

Unclassified**English - Or. English**

21 March 2025

**DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE****Clarifying ‘full protection and security’ obligations in investment treaties:
opportunities for a Joint Interpretation****Note by the OECD Secretariat**

This note attempts to summarise the breadth of agreement across Track 2 participants on the scope and content of ‘full protection and security’ obligations (FPS) and the extent to which they could likely achieve a clarification of obligations in their older treaties using a Joint Interpretation reflecting this agreement. Discussions on this matter were held during the Track 2 meeting of 14 February 2025.

This note is made public to ensure transparency of government conversations under Track 2. Delegates had an opportunity to comment on this note before its public release. The note does not prejudice the outcomes of discussion under the Track 2 work programme.

The work on the *Future of Investment Treaties* is documented at <https://oe.cd/foit2>.

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JT03562651

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Context and purpose of this note

1. Track 2 participants are exploring how interested governments could transition substantive provisions in their existing investment treaties of obligations to more precise language that they use in their recent treaty practice. They have discussed the opportunities and implications of Joint Interpretations¹ and plurilateral treaty modifications² for that purpose.
2. Participants have noted that a plurilateral Joint Interpretation would require broad agreement on a consistent textual framing. They have begun exploring how their understanding on the intent for individual substantive treaty clauses could be expressed textually with a view to a potential Joint Interpretation. The framing of their understanding is deducted from and inspired by the way they express their intentions – more clearly than in older treaties – in current treaty practice.
3. For ‘full protection and security’ (FPS) clauses, a large sample study issued as [DAF/INV/TR2/WD\(2025\)1/REV1](#) describes evolutions of their design in 2,348 investment treaties concluded between 1959 and 2024 by the 101 jurisdictions invited to participate in Track 2.³ The study shows that Track 2 participants use broadly similar textual framings to describe the obligations under FPS clauses (FPS) obligations in their recent treaties.
4. The present note (section 1) sets out corresponding language that governments use in their current treaty practice with respect to FPS, to deduct agreement on textual framings that interested jurisdictions could use for a Joint Interpretation to clarify FPS obligations in their earlier treaties that do not feature such specifications.
5. As set out in [DAF/INV/TR2/WD\(2025\)1/REV1](#) – and reproduced in section 2 hereunder for ease of reference – a Joint Interpretation can likely clarify around 95% of Track 2 participants’ treaties featuring older, unclear FPS designs.⁴

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

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

³ Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Bahrain, Bangladesh, Belgium, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, China, Colombia, Congo (Democratic Republic), Costa Rica, Cote d’Ivoire, Croatia, Czechia, 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, Sierra Leone, 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.

⁴ See “‘Full protection and security’ provisions in investment treaties: A large sample survey of treaty provisions”, [DAF/INV/TR2/WD\(2025\)1/REV1](#), section 4.

Issues for discussion

- Do Track 2 participants agree that the elements summarised in this note reflect their intentions with regard to FPS obligations, including in their earlier treaties that do not specify the content and contours of obligations under FPS?
- Would a Joint Interpretation that reflects the elements of likely consensus summarised below be a suitable option to effectively and efficiently clarify FPS obligations in older treaties that do not contain specifications on the scope and content of FPS obligations?

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

1. Likely scope of consensus on the contours and content of FPS obligations

6. Track 2 participants' recent treaty practice suggests a sizable scope of agreement with respect to the content and contours of FPS obligations. 'Full protection and security' appears to be broadly understood as an *obligation of means* prescribed by the *customary international law minimum standard of treatment* (MST-CIL) relating to the protection of investments against *physical* harm.

'Full protection and security' is an obligation of means...

7. Recent treaties have increasingly framed FPS obligations as obligations of means, requiring that parties "act as may be reasonably necessary", "take all measures reasonably necessary", or take "reasonable and necessary measures" to ensure the protection and security of investments.⁵ Recent joint interpretative efforts have similarly emphasised that FPS "does not [...] guarantee that aliens or their investments are not harmed under any circumstances".⁶

8. Traces of this understanding of FPS as 'due diligence' obligations can be found in documents dating back to the mid-1960s.⁷ International tribunals have followed this understanding extensively, including the International Court of Justice (ICJ) which stated in 1989 – and reiterated in a case in 2023 – that FPS "cannot be construed as the giving of a warranty that property shall never in any circumstances be occupied or disturbed".⁸

⁵ These textual framings are observed in about a dozen investment treaties included in the sample of treaties considered for the treaty survey in [DAF/INV/TR2/WD\(2025\)1/REV1](#). Their use in plurilateral treaties, especially by ASEAN member states, leads to their presence in a sizable number of treaty relationships. See, e.g., [EU-Viet Nam Investment Protection Agreement \(2022\)](#) (Article 2.5 para.5); the [China-New Zealand FTA \(2008\) - Upgrade \(2021\)](#).

