Organisation for Economic Co-operation and Development

DAF/INV/TR2/WD(2025)11/REV1

Unclassified **English - Or. English**

12 March 2026

DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS
INVESTMENT COMMITTEE

The Future of Investment Treaties – Track 2: Summary of discussions of the meeting of 20 October 2025

Note by the Secretariat

Delegates from 101 jurisdictions were invited to participate in the 14th Track 2 meeting of the OECD work programme on the *Future of Investment Treaties*. The meeting was held on 20 October 2025 in virtual format.

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

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

investment@oecd.org

This work is published under the responsibility of the Secretary-General of the OECD. The opinions expressed and arguments employed herein do not necessarily reflect the official views of the Member countries of the OECD.

JT03582844

This document, as well as any data and map included herein, are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

Future of Investment Treaties (Track 2)
Summary of discussions of the meeting of 20 October 2025

Table of contents

Context, purpose and structure of this note **2**

1. The interaction between investment treaty obligations and the 'right to regulate' **4**

1.1. The definition of and reference to the parties' 'right to regulate' or in investment treaties 4
1.2. Diversity of treaty policies addressing 'right to regulate' in investment treaties 5
1.3. Complementarity of the Track 2 work on the right to regulate with UNCITRAL Working Group III 6

2. Framing the shared understanding of 'indirect expropriation' for a potential joint interpretation: further examination **6**

2.1. Definition of indirect expropriation (paras. 1 and 2) 7
2.1.1. Merits of clarifying the 'effect equivalent' threshold of indirect expropriation measures 8
2.1.2. Textual description of the 'effect equivalent': 'substantial deprivation' 8
2.2. Methodology and relevant factors of an indirect expropriation inquiry (para. 3) 9
2.3. Non-discriminatory measures pursuing legitimate public policy objectives (para. 4) 9

3. Work programme under Track 2 for the 2026-2027 biennium **10**

Context, purpose and structure of this note

1. The OECD has hosted intergovernmental discussions on international investment policies for over six decades. At present, over a hundred jurisdictions from all continents are invited to participate in these conversations, which the OECD Secretariat supports through research. Governments set the agenda and priorities for these conversations.

2. Since 2011, the OECD-hosted investment policy community has intensified its focus on investment treaties, their design and interpretation by treaty users, associated institutional arrangements, and the implications for policymaking. Public attention to these implications has increased in recent years, and many treaties, especially older ones, do not contain more recent drafting approaches.

3. In March 2021, governments decided to set their discussions on investment treaties and treaty policy on a new footing and called on the OECD to host these conversations on the *Future of Investment Treaties* in an inclusive format in two interrelated tracks.

- Track 1 discussions consider the challenges that investment treaties should address in the future as well as desirable changes to current approaches.
- Track 2 is a government-led effort to consider among peers the merits and options for the transition[1] of substantive clauses with outdated design in existing treaties in a pragmatic manner.

[1] The notion of "transition" is used in this note as an umbrella term for any kind of action that seeks to bring older treaty designs more in line with current approaches or improve the outcomes

4. One hundred and one jurisdictions are currently invited to participate in this work programme.[2] In the interest of transparency to the public, the main outcomes of substantial discussions are made publicly available on a dedicated OECD webpage.

5. Since the start of the work in 2021, discussions in Track 2 have shown how several substantive clauses commonly found in investment treaties have evolved. Most jurisdictions apply the new approaches to key clauses with a high degree of consistency.

6. Meetings between 2021 and mid-2025 provided fora to analyse and discuss the evolution of treaty practice with respect to five substantive clauses – fair and equitable treatment (FET), 'indirect expropriation', 'most-favoured-nation' (MFN) treatment obligations, 'full protection and security' (FPS) and 'national treatment' (NT) clauses. Governments have explained their respective motivations underlying new treaty text for these clauses in past Track 2 meetings. **Documents and discussions of substantive issues in the Track 2 discussions do not, by themselves, necessarily constitute all participating governments' official interpretations of provisions and should not be cited as such**.

7. Track 2 participants have also discussed procedural means to address unspecific framings in older agreements without prejudice on future direction. They have in particular discussed the potential of joint interpretations to clarify their intentions in older treaties, and of plurilateral treaty modifications, to change the substance of rights and obligations contained in their older investment treaties.[3]

8. The meeting scheduled on 20 October 2025 continued the exploration of several of these matters. Delegates:

- Explored how the parties' **'right to regulate'** interacts with substantive investment treaty obligations with a view to inform future discussions on the topic in the context of Track 2 (section 1);

of certain treaty clauses in other ways. A "transition" could for instance be achieved through an interpretive instrument, a modification, or an amendment of the text of a treaty.

