify aspects in relation to which MFN treatment is granted. Such lists first emerged in 1993 and are observed in

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62 See for example, agreements that Brazil has concluded with Chile (2015), Colombia (2015), Ecuador (2019), Ethiopia (2018), Guyana (2018), Mexico (2015), Suriname (2018), and the United Arab Emirates (2019); the language is also observed in the Brazil-Chile FTA (2018).

63 See for example, the Canada-China BIT (2012), Article 5(3) provides that *"For greater certainty, the "treatment" referred to in paragraphs 1 and 2 of this Article does not encompass the dispute resolution mechanisms, such as those in Part C, in other international investment treaties and other trade agreements"*.

64 See for example, the Canada-Colombia FTA (2008), Article 804(3): *"For greater clarity, treatment "with respect to establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments" referred to in paragraphs 1 and 2 does not encompass dispute resolution mechanisms, such as those in Section B of this Chapter, that are provided for in international treaties or trade agreements"*.

65 See for example, the China-Japan-Korea trilateral investment agreement (2012), Article 4(3): *"It is understood that the treatment accorded to investors of the third Contracting Party or any non-Contracting Party and to their investments as referred to in paragraph 1 does not include treatment accorded to investors of the third Contracting Party or any non-Contracting Party and to their investments by provisions concerning the settlement of investment disputes between a Contracting Party and investors of the third Contracting Party or between a Contracting Party and investors of any non-Contracting Party that are provided for in other international agreements"*.

treaties that do and those that do not explicitly exclude dispute settlement arrangements from the scope of MFN.

75. The aspects to which MFN treatment applies are included in open or closed lists that are composed of various items. A total of 21 items and combinations of items to which MFN treatment applies have been observed in the sample of treaties in which dispute settlement arrangements are excluded from the scope of MFN clauses.[66] No treaty in the sample which relies on a positive list to describe the scope of application of its MFN clause contains a term that evokes dispute settlement arrangements.

76. In treaties that contain a list *and* an explicit exclusion of dispute settlement arrangements from the scope of MFN, the explicit exclusion is framed as a confirmation that the list is *not* intended to include dispute settlement arrangements. This approach was first contemplated in the earliest traceable occurrence of such language in the Third Draft Agreement on the FTAA of 21 November 2003, and remains the most frequently observed model across the treaty sample.[67]

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[66] The full list of elements that have been identified in the treaties in the sample include *"admission"*, *"establishment"*, *"maintenance"*, *"acquisition"*, *"expansion"*, *"management"*, *"conduct"*, *"operation"*, *"exploitation"*, *"sale"*, *"disposition"*, *"disposal"*, *"use"*, *"enjoyment"*, *"extension"*, *"liquidation"*, *"performance"*, *"development"*, *"abandonment"*, *"transfer"*, and *"receipt"*.

[67] See for a further framing of the relationship between positive list and explicit exclusion the Chile-Colombia FTA (2006), which specifies that *"the scope of Article [that sets out the MFN treatment] covers only matters relating to the establishment, acquisition, expansion, management, conduct, operation, sale, or other disposition of the investment, and thus does not apply to procedural matters, including dispute settlement mechanisms such as those contained in Section B of this Chapter."* Annex 9.3 to the FTA also provides that *"The Parties agree that the scope of application of Article 9.3 only includes matters related to the establishment, acquisition, expansion, administration, management, operation, sale or other provision related to the investment and, therefore, it will not be applicable to procedural matters, including dispute resolution mechanisms such as the content in Section B of this Chapter."* (translated from Spanish by the authors, emphasis added).

Annex A. Survey sample and methodology

Sample composition

77. The sample for this survey consists of 2,429 investment treaties and related documents that the 99 jurisdiction that are invited to participate in the Track 2 Project[68] have concluded with any other jurisdiction between 1959 and 31 October 2022.[69]

78. The concept of "investment treaty" is increasingly fluid as traditionally assumed defining features – foremost the presence of post-establishment protection content – are no longer present in some treaties. For the purpose of this survey, "investment treaties" are nonetheless understood as treaties that contain post-establishment protection content, given that rules on MFN are part of that subset of rules. Treaties with investment content that do not include any post-establishment protection provisions are not included in the sample.

79. The vast majority of the documents in the sample are bilateral investment treaties. Investment chapters in bilateral preferential trade agreements with investment provisions as well as 25 plurilateral agreements with investment provisions – signed by at least one economy that participates in the Track 2 Project – are also included in the sample. For plurilateral arrangements, only relationships that involve at least one participant in the Track 2 Project are considered. Three plurilateral treaties are excluded from the statistical assessment in this study: the Energy Charter Treaty, the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference, and the Unified Agreement for the Investment of Arab Capital in the Arab States.

