



UNITED NATIONS
UNCTAD

Accelerating IIA Reform for sustainable development

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UNCTAD's Roadmap for IIA Reform

6 Guidelines

Harness IIAs for SD

Focus on critical reform areas

Act at all levels

Sequence properly

Inclusive / transparent process

Multilateral support structure

5 Areas

Safeguarding the right to regulate, while providing protection

Ensuring responsible investment

Enhancing systemic consistency

Reforming investment dispute settlement

Promoting and facilitating investment

4 Levels

Multilateral

Regional

Bilateral

National

Designing sustainable development-oriented new treaties

Phase 1

Modernizing the existing stock of old-generation treaties

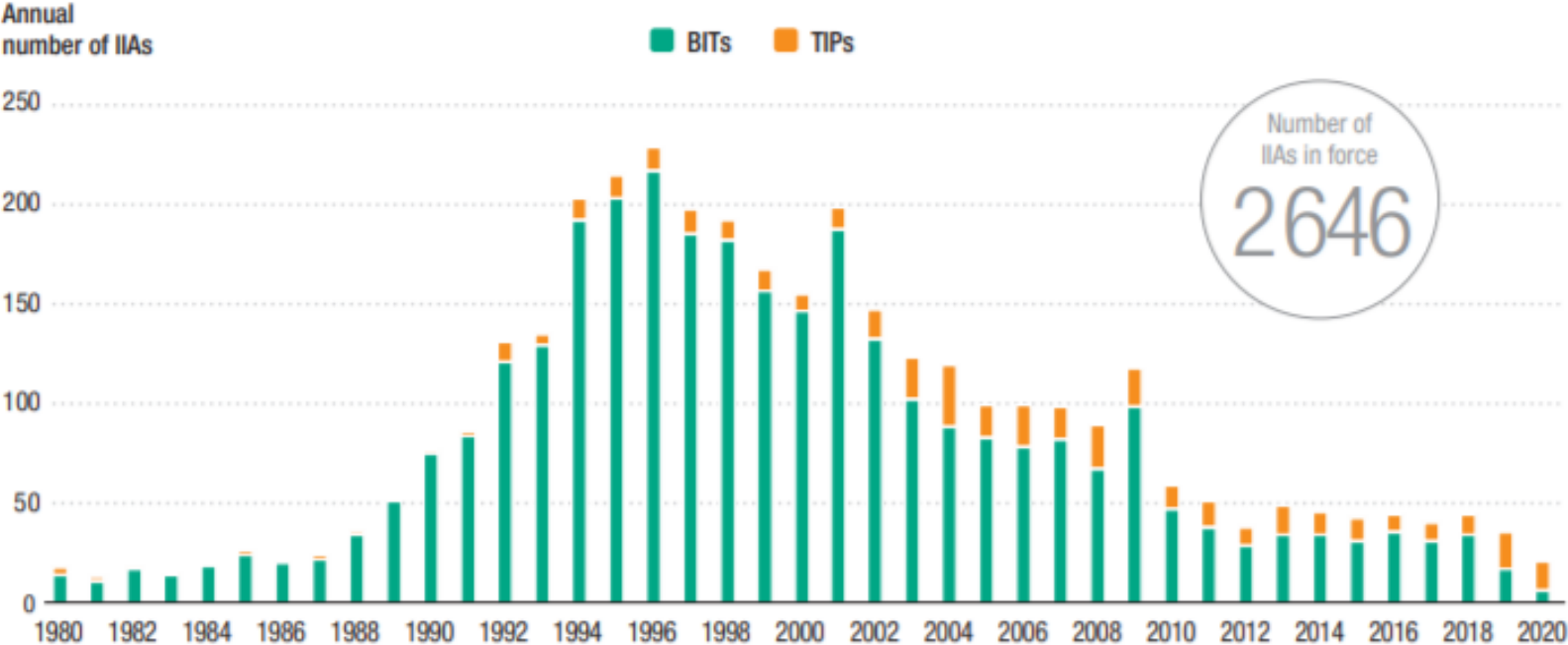
Phase 2

Promoting coherence (between IIAs, national and international and between investment and other policies)

Phase 3

In 2020, countries concluded 21 IIAs, over half of which were rollover agreements concluded by the United Kingdom

Figure III.3. | Number of IIAs signed, 1980–2020



Source: UNCTAD, IIA Navigator.
Note: This includes treaties (i) unilaterally denounced, (ii) terminated by consent, (iii) replaced by a new treaty and (iv) expired automatically.

