The Future of Investment Treaties
Track 2

# Summary of Discussions of the Future of Investment Treaties Track 2 - meeting of 13 April 2022

Note by the OECD Secretariat

This note summarises discussions held between treaty experts during the meeting under Track 2 of the work programme on the *Future of Investment Treaties* that took place on 13 April 2022 in a virtual format.

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## 1. About this document

1. The OECD has hosted intergovernmental discussions on international investment policies for over six decades. Today, almost 100 jurisdictions from all continents are invited to be part of these conversations, which the OECD Secretariat (Secretariat) supports through independent research. Governments set the agenda and priorities for these conversations.

2. Since 2011, this broad policy community has intensified its focus on investment treaties, their design and interpretation by treaty users, associated institutional arrangements, and the resulting implications for policymaking writ large. Concerns about these implications have grown rapidly in recent years, especially as: treaties are being used to challenge public policy measures to address the climate crisis or other policy measures widely considered legitimate; courses and outcomes of disputes document unintended interpretations and uses of treaties; and important aspects that could be usefully agreed in investment treaties and would likely lead to overall better outcomes are not addressed.

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

- Track 1 is concerned with a broader dialogue about the objectives that investment treaties could usefully fulfil and which content they would need to have to achieve these objectives, focusing, initially on treaties and climate change.
- Track 2 is a government-led effort to consider among peers the merits and options for the adjustment of existing treaties in respect of specific substantive provisions, and whether it would be better if specific substantial provisions used in the large number of earlier treaties should resemble more recent designs of such clauses that are now consistently used, and if so, how this could be achieved.

4. This work programme has an initial duration of two years. Inaugural meetings of work under the two tracks took place in virtual format on 27-29 October 2021, bringing together treaty experts and policy makers from a large number of jurisdictions. It was agreed that in the interest of transparency to the public, the main traits of the substantial discussions would be made publicly available through a dedicated OECD webpage (https://www.oecd.org/investment/investment-treaties.htm). A second meeting of work under both Tracks 1 and 2 took place on 12-13 April 2022. Further meetings are tentatively scheduled to be held on 29-30 November 2022 and April and November 2023.

5. The present document contains the main elements of discussions of the meeting under Track 2 that was held on 13 April 2022. The summary was prepared by the Secretariat, and participating governments have had an opportunity to comment on the draft. The summary follows the structure of discussions as indicated immediately below. It includes some insights and data from a Secretariat research note (*The notion of 'indirect expropriation' in investment treaties concluded by 88 jurisdictions*, DAF/INV/TR2/WD(2021)2) that supported the discussions at the meeting. The interventions noted in the present document do not necessarily represent official government views nor those of the OECD.

## 2. Rationale underlying conversations under Track 2 and overview of discussions of the Track 2 meeting of 13 April 2022

6. The meeting began with a short summary of the rationale underlying the work under Track 2, delivered by the Chair, who opened the meeting by welcoming all participants and more particularly new non-OECD jurisdictions that accepted the OECD's invitation to participate in the Track 2 Project. The Chair highlighted the timely nature of the meeting, as numerous governments are presently engaged in significant policy discussions, including with respect to the need to regulate in important fields such as health policy and climate change.

7. The OECD Secretariat then recalled the background to the Track 2 work programme, noting that investment treaties have been an essential component of many countries' investment policies for the past half-century. In more recent years, doubts emerged in some jurisdictions regarding the design of older treaties and particular clauses contained therein, as well doubts regarding their interpretation and their use, and the relationship of these treaties with policy space and governments' right to regulate. Considerations are now being raised as to how investment treaties can be used to address challenges such as climate change and public health, amongst others.

8. The Chair recalled that the meeting had several objectives:

- To delve further into substantive considerations raised during the Track 2 meeting held on 28-29 October 2021 on indirect expropriation and for which several delegates expressed interest to explore further.[1] These were, the interaction between "indirect expropriation" clauses and the right of governments to regulate in the public interest. To support and enrich discussions, international investment and international law experts were invited to speak in a non-government specific session to shed light on this interplay, and to consider different aspects of the notion of indirect expropriation, especially in relation to distinguishing between compensable expropriation and a non-compensable exercise of governments' right to regulate. Indeed, the Secretariat's study confirmed that older style investment treaties do not generally provide guidance on the interpretation of "indirect expropriation" clauses and on how more specifically the boundaries between an expropriation and an exercise of a state's right to regulate should be determined.
- To discuss and exchange practice experiences on current approaches as to how "indirect expropriation" clauses are dealt with in investment treaties.