[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, Czechia, Denmark, Democratic Republic of Congo, 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.

[3] See Secretariat research notes: "*Treaty modification: legal framework and opportunities for investment treaties*" [DAF/INV/TR2/WD(2024)8/REV2] and "*Design options for a plurilateral agreement to modify 'fair and equitable treatment' provisions in investment treaties*" [DAF/INV/TR2/WD(2024)9/REV2]; and the Summary of discussions of the meeting of 5 November 2024 [DAF/INV/TR2/WD(2024)10/REV2].

- Pursued their exploration of how a **shared understanding of 'indirect expropriation' obligations** could be textually framed for a potential joint interpretation among interested jurisdictions (section 2); and
- Agreed on the **priorities for Track 2 work** for the 2026-2027 biennium (section 3).

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

9. Track 2 participants have often stressed that ensuring that their 'right to regulate' is properly reflected and accounted for in the drafting of treaty obligations has been an important factor underlying the evolution of the design of many investment treaty obligations in their recent treaty practices.[4] Discussions focused on specific substantive standards and how their newer designs better reflect the parties' right to regulate. Participants called however for a broader discussion on how investment treaty obligations interact in general with treaty parties' 'right to regulate', noting the emergence of express language in recent investment treaties that expressly address the interactions.

10. To identify participants' specific interests and determine potential avenues of Track 2 work on the topic of 'right to regulate', the Secretariat prepared a preliminary scoping paper [DAF/INV/TR2/WD(2025)10] that provided initial reflections on the notion of governments' 'right to regulate' and a preliminary typology of provisions and specifications observed in recent investment treaties that address 'right to regulate'.

11. Discussions focused on three issues:

- The notion of 'right to regulate', and whether to include a provision on 'right to regulate' in investment treaties (section 1.1);
- The diversity of policy approaches in recent investment treaties that address the interactions of investment treaty obligations with parties' right to regulate' (section 1.2); and
- The complementarity of this work with the work conducted by the UNCITRAL Working Group III on ISDS reform (section 1.3).

1.1. The definition of and reference to the parties' 'right to regulate' or in investment treaties

12. Delegates noted the Secretariat's presentation in which several clarifications were made. In particular, the Secretariat stressed that the 'right to regulate' in customary international law lacked a formal legal basis and that, while a few legal instruments could be understood as potential indicators of the existence and meaning of the right to regulate in customary international law, their connexion to the right to regulate had never been clearly established by international courts or tribunals. In this regard, a few delegations noted that it would be useful to have more insights on legal sources of the right to regulate in customary international law.

[4] See, *e.g.,* for 'indirect expropriation': Summary of discussions – October 2021 and April 2022; for FET: Summary of discussions – March 2024; for MFN: Summary of discussions – February 2024; and for 'national treatment' (NT): Summary of discussions – June 2025 [DAF/INV/TR2/WD(2025)9/REV1].

13. Some delegates indicated an explicit reference to the 'right to regulate' in investment treaties was useful. They confirmed the complementarity between such explicit reference and the ongoing work of clarification of substantive provisions undertaken since the beginning of the Track 2 process, noting that better delimited obligations inherently contribute to preserving the right to regulate. Delegates also highlighted that a combination of approaches should be employed to achieve this objective.

14. Delegates explained that the inclusion of 'right to regulate provisions' in investment treaties aims to provide greater legal certainty and clarity for both investors and states, and ensuring an appropriate balance between investment protection and the sovereign right to adopt measures pursuing national policy objectives.

1.2. Diversity of treaty policies addressing 'right to regulate' in investment treaties

15. Many delegates confirmed that their jurisdiction typically includes a **reaffirmation of the right to regulate** in the preamble and/or as part of stand-alone provisions in their recent investment treaties. These reaffirmations are described as an *interpretive guidance* for arbitral tribunals in the analysis of substantive obligations rather than an exception to investment protection obligations.

16. Delegates exchanged around the variety of designs relating to the 'right to regulate' in investment treaties:

- Some delegates indicated a preference for reaffirming the right to regulate in a stand-alone provision rather than in the preamble. When set out as a stand-alone provision, such reaffirmation is typically placed ahead of substantive obligations to ensure its visibility to, and consideration by, arbitral tribunals in the interpretation and application of treaty provisions.
- Other delegates found useful to further clarify that the mere fact that a Party regulates in a manner that interferes with an investor's expectation does not amount to a breach of the treaty.
- Finally, a few delegates use language that allows States to determine what regulatory measures are appropriate while restating the obligation to ensure that all policy measures comply with the treaty ("*otherwise consistent*" with treaty obligations).

