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REFORM ACCELERATOR

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WHAT IS THE INTERNATIONAL INVESTMENT AGREEMENTS REFORM ACCELERATOR?

The IIA Reform Accelerator aims to expedite the modernization of the existing stock of old-generation IIAs. It operationalizes the idea of gradual innovation by focusing on the reform of the substantive provisions of IIAs in selected key areas. The Accelerator focuses on eight IIA provisions that are most in need of reform, and that have seen a clear reform trend in line with the sustainable development goals (SDGs) and towards safeguarding the State's right to regulate in IIAs. For each provision, the IIA Reform Accelerator identifies sustainable development-oriented policy options (building on UNCTAD's Investment Policy Framework for Sustainable Development 2015) and proposes ready-to-use model language that implements these options. The Accelerator further illustrates how these options have been used in recent IIAs and model BITs. Explanatory comments accompany the model formulations to highlight their objective, provide background and explain possibilities for combining various reform options.

The reform-oriented formulations can be directly used at the national, bilateral, regional and multilateral level with a view to: (i) interpreting, (ii) amending or (iii) replacing old-generation treaties. They can also be adapted and contribute to the ongoing collective peer learning by IIA negotiators.

1. The need to accelerate the reform of old-generation IIAs

Reform of the existing stock of 2,500 old-generation treaties in force today has not yet taken off on a large scale, while the number of known treaty-based investor-State dispute settlement (ISDS) cases continues to grow. The vast majority of these cases are based on old-generation treaties: all ISDS cases initiated in 2019 and 99 per cent of the total number of known cases – virtually all cases – have been filed pursuant to treaties concluded before 2012,[1] which typically feature broad and vague formulations and include few exceptions or safeguards (*WIR17*). This gives rise to the need to devise policy means that help accelerate the reform of old-generation treaties and thereby reduce the risk of ISDS cases against State measures in pursuit of legitimate public policy objectives. This is a critical complement to the efforts of reforming the ISDS system that are ongoing in ICSID, UNICTRAL and other fora (UNCTAD, 2019).

The importance of reforming the stock of old-generation treaties is further highlighted by the COVID-19 pandemic. IIAs can come into play in relation to the policy responses taken by governments to address the COVID-19 pandemic and its economic fallout as these government measures also affect the operations of foreign investors. IIAs provide legal stability and predictability to foreign investors, and as such impact on contracting parties' regulatory powers to pursue the public interest. This can place constraints on government measures (WIR15). State measures to limit the adverse economic impact of the pandemic are manifold and vary from one country to another (UNCTAD, 2020). Although these measures are taken for the protection of the public interest and to

[1] Old-generation treaties are defined as those concluded between 1959 and 2011, prior to the launch of UNCTAD's Investment Policy Framework for Sustainable Development in 2012 (*WIR12*). Some pre-2012 treaties already contain elements of new-generation treaties. Likewise, some treaties that were negotiated and concluded after 2012 fail to incorporate reform elements.

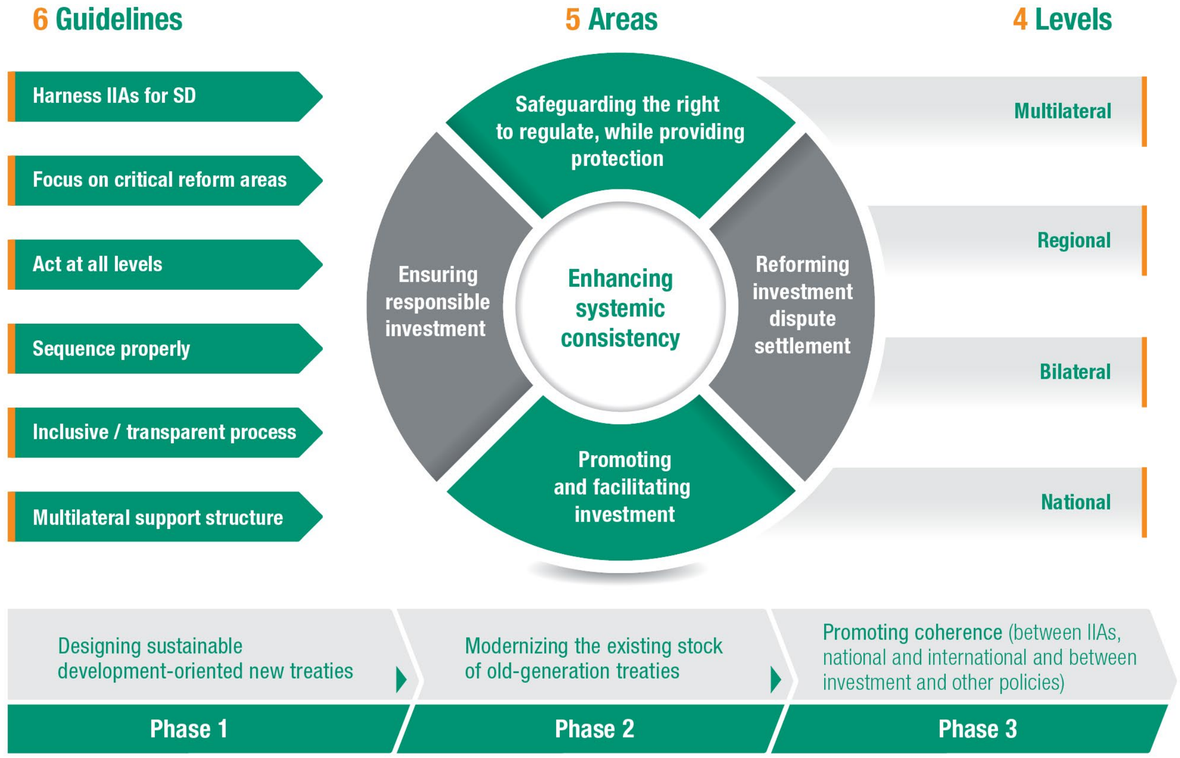
mitigate the negative impact of the pandemic on the economy, some of them could, depending on the way they are implemented, expose governments to arbitration proceedings initiated by foreign investors under IIAs. This is especially true for those IIAs that lack the necessary exceptions and refinements to safeguard policy space.

IIAs were not designed to undermine the legitimate regulatory function of the State, especially in emergency situations. However, they were concluded, for the most part, during a different era with less consideration for today's global challenges relating to public health, the environment and sustainable development goals more broadly. IIAs concluded 20 to 60 years ago do not reflect today's global challenges. Arbitral tribunals have adopted expansive interpretations of the broad provisions found in those IIAs. At times, this reduces the capacity of host States to regulate in the public interest. Reform of the existing stock of IIAs allows States to better respond to challenges in areas such as public health, economic stability and the environment. Balanced treaty reform, as advocated by UNCTAD, reduces the risk of expensive and lengthy ISDS proceedings that challenge *legitimate* government measures. At the same time, it preserves the protective value of IIAs. Although reforming existing IIAs is a continuous process that requires sustained efforts, it is important to act now by including this issue in the list of priorities of the post-COVID-19 crisis policy agenda.

So far, countries have implemented treaty reform of their existing stock of old IIAs almost exclusively on a treaty-by-treaty basis. Developed, developing and transition economies alike face numerous challenges in addressing their stock of old-generation treaties. At UNCTAD's Annual IIA Conferences and regional seminars, treaty negotiators and policymakers regularly provide insights on IIA reform progress and potential impediments to reform, highlighting the lack of strong internal capacities, unclear policy positions on IIAs and ISDS reform, lack of buy-in at the highest levels and failure to identify matching partners for reform processes, among others.

In 2018, UNCTAD introduced its Road Map for IIA Reform, covering in a single package, all key aspects across IIA Reform (UNCTAD, 2018; figure 1). It recommended to focus on three phases: Moving to a new generation of IIAs ("Phase 1"), modernizing the existing stock of IIAs ("Phase 2") and improving investment policy coherence and synergies ("Phase 3"). In line with this approach and focusing on expediting the modernization of the existing stock of IIAs, UNCTAD now introduces the "IIA Reform Accelerator".

Figure 1. UNCTAD's Road Map for IIA Reform



Source: UNCTAD, 2018.

2. Objective and design criteria of the IIA Reform Accelerator

Objective: a tool for coordination and consensus-building

The IIA Reform Accelerator is meant to help countries overcome the current challenges in IIA reform by suggesting concrete options to reform central IIA provisions. In doing so, the Accelerator provides a tool for coordination, focused discussion and consensus-building on joint reform actions between multiple countries. It aims to help level the playing field for policymakers and treaty negotiators by making the latest "IIA reform knowledge" and recent treaty practice more readily accessible. The IIA Reform Accelerator can be used with respect to multiple reform options, three of which are highlighted below. This is meant to result in a greater level of coherence in reform approaches adopted by individual countries.

The IIA Reform Accelerator responds to the need for change of substantive aspects of the IIA regime. It fills a vacuum by complementing other ongoing efforts, including those aimed at reforming the investment dispute settlement system.

Design criteria: the IIA Accelerator's scope and guiding elements

UNCTAD's IIA Reform Accelerator is underpinned by five elements, guiding and enabling change in the IIA regime:

(1) An orientation towards sustainable development;
(2) Principles and options developed in UNCTAD's longstanding IIA reform policy tools;
(3) Flexibility to "adapt and adopt" in line with countries' specific needs (as concerns the options, depth, sequence, pace, and partners for reform);
(4) Collective peer-learning;
(5) Capacity-building.

The Accelerator builds on the Investment Policy Framework for Sustainable Development (UNCTAD, 2015) and the Reform Package for the International Investment Regime (UNCTAD, 2018). It reflects UNCTAD's extensive experience in providing technical assistance and capacity-building to its member States on substantive and procedural questions arising under their IIAs. The IIA Reform Accelerator combines incremental IIA reform with a multilateral holistic approach based on UNCTAD's experience and expertise. This includes multilateral coordination and cooperation where useful and desired.

As a first step, UNCTAD's IIA Reform Accelerator focuses on eight key IIA provisions (treaty scope and substance):

(1) Definition of investment
(2) Definition of investor
(3) National treatment (NT)
(4) Most-favoured-nation (MFN) treatment
(5) Fair and equitable treatment (FET)
(6) Full protection and security (FPS)
(7) Indirect expropriation
(8) Public policy exceptions

The provisions included in the IIA Accelerator have been chosen based on insights from UNCTAD's Annual IIA Conferences, capacity-building activities and policy research. The substantive provisions identified here include those that are most frequently invoked in ISDS claims, including to challenge genuine public interest measures such as those for the protection of public health or the environment. Further, provisions have been included that have a significant impact on sustainable development or affect the host State's ability to regulate in the interest of sustainable development. These eight provisions should, therefore, be prioritized as being most in need of reform. The Accelerator focuses on the post-establishment phase as old-generation BITs rarely cover the pre-establishment stage.

IIA reform is a much wider endeavour than the eight clauses this version of the Accelerator covers. The IIA Reform Accelerator is intended as a starting point and a living document that will be regularly updated and further developed, including through the addition of further treaty provisions. Other treaty provisions, which are not addressed here – such as umbrella clauses or transfer of funds provisions – play an important role in rebalancing the IIA regime (*WIR15*) as do new, emerging IIA clauses such as those relating to investor obligations and responsibilities or investment promotion and facilitation (*WIR19*). These provisions will be covered in a subsequent version of the IIA Reform Accelerator. The Accelerator does not cover mechanisms for settling investment disputes included in old-generation IIAs, the reform of which is currently discussed in other fora, including UNCITRAL and ICSID.

For each of the eight provisions, the Accelerator offers a menu of sustainable development-friendly options. These options have been identified based on UNCTAD's Investment Policy Framework for Sustainable Development, recent treaty practice (as demonstrated by the tables of reform-oriented provisions in IIAs concluded in recent years, see Ch. III of *WIR19, WIR18, WIR17,* etc.), and lessons learned from UNCTAD's extensive technical assistance and capacity-building experience in developing countries.

For each option, the Accelerator offers ready-to-use model language that implements the reform approach. This language is based on a sample of treaties and model BITs that serve to illustrate the use of the respective reform option and have informed the model language. Factors such as geographical representation of treaty parties and their development status have been taken into account in selecting the sample. The reform options and model formulations are accompanied by explanatory comments and annotations that highlight their objective and the interplay between different options.

As the illustrative language of reform-oriented formulations is based on actual provisions used in recent treaties and model treaties, it aims to show the results of peer learning by countries' IIA negotiators beyond individual negotiation outcomes and sets the stage for accelerated reform of old-generation treaties. The Accelerator translates UNCTAD's Investment Policy Framework reform options into practical treaty language that can be adopted and/or adapted by IIA negotiators. Usage of the Accelerator will add to the ongoing collective peer learning process, including by further finetuning provisions and adding other key provisions to its core.

