

## Taking Stock of IIA Reform

### 1. Imperative and Roadmap for IIA Reform

There is a pressing need for systematic reform of the global regime of international investment agreements (IIAs) to bring it in line with today's sustainable development imperative. Today, the question is not whether or not to reform, but about the *what*, *how* and the *extent* of such reform. UNCTAD's 2015 World Investment Report (WIR) lays out an Action Menu and a Roadmap for IIA Reform.

IIA reform is happening against the backdrop of the global trend to formulate a "new generation investment policies" that place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment. UNCTAD's Investment Policy Framework for Sustainable Development (the UNCTAD Policy Framework), launched in 2012 and updated in 2015, serves as a reference point for policymakers in formulating such new generation investment policies.

The role of new generation investment policies in mobilizing investment, maximizing sustainable development benefits and minimizing risks, is also recognised in the Addis Ababa Action Agenda (AAAA), the outcome document of the Third United Nations (UN) Financing for Development (FfD) Conference, July 2015. In paragraph 91, UN Member States declare that "[t]he goal of protecting and encouraging investment should not affect our ability to pursue public policy objectives. We will endeavour to craft trade and investment agreements with appropriate safeguards so as not to constrain domestic policies and regulation in the public interest."

In the AAAA, UN Member States also "request UNCTAD to continue its existing programme of meetings and consultations with Member States on investment agreements." The 16 March 2016 UNCTAD Expert Meeting on "Taking Stock of IIA Reform" responds to this mandate, convening Member States as well as the investment and development community to share their experiences with IIA reform.

This paper serves as input into the deliberations. It takes stock of efforts towards IIA reform, as they have been undertaken at the national, bilateral, regional and multilateral levels. It is meant for an in-depth discussion on lessons learned, challenges ahead and the way forward.



## 1.1. Reforming the International Investment Regime: the UNCTAD Roadmap

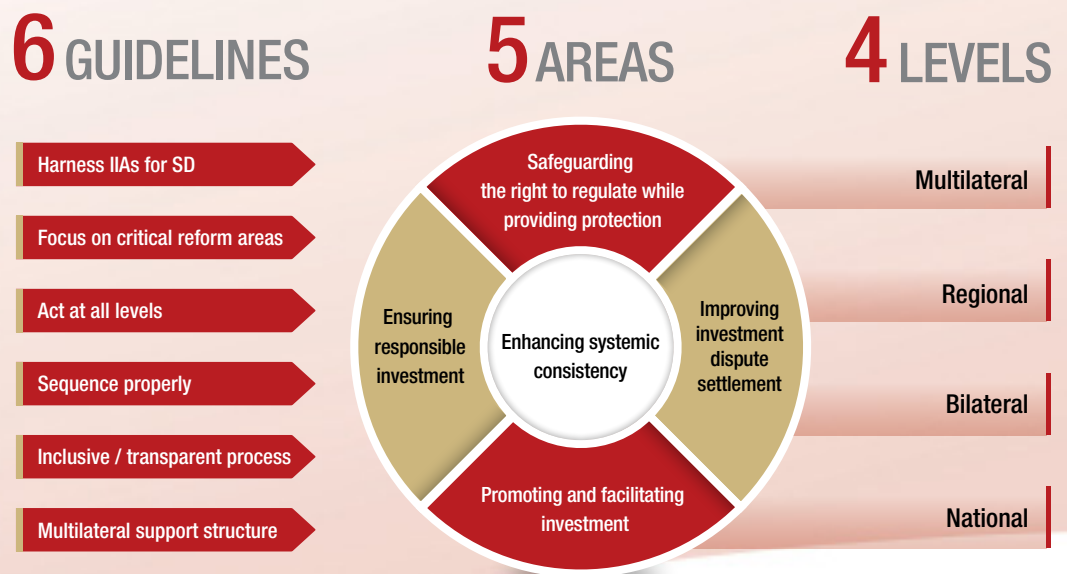
UNCTAD's advocacy for a systemic and sustainable development-oriented approach to reforming the international investment regime started in 2010. Based on UNCTAD's long-standing experience with its Work Programme on IIAs, WIR 2010 highlighted the need to reflect broader policy considerations in IIAs, with a view to formulating a new generation of investment policies. WIR 2012 then launched the UNCTAD Policy Framework (see below), offering concrete policy options to negotiate sustainable-development-friendly IIAs. In 2013, the WIR proposed five paths of reform for investor-State arbitration and subsequently, WIR 2014 presented four pathways of reform for the IIA regime as they were emerging from State practice. With its thematic focus on investing in the sustainable development goals (SDGs), WIR 2014 linked these pathways to the overall objective of mobilizing foreign investment and channeling it to key SDG sectors.