80. Two reasons motivate this choice: The signature and in-force status of the Unified Agreement for the Investment of Arab Capital in the Arab States for individual economies cannot be determined with any degree of certainty from authoritative publicly accessible sources. All three agreements cover a very significant number of relationships that would make remaining data unreadable: the Energy Charter Treaty and the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the

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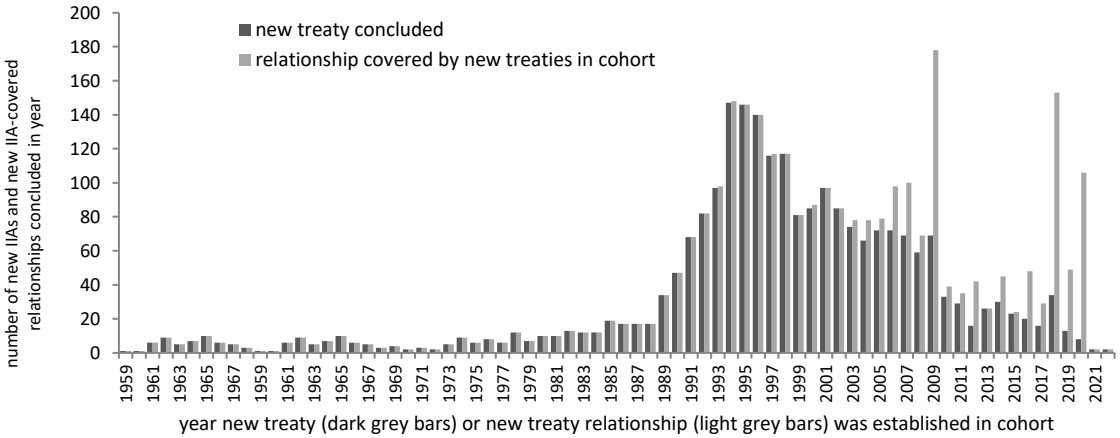
[68] The invited jurisdictions are Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Czech Republic, Denmark, 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, Peru, Philippines, Poland, Portugal, Qatar, Romania, Saudi Arabia, Senegal, Serbia, 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.

[69] Where the term "jurisdiction" is used in this report, it does not imply any judgement by the OECD as to the legal or other status of any territorial entity. Belgium and Luxembourg have concluded many treaties jointly as the "Belgium-Luxembourg Economic Union"; while they constitute a joint treaty partner, this report counts the Belgium-Luxembourg Economic Union as *two* jurisdictions and produces data separately for the two jurisdictions, but counts treaties concluded by the Belgium Luxembourg Economic Union only once.

Organisation of the Islamic Conference for example each covers over 1,500 relationships[70]. The Energy Charter also has only partial sectoral coverage and in many relationships co-exists with other investment treaty arrangements.

81. Overall, the treaties or related texts in the sample cover 2,924 bilateral relationships. Figure A A.1 shows the distribution of new treaties and treaty relationships included in the sample in annual cohorts.

Figure A A.1. Sample composition: treaties and treaty-covered relationships 2003-2021



Source: OECD Investment Treaty Database.

82. The primary considerations for the composition of the treaty sample were reliability and authenticity of the treaty texts. The sample includes thus only documents that were available from government websites of economies that participate in the Track 2 Project or, rarely, websites of the governments of their treaty partners, as well as websites maintained by international or regional organisations.[71] Agreements were only included if an authentic text was available in a language accessible to the Secretariat (English, French, German, Italian, Spanish, Portuguese, Arabic). The assessment of the treaty content was made for one authentic language only, which may not have been the language in which the treaty has been negotiated or which is the determining language in cases of deviations. Translations towards the authentic language that has been used for the assessment of a given treaty may have contributed to linguistic variance.

83. Given the limitations to availability of treaty texts, the sample may not in all cases be representative and may be biased for a number of reasons. Some treaties, especially those signed just before the finalisation of the survey may not be accessible on publicly available databases used for this survey. The full list of treaties and related arrangements included in the sample is available in Annex B.

84. Treaties and amendments have been included in the sample regardless of whether they are in force. Treaties that are not known to be in force or that are known to no longer

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[70] The number of States Parties to the Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference cannot be determined with certainty for lack of authoritative data on the States Parties to the treaty.

