Organisation for Economic Co-operation and Development

DAF/INV/TR2/WD(2025)10/REV1

Unclassified English - Or. English

2 March 2026

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE

The interaction between investment treaty obligations and the 'right to regulate'

A scoping paper

This note provides initial reflections on the interaction of investment treaties and State parties' 'right to regulate'; and proposes a preliminary typology of the main treaty provisions and specifications that treaty makers have developed to delimitate the right to regulate in investment treaties. Discussions on this note were held on 20 October 2025.

This note is made public to ensure transparency of governments conversations under the work programme on *Modernising investment treaties*. Delegates had an opportunity to comment on this note before its public release. The note does not prejudge the outcomes of discussion under the work programme.

The work on *Modernising investment treaties* is documented at https://oe.cd/foit2.

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JT03581955

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Context, purpose and structure of this note

1. Investment treaties inherently seek to constrain the State's use of its right to regulate for certain purposes and in certain ways agreed by the treaty Parties. Treaty obligations determine the agreed limits by providing that certain 'regulation' is incompatible with treaty obligations (e.g., regulation that discriminates based on nationality, or unlawfully expropriates, that is, for example, without compensation or public interest).

2. The interaction of investment treaty obligations and the right to regulate is under increasing scrutiny because of perceptions that tribunals have, in certain instances, unduly restricted State's regulatory space through their interpretation and application of treaties' substantive obligations.

3. Different approaches can contribute to managing the interaction between treaty obligations and the right to regulate. Reforms of investor-State dispute settlement (ISDS) mechanisms as currently explored at UNCITRAL Working Group III could influence this interaction. A specific framing of substantive obligations – as reflected in most jurisdictions' recent treaty practice – also contributes to the preservation of the right to regulate by delineating State parties' obligations and preventing unintended interpretations by arbitral tribunals.

4. Some recent treaties also feature express language on how the parties' obligations interact with their right to regulate. In the context of their work on the design of older generation investment treaties, participants in the work under Track 2 of the *Future of Investment Treaties* have called for reflections on how these provisions on the interaction of the parties' obligations with the right to regulate can be designed.

5. The present note contains initial reflections on the understandings of the 'right to regulate' and examines provisions addressing its interaction with investment treaty obligations (**Section 1**). It also proposes a preliminary typology of the main treaty provisions and specifications that treaty makers have developed to delimitate the right to regulate in investment treaties (**Section 2**).

Unless an official translation is publicly available, the French version of this note does not contain translations of treaty provisions and excerpts from awards cited as examples.

Issues for consideration

- Has your government included some of the provisions and specifications described in the present note?
- What was the rationale behind the decision of your government to include, clarify, or modify provisions to address the interaction of treaty obligations with the right to regulate?
- How does your government evaluate the efficiency of treaty provisions and specifications as presented in Section 2?
- Which treaty provisions and specifications as introduced in Section 2 of the present note would your government be interested in further exploring in future Track 2 discussions?

1. What is the 'right to regulate' and how does it interact with investment protection?

6. Although references to the 'right to regulate' are increasingly frequent in investment treaties, its meaning and legal implications remain largely unsettled both in the literature and in arbitral decisions.[1] In particular, the 'right to regulate' appears to encompass distinct understandings that both lack a clear legal basis:

- The 'right to regulate' is usually understood as a component of States' sovereignty as recognised by customary international law. As such, it forms the basis of **any domestic regulatory activity that States may undertake**. From this perspective, States *always* have the right to regulate, even when such regulation is inconsistent with investment treaty obligations. At the same time regulating in certain ways may lead to a breach of the treaty and a duty of compensation which may in turn give rise to what is commonly referred to as 'regulatory chill', i.e., a government's reluctance to change regulations in areas where it may trigger claims for compensation from foreign investors.
- The 'right to regulate' can also be conceived as a reference to the capacity of State parties to **adopt measures without having to compensate adversely affected foreign investors** protected by an investment treaty. This capacity is limited to **legitimate regulatory action**, i.e., measures designed and applied to protect legitimate public welfare objectives such as health, safety or the protection of the environment.

