Accelerating IIA Reform for sustainable development

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UNCTAD
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
- Ensuring responsible investment
- Safeguarding the right to regulate, while providing protection
- Reforming investment dispute settlement
- Promoting and facilitating investment
- Enhancing systemic consistency

4 Levels
- Multilateral
- Regional
- Bilateral
- National

Phase 1
- Designing sustainable development-oriented new treaties

Phase 2
- Modernizing the existing stock of old-generation treaties

Phase 3
- Promoting coherence (between IIAs, national and international and between investment and other policies)
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>
<thead>
<tr>
<th>Megaregional IIA</th>
<th>IIA reformed provisions</th>
<th>Population (Number)</th>
<th>GDP (Trillions of dollars)</th>
<th>Total FDI stock covered (Billions of dollars)</th>
<th>Bilateral investment relationships created</th>
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<tbody>
<tr>
<td>China–EU CII</td>
<td>- NT and MFN pre- and post-establishment with “in like situation” comparator</td>
<td>1.9 billion</td>
<td>30</td>
<td>188</td>
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<td>- MFN exception excluding ISDS</td>
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<td>- Specific section on investment and sustainable development</td>
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<td>EU–UK TCA</td>
<td>- NT and MFN pre- and post-establishment with “in like circumstances” comparator</td>
<td>513.5 million</td>
<td>18.4</td>
<td>1 684</td>
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<td>- No FET clause</td>
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<td>- No expropriation clause</td>
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<td>- Commitment to enhance the contribution of investment to sustainable development</td>
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<td>RCEP</td>
<td>- Refined definition of investment</td>
<td>2.3 billion</td>
<td>26.3</td>
<td>2 690</td>
<td>105</td>
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<td>- NT and MFN pre- and post-establishment with “in like circumstances” comparator</td>
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<td>- Qualified FET</td>
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<td>- Indirect expropriation defined</td>
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<td>- Transfer-of-funds exceptions</td>
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<td>- Security exception</td>
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<td>- Investment promotion and facilitation provisions</td>
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<td>- No ISDS</td>
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<td>USMCA</td>
<td>- Refined definition of investment</td>
<td>500 million</td>
<td>24.3</td>
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<td>- NT and MFN pre- and post-establishment with “in like circumstances” comparator</td>
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<td>- Reference to environment, health and CSR</td>
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<td>- Limited ISDS scope</td>
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<td>- Tailored ISDS arrangements (only between the United States and Mexico)</td>
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<td>CPTPP</td>
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<td>499 million</td>
<td>10.5</td>
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The total ISDS case count had reached over 1,100 by the end of 2020.
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)

- Expropriation: 64% Yes, 36% No
- General public policy exceptions: 58% Yes, 42% No
- Preamble: 44% Yes, 56% No
- Right to regulate clause: 42% Yes, 58% No
- Not lowering/waiving of standards clause: 38% Yes, 62% No
- ISDS-related provisions (tribunal-appointed experts, exclusion of claims): 20% Yes, 80% No
- Corporate social responsibility clause: 15% Yes, 85% No

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)

- Full: 12
- Partial: 15
- None: 74

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

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<td>Armenia–Singapore Agreement on Trade in Services and Investment</td>
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<td>Australia–Hong Kong, China Investment Agreement</td>
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<td>Australia–Uruguay BIT</td>
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<td>Brazil–Morocco BIT</td>
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<td>Brazil–United Arab Emirates BIT</td>
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<td>Burkina Faso–Turkey BIT</td>
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<td>Cabo Verde–Hungary BIT</td>
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<td>EU–Viet Nam Investment Protection Agreement</td>
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<td>Hong Kong, China–United Arab Emirates BIT</td>
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<td>India–Kyrgyzstan BIT</td>
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<td>Islamic Republic of Iran–Nicaragua BIT</td>
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<td>Myanmar–Singapore BIT</td>
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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

Source: ©UNCTAD, IIA Navigator.  
Source: ©UNCTAD, ISDS Navigator.
Phase 2 reform options

- Withdrawing from multilateral treaties
- Jointly interpreting treaty provisions
- Amending treaty provisions
- Terminating existing old treaties
- Replacing “outdated” treaties
- Abandoning unratified old treaties
- Consolidating the IIA network
- Engaging multilaterally
- Managing relationships between coexisting treaties
- Referencing global standards

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)

500
Government officials trained on key IIA and ISDS issues

130
Countries benefiting from guiding principles on investment policymaking\(^a\)

80
Countries and REIOs benefiting from comments on or inputs into development of regional investment treaties\(^b\)

75
Countries and REIOs benefiting from model BIT and IIA reviews

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