The initial outline of the IIA Reform Accelerator benefited from peer reviews by experts and stakeholders from the investment and development community.

3. Operationalizing the IIA Reform Accelerator

Operationalizing the IIA Reform Accelerator could take different forms. Three potential options for bilateral and multilateral engagement are outlined below. The Accelerator can be the basis for joint interpretation, amendment, or replacement of old treaties. The Accelerator leaves it to countries to choose which form to use when updating their old-generation agreements. It can help foster a certain degree of coherence in IIA reform by enhancing a common understanding of the main challenges and concerns of specific IIA provisions. In reforming their treaty network, countries may also decide to rely on other reform tools and mechanisms, beyond those proposed here. This decision should be based on the specific circumstances and strategic considerations of each country.

UNCTAD's expertise and convening power on IIA issues could guide and support country-driven substantive reform of the IIA regime. UNCTAD could also act as a repository for related information, statements and notifications by countries when they use the IIA Reform Accelerator in their treaty reform efforts.

Ensuring coherence when using the IIA Reform Accelerator

Processes using Accelerator reform options should consider broader coherence issues. This includes the need to ensure coherence within the treaty in question (e.g. the interaction between different provisions and reform options), coherence in the overall IIA reform effort of a country, and coherence between reform efforts for international and national investment policies. Ensuring coherence will help to avoid unintended consequences.

With respect to coherence within the treaty in question, it is important to bear in mind that treaty obligations may arise from the interplay of provisions. The extent to which a State's right to regulate in the public interest is restricted may be directly affected by treaty provisions relating to the scope of the IIA or definitions of concepts such as "investment" and "investor". General exceptions or denial of benefits clauses are equally important in this respect as they may provide a counterweight to otherwise broad treaty coverage. Similarly, substantive provisions interact. For example, a restrictive approach to indirect expropriation may be undermined by an overly broad fair and equitable treatment (FET) clause.

Interactions also occur between different reform options for each treaty provision proposed by the Accelerator. Some reform options can be used on their own, others can or should be combined, or are mutually exclusive. For example, States could specify in a stand-alone fashion that full protection and security (FPS) refers only to "physical" or police protection. An enterprise-based definition of investment should be used together with a list of excluded assets. Reducing the FET clause to a political commitment cannot be combined with a clarification of the FET standard.

Secondly, coherence in the overall reform efforts can help reduce opportunities for treaty shopping and mitigate the risk that reform achievements in new or amended treaties are undermined by recourse to unreformed ones (UNCTAD, 2018). However, this does not mean that reform processes – often gradual or incremental – should be deferred in the absence of a coherent solution to all existing treaties. The need for reform generally outweighs the desirability of a coherent but unreformed treaty network. UNCTAD's 10 Policy Tools for Phase 2 of IIA Reform (*WIR17*; UNCTAD, 2018) address the challenges countries face when managing their treaty networks, such as overlapping commitments with the same treaty partners and the lack of coherence in treaties signed with different partners.

Thirdly, coherence between the international and national policy reform efforts is important to maximize potential synergies between a country's IIA network and the national legal framework for investment (*WIR17*). This does not necessarily require uniform language and divergence between the two levels can be in line with what each framework aims to achieve. However, incoherence can arise, for example, between clearly defined protection provisions in one or several IIAs and broad clauses in a national investment law. Similarly, broadly drafted provisions in "old" IIAs risk cancelling out reform efforts in new, more modern investment laws (*WIR18*).

It is important that policymakers in charge of national and international investment policies do not operate in silos and instead create outcomes that are mutually supportive. With respect to Phase 3 of IIA Reform ("improving investment policy coherence and synergies"), UNCTAD recommends (i) strengthening the cooperation between policymakers, (ii) improving the interaction between the national and international investment regimes, and (iii) ensuring cross-fertilization between the two regimes so that lessons learned in one realm of policymaking benefit the other (*WIR* 2018). UNCTAD will soon launch its Practitioner's Guide to Drafting Investment Laws. This Guide supports the adoption of sustainable development-oriented national investment laws that are in line with countries' policy preferences and create synergies with reform efforts relating to their IIA networks.

How the Accelerator can expedite IIA Reform

Choosing a reform action: interpretation, amendment or replacement

Various options arise for the Accelerator's use: as the basis for joint interpretation, amendment, or replacement of old treaty provisions. This engagement could focus on one or several of the substantive provisions. As such, the Accelerator can be used with flexibility when sequencing and pacing treaty modernization. However, clarification of key provisions is only one way of addressing the challenges arising out of old-generation IIAs. Countries may choose to pursue other policy tools, each with their pros and cons (e.g. terminating old treaties, *WIR17*).

First, countries could use the proposed formulations as a basis for joint interpretative notes (table 1). This reform option for use of the Accelerator is potentially the easiest in its practical application as it allows the treaty parties to rely on the language provided in the Accelerator as a model for their common position on a specific IIA clause. However, this is only possible for an already existing substantive clause in the IIA in question. No new provisions can be introduced by means of an interpretation. Moreover, any modifications would be relatively limited as an interpretation can only *clarify* the existing text of the treaty. Where a treaty provides for binding joint interpretation, parties can follow the procedure in the treaty. In the absence of such a provision, the Vienna Convention on the Law of Treaties (VCLT) requires tribunals to take into account, together with the context, "[a]ny subsequent agreement between the parties regarding the interpretation of the treaty" (Article 31.3(a)). The VCLT has no requirements as to the form such an interpretation takes. It is important to bear in mind that the ultimate effect of joint interpretations is not always discernible in advance and a joint interpretation may not have the results desired by the parties.

Some past tribunals have suggested that interpretations potentially only have limited effects.[2] Moreover, the International Law Commission has authoritatively reiterated that joint interpretations under the VCLT are an authentic *means* of interpretation (as opposed to an 'authentic interpretation') and are *taken into account alongside other means* of interpretation.

Table 1. Reform action: Jointly interpreting treaty provisions

Clarifies the content of a treaty provision and narrows the scope of interpretive discretion of tribunals

Outcomes (pros)	Challenges (cons)
• Allows the parties to clarify one or several specific provisions without amending or renegotiating the treaty (no ratification required, less cost and time-intensive) • Is particularly effective if the treaty expressly provides that joint interpretations by the parties (or their joint bodies) are binding on tribunals • Becomes relevant from the moment of adoption, including for pending disputes • Has authoritative power as it originates from the treaty parties	• Is limited in its effect as it cannot attach an entirely new meaning to the provision being interpreted • Can raise doubts about its true legal nature (may not always be easy to distinguish between a joint interpretation and an amendment) • Can leave tribunals with a margin of discretion • Might be difficult to establish as genuine if either party has consistently acted in a way that does not comport with the interpretation • May be difficult to negotiate in cases when a pending dispute involves the application of the provision concerned

Source: WIR17.

Second, countries could amend provisions in a specific treaty by means of protocols or exchanges of letters or notes (table 2). Applicable amendment procedures depend on the treaty that is subject to change. For IIAs that do not regulate amendments, the general rule of Art. 39 of the VCLT will apply ("A treaty may be amended by agreement between the parties"). A limited number of IIAs contain procedures for amendment. Amendments take effect following a process similar to that of the original treaty, i.e. after respective domestic ratification. Amendments could be done on a provision-by-provision basis or for the entire range of the eight key provisions identified in the Accelerator.

Table 2. Reform action: Amending treaty provisions

Modifies an existing treaty's content by amending its provisions

Outcomes (pros)	Challenges (cons)
• Constitutes a broader, more far-reaching tool than interpretation: can introduce new rules rather than merely clarify the meaning of existing ones • Selectively addresses the most important issues on which the parties' policy positions align • Can be easier to agree upon with the treaty partner and more efficient to negotiate compared with a renegotiation of the treaty as a whole	• Typically requires domestic ratification in order to take effect • Only applies prospectively, i.e. does not affect pending disputes • Does not lead to overall change in treaty design and philosophy • May lead to "horse trading" in which desired amendments are achieved only through a quid pro quo with parties demanding other amendments

Source: WIR17.

[2] See, for example, *Sempra Energy Int'l v. Argentina*, Award, 28 September 2007, para. 386; *Enron v. Argentina*, Award, 22 May 2007, para. 337: "What is relevant is the intention the parties had in signing the Treaty (…). Even if [an] interpretation were shared today by both parties to the Treaty, it would still not result in a change of its terms."

Third, and most far-reaching, countries could substitute old treaty provisions with new ones (table 3). Approaching the treaty afresh enables the parties to achieve a higher degree of change (vis-à-vis selective amendments that only make minor changes to existing provisions) and to be more rigorous and conceptual in designing an IIA that reflects their contemporary shared vision. As with amendments, where the IIA does not provide for a procedure to adopt changes to its text, the general rule of Art. 39 of the VCLT applies. Replacements of treaty provisions tend to be implemented through separate agreements, subject to the same ratification procedure as the IIA itself. The Accelerator in its current limited form could be relied on as a basis for formulating the eight provisions in question. Bearing in mind the coherence issues discussed above, when replacing outdated treaties, it is important to identify sustainable development friendly formulations for other provisions beyond the eight contained in the current version of the Accelerator. UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2015) provides guidance for doing so. Lastly, when substituting old treaties with new ones, countries may wish to formulate appropriate transition clauses and will need to be mindful of termination provisions and survival clauses in the earlier IIA (UNCTAD, 2018).

Table 3. Reform action: Replacing "outdated" treaty provisions

Substitutes an old treaty provision with a new one	
Outcomes (pros)	**Challenges (cons)**
• Allows for a holistic approach to reform through a comprehensive revision of treaty provisions in line with the contracting parties' evolving policy objectives • Allows for the revision of the treaty's philosophy and overall design and the inclusion of new policy issues • Can be done at any time during the lifetime of the treaty	• Requires participation of a treaty partner or partners with similar views • Can be cost- and time-intensive, as it involves the negotiation of entire treaty provisions from scratch • Does not guarantee inclusion of reform-oriented elements (depends on the negotiated outcome) • May require effective transition between the old and the new treaty provision

Source: Based on *WIR17*.

Choosing a level of engagement: bilateral, regional or multilateral

These three different reform efforts could take place bilaterally, regionally or on a multilateral basis. Bilateral engagement provides the highest degree of flexibility and IIA parties can rely on the Accelerator in a tailored approach, making use of it in whatever manner deemed suitable. Such an approach would, however, take a significant amount of time and resources as a multitude of treaty partners must be approached separately. The Accelerator could also be relied on as the basis for regional or multilateral engagement. A group of like-minded countries, including in the context of regional economic integration organizations, could agree to rely on the Accelerator for joint interpretation or amendment.

The Accelerator's use by countries could incorporate insights provided by and lessons learned from multilateral reform processes in international economic law. These include the UNCITRAL Transparency Convention (Mauritius Convention), the ongoing reform efforts in the area of investor-State dispute settlement in UNCITRAL and the OECD Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument or MLI) (box 1). Like-minded countries could sign on to a multilateral document which sets out the preferred formulation for each of the eight key provisions. When signing on, countries could flexibly opt-in to the various provisions they would like to amend/interpret in a process reminiscent of the OECD MLI.

The IIA Reform Accelerator provides a concrete tool aimed at building the technical capacity of investment policymakers and IIA negotiators to i) deepen their understanding of the most urgent issues and actions needed to reform the IIA regime in line with their respective countries' development objectives; and ii) provide them with specific and varied drafting options for new generation IIAs combined with explanations of the issues at hand. In doing so, the IIA Accelerator will facilitate and speed-up the transition towards an IIA regime that is conducive to sustainable development.

UNCTAD stands ready to facilitate efforts aimed at operationalizing the IIA Reform Accelerator, both in terms of country-based technical assistance and capacity-building (e.g. through its national IIA Review mechanism) or through multi-country and regional consensus-building workshops intended to facilitate respective IIA reform efforts.

Box 1. Examples of multilateral reform in international economic law

In the last few years, international economic law has undergone a series of multilateral reform efforts that can inform substantive investment treaty reform and negotiations. Within the field of international investment law, two recent and ongoing efforts seek to improve the system of investor-State dispute settlement (ISDS). First, the United Nations Convention on Transparency in Treaty-based Investor–State arbitration (the Mauritius Convention) fosters greater application of the UNCITRAL Transparency Rules in ISDS proceedings under IIAs concluded prior to 1 April 2014. The Mauritius Convention effectively modifies a number of first-generation IIAs (of those countries that have ratified the Convention), which turns it into a collective IIA reform action. As of November 2020, 23 States have signed the Convention, and seven have ratified it. The Convention applies to a total of four IIAs, three of which are in force. In addition, a claimant of a home State not party to the Convention may agree to the application of the Transparency Rules against a respondent that has ratified it, potentially increasing the reach of the Convention. Future IIA reform actions could draw upon (i) the process of multilateral negotiations that led to the UNCITRAL Rules and the Mauritius Convention and (ii) the Mauritius Convention's opt-in mechanism, which modifies certain aspects of pre-existing IIAs.