Table III.3.

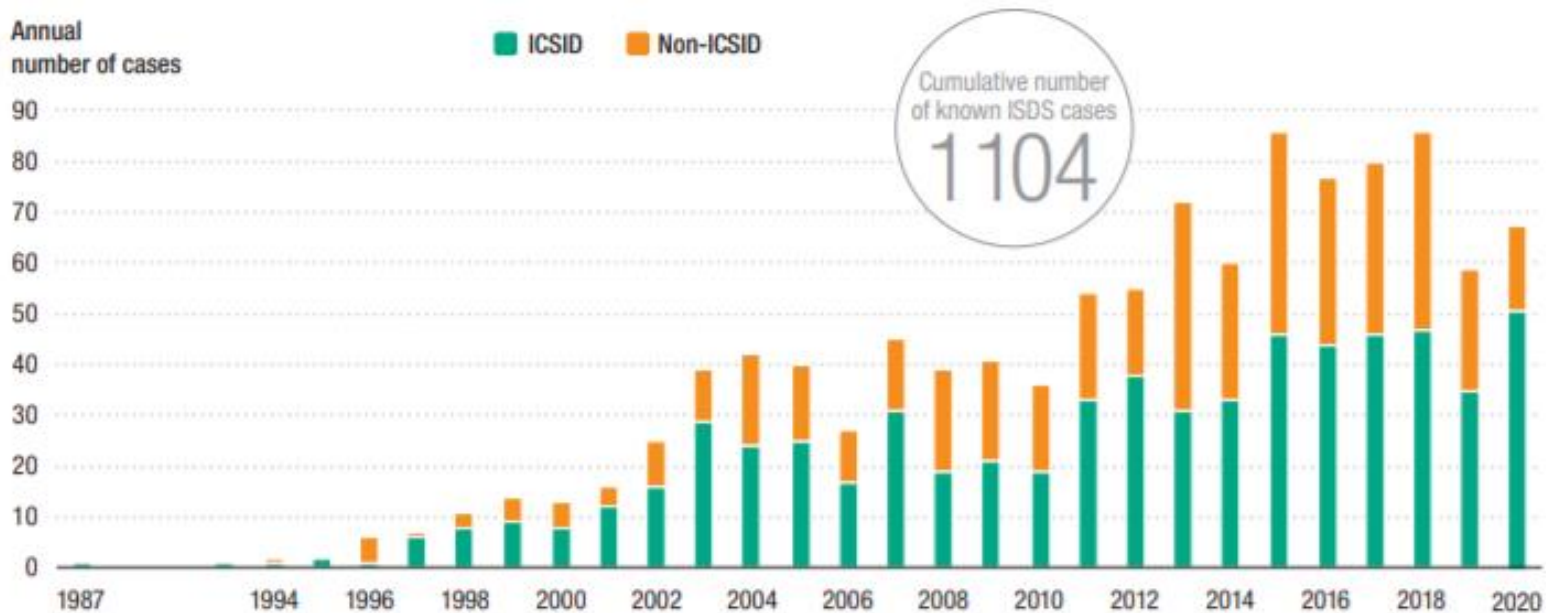
Selected recent megaregional IIAs at a glance

Megaregional IIA	IIA reformed provisions	Economic significance			Bilateral investment relationships created
		Population (Number)	GDP (Trillions of dollars)	Total FDI stock covered (Billions of dollars)	
China–EU CAI	<ul style="list-style-type: none"> • NT and MFN pre- and post-establishment with "in like situation" comparator • MFN exception excluding ISDS • Specific section on investment and sustainable development • No ISDS 	1.9 billion	30	188	27
EU–UK TCA	<ul style="list-style-type: none"> • NT and MFN pre- and post-establishment with "in like circumstances" comparator • No FET clause • No expropriation clause • No ISDS • Commitment to enhance the contribution of investment to sustainable development 	513.5 million	18.4	1 684	27
RCEP	<ul style="list-style-type: none"> • Refined definition of investment • NT and MFN pre- and post-establishment with "in like circumstances" comparator • Qualified FET • Indirect expropriation defined • Transfer-of-funds exceptions • Security exception • Investment promotion and facilitation provisions • No ISDS 	2.3 billion	26.3	2 690	105
USMCA	<ul style="list-style-type: none"> • Refined definition of investment • NT and MFN pre- and post-establishment with "in like circumstances" comparator • Qualified FET • Indirect expropriation defined • Transfer-of-funds exceptions • Reference to environment, health and CSR • Limited ISDS scope • Tailored ISDS arrangements (only between the United States and Mexico) 	500 million	24.3	2 181	3
CPTPP	<ul style="list-style-type: none"> • Refined definition of investment • NT and MFN pre- and post-establishment with "in like circumstances" comparator • MFN exception excluding ISDS • Qualified FET • Indirect expropriation defined • Transfer of funds exceptions • Reference to environment, health and CSR • Limited ISDS scope • Tailored ISDS arrangements 	499 million	10.6	1 230	55