7. Substantive provisions contained in investment treaties set the limits between incompatible – and thus compensable – measures and compatible, non-compensable regulatory action.

8. However, claims challenging public welfare regulations and treaty interpretations by tribunals that have occasionally curtailed the right to regulate, have led treaty negotiators to include explicit references to the interaction of investment protection and the right to regulate more frequently.

9. The present note proposes a preliminary typology of text usually inserted to better preserve and delimitate State parties' right to regulate. For the purpose of this preliminary exploration, three categories of 'right to regulate provisions'[2] can be distinguished:

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[1] Previous work among governments at the OECD has reflected on how investment treaties could potentially apply to a wide range of government action and highlighted the multi-dimensional impact of investment treaties on regulatory policy. See D. Gaukrodger, "The balance between investor protection and the right to regulate in investment treaties: a scoping paper", *OECD Working Papers on International Investment*, 2017/02. The issue of the right to regulate has also been explored in Track 1 through the interaction of treaties addressing investment with sustainable development; see D. Gaukrodger, "*The Future of Investment Treaties – Track 1 Sustainability Cluster. Illustrative case study on goals and challenges in treaty policy – exceptions clauses*", [DAF/INV/TR1/WD(2021)1], 11 October 2021.

[2] The present note treats general and security exceptions as part of the broader category of 'right to regulate provisions', while acknowledging that they may also be understood as distinct mechanisms for preserving policy space in investment treaties.

- **Reaffirmations of the right to regulate**. States reaffirm their right to regulate, either in preambles or in stand-alone provisions. These reaffirmations are not framed as exceptions and do not usually describe their possible legal effects.
- **Clarifications on the treaty parties' (non-)liability under specific investment protection standards for measures pursuing legitimate public policy objectives**. Many investment treaty protections contain specific framings that determine whether regulatory action is legitimate or if it amounts to a breach of the obligation. For example, 'indirect expropriation' provisions specify in some cases that *bona fide* non-discriminatory regulation pursuing a public policy objective does not constitute an expropriation. If a measure meets the criteria set by a clarification contained in a specific standard, no breach of the obligation is established.
- **General and security exceptions**. General and security exceptions are an additional tool or a "safety net" to seek to protect State's exercise of regulatory powers in pursuit of public policy objectives identified in the exceptions. They may come into play when a breach of a treaty obligation is established *prima facie*.

10. Examples of provisions for all three categories are set out in Section 2. Some of the specifications presented in the note have been discussed in past Track 2 meetings.[3] Additional approaches, such as carve-outs of certain sectors or types of measures,[4] reservations to substantive obligations or procedural filters, are not addressed in this note.

[3] Clarifications inserted in specific standards reaffirm the 'right to regulate' in relation to 'fair and equitable treatment', 'indirect expropriation' and 'national treatment' provisions. These clarifications have been described in the following notes: "*Designs of "fair and equitable treatment" provisions in recent investment treaties: an inventory of additional clarifications*" [DAF/INV/TR2/WD(2024)3/REV1], note by the Secretariat, 29 February 2024; "*Scope of likely agreement on 'indirect expropriation': opportunities to clarify earlier treaties using a Joint Interpretation*" [DAF/INV/TR2/WD(2025)3], note by the Secretariat, 18 March 2025; "*'National treatment' provisions in investment treaties: preliminary examination of recent treaty language*" [DAF/INV/TR2/WD(2025)7], note by the Secretariat, 27 May 2025.

[4] Sectoral carve-outs have been discussed in Track 1 with regards to climate change measures. See "*Methods to align investment treaty benefits for energy investment with the Paris Agreement and net zero*" [DAF/INV/TR1/WD(2024)1/REV2], note by the Secretariat, 12 March 2025.