Secondly, UNCITRAL Working Group III on ISDS Reform is currently engaging in an effort to reform ISDS. The government-led process also involves observers from international organizations, intergovernmental and non-governmental organizations, including academia, civil society, think tanks and practitioners. The Working Group is discussing the details of potential alternative solutions before committing to any option(s). At the current state of the debate, a non-exhaustive list of solutions includes: (a) the establishment of a permanent appellate court, to which a claim can be submitted for review after an arbitration panel has reached a first-instance decision; (b) the establishment of a permanent multilateral investment court, with first-instance and appellate proceedings, to which countries can opt-in when reforming their old BITs or concluding new ones; (c) an outline of a multilateral treaty containing "blocks" that should be considered as part of minimum standards, which States can join through an opt-in mechanism; (d) a "suite approach", developing a menu of relevant solutions that States can elect to incorporate, in whole or in part, in their BITs. Despite the Working Group's focus on procedural reform, submissions by States and experts also refer to substantive reform of IIA clauses at different levels (national, bilateral, regional and multilateral).

Beyond the investment regime, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the BEPS Multilateral Instrument or MLI) fosters States' implementation of tax treaty related measures and the potential amendment of over 3,000 bilateral tax treaties concluded to date. The BEPS Multilateral Instrument deals with a number of issues of concern (e.g. hybrid mismatch arrangements, treaty abuse, streamlining dispute resolution) and creates change in a flexible, à la carte way. For example, the BEPS Multilateral Instrument will apply only to the tax treaties specifically designated by the parties to the Convention, and it uses opt-out mechanisms that allow parties to exclude or modify the legal effects of certain provisions. Choices between alternative provisions and opt-in mechanisms give the possibility of taking on additional commitments. As of November 2020, the BEPS Multilateral Instrument has 94 State signatories, with four more expressing their intent to sign, and was ratified by 56 parties. The Instrument will apply to over 600 bilateral tax treaties among these ratifying States by January 2021. Future work could be undertaken on lessons learned for IIA reform from global tax treaty reform (which may involve not only "do's" but also "don'ts"), analysing (i) the multilateral stakeholder process that led to the adoption of the Final BEPS Package; and (ii) the treaty's architecture, which is similar to (but far more complex than) the Mauritius Convention, allowing for unilateral declarations, and selective reservations to or amendments of pre-existing tax treaties.

Source: UNCTAD.

4. Reform of eight key IIA provisions

The Accelerator initially includes eight key IIA provisions, including five of the most frequently invoked substantive clauses in known treaty-based ISDS cases (table 4).

For each of these provisions, the Accelerator describes one or various sustainable development-friendly approaches, a formulation that reflects this approach, recent use of this approach in treaty practice and model IIAs, and an explanation. The reform-oriented formulations constitute illustrative examples of treaty language. The language is generic and blends different approaches employed in actual IIAs. The formulations should not be understood as a quotation of the language of any particular IIA. Treaties mentioned in parenthesis generally follow the broad approach identified, without directly employing the illustrative language. Depending on the provision in question, real treaty language may diverge to different degrees from the generic example provision proposed here.

Table 4. Overview of IIA Accelerator reform options

Treaty provisions	Options for IIA reform
1. Definition of investment	• Exclude specific types of assets from the definition of investment • Require investments to fulfil specific characteristics to be covered by the treaty • Include an enterprise-based definition of investment • Include a legality requirement
2. Definition of investor	• Exclude certain categories of natural or legal persons from treaty coverage • Include a denial-of-benefits clause
3. National treatment	• Include criteria for determining "like circumstances" for NT • Subordinate the right of NT to a host country's domestic laws • Include reservations to NT
4. Most-favoured-nation treatment	• Include criteria for determining "like circumstances" for MFN • Circumscribe the scope of the MFN clause • Clarify that substantive obligations in other IIAs do not in themselves constitute "treatment"
5. Fair and equitable treatment	• Replace FET with an exhaustive list of State obligations • Clarify the FET standard • Reduce FET to a political commitment or entirely omit the FET clause
6. Full protection and security	• Explicitly link the FPS clause to customary international law and clarify that the FPS standard refers to physical protection
7. Indirect expropriation	• Clarify protection in case of indirect expropriation • Explicitly exclude indirect expropriation
8. Public policy exceptions	• Include exceptions for domestic regulatory measures in pursuit of circumscribed policy objectives or for prudential measures. • Prevent abuse of the exceptions by host States

Source: UNCTAD.

Definition of investment

The definition of investment sets out the types of investment covered by the treaty (UNCTAD's Investment Policy Framework, section 2.1).

IIA reform option: Exclude specific types of assets from the definition of investment

The overwhelming majority of old IIAs feature a broad definition of "investment" which grants protection to all types of assets. As a consequence, economic transactions not contemplated by the parties or assets whose contribution to the host state's economic development is questionable may be covered.

Many new treaties specifically exclude certain types of assets from the definition of "investment". The Accelerator lists the most common exclusions found in modern treaties (box 2).

These exclusions often arise in response to arbitral practice, which reveals the wide scope of unqualified treaty coverage. The *Abaclat v. Argentina* award, for example, concerned "investments" in the form of debt issued by a Party. Holders of government bonds were able to file a mass claim under the applicable BIT. Considering the nature of public debt instruments, including the fact that they are widely traded in secondary markets, the safest way to preventing (mass) claims by government bond holders may be to explicitly exclude public debt from the definition of investment.

Another very common exclusion concerns commercial contracts for the sale of goods and services. To illustrate, in *Petrobart Limited v. Kyrgyz Republic* the tribunal asserted that the applicable IIA incorporates a broad definition of investment and, in contradiction to earlier findings on similar issues, considered that a mere sales contract and the claims to money arising therefrom constitute an investment.

These two examples illustrate that a broad definition of investment and lack of clarity as to which assets are covered or excluded from the definition of "investment" may extend coverage of the IIA to assets not originally intended to be covered and which do not make a direct and/or substantial contribution to the host State's sustainable development. Ultimately, the exclusions help to prevent claims where uncertainty over the IIA's coverage exists. Explicit guidance helps to ensure the predictability and consistency of the international investment system and thereby lowers costs and enhances the attainment of sustainable development objectives.

Box 2. IIA reform option: Exclude specific types of assets from the definition of investment

Reform-oriented formulations with recent treaty examples (illustrative)

For greater certainty, "investment" does not include the following:

a) portfolio investments;[a]

● Brazil–India BIT (2020), Art. 2.4.1(iv) ● Burkina Faso–Turkey BIT (2019), Art. 1.1 ● Congo–Morocco BIT (2018), Art. 1.1(ii) ● Intra–MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 3.3.1(ii) ● Morocco–Nigeria BIT (2016), Art. 1

b) debt issued by a Party or loans granted to a Party;

● Brazil–India BIT (2020), Art. 2.4.1(ii) ● Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) (2018), Art. 9.1, fn. 3[b] ● Congo–Morocco BIT (2018), Art. 1.1(i) ● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 3.3.1(i) ● Japan–Jordan, Note to Art. 1 ● Morocco–Nigeria BIT (2016), Art. 1

c) [claims to money arising solely from] commercial contracts for the sale of goods and services [by a natural person or enterprise in the territory of a Party to a natural person or enterprise in the territory of the other Party] as well as credit granted in connection with such contracts;

● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 1(e)(iv), fn. 2 ● Brazil–India BIT (2020), Art. 2.4.1(v) ● Burkina Faso–Turkey (2019), Art. 1.1 ● Canada–EU CETA (2016), Art. 8.1 ● Congo–Morocco BIT (2018), Art. 1.1(v) ● CPTPP (2018) Art. 9.1, fn. 2[c] ● Egypt–Mauritius BIT (2014), Art. 1.1(iii) ● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 3.3.1(iii) ● Japan–Jordan BIT (2018), Note to Art. 1 ● Morocco–Nigeria BIT (2016), Art. 1 ● PACER plus (2017), Ch. 9, Art. 1 ● USMCA (2018), Art. 14.1

d) any order or judgment entered in a judicial or administrative action;

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.1, fn. 10 ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 1(e), fn. 1[d] ● Brazil–India BIT (2020), Art. 2.4.1(i) ● EU–Singapore Investment Protection Agreement (2018), Art. 1.2.1(h), fn. 3 ● United Arab Emirates–Uruguay BIT (2018), Art. 1.2, fn. 2 ● USMCA (2018), Art. 14.1

e) intellectual property rights which are not protected under domestic law;

● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 1(e), fn. 1

f) non-business assets;

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.1, fn. 11[e]

g) market share, market access or similar intangibles;

● Brazil–India BIT (2020), Art. 2.4.1(vi) ● PACER plus (2017), Ch. 9, Art. 1, fn. 1

h) costs incurred before the establishment of the investment, including costs for licenses, permissions or permits.

● Brazil–India BIT (2020), Art. 2.4.1(iii) ● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 3.3.1(iv)

Recent model IIAs that generally follow the approach (non-exhaustive)

● Azerbaijan (2016), Art. 1.1 ● BLEU (2019), Art 2.3 ● Brazil (2015), Art. 3.1.3 ● India (2015), Art. 1.4 ● Morocco (2019), Art. 3.3 ● Netherlands (2019), Art. 1(a) ● Pan-African Investment Code (2016), Art. 4.4 ● Slovakia (2019), Art. 1.2

Source: UNCTAD.

[a] States may wish to specify a threshold of shareholding to define portfolio investments. The Burkina Faso–Turkey BIT (2019), Art. 1.1, for example, imposes a ten percent threshold.

[b] The formulation used in the CPTPP is more restrictive in that it only excludes "loan[s] issued by one Party to another Party" and not public debt more generally.

[c] The CPTPP does not explicitly exclude these but rather finds that "claims to payment that are immediately due and result from the sale of goods and services, are less likely to have [the] characteristics [of an investment]."

[d] Also excludes arbitral awards.

[e] This agreement explicitly excludes non-business related 'loans and other debt instruments' … and non-business related 'claims to money or to any contractual performance'.

IIA reform option: Require investments to fulfill specific characteristics to be covered by the treaty

States may want to tailor their definition of investment to target assets conducive to sustainable development by granting protection only to investments that bring concrete benefits to the host country, e.g. long-term capital commitment and employment generation. To that effect, the parties may wish to include characteristics for sustainable development-friendly investments (box 3).

In the past, when confronted with an open-ended definition of "investment", tribunals have either followed the so-called *Salini* criteria (commitment of money or assets, duration, risk, and a contribution to the host State's economic development) or rejected this line of jurisprudence (e.g. *Philip Morris v. Uruguay*, *Phoenix v. Czechia*). In the absence of explicit guidance in the IIA, the situation continues to be unpredictable for States and investors alike.

Including the requirements of duration and the contribution to sustainable development as characteristics of an investment is the most sustainable development-friendly course of action. This approach contributes to shielding countries from suits by investors holding assets which do not advance the host State's durable development.

Box 3. IIA reform option: Require investments to fulfill specific characteristics to be covered by the treaty

Reform-oriented formulations with recent treaty examples (illustrative)

The characteristics of an "investment" include, the commitment of capital or other resources, the expectation of gain or profit, the assumption of risk, a certain duration, and the contribution to sustainable development.

IIAs providing for the first three characteristics: ● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.1, fn. 9 ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 1(e) ● Australia–China FTA (2015), Art. 9.1(d) ● China–Republic of Korea FTA (2015), Art. 12.1 ● CPTPP (2018), Art. 9.1 ● PACER plus (2017), Ch. 9, Art. 1 ● USMCA (2018), Art. 14.1

IIAs providing for the first four characteristics: ● Brazil–India BIT (2020), Art. 2.4 ● Canada–EU CETA (2016), Art. 8.1 ● EU–Singapore Investment Protection Agreement (2018), Art. 1.2.1 ● EU–Vietnam Investment Protection Agreement (2019), Art. 1.2(h) ● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 3.3

IIAs that include the "contribution to sustainable (or economic) development" in the definition of investment: ● Burkina Faso–Turkey BIT (2019), Art. 1.1 ● Congo–Morocco BIT (2018), Art. 1.1 ● Egypt–Mauritius BIT (2014), Art. 1.1 ● Morocco–Nigeria BIT (2016), Art. 1

Recent model IIAs that generally follow the approach (non-exhaustive)

Model IIAs providing for the first three characteristics: ● Azerbaijan (2016), Art. 1.1

Model IIAs providing for the first four characteristics: ● BLEU (2019), Art 2.3 ● Czechia (2016), Art. 1.1 ● Netherlands (2019), Art. 1(a) ● Slovakia (2019), Art. 1.2

Model IIAs that include the contribution to sustainable (or the host State's) development in the definition of investment: ●India (2015), Art. 1.4 ● Morocco (2019), Art. 3.3 ● Pan-African Investment Code (2016), Art. 4.4

Source: UNCTAD.

