The Future of Investment Treaties
Track 2

The notion of 'indirect expropriation' in investment treaties concluded by 88 jurisdictions: a large sample survey of treaty provisions

Meeting background

19 October 2021

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Context, purpose and structure of this note

1. Protections against expropriation form part of the historical core of investment treaties.[1] It is widely held and expressly stated in many treaty texts[2] that an expropriation does not necessarily require a forced and permanent transfer of title, but can also occur as an "indirect" expropriation.[3] The concept of "indirect expropriation" is used to describe a measure or series of measures in which the taking does not fulfil the formal criteria of a direct expropriation[4] but has and equivalent economic effect that is "tantamount"[5] to those of a "direct" expropriation or "hollow out" the elements that constitute ownership.

2. The exact conditions under which a government measure qualifies as an "indirect expropriation" depend on many factors. Investors have alleged that some regulatory measures intended for environmental or health purposes or taxation constitute "indirect expropriations" and tribunals have agreed. "Indirect expropriation"[6] is often alleged in treaty-based investor-state disputes, and tribunals have frequently determined that "indirect expropriations" had occurred.[7]

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[1] The concept of international investment agreement as used here includes bilateral investment treaties as well as investment chapters included in bilateral or plurilateral preferential trade agreements (PTAs). Detailed information about the sample composition and terminology used in this study is available in Annex A.

[2] An early example of such explicit statement is the OECD *Draft Convention on the Protection of Foreign Property*, which was negotiated in the early 1960s and contains in its Article 3 an explicit prohibition of "measures, depriving directly *or indirectly*" a foreign national of their property unless certain conditions are met. The presence of such treaty language in earlier treaties has not been assessed in full, but has been observed as being common.

[3] The actual term used in individual treaties varies. English language treaty texts typically use the words "expropriation", "nationalisation", "deprivation" or "alienation"; at least in recent treaty practice, the term "expropriation" is the most frequently used term. This note uses the term "expropriation" throughout, regardless of the word used in a specific treaty. This choice is made for convenience and does not imply any interpretation as to the commonalities or differences between the terms observed in treaties.

[4] The *Argentina-Qatar BIT (2016)* for example contains this linguistic element.

[5] Wording of *NAFTA*, Article 1110, for example, as well as Argentina-United States BIT (1991) and United States-Bahrain BIT (1999).

[6] Some tribunals have asserted that criteria for distinguishing "indirect expropriations" from non-compensable regulatory measures are established under international law (e.g. Methanex Corporation v. United States of America, UNCITRAL, Final Award of the Tribunal on Jurisdiction and Merits, 3 August 2005, Part IV - Chapter D, Article 1110, NAFTA, §7; Saluka Investments B.V. v. Czech Republic (PCA Case No. 2001-04), UNCITRAL, Partial Award, 17 March 2006, § 255; and Continental Casualty Company v. Argentine Republic (ICSID Case No. ARB/03/9), Award, 5 September 2008, § 276). In their decisions, the three tribunals mention different criteria-sets for what distinguishes an "indirect expropriation" from a regulatory measure, however, and none of the three tribunals mention criteria-sets that can be found in any of the agreements in the sample.

[7] UNCTAD's case analysis reported, in mid-October 2021, that among the 657 cases for which information on alleged breaches was available and analysed, indirect expropriation had been alleged in 450 cases – around 68% of the total. Only breaches of "fair and equitable" treatment scored higher, with 555 cases. The presence of an "indirect expropriation" was found in 65 cases

3. As investment treaties typically require that losses caused by "indirect expropriations" must be compensated, many regulatory acts can potentially entail pay-outs to the extent that they are found to constitute "indirect expropriations", even if the measure is non-discriminatory and was taken in the public interest. The construct of "indirect expropriation" may thus make a given regulatory action onerous or, in extreme cases, almost unaffordable when it adversely impacts value of treaty-covered investments. That governments and the societies they serve do not obtain an asset – as is the case in direct expropriations – makes such arbitral awards even more controversial. The notion of what constitutes an "indirect expropriation" and the extent to which a given treaty grants protection through compensation for "indirect expropriation" are thus key parameters for the conditions and price on governments' ability to regulate in the public interest.

4. Many countries have begun to address concerns associated with the lack of clarity around "indirect expropriations". Brazil's latest treaties contain a wholesale exclusion of "indirect" expropriations from the scope of treaty protections,[8] while others exclude at least some scenarios that could be conceived as "indirect expropriation" from the scope of investor-state dispute settlement mechanisms.[9] A much larger number of treaties referring to "indirect expropriation" seek to clarify the boundaries of this concept for the purpose of a given treaty. Since 2003, language in these treaties specify:

- the extent to which "indirect expropriations" are covered by the treaty; and
- under which conditions a regulatory measure constitutes an "indirect expropriation" and how the presence of these conditions is to be determined.

This survey describes statistically the treaty designs that result from these latter efforts and how treaty design in this regard has evolved collectively and in individual countries over time.

5. The basis for this analysis is a sample of 762 investment treaties and related arrangements – bilateral or plurilateral arrangements, stand-alone treaties or investment

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out of 234 (around 28%) for which information was available. The OECD Secretariat has not made its own assessment of cases in this regard, but these numbers provide an order of magnitude.

[8] A wholesale exclusion of "indirect" expropriations from the scope of treaty protections is so far only observed, within the sample, in treaties in which Brazil participates. The first observation is in 2015 in the *Brazil-Malawi BIT (2015)*, where the exclusion is implicit: "*2. Subject to its laws and regulations, a Party shall not directly nationalize or expropriate covered investments by this Agreement, except: (...)*". In many subsequent BITs, the exclusion is more explicit (e.g. "*this Treaty only covers direct expropriation, which occurs when an investment is nationalised or otherwise directly expropriated through formal transfer of title or outright seizure*"). As of October 2021 such exclusions have been observed in 10 bilateral treaties (*Brazil-Chile BIT (2015)*; *Brazil-Chile FTA (2018)*; *Brazil-Ecuador BIT (2019)*; *Brazil-Ethiopia BIT (2018)*; *Brazil-Guyana BIT (2018)*; *Brazil-India BIT (2020)*; *Brazil-Malawi BIT (2015)*; *Brazil-Peru ETEA (2016)*; *Brazil-Suriname BIT (2018)*; *Brazil-United Arab Emirates BIT (2019)*) and the *MERCOSUR Protocol on Investment Cooperation and Facilitation* as the only plurilateral treaty with this feature.

[9] The Australia-China FTA (2015), for example, states, in Article 9.11 "*Measures of a Party that are non-discriminatory and for the legitimate public welfare objectives of public health, safety, the environment, public morals or public order shall not be the subject of a claim under this Section*". While this framing does not refer to the term "indirect expropriation", it captures at least some of the cases in which tribunals have found liability under "indirect expropriation". This note is only concerned with clarifications of the notion of "indirect expropriation" and does not dwell on approaches to exclude "indirect expropriation" from the scope of the treaty protections or from the scope of investor-state dispute settlement.

content included in wider preferential trade agreements, joint interpretations of treaties and treaty amendments – that the 88 economies that are invited to participate in the OECD-hosted Track 2 Project[10] have concluded since the emergence of such language in an investment treaty context in 2003.[11]

6. The statistical description of treaty text presented here does not interpret treaty content. Rather, it seeks to inform governments about treaty practices of their peers and contribute to their individual and collective understanding of evolutions in treaty design. It adds to the growing body of large-sample studies on specific treaty design elements that the OECD-hosted investment policy community has received and discussed since 2011.[12]

7. Following a summary of findings and proposed issues for discussion, Section 1 summarises the emergence of specifications of the notion of "indirect expropriation", its observed components and their interaction, and country practice in these regards. Section 2 offers some observations on the diversity of the approaches and outcomes and trends over time. Section 3 sets out the extent to which, and how, specifications of "indirect expropriation" such as those adopted since 2003 diffuse into the treaty population, and Section 4 offers observations on the variation of designs of specifications of the notion of "indirect expropriation". A detailed description of the methodology in Annex A explains the composition of the survey sample. Annex B contains the list of documents that are included in the survey sample.

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[10] These economies are: Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Czech Republic, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guinea, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Korea, Kosovo*, Latvia, Lithuania, Luxembourg, Malaysia, Mali, Mauritius, Mexico, Moldova, Montenegro, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Nigeria, North Macedonia, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, and Uruguay.

[11] The sample includes all treaties and related documents dating from the stipulated period for which a full, authentic text was available to the OECD Secretariat in mid-October 2021 regardless of whether they were in force at that or any earlier point in time. More information on the sample of assessed treaties and related documents is available in Annex A, and Annex B contains the full list of documents included in the sample.

[12] These surveys include: Environmental concerns in international investment agreements: a survey, 2011; Dispute settlement provisions in international investment agreements: A large sample survey, 2012; Temporal validity of international investment agreements: a large sample survey of treaty provisions, 2013; Investment treaty law, sustainable development and responsible business conduct: a fact finding survey, 2014.

* 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.

Summary of findings

8. The analysis of 762 treaties and related arrangements concluded or agreed between 2003 and mid-October 2021 by the 88 jurisdictions that are invited to participate in the Track 2 Project with respect to efforts to specify the notion of "indirect expropriation" yields the following main findings:

- Explicit language that seeks to specify the notion of "indirect expropriation"[13] or to guide the findings of an "indirect expropriation" first emerged in 2003 in an interpretative agreement contained in an exchange of letters. Such language was incorporated shortly thereafter in the body of a treaty, and has gradually become standard in newly concluded investment treaties. As of October 2021, 178 treaties and 9 additional documents (including notably amendments or joint interpretations) contained such language, and all but fourteen of the jurisdictions that are invited to participate in the Track 2 Project had such language in at least one of their treaties.[14]
- While almost 50% of all treaty relationships for which arrangements were concluded since May 2003 contain a specification of the notion of "indirect expropriation", the feature is rare among the entire population of treaty-covered relationships: Among the treaty relationships that were in force in October 2021 or expected to come into force after that time, only about 18% contain a clarification. Hence, 82% of the treaties in force at this time provide protection against "indirect expropriation" without providing a specification on the scope and conditions of that concept.
- The structure of linguistic elements to specify the notion of "indirect expropriation" is very homogeneous throughout the sub-sample of treaties that contain such a specification. It consists of up to four primary components that cumulatively establish the specification. Most of these components are further specified by second-, third-, and fourth-order specifications in a hierarchical structure.
- The first- and some second-order elements were present in the document that pioneered the approach in 2003, an exchange of letters between Singapore and the United States in relation to their 2003 FTA. This approach was driven by the objective to align United States' treaty practice more with United States' domestic law. Part of the language that is now found in investment treaties around the world can be traced back to identical wording in United States' domestic court decisions that preceded the inclusion in investment treaties by decades.
- In contrast to the structural homogeneity of the treaty clauses, details of the specifications of the notion of "indirect expropriation" is complex and diverse. In substance, clarifications consist of a combination of up to four primary components. Each of these components can be and often is accompanied by second-order specifications, and some of these second-order clarifications are further clarified or illustrated by third-order elements, which are occasionally specified by fourth-order clarifications – with growing variation in language used in every additional layer.

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[13] The actual term used in treaties varies. English language versions, insofar as the treaty uses English as an authentic language, use the words "expropriation", "nationalisation", "deprivation" or "alienation", with "expropriation" the most frequently used by some margin. This note uses the term "expropriation" throughout. This choice is made for convenience and does not imply any interpretation as to the overlap or differences between the terms observed in treaties.

[14] The description of the methodology in Annex 1 sets out how occurrences in plurilateral agreements are attributed to and counted for countries that are parties to a given agreement.

Only a very small number of treaties that specify the notion of "indirect expropriation" deviate from this model.

- Different combinations of the components and sub-components in the treaty sample lead to a large number of nominally different specifications of the term "indirect expropriation". Among the 186 treaties and related arrangements that contain such language on "indirect expropriation", 87 unique combinations have been found – when considering only the first-, second- and third-order elements and ignoring minor nuances. Each unique variant is used, on average, around twice, with 67 variants used only once in the treaty sample.
- Individual countries use different language to specify the notion of "indirect expropriation" within their treaty sets. More than half of the countries that have more than one treaty with a specification have not replicated once chosen language for any other agreement they have concluded. New combinations of factors continue to be introduced, and the rate of introduction of new variants continues to accelerate. While the variation in detail is thus large even by standards observed in investment treaties generally, there is almost no deviance from the structural approach pioneered in 2003.
- The variation of wording in the specifications suggests that language used with respect to "indirect expropriation" primarily seeks to *calibrate* which type of measure falls under the protection against "indirect expropriation" for the purpose of an individual treaty – rather than to clarify the notion. While the language also contains clarifications for the purpose of an individual treaty, the significant degree of variation among treaties is unlikely to contribute to a collective clarification of the contours of "indirect expropriation" in investment treaties overall or in the treaty sets of individual countries.
- Specifications of the notion of "indirect expropriation" proliferate predominantly through new treaties that cover previously uncovered country-relationships. Treaty replacements and amendments have played only a secondary role for their dissemination. Opportunities, such as when governments have agreed on other changes to existing treaties, have not systematically been used to specify the notion of "indirect expropriation"; even countries that tend to include specifications of "indirect expropriation" in new treaties have not used such opportunities systematically in the contexts of amendments.
- The practical consequences of specifications of the notion of "indirect expropriation" in treaty-based litigation have not been assessed as part of this study. Data available by October 2021 shows that treaties with such language had so far only rarely been used as a basis for ISDS claims. This does not allow in itself, however, to draw any conclusions on the effect of the specification, and more systematic study of such effects would be required to make any statements on the impact of specifications of the concept of "indirect expropriation" in investment treaties.