⁶ Most recently, the Free Trade Commission (FTC) of the United States-Colombia Trade Promotion Agreement (TPA)'s [Decision No. 9 of 15 January 2025](#) interpreting provisions of the TPA investment chapter specifies that the FPS standard (Article 10.5.2(b)) "does not [...] guarantee that aliens or their investments are not harmed under any circumstances".

⁷ The [OECD Draft Convention on the Protection of Foreign Property \(1967\)](#) was one of the first documents to explicitly define FPS as a 'due diligence' obligation. See the [Notes and comments](#) to the Draft Convention, which mention explicitly that 'most constant protection and security' refers to "the obligation of each Party to exercise due diligence as regards actions by public authorities as well as others in relation to such property". Although it never entered into force as a treaty, the Draft Convention accompanied by its Notes and comments, reveal the thinking at the time of countries involved in its negotiation and heavily inspired later bilateral treaties.

⁸ See ICJ, *Case concerning Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)*, [Judgment of 20 July 1989](#), para. 108 (*Reports of Judgments, Advisory Opinions and Orders*, p. 65). In a recent [Judgment](#) of 30 March 2023, the ICJ reiterated such interpretation of the 'most constant protection and security' provision in the [United States-Iran Treaty of Amity \(1955\)](#) (*I.C.J. Reports 2023*, p. 116).

...prescribed by the customary international law minimum standard of treatment...

9. While earlier documents⁹ and treaties concluded over the 1980s and 1990s merely expressed FPS as an international law obligation,¹⁰ recent treaties have systematically clarified that FPS is *limited* to the minimum standard of treatment of aliens under customary international law (MST-CIL) and that it does not require treatment in addition to, or that goes beyond that standard.

10. The clarification first appeared in 2001, in the [Note of Interpretation](#) issued by the NAFTA Free Trade Commission with respect to NAFTA Article 1105 which required parties to accord treatment ‘in accordance with international law’, which includes FPS. Treaties concluded since the early 2000s have increasingly referred to MST-CIL and today, all treaties that provide for FPS obligations limit the required treatment to the MST-CIL.¹¹

...relating to the protection of investments against physical harm

11. Treaties in the mid-1980s started framing FPS obligations as concerning the physical protection of investments; and since the mid-2000s, treaties have broadly identified FPS obligations as concerning the ‘physical’ or ‘police’ protection (or ‘security’) of investments. Recent multilateral efforts to reform the ECT¹² and joint interpretations¹³ have confirmed this understanding.

12. The ICJ likewise confirmed in its recent [Judgment](#) of 30 March 2023 that the core of FPS obligations “concerns the protection of property from physical harm” and noted that the extension of FPS beyond this scope would blur the delineation of the standard with other standards of treatment, especially with ‘fair and equitable treatment’.¹⁴

⁹ The Resolution of the Council on the Draft Convention on the Protection of Foreign Property (adopted on 12 October 1967) “reaffirms the adherence of Member States to the principles of international law embodied in the Draft Convention”, which includes the ‘most constant protection and security’ standard.

¹⁰ About 80 treaties concluded over the 1980s and 1990s included in the treaty survey require that parties provide for FPS ‘in accordance with international law’. The design is not featured in any treaties in the sample concluded after 2020.

¹¹ See “Full protection and security provisions in investment treaties: A large sample survey of treaty provisions”, Note by the Secretariat, [DAF/INV/TR2/WD\(2025\)1/REV1](#), section 2.

¹² Decision of the Energy Charter Conference, Subject: Amendments to the Energy Charter Treaty, 3 December 2024, Article 4, “The obligation to accord full protection and security set out in paragraph (1) refers to the *physical security of investors and their investments*”.