17. Likewise, most delegations confirmed that **clarifications of substantive standards with regard to regulatory measures** form part of their recent treaty practice. In this context, some delegations emphasised the importance of the interaction between a right to regulate provision and clarifications of substantive obligations. Several delegations further observed that mere reaffirmations of the right to regulate, while important to express the treaty parties' intent, have limited practical effect if not coupled with provisions that offer specific guidance on how to balance the right to regulate with investment protection obligations.

18. To a lesser extent, a few delegations confirmed that they have included **general exceptions** in their recent investment treaties as an additional tool to preserve policy space for regulatory measures. In particular, they noted that further clarification may be needed regarding the consequences of the application of general exceptions – specifically with respect to State liability and the obligation to compensate adversely affected investors – in order to address how investment treaty tribunals have interpreted such provisions in recent arbitral awards.

19. Some delegations expressed an interest in further work on how arbitral tribunals analysed clarifications incorporated into substantive standards and reaffirmations of the right to regulate, whether contained in preambles or in stand-alone provisions. They also indicated an interest in examining how 'right to regulate provisions' interact across different substantive provisions and in comparing the interpretive techniques adopted by tribunals in this context.

1.3. Complementarity of the Track 2 work on the right to regulate with UNCITRAL Working Group III

20. The Chair invited the UNCITRAL Secretariat to introduce the work undertaken by the Working Group III on the right to regulate. The UNCITRAL Secretariat explained that the Working Group had identified the right to regulate as a cross-cutting issue, given its hybrid nature between substantive and procedural aspects. During the initial discussions on this topic in April 2025, delegations expressed divergent views on whether the right to regulate should be discussed at UNCITRAL. While some delegations supported its inclusion to address concerns related to 'regulatory chill', others considered that the matter should not be discussed in this forum due to its close connection with substantive obligations. Reference was also made to the ongoing Track 2 work at the OECD, which a number of delegations identified as the more appropriate forum for consideration of this issue. An informal discussion on draft provisions addressing the right to regulate will take place at the intersessional meeting scheduled in early November 2025.

21. At the Track 2 meeting, some delegates said they believe there is complementarity between the work undertaken by UNCITRAL Working Group III – whose mandate focuses on procedural aspects and ISDS – and the ongoing OECD Track 2 work on 'right to regulate'. They further encouraged continued collaboration among both organisations on this shared issue. Some delegates expressed their support for the continuation of the work on the right to regulate and its relationship with substantive provisions at the OECD. They also considered that the issues of liability arising from breaches of substantive standards, as well as compensation, are issues of a substantive nature and should be continued at the OECD.

2. Framing the shared understanding of 'indirect expropriation' for a potential joint interpretation: further examination

22. At the 17 June 2025 meeting, Track 2 participants discussed whether their shared understanding of 'indirect expropriation' obligations could be expressed textually, and whether to develop a potential joint interpretation of older treaties among interested jurisdictions. Delegates discussed a preliminary textual outline – as set out in DAF/INV/TR2/WD(2025)3 – comprised of four core elements that many governments use in their recent investment treaties to specify the scope and content of 'indirect expropriation' obligations.

23. Several delegations highlighted the merits of clarifying indirect expropriation obligations in older treaties, considering that some arbitral tribunals have at times interpreted treaties that lacked specifications on the content of related obligations in ways that did not correspond to treaty parties' intent or that unduly limited their regulatory leeway to adopt measures pursuing legitimate public policy objectives.

24. Delegates generally expressed the view that the four core elements put forward in the Secretariat's note broadly reflected their recent treaty practices with respect to indirect

expropriation and exchanged views on the specific textual framings for a potential joint interpretation illustrated in the note. Based on the discussions and comments expressed by delegates – as summarised in DAF/INV/TR2/WD(2025)9/REV1, a revised textual outline was subject to discussions in the 20 October meeting set out in the Secretariat's research note "*Framing the shared understanding of 'indirect expropriation' obligations for a potential joint interpretation: further examination*" [DAF/INV/TR2/WD(2025)3/REV1].

25. The note contained preliminary findings on recent investment treaty practices and on experience with treaty use and interpretation on 'indirect expropriation' to inform delegates' considerations of the rationale and potential benefits of the textual adjustments. An Addendum DAF/INV/TR2/WD(2025)3/REV1/ADD compiled relevant excerpts from case-law and related material on the interpretation of 'indirect expropriation' referred to in the note for delegates' ease of reference.