[71] These include the United Nations Treaties series, the website of the Organisation of American States and the EFTA website. UNCTAD's treaty collection was not used for concerns about unsigned or invalid versions, other than to fill gaps and only if the document file made available on the database showed a scan of a signed and dated original text.

be in force are shown in *italics* in this document.[72] For certain assessments as indicated in the text or notes to figures, only future-oriented treaties were considered; future-oriented treaties are those arrangements that were known to be in force in October 2022 or were expected to enter into force in the future. Treaties that are "expected to come into force" are those that have been signed but have not yet entered into effect. Some treaties that have been signed but for which at least one signatory has declared it will not bring into effect, are not counted in this group. Treaties that have been superseded or terminated are also excluded from the group of future-oriented treaties; treaties that are suspended are likewise treated as belonging to this group even though they may theoretically return to force in the future.

Treatment of amendments and side-agreements

85. Many treaties in the sample have been amended after their initial conclusion or complemented by side agreements such as joint interpretations. These documents were likewise assessed for this study. For purposes of the presentation, in particular for the description of developments over time, such joint interpretations and amendments are treated as if a new treaty with the features had replaced an existing treaty. The signature date of the amendment or side-agreement determines the inclusion of the arrangement in a cohort.

Treatment of coexisting treaty arrangements in a given bilateral relationship

86. In many instances, bilateral relationships are simultaneously covered by more than one treaty. In individual cases, up to five investment treaties exist simultaneously in a bilateral relationship. The interaction of the provisions of these arrangements with each other is rarely clarified in treaties themselves and is uncertain overall. Simultaneous coexistence is not to be confounded with treaty replacements, where only one of the treaties – the old *or* the new treaty – is in force at a given point in time.

87. For the purpose of this study, simultaneous co-existence is not resolved. Rather, treaty relationships established by a given bilateral relationship are accounted for independently as if they were established in different bilateral relationships.

88. "Suspended" treaties are treated, for the purpose of this study, as if there were no longer in force. Suspension of a treaty is used by some jurisdictions in cases of replacements, often of a BIT that is being replaced by a PTA, where the termination of the newer treaty would lead to a revival of the suspended earlier treaty.[73] No practical occurrences of such revival are known.

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[72] This does not apply systematically to plurilateral arrangements that can be in force for some of its signatories but not for others. Only when the agreement is not in force for any of its signatories is the treaty name shown in *italics*.

[73] For further details see Pohl, J. (2013), "Temporal Validity of International Investment Agreements: A Large Sample Survey of Treaty Provisions", OECD Working Papers on International Investment, No.2013/04, OECD Publishing, Paris, https://doi.org/10.1787/5k3tsjsl5fvh-en, p.15.

Annex B. List of treaties and related documents in the sample

89. This Annex contains the list of treaties and related documents that are included in the sample of this study. Treaties and documents in *italics* were, according to publicly available information accessed by the Secretariat, not yet or no longer in force at the time the survey was concluded on 31 October 2022. The treaties are listed in alphabetical order for each country, resulting in a double listing of individual treaties concluded between participants in the Track 2 Project, under both economies. Plurilateral agreements included in the sample are shown at the end of the list. The electronic version of the present document provides – some rare exceptions aside – access to the full text of the treaty through a hyperlink under the treaty name; some documents may no longer be available at the electronic address as time passes.