On this basis, WIR 2015 laid out a comprehensive Action Menu and a Roadmap for IIA Reform. Again, WIR 2015 took a broader perspective, complementing its Roadmap for IIA Reform with a set of guidelines for coherent international tax and investment policies aimed at realizing the synergies between investment policy and initiatives to counter tax avoidance.

The Roadmap for IIA Reform was developed in response to call from the 2014 IIA Conference, held as part of the World Investment Forum (Box 1, p 13). Following its launch in the 2015 WIR, the Roadmap was considered by Member States and was met with positive feedback in the 62nd Session of the UNCTAD Trade and Development Board (TDB), September 2015.

UNCTAD's guidance for IIA reform suggests that it should: address five main challenges, take place at four levels of policymaking, and be directed by Six Guidelines (Figure 1).

Figure 1. UNCTAD's Roadmap for IIA Reform



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**Five reform areas.** IIA reform can build on lessons learned from 60 years of IIA rulemaking. In so doing, it should address five main challenges: (i) safeguarding the right to regulate while providing protection; (ii) improving investment dispute settlement; (iii) adding a component of investment promotion and facilitation to

the regime; (iv) ensuring responsible investment; and (v) enhancing the systemic consistency of the IIA regime. UNCTAD's 2015 WIR offers policy options to address these challenges (substantive IIA clauses, investment dispute settlement). By and large, these policy options address the standard elements covered in an IIA and match its typical clauses. Some of these reform options can be combined and tailored to meet several objectives.

**Four levels of reform action.** Actions for sustainable-development-oriented IIA reform can be and have to be undertaken at all levels of policymaking: national, bilateral, regional and multilateral levels. At each level, the reform process would broadly follow a sequence of steps that includes (i) taking stock and identifying problems; (ii) developing a strategic approach and an action plan for reform; and (iii) implementing actions and achieving the desired outcomes.

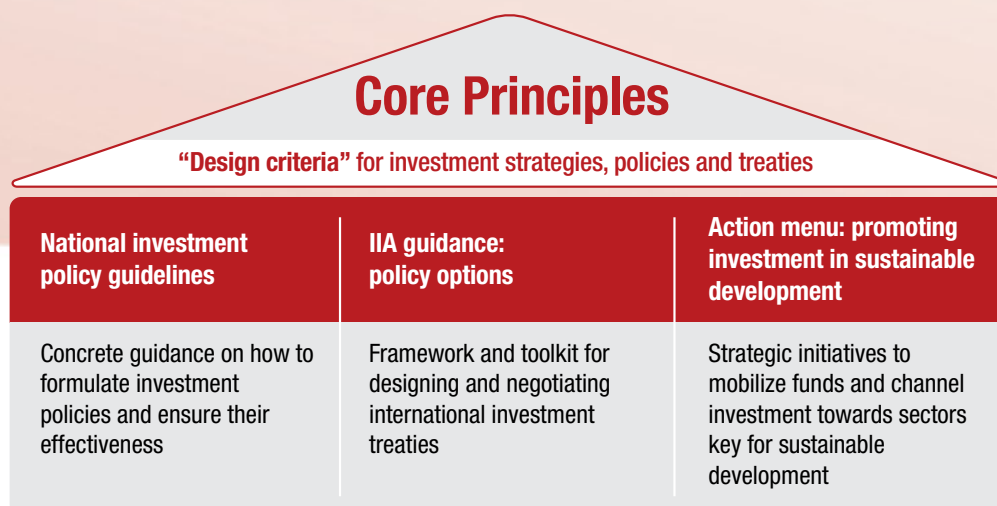
**Six Guidelines for IIA Reform.** 2015 WIR also offers Six Guidelines for IIA Reform, inspired by the Core Principles of the UNCTAD Investment Policy Framework. The Six Guidelines are: (i) harness IIAs for sustainable development; (ii) focus on critical reform areas; (iii) act at all levels; (iv) sequence properly for concrete solutions; (v) ensure an inclusive and transparent reform process; and (vi) strengthen the multilateral supportive structure.