2. 'Right to regulate provisions' in investment treaties: a preliminary typology

11. Three categories of provisions and textual elements are observed in treaty practice: reaffirmations of the right to regulate (2.1), clarifications of specific standards with regards to measures pursuing legitimate public policy objectives (2.2), and general and security exceptions (2.3). For each of these categories, the note contains one or several illustrations of provisions or textual elements that appear in investment treaties. These categories are not mutually exclusive – investment treaties usually contain exceptions and specifications pertaining to several if not to all three categories.

2.1. Reaffirmations of State Parties' right to regulate

12. A growing number of investment treaties contain explicit reaffirmations of State parties' right to regulate, either in preambles (2.1.1) or in stand-alone provisions (2.1.2).

2.1.1. In preambles

> The Parties, […]
>
> Recognising that the provisions of this Agreement preserve the right of the Parties to regulate within their territories and the Parties' flexibility to achieve legitimate policy objectives, such as public health, safety, environment, public morals and the promotion and protection of cultural diversity […].[5]

13. A number of investment treaties contain a general recognition of the right to regulate in preambular text. This recognition often appears in combination to clarified treaty obligations, a general exceptions clause or an additional reaffirmation of the right to regulate in the body of the treaty.

14. According to Article 31 of the Vienna Convention on the Law of Treaties (VCLT), the preamble forms part of the context that should be taken into consideration when interpreting treaty provisions.[6] In earlier cases, arbitral tribunals have referred to preambles to give broad interpretations of substantive standards protecting investors and investments.[7] Presumably, the language referred to above is aimed at ensuring a more balanced approach, i.e., that also takes into consideration States' right to regulate. This preambular language refers to substantive treaty provisions and therefore would have to be paired with more precise treaty obligations and other tools as discussed below to ensure that proper balance.

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[5] Preamble of CETA (2016). A similar text appears in the preambles of the EU-New Zealand FTA (2023) and the EU-Singapore Investment Protection Agreement (IPA) (2018).

[6] Article 31(1) of the VCLT provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". Article 31(2) further specifies that "[t]he context for the purpose of the interpretation of a treaty shall comprise […] its preamble".

[7] E.g., *SGS Société Générale de Surveillance S.A. v. Philippines*, ICSID Case No. ARB/02/6, Decision of the Tribunal on Objections to Jurisdiction, 29 January 2004, para. 116: "The BIT is a treaty for the promotion and reciprocal protection of investments. According to the preamble, it is intended "to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other". It is legitimate to resolve uncertainties in its interpretation so as to favour the protection of covered investments".

2.1.2. In stand-alone provisions

Example A: General right to regulate clause

The Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.[8]

Example B: Right to regulate clause tied to compliance with the treaty

Nothing in this Chapter shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Chapter that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental, health, safety, or other regulatory objectives.[9]

Example C: Right to regulate clause combined with provision addressing frustration of investors' expectations as a result of regulatory measures

The provisions of this Agreement shall not affect the right of the Contracting Parties to regulate within their territories necessary to achieve legitimate policy objectives such as the protection of public health, safety, environment, public morals, labor rights, animal welfare, social or consumer protection or for prudential financial reasons. The mere fact that a Contacting Party regulates, including through a modification to its laws, in a manner which negatively affects an investment or interferes with an investor's expectation, including its expectation of profits, is not a breach of an obligation under this Agreement.[10]

15. Reaffirmations of the right to regulate in stand-alone provisions usually refer to a non-exhaustive list of legitimate public policy objectives. Most reaffirmations of the right to regulate do not include specific language on their effect and do not address their possible impact on claims or outcomes (**Example A**).

16. The design as illustrated in **Example B** contains language that allows States to determine what regulatory measures are appropriate while restating the obligation to ensure that all public policy measures comply with the treaty ("*otherwise consistent with this Chapter*"). The meaning of similar provisions has been subject to debate in some arbitral cases but it has not been recognised as having the same effect as an exception, i.e., by justifying a breach of a treaty obligation.[11] Instead, it is usually interpreted as an element of context to guide the interpretation of treaty obligations.[12]

17. Other treaties contain a reaffirmation of the right to regulate further specifying that the mere fact of changing a law, adversely affecting the investor's expectations, does not amount to a breach of an investment protection obligation, as illustrated in **Example C**.