IIA reform option: Include an enterprise-based definition of investment

In addition to excluding certain assets from coverage of the treaty, a further option is to adopt a more targeted, enterprise-based definition, offering protection only to enterprises owned or controlled (or with a certain minimum share held) by the investor (box 4). This would cover the most typical way to invest (including through M&A transactions) but would remove many other types of assets from treaty coverage. The enterprise's assets, however, often continue to be covered by the treaty.

Box 4. IIA reform option: Include an enterprise-based definition of investment

Reform-oriented formulations with recent treaty examples (illustrative)

"Investment" means an enterprise, including a participation therein, within the territory of a Party, owned or controlled, directly or indirectly, by an investor of the other Party. An enterprise possesses the following assets: [list of included and excluded assets follows]

● Brazil–India BIT (2020), Art. 2.4 ● Congo–Morocco BIT (2018), Art. 1.1 ● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 3.3 ● Morocco–Nigeria BIT (2016), Art. 1

Recent model IIAs that generally follow the approach (non-exhaustive)

● India (2015), Art. 1.4 ● Pan-African Investment Code (2016), Art. 4.4

Source: UNCTAD.

IIA reform option: Include a legality requirement

States may also wish to explicitly ensure that only investments made in accordance with the law are protected under the treaty, thereby avoiding investments made through corruption or fraud, for instance (box 5). This type of clause would exclude from coverage investments made in violation of the host State's domestic law. This limitation is of a jurisdictional nature, meaning that tribunals should not proceed to the merits phase if the investment is found to violate the host State's laws.

In the past such legality requirements have helped to disqualify investments obtained in violation of anti-corruption laws (e.g. *Metal-Tech v. Uzbekistan*) and thereby contributed to the rule of law in the host State and sustainable development more generally.

Box 5. IIA reform option: Include a legality requirement

Reform-oriented formulations with recent treaty examples (illustrative)

This Agreement applies to "investments" made in accordance with the applicable laws and regulations.

● Burkina Faso–Turkey BIT (2019), Art. 1.1 and 2 ● Canada–EU CETA (2016), Art. 8.1 ● Congo–Morocco BIT (2018), Art. 1 ● EU–Singapore Investment Protection Agreement (2018), Art. 2.1.1 ● EU–Vietnam Investment Protection Agreement (2019), Art. 1.2(q) ● Iran, Islamic Republic of–Nicaragua BIT (2019), Art. 1.1 ● Japan–Jordan BIT (2018), Art. 1(a) ● Morocco–Nigeria BIT (2016), Art. 1 ● United Arab Emirates–Uruguay BIT (2018), Art. 1.2

Recent model IIAs that generally follow the approach (non-exhaustive)

● Azerbaijan (2016), Art. 1.1 ● BLEU (2019), Art 2.4 ● Brazil (2015), Art. 3.1.3 ● Czechia (2016), Art. 1.1 ● India (2015), Art. 1.4 ● Morocco (2019), Art. 2.1 ● Netherlands (2019), Art. 2.1 ● Pan-African Investment Code (2016), Art. 4.4 ● Slovakia (2019), Art. 2.2

Source: UNCTAD.

Definition of investor

The definition of investor sets out the types of investors covered by the treaty (UNCTAD's Investment Policy Framework, section 2.2).

IIA reform option: Exclude certain categories of natural or legal persons from treaty coverage

A broad definition of "investor" can result in unanticipated or unintended coverage of persons (natural or legal). For example, if a treaty determines the nationality of a legal entity solely on the basis of the place of incorporation, it creates opportunities for treaty shopping or free-riding by investors not conceived to be beneficiaries (e.g. a third-country/host-country investor may channel its investment through a "mailbox" company established in the territory of a Party, in order to obtain treaty protection). A related set of issues arises with respect to dual nationals where one nationality is that of the host State.

There are various options to narrow the range of covered persons (box 6). For example, to eliminate the risk of abuse and enhance legal predictability, a treaty may add a requirement that a company must have its seat in the home State and carry out real economic activities there. The volume of investments channelled through "special purpose entities" may make such a clause increasingly relevant.

The below reform options aim to address this situation by (a) specifying the circumstances under which natural persons with dual nationality are covered and (b) excluding legal entities that do not have their seat and substantial business activities in one of the parties.

Box 6. IIA reform option: Exclude certain categories of natural or legal persons from treaty coverage

Reform-oriented formulations with recent treaty examples (illustrative)

The term "investor" shall mean:

a) Any natural person having the nationality of a Contracting Party in accordance with its national legislation.

Natural persons who are dual nationals are deemed to be nationals of the State of their dominant and effective nationality; [and]

● Canada–EU CETA (2016), Art. 8.1 ● Congo–Morocco BIT (2018), Art. 1.2(a) ● Morocco–Nigeria BIT (2016), Art. 1.3[a] ● USMCA (2018), Art. 14.1

A natural person having the nationality of a Contracting Party shall not [simultaneously] have the nationality of the other Contracting Party in which the investment is made and may not submit a claim to arbitration against that latter Contracting Party;

● Egypt–Mauritius BIT (2014), Art. 1.3(a) ● Iran, Islamic Republic of–Nicaragua BIT (2019), Art. 1.2(a)

b) A legal entity that is constituted or otherwise duly organized in accordance with the laws of one of the Contracting Parties, having its seat and substantial business activities in the territory of that Party.

IIAs referring to (substantial) business activities and the legal entity's seat: ● Burkina Faso–Turkey BIT (2019), Art. 1.2(b) ● EU–Singapore Investment Protection Agreement (2018), Art. 1.2.5 ● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 3.4 ● Iran, Islamic Republic of–Nicaragua BIT (2019), Art. 1.2(b)[b] ● Congo–Morocco BIT (2018), Art. 1.2(b) ● Morocco–Nigeria BIT (2016), Art. 1 ● United Arab Emirates–Uruguay BIT (2018), Art. 1.1(b)

IIAs only referring to (substantial) business activities:● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 1.3 in conjunction with Art. 3.1 ● Australia–China FTA (2015), Art. 9.1(c) ● Brazil–India BIT (2020), Art. 2.5(b) ● Canada–EU CETA (2016), Art. 8.1 ● CPTPP (2018), Art. 9.1 ● EU–Vietnam Investment Protection Agreement (2019), Art. 1.2(c) ● PACER plus (2017), Ch. 1, Art. 2 in conjunction with Ch. 9, Art. 1 ● USMCA (2018), Art. 14.1

Recent model IIAs that generally follow the approach (non-exhaustive)

a) Natural persons – excluding certain dual nationals: ● Azerbaijan (2016), Art. 1.3 ● Czechia (2016), Art. 1.3 ● Morocco (2019), Art. 3.4 ● Netherlands (2019), Art. 1(b) ● Slovakia (2019), Art 1.3

b) Legal Persons – seat and/or substantial business activities requirement: ● Azerbaijan (2016), Art. 1.3(b) ● BLEU (2019), Art. 2.2(b)[b] ● Czechia (2016), Art. 1.3(b) ● India (2015), Art. 1.5(a) ● Morocco (2019), Art. 3.4(b) ● Netherlands (2019), Art. 1(b)(ii) ● Pan-African Investment Code (2016), Art. 4.1 ● Slovakia (2019), Art 1.3(b)

Source: UNCTAD.
[a] The Agreement does not refer to effective and/or dominant nationality but instead excludes dual national that are permanent residents of the host Party.
[b] The Agreement refers to seat *or* economic activity.

IIA reform option: Include a denial-of-benefits clause

In addition (or in the alternative) to adding the above features to the definition of covered investors, States may wish to include a denial-of-benefits clause that would allow denying protection to "mailbox" companies/"special purpose entities" or investments that are owned and controlled by persons from countries with which the denying Party does not maintain diplomatic relations or which are subject to economic sanctions (box 7).

To ensure the effectiveness of the denial-of-benefits clause in light of the contradictory arbitral practice, it may be useful to clarify that the clause can be invoked "retrospectively", meaning also after the commencement of arbitral proceedings.

An additional option is to include an anti-circumvention clause for investors/investments that have been obtained or restructured for the purpose of submitting an ISDS claim after a dispute arose or was foreseeable to arise (not included here, e.g. EU–Vietnam Investment Protection Agreement (2019), Art. 3.43 and India's Model BIT, Art. 35).

Box 7. IIA reform option: Include a denial-of-benefits clause

Reform-oriented formulations with recent treaty examples (illustrative)

A Contracting Party may deny the benefits of this Agreement, including the provisions relating to dispute settlement proceedings, to any investor or investment if:

a) The investor or investment is owned or controlled by persons of a non-Party or the denying Party and has no substantive business operations in the territory of the other Contracting Party;

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.24 ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 19.1(a)-(b) ● Australia–China FTA (2015), Art. 9.6.1 ● Burkina Faso–Turkey BIT (2019), Art. 11.1 ● China–Republic of Korea FTA (2015), Art. 12.15.2 ● CPTPP (2018), Art. 9.15.1 ● Japan–Jordan BIT (2018), Art. 21.2 ● Morocco–Nigeria BIT (2016), Art. 22.2 ● PACER plus (2017), Ch. 9, Art. 18.1 ● United Arab Emirates–Uruguay BIT (2018), Art. 17.2 ● USMCA (2018), Art. 14.14.1

b) The investor or investment is owned or controlled by persons of a non-Party and the denying Party does not maintain diplomatic relations with the non-Party or adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the person or that would be violated or circumvented if the benefits of this Agreement were accorded to the person or to its investments.

● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 19.1(c) ● Australia–China FTA (2015), Art. 9.6.2 ● Canada–EU CETA (2016), Art. 8.16 ● China–Republic of Korea FTA (2015), Art. 12.15.1 ● CPTPP (2018), Art. 9.15.2 ● Japan–Jordan BIT (2018), Art. 21.2 ● Morocco–Nigeria BIT (2016), Art. 22.1 ● USMCA (2018), Art. 14.14.1

For greater certainty, the right to deny the benefits of this Agreement may be exercised at any time, including after the institution of arbitration proceedings in accordance with the relevant provisions.

● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 19.5

Recent model IIAs that generally follow the approach (non-exhaustive)

a) Mailbox companies (owned or controlled by persons of a non-Party or the denying Party and no substantial business operations): ● Azerbaijan (2016), Art. 11.1(b)-(c) ● India (2015), Art. 35 ● Morocco (2019), Art. 25.1

b) Persons from non-Party with no diplomatic relations or subject to sanctions: ● Azerbaijan (2016), Art. 11.1(a) ● BLEU (2019), Art. 13.1 ● Czechia (2016), Art. 11 ● Morocco (2019), Art. 25.2 ● Slovakia (2019), Art. 10

c) "Retrospective" invocation of denial of benefits: ● Azerbaijan (2016), Art. 11.1 ● BLEU (2019), Art. 13.2 ● India (2015), Art. 35 ● Morocco (2019), Art. 25

Source: UNCTAD.

National treatment (NT)

The NT provision aims to protect foreign investors/investments from discrimination vis-à-vis domestic investors (UNCTAD's Investment Policy Framework, section 4.1).

IIA reform option: Include criteria for determining "like circumstances" for NT

The National Treatment clause has been invoked in approximately one fourth of all cases. Clarifications and reservations (box 8) to the scope of NT are, thus, important tools in enhancing the sustainable development-friendly nature of IIAs.

The NT provision generally prohibits less favourable treatment of foreign investors/investments vis-à-vis domestic investors/investments. States may wish to clarify that this obligation does not apply to any foreign and domestic investors/investments but only those that are "in like circumstances". This can go some way in safeguarding the right to regulate, but it can also raise questions about the specific criteria for comparison. Therefore, a treaty may need to set out the relevant criteria.

To illustrate, in the past, tribunals have decided that investors/investments that are not "alike" on first sight can be in "like circumstances" for the purposes of the NT provision. The tribunal in *Occidental v. Ecuador*, for example, held that exporters operating in vastly different sectors (oil and flowers in that case) are alike for the purposes of a tax refund, despite the absence of any competitive relationship between them.