9. The overall objective of the meeting was to conclude on preliminary conclusions on "indirect expropriation" clauses and for governments to share their views on the potential next steps of the Track 2 work programme and available options for government action throughout 2022 and 2023.

[1] The summary of the meeting under Track 2 held on 28-29 October 2021 is available at DAF/INV/TR2/WD(2021)3.

## 3. The interaction between "indirect expropriation" clauses and the right of governments to regulate in the public interest

10. By way of background, the Chair recalled that the statistical note prepared by the Secretariat and presented at the Track 2 meeting held on 28-29 October 2021 highlighted that more recent treaties with clarified clauses on "indirect expropriation" provided for specific references to non-discriminatory measures taken in good faith to regulate in the public interest. These clauses largely exclude such measures from the scope of what could be conceived as an indirect expropriation. Further, many of these more recent treaties allow for exceptions "in rare circumstances". In response to the interest of several delegates as expressed during the inaugural Track 2 meeting to explore these substantive issues in further detail, the Secretariat has called upon three experts with different areas of expertise and hailing from different legal traditions, to address technical aspects of the question between the interplay between the right to regulate and indirect expropriation. The speakers aligned with the findings of the Secretariat's empirical study, namely, that expropriation provisions in older generation investment treaties are characterised by their vagueness. They each presented ideas and proposals as to how states could remedy to this uncertainty and unpredictability by better framing and clarifying clauses for "indirect expropriation" in reference to the interplay between investor rights and the right to regulate. The presentations by the three guest speakers subsequently prompted substantive discussions among governments on the question of the interaction between "indirect expropriation" clauses and the right of governments to regulate in the public interest.

11. In a first presentation, **Professor Dr. Yannick Radi**[2] specifically considered the police powers doctrine to shed light on the interplay between "indirect expropriation" and the right to regulate. A central question to this interplay is the extent and circumstances in which states can adopt *bona fide* regulatory measures (that is, regulatory measures that aim at the protection of the public interest, that are non-discriminatory and that respect due process), thereby exercising their sovereign right to regulate, without these measures being considered as a compensable indirect expropriation.

12. Professor Radi highlighted that this question raises another one – namely, how to identify instances of "indirect expropriation". States and arbitral tribunals, in their interpretation and application of investment treaties, have increasingly relied on the police powers doctrine, which is often opposed to the sole effect doctrine. Where the former considers the overall objective of a measure to ascertain whether indirect expropriation can be established, the latter can be said to focus on the effect of a said measure.

13. Professor Radi exposed the two main approaches to the police powers doctrine, as developed in arbitral and treaty practice. A first approach considers that *bona fide* regulatory measures should never be considered expropriatory, regardless of their impact on investors. A second (nuanced) approach considers that *bona fide* regulatory measures should not be considered expropriatory unless they have an impact too severe on the investment in light of the purpose of the said measure. He noted further that both approaches have been declared to form part of customary international law in arbitral practice. In that regard, he highlighted the risks associated with "indirect expropriation" clauses loosely referring to customary international law without further specification, as

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[2] Professor Dr. Yannick Radi is currently Professor of Public International Law at the University of Louvain (Belgium) and Guest Professor of International Investment Arbitration at Sciences Po Law School in Paris (France). His fields of research include international arbitration, international investment law, sustainable development as well as business & human rights.

this leaves the determination of its content in the hands of arbitral tribunals in ways that are not necessarily in line with the original intent of the parties to investment treaties.