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8 CETA (2016), art. 8.9(1); EU-Viet Nam IPA (2019), art. 2.2(1). Similar text appears in Argentina-Chile FTA (2017), art. 8.4; EU-Singapore IPA (2018), art. 2.2(1); Canada Model FIPA (2021), art. 3; EU-Chile Interim Trade Agreement (ITA) (2022), art. 10.3; EU-New Zealand FTA (2023), art. 10.1.2; and Modernised ECT (2024), art. 16.

9 USMCA (2020), art. 14.16. Similar text appears in the following agreements: Additional Protocol to Pacific Alliance (2014), art. 10.31.1; CPTPP (2016), art. 9.16.

10 Netherlands Model BIT (2019), art. 2.2. A similar text appears in CETA (2016), arts. 8.9.1 and 8.9.2.

11 *Infinito Gold Ltd. v. Republic of Costa Rica*, ICSID Case No. ARB/14/5, Award, 3 June 2021, paras. 772-780.

12 *Infinito Gold v. Costa Rica*, Award, paras. 777-778.

2.2. Clarifications of specific standards with regards to regulatory measures

18. Various recent treaty provisions contain clarifications of the scope and content of substantive obligations specifying that regulatory measures pursuing a public policy or public welfare objectives do not constitute a breach of said obligation. Such clarifications appear for instance in 'fair and equitable treatment' provisions (2.2.1), 'indirect expropriation' (2.2.2), non-discrimination clauses (2.2.3) and prohibitions of performance requirements (2.2.4).

19. Clarifications have also been included in specific standards with regards to additional legitimate objectives, such as avoiding double taxation,[13] ensuring the stability of the financial system through prudential measures,[14] or the restriction of transfers in the exercise of regulatory powers and the domestic rule of law.[15] These additional clarifications are not addressed here.

2.2.1. In 'fair and equitable treatment' provisions

> Non-discriminatory and non-arbitrary legislative or regulatory measures adopted by either Party to protect general welfare objectives, such as public order, public health, public security, environmental protection and economic policy, and which give an investor of the other Party the same treatment as that accorded to its own investors of third States in like circumstances, shall not be deemed to breach the minimum standard of treatment.[16]

20. 'Fair and equitable treatment' provisions in recent investment treaties feature clarifications with regards to the application of the obligation for, *inter alia*, regulatory measures adopted to protect general welfare objectives. Such measures do not constitute a breach of the obligation to grant 'fair and equitable treatment'.[17]

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13 E.g., EU-Viet Nam Investment Protection Agreement (IPA) (2019), art. 4.4: "Nothing in this Agreement shall be construed as preventing the adoption or enforcement of any measure aimed at preventing the avoidance or evasion of taxes pursuant to the tax provisions of agreements to avoid double taxation or other tax arrangements or domestic fiscal legislation".

14 E.g., EU-Viet Nam IPA (2019), art. 4.5: "Nothing in this Agreement shall be construed as preventing a Party from adopting or maintaining measures for prudential reasons, such as: (a) the protection of investors, depositors, policy-holders or persons to whom a fiduciary duty is owed by a financial service supplier; or (b) ensuring the integrity and stability of a Party's financial system. 2. The measures referred to in paragraph 1 shall not be more burdensome than necessary to achieve their aim".

15 E.g., Canada-Moldova BIT (2018), art. 11: "a Party may prevent a transfer through the equitable, non-discriminatory and good faith application of its domestic law relating to: (a) bankruptcy, insolvency, or the protection of the rights of a creditor; (b) issuing, trading, or dealing in securities; (c) a criminal or penal offence; (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or (e) ensuring compliance with an order or judgment in judicial or administrative proceedings".

16 Argentina-United Arab Emirates BIT (2018), art. 5.4.

17 "*Designs of "fair and equitable treatment" provisions in recent investment treaties: an inventory of additional clarifications*"[DAF/INV/TR2/WD(2024)3/REV1], note by the Secretariat, 29 February 2024.