The most important clarification, however, relates to distinctions on the basis of legitimate objectives such as measures implemented for the protection of SDG-related policies. Generally, past tribunals were willing to accept that such distinctions on the basis of legitimate public welfare or regulatory objectives may render investors/investments not alike (e.g. *Pope and Talbot v. Canada* and *Cargill v. Mexico*).

To explicitly codify this jurisprudence when updating existing agreements helps to avoid future uncertainty in this respect. This becomes even more important as IIAs increasingly incorporate general exception clauses (see below). Tribunals have interpreted such clauses as forestalling access to inbuilt flexibilities. To counter this, for example, the Armenia–Singapore Agreement on Trade in Services and Investment (2019) explicitly clarifies in a footnote that investors/investments may still not be in like circumstances due to the existence of legitimate regulatory distinctions despite the existence of a general exceptions provision.

Box 8. IIA reform option: Include criteria for determining "like circumstances" for NT

Reform-oriented formulations with recent treaty examples (illustrative)

For greater certainty, whether treatment is accorded in "like circumstances" depends on the totality of circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare [or regulatory] objectives.

● Brazil–India BIT (2020), Art. 5.2 ● CPTPP (2018), Art. 9.4, fn. 14 ● Morocco–Nigeria BIT (2016), Art. 6.3[a]
● United Arab Emirates–Uruguay BIT (2018), Art. 4.1, fn. 3 ● USMCA (2018), Art. 14.4.4

Recent model IIAs that generally follow the approach (non-exhaustive)

Provides for a (non-exhaustive) list of relevant circumstances:[a] ● India (2015), Art. 4.1, fn. 2 ● Morocco (2019), Art. 7.2
● Pan-African Investment Code (2016), Art. 9.3 ● Slovakia (2019), para. 6.3

Does not provide for an indicative list of relevant circumstances: ● Brazil (2015), Art. 5.3

Source: UNCTAD.
[a] The IIA explicitly provides for a (non-exhaustive) list of relevant circumstances. Such circumstances include, depending on the treaty in question, the business sector in which the investment operates/the goods or services produced and consumed; the actual or potential impact of the investment on third persons, the local/regional/national population and environment; the public/private nature of the investment; the aim and purpose of the measure at issue.

IIA reform option: Subordinate the right of NT to a host country's domestic laws

Countries that are reluctant to rescind fully the right to discriminate in favour of domestic investors can make the NT obligation "subject to their domestic laws and regulations" (box 9). This approach gives flexibility to grant preferential (e.g. differentiated) treatment to domestic investors as long as this is in accordance with the country's legislation. Alternatively, only domestic laws and regulations in force at the entry into force of the IIA could be grandfathered.

However, this limitation to the NT obligation may be perceived by some as insufficiently protecting foreign investors/investments against discrimination vis-à-vis domestic investors/investments.

Box 9. IIA reform option: Subordinate the right of NT to a host country's domestic laws

Reform-oriented formulations with recent treaty examples (illustrative)

Without prejudice to its laws and regulations [in force at the date of entry into force of this Agreement], each Party shall accord [National Treatment].

● Brazil–India BIT (2020), Art. 5.1 ● United Arab Emirates–Uruguay BIT (2018), Art. 4.1

Recent model IIAs that generally follow the approach (non-exhaustive)

● Brazil (2015), Art. 5.1 ● Morocco (2019), Art. 7.1

Source: UNCTAD.

IIA reform option: Include reservations to NT

There can be a middle ground between full policy freedom on the one hand, and a rigid guarantee of non-discrimination on the other. For example, States may exempt specific policy areas or measures as well as sensitive or vital economic sectors/industries from the scope of the obligation in order to meet both current and future regulatory or public-policy needs such as addressing market failures (box 10).

These exceptions may also be relevant for other provisions. In that case, it may be advisable not to nest them within the NT provision but in a separate article, clearly stating which substantive obligations the exception covers. In the treaty examples provided here, at times the Parties chose this route of having the carve out apply to a wider range of substantive IIA provisions (or the entire treaty) and not exclusively the NT provision.

The listed exceptions to NT are among the most widely used in recent IIAs. Notwithstanding other international obligations (for example under trade agreements), States may wish to preserve a certain degree of flexibility with respect to government procurement measures by exempting them from the NT obligation. Similarly, the carve outs to NT contained in the TRIPS agreement are of limited use when IIAs make reliance thereon impossible. The increasingly widespread exceptions for subsidies or grants, often with wider applicability beyond NT, may partially be driven by the wave of litigation, for example, over the withdrawal of government incentives for renewable energy recently faced by a number of countries.

Clearly defined exemptions from the NT obligation may help to advance sustainable development objectives as they allow States to, for example, subsidize renewable energy or finance infrastructure projects with local content requirements without running the risk of violating the NT obligations.

Box 10. IIA reform option: Include reservations to NT

Reform-oriented formulations with recent treaty examples (illustrative)

This Article shall not apply to:

a) government procurement;

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.10.5 ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 2.2(a) ● Australia–China FTA (2015), Art. 9.2.3(a) ● Brazil–India BIT (2020), Art. 3.6(d) ● Canada–EU CETA (2016), Art. 8.15.5(a) ● CPTPP (2018), Art. 9.12.6(a) ● Egypt–Mauritius BIT (2014), Art. 2.3(b) ● EU–Singapore Investment Protection Agreement (2018), Art. 2.1.3(a) ● PACER plus (2017), Ch. 9, Art. 3.2(a) ● United Arab Emirates–Uruguay BIT (2018), Art. 4.3(a) ● USMCA (2018), Art. 14.12.5(a)

b) subsidies or grants;

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.2.2(c) ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 2.2(b) ● Australia–China FTA (2015), Art. 9.2.3(b) ● Brazil–India BIT (2020), Art. 3.6(e) ● Canada–EU CETA (2016), Art. 8.15.5 ● CPTPP (2018), Art. 9.12.6(b) ● Egypt–Mauritius BIT (2014), Art. 2.3(c) ● EU–Singapore Investment Protection Agreement (2018), Art. 2.1.2 ● PACER plus (2017), Ch. 9, Art. 3.2(b) ● United Arab Emirates–Uruguay BIT (2018), Art. 4.3(b) ● USMCA (2018), Art. 14.12.5(b)

c) taxation;

● Egypt–Mauritius BIT (2014), Art. 2.3(a)[a] ● Japan–Jordan BIT (2018), Art. 19.2[b] ● United Arab Emirates–Uruguay BIT (2018), Art. 4.3(c)

d) services supplied in the exercise of governmental authority; or

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.2.2(b) ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 2.2(e) ● Brazil–India BIT (2020), Art. 3.6(f) ● EU–Singapore Investment Protection Agreement (2018), Art. 2.1.3(c)

e) measures that derogate from the National Treatment obligation in conformity with the TRIPS Agreement.

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.10.4 ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 6.4 ● Brazil–India BIT (2020), Art. 3.6(c) ● PACER plus (2017), Ch. 9, Art. 6.2

Recent model IIAs that generally follow the approach (non-exhaustive)

● Azerbaijan (2016), Art. 4.5 ● Morocco (2019), Art. 9.1 ● Pan-African Investment Code (2016), Art. 10.6 ● Slovakia (2019), Art. 6.5, 13.1

Source: UNCTAD.

[a] The carve out for taxation is not restricted to NT but covers the entire IIA.

[b] The carve out for taxation is not restricted to NT but also includes the MFN provision.

Most-favoured-nation treatment (MFN)

The MFN provision aims to protect foreign investors/investments from discrimination vis-à-vis third-country foreign investors (UNCTAD's Investment Policy Framework, section 4.2).

IIA reform option: Include criteria for determining "like circumstances" for MFN

The considerations applying to like circumstances under the MFN clause are the same as those applying to NT (consult the NT explanation for more details). As a consequence, many modern IIAs rely on the same formulation to clarify "like circumstances" for NT and MFN (box 11).

An example in which the tribunal followed the approach of distinguishing between different foreign investors on basis of legitimate regulatory objectives is *Parkerings v. Lithuania*. As with NT, the explicit codification of this strand of jurisprudence helps to avoid future uncertainty.

Box 11. IIA reform option: Include criteria for determining "like circumstances" for MFN

Reform-oriented formulations with recent treaty examples (illustrative)

For greater certainty, whether treatment is accorded in "like circumstances" depends on the totality of circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare [or regulatory] objectives.

● CPTPP (2018), Art. 9.4, fn. 14 ● United Arab Emirates–Uruguay BIT (2018), Art. 5.1, fn. 5
● USMCA (2018), Art. 14.5.4

Recent model IIAs that generally follow the approach (non-exhaustive)

Provides for a (non-exhaustive) list of relevant circumstances:[a] ● BLEU (2019), Art. 6.3 4 ● Morocco (2019), Art. 8.2
● Pan-African Investment Code (2016), Art. 7.3 ● Slovakia (2019), para. 6.3

Does not provide for an indicative list of relevant circumstances: ● Brazil (2015), Art. 6

Source: UNCTAD.
[a] Such circumstances include, depending on the treaty in question, the business sector of the investment, the goods or services produced and consumed; the actual or potential impact of the investment on third persons, the local/regional/national population and environment; the public/private nature of the investment; the character of the measure, including its nature, purpose, duration and rationale.

IIA reform option: Circumscribe the scope of the MFN clause

While the MFN clause was invoked in approximately one fifth of cases, its significance goes well beyond what this number would suggest. Without proper limitations, the MFN clause can effectively multilateralize benefits granted by a treaty Party and require their application to investors/investments that would ordinarily not be covered.

Such benefits can arise from other treaties such as double taxation treaties or economic cooperation agreements. Should a country wish to preclude the MFN clause from applying to any relevant international agreement, it can do so by excluding specific types of treaties from the scope of the MFN clause. The most common exclusions relate to double tax treaties or regional economic cooperation.

The MFN clause not only concerns non-investment treaties but also plays a role in the relationship between different IIAs signed by one country. Reformed formulations may indirectly be rolled back as investors could rely on old/unreformed IIAs that impose uncalibrated obligations on States. For example, a number of arbitral decisions have read the MFN obligation as allowing investors to invoke more investor-friendly procedural provisions from third treaties or to circumvent procedural requirements in the base treaty (e.g. *Maffezini v. Spain)*. Explicit guidance as to the relationship between the MFN clause and dispute settlement provisions may provide greater clarity to investors and tribunals and avoid or shorten ISDS proceedings.

The below formulation (box 12), thus, comprises three different limitations to the MFN clause, i.e. for double taxation treaties, economic integration agreements and ISDS clauses of other IIAs.

Box 12. IIA reform option: Circumscribe the scope of the MFN clause

Reform-oriented formulations with recent treaty examples (illustrative)

The treatment set forth in this article shall not be construed to oblige any Party to extend to investors of the other Party and covered investments any preferential treatment resulting from:

a) an agreement on the avoidance of double taxation or any other international agreement or arrangement relating wholly or mainly to taxation; or

● Burkina Faso–Turkey BIT (2019), Art. 4.4(a) ● Congo–Morocco BIT (2018), Art. 3.3 ● Egypt–Mauritius BIT (2014), Art. 5.3 ● EU–Vietnam Investment Protection Agreement (2019), Art. 2.4.4(b) ● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 5.6 and 10.1 ● Iran, Islamic Republic of–Nicaragua BIT (2019), Art. 4.2 ● Morocco–Nigeria BIT (2016), Art. 6.5(d) ● PACER plus (2017), Ch. 11, Art. 5.7 ● United Arab Emirates–Uruguay BIT (2018), Art. 5.2(b) ● USMCA (2018), Art. 32.3.6(d)

b) an agreement establishing a free trade area, a customs, economic or monetary union, a common market or a regional arrangement of similar nature.

● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 4.3[a] ● Australia–China FTA (2015), Art. 9.4.3[a] ● Burkina Faso–Turkey BIT (2019), Art. 4.4(b) ● China–Republic of Korea FTA (2015), Art. 12.4.2(a) ● Congo–Morocco BIT (2018), Art. 3.3 ● Egypt–Mauritius BIT (2014), Art. 5.3 ● EU–Vietnam Investment Protection Agreement (2019), Art. 2.4.4(a)[b] ● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 5.6[a] ● Iran, Islamic Republic of–Nicaragua BIT (2019), Art. 4.2 ● Morocco–Nigeria BIT (2016), Art. 6.5(a) ● United Arab Emirates–Uruguay BIT (2018), Art. 5.2(a)

For greater certainty, the obligations set out in this Article do not encompass investor-State dispute settlement procedures or mechanisms.