14. Finally, Professor Radi put forward a number of ideas and proposals, which he indicated could be considered by governments when adjusting existing treaties and considering their treaty practices, to be used individually or in combination. As a preliminary remark, he first outlined that the above-mentioned nuanced approach of the police powers doctrine adds little to current practice from a legal point of view; indeed, he explained that under the expropriation provisions which are typical of the old generation of investment treaties, *bona fide* regulatory measures are already considered as indirect expropriations only if they have a severe impact on investments. Furthermore, Professor Radi noted that the nuanced approach of the police powers doctrine places too much of an emphasis on the impact of a measure without reference to other relevant elements. He referred for instance to investors' due diligence and investors' expectations, to be taken into consideration in relation to the meaning of property rights and the definition of investment.

15. For this reason, Professor Radi recommended another approach, one which would explicitly provide and directly refer to fundamental considerations to be taken into account in a factual case-by-case enquiry to ascertain the existence of an "indirect expropriation". Such considerations include the notion that property rights are inherently limited; that business risk is inherent to the notion of investment; that investors have due diligence obligations with regard to their investment; and that their expectations must be reasonable. Professor Radi stressed that explicit lists of such considerations should be incorporated into treaty practice because a mere reference to the context is according to him too vague.

16. In a second presentation, **Professor Dr. Shotaro Hamamoto**[3] presented on the specific case for including an obligation on "indirect expropriation" in investment treaties. Professor Hamamoto presented an overview of recent arbitral practice that provided and/or refined definitions of the notion of "indirect expropriation" in the context of specific investment treaties, noting that in some instances, the decisive element of the definition and interpretation of an "indirect expropriation" clause has been the effect of a particular regulatory measure. In that regard, he emphasised that the question of transfer of property title is central in understanding the notion of direct expropriation.

17. Professor Hamamoto further added that in his view, framing the notion of "indirect expropriation" only in terms of its effect on investment might be problematic, noting that "direct expropriation" involves an effective seizure and transfer of title of the investment or property to the state, which subsequently calls for compensation of the investor.

18. In instances of "indirect expropriation" however, Professor Hamamoto noted that regulatory measures – which either substantially deprive the investor of its investment and/or do not enrich the state – do not raise transfer-of-title considerations. This begs the question, according to him, of the effective basis for compensation. In other words: is it possible to compel states to pay compensation to investors in instances of "indirect expropriation" where there is no transfer of title?

19. In this regard, Professor Hamamoto indicated that arbitral tribunals have, in instances where "indirect expropriation" was established, also found states liable for breaches of international law obligations, most frequently the 'fair and equitable' standard,

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[3] Professor Dr. Shotaro Hamamoto is currently Professor in the Graduate School of Law of Kyoto University (Japan). He teaches on the Law of International Organisations and International Law. His fields of research include international investment law, international dispute settlement, the law of the sea and institutional law of the European Union.

with a view to establish a basis for compensation to the investor. Professor Hamamoto's research has concluded that arbitral tribunals have considered that unlawful elements were crucial to a finding of "indirect expropriation"; and that the concept of "indirect expropriation" was historically developed in instances where recourse to the 'fair and equitable' standard of treatment was not available.

20. To conclude, Professor Hamamoto suggested that there is not, in his view, any added value in investment treaties providing for "indirect expropriation" clauses in instances where a 'fair and equitable' protection is provided therein; but that a case does exist for providing a detailed expropriation clause, specifically referring to the legitimate regulatory powers of the state, in instances where a 'fair and equitable' treatment clause would be absent from an investment treaty.

21. In a third and final presentation, **Dr. Caroline Henckels**[4] presented on the judicial technique of proportionality testing in the context of indirect expropriation. By way of introduction, Dr. Henckels recalled the different approaches to "indirect expropriation" that have emerged in arbitral practice, as evoked by Professor Radi in his presentation, and suggested a third approach which takes both the purpose and effect of a measure into consideration. Dr. Henckels indicated that while no approach prevails in arbitral practice, recent arbitral decisions have generally evidenced a greater tendency to take into consideration the purpose of a measure as well as its effect, referring to the need for measures to achieve a balance between state and investor interests.