26. Discussions at the 20 October meeting mostly focused on two core elements of the revised textual outline:

- The definition of 'indirect expropriation' measures, specifically on the inclusion of a clarification on the degree of interference of a measure with an investor's property rights required for it to amount to an indirect expropriation (**section 2.1**); and
- The inclusion of methodological guidance for, and relevant factors of an indirect expropriation inquiry (**section 2.2**).

27. Due to time constraints, discussions of the fourth textual component with respect to the inclusion of a clarification on the extent to which non-discriminatory measures pursuing legitimate public welfare objectives do not constitute indirect expropriation (the 'police powers' doctrine) were postponed for the next Track 2 meeting tentatively scheduled in 2026Q1 (**section 2.3**).

2.1. Definition of indirect expropriation (paras. 1 and 2)

~~2~~ 1 A~~n action~~ measure or a series of ~~actions~~ measures cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

~~1~~ 2 An indirect expropriation is a~~n action~~ measure or a series of ~~actions~~ measures by a Party that has an effect equivalent to a direct expropriation in that it substantially deprives the covered investor of the fundamental attributes of property in its covered investment, including the right to use, enjoy and dispose of its covered investment, without formal transfer of title or outright seizure.

28. The first elements of the initial draft outline defined which measures constitute an indirect expropriation. It framed 'indirect expropriation' as a measure that has an 'effect equivalent' to direct expropriation, as most investment treaties in recent years have done. During the last Track 2 meeting, some delegates requested to include additional textual elements clarifying this definition. Some delegates considered that it could specifically benefit from a clarification on the degree of interference of a measure with an investor's property rights to be considered as having an 'effect equivalent' to a direct expropriation.

29. Delegates broadly convened on the merits of clarifying the 'effect equivalent' threshold (section 2.1.1) and on the definition of the 'effect equivalent' as requiring a 'substantial deprivation' of an investor's fundamental attributes of property in its investment (section 2.1.2).

2.1.1. Merits of clarifying the 'effect equivalent' threshold of indirect expropriation measures

30. The Secretariat research note DAF/INV/TR2/WD(2025)3/REV1 found that clarifications of the 'effect equivalent' of indirect expropriation measure have been featured with increasing frequency in treaties concluded over last ten years. A preliminary overview of case-law also suggests that tribunals have by and large considered whether a measure or a series of measures amounted to a 'substantial deprivation' of an investor's fundamental rights of ownership to determine whether an indirect expropriation had occurred. The revised textual outline incorporated the most common textual description that recent investment treaties use to clarify the 'effect equivalent' of an indirect expropriation measure.

31. Several Track 2 participants considered that the clarification included in the revised textual outline reflected customary international law rules regarding the threshold required for a measure or a series of measures to constitute an indirect expropriation and supported its inclusion in a potential joint interpretation of older investment treaties.

32. One jurisdiction noted that, while it appreciates the efforts many governments have made to clarify the 'effect equivalent' threshold in their recent treaties, it has not incorporated a similar textual specification in its own recent investment treaty practice. The jurisdiction explained that for now, it considers that the 'effect equivalent' language should sufficiently convey the high threshold intended. It also expressed concerns that the placement of a clarification of the 'effect equivalent' could lead to potential misinterpretations by treaty users as introducing a separate, distinct test from the multi-factor test that an indirect expropriation inquiry should follow (especially with respect to the assessment of the economic impact of the measure as a relevant factor to be considered), as set out in the following paragraph 3 of the draft outline.

2.1.2. Textual description of the 'effect equivalent': 'substantial deprivation'

33. Track 2 participants by and large convened that the description of the effect equivalent threshold incorporated in the revised textual outline as requiring a 'substantial deprivation' of an investor's fundamental attributes of property in its investment reflected customary international law rules in this respect.

34. One jurisdiction questioned whether it would be preferable to refer textually to a 'radical' rather than to the 'substantial' deprivation. In its view, while both expressions appeared to be relatively similar, the adjective 'radical' could potentially convey more accurately the threshold, as requiring that an investment be interfered with to such an extent that the investor's property rights are rendered useless as a result of the measure or series of measures. The Chair noted in this respect that the case-law and recent treaty practice more commonly refer to a 'substantial deprivation' of an investor's property rights to reflect the threshold of indirect expropriation under customary international law.