Based on UNCTAD's 2015 Action Menu and Guidelines for IIA Reform, countries can develop their own roadmap, selecting processes and formats in line with their development strategies and needs, as well as their strategic choices about the priority, intensity, depth and character of their engagement in IIA reform. However, IIA reform also needs to be pursued with a common agenda and vision in mind, since any reform step taken without multilateral coordination will only worsen fragmentation.

## 1.2. New Generation Investment Policies: the UNCTAD Policy Framework

In 2012, the special theme of WIR launched UNCTAD's Investment Policy Framework for Sustainable Development (Figure 2). The UNCTAD Policy Framework responds to the recognition that at a time of persistent crises and pressing social and environmental challenges, mobilizing investment and ensuring that it contributes to sustainable development objectives is a priority for all countries. In so doing, the UNCTAD Policy Framework builds on the emerging new generation of investment policies.

**Figure 2. UNCTAD's Investment Policy Framework for Sustainable Development**



Source: ©UNCTAD.

The Framework first details the drivers of change in the investment policy environment and the challenges that need to be addressed; it then proposes a set of Core Principles for investment policymaking, which serve as “design criteria” for national and international investment policies. On this basis, it presents guidelines for national investment policies and policy options for the formulation and negotiation of IIAs. UNCTAD’s Policy Framework has since served as a reference point for policymakers, including through Investment Policy Reviews (IPRs), in formulating national investment policies and negotiating IIAs, as a basis for building capacity on investment policy, and as a point of convergence for international cooperation on investment issues. It has been used by more than 100 countries (including members of five regional economic integration organizations (REIOs)) in the revision of their national or regional model IIAs.

Three years after its launch, new insight gained through policy debates and technical assistance experience, feedback received from experts as well as new policymaking priorities, had accumulated to the point that an update of the Policy Framework was opportune (the 2015 Update). The 2015 Update incorporates this information into the national investment policy guidelines and the IIA menu of options, elaborates on the “pre-establishment” component and proposes concrete policy measures from UNCTAD’s 2014 WIR Action Plan for Investment in Sustainable Development, aimed at promoting investments with a specific sustainable development orientation. In July 2015 UNCTAD launched the update at the Third FfD Conference in Addis Ababa, Ethiopia.

## 2. Reform in Progress

IIA reform is taking place against the background of an expanding IIA regime, with intensified efforts of investment policy-making at the regional level. By the end of 2015 the IIA universe consisted of 3,286 agreements (2,928 BITs and 358 “other IIAs”). “Other IIAs” refer to economic agreements, other than BITs that include investment-related provisions (e.g. investment chapters in economic partnership agreements (EPAs) and free trade agreements (FTAs), regional investment agreements and framework agreements on economic cooperation).

**Table 1. Roadmap for IIA Reform**

	Take stock/ identify problem	Strategic approach/ action plan	Level
National	<ul style="list-style-type: none"> <li>National IIA review</li> </ul>	<ul style="list-style-type: none"> <li>National IIA action plan</li> </ul>	<ul style="list-style-type: none"> <li>New model treaty</li> <li>Implementation</li> </ul>
Bilateral	<ul style="list-style-type: none"> <li>Joint IIA consultations to identify reform needs</li> </ul>	<ul style="list-style-type: none"> <li>Plan for a joint course of action</li> </ul>	<ul style="list-style-type: none"> <li>Joint interpretation</li> <li>Renegotiation / amendment</li> </ul>
Regional	<ul style="list-style-type: none"> <li>Collective review</li> </ul>	<ul style="list-style-type: none"> <li>Collective IIA action plan</li> </ul>	<ul style="list-style-type: none"> <li>Consolidation / rationalization of BIT networks</li> <li>Common model</li> <li>Joint interpretation</li> <li>Renegotiation / amendment</li> <li>Implementation / aid facility</li> </ul>
Multilateral	<ul style="list-style-type: none"> <li>Global review of the IIA regime (e.g. WIR15)</li> </ul>	<ul style="list-style-type: none"> <li>Multilateral consensus-building on key and emerging issues</li> <li>Shared vision on systemic reform</li> </ul>	<ul style="list-style-type: none"> <li>Multilateral Action Plan</li> <li>Multilateral backstopping</li> </ul>

Source: ©UNCTAD.

IIA reform is taking place at four levels of policymaking: national, bilateral, regional and multilateral.