The total ISDS case count had reached over 1,100 by the end of 2020

Figure III.4. Trends in known treaty-based ISDS cases, 1987–2020

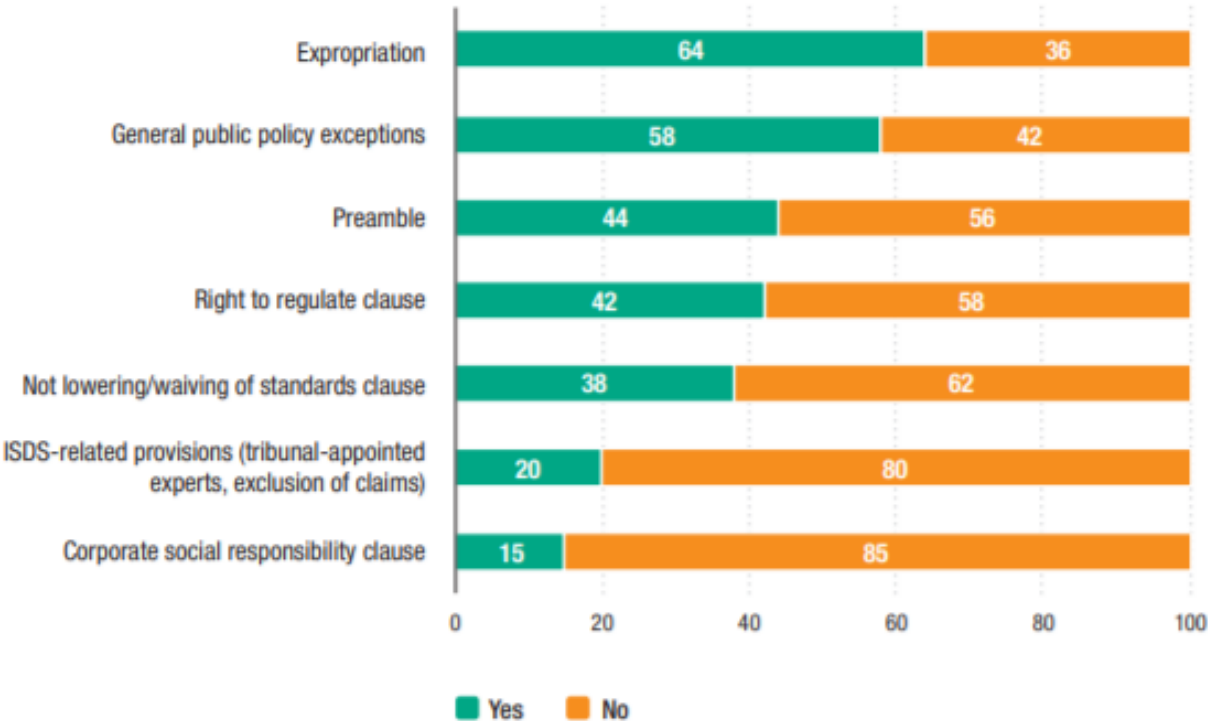


Source: UNCTAD, ISDS Navigator.

Note: Information has been compiled from public sources, including specialized reporting services. UNCTAD's statistics do not cover investor-State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signaled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continually adjusted as a result of verification processes and may not match exactly case numbers reported in previous years.