2.2.2. In 'indirect expropriation' provisions

> [Except in rare circumstances] A non-discriminatory measure of a Party that is adopted and maintained in good faith to protect legitimate public welfare objectives, such as health, safety and the environment, does not constitute indirect expropriation.[18]

21. 'Indirect expropriation' provisions contained in some recent investment treaties feature a clarification according to which non-discriminatory measures pursuing a legitimate public welfare objective do not constitute an indirect expropriation.[19]

2.2.3. In non-discriminatory treatment provisions

> For greater certainty, whether treatment is accorded in 'like circumstances' […] depends on the totality of the circumstances, including whether the relevant treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives.[20]

22. Recent investment treaties provide general methodological guidance on the assessment of whether treatment 'in like circumstances' is accorded, including whether treatment distinguishes on the basis of a legitimate public welfare objective.[21] According to this clarification, no discriminatory treatment can be established if a distinction is made on the basis of a public policy objective. Such methodological guidance appears in both national treatment and most-favoured nation treatment provisions.

2.2.4. In prohibitions of performance requirements

> Provided that such measures are not applied in an arbitrary or unjustifiable manner, or do not constitute a disguised restriction on international trade or investment, paragraphs 1(b) [domestic content requirement], 1(c) [purchase, use, or preference requirements to domestic goods or services], 1(f) [transfer of technology requirement], 2(a) [incitation to domestic content], and 2(b) [incitation to purchase domestic goods or services] shall not be construed to prevent a Party from adopting or maintaining measures:
>
> i. Necessary to secure compliance with laws and regulations that are not inconsistent with this Agreement,
>
> ii. Necessary to protect human, animal or plant life or health, or
>
> iii. Related to the conservation of living or non-living exhaustible natural resources.[22]

23. More rarely, investment treaties include GATT-style clarifications that allow State parties to regulate market access through the imposition of performance requirements to achieve identified public welfare objectives.

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18 This illustrative language was proposed for a discussion of a potential draft for a joint interpretation on 'indirect expropriation'. See, "*Scope of likely agreement on 'indirect expropriation': opportunities to clarify earlier treaties using a Joint Interpretation*" [DAF/INV/TR2/WD(2025)3], note by the Secretariat, 18 March 2025.

19 *Ibid*.

20 CPTPP (2018), art. 9.4 [footnote 14].

21 "*'National treatment' provisions in investment treaties: preliminary examination of recent treaty language*" [DAF/INV/TR2/WD(2025)7], note by the Secretariat, 27 May 2025.

22 USMCA (2018), art. 14.10(3)(c).

2.3. General and security exceptions clauses

24. General and security exceptions clauses[23] usually set a list of legitimate objectives of public interest– such as the preservation of public health, the environment, public order or morals – and a nexus-requirement between a measure and said objectives. There is a great variety of designs in investment treaties that this note does not seek to address.[24] Rather, this section focuses on most frequently observed designs of general (2.3.1) and security (2.3.2) exceptions clauses.

2.3.1. General exceptions clauses

25. There is a growing use of general exceptions clauses in investment treaties since the 2000s[25] that seeks to provide policy space for regulations protecting public health, the environment and other public interests. However, many older investment treaties and a substantial number of recent treaties do not contain a general exceptions clause.[26]

Example A: Incorporation of GATT/GATS style general exceptions clause

For the purposes of Chapter 6 and 8 [Investment], Articles XIV and XIV bis of the GATS are incorporated into and form part of this agreement, *mutatis mutandis*.[27]

Example B: General exceptions clause inspired by GATT/GATS-style exceptions clause

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between covered investments or investors of the other Party and other investments or investors, where like conditions prevail, or a disguised restriction on investment, nothing […] shall prevent the adoption or enforcement by either Party of measures:

a. Necessary to protect public morals or to maintain public order; [Note: The public order exception may be invoked only where a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.]

b. Necessary to protect human, animal or plant life or health; [Note: This exception includes environmental measures necessary to protect human, animal or plant life or health]

c. Necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Chapter, including those relating to: i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on a contract; ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts; or iii) safety;

d. Imposed for the protection of national treasures of artistic, historic or archaeological value; or

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23 Provisions containing general and/or security exceptions are sometimes designated as "non-precluded measures" clauses.