## 2.1. National Level

National level reform options include national IIA reviews and action plans, resulting, among others, in new model treaties. Since 2012, at least 110 countries have reviewed their national and/or international investment policies. About 100 of them (including member States of five REIOs) have used the UNCTAD Policy Framework.

i) *National Model IIAs*. Since 2012 at least sixty countries have developed or are developing new model IIAs. Until the 1990s, mainly developed countries used IIA models (e.g. Canada, Germany, United States). Today, both developed and developing countries use model treaties, which can indicate a country's overall approach to IIAs.

In terms of content, most of the new models include provisions safeguarding the right to regulate, including for sustainable development objectives, and provisions aimed at minimizing exposure to investment arbitration. Many of these elements are in line with UNCTAD's Policy Framework and match policy options included in UNCTAD's Roadmap for IIA Reform. While new IIA models differ in the extent to which they include reform elements, many of them demonstrate countries' intentions to move away from the "protection (only) model" to a more balanced "investment for sustainable development model".

- **Brazil's** model agreement on the cooperation and facilitation of investment (CFIA) was approved in 2013.<sup>1</sup> It was the model for concluding CFIAs with Angola, Chile, Colombia, Malawi, Mexico and Mozambique. It is currently the basis for negotiations (Peru) or for envisaged negotiations with several other countries. The model benefited from domestic consultations with the Brazilian private sector and experiences of other countries and international organizations. Central to this model is the establishment of mechanisms for the prevention of disputes (focal points, Ombudsmen, joint committees of government representatives of both parties) and for the promotion and facilitation of investment. The model includes clarified substantive protections (e.g. expropriation, national treatment and most favoured nation (MFN) treatment provisions), but does not include investor-State dispute settlement (ISDS) (i.e. only State-State dispute settlement).
- **Colombia's** 2011 model BIT is currently under revision (with public consultations) and its update is expected in 2016. The country's 2016 review is expected to continue the reform effort for its 2011 model to preserve the right to regulate and ensure responsible investment. The latter includes provisions to safeguard the State's right to regulate through public policy exceptions, excludes investments made with assets of illegal origin, closely circumscribes (i.e. clarifies) fair and equitable treatment (FET) and indirect expropriation, and contains provisions promoting certain standards on corporate social responsibility (CSR). The 2016 update is expected to continue this trend of preserving the right to regulate and ensuring responsible investment.
- **Germany** published an expert opinion on a model BIT for developed countries in May 2015. The expert opinion was transmitted to the European Commission and published on the website of the German Ministry for Economic Affairs and Energy. Central to it are the establishment of a bilateral investment court or tribunal for each specific treaty, with judges pre-selected by the parties to the agreement, individual cases being assigned to the judges by abstract rules and a standing appellate review mechanism. The expert opinion also includes public policy exceptions, policy options ensuring that foreign investors are not conferred greater

rights than those enjoyed by domestic investors, and clarifications to the FET and indirect expropriation provisions.

- **India's** new model BIT was approved by the Union Cabinet (the Prime Minister and the Cabinet Ministers) in mid-December 2015. Notable are the absence of an MFN clause, as well as the inclusion of carve-outs, safeguards and clarifications covering a number of issues and a variety of policy areas (e.g. exclusion of portfolio investments from the definition of investment, exclusions of government procurement, taxation, subsidies, and compulsory licenses from the treaty scope, replacement of the FET standard with a list of State obligations under customary international law and a clarification of indirect expropriation). The model includes provisions on investor compliance with the State Parties' laws and on CSR. It requires the exhaustion of domestic remedies before ISDS may be commenced and mentions the possibility of establishing an appellate body to review awards rendered by investment tribunals.
- **Indonesia's** draft model BIT is in the process of being finalized. The draft version, prior to finalization, is characterized by carve-outs, safeguards and clarifications in order to strike a balance between the rights of investors and the right of States to regulate. The draft model excludes portfolio investments and applies the *Salini* test for defining an "investment". Moreover, national treatment is subject to exceptions as provided in the schedule of reservations. The MFN clause also contains several clarifications, e.g. the exclusion of dispute settlement. The FET provision contains clarifications and ISDS is subject to specific host country consent.
- **Egypt's** new model BIT text is currently subject to consultations involving Egyptian investors abroad, relevant government entities and international organizations. The draft model includes carve-outs that protect sustainable-development-oriented measures from the scope of indirect expropriation and from ISDS and a general exceptions for the protection of environmental, public health and labour standards. The model clarifies FET in a way that is sensitive to the parties' different levels of development and contains provisions on investor responsibilities, including for the fight against corruption. Amicable solution mechanisms (e.g. negotiation, mediation and conciliation) are the main tools for dispute settlement, conditioning access to ISDS on a specific agreement by the disputing parties.
- **Norway's** draft model BIT was presented for public consultations on 13 May 2015. The comments received during the public consultation and other international developments are currently being reviewed. The draft model contains a clause on the right to regulate and a section with exceptions, including a general exceptions clause and exceptions for essential security interests, cultural policy, prudential regulations and taxation. It clarifies indirect expropriation and establishes a joint committee tasked with supervising the implementation of the agreement, resolving disputes regarding its interpretation, working to remove barriers to investment, amending the agreement when necessary, and potentially adopting codes of conduct for arbitrators.
- **The United States'** 2012 model BIT builds upon an earlier model from 2004 and benefited from inputs from Congress, private sector, business associations, labour and environmental groups and academics. The 2012 model clarifies the clauses on national treatment, FET, full protection and security, indirect expropriation, and free transfer of funds. It also includes provisions on transparency and public participation (e.g. a requirement that