22. In that respect, Dr. Henckels pointed to the fact that a number of tribunals refer to the judicial technique of 'proportionality testing' in evaluating the relationship between the purpose of a measure and its effect on an investor. This technique was particularly applied in respect of older style treaties that do not specify what an "indirect expropriation" entails. While there is no single approach to 'proportionality testing', Dr. Henckels presented the four traditional elements of the test: the legitimacy of a measure; its suitability with respect to the desired objective; an element of necessity; and a balancing exercise between competing interests to determine whether a measure's impact is proportionate to the gain that the measure seeks to achieve. As per this approach, an exercise of police powers by a State is not deemed an "indirect expropriation" unless the measure has a disproportionate effect on the investor. Dr. Henckels favours this approach compared to earlier approaches that focused solely on a measure's effects, with no consideration to the objective of the regulatory measure.

23. Nevertheless, a certain degree of uncertainty and unpredictability remains as the reasoning of arbitral tribunals and their application of this test has to date been methodologically inconsistent, as it allows arbitral tribunals to use their discretion in carrying out the balancing exercise of deciding on the importance of a regulatory measure against the competing interests of an investor. In Dr. Henckels' view, this could result in the substitution of a tribunal's own views for those of the relevant national authorities. As such, the proportionality technique has garnered criticism for permitting an overly intrusive assessment of the autonomy of States in the context of investment dispute. Dr. Henckels noted that such criticism raises questions as to the appropriate degree of deference that tribunals should afford to States, and the role of States as treaty makers in setting the appropriate standard of review, as indeed there is scope for investment treaties to provide further guidance to tribunals in this regard.

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[4] Dr. Caroline Henckels is currently Associate Professor in the Faculty of Law at Monash University, Australia). She researches in the areas of public international law, with a focus on international economic law, international investment law and comparative public law.

24. In that respect, Dr. Henckels proposed some guidance for States to consider as to the framing of 'proportionality testing' in their treaty practice. She suggested for example excluding the balancing stage of the test; or clarifying that only a manifest lack of proportionality renders a measure expropriatory (as is done in some of newer treaties, with wording such as "must be so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith" or "extremely severe or disproportionate in light of its purpose" of "so severe in light of its purpose that it appears manifestly excessive"). Such clarifications would provide guidance to tribunals as to the appropriate standard of review. Alternatively, Dr. Henckels suggested that "indirect expropriation" clauses do without proportionality testing, by providing those measures designed and applied to protect legitimate public welfare objectives are never held to be expropriatory (this approach was also evoked by Professor Radi).

25. Treaty experts and delegates thanked the speakers for their insightful and informative presentations and guidance, and the Secretariat for arranging for these presentations. A number of delegates also followed-up on the speakers' interventions with questions to refine their understanding of the issues at hand, thereby further enriching the discussions.

26. One treaty expert enquired whether Professor Hamamoto's proposal to do without "indirect expropriation" clauses in instances where treaties provide for a fair and equitable treatment (FET) clause applied regardless of the scope of such clauses, or only in instances where FET clauses are broad (as opposed for example to circumscribed "minimum standard of treatment" provisions). Professor Hamamoto confirmed that his assessment applied to all types of fair and equitable clauses except where these explicitly exclude protection of legitimate expectations. He noted where FET clauses lacked clarity, "indirect expropriation" clauses should be maintained.

27. On the question of "rare circumstances", a delegate noted that only few references to such a specification are provided in treaty language and arbitral practice. In this context, the delegate queried as to the extent to which treaty language could influence interpretation of expropriation provisions in the context of treaty disputes. Dr. Henckels indicated that no decision has yet considered proportionality testing under the "rare circumstances" prism. She further noted that there existed no references to necessity testing in the context of expropriation, again highlighting the risk that the analysis could also open the door to more balancing and potential intrusiveness by tribunals.[5] To conclude, Dr. Henckels again stressed that any proportionality testing should be accompanied by a culture of deference, and that tribunals are increasingly adopting a deferential approach in looking at State measures.