A number of recently concluded BITs and investment chapters of FTAs carve out regulatory space for domestic health-related measures

Figure III.9. Provisions referencing public health in IIAs concluded between 2018 and 2020 (Per cent)

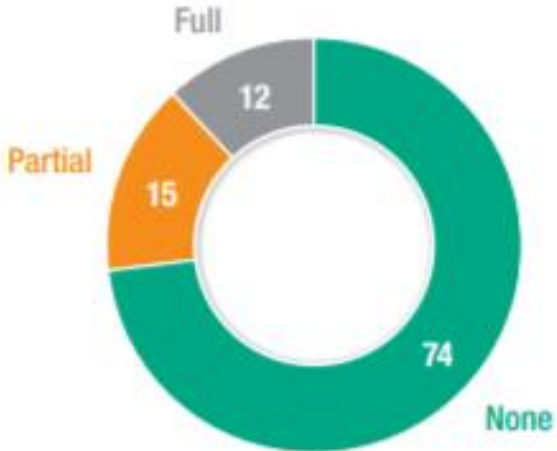


Source: UNCTAD, IIA Navigator.
Note: This survey covers all IIAs signed from 2018 to 2020 for which texts were available that contain substantive provisions on investment protection. In total, 55 IIAs were analysed.

GATS is also relevant to investment in health

GATS includes commitments on market access and non-discrimination obligations for trade in health services.

Figure III.8. Country market access and national treatment commitments under GATS for hospital services (mode 3) (Per cent)



Source: UNCTAD.

Moving to a new generation of IIAs (Phase 1)

Newly signed IIAs widely incorporate new-generation treaty provisions

Selected reform features - IIAs signed in 2019

	1	2	3	4	5	6	7	8	9	10	11
Armenia–Singapore Agreement on Trade in Services and Investment	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Australia–Hong Kong, China Investment Agreement	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Australia–Indonesia CEPA	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Australia–Uruguay BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Belarus–Hungary BIT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Brazil–Ecuador BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Brazil–Morocco BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Brazil–United Arab Emirates BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Burkina Faso–Turkey BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Cabo Verde–Hungary BIT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
EU–Viet Nam Investment Protection Agreement	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Hong Kong, China–United Arab Emirates BIT	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
India–Kyrgyzstan BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Islamic Republic of Iran–Nicaragua BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Myanmar–Singapore BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>

Yes No

1. Preamble references **public policy interests**
2. Refined **definition of investment**
3. Clarification or omission of **FET clause**
4. Clarification or exclusion of **indirect expropriation**
5. **exceptions from the free-transfer-of-funds obligation**
6. Omission of the “**umbrella**” clause
7. General **exceptions**
8. Not lowering of **standards** to attract investment
9. Promotion of **Corporate and Social Responsibility** standards
10. Limiting **access to ISDS**
11. Provisions on **investment promotion**

Modernizing the existing stock of IIAs (Phase 2)

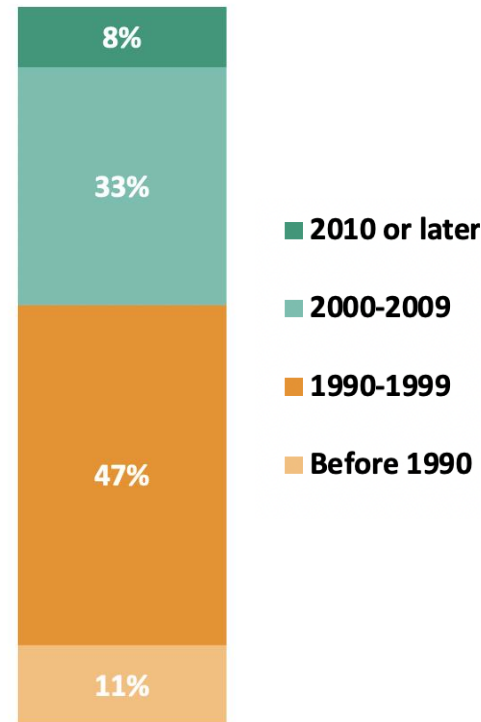
Old treaties abound

- 2463 IIAs in force today were concluded before 2010

Old treaties bite

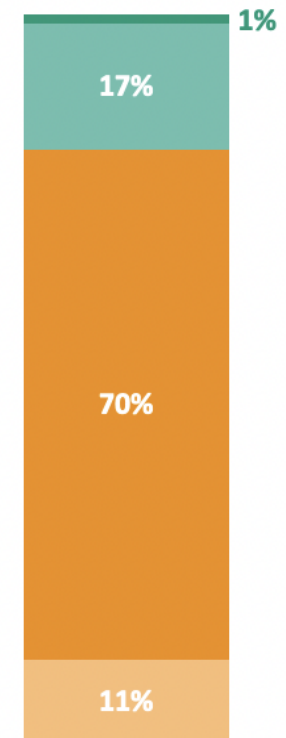
- 1077 out of 1091 known treaty-based ISDS cases have been filed pursuant to treaties signed before 2010