¹³ See the US-Colombia TPA FTC’s [Decision No. 9 of 15 January 2025](#) interpreting provisions of the TPA investment chapter (para. 3(d)) which clarified that FPS “does not require a Party to prevent economic injury inflicted by third parties, [or] provide for stability of a Party’s legal environment”.

¹⁴ See ICJ, *Certain Iranian Assets (Islamic Republic of Iran v. United States of America)*, [Judgment](#), 30 March 2023, para. 190 (*I.C.J. Reports 2023*, p. 116): “[T]reaties on commerce and navigation and international investment agreements often provide for fair and equitable treatment and the most constant protection and security, consecutively or even in the same sentence. These two separate standards of protection will overlap significantly if the standard of the most constant protection and security is interpreted to include legal protection. The Court observes that the most constant protection and security standard is of particular practical significance and relevance in the form of protection of property from physical harm by third parties”.

2. Transitioning old FPS designs to new designs: preliminary quantitative estimate

13. This section, identical to section 4 of the note “*Full protection and security provisions in investment treaties – A large sample survey of treaty provisions*” issued as [DAF/INV/TR2/WD\(2025\)1/REV1](#) and included here for ease of reference, provides a preliminary quantitative estimate of the share of treaties that could be clarified through Joint Interpretations, that is, where the transition to a clarified description of FPS based on the elements of likely consensus summarised above remains within the ordinary meaning of the existing clauses. Section 2.1 presents the methodology and preliminary assumptions of the quantitative estimate; and section 2.2 presents the results of the estimate.

2.1. Methodology and assumptions for the preliminary quantitative estimate of the availability of Joint Interpretations for a transition of FPS clauses

14. The preliminary quantitative estimate of the availability of Joint Interpretations to transition old-generation FPS designs to new designs relies on several assumptions that are summarised in Table 1 below. As shown in the table, old-generation FPS clauses can be broadly categorised in six distinct groups, of which four appear to be accessible to a clarification by Joint Interpretation – the transition to a clarified framing would remain within the ordinary meaning of the current clauses.

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

desired end-point ►	FPS limited to MST-CIL <i>and</i> identified as protection against physical harm exclusively	Number of occurrences in sample (share in total number of treaties featuring earlier FPS designs)
▼ design present in earlier treaties		
Unqualified notion of protection and security (e.g., obligation to ‘protect’ or ‘safeguard’ investments)	Joint interpretation likely possible	255 (15.6%)
Unspecified reference to FPS obligation (obligation not specified beyond ‘full’, ‘adequate’, ‘most constant’, or other textual qualifiers)	Joint interpretation likely possible	1,208 (74.0%)
FPS ‘in accordance with’ international law (without floor nor ceiling)	Joint interpretation likely possible	78 (4.8%)
FPS ‘at least’ as under international law	Joint interpretation likely possible (‘at least’ does not necessarily imply ‘more’)	4 (0.2%)
FPS ‘in accordance with’ domestic law (without reference to international law)	Amendment likely required	45 (2.8%)
FPS obligation includes legal protection (e.g., obligation to provide ‘full legal protection and security’)	Amendment likely required	43 (2.6%)

Note: Absolute numbers of treaties concluded in force or not, excluding treaties that were terminated or replaced. Treaties that do not contain references to FPS obligations are not considered in this exercise. Treaties included in the sample are listed in [DAF/INV/TR2/WD\(2025\)1/REV1](#) (Annex B).