Issues for consideration

9. The statistical description of how treaties specify the notion of "indirect expropriation" yields some findings that investment treaty makers may wish to consider:

- Despite the frequent inclusion of the concept of "indirect expropriation" among the protections afforded by investment treaties, no treaty until 2003 specified the contours of this concept. What is the primary purpose of this language? Does it serve primarily to *clarify* an established, identical concept – or does the language rather *calibrate* the scope of what a given treaty guarantees within the concept of "indirect expropriation"?
- Have the efforts to specify the notion of "indirect expropriation" led to greater clarity on the conditions under which specific measures qualify as "indirect expropriations" in the context of a given treaty or under international investment law more generally? If so, which evidence or indications can we collect to assess the extent of this greater clarity?
- Since 2003, over 87 linguistically different notions have been introduced for this concept in the context of investment treaties. Do governments hold that different linguistic specifications of "indirect expropriation" among their own treaties or among treaties in general refer to different, distinct notions of "indirect expropriation"?
- While most countries include specifications of the notion of "indirect expropriation" in new treaties, over 90% of the collective population of treaty relationships in force as of October 2021 contains no such language. Would it be desirable that earlier treaties also contain such language or that specifications used today apply to these earlier treaties? If so, would such a collective retrofit be feasible, and how could it be achieved in practice?
- Would there be a means under international law to clarify the notion of "indirect expropriation" so that it applies across treaties? Would a more homogeneous understanding of the concept "indirect expropriation" be desirable? If so, which practical steps could lead to such an outcome?
- What factors could explain why specifications of the notion of "indirect expropriation" are frequently included in new treaty arrangements but more rarely introduced in the context of treaty amendments?
- Why do plurilateral arrangements since 2003 contain specifications of "indirect expropriation" three times more frequently than bilateral arrangements concluded over the same period?

1. Emergence and components of specifications of "indirect expropriation"

10. Efforts to specify the notion of "indirect expropriation" in investment treaties or to guide arbitral tribunals in their findings on whether a specific measure constitutes an "indirect expropriation" can be traced back to 2003, when explicit language in a treaty context first emerged in the Exchange of Letters on Expropriation to the Singapore-United States FTA (2003).[15] The specification in this Exchange of Letters is composed of four textual elements that:

- identify the **assets that can be subject to an "indirect expropriation"** from among items covered by the definition of "investment" in the treaty;
- establish a **positive description** of what constitutes an "indirect expropriation";
- set out **criteria that need to be considered** when determining whether a measure constitutes an "indirect expropriation"; and
- specify under which conditions a measure **does *not* or *typically does not* constitute an "indirect expropriation"**.

11. These four elements are the primary textual material that countries have used and continue to use to specify the notion of "indirect expropriation" in their investment treaties to date.[16] Between the adoption of the pioneering text of 2003 and October 2021, a specification of the notion of "indirect expropriation" has been included in 178 treaty relationships concluded or amended in the sample, representing just under 50% of all relationships in which treaties were concluded or amended in this timeframe.

12. Since 2003, the inclusion of language that specifies the notion of "indirect expropriation" has become steadily more frequent and has become almost ubiquitous in recent treaty cohorts (Figure 1). Specifications are particularly frequent in plurilateral arrangements concluded since May 2003 (73%, 16 occurrences in 22 plurilateral sample treaties), but still less so in bilateral arrangements (24%, 162 out of 683 bilateral arrangements).

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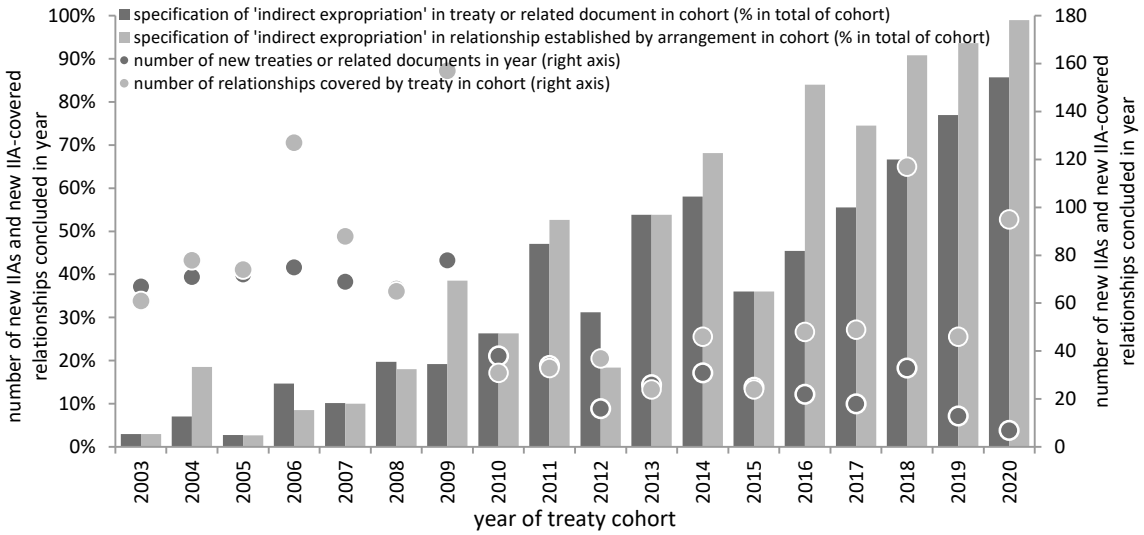
15 It appears that the impetus for the clarification emerged in the United States in the context of the revision its model BIT in and after 2002. The 2002 Trade Act, Section 2102 (b)(3), lists among the principal negotiating objectives regarding foreign investment "[…] *(D) seeking to establish standards for expropriation and compensation for expropriation, consistent with United States legal principles and practice; […]*".

16 The survey was finalised in October 2021 and includes all treaties whose full text was available to the OECD Secretariat until that date. The Annex contains more information on the treaty sample used for this survey.

Figure 1. Frequency of specifications of the notion of "indirect expropriation" in investment treaty cohorts 2003-2020



Note: The figure shows percentages in annual cohorts of treaties or related documents that contain specifications in all sample treaties and documents in the respective cohort plotted against the left axis as well as the percentages of relationships covered by these documents resulting from plurilateral arrangements. The 2003 cohort only includes treaties or associated documents concluded on or after 6 May 2003. Dots show the number of treaties and relationships that are included in a cohort, plotted on the right axis. The 2021 cohort is not shown given that only one sample treaty was in this cohort at the time when the survey was concluded.
Source: OECD investment treaty database.

13. All 187 documents – treaties, amendments and joint interpretations – that specify the notion of "indirect expropriation" contain one or more of the four building blocks that were contained in the Exchange of Letters on Expropriation to the Singapore-United States FTA (2003). This relative structural homogeneity contrasts with large linguistic variation and ingenious combinations of linguistic elements in the details.

14. The following subsections provide information on how the notion of "indirect expropriation" is framed in investment treaties: How the building-blocks are designed and what they consist of (section 1.1) and how they are combined (section 1.2) in the sample treaties.

1.1. Four components and three levels of related sub-components to frame the notion of "indirect expropriation"

15. The four components that make up specifications of "indirect expropriation" in investment treaties are typically found in the same order in which they were set in the pioneering Singapore-United States agreement of 2003. They are presented here in that order along with the related linguistic elements and sub-components.

1.1.1. Assets that can be subject to "indirect expropriations"

16. The typically first element that treaties employ to specify the notion of "indirect expropriation" – and often expropriation more generally – sets out the assets that can potentially be subject to an expropriation. The Exchange of Letters on Expropriation to the Singapore-United States FTA (2003), which served as a template for many later treaties, states in this regard:

"An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment."

17. This element narrows the scope of assets from among the elements in the treaty's definition of "investment" that can possibly be expropriated. The clause potentially excludes some elements that may be covered by the definitions of "investment" in treaties such as goodwill, customer base, market share or licences, permits and other government authorisations from the items that could be subject to an (indirect) expropriation.

18. Such language is present in 76 treaties in the sample (43% of treaties that specify the notion of "indirect expropriation"), mostly United States, Australian and Korean treaties, as well as some ASEAN treaties.

19. Four main textual variants have been observed in the sample. These are, in decreasing order of frequency (emphasis not in the treaty text and included here to point to the differences):

- "an action or a series of actions by a party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment". It is the wording of the Exchange of Letters on Expropriation to the Singapore-United States FTA (2003) and is present in 60 IIAs (or 79% of the sample treaties that specify "indirect expropriation").[17]
- "an action or a series of actions by a party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment". This wording, dropping "property interest" from the variant above, is employed in 14 IIAs (or 18%) of which seven have been concluded by Korea.
- "an action or series of actions by a party cannot constitute an expropriation unless it interferes with a tangible or intangible property right in an investment *and eliminates all or nearly all of its value*" (one single occurrence in the sample).[18]
- "a measure or a series of measures by a contracting party cannot constitute an expropriation unless it interferes with a tangible or intangible, *movable or immovable property*, or property interests in an investment" (one single occurrence in the sample).[19]

1.1.2. Positive descriptions of the notion of "indirect expropriation"

20. Positive descriptions of what constitutes an "indirect expropriation" appear in 80% of all treaties that specify the notion of "indirect expropriation".[20] The description is frequently

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17 RCEP (2020), ANNEX 10B further specifies the notion "property interest" in a footnote: "[1] *For the purposes of this Annex, "property interest" refers to such property interest as may be recognised under the laws and regulations of that Party*".

18 Canada-Korea FTA (2014), Annex 8-B.

19 Japan-Uruguay BIT (2015).

20 Such descriptions are also observed in treaties that do not otherwise specify the notion of "indirect expropriation", including very early treaties. Agreements that contain exclusively this component are not considered as containing a specification of the notion of "indirect expropriation" for the purpose of this study. The presence of this element without further specification has become very rare: treaties concluded since May 2003 contain either no language that specifies "indirect expropriation" or contain several elements to specify this notion. The only treaty in the sample that

included in a general statement that expropriation may occur as a "direct" or "indirect" expropriation. Typical language reads:[21]

> *"Article [...] of this Chapter addresses two situations:*
>
> *(a) the first situation is direct expropriation, (...); and*
>
> *(b) the second is indirect expropriation where a measure or series of measures by a Party has an effect equivalent to 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."*

21. Such descriptions exist in five linguistic variations, which have, in declining order of frequency, the following features:

- "Indirect expropriation" is defined as an "action or series of actions adopted by a Party that has an effect equivalent to direct expropriation without formal transfer of title or outright seizure" or "tantamount to direct expropriation";[22] this variant dominates by far and is used in 126 documents (85% of all documents that contain this component in their specification of "indirect expropriation");
- Nine documents use this same language, but specify the conditions that constitute an *equivalent effect*,[23] and one additional treaty features an illustrative list of what qualifies as "equivalent effects".[24]
- A further variant, observed eight times in the sample and only in treaties concluded by India, requires that a measure or series of measures is taken *intentionally* to create a situation whereby the investment may be rendered substantially unproductive and incapable of yielding a return without a formal transfer of title or outright seizure.[25]

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was concluded with this design between 6 May 2003 and October 2021 is the *Argentina-Qatar BIT (2016)*.

[21] The wording reproduced here is taken from Australia-Indonesia CEPA (2019), ANNEX 14-B.

[22] The *Argentina-Qatar BIT (2016)* and *Argentina-United Arab Emirates BIT (2018)*, employ the term "tantamount" to direct expropriation.

[23] E.g. CETA (2016), ANNEX 8-A: "(b) indirect expropriation occurs if a measure or series of measures of a Party has an effect equivalent to direct expropriation, in that it substantially deprives the investor of the fundamental attributes of property in its investment, including the right to use, enjoy and dispose of its investment, without formal transfer of title or outright seizure." Three IIAs use a similar form, e.g. China-Peru FTA (2009), ANNEX 9 "*(b) indirect expropriation occurs when a state takes an action or series of actions that have an effect equivalent to direct expropriation, in that it deprives the investor in substance of the use of the investor's property, although the means used fall short of those specified in [the] subparagraph [defining direct expropriation]*."