28. Another jurisdiction queried as to the necessity of treaties providing for "indirect expropriation" clauses as this standard may raise tensions and inconsistencies with other standards of treatment, including FET and the right of governments to regulate in the public interest. Professor Radi shared some thoughts in respect of treaties that prohibit illegal "indirect expropriation" while stating that non-discriminatory regulatory measures to protect the public interest are not expropriatory. He noted that those treaties that do not contemplate exceptions for regulatory measures having an impact too severe on investments in light of their purpose may be seen as being inconsistent with the law of "indirect expropriation", depending on how "indirect expropriation" is construed. Professor

[5] On that point specifically, a jurisdiction later noted that one of its recently concluded investment treaties did in fact combine necessity and proportionality testing.

Radi suggested that State parties should consider this matter, to avoid tribunals potentially interpreting treaties in a manner inconsistent with the original intent of the treaty parties.

29. On that point, a jurisdiction offered a diverging point of view, noting that there is in fact no inherent conflict between the right to regulate and indirect expropriation, as the former is *per se* limited in international treaties, further noting that "expropriation" and "indirect expropriation" are not prohibited under treaties, but rather, allowed subject to compensation.

30. Another jurisdiction lent favour to Professor Hamamoto's view not to include "indirect expropriation" clauses in treaties, adding that the right to regulate is a sovereign right that tribunals ought to consider when ascertaining "indirect expropriation". Nevertheless, the delegate also recognised the added benefit of this standard of protection for investor rights and noted that such an approach could undermine the original intent of parties and the purpose of investment treaties. Professor Radi highlighted in that regard that while the right to regulate is indeed a sovereign right, it is in the interest of States to clarify what the content of *customary international law* is with respect to the interplay between the notion of "indirect expropriation", the right to regulate and the police powers doctrine.

31. On the question of the inconsistency of interpretation and application of standards of protection and judicial techniques, one jurisdiction noted that the jurisprudence of the European Court of Human Rights could provide guidance, namely with respect to proportionality testing.

## 4. Current approaches as to how "indirect expropriation" is dealt with in investment treaties

32. Discussions between governments then turned to current approaches as to how "indirect expropriation" is currently dealt with in investment treaties. To begin, the Chair recalled that at the October 2021 meeting, treaty experts and delegates presented and shared their insights on the framing of the notion of "indirect expropriation" in their respective treaty practices.

33. The Secretariat briefly summarised the current main treaty practices to "indirect expropriation" clauses, explaining that these insights emerged from the statistical descriptions carried out and presented by the Secretariat at the October 2021 meeting and from jurisdictions' presentations on their respective treaty practices and discussions resulting therefrom. To recall, the statistical analysis highlighted a steady move over the past two decades towards the inclusion of clarifications to the notion of "indirect expropriation" in investment treaties. The use of such clarified clauses has been an almost universal practice in newer treaties, with many countries applying this practice consistently over several years. Discussions among governments at the October 2021 meeting and the presentations by a number of jurisdictions on their respective treaty practices highlighted the common intent of jurisdictions to clarify the notion of "indirect expropriation" on the one hand, and the similarity in the textual means to achieve this objective on the other.

34. The Secretariat advanced that its analysis brought to light *four main approaches* in current treaty practice that governments employ to manage the scope of "indirect expropriation" clauses:

- First: a non-discriminatory regulatory measure in the public interest is not an "indirect expropriation" under defined conditions, "except in rare circumstances";
- Second: the above approach combined with a reference to customary international law;
- Third: a set of conditions that entirely exclude that a non-discriminatory regulatory measure in the public interest constitutes an "indirect expropriation"; and
- Fourth: excluding "indirect expropriation" from the scope of the treaty protections entirely.

35. The Secretariat highlighted that there has been a shift from earlier designs to new approaches, based on a shared intent to clarify the notion of "indirect expropriation". The solutions or approaches that governments have adopted to achieve the objective of clarifying what protections they offer under the notion of "indirect expropriation" are in fact fairly similar, and they cover all treaties in the observed sample.

36. The Chair invited delegates to react and provide their insights on the framing of these approaches, and in particular to consider two questions, namely: do one or several of these designs of "indirect expropriation" clauses correspond to a specific jurisdiction's treaty practice; and do other approaches exist which would require specific mention in addition to the four identified designs?

