



First round of break-out sessions: Substantive content of IIAs Indirect expropriation¹

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The break-out session on indirect expropriation undertook a wide ranging and informative discussion about the issues surrounding this provision in IIAs.

The group discussed indirect expropriation provisions drawing on recent treaty practice aimed at defining this concept by adding explanatory language. The experts began by noting the manner in which expropriation provisions have generally been articulated in IIAs, as requiring that expropriation be for a public purpose, under due process of law, in a non-discriminatory manner and against compensation. The experts also took notice that in more recent treaty practice a growing number of States have begun to include language on expropriation which aims to provide a greater explanation of the circumstances and conditions under which an indirect expropriation will be found to have occurred. They noted in particular the treaty practice of the United States and Canada since 2004, the Central America-Dominican Republic-United States Free Trade Agreement, the 2009 Agreement of the Association of Southeast Asian Nations, the model bilateral investment treaty (BIT) template of the Southern African Development Community (SADC), and others.

The experts queried whether or not this practice evidenced a trend in State treaty making towards greater explanation of the indirect expropriation provision. While the experts noted that some States had been consistent in their practice on this point, most States were not. The experts noted the challenges arising from such inconsistencies across existing BITs and throughout State treaty portfolios. In this respect, the experts noted instances in which States, having adopted a provision on expropriation which includes explication of the meaning of indirect expropriation, have in subsequent practice reverted to treaty language containing no such explication.

The group next considered why some States had decided to add explanatory language on indirect expropriation in their treaties in the first place and the scope of issues thought to arise with regard to the classical formulation of the expropriation provision. In this context, some experts raised the issue of what

¹ The opinions expressed in this paper are those of the author and do not necessarily reflect the views of the UNCTAD Secretariat or its Member States.

has been termed “regulatory chill” and whether or not a lack of clarity under the classical formulation had caused States to be unduly reluctant in some policy areas for fear of incurring potential expropriation claims. Different views were expressed on the existence and extent of this effect. There was, for example, some disagreement among the experts about the social science of proving and showing the existence of a “regulatory chill”. A number of participants provided anecdotal observations with respect to instances where States appeared not to have adopted certain policies for fear of running afoul of broad investment treaty protections, including the protection against indirect expropriation. In contrast, some other experts observed that rather than construing “regulatory chill” pejoratively, States undertaking efforts to ensure that their administration is in accord with investment treaty obligations should be applauded for proactively pursuing compliance with their international obligations. In this context, the important role of the indirect expropriation clause in ensuring the protection of foreign investors was emphasized.

Another question raised was whether the issues concerning the meaning of indirect expropriation might also be connected to other aspects of the investment treaty regime. Thus, for example, some experts observed that while improvements in the drafting of the expropriation provision might be useful, more comprehensive reform might also look at the question of remedies and damages as well as the process of arbitral decision-making.

Finally, the experts discussed whether or not the new treaty language mentioned above had made a difference in investor-State arbitration. It was noted that there did not appear to have been any successful claims for indirect expropriation brought against States which have adopted explanatory treaty language. It was further noted, however, that as a general matter indirect expropriation claims have been less successful to begin with than other claims, such as fair and equitable treatment.

The discussion in the group concluded by noting a number of options that States may wish to consider in terms of addressing the protection against indirect expropriation in their treaties. There was some consensus that including language which further explains what States mean by expropriation and indirect expropriation can be a useful step and that States ought generally to consider such language going forward with new treaties. With regard to existing treaties, however, it was noted that there were challenges posed by renegotiating entire treaty portfolios for both large and small States. Seeking to overcome these difficulties, some experts suggested that an international instrument following the opt-in approach of the UNCITRAL Transparency Convention (the Mauritius Convention) might help by providing a general statement clarifying the concept of indirect expropriation across existing and/or future treaties. States signing onto this understanding would thereby open for amendment their portfolio of investment treaties to bring them in line with the standard upon reciprocal acceptance of the instrument by counter-parties.