[24] The *Turkey-Serbia BIT (2018)* states (unofficial translation): "For greater clarity, examples of an indirect measure having an effect of an expropriation include, inter alia, a measure or series of measures by a Contracting Party depriving an investor of basic property features, including the right to use, enjoy and dispose of his investment without formal transfer or permanent seizure."

[25] E.g. India-Lithuania BIT (2011), Annex: "*1. A measure of expropriation includes, apart from direct expropriation or nationalization through formal transfer of title or outright seizure, a measure or series of measures taken intentionally by a Party to create a situation whereby the investment of an investor may be rendered substantially unproductive and incapable of yielding a return without a formal transfer of title or outright seizure.*" Other treaties also contain the

- Six sample treaties, all concluded by Kuwait, specify the notion of "expropriation effect" or "*de facto* expropriation" and supplement this specification with an open list of illustrative measures.[26]
- Two texts, both Joint Interpretations concluded by India, state that "indirect expropriation" is "where a measure or series of measures have the effect of a nationalisation or expropriation" without adding further elements.[27]

1.1.3. Criteria that must be considered when determining whether an "indirect expropriation" has occurred

22. Many treaties and related documents contain a description of the criteria that need to be considered for the determination of whether a measure amounts to an "indirect expropriation". The Exchange of Letters on Expropriation to the Singapore-United States FTA (2003), that pioneered the approach,[28] states that "*the determination of whether a measure constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including*", followed by a list of factors, which in the initial agreement are (emphasis added):

- the *economic impact* of the government action;
- the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and
- the *character* of the government action.

23. Language on factors that need to be considered when determining whether an "indirect expropriation" has taken place is included in 156 agreements concluded since it was first used in the Exchange of Letters on Expropriation to the Singapore-United States FTA (2003), corresponding to 84% of the documents that specify the notion of "indirect expropriation". It is the second-most frequent component used to specify the notion of "indirect expropriation" among the treaties with such a specification in the sample.

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requirement of "intention" to qualify a measure as an "indirect expropriation", but in a different clause, see below section 1.1.4.

26 E.g. *Kenya-Kuwait BIT (2013)*: "*For the purposes of this Agreement, the term "expropriation" shall also include any interventions or regulatory measures by a Contracting Party that have a de facto expropriatory effect, in that effect results in depriving the investor in fact from his ownership, control or substantial benefits over his investment or which may result in loss or damage to the economic value of the investment, such as the freezing or blocking of the investment, compulsory sale of all or part of the investment, or other comparable measures*."

27 Colombia-India BIT (2009) - Joint Interpretative Declaration (2018) and India-Bangladesh BIT (2009) - Joint Interpretive Agreement (2017).

28 The language of this element can be traced back to the United States Supreme Court decision Penn Central Transportation Co. v. New York City, 438 U.S. 104 (1978): "*In engaging in these essentially ad hoc, factual inquiries, the Court's decisions have identified several factors that have particular significance. The economic impact of the regulation on the claimant and, particularly, the extent to which the regulation has interfered with distinct investment-backed expectations are, of course, relevant considerations. (...) So, too, is the character of the governmental action.*" A judgement rendered the following year in Kaiser Aetna v. United States, 444 U.S. 164 (1979) builds on this language when it states: "*[The Court] has examined the "taking" question by engaging in essentially ad hoc, factual inquiries that have identified several factors—such as the economic impact of the regulation, its interference with reasonable investment backed expectations, and the character of the governmental action—that have particular significance.*"

24. The original combination, with the identical order of items,[29] remains the dominant approach throughout the subsample of treaties that specify the notion of "indirect expropriation" and is found without alterations in 61 IIAs. Alongside the continued popularity of this original language, broad variation has developed with regards to the criteria that need to be considered, without however deviating structurally from the approach of the Exchange of Letters on Expropriation to the Singapore-United States FTA (2003). Some agreements list *additional* criteria that need to be considered, some use *fewer* criteria, and some use *other* criteria than those found in the 2003 Singapore-United States Exchange of Letters.

25. In total, 22 different aspects for consideration are used in treaties in the sample. The full list of criteria that occur in the treaty sample in this context, included in various combinations, hierarchical or side-by-side, contains, in decreasing order of frequency of occurrence (absolute number of occurrences of the feature indicated in brackets):

- The *economic impact* of the measure (150);
- The *character* of the measure (141);
- The extent to which the government action interferes with distinct, reasonable investment-backed expectations (131);
- The *objective* or *purpose* of the measure (61);[30]
- The *context* of the measure (28);[31]
- Whether the government action breaches the government's prior binding written commitment to the investor (18);[32]
- Whether the measure is *discriminatory* (14);[33]
- Whether the measure is *disproportionate* in relation to the public purpose (13);[34]
- The *duration* of measure (11);[35]

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[29] The original wording from 2003 reads as follows: "the determination of whether a measure constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers all relevant factors relating to the investment, including: [list of factors]".

[30] E.g. the Chile-Japan EPA (2007), Annex 9: "*(iv) the objectives of the government action, including whether such action is taken for legitimate public objectives*" or *China-Japan-Korea trilateral investment agreement (2012)*: "*(iii) the character and objectives of the action or series of actions, including whether such action is proportionate to its objectives*". E.g. the *Argentina-United Arab Emirates BIT (2018)*: "*(c) the purpose and context of the governmental act*".

[31] E.g. the *Argentina-United Arab Emirates BIT (2018)*: "*(c) the purpose and context of the governmental act*".

[32] E.g. the Australia-Indonesia CEPA (2019), ANNEX 14-B: "*(b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, license or other legal document; and*" ACIA, Annex 2: "*(b) whether the government action breaches the government's prior binding written commitment to the investor whether by contract, licence or other legal document; […]*" *Lithuania-Turkey BIT (2018)*: "*(b) the extent to which the measure or series of measures interfere with distinct, reasonable investment-backed expectations arising out of the Contracting Party's prior binding explicit written commitment directly and specifically to the investor; […]*".

[33] E.g. the *China-India BIT (2006)*, III. Ad Article 5(2): "*ii. the extent to which the measures are discriminatory either in scope or in application with respect to a Party or an investor or an enterprise; (…).*"

[34] E.g. the China-Peru FTA (2009), Annex 9: "*(b) disproportionate to the public interest.*"

[35] E.g. the CETA (2016), Annex 8-A: "*2. The determination of whether a measure or series of measures of a Party, in a specific fact situation, constitutes an indirect expropriation requires a*

- Whether they are for *bona fide* public interest purposes (11);[36]
- The *intent* of the measure (10);[37]
- Whether there is a *reasonable nexus* between the measure and the intention to expropriate (10);
- The *scope* of the measure (7);[38]
- The *rationale* of the measure (6);[39]
- Whether the action or series of actions *substantially affected an investment* of an investor of the other Party made in the territory of the host Party, thus *depriving the investor of the control and management of the investment* (5);[40]
- The *nature* of the measure (4);[41]

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case-by-case, fact-based inquiry that takes into consideration, among other factors: (…) (b) the duration of the measure or series of measures of a Party;"

[36] "Whether [the measures] are for bona fide public interest purposes or not" (employed in 9 IIAs); "Whether there is a reasonable nexus between [the measures] and the intention to expropriate" (employed in 12 IIAs), e.g. the India-Lithuania BIT (2011), Annex: "*2. The determination of whether a measure or a series of measures of a Party in a specific situation, constitutes measures as outlined in paragraph 1 above requires a case by case, fact based inquiry that considers, among other factors: (…) (iv) the character and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention to expropriate.*"

[37] E.g. the *China-India BIT (2006)*, III. Ad Article 5(2): "*iv. the character and intent of the measures or series of measures, whether they are for bona fide public interest purposes or not and whether there is a reasonable nexus between them and the intention on to expropriate.*"

[38] E.g. the Colombia-United Kingdom BIT (2010): "*(b) the determination of whether a measure or series of measures of a Contracting Party constitute indirect expropriation requires a case-by-case, fact based inquiry into various factors including, but not limited to the scope of the measure or series of measures and their interference with the reasonable and distinguishable expectations concerning the investment;*"

[39] E.g. in *PACER plus*.

[40] E.g. Argentina-Chile FTA (2017), Artícle 8.8: "*(i) si tal acto o serie de actos interfirieron sustancialmente en una inversión en el territorio de la Parte receptora de la inversión perteneciente a un inversor de la otra Parte, privando al inversor efectivamente del control o administración de su inversión;*". Two of those 5 IIAs add that this does not prohibit a Contracting Party from interfering with management or control when done in good faith and in compliance with the law of the Contracting Party where the investment is made. E.g. the *Joint Interpretative Agreement (2017) to India-Bangladesh BIT (2009)*, Note on interpretation of expropriation – Article 5: "*[4] This does not prohibit a Contracting Party from interfering with management or control when done in good faith and in compliance with the law of the Contracting Party where the investment is made. This would cover, for example, requirements under financial or insolvency law of the relevant Contracting Party, or law regarding senior management positions in sensitive industries that the Contracting Party considers necessary.*"

[41] E.g. the *Lithuania-Turkey BIT (2018)*: "*(c) the character of the measure or series of measures, including their nature, purpose, duration and rationale.*"

- Whether there is an appropriation of the investment by a contracting party which results in transfer of the investment, in whole or significant part, to that contracting party or to an agency or instrumentality of the contracting party or a third party (3);[42]
- Whether the measures result in a total or near total and permanent destruction of the value of the investment (3);[43]
- The extent to which the measure or series of measures interferes with the possibility to use, enjoy or dispose of the property (2);[44] and
- Whether the *value of the assets was substantially diminished*, whether major obstacles to the activities or substantial prejudice to the value of the same asset were created (1).[45]

26. Some of the criteria that, according to the agreement texts, need to be taken into consideration to determine the presence of an "indirect expropriation" are specified further, in a further level of clarification of terminology used to specify the notion of "indirect expropriation". Explanatory language of this third level of specification has been observed with respect to several items: The *economic impact* of the measure;[46] the *extent to which the government action interferes with distinct, reasonable investment-backed expectations*;[47] and the *character*[48] of the measure.

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[42] E.g. the *Japan-Kenya BIT (2016)*, Article 10: "*(c) an appropriation of the investment by the Contracting Party which results in transfer of the complete or near complete value of that investment to that Contracting Party, to an agency of that Contracting Party or to a third party.*"

[43] E.g. the *Joint Interpretative Declaration (2018) to Colombia-India BIT (2009)*, Note 6: "*a) the measures result in a total or near total and permanent destruction of the value of the investment*"

[44] E.g. the *EU-Singapore Investment Protection Agreement (2018)*, Annex 1: "*(b) the extent to which the measure or series of measures interferes with the possibility to use, enjoy or dispose of the property;*".

[45] See *Slovakia-Lebanon BIT (2009)*.

[46] Most documents that refer to the economic impact of the measure specify this item further, most often by stating that "the fact that such action or series of related actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that such an expropriation has occurred."

[47] Twenty treaties specify, in six distinct fashions, conditions under which investment-backed expectations are 'reasonable' with reference to a government's binding written assurances to the investor; the nature and extent of governmental regulation; or the potential for government regulation in the relevant sector (e.g. "*an investor's expectations that regulations will not change are less likely to be reasonable in a heavily regulated sector than in a less heavily regulated sector*")".

[48] Twenty-two treaties and related documents contain seven different specifications of the notion of "character". Some treaties concluded by Korea contain wording such as: "*Relevant considerations could include whether the government action imposes a special sacrifice on the particular investor or investment that exceeds what the investor or investment should be expected to endure for the public interest*" and "*Relevant considerations could include whether the investor bears a disproportionate burden, such as a special sacrifice, that exceeds what the investor or investment should be expected to endure for the public interest*". *RCEP (2020)* also contains such language that applies exclusively to Korea in a footnote in ANNEX 10B: "[2] *For Korea, a relevant consideration could include whether the investor bears a disproportionate burden, such as a special sacrifice that exceeds what the investor or investment should be expected to endure for the public interest. This footnote does not prejudice the determination of the character of the government action of any other Party.*"

27. The hierarchical organisation of these elements varies among treaties. Some treaties employ certain terms directly as aspects that need to be considered, while others subordinate some of the elements to higher ranking terms. For example, explanatory clarifications of the "*character*" of a measure refer to the *objectives and context* of the measure;[49] whether the measure is *discriminatory*;[50] or whether it is *proportionate to the public purpose* (9 documents);[51] the *intent*,[52] *scope*,[53] or *rationale* of the measure;[54] the *degree of nexus between the measures and outcome or effects that forms the basis of the expropriation claim* (2 documents).[55]

28. Overall, the combination of criteria-sets results in 44 distinct combinations of terms and aspects for the single sub-element of which factors need consideration when determining whether an "indirect expropriation" has occurred. Twenty-four of these combinations occur only one single time in the entire sample.

1.1.4. Criteria that typically or always exclude the presence of an "indirect expropriation"

29. The fourth element that is almost universally employed to specify the notion of "indirect expropriation" consists of criteria that are concerned with conditions whose presence or absence *excludes* always, often or sometimes that a measure constitutes an "indirect expropriation". It is the most frequently employed component in language to specify the notion of "indirect expropriation" and present in almost 97% of documents with that feature in the sample.