37. Treaty delegates commended the Secretariat on its work, its effective summary of treaty practices and the useful identification of models relied on by jurisdictions in their respective treaty practices. They also recognised the designs which they used prevalently in their own treaty practice among the four approaches and found that the Secretariat's study comprehensively and exhaustively reflected all designs used in treaty practice. Delegates also agreed with the Secretariat's assessment that there existed a trend towards greater clarification of "indirect expropriation" clauses, and a significant degree of overlap between the four approaches adopted across jurisdictions.

38. A number of jurisdictions confirmed that they relied on the first approach identified by the Secretariat (which the Secretariat noted was the most prevalent approach observed in its empirical study). Delegates from several jurisdictions made additional observations as to the treaty practices adopted and used by their governments – as follows:

- One jurisdiction noted that it added an additional component to the first design, namely, a reference to the "manifestly excessive nature of the measure" criterion, with a view to complementing it and providing further clarity.
- Another jurisdiction noted that it relied on the first identified design, with an additional component enumerating factors to determine whether an "indirect expropriation" can be established.
- A further jurisdiction noted that it mainly relied on the first approach in its more recently concluded treaties, while also providing attention to lists of circumstances which would exclude the presence of an "indirect expropriation". The jurisdiction held that this approach provides flexibility and policy space, especially if tribunals are going to determine which the areas and the extent of the measure that the government is taking.

- One government expert noted that its government had provided clarified provisions in its more recent investment treaties (including with respect to "indirect expropriation") in various forms among which were consistent party submissions to tribunals on treaty language interpretation (e.g. on the elements constitutive of the legitimate exercise of a State's regulatory powers, the right to regulate as opposed to indirect expropriation); annexes to treaties; and treaty texts. The expert also noted that the language the jurisdiction relied on generally reflected its understanding of customary international law and the police powers doctrine. In that regard, the delegate noted that language it used in recent treaty practice to clarify the notion of "indirect expropriation" refers to the State's right to regulate, to reinforce the notion that the substantive obligations in the treaty must be read in a way coherent with this principle.
- Another jurisdiction recognised that its treaty practice fell within the first approach identified by the Secretariat. It noted that the rationale of its jurisdiction's treaty practice is to provide a descriptive explanation of what is (and is not) an "indirect expropriation", with an intention to guide tribunals rather than carve-out the standard of treatment from the treaty's obligations.
- Another delegate explained that its government had recently engaged in efforts to clarify its treaty obligations with respect to "indirect expropriation", e.g., through annexes to trade agreements for example, including for the purposes of providing better guidance to tribunals in investor-state arbitrations. It noted that its jurisdiction relied on clause designs aligned with the first and third models identified by the Secretariat.

39. Altogether, jurisdictions with bulks of older stock treaties that do not provide for any clarification of the notion of "indirect expropriation" recognised that improved and specified clauses are useful and preferable to older and vague designs, including for the purposes of providing guidance to tribunals. Several delegates noted in this regard that vague designs of older style treaties could be replaced by one of the four approaches identified by the Secretariat.

## 5. Preliminary conclusions on the findings and implications on evolving treaty practice with respect to "indirect expropriation" and the merits and opportunities of bringing change to arrangements with unspecified "indirect expropriation" clauses

40. Discussions concluded with preliminary findings and implications on evolving treaty practice with respect to "indirect expropriation" clauses. The Chair proposed some starting points to frame this discussion. Delegates were also invited to share their views on potential next steps and options for government action in the next stages of the Track 2 work programme.

41. The Chair noted that governments participating to the Track 2 Project came in agreement that the design for clauses on "indirect expropriation" have changed since the earlier generation of treaties, where treaty language did not specify the notion of "indirect expropriation" (and indeed treaties concluded since the early 2000s follow largely consistent patterns across a significant number of jurisdictions). The Chair further recalled that a broad consensus exists among participating jurisdictions that well-defined and specified clauses are needed for those treaties providing protection against "indirect expropriation" (particularly in light of this standard of protection's interaction with the right to regulate). The Chair also noted a shared willingness to collectively consider and tackle the question of whether it would be better that specific substantive provisions (used in a

large number of earlier treaties) resemble or be aligned with more recent designs now consistently used, for example, via a retrofitting exercise of older existing treaties.