Age of IIAs: share of IIAs in force, by year of signature



Source: ©UNCTAD, IIA Navigator.

IIAs invoked in known treaty-based ISDS cases, by year of signature



Source: ©UNCTAD, ISDS Navigator.

Phase 2 reform options



UNCTAD Virtual IIA Conference 2020: “IIA Reform in Times of COVID-19”



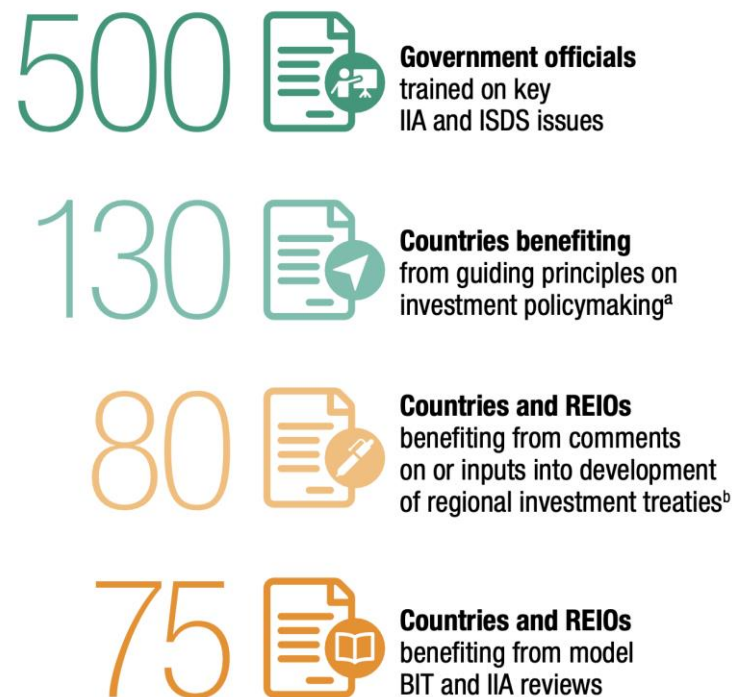
UNCTAD Virtual IIA Conference 2020
Full recording available
26 November 2020

UNCTAD's work on IIA reform

Research and policy analysis



Technical Assistance (2012-2019)



Source: UNCTAD.

REIO = regional economic integration organization.

^a Developed with UNCTAD's assistance or facilitation.

^b Such as the AfCFTA investment protocol and the COMESA (Common Market for Eastern and Southern Africa) Investment Area.

UNCTAD's newest tool – the IIA Reform Accelerator

Aim

1. Expedite the modernization of the existing stock of old-generation IIAs
2. A tool for coordination, focused discussion and consensus-building on joint reform actions
3. Focus on substantive treaty provisions

Scope

Eight IIA provisions that are most in need of reform and have seen a clear reform trend

1. Definition of investment
2. Definition of investor
3. National treatment
4. Most-Favored-Nation Treatment
5. Fair and equitable treatment
6. Full protection and security
7. Indirect expropriation
8. General Exceptions

Approach

For each provision, the Accelerator:

1. identifies sustainable development-oriented policy options (building on the IPFSD);
2. proposes ready-to-use model language;
3. illustrates how these options have been used in recent IIAs and model BITs;
4. provides explanatory comments for each option.



Way forward

- **Prioritize** holistic reform actions
- **Find** the right **treaty partners** to implement reform
- **Ensure coherence** between reform efforts

Comprehensive regime reform would benefit from intensified multilateral backstopping

UNCTAD stands ready to continue supporting countries in their IIA reform efforts

- Technical assistance and capacity building
- Research and policy analysis
- Inclusive, multi-country, regional and multilateral backstopping
- World Investment Forum