24 A comprehensive study on general exceptions was conducted by the OECD in *"The Future of Investment Treaties – Track 1 Sustainability Cluster. Illustrative case study on goals and challenges in treaty policy – exceptions clauses*" [DAF/INV/TR1/WD(2021)1], note by the Secretariat, 27 October 2021.

25 *Ibid*., para. 13.

26 For example, the Canada Model FIPA (2021) does not contain a general exceptions clause.

27 Japan-India EPA (2011), art. 11.2.

e. Relating to the conservation of living or non-living exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption.[28]

26. As illustrated by **Example A**, some investment treaties directly incorporate GATT or GATS general exceptions clauses *mutatis mutandis*. Other treaties include general exceptions clauses inspired by the structure and design of GATT Article XX, sometimes with minor changes that alter and/or further specify the list of objectives (**Example B**).

27. Arbitral tribunals usually examine the following criteria to determine whether a GATT-style general exceptions clause applies: i) whether the measure pursues one of the objectives listed in the provision, ii) whether it complies with the nexus requirement and iii) whether it meets the conditions set out in the introductory paragraph (i.e., that it does not constitute an arbitrary or unjustifiable discrimination between investments or investors, nor a disguised restriction on international trade or investment).[29] According to recent arbitral practice, the application of a general exceptions clause does not always relieve a State from the obligation to compensate an adversely affected investor.[30]

2.3.2. Security exceptions clauses

Example A: Self-judging security exceptions clause

Nothing in this Agreement shall be construed to [...] preclude a Party from applying measures that it considers necessary for the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[31]

Example B: Non-self-judging security exceptions clause

This Treaty shall not preclude the application by either Party of measures necessary for the maintenance of public order, the fulfilment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.[32]

28. Exceptions for national or essential security interests are either inserted as part of the general exceptions clause[33] or as a stand-alone provision as illustrated in the examples above. Security exceptions clauses usually take inspiration from GATT Article XXI and/or

[28] Australia-Japan EPA (2014), art. 14.15. Similar text appears in Australia-Malaysia FTA (2012), art. 12.18; Australia-Peru FTA (2018), art. 8.18; and Japan-Jordan BIT (2018), art. 15.1. In some cases, general exceptions clauses contain self-judging language inspired by GATT-style security exceptions clauses (e.g., Argentina-Chile FTA (2017), art. 8.19).

[29] *Montauk Metals Inc. v. Colombia*, ICSID Case No. ARB/18/13, Award, 7 June 2024, para. 977.

[30] *Bear Creek Mining Corporation v. Peru*, ICSID Case No. ARB/14/21, Award, 30 November 2017, para. 477; *Eco Oro Minerals Corp. v. Colombia*, ICSID Case No. ARB.16/41, Decision on Jurisdiction, Liability and Directions on Quantum, 9 September 2021, paras. 829-830; *Montauk Metals Inc. v. Colombia*, Award, para. 976.

[31] USMCA (2018), art. 32.2(1).

[32] Argentina-United States BIT (1991), art. XI

[33] India-Japan EPA (2011), art. 11.

GATS Article XIV *bis*. In some cases, security exceptions clauses incorporate the structure of GATT Article XXI but contain a different list of objectives.[34]

29. A distinction is usually drawn between security exceptions that contain a self-judging language (**Example A**) and provisions suggesting that arbitral tribunals can control the necessity of the measure with regards to the legitimate interest invoked by the host State (**Example B**).

[34] CPTPP (2018), art. 29.2.

Acknowledgements

This note was authored by Anne-Charlotte Cervello and Joachim Pohl of the OECD Secretariat (Investment Division).