30. In the Exchange of Letters on Expropriation to the Singapore-United States FTA (2003) this element is framed as follows:

> *"Except in rare circumstances, nondiscriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such*

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[49] E.g. the Australia-Korea FTA (2014), Annex 11-B: "*the character of the government action, including its objectives and context*".

[50] E.g. the Chile-Japan EPA (2007), Annex 9: "*(iii) the character of the government action, including whether such action is non-discriminatory*".

[51] E.g. the Malaysia-San Marino BIT (2012): "*(c) the character of the government action, including its objective and whether the action is disproportionate to such objective*". Australia-Indonesia CEPA (2019) states: "*(c) the character of the government action, including, its objective and whether the action is disproportionate to the public purpose23*". The *China-Japan-Korea trilateral investment agreement* states: "*(iii) the character and objectives of the action or series of actions, including whether such action is proportionate to its objectives*". In those two IIAs, this "proportion" factor is included in the "character" one.

[52] India-Singapore CECA (2005), Annex 3: "*(iii) character of the measure or series of measures, including inter alia, their intent, objectives, purpose, and degree of nexus between the measures and outcome or effects that forms the basis of the expropriation claim; and*".

[53] E.g. the India-Lithuania BIT (2011), Annex: "*(ii) the extent to which the measures are discriminatory either in scope or in application with respect to a Party or an investor or an enterprise*".

[54] E.g. the *PACER plus*, ANNEX 9-C: "*(c) the character of the government action, including its objective and rationale.*"

[55] India-Singapore CECA (2005).

as public health, safety and the environment, do not constitute indirect expropriations."

31. Treaty practice since the adoption of this document has evolved in three dimensions:

- Additional conditions or scenarios under which a measure may disqualify from constituting an "indirect expropriation" have emerged: These conditions and scenarios now feature up to three aspects: non-discrimination; serving a public policy purpose; and not reaching a sufficient intensity ("tantamount").
- The consequences of the presence of these conditions have diversified beyond "not 'indirect expropriation' except in rare circumstances", and further detail has been added to specify these conditions: Depending on the treaty, the presence of these criteria may now disqualify a given measure from being an "indirect expropriation" *always, typically,* or *only occasionally;*[56]
- Treaties accumulate condition-sets that determine whether a given measure disqualifies or potentially disqualifies from constituting an "indirect expropriation".

Conditions and scenarios under which a measure may or does disqualify from constituting an "indirect expropriation"

32. Most of the 180 documents that employ the fourth element to specify the notion of "indirect expropriation"[57] combine two primary criteria that must be present to open the possibility that a measure disqualify from being "indirect expropriation":

- the measure must be *non-discriminatory*; and
- the measure must serve or intend to serve a specific *purpose*, most often the pursuit of a legitimate public welfare objective.

A third explicit criterion, related to whether the measure is *severe*, *indefinite* or has *disproportionate* effects, has emerged more recently.

33. The criterion that the measure must be *non-discriminatory* to be potentially excluded from the qualification of "indirect expropriation" is almost universal among those that contain the element to specify the notion of "indirect expropriation".[58]

34. There is more linguistic variation with regards to the framing of the *purpose* for which the measure needs to be designed or implemented to potentially exclude it from qualifying as an "indirect expropriation". This variation stems from illustrative, open-ended lists[59] of public

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[56] A few treaties specify which type of government actions are "*regulatory actions*" in the sense of the clause. India has specifically clarified in sixteen of its treaties that judicial decisions and awards do fall within the notion of measures for the purpose of the clause.

[57] Some treaties apply this element to expropriations generally, hence including direct expropriations. This approach has been observed in 14 treaties in the sample, mostly treaties concluded by India, but no systematic analysis of older treaties with respect to this criterion has been made as treaty design regarding "direct expropriation" is outside the scope of this note.

[58] Among these is the *Investment Agreement for the COMESA Common Investment Area (2007)*, Article 20(8), which states: "*Consistent with the right of states to regulate and the customary international law principles on police powers, bona fide regulatory measures taken by a Member State that are designed and applied to protect or enhance legitimate public welfare objectives, such as public health, safety and the environment, shall not constitute an indirect expropriation under this Article.*"

[59] Most treaties express the open-ended nature through the wording implicitly; while fifteen treaties, especially treaties concluded by Korea, Colombia and Peru, specify the open-ended nature

welfare objectives that are present in all but eight documents[60] that specify the notion of "indirect expropriation". Fifteen distinct public welfare objectives are mentioned in sample treaties in this regard and appear in 18 distinct combinations. In decreasing order of frequency of their inclusion, these objectives are:

- Public health (178 occurrences),[61]
- Environment (177 occurrences),
- Safety (175 occurrences).
- Real estate price stabilization (16 occurrences, all concluded by Korea);
- Public morals (six single occurrence);
- Public order (four occurrences);
- Social policy (four occurrences);
- Economic policy (three occurrences);
- National security (three occurrences);
- Financial stability (three occurrences);
- Tax policy (three occurrences);
- Labour (two occurrences);
- Monetary policy (one single occurrence);
- Exchange policy (one single occurrence); and
- Consumer protection (one single occurrence).

35. All 180 documents with this feature mention at least two (and up to eight) elements leading to 20 combinations of the illustrations alone. The combinations appear with varying frequency in the sample. For example, 14 out of the 20 combinations occur only a single time, and the trio of health, safety and environment, alone or in combination with other elements, appear in 169 out of the 180 texts that include lists of illustrative elements.

36. An *additional* criterion to determine whether a given measure potentially constitutes an "indirect expropriation" has emerged as of 2008 and is observed in only four sample treaties.[62] It adds a further set of conditions that must be met for the measure to qualify as an "indirect expropriation": To constitute an "indirect expropriation", the measure needs to be either *severe* or for an *indefinite period* and *disproportionate to the public interest*. Whether the measure is

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of the lists explicitly (e.g. Australia-Korea FTA (2014), Footnote 54). The language of the *Uruguay-United Arab Emirates BIT (2018)* and *Colombia-Japan BIT (2011)* are more ambiguous over whether the lists are open-ended or not and could also be understood to be closed lists in their Spanish language version.

60 Canada-Slovakia BIT (2010); *China-India BIT (2006)*; *India-Slovakia BIT (2006)*; Japan-Mongolia EPA (2015); *EU-Viet Nam Investment Protection Agreement (2019)*; *China-Japan-Korea trilateral investment agreement (2012)*. Two treaties, *Colombia-Japan BIT (2011)* and the Japan-Peru BIT (2008), use a reference to *General and Security Exceptions* articles rather than evoking them directly; the lists there contain additional elements not mentioned here.

61 Some treaties clarify the notion of "health" further. The CPTPP, for example, states, in footnote 37: "*For greater certainty and without limiting the scope of this subparagraph, regulatory actions to protect public health include, among others, such measures with respect to the regulation, pricing and supply of, and reimbursement for, pharmaceuticals (including biological products), diagnostics, vaccines, medical devices, gene therapies and technologies, health-related aids and appliances and blood and blood-related products.*"

62 Three treaties with this design were concluded by New Zealand and two by China. They are China-New Zealand FTA (2008), Annex 13; Malaysia-New Zealand FTA (2009), Annex 7; China-Peru FTA (2009), Annex 9; Korea-New Zealand FTA (2015), Annex 10-B.

"discriminatory in its effect" is merely an indicator for the likelihood that a measure constitute an "indirect expropriation", along with a possible breach of a prior written commitment to the investor.

Systematic, typical or occasional exclusion of a measure being an "indirect expropriation"

37. The second component of the approach establishes the consequences of the presence of one or more of the aforementioned criteria:

- In 38 treaties, among which are several plurilateral agreements and thus covering 239 relationships, the presence of the factors *categorically excludes* that the measure constitutes an "indirect expropriation";[63]
- In 124 treaties, mostly bilateral agreements and thus "only" covering 289 relationships, the presence of the factors is a strong indicator that the measure does not constitute an "indirect expropriation" – only in "*rare circumstances*" may a measure constitute an "indirect expropriation" despite the factors being present; and
- In four treaties covering as many relationships, a measure *can* constitute an "indirect expropriation" in the presence of the factors, but the treaty does not indicate any relative frequency.[64]

38. About half of the treaties that refer to "rare circumstances" shed some indicative light on what qualifies as such "rare circumstances". They often refer to proportionality of the measure in relation to the pursued policy objective, either directly (16 occurrences)[65] or via the concept of *good faith*, for which proportionality is an indicator (45 occurrences).[66]

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[63] This feature is particularly frequently observed in treaties concluded by Asian economies as well as Turkey. Plurilateral arrangements concluded by ASEAN economies have this feature almost systematically. The inclusion of the feature in many plurilateral arrangements leads to a very significant number of relationships in which this feature is observed, which make up 45% of the relationships in which the fourth criterion to specify "indirect expropriation" is present despite its present in only 23% of the treaties with the feature. A textual example from Turkey-Kuwait BIT (2010), Article 4, reads: "*2. Non-discriminatory legal measures designed and applied to protect legitimate public welfare objectives, such as health, safety and environment, do not constitute indirect expropriation.*"

[64] Three of these treaties were concluded by Colombia, and the fourth is the Japan-Mongolia EPA (2015). The *Colombia-Japan BIT (2011)* states "*3. Except in such circumstances as when a measure or a series of measures is so severe in the light of their purpose that they cannot be reasonably viewed as having been adopted and applied in good faith, non-discriminatory measures of a Contracting Party that are designed and applied to protect legitimate public welfare objectives in accordance with paragraph 1 of Article 15 do not constitute indirect expropriation.*". The Colombia-Israel FTA (2013) states, in a footnote: "*A measure or a series of measures adopted to protect public purposes including inter alia, the protection of public health, safety and the protection of the environment, do not necessarily constitute an effect equivalent to nationalization or expropriation.*"

[65] Korea and the European Union frequently use this approach, among other countries (see e.g. Japan-Uruguay BIT (2015), Annex III: "*[W]hen a measure or a series of measures by a Contracting Party is extremely severe or disproportionate in light of its purpose.*"

[66] See Canada-Colombia FTA (2008), Annex 811: "*[W]hen a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted in good faith*"; or *Peru-Guatemala FTA (2011)*, Annex 12.10: "*[C]uando una medida o serie de medidas son desproporcionadas a la luz de su objetivo de forma tal que no pueda considerarse de*

Accumulation of condition-sets that determine whether a given measure disqualifies or potentially disqualifies from constituting an "indirect expropriation

39. While the pioneering Exchange of Letters on Expropriation to the Singapore-United States FTA (2003) contained a single set of criteria that determined that a given measure did not constitute [except in rare circumstances] an "indirect expropriation", a few later documents establish more than one of these condition sets. By October 2021, only four treaties were found to have this design feature; all four combined two criteria tests.[67]

40. The following example of this design[68] combines a proportionality-test with a purpose-test:

> *"In order to constitute indirect expropriation, the Party's deprivation of the investor's property 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.*
>
> *Non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives, such as public health, safety, the environment, and real estate price stabilisation (through, for example, measures to improve the housing conditions for low-income households),do not constitute indirect expropriations."*

41. Under this design, only measures that meet the conditions of the two sets or rules can potentially qualify as an "indirect expropriation", hence limiting the scope of measures that can qualify as an "indirect expropriation".

1.2. Combinations and interactions between the components

42. The preceding presentation of the components of language that are employed to specify the notion of "indirect expropriation" can be summarised in the simplified schema set out in Figure 2. This schema organises the most frequently observed elements in the first three levels of the logical hierarchy as they are found in the overwhelming majority of treaties that specify the notion of "indirect expropriation". Each level of linguistic hierarchy specifies elements in the next-higher level.

43. The presentation of the structure omits the fourth level of linguistic elements that is observed in some treaties for some elements as well as rare linguistic variants. This choice was made to reduce complexity and because diversity of the structure and designs increases at every level of specification.