Parties consult periodically regarding how to improve their transparency practices, including in the context of ISDS). The model also contains a provision on the possibility of a future appellate mechanism and requires the Parties to strive to ensure that any such mechanism includes provisions on transparency and public participation. The 2012 model strengthens labour and environmental obligations by requiring the Parties to ensure that they do not waive or derogate from their labour and environmental laws. The model is intended to provide a balance of interests, facilitating and protecting investment, while protecting the ability of governments to regulate in the public interest.

ii) *National IIA Reviews*. Most countries engaged in undertaking an investment policy review focused on the international policy dimension, i.e. conducted so-called “IIA reviews”. Among the 110 countries that have recently undertaken a review, eleven countries have benefited from an IIA review as part of an IPR. Since 2012, UNCTAD conducted IPRs for Bangladesh (2013), Bosnia and Herzegovina (2015), Congo (2015), Djibouti (2013), Kyrgyzstan (2015), Madagascar (2015), Republic of Moldova (2013), Mongolia (2013), Mozambique (2012), Sudan (2015), and Tajikistan (forthcoming). In such IIA reviews, countries analyze, among others, their treaty networks and content profiles, and also some of them undertake impact and risk assessments to identify specific reform needs in line with national development objectives. Some IIA reviews involved inter-ministerial consultations, parliamentary engagement, as well as inputs from academia, civil society and business. Countries which have recently reviewed their IIAs include Azerbaijan, Bosnia and Herzegovina, Brazil, Colombia, Egypt, Germany, Indonesia, South Africa, Sri Lanka, Switzerland, Thailand and the Netherlands (with some of these reviews ongoing).

Some IIA reviews culminate in the creation of a new model IIA (see above), while others contribute to an ongoing modernization of the country’s negotiating documents and approach to international investment policymaking. Some IIA reviews result in decisions about whether certain IIA relationships should be renegotiated, amended or terminated.<sup>2</sup> And sometimes, focus is given to codifying IIA concepts into national laws.

- **Canada** continuously updates its IIA policy on the basis of emerging issues and arbitral decisions in ISDS cases. Efforts resulted in a new model BIT in 2004 and its periodical updates for the purposes of IIA negotiations ever since. Recent Canadian IIAs contain clarifications of the standards of protection involved, including the meaning of indirect expropriation, FET, full protection and security, as well as a general exceptions clause and a refined ISDS mechanism, providing *inter alia* for transparency of the proceedings. They typically also include express provisions on labour and environmental protection as well as CSR.
- **The Netherlands** has recently been engaged in a review of its international investment policy engagement. The Ministry of Foreign Affairs requested expert studies on the issue (including one by UNCTAD, providing an overview of treaty-based ISDS cases brought under Dutch IIAs).<sup>3</sup> The review led to a decision by the Ministry to revise the current portfolio of Dutch IIAs, subject to consultations with concerned stakeholders and subject to authorization of the European Commission. The update is expected to align the model with the European Union negotiating proposals for the Transatlantic Trade and Investment Partnership (TTIP), e.g. excluding “mailbox” companies from the scope of the BIT and providing for transparency in the context of investment dispute settlement, according to the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules.