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.6.3 ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 4.5 ● Australia–China FTA (2015), Art. 9.4.2 ● Burkina Faso–Turkey BIT (2019), Art. 4.4(c) ● Canada–EU CETA (2016), Art. 8.7.4 ● China–Republic of Korea FTA (2015), Art. 12.4.3 ● Congo–Morocco BIT (2018), Art. 3.2 ● CPTPP (2018), Art. 9.5.3 ● Egypt–Mauritius BIT (2014), Art. 5.4 ● EU–Vietnam Investment Protection Agreement (2019), Art. 2.4.5 ● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 5.7 ● Japan–Jordan BIT (2018), Note to Art. 4 ● United Arab Emirates–Uruguay BIT (2018), Art. 5.4

Recent model IIAs that generally follow the approach (non-exhaustive)

Economic integration agreements: ● Azerbaijan (2016), Art. 5.1(a) ● BLEU (2019), Art. 6.4(b)(i) ● Brazil (2015), Art. 6.3(ii) ● Czechia (2016), Art. 3.4 and 3.5 ● Morocco (2019), Art. 9.1(a) ● Netherlands (2019), Art. 2.5 ● Pan-African Investment Code (2016), Art. 8.5(a)

Double taxation treaties: ● Azerbaijan (2016), Art. 5.1(b) ● Brazil (2015), Art. 11.1 ● Czechia (2016), Art. 3.6 ● Morocco (2019), Art. 9.1(c) and 24.1 ● Netherlands (2019), Art. 10.1 ● Pan-African Investment Code (2016), Art. 8.5(b)

ISDS: ● Azerbaijan (2016), Art. 4.3 ● BLEU (2019), Art. 6.4(b)(iii) ● Brazil (2015), Art. 6.3(i) ● Czechia (2016), Art. 3.3 ● Morocco (2019), Art. 8.3 ● Netherlands (2019), Art. 8.3 ● Pan-African Investment Code (2016), Art. 7.4 ● Slovakia (2019), Art. 6.4

Source: UNCTAD.

[a] The MFN obligation is not applicable to *pre-existing* treaties.

[b] The provision is more narrow in that it only applies to an "agreement which includes commitments to abolish substantially all barriers to investment".

IIA reform option: Clarify that substantive obligations in other IIAs do not in themselves constitute "treatment"

The MFN clause can potentially have the effect of rolling back substantive treaty reform. A number of arbitral decisions have read the MFN obligation as allowing investors to invoke more investor-friendly provisions from third treaties. Unreformed MFN clauses could be used to incorporate standards not included in the base treaty, to benefit from higher protection standards compared to the ones found in the base treaty or to circumvent requirements found in the base treaty.

Outdated and uncalibrated substantive treaty standards can be imported by relying on the MFN clause as done, for example, in *Bayindir v. Pakistan.* The tribunal accepted that the investor could claim a breach of the FET requirement despite the absence of such a clause in the applicable IIA. Alternatively, investors may seek to rely on the MFN clause to circumvent obligations in the applicable IIA. To illustrate, in *Metal-Tech v. Uzbekistan* the investor (unsuccessfully) argued that the legality requirement in the IIA should not apply as other treaties concluded by the host State do not contain a similar provision. States may wish to exclude this possibility by clarifying what constitutes "treatment" for the purposes of the MFN clause (box 13).

Lastly, problems may even arise where the MFN clause is relied upon to import substantive standards of treatment from modern IIAs. Reformed IIAs often contain carve outs or exceptions that aim to achieve a balance between investment protection and sustainable development. In the absence of a clarification, the MFN provisions may be utilized to import the substantive treaty standards without the accompanying exceptions contained in the originating IIA. The negotiated balance may then be disturbed to the disadvantage of sustainable development objectives.

Box 13. IIA reform option: Clarify that substantive obligations in other IIAs do not in themselves constitute "treatment"

Reform-oriented formulations with recent treaty examples (illustrative)

Substantive obligations in other international investment treaties and other trade agreements do not in themselves constitute "treatment", and thus cannot be considered when assessing a breach of this Article. [Measures adopted or maintained by a Party pursuant to those substantive obligations constitute "treatment".]

● Canada–EU CETA (2016), Art. 8.7.4 ● EU–Vietnam Investment Protection Agreement (2019), Art. 2.4.5

Recent model IIAs that generally follow the approach (non-exhaustive)

● Czechia (2016), Art. 3.3 ● Morocco (2019), Art. 8.4 ● Netherlands (2019), Art. 8.3 ● Pan-African Investment Code (2016), Art. 7.4 ● Slovakia (2019), Art. 6.4

Source: UNCTAD.

Fair and equitable treatment (FET)

The FET provision aims to protect foreign investors/investments against, e.g. denial of justice and/or arbitrary and abusive treatment. This all-encompassing standard aims to foster good governance in the host State. (UNCTAD's Investment Policy Framework, section 4.3).

IIA reform option: Replace FET with an exhaustive list of State obligations

The FET clause constitutes by far the most litigated provision in IIAs. Claimants alleged a violation of FET in over 80 per cent of known ISDS cases. In cases decided in favour of the investor, breaches of the FET provision were the most commonly found violation. Clarifying the clause can significantly enhance predictability for investors and States, giving interpretative guidance to arbitral tribunals. A more defined threshold for finding a breach of the standard decreases States' exposure to ISDS claims and helps to preserve the ability to adapt public policies in light of changing objectives. At the same time, foreign investors have more clarity which type of State acts violate the FET standard while benefiting from the most important investor protection standards under the provision.

A solution for reforming the FET clause is to replace the unqualified FET clause with an exhaustive list of more specific obligations (box 14). Some treaties that have done so still retain the label of "fair and equitable treatment", while others entirely omit this term. Agreeing on such a list may turn out to be a challenging endeavour. However, its exhaustive nature, if carefully drafted, could help avoid unanticipated and far-reaching interpretations by tribunals. The treaty could also create a mechanism for periodic review of this exhaustive list by the Parties to adapt it, if necessary, in response to developments in international investment law and arbitral practice over time.

It is notable that recent treaties do not incorporate investors' legitimate expectations in this closed list. Many past awards have dealt with this concept (which is not referred to in the FET provisions in old-generation treaties either). Instead, some recent treaties address legitimate expectations in a separate provision, specifying a set of conditions and circumstances which give rise to legitimate expectations and stipulating that they may be taken into account by the arbitral tribunal when assessing a breach of any of the elements of the closed list. Under this approach, legitimate expectations do not give rise to any self-standing substantive obligations.

Box 14. IIA reform option: Replace FET with an exhaustive list of State obligations

Reform-oriented formulations with recent treaty examples (illustrative)

A Party breaches the obligation of fair and equitable treatment only if a measure or series of measures constitutes:

a) denial of justice in criminal, civil or administrative proceedings;

b) fundamental breach of due process;

c) manifestly arbitrary conduct;

d) targeted discrimination, on [manifestly] wrongful grounds such as gender, race or religious belief; or

e) [manifestly] abusive treatment, such as coercion, duress and harassment.

● Brazil–India BIT (2020), Art. 4.1[a] ● Canada–EU CETA (2016), Art. 8.10.2 ● EU–Singapore Investment Protection Agreement (2018), Art. 2.4.2 ● EU–Vietnam Investment Protection Agreement (2019), Art. 2.5.2

Recent model IIAs that generally follow the approach (non-exhaustive)

● BLEU (2019), Art. 4.3 ● India (2015), Art. 3.1[b] ● Morocco (2019), Art. 6.1(a) ● Netherlands (2019), Art. 9.2
● Slovakia (2019), Art. 5.2

Source: UNCTAD.
[a] This agreement omits the formulation "fair and equitable treatment" in the relevant provision. The content, however, closely resembles the generic language displayed here.
[b] Ibid.

IIA reform option: Clarify the FET standard

Several other options exist to address the deficiencies of an unqualified FET standard. One option in this respect would be for the Parties to clarify their understanding of the standard by noting, for instance, which scenarios constitute a breach of the provision and which are excluded. The Accelerator lists some of the most common clarifications to the FET clause. Another common option is to link FET to the minimum standard of treatment under customary international law (not included here; see UNCTAD Investment Policy Framework, section 4.3). However, the exact contours of customary international law remain elusive, and a reference to this concept could engender significant uncertainties for both, States and investors. Moreover, considering arguments about the nature and development of customary international law, not all countries may feel comfortable in referring to this concept.

Arbitral practice has developed a number of principles with respect to unqualified FET obligations (e.g. *Antaris v. Czechia*). However, despite the existence of an ample body of decisions dealing with the clause, arbitral tribunals' approaches are diverse and at times contradictory. Explicit clarifications to the FET clause, in particular with respect to breaches of other provisions of the IIA or of obligations under treaties other than IIAs (e.g. the WTO Agreements) can substantially enhance the predictability of the legal framework.

Circumscribing "investors' expectations" in the treaty and providing clear guidance may help to curb the proliferation of ISDS cases primarily or solely relying on the notion of "legitimate expectations" such as those faced by a number of countries over the phase out of incentives for renewable energy or measures adopted in response to severe economic crises (UNCTAD, 2012; UNCTAD, 2019).

Box 15 comprises three different clarifications and limitations for the FET clause. These relate to the relationship between FET and (i) the obligation not to deny justice; (ii) breaches of other provisions or other international agreements; and (iii) investors' expectations.

Box 15. IIA reform option: Clarify the FET standard

Reform-oriented formulations with recent treaty examples (illustrative)

Clarifying FET with reference to the obligation not to deny justice:

The obligation to provide "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil or administrative proceedings in accordance with the principle of due process of law.

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.4.2(a) ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 5.1(a) ● China–Republic of Korea FTA (2015), Art. 12.5.2(a) ● CPTPP (2018), Art. 9.6.2(a) ● Morocco–Nigeria BIT (2016), Art. 7.2(a) ● PACER plus (2017), Ch. 9, Art. 9.2(a) ● United Arab Emirates–Uruguay BIT (2018), Art. 3.2(a) ● USMCA (2018), Art. 14.6.2(a)

Clarifying the relationship between FET and a breach of another provision or agreement:

[For greater certainty,] a determination that there has been a breach of another provision of this Agreement, or of a separate international agreement, does not establish that there has been a breach of this Article.

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.4.3 ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 5.3 ● Brazil–India BIT (2020), Art. 4.3 ● Canada–EU CETA (2016), Art. 8.10.6[a] ● China–Republic of Korea FTA (2015), Art. 12.5.3 ● CPTPP (2018), Art. 9.6.3 ● Egypt–Mauritius BIT (2014), Art. 4.4 ● EU–Singapore Investment Protection Agreement (2018), Art. 2.4.7 ● EU–Vietnam Investment Protection Agreement (2019), Art. 2.5.7 ● Morocco–Nigeria BIT (2016), Art. 7.3 ● PACER plus (2017), Ch. 9, Art. 9.3 ● United Arab Emirates–Uruguay BIT (2018), Art. 3.3 ● USMCA (2018), Art. 14.6.3

Clarifying the relationship between FET and investor expectations:

For greater certainty, the mere fact that a Party takes or fails to take an action that may be inconsistent with an investor's expectations does not constitute a breach of this Article, even if there is loss or damage to the covered investment as a result.

● CPTPP (2018), Art. 9.6.4 ● USMCA (2018), Art. 14.6.4

Recent model IIAs that generally follow the approach (non-exhaustive)

Clarifying FET with reference to the obligation not to deny justice: ● Azerbaijan (2016), Art. 2.3

Clarifying the relationship between FET and a breach of another provision or agreement: ● Azerbaijan (2016), Art. 2.4 ● BLEU (2019), Art. 4.6 ● India (2015), Art. 3.3 ● Morocco (2019), Art. 6.7 ● Netherlands (2019), Art. 9.6 ● Slovakia (2019), Art. 5.4

Clarifying the relationship between FET and investor expectations: ● Morocco (2019), Art. 6.4

Source: UNCTAD.

[a] The Canada–EU CETA (2016), Art. 8.10.7 also clarifies that a breach of "domestic law does not, in and of itself, establish a breach of this Article."

IIA reform option: Reduce FET to a political commitment or entirely omit the FET clause

An omission of the FET clause reduces States' exposure to investor claims but may be perceived to reduce the protective value of the agreement (box 16). It allows States the greatest degree of flexibility in pursuing sustainable development objectives.

Box 16. IIA reform option: Reduce FET to a political commitment or entirely omit the FET clause

Reform-oriented formulations with recent treaty examples (illustrative)

Including a political commitment in the preamble:

Recognising the importance of fostering a transparent and favourable environment for investments by investors of one contracting party in the territory of the other contracting party.

● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), preamble

Omitting the FET clause:

For greater certainty, this agreement does not provide for the obligation to provide fair and equitable treatment.