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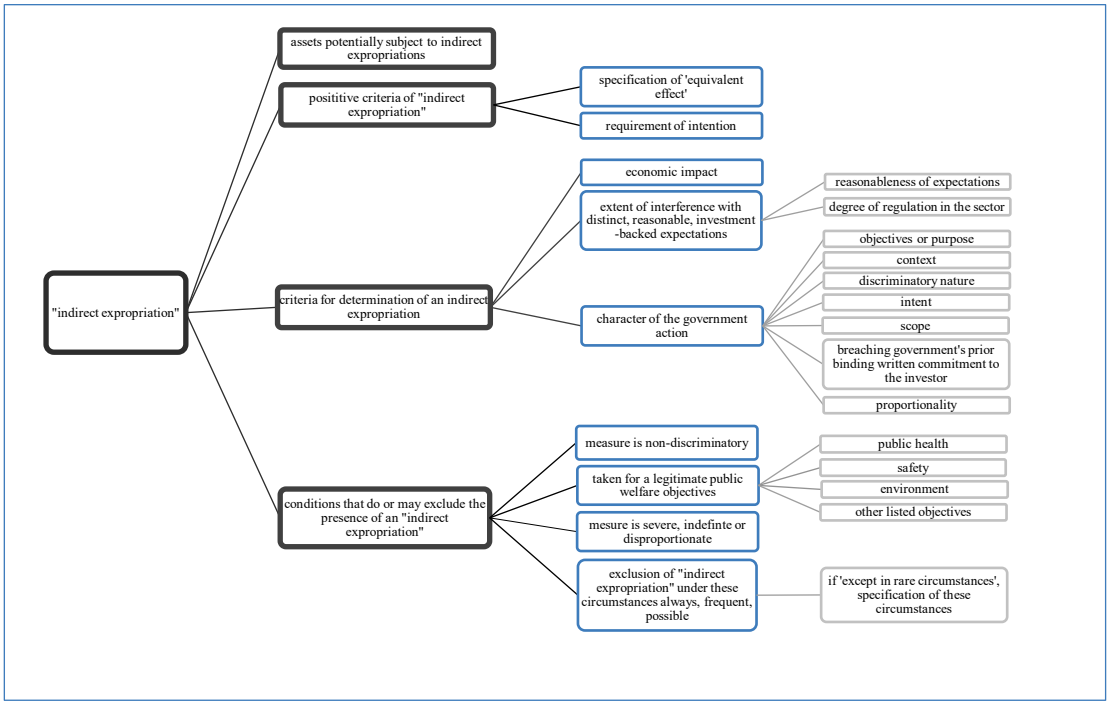
manera razonable que fueron adoptadas y aplicadas de buena fe (…)"; and Japan-Mongolia EPA (2015), Annex 10: "*3. Except in such circumstances as when a measure or series of measures is so severe in the light of its purpose that it cannot be reasonably viewed as having been adopted and applied in good faith, (…)*".

67 These are China-New Zealand FTA (2008), Annex 13; Malaysia-New Zealand FTA (2009), Annex 7; China-Peru FTA (2009), Annex 9; Korea-New Zealand FTA (2015), Annex 10-B.

68 The example is taken from Korea-New Zealand FTA (2015), Annex 10-B.

Figure 2. Simplified structure of textual elements to specify the notion of "indirect expropriation" in sample treaties

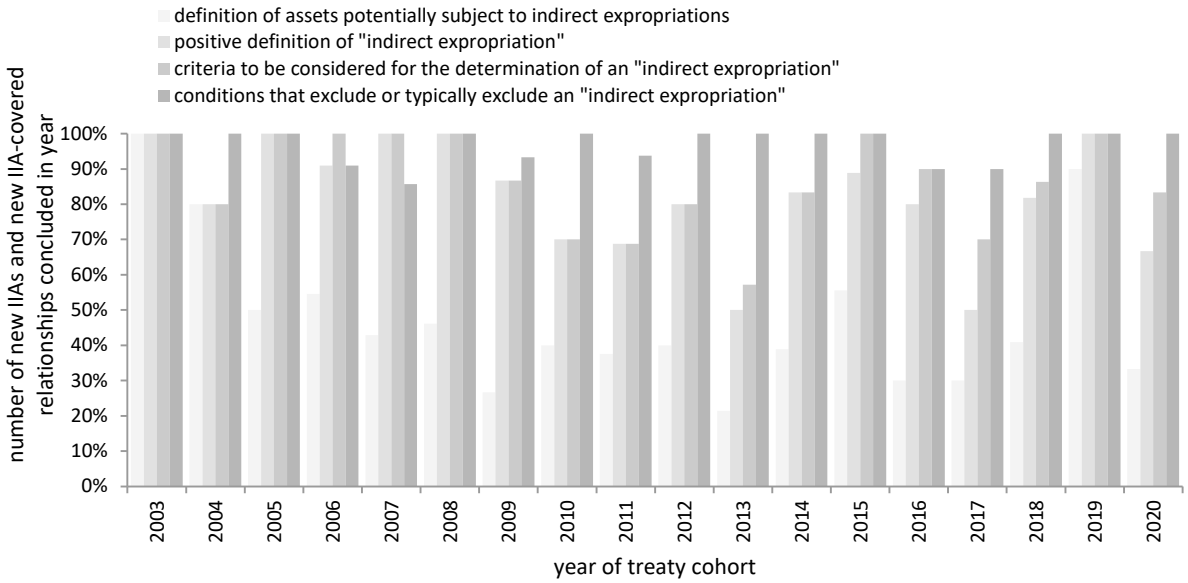


Note: The visualisation only shows a simplified structure of textual elements as they are found in most frequent designs of specifications of the notion "indirect expropriation" in sample treaties. It only shows the three highest levels of the hierarchical organisation of linguistic elements and omits rare variants.
Source: OECD.

44. The use and combination of the elements and sub-elements lead to very large number of variants of text employed to calibrate and clarify the notion of "indirect expropriation": Even when only the first two levels of the hierarchy are considered and nuances are ignored, the 186 treaties and related documents that contain clarifying notions do so in 59 different ways, of which 38 variants occur only once in the sample. When the third level of explanatory language is considered (but most of the rich and numerous nuances remain ignored), there are 87 different linguistic variants to describe the notion of "indirect expropriation"; of these, 67 are used only one single time in the sample. At the same time, 33 treaties or related documents, or roughly 18% of the treaties with specifications, use the exact text that is found in the Exchange of Letters on Expropriation to the Singapore-United States FTA (2003) that pioneered the trend.

45. There are no discernible time-trends with respect to the designs of clauses and the use of different components or combinations – other than the growing number of specifications overall. For example, while the relative frequency of the four primary components that make up specifications of "indirect expropriation" evolves over time, there are no discernible trends or directions (Figure 3).

Figure 3. Relative frequency of primary components in treaties with "indirect expropriation" specification over time



Note: The 2021 cohort is not shown given that only one treaty in the sample belongs in the cohort at the time when the survey was concluded. Columns show relative frequency of the presence of an element in annual cohorts.
Source: OECD treaty database.

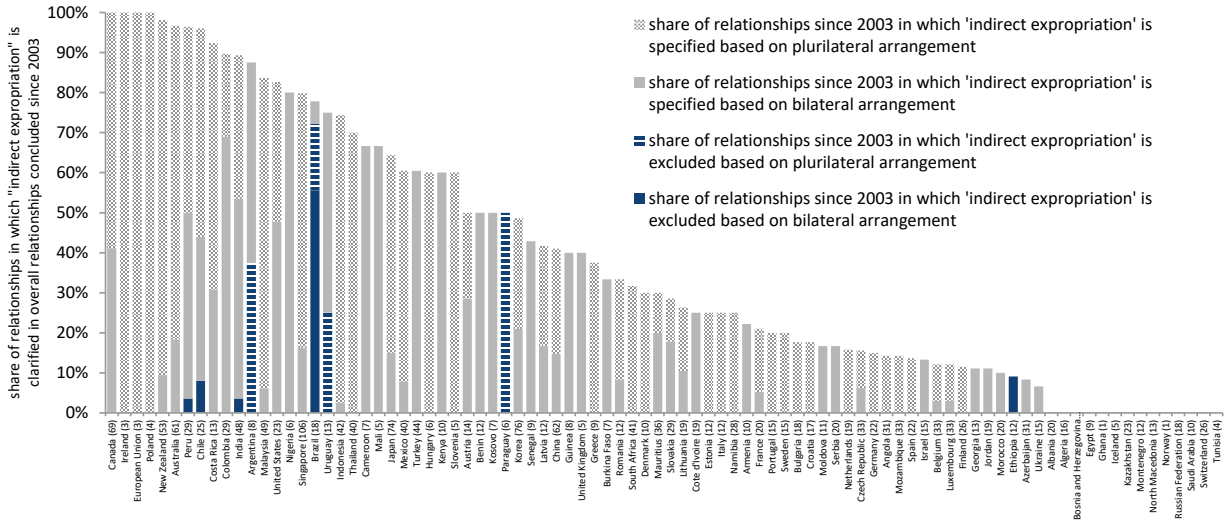
2. Individual countries include specifications to varying degrees and presence in some countries' treaty sets is shaped predominantly by participation in plurilateral arrangements

46. Individual countries have taken up the practice of specifying the notion of "indirect expropriation" to different degrees since the approach was pioneered in 2003. All but fourteen jurisdictions that are invited to participate in the Track 2 Project have included specifications of "indirect expropriation" in at least one of their treaties, and 8 of these jurisdictions (9%) have excluded "indirect expropriation" from the coverage of at least one of their treaties that contains post-establishment protections.

47. Plurilateral arrangements that contain specifications of "indirect expropriation" have contributed significantly to the wide spread of the practice among the 88 jurisdictions covered by this study. Only 53 of these jurisdictions have included specifications of the notion in bilateral arrangements, while 21 countries have such language in their treaties only thanks to participation in a plurilateral arrangement with the feature, chiefly in treaties that the European Union has concluded on behalf of its Members.

48. Different degrees of embrace of the practice and different paces of treaty making, treaty replacement, and conclusion of amendments and joint interpretations since 2003 have led to significant variation of the presence of the feature in individual countries' treaty sets (Figure 4).

Figure 4. Share of treaty relationships concluded or updated since 2003 in which the notion of "indirect expropriation" is specified or excluded: individual country profiles



Note: Considers only arrangements made since 6 May 2003, regardless of in-force status of the underlying arrangement. Numbers in brackets next to country names show the number of overall relationships in the sample that were concluded, amended or complemented by the country through a bilateral or plurilateral instrument since 6 May 2003, irrespective of the possible presence of a specification of the notion of "indirect expropriation".
Source: OECD investment treaty database.

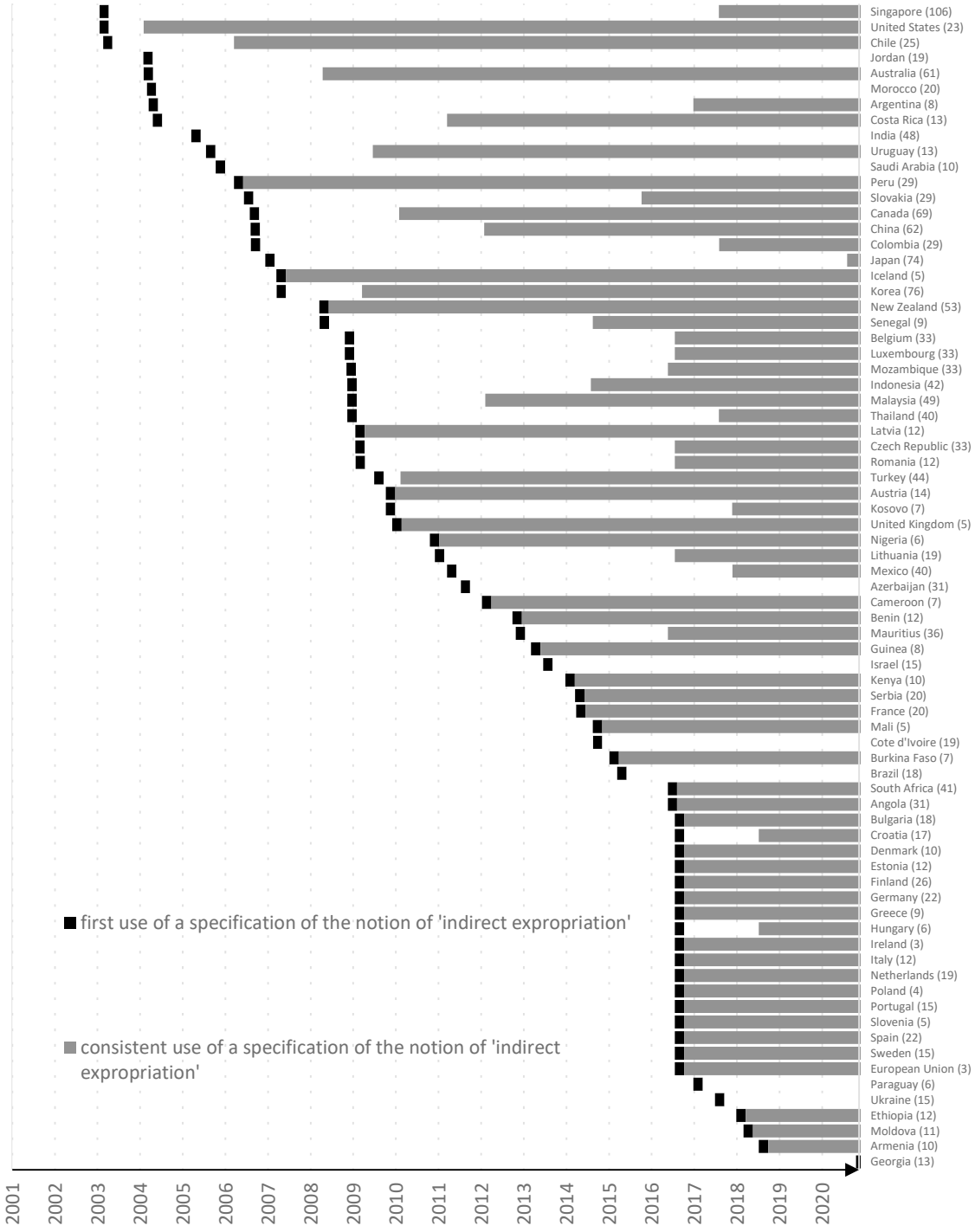
49. Figure 4 also documents the extent to which plurilateral arrangements have contributed to the presence of the feature in individual countries' treaty sets and the rather dominant role

that these arrangements have played in the dissemination of specifications of "indirect expropriation" for many countries. The greater frequency with which specifications of "indirect expropriation" are observed in plurilateral arrangements and their relative importance for the coverage of relationships since 2003 when compared to bilateral treaties, have both contributed to this outcome:

- Almost three quarters (70%) of the 23 plurilateral arrangements concluded or amended since May 2003 in the sample contain specifications of "indirect expropriation"; only under one quarter (24%) of bilateral arrangements have the feature.
- The 23 plurilateral arrangements in the sample cover 361 bilateral relationships, almost than twice as many than the 161 bilateral arrangements that cover only as many relationships.