35. One jurisdiction, while noting that the 'substantial deprivation' appears to be the most common textual description of the threshold required for a measure to have an effect equivalent to a direct expropriation, questioned whether it accurately reflected all indirect expropriation scenarios, in particular the case where a measure or a series of measures result in the loss of all or virtually all of an investment's value. The jurisdiction requested that further work be conducted by the Secretariat to support governments' reflections on the implications of this textual description in a potential joint interpretation.

2.2. Methodology and relevant factors of an indirect expropriation inquiry (para. 3)

3	The determination of whether a measure or series of measures constitutes an indirect expropriation requires a case-by-case and fact-based inquiry, that considers, among other factors: i. the economic impact of the measure or series of measures, although the sole fact that a measure or series of measures has an adverse effect on the economic value of an investment does not establish that an indirect expropriation has occurred; ii. the character of the measure or series of measures; iii. the duration of the measure or series of measures; iv. the extent to which the measure or series of measures interferes with distinct, reasonable investment-backed expectations.

36. Track 2 delegates convened that the duration of a measure or series of measures is aa relevant factor of an indirect expropriation inquiry, and convened that the clarification on the assessment of the economic impact of a measure – as included in the revised draft outline – reflected their understanding and recent treaty practices.

37. Two delegations considered whether it could be useful to include additional clarifications with respect to the factors listed in the draft outline of paragraph 2, notably with respect to the consideration of the **duration** and of the **character** of the measure in the context of an indirect expropriation inquiry, to provide additional guidance on what these assessments entail specifically and to reflect governments' common understanding.[5]

2.3. Non-discriminatory measures pursuing legitimate public policy objectives (para. 4)

4	For greater certainty, ~~[E~~ except in rare circumstances~~]~~ – such as when the impact of a measure or a series of measures is so severe or disproportionate in light of its purpose that it cannot be reasonably viewed as having been adopted in good faith – ~~A~~ 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.

38. At the previous Track 2 meeting, delegates generally supported the addition of the guidance on whether non-discriminatory measures pursuing legitimate public policy objectives may constitute indirect expropriation, and expressed diverse views on its textual description in a potential joint interpretation.

39. The revised paragraph 4 incorporated two changes that were suggested by delegates during the previous meeting:

- **Inclusion of textual indicators of the guiding intent of the provision** ('*for greater certainty*' and '*except in rare circumstances, such as…*'). Track 2 participants that have used this specification in their recent investment treaties confirmed – in the last meeting and in previous meetings – that the provision is meant as guidance to tribunals, rather than as an *exception,* and is intended to be read in conjunction with the preceding paragraph setting the general methodology and relevant factors for an indirect expropriation inquiry.

[5] In this respect, the Secretariat's note DAF/INV/TR2/WD(2025)3/REV1 provided some issues for discussion on possible additional clarifying elements on the relevance of the *duration* of the measure and on the *character* of the measure in the context of an indirect expropriation inquiry.

- **Further clarifications on the assessment of whether a measure constitutes a valid exercise of 'police powers'**. At the previous meeting, Track 2 participants noted that while good faith appears to be a common factor in this assessment, they questioned how it relates to the proportionality assessment that tribunals have by and large conducted in this respect. The revised paragraph 4 included an illustration – based on many jurisdictions' recent treaty practices – of how a manifest lack of proportionality could be an indicator of lack of good faith in the assessment of whether a measure constitutes a valid exercise of police powers.

40. Delegates were invited to exchange views on the factors that their jurisdiction considers to be relevant to assess whether a non-discriminatory measure pursuing legitimate public policy objectives was adopted and maintained in good faith; and whether the revised textual outline expressed their jurisdiction's understanding of the relevance of the proportionality of a measure in this respect. Due to time constraints, discussions of this fourth textual component of a potential joint interpretation on 'indirect expropriation' were postponed to the next Track 2 meeting tentatively scheduled in 2026Q1.

3. Work programme under Track 2 for the 2026-2027 biennium

41. Delegates generally expressed their satisfaction with the content of the work programme for the 2026-2027 biennium [DAF/INV/TR2/WD(2025)8/REV3]. Particularly, some expressed interest in exploring convergence among participants on a set of substantive provisions in a potential plurilateral joint interpretation, while expressing their support for the exploration of additional issues such as the definition of investor and investment. Delegates also expressed an interest in further examining the interaction of investment treaties with the right to regulate.

42. Delegates also encouraged continued cooperation between the OECD and UNCITRAL in advancing reforms to the investment protection system. They recognised the value of engaging with potentially interested jurisdictions through regional outreach, recalling that the inclusivity of the Track 2 work programme was key to ensure meaningful outcomes.