Explicit omission: ● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 4.3

Omission: ● Australia–China FTA (2015)[a]

Recent model IIAs that generally follow the approach (non-exhaustive)

No FET clause: ● Brazil (2015)

Source: UNCTAD.

[a] Art. 9.9 deals with the "future work program" and foresees negotiations on the inclusion of a minimum standard of treatment provision.

Full protection and security (FPS)

The FPS provision requires host States to exercise due diligence in protecting foreign investments (UNCTAD's Investment Policy Framework, section 4.3).

IIA reform option: Explicitly link the FPS clause to customary international law and clarify that the FPS standard refers to physical protection

The FPS clause is the third most litigated substantive obligation encountered in IIAs. A breach of FPS has been invoked in over 40 per cent of cases. Policymakers may, thus, want to qualify the FPS standard, for example, by explicitly linking it to customary international law. The inclusion of this reform option here contrasts from the approach under the FET clause. This is mainly due to the large number of sustainable development-friendly reform actions taken by countries under the FET clause. With respect to FPS, reform approaches observed in practice have not been as innovative, making the link between FPS and customary international law a viable, albeit limited, option for improvement (box 17). It should be noted, however, that linking FPS to customary international law only excludes interpretations of FPS as a self-standing treaty standard that exists independently of state practice. It does not clarify the substantive content of the obligation.

Some tribunals may interpret the FPS obligation so as to include economic, legal and other protection and security. This can constrain governments' regulatory prerogatives, including for sustainable development objectives. The wide approach to FPS, beyond physical protection, has been followed by tribunals in cases such as *Azurix v. Argentina*, *Enron v. Argentina* and *Biwater Gauff v. Tanzania*. The example of *Saluka v. Czechia* provides a counterweight to this expansive reading of the provision. To provide explicit guidance, in addition to linking FPS to CIL, a definition of the standard could be included to clarify that the provision is limited to "physical" or "police" security. In the absence of such a clarification, arbitral tribunals are free to adopt a limited or expansive approach, leading to uncertainty for States and investors.

Box 17. IIA reform option: Explicitly link the FPS clause to customary international law and clarify that the FPS standard refers to physical protection

Reform-oriented formulations with recent treaty examples (illustrative)

FPS and CIL:

The concept of "full protection and security" does not require treatment in addition to or beyond that which is required under customary international law and does not create additional substantive rights.

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.4.2 ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 5.1(c) ● Burkina Faso–Turkey BIT (2019), Art. 3.2 ● China–Republic of Korea FTA (2015), Art. 12.5.2 ● CPTPP (2018), Art. 9.6.2 ● Egypt–Mauritius BIT (2014), Art. 4.2 ● Japan–Jordan BIT (2018), Art. 5 ● Morocco–Nigeria BIT (2016), Art. 7.2 ● PACER plus (2017), Ch. 9, Art. 9.2 ● United Arab Emirates–Uruguay BIT (2018), Art. 3.2 ● USMCA (2018), Art. 14.6.2

FPS as physical security:

For greater certainty, "full protection and security" refers to each party's obligation to take such measures as may be reasonably necessary to ensure the physical protection of the covered investment.

IIAs referring to "physical" protection: ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 5.1(b) ● Canada–EU CETA (2016), Art. 8.10.5 ● EU–Singapore Investment Protection Agreement (2018), Art. 2.4.5 ● EU–Vietnam Investment Protection Agreement (2019), Art. 2.5.5

IIAs referring to "police" protection: ● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.4.2(b) ● China–Republic of Korea FTA (2015), Art. 12.5.2(b) ● CPTPP (2018), Art. 9.6.2(b) ● Morocco–Nigeria BIT (2016), Art. 7.2(b) ● PACER plus (2017), Ch. 9, Art. 9.2(b) ● United Arab Emirates–Uruguay BIT (2018), Art. 3.2(b) ● USMCA (2018), Art. 14.6.2(b)

Recent model IIAs that generally follow the approach (non-exhaustive)

FPS and CIL: ● Azerbaijan (2016), Art. 2.2

FPS as physical security: ● Azerbaijan (2016), Art. 2.2 ● BLEU (2019), Art. 4.5 ● India (2015), Art. 3.2 ● Morocco (2019), Art. 6.1(b) ● Netherlands (2019), Art. 9.1 ● Slovakia (2019), Art. 5.3

Source: UNCTAD.

Indirect expropriation

The expropriation provision protects foreign investors in case of dispossession of their investments by the host country. Indirect expropriation refers to regulatory takings, creeping expropriation and acts tantamount or equivalent to expropriation (UNCTAD's Investment Policy Framework, section 4.5).

IIA reform option: Clarify protection in case of indirect expropriation

An allegation of indirect expropriation is one of the most common claims in ISDS proceedings. About 70 per cent of known ISDS cases include such a claim. A breach of indirect expropriation is the second most common finding in arbitral proceedings decided in favour of the investor.

While the allegations at times concern targeted measures, expropriation provisions have also been used to challenge legislative and regulatory instruments of general application with an alleged negative effect on the value of an investment. This raises the question of the proper dividing line between expropriations and legitimate public policymaking (e.g. environmental, social or health regulations).

To avoid undue constraints on a State's prerogative to regulate in the public interest, an IIA may set out general criteria for State acts that may (or may not) be considered an indirect expropriation. While this does not exclude liability risks altogether, it allows for better balancing of investor and State interests.

A refinement of the legal standard also provides reassurances to national decision makers. While measuring the "regulatory chill" effect is difficult, anecdotal evidence suggests that governments at times abstain from the adoption of regulatory or legislative measures for public policy objectives as they fear being subject to costly ISDS claims for alleged treaty breaches.

Many States nowadays exclude certain actions from the scope of the expropriation provision. A commonly found exclusion relates to compulsory licensing or other actions in conformity with the TRIPS Agreement. A clarification in the IIA ensures that existing TRIPS flexibilities can, in fact, be relied upon without running the risk of facing ISDS claims under IIAs. This greatly enhances the sustainable development-friendly dimension of an IIA.

The language in box 18 proposes three different clarifications or limitations with respect to indirect expropriations: (i) it establishes criteria to be met for a finding of indirect expropriation; (ii) it defines in general terms what measures do not constitute an indirect expropriation; and (iii) it clarifies that the issuance of compulsory licenses in accordance with the TRIPS Agreement does not constitute an indirect expropriation.

Box 18. IIA reform option: Clarify protection in case of indirect expropriation

Reform-oriented formulations with recent treaty examples (illustrative)

Listing criteria for a finding of indirect expropriation:

The determination of whether an action or series of related actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

a) the economic impact of the government action, although the fact that an 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 an indirect expropriation has occurred;

b) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

c) the character of the government action, including its object, context and intent.

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Annex 3-A, para. 3(a) ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Annex 2, para. 3 ● Canada–EU CETA (2016), Annex 8-A, para. 2 ● China–Republic of Korea FTA (2015), Annex 12-B, para. 3(a) ● CPTPP (2018), Annex 9-B, para. 3(a) ● EU–Singapore Investment Protection Agreement (2018), Annex 1, para. 2 ● EU–Vietnam Investment Protection Agreement (2019), Annex 4, para. 2 ● Morocco–Nigeria BIT (2016), Art. 8.2(b) ● PACER plus (2017), Annex 9-C, para. 3 ● United Arab Emirates–Uruguay BIT (2018), Annex on Expropriation, para. 4(a) ● USMCA (2018), Annex 14-B, para. 3(a)

Box 18 (continued)

Defining in general terms what measures do not constitute an indirect expropriation:

For greater certainty, non-discriminatory regulatory actions by a Party that are designed and applied to achieve legitimate public welfare objectives, such as the protection of health, safety and the environment, do not constitute indirect expropriations.

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Annex 3-A, para. 3(b) ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Annex 2, para. 4 ● Burkina Faso–Turkey BIT (2019), Art. 6.2 ● Canada–EU CETA (2016), Annex 8-A, para. 3 ● China–Republic of Korea FTA (2015), Annex 12-B, para. 3(b) ● CPTPP (2018), Annex 9-B, para. 3(b) ● EU–Singapore Investment Protection Agreement (2018), Annex 1, para. 2 ● EU–Vietnam Investment Protection Agreement (2019), Annex 4, para. 3 ● PACER plus (2017), Annex 9-C, para. 4 ● United Arab Emirates–Uruguay BIT (2018), Annex on Expropriation, para. 4(b) ● USMCA (2018), Annex 14-B, para. 3(b)

Including an exception for the issuance of compulsory licenses in accordance with the TRIPS Agreement:

For greater certainty, this Article does not apply to the issuance of compulsory licences granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that the measure is consistent with the TRIPS Agreement.

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.11.4 ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 10.5 ● Canada–EU CETA (2016), Art. 8.12.5-6[a] ● CPTPP (2018), Art. 9.8.5[b] ● EU–Singapore, Art. 2.6.3 and Annex 3[c] ● EU–Vietnam, Art. 2.7.4[d] ● Japan–Jordan BIT (2018), Art 11.6 ● Morocco–Nigeria BIT (2016), Art. 8.8 ● PACER plus (2017), Ch. 9, Art. 13.5-6 ● United Arab Emirates–Uruguay BIT (2018), Art. 8.7 ● USMCA (2018), Art. 14.8.6

Recent model IIAs that generally follow the approach (non-exhaustive)

Listing criteria for a finding of indirect expropriation: ● BLEU (2019), Art. 8.2 ● India (2015), Art. 5.3(b) ● Morocco (2019), Art. 10.8(b) ● Netherlands (2019), Art. 12.4 ● Slovakia (2019), Art. 7.5

Defining in general terms what measures do not constitute an indirect expropriation: ● Azerbaijan (2016), Art. 6.5 ● Czechia (2016), Art. 5.3 ● India (2015), Art. 5.5 ● Morocco (2019), Art. 10.8(c) ● Netherlands (2019), Art. 12.8 ● Pan-African Investment Code (2016), Art. 11.3 ● Slovakia (2019), Art. 7.6

Including an exception for the issuance of compulsory licenses in accordance with the TRIPS Agreement: ● Morocco (2019), Art. 10.7 ● Netherlands (2019), Art. 12.9 ● Pan-African Investment Code (2016), Art. 11.4 ● Slovakia (2019), Art. 7.7-8

Source: UNCTAD.
[a] The agreement additionally clarifies that a determination of a measure’s inconsistency with the TRIPS Agreement does not establish that there has been an expropriation.
[b] Ibid.
[c] Ibid.
[d] Only excludes compulsory licensing and does not clarify that action otherwise consistent with the TRIPS Agreement does not constitute an expropriation.

IIA reform option: Explicitly exclude indirect expropriation

Another option is to explicitly exclude indirect expropriations from treaty coverage (box 19). However, expressly excluding indirect expropriation from the IIA may be perceived as considerably reducing the protective value of the agreement as it would leave investors unprotected from certain types of expropriations such as “creeping” or “disguised” takings. One should also note that these measures could still be covered by the FET standard (if included in the treaty).

Box 19. IIA reform option: Explicitly exclude indirect expropriation

Reform-oriented formulations with recent treaty examples (illustrative)

For greater certainty, this Agreement only covers direct expropriation, which occurs when an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

● Brazil–India BIT (2020), Art. 6.3 ● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 6.6

Source: UNCTAD.

Public policy exceptions

These exceptions permit public policy measures, otherwise inconsistent with the treaty, to be taken under specified circumstances (UNCTAD's Investment Policy Framework, section 5.1).

IIA reform option: Include exceptions for domestic regulatory measures in pursuit of circumscribed policy objectives or for prudential measures

An increasing number of IIAs include public policy exceptions. When properly phrased, such provisions make IIAs more conducive to sustainable development. They foster coherence between IIAs and other public policy objectives and reduce States' exposure to claims arising from conflicts that may occur between the interests of a foreign investor and the promotion and protection of legitimate public-interest objectives. Exceptions allow for measures, otherwise prohibited by the agreement, to be taken under specified circumstances. General exceptions identify the policy areas for which flexibility is to be preserved in respect of all (or specified)[3] treaty protection standards.

It is important to note that tribunals can interpret General Exception clauses to counteract implied flexibilities in other provisions. The tribunal in *Bear Creek v. Peru*, for example, found that the existence of a General Exception clause in the applicable IIA forestalled recourse to the police powers doctrine. States may wish to counteract such interpretations by including clarifications, for example in a footnote to the General Exception clause.

In order to adjust the threshold for the use of exceptions by States, the provision may specify the required link, or "nexus" between the measure and the alleged policy objective pursued by this measure. For example, instead of providing that the measure must be "necessary" to achieve the policy objective (high threshold), the IIA could require that the measure be "designed" to achieve or "related" to the policy objective (lower threshold).