50. Early adoption – and early consistent adoption – of the feature is a further factor that contributes to explaining the different degrees of presence of the feature in individual countries' treaty sets. Countries began including specifications of the notion of "indirect expropriation" gradually over a longer time frame; in many countries, such inclusion was initially sporadic, and systematic inclusion of such language by individual countries in countries' treaties often only began a decade after the first inclusion by that country (Figure 5).

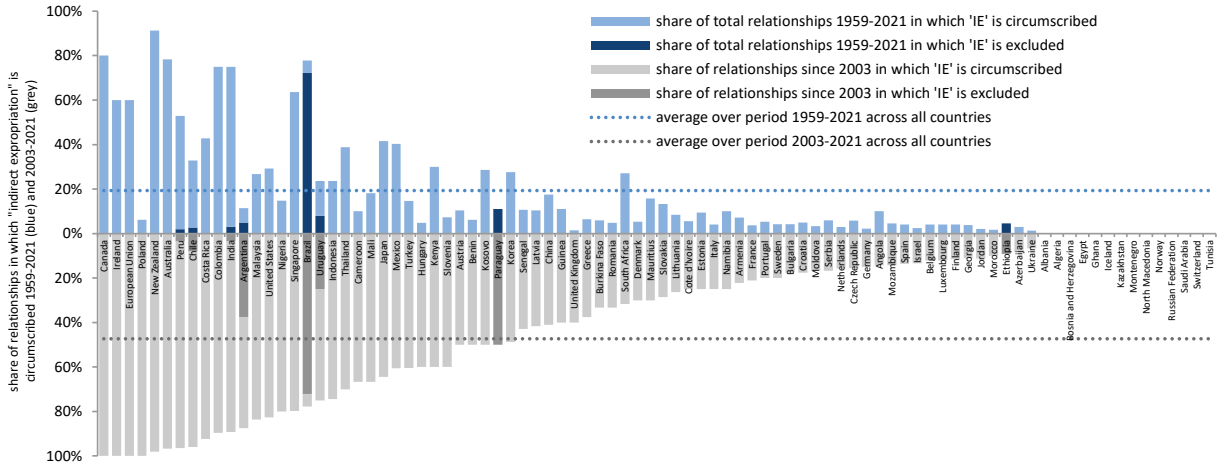
Figure 5. Adoption of language that specifies the notion of "indirect expropriation" in individual countries over time (moment of first use and beginning of systematic use)



Note: Only jurisdictions that have the feature at least once are shown. Numbers in brackets for each country show how many treaty relationships were created or amended between 6 May 2003 and October 2021, irrespective of whether they contain a specification of the notion of "indirect expropriation". Exclusions of "indirect expropriation" from the scope of protections are not considered for the purpose of the presentation.
Source: OECD investment treaty database.

51. If inclusion of specifications of the notion of "indirect expropriation" has become almost systematic in recent treaties, the feature remains rather marginal in the overall stock of investment treaties that have accumulated over the decades. As many treaty arrangements predate May 2003 and do not contain specifications of the notion of "indirect expropriation", the share of treaties with the feature is actually much smaller than it might appear when focusing on recent arrangements alone. Only around 19% of all relationships feature a specification of the notion of "indirect expropriation" or exclude "indirect expropriation" entirely from the scope of protections – well under half of the 47%-share observed in relationships concluded or adjusted since May 2003. Depending on the age-profile of individual countries' treaty sets, the proportion of relationships with a specification can deviate quite significantly from the proportion in their respective post-2003 subset (Figure 6).

Figure 6. Share of individual countries' relationships that do or do not contain exclusions or specifications of the concept "indirect expropriation" in countries' complete treaty sets versus post-2003 treaty sets



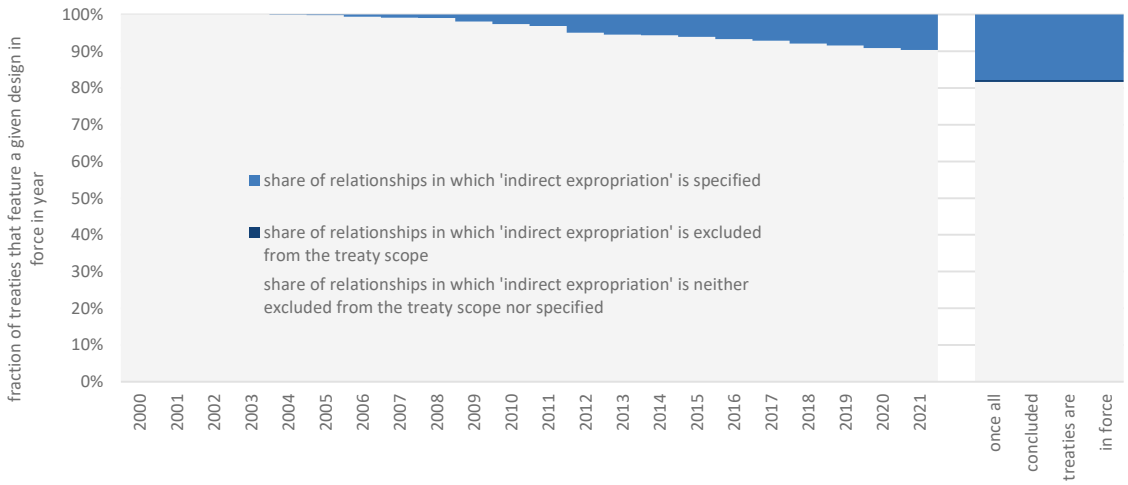
Note: Only relationships based on treaties in force or those that could be expected to come into the force in the future are considered for both the period 1959-2021 and 2003-2021. Assessment of treaty content is made of the rules that govern the treaty-relationship as of October 2021, that is, later amendments of other side-agreements are taken into account for the assessment of the content of the treaty. Treaties that predate 6 May 2003 and that have not been amended or complemented since that date were not assessed for whether they exclude "indirect" expropriations from the scope of the protections. A cursory assessment suggests that very few treaties feature such a design.
Source: OECD investment treaty database.

3. The predominant recent design approach diffuses into the overall treaty sample slowly, and mainly through treaties in previously uncovered relationships

52. As a result of the large stock of (mainly pre-2003) treaties that do not specify the notion of "indirect expropriation", the proportion of relationships in which treaty text specifies the notion of "indirect expropriation" increases very slowly. Despite the large proportion of agreements with a clarification among recent treaties, the share of relationships governed by treaties with this feature in force had not reached 10% at the end of 2020, over 16 years after a shift in designs had begun.[69]

53. Even if all agreements that had been concluded by October 2021 were to come into effect, the share of relationships in which underlying treaties specify the notion of "indirect expropriation" would still not reach even 18%; the share of relationships that contain some post-establishment protection content but explicitly exclude "indirect expropriation" from the scope of treaty provisions would remain very small, at 0.6%; even in this scenario, over 81% of all covered relationships would not contain a specification of "indirect expropriation" (Figure 7).

Figure 7. Diffusion of designs that specify the notion of "indirect expropriation" into the overall treaty population



Note: Graph shows relationships known to be in force on 31 December of the indicated year.
Source: OECD investment treaty database.

54. Several factors contribute to the slow diffusion into the overall treaty population with the feature:

- Many recent treaties that contain the feature have not yet come into effect, partly due to their recent conclusion and the delays typically observed between conclusion of a

[69] The share of relationships in which "indirect expropriation" is excluded from the scope of treaty coverage remains at zero in February 2020 as none of the eleven sample treaties that were concluded after May 2003 and have this feature are known to had come into force by that time.

treaty and its entry into force. The median time between these events in the overall treaty population for which exact signature and entry-into-force dates are known is just over 21 months.

- Specifications of the notion of "indirect expropriation" have almost exclusively been brought into the treaty population in the context of treaties in relationships that had not previously been covered by a treaty at all. These cases represent 85% of all relationships in which such a specification is observed. The remaining 15% of the relationships in which the notion of "indirect expropriation" is now specified, obtained this feature through a change in a previously covered relationship, predominantly through wholesale treaty replacements (31 treaties, six of which were plurilateral treaties[70] bringing change to 84 relationships). Treaty amendments or side-agreements played a much lesser role: they only contributed to the change in seven relationships.[71]

55. A stronger growth of the share of treaty relationships with specifications of "indirect expropriation" in the coming years seems however possible. Not only have such specifications now become the norm in almost all new treaties, but countries have also used the opportunity to introduce specifications in the context of treaty replacements more systematically. While no specification was introduced in 44 cases where a treaty replacement took place after 6 May 2003, these replacements were mainly concluded in 2003 or the immediately following years. No treaty replacement after 2012 omitted the occasion to introduce a specification.

[70] The six agreements are CETA, *EU-Viet Nam Investment Protection Agreement*, *EU-Singapore Investment Protection Agreement*, USMCA, Mexico-Central America FTA, and ACIA.

[71] One treaty in the sample, the Colombia-India BIT (2009), included a specification of the notion of "indirect expropriation" in its original text, but was later complemented by a joint interpretation (Joint Interpretative Declaration (2018) to the Colombia-India BIT (2009)), that also contained a specification, but this time using a different set of criteria. In the preamble to their joint interpretation, the Parties acknowledge that "additional uncertainties and ambiguities may remain and need to be further clarified at a future date".

4. Diversity in the details of designs is rich, country-specific and growing – while structural homogeneity remains high

56. The overall degree of linguistic diversity in how the notion of "indirect expropriation" is specified – 87 main variants in only 186 arrangements – is striking, even in the context of investment treaty designs where rich diversity is observed more generally.[72] It is all the more noteworthy as this variation is almost exclusively observed in detail – with uncertain and largely untested practical consequences – while structural homogeneity is very high: almost all 89 designs follow, since 2003, the path pioneered by a single document.

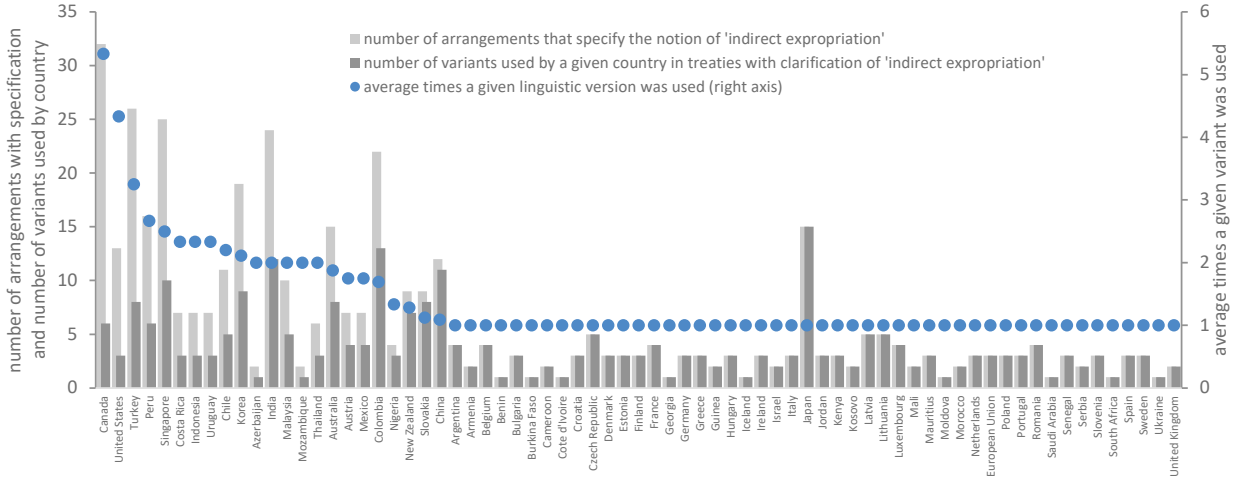
57. The limited degree of homogeneity in details of designs of specifications of "indirect expropriation" is also observed in individual countries' treaty sets, albeit to varying, country-specific degrees (section 4.1). A longitudinal assessments documents that the growth of linguistic diversity of specifications of "indirect expropriation" has not yet plateaued or abated – on the contrary, differentiation is still accelerating (section 4.2).