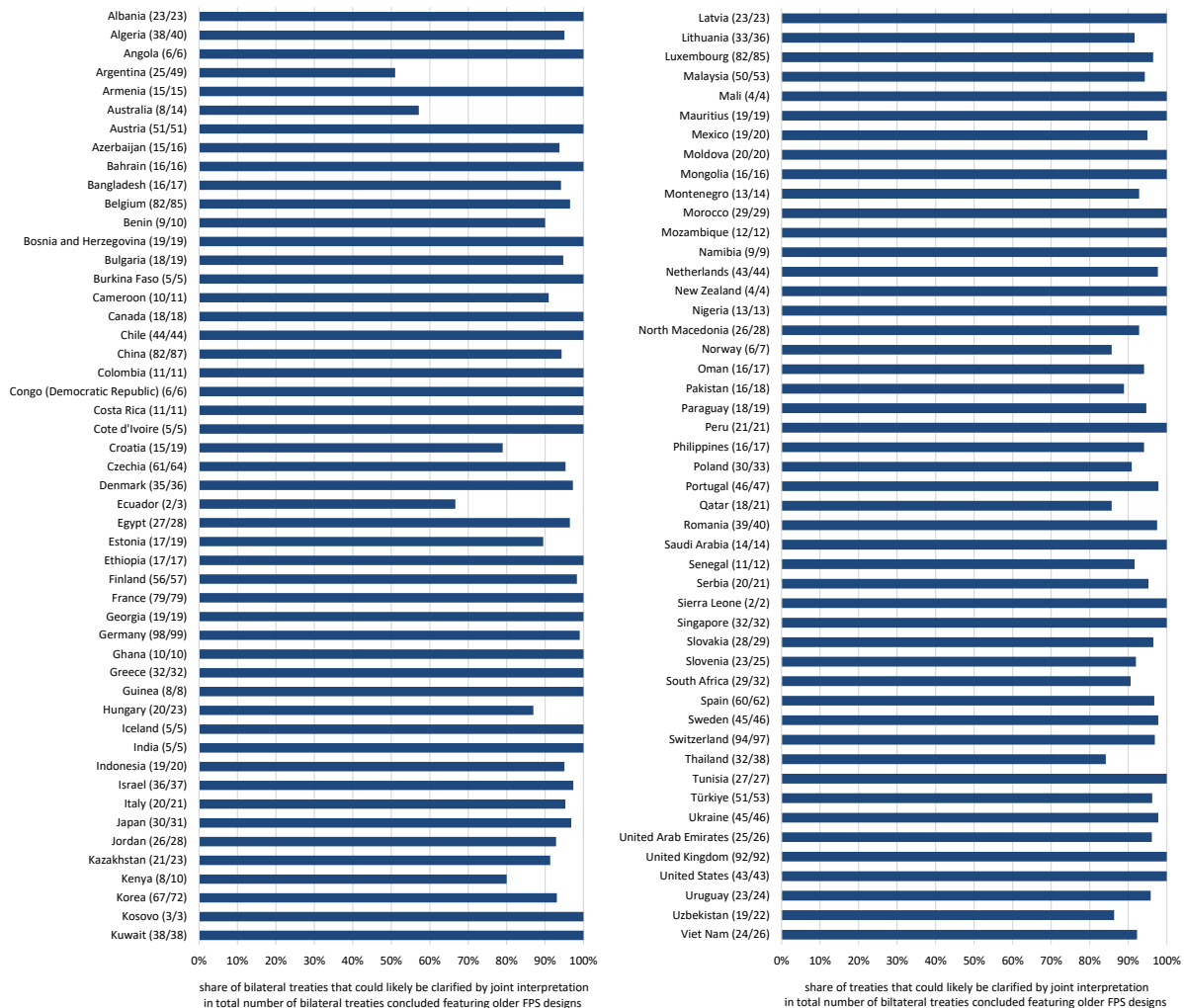
Source: OECD.

2.2. Preliminary findings: a Joint interpretation could likely clarify FPS obligations in 95% of Track 2 participants’ treaties with older designs

15. In aggregate, a Joint interpretation reflecting the elements of likely consensus summarised above can likely clarify FPS obligations in about 95% of Track 2 participants’ bilateral treaties with older designs. Just over 5% of treaties would likely require an amendment or modification to reflect new FPS designs.

16. The share of treaties that can likely be transitioned through a Joint Interpretation is different for individual jurisdictions. Over 80% of the jurisdictions participating in Track 2 can likely transition all or almost all of their old treaties featuring older FPS designs. Figure 1 shows for each participating jurisdiction the share of treaties featuring older FPS designs that can likely be transitioned using a Joint Interpretation.

Figure 1. Share of individual jurisdictions’ bilateral treaties featuring old FPS designs which can likely be transitioned to new designs by a Joint Interpretation



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

Source: OECD Investment Treaty database.

Acknowledgements

This note was authored by Faraz Moosa and Joachim Pohl of the OECD Secretariat (Investment Division). Research contributions by Charlotte Baxmann are gratefully acknowledged.