The Accelerator lists some of the most commonly found public policy objectives (box 20). What objectives are to be included is often a Party-specific decision. However, the objectives protected by paragraphs a) to d) are virtually universal.

Box 20. IIA reform option: Include exceptions for domestic regulatory measures in pursuit of circumscribed policy objectives

Reform-oriented formulations with recent treaty examples (illustrative)

General exception clause:

… nothing in this Agreement shall be construed to prevent a Party from adopting or enforcing measures:

a) necessary to protect public morals or to maintain public order;

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.26(a) ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 9.1(a) ● Brazil–India BIT (2020), Art. 23.1(a) ● Canada–EU CETA (2016), Art. 28.3.1 and 28.3.2(a) ● EU–Singapore Investment Protection Agreement (2018), Art. 2.3.3(a)[a] ● EU–Vietnam Investment Protection Agreement (2019), Art. 4.6(a)[b] ● PACER plus (2017), Ch. 11, Art. 1.5(a) ● United Arab Emirates–Uruguay BIT (2018), Art. 18.1(b)

b) necessary to protect human, animal or plant life or health;[c]

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.26(b) ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 9.1(b) ● Australia–China FTA (2015), Art. 9.8(a) ● Brazil–India BIT (2020), Art. 23.1(b) ● Burkina Faso–Turkey BIT (2019), Art. 5(a) ● Canada–EU CETA (2016), Art. 28.3.1 and 28.3.2(b) ● Egypt–Mauritius BIT (2014), Art. 13 ● EU–Singapore Investment Protection Agreement (2018), Art. 2.3.3(b)[a] ● EU–Vietnam Investment Protection Agreement (2019), Art. 4.6(b)[b] ● PACER plus (2017), Ch. 11, Art. 1.5(b) ● United Arab Emirates–Uruguay BIT (2018), Art. 18.1(a)

[3] Some of the illustrative example agreements provided here do not apply the exception clause to the entirety of the IIA or investment chapter. Instead, they explicitly identify the provisions which are subject to the exception clause.

Box 20 (continued)

c) necessary to secure compliance with laws or regulations which are not inconsistent with this Agreement including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on contracts;

(ii) the protection of the privacy of individuals in relation to the processing and dissemination of personal data and the protection of confidentiality of individual records and accounts or

(iii) safety

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.26(c) ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 9.1(c) ● Australia–China FTA (2015), Art. 9.8(b) ● Brazil–India BIT (2020), Art. 23.1(c) ● Canada–EU CETA (2016), Art. 28.3.1 and 28.3.2(c) ● EU–Singapore Investment Protection Agreement (2018), Art. 2.3.3(e)[a] ● EU–Vietnam Investment Protection Agreement (2019), Art. 4.6(e)[b] ● PACER plus (2017), Ch. 11, Art. 1.5(c) ● United Arab Emirates–Uruguay BIT (2018), Art. 18.1(c)

d) relating to the conservation of living and non-living exhaustible natural resources [if such measures are made effective in conjunction with restrictions on domestic production or consumption];

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.26(d) ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 9.1(f) ● Australia–China FTA (2015), Art. 9.8(d) ● Brazil–India BIT (2020), Art. 23.1(d) ● Burkina Faso–Turkey BIT (2019), Art. 5(b) ● Canada–EU CETA (2016), Art. 28.3.1 ● EU–Singapore Investment Protection Agreement (2018), Art. 2.3.3(c)[a] ● EU–Vietnam Investment Protection Agreement (2019), Art. 4.6(c)[b] ● PACER plus (2017), Ch. 11, Art. 1.5(d) and 1.7(b) ● United Arab Emirates–Uruguay BIT (2018), Art. 18.1(e)

e) imposed for the protection of national treasures of artistic, historic or archaeological value;

● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 9.1(e) ● Australia–China FTA (2015), Art. 9.8(c) ● Brazil–India BIT (2020), Art. 23.1(e) ● Canada–EU CETA (2016), Art. 28.3.1 ● EU–Singapore Investment Protection Agreement (2018), Art. 2.3.3(d)[a] ● EU–Vietnam Investment Protection Agreement (2019), Art. 4.6(d)[b] ● PACER plus (2017), Ch. 11, Art. 1.7(a) ● United Arab Emirates–Uruguay BIT (2018), Art. 18.1(d)

f) aimed at ensuring the effective or equitable imposition or collection of taxes; or

● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 9.1(d)[d] ● Canada–EU CETA (2016), Art. 28.7.4(d) ● EU–Singapore Investment Protection Agreement (2018), Art. 2.3.3(f)[d] ● EU–Vietnam Investment Protection Agreement (2019), Art. 4.6(f)[d] ● PACER plus (2017), Ch. 11, Art. 5.3.(d)

g) that it deems necessary to fulfill its legal obligations to indigenous peoples.

● USMCA (2018), Art. 32.5

Recent model IIAs that generally follow the approach (non-exhaustive)

General exception: ● Azerbaijan (2016), Art. 5.2 ● Brazil (2015), Art. 11.2 and 16.1 ● Czechia (2016), Art. 12.1 ● India (2015), Art. 32.1 ● Morocco (2019), Art. 21 ● Netherlands (2019), Art. 2.2 ● Pan-African Investment Code (2016), Art. 14.1

Source: UNCTAD.

[a] The exception is nested within the NT provision.

[b] The provision explicitly refers to the NT and MFN provisions.

[c] Several agreements explicitly incorporate the parties' common understanding that this subparagraph equally covers environmental measures.

[d] The referenced provision refers to an inconsistency with the NT standard and covers *direct* taxes.

Additionally, many IIAs contain a so-called prudential carve out. Prudential measures are particularly relevant with respect to financial services providers. Where the IIA covers such services, as most BITs and many other IIAs do, the inclusion of the carve out may be an important tool to allow States to regulate in the pursuit of financial stability. Alternatively, financial services could be exclusively regulated in a separate chapter of a wider agreement or be carved out from the scope of the IIA.

Generally macro-prudential recommendations of global bodies such as, for example, the Basel Committee on Banking Supervision or the Financial Stability Board should not violate substantive IIA protection standards. However, particularly at times of financial or economic crisis States may be required to adopt drastic measures, which could raise challenges by foreign investors. An explicit clarification to that effect allows States to pursue financial stability without running the fear of legal challenges.

The below formulations (box 21) cover this second type of exceptions.

Box 21. IIA reform option: Include exceptions for prudential measures

Prudential measures carve out:

Nothing in this Treaty shall be construed to prevent a Party from adopting or maintaining prudential measures, such as:

a) the protection of investors, depositors, financial market participants, policy holders, policy claimants, or persons to whom a fiduciary duty is owed by a financial service supplier;

b) the maintenance of the safety, soundness, integrity or financial responsibility of financial institutions; and

c) ensuring the integrity and stability of the financial system of a Party.

[Where such measures do not conform to the provisions of this Treaty, they shall not be more burdensome than necessary to achieve their aim.]

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.3.5 ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 9.2 ● Brazil–India BIT (2020), Art. 21.1-2 ● EU–Singapore Investment Protection Agreement (2018), Art. 4.4.1-2 ● EU–Vietnam Investment Protection Agreement (2019), Art. 4.5.1-2 ● Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017), Art. 11 ● Japan–Jordan BIT (2018), Art. 17 ● PACER plus (2017), Ch. 11, Art. 4

Recent model IIAs that generally follow the approach (non-exhaustive)

Prudential measures: ● Brazil (2015), Art. 12 ● Czechia (2016), Art. 14.3 ● Morocco (2019), Art. 23.1 ● Pan-African Investment Code (2016), Art. 33 ● Slovakia (2019), Art. 12

Source: UNCTAD.

IIA reform option: Prevent abuse of the exceptions by host States

In order to prevent abuse of exceptions, it is useful to clarify that "exceptional" measures must be applied in a non-arbitrary manner and not as disguised investment protectionism (box 22). The general exception clause above is often accompanied by such an anti-abuse clause. States should note, however, that the inclusion of such an anti-abuse clause significantly raises the difficulties in successfully relying on the general exception clause. It will trigger enhanced scrutiny of the measure and places the onus of proving that the measure is applied in a non-arbitrary manner and is not disguised investment protectionism on the defendant.

Box 22. IIA reform option: Prevent abuse of the exceptions by host States

Reform-oriented formulations with recent treaty examples (illustrative)

Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination where like conditions prevail or constitute a disguised restriction on investors and investments …

● Armenia–Singapore Agreement on Trade in Services and Investment (2019), Art. 3.26 ● ASEAN–Hong Kong, China SAR Investment Agreement (2017), Art. 9.1 ● Australia–China FTA (2015), Art. 9.8 ● Burkina Faso–Turkey BIT (2019), Art. 5.3 ● Canada–EU CETA (2016), Art. 28.3.1 ● Egypt–Mauritius BIT (2014), Art. 13 ● EU–Singapore Investment Protection Agreement (2018), Art. 2.3.3[a] ● EU–Vietnam Investment Protection Agreement (2019), Art. 4.6 ● PACER plus (2017), Ch. 11, Art. 1.5 and 1.7 ● United Arab Emirates–Uruguay BIT (2018), Art. 18.1 ● USMCA (2018), Art. 32.5

Recent model IIAs that generally follow the approach (non-exhaustive)

● Azerbaijan (2016), Art. 5.2 ● Brazil (2015), Art. 11.2 and 16.1 ● Pan-African Investment Code (2016), Art. 14

Source: UNCTAD.
[a] The exception is nested withing the National Treatment provision.

THE WAY FORWARD

Reforming old-generation treaties is not an easy task. While IIAs should provide legal stability and predictability to foreign investors, this should not restrain regulatory powers to pursue *legitimate* public interest measures. Comprehensive IIA reform needs to be guided by sustainable development objectives and be embedded in a country's overall development plan. Countries, especially developing and least developed countries often face important capacity challenges when attempting to reform their IIA networks in a way that effectively responds to their national development objectives.

Determining which policy options are right for a country requires a careful and fact-based cost-benefit analysis, while also addressing a number of broader challenges. Such challenges include prioritizing reform actions, finding the right treaty partners to implement them and ensuring coherence between reform efforts at different levels of policymaking. As commitments under IIAs have implications for numerous other policy areas at the national, subnational and municipal levels within countries (UNCTAD, 2018), IIA reform efforts require broad internal policy coordination.

Depending on the specific circumstances and policy choices of each country, preference may be given to different reform paths. These include the option of foreclosing on an IIA relationship in its entirety (by terminating an existing agreement without replacing it; by deciding not to sign an IIA after a cost-benefit analysis) or foreclosing on a particular provision (by omitting it from the treaty).

To complement the options and approaches provided in the IIA Reform Accelerator (which are primarily geared at reforming existing outdated IIA networks), countries can and should continue to make use of a more diverse range of reform actions at different levels of policymaking (e.g. conducting thorough IIA reviews, developing new model IIAs and considering reform efforts focused on investment dispute settlement). These reform initiatives should also be in line with national laws dealing with foreign investment, and IIA reform may call for parallel reform steps in corresponding clauses in investment laws (*WIR17*).

The need for comprehensive IIA reform, considering all available options and tools, becomes particularly apparent in times of crisis, such as the COVID-19 pandemic the world is facing today. Government measures that legitimately seek to respond to public health needs or address the economic fallout of public health interventions may be challenged under old-generation IIAs that were conceived at a different era, with different objectives in mind. This IIA Reform Accelerator constitutes one further step towards helping countries step up the reform of old-generation IIAs.

The process of the IIA Reform Accelerator's application will be underpinned by UNCTAD policy research and capacity-building activities. UNCTAD stands ready to support efforts aimed at relying on the IIA Reform Accelerator, both in terms of country-based technical assistance and capacity-building (e.g. through its national IIA Review mechanism) or through multi-country and regional consensus-building workshops intended to facilitate respective IIA reform efforts. UNCTAD could potentially also act as a repository for related information, statements and notifications by countries when they use the IIA Reform Accelerator in their treaty reform efforts, thus bridging the gap between the incremental nature of individual reform efforts and the required global nature of making IIA reform work for sustainable development for all.

Going forward, the IIA Reform Accelerator aims to present a viable, less resource-intensive alternative to the traditional way of IIA negotiations by focusing on a selection of reform-oriented formulations for eight IIA clauses. Prioritizing provisions when embarking on the reform of old-generation treaties could assist treaty negotiators in drafting modern and balanced IIAs, while minimizing negotiation costs (e.g. by reducing the need for extensive face-to-face negotiations and costly travels). The IIA Reform Accelerator is ideally placed in this context by making solutions that are based on recent treaty practice readily available.

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https://investmentpolicy.unctad.org/international-investment-agreements

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