4.1. Individual countries' treaty sets show different degrees of homogeneity in the specification of the notion of "indirect expropriation"

58. Variation of specifications of the notion of "indirect expropriation" is high in the overall treaty sample, but it is even higher in most countries' treaty sets. More than three quarters (80%) of the 60 jurisdictions in the sample that have clarified this notion at least once and have more than one treaty with the feature, have not replicated the chosen model in any later treaty. Of the 62 jurisdictions that have clarifications in at least two treaties, 48 have used a different variant each time they concluded a new treaty with the feature. Only very few countries have stuck to a one linguistic variant (minor nuances being ignored for the assessment), but the highest average replication rate of any country in the sample is only just over five, but even that country – Canada – still uses six different linguistic variations for its specifications (Figure 8).

[72] See on the diversity of language in other areas that have been explored in large-sample surveys of treaty design the studies mentioned in footnote 12.

Figure 8. Homogeneity of clarifications of "indirect expropriation" within individual countries' treaty samples: absolute number of variants used and repeat frequency



Note: Only jurisdictions that have at least one arrangement that specifies the notion of "indirect expropriation" are shown. Plurilateral arrangements to which a given jurisdiction is a party are only counted once.
Source: OECD investment treaty database.

59. Variation of how the notion of "indirect expropriation" is framed may not matter in practice – that is essentially untested in litigation – but each variation in the way a potentially identical concept is described may still lead to detailed and costly comparisons of treaty language in litigation contexts where nuances may be loaded with supposed meaning.

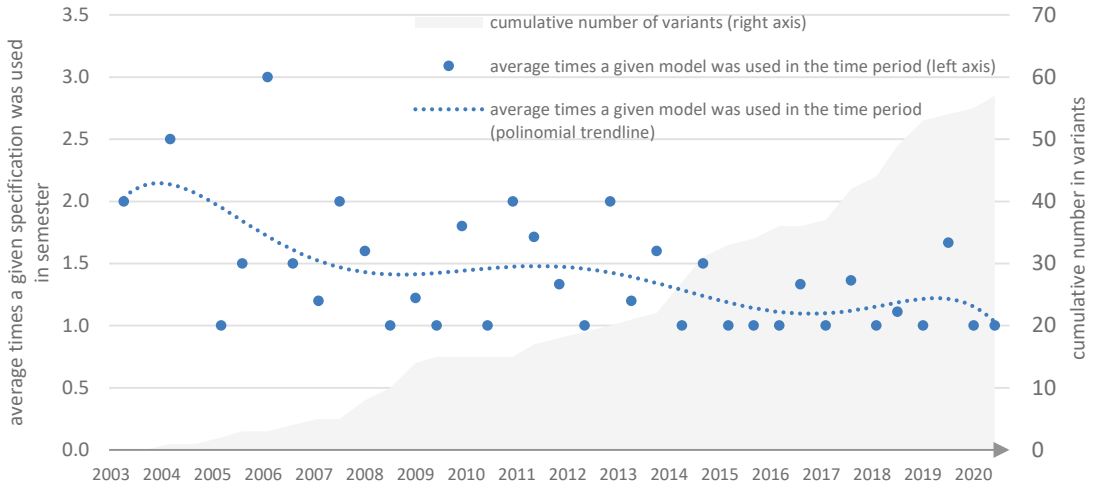
60. What drives the generation of new variants is uncertain. Information about experience from litigation, which could be one driving factor of treaty reform, is incomplete: Governments may be involved in ongoing litigation where design shortcomings are identified. Also, closed cases may not be publicly known or publicly documented. By October 2021, only four claims had become known that were brought under one of the 186 arrangements that specify the notion of "indirect expropriation" and in which an "indirect expropriation" was alleged.[73]

4.2. The development of diversity in notions of "indirect expropriation" accelerates

61. A further inquiry into the origin of the large diversity in language to specify notions of "indirect expropriation" shows that the generation of new variants keeps accelerating – while the fundamental design principles of specifications of "indirect expropriation" continue to remain essentially unchanged. Figure 9 documents how the repeat-rate of a given design in regular six-month intervals has declined between May 2003 and early 2021. Initially, a given model was used on average twice or even thrice in a six-month interval, this repeat rate has steadily dropped to little more than one (blue trendline), which translates in treaties that are concluded in a recent interval use all different designs.

[73] Galway Gold Inc. v. Republic of Colombia (ICSID Case No. ARB/18/13), brought under the Canada-Colombia FTA (2008), *Carlos Ríos and Francisco Ríos v. Republic of Chile* (ICSID Case No. ARB/17/16), brought under the Chile-Colombia FTA (2006); Bear Creek Mining Corporation v. Republic of Peru (ICSID Case No. ARB/14/21), brought under the Canada-Peru FTA (2008), and Al Tamimi v. Oman (ICSID Case No. ARB/11/33), brought under the United States-Oman FTA (2006).

Figure 9. Dynamic of diversity in specifications of 'indirect expropriation': evolution 2003-2021



Note: Blue dots and corresponding blue trendline shows repeat rate of specifications of the notion of "indirect expropriation" within 6-month intervals, considering only the two highest levels of the linguistic hierarchy in the design of the specifications. The top edge of the grey surface shows the number of variants of observed in the sample at any given time.
Source: OECD investment treaty database.

62. The reasons why the diversity of specifications of the notion of "indirect expropriation" continue to grow are unknown; the fact that ever more countries take up the practice to specify the notion could play a role for this observation. This suggestion makes the stability of the fundamental design of specifications of the notion of "indirect expropriation" all the more noteworthy.

Annex A. Methodology

Sample composition

63. The sample for this survey consists of 762 investment treaties and related documents that the 88 economies that are invited to participate in the Track 2 Project[74] have concluded with any other economy between 6 May 2003 and October 2021.[75]

64. The concept of "investment treaty" is increasingly fluid as traditionally assumed defining features – foremost the presence of post-establishment protection content – are no longer present in some treaties. For the purpose of this survey, "investment treaties" are nonetheless understood as treaties that contain post-establishment protection content, given that rules on "indirect expropriation" are part of that subset of rules. Treaties with investment content that do not include any post-establishment protection provisions are not included in the sample.

65. The vast majority of the 762 documents in the sample are bilateral investment treaties. Investment chapters in bilateral preferential trade agreements with investment provisions as well as 23 plurilateral agreements with investment provisions – signed by at least one economy that participates in the Track 2 Project – are also included in the sample. For plurilateral arrangements, only relationships that involve at least one participant in the Track 2 Project are considered. Overall, the treaties or related texts in the sample cover 1120 bilateral relationships. Figure A A.1 shows the distribution of new treaties and treaty relationships included in the sample in annual cohorts.

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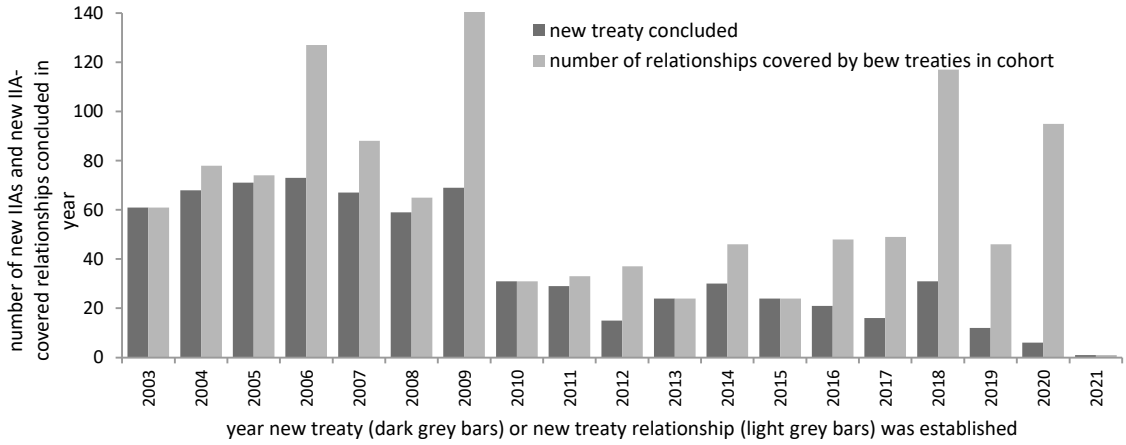
[74] The invited economies Albania, Algeria, Angola, Argentina, Armenia, Australia, Austria, Azerbaijan, Belgium, Benin, Bosnia and Herzegovina, Brazil, Bulgaria, Burkina Faso, Cameroon, Canada, Chile, People's Republic of China, Colombia, Costa Rica, Cote d'Ivoire, Croatia, Czech Republic, Denmark, Egypt, Estonia, Ethiopia, Finland, France, Georgia, Germany, Ghana, Greece, Guinea, Hungary, Iceland, India, Indonesia, Ireland, Israel, Italy, Japan, Jordan, Kazakhstan, Kenya, Korea, Kosovo, Latvia, Lithuania, Luxembourg, Malaysia, Mali, Mauritius, Mexico, Moldova, Montenegro, Morocco, Mozambique, Namibia, Netherlands, New Zealand, Nigeria, North Macedonia, Norway, Paraguay, Peru, Poland, Portugal, Romania, Russian Federation, Saudi Arabia, Senegal, Serbia, Singapore, Slovakia, Slovenia, South Africa, Spain, Sweden, Switzerland, Thailand, Tunisia, Turkey, Ukraine, United Kingdom, United States, and Uruguay.

[75] Where the term "country" is used in this report, it does not imply any judgement by the OECD as to the legal or other status of any territorial entity. Belgium and Luxembourg have concluded many treaties jointly as the "Belgium-Luxembourg Economic Union"; while they constitute a joint treaty partner, this report counts the Belgium-Luxembourg Economic Union as *two* countries, but counts treaties concluded by the Economic Union only once.

Figure A A.1. Sample composition: treaties and treaty-covered relationships 2003-2021



Source: OECD investment treaty database.

66. The primary considerations for the composition of the treaty sample were reliability and authenticity of the treaty texts. The sample includes thus only documents that were available from government websites of economies that participate in the Track 2 Project or, rarely, websites of the governments of their treaty partners, as well as websites maintained by international or regional organisations.[76] Agreements were only included if an authentic text was available in a language accessible to the Secretariat (English, French, German, Italian, Spanish, Portuguese, Arabic). The assessment of the treaty content was made for one authentic language only, which may not have been the language in which the treaty has been negotiated or which is the determining language in cases of deviations. Translations towards the authentic language that has been used for the assessment of a given treaty may have contributed to linguistic variance.

67. Given the limitations to availability of treaty texts, the sample may not in all cases be representative and may be biased for a number of reasons. Some treaties, especially those signed just before the finalisation of the survey may not be accessible on publicly available databases used for this survey. The full list of treaties and related arrangements included in the sample is available in Annex B.

68. Treaties and amendments have been included in the sample regardless of whether they are in force. Treaties that are not known to be in force or that are known to no longer be in force are shown in *italics* in this document.[77] For certain assessments as indicated in the text or notes to figures, only future-oriented treaties were considered; future-oriented treaties are those arrangements that were known to be in force in October 2021 or were expected to enter into force in the future. Treaties that are "expected to come into force" are those that have been signed but have not yet entered into effect. Some treaties that have been signed but for which at least one signatory has declared it will not bring into effect, are not counted in this group.

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[76] These include the United Nations Treaties series, the website of the Organisation of American States and the EFTA website. UNCTAD's treaty collection was not used for concerns about unsigned or invalid versions, other than to fill gaps and only if the document file made available on the database showed a scan of a signed and dated original text.

[77] This does not apply systematically to plurilateral arrangements that can be in force for some of its signatories but not for others. Only when the agreement is not in force for any of its signatories is the treaty name shown in *italics*.

Treaties that have been superseded or terminated are also excluded from the group of future-oriented treaties; treaties that are suspended are likewise treated as belonging to this group even though they may theoretically return to force in the future.

Treatment of amendments and side-agreements

69. Many treaties in the sample have been amended after their initial conclusion or complemented by side agreements such as joint interpretations. These documents were likewise assessed for this study. For purposes of the presentation, in particular for the description of developments over time, such joint interpretations and amendments are treated as if a new treaty with the features had replaced an existing treaty. The signature date of the amendment or side-agreement determines the inclusion of the arrangement in a cohort.