Albania-Austria BIT (1993)
Albania-Azerbaijan BIT (2012)
Albania-Belgium/Luxembourg BIT (1999)
Albania-Bosnia and Herzegovina BIT (2008)
Albania-Bulgaria BIT (1994)
Albania-China BIT (1993)
Albania-Croatia BIT (1993)
Albania-Croatia BIT (1993) - Protocol (2009)
Albania-Cyprus BIT (2010)[74]
Albania-Czech Republic BIT (1994)
Albania-Czech Republic BIT (1994) - Protocol (2010)
Albania-Denmark BIT (1995)
Albania-Finland BIT (1997)
Albania-France BIT (1995)
Albania-Germany BIT (1991)
Albania-Greece BIT (1991)
Albania-Israel BIT (1996)
Albania-Italy BIT (1991)
Albania-Korea BIT (2003)
Albania-Kosovo BIT (2016)
Albania-Lithuania BIT (2007)
Albania-Malaysia BIT (1994)
Albania-Malta BIT (2011)
Albania-Moldova BIT (2004)
Albania-Poland BIT (1993)
Albania-Portugal BIT (1998)
Albania-Romania BIT (1994) - Protocol (2005)
Albania-Russian Federation BIT (1995)
Albania-San Marino BIT (2012)
Albania-Serbia BIT (2002)
Albania-Slovenia BIT (1997)
Albania-Spain BIT (2003)
Albania-Sweden BIT (1995)
Albania-Switzerland BIT (1992)
Albania-Ukraine BIT (2002)
Albania-United Arab Emirates BIT (2015)
Albania-United Kingdom BIT (1994)
Albania-United States BIT (1995)
Algeria-Austria BIT (2003)
Algeria-Bahrain BIT (2000)
Algeria-Belgium/Luxembourg BIT (1991)
Algeria-China BIT (1996)
Algeria-Czech Republic BIT (2000)
Algeria-Denmark BIT (1999)
Algeria-Ethiopia BIT (2002)
Algeria-Finland BIT (2005)
Algeria-France BIT (1993)
Algeria-Germany BIT (1996)
Algeria-Greece BIT (2000)
Algeria-Iran BIT (2003)
Algeria-Italy BIT (1991)
Algeria-Korea BIT (1999)
Algeria-Kuwait BIT (2001)
Algeria-Libya BIT (2001)
Algeria-Malaysia BIT (2000)
Algeria-Mali BIT (1996)
Algeria-Mauritania BIT (2008)
Algeria-Netherlands BIT (2007)
Algeria-Nigeria BIT (2002)
Algeria-Oman BIT (2000)
Algeria-Portugal BIT (2004)
Algeria-Russian Federation BIT (2006)
Algeria-Serbia BIT (2012)
Algeria-South Africa BIT (2000)
Algeria-Spain BIT (1994)
Algeria-Sweden BIT (2003)
Algeria-Switzerland BIT (2004)
Algeria-Tajikistan BIT (2008)
Algeria-Tunisia BIT (2006)
Algeria-United Arab Emirates BIT (2001)
Algeria-Yemen BIT (1999)
Angola-Brazil CIFA (2015)
Angola-France BIT (2008)
Angola-Germany BIT (2003)
Angola-Italy BIT (1997)
Angola-Portugal BIT (1997)
Angola-Portugal BIT (2008)
Angola-South Africa BIT (2005)
Angola-Spain BIT (2007)
Angola-United Kingdom BIT (2000)
Argentina-Armenia BIT (1993)
Argentina-Australia BIT (1995)
Argentina-Austria BIT (1992)
Argentina-Belgium/Luxembourg BIT (1990)
Argentina-Bolivia BIT (1994)
Argentina-Bulgaria BIT (1993)
Argentina-Canada BIT (1991)
Argentina-Chile BIT (1991)
Argentina-Chile FTA (2017)
Argentina-China BIT (1992)
Argentina-Chinese Taipei BIT (1993)
Argentina-Costa Rica BIT (1997)
Argentina-Croatia BIT (1994)
Argentina-Cuba BIT (1995)
Argentina-Czech Republic BIT (1996)
Argentina-Denmark BIT (1992)

74 Note by the Republic of Türkiye: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Türkiye recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Türkiye shall preserve its position concerning the "Cyprus issue".

Note by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Türkiye. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