42. The Chair further noted that governments recognised that the four approaches or models used prevalently in treaty practice in respect of the design of "indirect expropriation" clauses identified by the Secretariat could form part of a practical solution in respect of "indirect expropriation" clauses. The Chair posed a central question, namely: *how can a retrofit of older style treaties be designed?*

43. The Chair proposed different options that could be envisaged, including a bilateral approach, whereby governments would revise their investment treaties on a case-by-case basis or by negotiating additional clarifying annexes to append to existing treaties (the Chair nevertheless noted in this regard that some governments voiced their concern at the October 2021 meeting in that this could be a burdensome exercise and may present shortcomings); or a plurilateral approach that would enable governments to revise substantive clauses in their existing older investment treaties through an opting-in mechanism that presented a "menu" allowing governments to select substitute clauses from a set "menu", in a synchronised and efficient manner. This type of approach would also allow jurisdictions to opt-in for the most suitable "indirect expropriation" clause, based on the four main models identified, which may vary depending on specific investment treaties and treaty partners.

44. The Chair clarified that the discussions were so far merely exploratory and not intended to effectively decide upon any particular approach or a way forward. Rather, the discussions should help frame subsequent Track 2 discussions and facilitate the definition of next steps in 2023when a stocktaking exercise will be carried out by participating governments to identify the way forward.

45. At this stage, the Chair encouraged delegates to consider the following points to frame preliminary conclusions:

- Whether there is agreement that indeed, older models of "indirect expropriation" clauses are no longer used in newer treaties;
- Whether it would be useful for jurisdictions to be able to choose from among the four designs of "indirect expropriation" clauses in updating their older style investment treaties, depending on their treaties and treaty partners; and
- Whether jurisdictions would consider bilaterally negotiating their older investment treaties with one of the four approaches identified by the Secretariat and delegates? Or whether, alternatively, jurisdictions would be keen to explore a plurilateral solution that would allow jurisdictions to revise substantive protections in their older treaties through an opt-in instrument, by selecting substitute clauses in line with one of the four designs of indirect expropriation clauses?

46. A considerable number of delegates acknowledged that, while different treaty practices should not be ranked in terms of whether or not they are new, older style treaties and vague clauses for "indirect expropriation" do lack predictability and certainty in the contest of investment-dispute arbitrations, and it is necessary to clarify the "indirect expropriation" treatment in older style treaties. Delegates were also in agreement that designs of clauses in earlier treaties should no longer be used or relied on going forward, and many recognised that a bilateral approach to such reform would be time and resource intensive, and especially so for developing countries and countries with a large stock of older investment treaties.

47. One jurisdiction suggested that there could be room for the possibility of providing guidance to tribunals without treaty amendments. Other jurisdictions however noted that such a solution might not be suitable as modern treaties include clauses and principles absent from older style treaties and may not be sufficient for the purposes of adequate guidance to tribunals. As such a significant number of jurisdictions voiced their support for a plurilateral reform approach – albeit noting that these are only preliminary discussions which require further consideration and exchanges – as it presents the benefit of efficiently and realistically mitigating negotiating resources and costs (one jurisdiction cited the African Continental Free Trade Area agreement as a useful example in that respect). Regarding future Track 2 meetings, one jurisdiction noted that it would be helpful for discussions on future provisions and standards of treatment that experts provide feedback from their jurisdictions' experiences in treaty drafting to feed into these discussions and considerations.

48. To conclude, a significant number of jurisdictions supported the possibility of a plurilateral approach or solution with respect to Track 2 discussions on the potential retrofitting of older style treaties with modern treaty clauses and commended the OECD for hosting these discussions and taking a leadership role in this important field. Delegates also noted that, with regards to a solution involving a choice from a "menu" of different options or designs, the approach is appropriate and desirable so long as the options available on such a "menu" constitute a clear improvement from the design(s) which any given jurisdiction has been using in their earlier practice.

49. The Chair concluded the meeting by proposing that the next meeting under Track 2 of the work on the *Future of Investment Treaties* would be dedicated to the "most-favoured nation" (MFN) clauses as they relate to dispute settlement arrangements, to which delegates agreed.

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