Composition of the historical sample 1959-2021

70. Certain sections of the study refer to the sample of treaties concluded since 1959. The criteria for the inclusion of treaties in the sample for this longer period follows the same criteria as described above. However, the Energy Charter Treaty is not included in that sample given its sectoral coverage and the large number of bilateral relationships it covers.

Contemporaneous coexistence of distinct treaty arrangements in a given bilateral relationship

71. References to treaty-based "relationships" refer to arrangements that are established by one treaty and potentially related amendments or side-agreements. In many bilateral relationships between two jurisdictions, two or more such treaties coexist contemporaneously, i.e. parallel arrangements with overlapping content are in force simultaneously. The effects of such contemporaneous coexistence of treaty arrangements in a given relationship have not been assessed here. For the purpose of the sample and the presentation, the relationships are assessed independently of one another.

Annex B. List of treaties and related documents in the sample

72. This Annex contains the list of treaties and related documents that are included in the sample of this study. Treaties and documents in *italics* were, according to publicly available information accessed by the Secretariat, not yet or no longer in force at the time the survey was concluded in October 2021. The treaties are listed in alphabetical order for each country, resulting in a double listing of individual treaties concluded between participants in the Track 2 Project, under both economies. Plurilateral agreements included in the sample are shown at the end of the list. The electronic version of the present document provides – some rare exceptions aside – access to the full text of the treaty through a hyperlink under the treaty name; some documents may no longer be available at the electronic address as time passes.

Albania-Azerbaijan BIT (2012)
Albania-Bosnia Herzegovina BIT (2008)
Albania-Croatia BIT (1993) - Protocol (2009)
Albania-Cyprus BIT (2010)[78]
Albania-Czech Republic BIT (1994) - Protocol (2010)
Albania-Korea BIT (2003)
Albania-Kosovo BIT (2016)[*]
Albania-Lithuania BIT (2007)
Albania-Moldova BIT (2004)
Albania-San Marino BIT (2012)
Albania-Spain BIT (2003)
Albania-United Arab Emirates BIT (2015)
Algeria-Austria BIT (2003)
Algeria-Finland BIT (2005)
Algeria-Iran BIT (2003)
Algeria-Mauritania BIT (2008)
Algeria-Netherlands BIT (2007)
Algeria-Portugal BIT (2004)
Algeria-Russian Federation BIT (2006)
Algeria-Serbia BIT (2012)
Algeria-Switzerland BIT (2004)
Algeria-Tajikistan BIT (2008)
Algeria-Tunisia BIT (2006)
Angola-Brazil BIT (2015)
Angola-France BIT (2008)
Angola-Germany BIT (2003)
Angola-Portugal BIT (2008)
Angola-South Africa BIT (2005)
Argentina-Chile FTA (2017)
Argentina-Japan BIT (2018)
Argentina-Panama BIT (1996) - Exchange of Letters (2004)
Argentina-Qatar BIT (2016)
Argentina-United Arab Emirates BIT (2018)
Armenia-Finland BIT (2004)
Armenia-India BIT (2003)
Armenia-Japan BIT (2018)
Armenia-Kazakhstan BIT (2006)
Armenia-Korea BIT (2018)
Armenia-Latvia BIT (2005)
Armenia-Lithuania BIT (2006)
Armenia-Netherlands BIT (2005)
Armenia-Singapore BIT (2019)
Armenia-Sweden BIT (2006)
Australia-Chile FTA (2008)
Australia-Hong Kong (China) FTA (2019)
Australia-Indonesia BIT (1992) - Exchange of letters (2020)
Australia-Indonesia CEPA (2019)
Australia-Japan EPA (2014)
Australia-Korea FTA (2014)
Australia-Malaysia FTA (2012)
Australia-Mexico BIT (2005)
Australia-New Zealand ANZCERTA Investment Protocol (2011)
Australia-Peru FTA (2018)
Australia-Singapore Amendment (2016)
Australia-Thailand FTA (2004)
Australia-Turkey BIT (2005)
Australia-United States FTA (2004)
Australia-Uruguay BIT (2019)
Austria-Algeria BIT (2003)
Austria-Cambodia BIT (2004)
Austria-Ethiopia BIT (2004)
Austria-Guatemala BIT (2006)
Austria-Kazakhstan BIT (2010)
Austria-Kosovo BIT (2010)
Austria-Kyrgyzstan BIT (2016)
Austria-Namibia BIT (2003)
Austria-Nigeria BIT (2013)
Austria-Tajikistan BIT (2011)
Austria-Yemen BIT (2003)
Azerbaijan-Afghanistan BIT (2017)
Azerbaijan-Albania BIT (2012)
Azerbaijan-Belarus BIT (2010)
Azerbaijan-Belgium/Luxembourg BIT (2004)
Azerbaijan-Croatia BIT (2007)
Azerbaijan-Czech Republic BIT (2011)
Azerbaijan-Estonia BIT (2010)
Azerbaijan-Greece BIT (2004)
Azerbaijan-Israel BIT (2007)
Azerbaijan-Korea BIT (2007)
Azerbaijan-Kuwait BIT (2009)

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78 Note by Turkey: The information in this document with reference to "Cyprus" relates to the southern part of the Island. There is no single authority representing both Turkish and Greek Cypriot people on the Island. Turkey recognises the Turkish Republic of Northern Cyprus (TRNC). Until a lasting and equitable solution is found within the context of the United Nations, Turkey shall preserve its position concerning the "Cyprus issue".

Note by all the European Union Member States of the OECD and the European Union: The Republic of Cyprus is recognised by all members of the United Nations with the exception of Turkey. The information in this document relates to the area under the effective control of the Government of the Republic of Cyprus.

* 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.

Azerbaijan-Latvia BIT (2005)
Azerbaijan-Lithuania BIT (2006)
Azerbaijan-Montenegro BIT (2011)
Azerbaijan-North Macedonia BIT (2013)
Azerbaijan-Qatar BIT (2007)
Azerbaijan-Russian Federation BIT (2014)
Azerbaijan-San Marino BIT (2015)
Azerbaijan-Serbia BIT (2011)
Azerbaijan-Switzerland BIT (2006)
Azerbaijan-Syria BIT (2009)
Azerbaijan-Tajikistan BIT (2007)
Azerbaijan-Turkey BIT (2011)
Azerbaijan-Turkmenistan BIT (2018)
Azerbaijan-United Arab Emirates BIT (2006)
Belgium/Luxembourg-Azerbaijan BIT (2004)
Belgium/Luxembourg-Bahrain BIT (2006)
Belgium/Luxembourg-Barbados BIT (2009)
Belgium/Luxembourg-Bosnia and Herzegovina BIT (2004)
Belgium/Luxembourg-Botswana BIT (2006)
Belgium/Luxembourg-China BIT (2005)
Belgium/Luxembourg-Colombia BIT (2009)
Belgium/Luxembourg-Congo (Democratic Republic) BIT (2005)
Belgium/Luxembourg-Ethiopia BIT (2006)
Belgium/Luxembourg-Guatemala BIT (2005)
Belgium/Luxembourg-Korea BIT (2006)
Belgium/Luxembourg-Kosovo BIT (2010)
Belgium/Luxembourg-Libya BIT (2004)
Belgium/Luxembourg-Madagascar BIT (2005)
Belgium/Luxembourg-Mauritius BIT (2005)
Belgium/Luxembourg-Montenegro BIT (2004)
Belgium/Luxembourg-Montenegro BIT (2010)
Belgium/Luxembourg-Mozambique BIT (2006)
Belgium/Luxembourg-Nicaragua BIT (2005)
Belgium/Luxembourg-Oman BIT (2008)
Belgium/Luxembourg-Panama BIT (2009)
Belgium/Luxembourg-Peru BIT (2005)
Belgium/Luxembourg-Qatar BIT (2007)
Belgium/Luxembourg-Rwanda BIT (2007)
Belgium/Luxembourg-Serbia BIT (2004)
Belgium/Luxembourg-Sudan BIT (2005)
Belgium/Luxembourg-Tajikistan BIT (2009)
Belgium/Luxembourg-Togo BIT (2009)
Belgium/Luxembourg-Uganda BIT (2005)
Belgium/Luxembourg-United Arab Emirates BIT (2004)
Benin-Canada BIT (2013)
Benin-China BIT (2004)
Bosnia and Herzegovina-Belgium/Luxembourg BIT (2004)
Bosnia and Herzegovina-Czech Republic BIT (2002) - Protocol (2009)
Bosnia and Herzegovina-France BIT (2003)
Bosnia and Herzegovina-India BIT (2006)
Bosnia and Herzegovina-Jordan BIT (2006)
Bosnia and Herzegovina-Lithuania BIT (2007)
Bosnia and Herzegovina-Slovakia BIT (2008)
Bosnia and Herzegovina-Switzerland BIT (2003)
Bosnia Herzegovina-Albania BIT (2008)
Brazil-Angola BIT (2015)
Brazil-Chile BIT (2015)
Brazil-Chile FTA (2018)
Brazil-Colombia BIT (2015)
Brazil-Ecuador BIT (2019)
Brazil-Ethiopia BIT (2018)
Brazil-Guyana BIT (2018)
Brazil-India BIT (2020)
Brazil-Malawi BIT (2015)
Brazil-Mexico BIT (2015)
Brazil-Morocco BIT (2019)
Brazil-Mozambique BIT (2015)
Brazil-Peru ETEA (2016)
Brazil-Suriname BIT (2018)
Brazil-United Arab Emirates BIT (2019)
Bulgaria-Bahrain BIT (2009)
Bulgaria-China BIT (1989) - Amendment (2007)
Bulgaria-Indonesia BIT (2003)
Bulgaria-Israel BIT (1993) - Protocol (2011)
Bulgaria-Kazakhstan BIT (1999) - Amendment (2006)
Bulgaria-Korea BIT (2006)
Bulgaria-Kuwait BIT (1997) - Amendment (2007)
Bulgaria-Latvia BIT (2003)
Bulgaria-Lithuania BIT (2005)
Bulgaria-Oman BIT (2007)
Bulgaria-Qatar BIT (2007)
Bulgaria-San Marino BIT (2007)
Bulgaria-Singapore BIT (2003)
Bulgaria-Thailand BIT (2003)
Bulgaria-United States BIT (1992) - Protocol (2003)
Burkina Faso-Canada BIT (2015)
Burkina Faso-Korea BIT (2004)
Burkina Faso-Morocco BIT (2007)
Cameroon-Canada BIT (2014)
Cameroon-Morocco BIT (2007)
Cameroon-Turkey BIT (2012)
Canada-Benin BIT (2013)
Canada-Burkina Faso BIT (2015)
Canada-Cameroon BIT (2014)
Canada-Chile FTA (1996) - Amendment (2017)
Canada-China BIT (2012)
Canada-Colombia FTA (2008)
Canada-Cote d'Ivoire BIT (2014)
Canada-Czech Republic BIT (2009)
Canada-Guinea BIT (2015)
Canada-Honduras FTA (2013)
Canada-Hong Kong (China) BIT (2016)
Canada-Jordan BIT (2009)
Canada-Korea FTA (2014)
Canada-Kosovo BIT (2018)
Canada-Kuwait BIT (2011)
Canada-Latvia BIT (2009)
Canada-Mali BIT (2014)
Canada-Moldova BIT (2018)
Canada-Mongolia BIT (2016)
Canada-Nigeria BIT (2014)
Canada-Panama FTA (2010)
Canada-Peru BIT (2006)
Canada-Peru FTA (2008)
Canada-Romania BIT (2009)
Canada-Senegal BIT (2014)
Canada-Serbia BIT (2014)
Canada-Slovakia BIT (2010)
Canada-Tanzania BIT (2013)
Canada-United Kingdom FTA (2020)
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Russian Federation-United Arab Emirates BIT (2010)
Russian Federation-Venezuela BIT (2008)
Saudi Arabia-Czech Republic BIT (2009)
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Saudi Arabia-Singapore BIT (2006)
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Senegal-Canada BIT (2014)
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Senegal-Portugal BIT (2011)
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South Africa-Angola BIT (2005)
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Uruguay-Viet Nam BIT (2009)

AANZFTA
Agreement on Investment under the ASEAN-India CECA
Agreement on the Encouragement and Reciprocal Protection of Investments in the Member States of the Eurasian Economic Community
ASEAN-China Investment Agreement
ASEAN-Korea FTA
CAFTA-DR
CETA
China-Japan-Korea trilateral investment agreement
Colombia-Northern Triangle FTA
CPTPP
EFTA-Korea Investment Agreement
EU-Singapore Investment Protection Agreement
EU-Viet Nam Investment Protection Agreement
First Protocol to amend the ASEAN-Japan CEPA
Korea-Central America FTA
MERCOSUR Protocol on Investment Cooperation and Facilitation
Mexico-Central America FTA
PACER plus
Pacific Alliance FTA
RCEP
SADC Protocol on Finance and Investment
SADC Protocol on Finance and Investment - SADC Protocol on Finance and Investment - Agreement on the amendment of Annex 1
Treaty of the Eurasian Economic Union
USMCA