Argentina-Dominican Republic BIT (2001)
Argentina-Ecuador BIT (1994)
Argentina-Egypt BIT (1992)
Argentina-El Salvador BIT (1996)
Argentina-Finland BIT (1993)
Argentina-France BIT (1991)
Argentina-Germany BIT (1991)
Argentina-Greece BIT (1999)
Argentina-Guatemala BIT (1998)
Argentina-Hungary BIT (1993)
Argentina-India BIT (1999)
Argentina-Indonesia BIT (1995)
Argentina-Israel BIT (1995)
Argentina-Italy BIT (1990)
Argentina-Jamaica BIT (1994)
Argentina-Japan BIT (2018)
Argentina-Korea BIT (1994)
Argentina-Lithuania BIT (1996)
Argentina-Malaysia BIT (1994)
Argentina-Mexico BIT (1996)
Argentina-Morocco BIT (1996)
Argentina-Netherlands BIT (1992)
Argentina-New Zealand BIT (1999)
Argentina-Nicaragua BIT (1998)
Argentina-Panama BIT (1996)
Argentina-Panama BIT (1996) - Exchange of Letters (2004)
Argentina-Peru BIT (1994)
Argentina-Philippines BIT (1999)
Argentina-Poland BIT (1991)
Argentina-Portugal BIT (1994)
Argentina-Qatar BIT (2016)
Argentina-Russian Federation BIT (1998)
Argentina-Senegal BIT (1993)
Argentina-South Africa BIT (1998)
Argentina-Spain BIT (1991)
Argentina-Sweden BIT (1991)
Argentina-Switzerland BIT (1991)
Argentina-Thailand BIT (2000)
Argentina-Türkiye BIT (1992)
Argentina-Ukraine BIT (1995)
Argentina-United Arab Emirates BIT (2018)
Argentina-United Kingdom BIT (1990)
Argentina-United States BIT (1991)
Argentina-Venezuela BIT (1993)
Argentina-Viet Nam BIT (1996)
Armenia-Argentina BIT (1993)
Armenia-Austria BIT (2001)
Armenia-Belgium/Luxembourg BIT (2001)
Armenia-Bulgaria BIT (1995)
Armenia-Canada BIT (1997)
Armenia-Finland BIT (2004)
Armenia-France BIT (1995)
Armenia-Germany BIT (1995)
Armenia-India BIT (2003)
Armenia-Israel BIT (2000)
Armenia-Italy BIT (1998)
Armenia-Japan BIT (2018)
Armenia-Kazakhstan BIT (2006)
Armenia-Korea BIT (2018)
Armenia-Latvia BIT (2005)
Armenia-Lithuania BIT (2006)
Armenia-Netherlands BIT (2005)
Armenia-Romania BIT (1994)
Armenia-Romania BIT (1994) - Protocol (2006)
Armenia-Singapore BIT (2019)
Armenia-Sweden BIT (2006)
Armenia-Switzerland BIT (1998)
Armenia-United Arab Emirates BIT (2016)
Armenia-United Kingdom BIT (1993)
Armenia-United States BIT (1992)
Australia-Argentina BIT (1995)
Australia-Chile BIT (1996)
Australia-Chile FTA (2008)
Australia-China BIT (1988)
Australia-China FTA (2015)
Australia-Czech Republic BIT (1993)
Australia-Egypt BIT (2001)
Australia-Hong Kong (China) BIT (1993)
Australia-Hong Kong (China) FTA (2019)
Australia-Hungary BIT (1991)
Australia-India BIT (1999)
Australia-Indonesia BIT (1992)
Australia-Indonesia CEPA (2019)
Australia-Japan EPA (2014)
Australia-Korea FTA (2014)
Australia-Lao PDR BIT (1994)
Australia-Lithuania BIT (1998)
Australia-Malaysia FTA (2012)
Australia-Mexico BIT (2005)
Australia-New Zealand ANZCERTA Investment Protocol (2011)
Australia-Pakistan BIT (1998)
Australia-Papua New Guinea BIT (1990)
Australia-Peru BIT (1995)
Australia-Peru FTA (2018)
Australia-Philippines BIT (1995)
Australia-Romania BIT (1993)
Australia-Singapore Amendment (2016)
Australia-Singapore FTA (2003)
Australia-Sri Lanka BIT (2002)
Australia-Thailand FTA (2004)
Australia-Türkiye BIT (2005)
Australia-United Kingdom FTA (2021)
Australia-United States FTA (2004)
Australia-Uruguay BIT (2001)
Australia-Uruguay BIT (2019)
Australia-Viet Nam BIT (1991)
Austria-Albania BIT (1993)
Austria-Algeria BIT (2003)
Austria-Argentina BIT (1992)
Austria-Armenia BIT (2001)
Austria-Azerbaijan BIT (2000)
Austria-Bangladesh BIT (2000)
Austria-Belarus BIT (2001)
Austria-Belize BIT (2001)
Austria-Bosnia and Herzegovina BIT (2000)
Austria-Bulgaria BIT (1997)
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AANZFTA
Agreement for Promotion, Protection and Guarantee of Investments among Member States of the Organisation of the Islamic Conference
Agreement on Investment under the ASEAN-India CECA
ASEAN-China Investment Agreement
ASEAN-Korea FTA
CAFTA-DR
CETA
China-Japan-Korea trilateral investment agreement
Colombia-Northern Triangle FTA
CPTPP
EFTA-Korea Investment Agreement
EFTA-Singapore FTA
EU-Singapore Investment Protection Agreement
EU-Viet Nam Investment Protection Agreement
First Protocol to amend the ASEAN-Japan CEPA
Korea-Central America FTA
MERCOSUR Protocol on Investment Cooperation and Facilitation
Mexico-Central America FTA
Mexico-Northern Triangle FTA
NAFTA
NAFTA - Joint interpretation
PACER plus
Pacific Alliance FTA
RCEP
SADC Protocol on Finance and Investment
Treaty of the Eurasian Economic Union
USMCA