- **South Africa** initiated a review of its international investment policy in 2008. Consultations involving a wide range of stakeholders took place over a three-year period. The review identified a range of concerns associated with BITs, notably the broadly drafted standards of protection and the risk of investment disputes. The review led to a decision by the South African cabinet in 2010 to develop a new investment bill to codify investment protection provisions into domestic law, to terminate BITs and offer partners the possibility of renegotiating their IIAs and, to refrain from entering into BITs in the future, unless there are compelling economic and political reasons for doing so. The Promotion and Protection of Investment Bill was published in 2013 for public comment and was passed by the National Assembly in 2015. The new Act includes important investment protection commitments while preserving the right of South Africa to pursue legitimate public policy objectives.
- **Switzerland** regularly updates its BIT model provisions (last update 2012). In February 2015 an interdepartmental working group took up its work to review provisions where necessary. The focus of their work lies on protection standards, the right to regulate as well as ISDS procedures. Ongoing discussions and developments in relevant international organizations (UNCTAD, the Organisation for Economic Co-operation and Development (OECD), the International Centre for Settlement of Investment Disputes (ICSID) and UNCITRAL) are taken into consideration. The conclusion of the work is foreseen for mid-2016.

## 2.2. Bilateral Level

Bilateral reform actions include joint IIA consultations and plans for a joint course of action. They can result in joint interpretations, renegotiations/amendments or consensual terminations of the Parties' current IIAs and in the conclusion of new treaties.

- i) *Joint Interpretation.* As the “masters of the treaties”, the Parties to an IIA can and have used joint interpretative statements on an existing treaty (e.g. in the form of memoranda of understanding). Moreover, several recent IIAs include express provisions on the power of States to issue joint binding interpretations on all or specific provisions of the treaty in question (Trans-Pacific Partnership (TTP) Agreement (2016); The Comprehensive Trade and Economic Agreement (CETA) (draft); Australia-China FTA (2015); Australia-Republic of Korea FTA (2014); Canada-Serbia BIT (2014); Mexico-Panama FTA (2014)).
- ii) *Treaty Amendments or Renegotiations.* Since 2012 (date of launch of UNCTAD's Policy Framework), at least 19 new IIAs replaced (or will replace upon entry into force) existing treaties, constituting some 8 per cent of IIAs that were signed or entered into force between 2012 and 2015. Aside from treaty amendments and renegotiations, some countries pursued consensual treaty terminations. For example, since 2012, the Austria-Cape Verde BIT (1991), the Italy-Poland BIT (1989) and the Italy-Ukraine BIT (1995) were terminated by consent.
- iii) *New Treaties.* The conclusion of new, sustainable-development-friendly treaties is a key pathway for IIA reform. Comparing the prevalence of IIA provisions that promote the right to regulate, as suggested in UNCTAD's Roadmap for IIA Reform, shows a clear shift in drafting practices. “Modern” BIT clauses frequently also match the respective policy options in the UNCTAD Policy Framework (Table 2).<sup>4</sup> This trend toward reform is even more pronounced when adding “other IIAs” to the analysis (respective reform options are more prevalent in recent “other IIAs” compared to BITs signed during the same time frame) (see also Annex tables 1-5). The difference is most notable with regard to the clarification of indirect expropriation and the presence of public policy exceptions.



## 2.3. Regional Level

Regional-level IIA reform actions include collective treaty reviews and IIA action plans, which can result in a common model, joint interpretations, renegotiations, and/or the consolidation of treaties. Regional IIAs and megaregionals can also advance IIA reform.

- i) *Regional Model IIAs.* A regional IIA model can significantly contribute to IIA reform, by guiding a number of countries (instead of a single one) or by impacting on a megaregional agreement. If widely used, a regional model can also foster coherence and reduce the systemic complexity of the IIA regime. To the extent that it lends sophistication, credibility and leverage to a country's negotiating position, a regional model may be particularly useful for developing countries. A notable example of an early regional model IIA is the 2007 **Common Market for Eastern and Southern Africa (COMESA)**.

**Table 2. Evidence of Reform in Recent IIAs: Preserving the Right to Regulate**

TREATY PROVISIONS Options for IIA Reform	UNCTAD Policy Framework*	Earlier BITs (1962-2011) (862 BITs)	Recent BITs (2012-2014) (40 BITs)
PREAMBLE Include public policy interests as treaty objectives	1.1.1	10%	65%
DEFINITION OF COVERED INVESTMENT Expressly exclude specific types of assets	2.1.1	5%	45%
DEFINITION OF COVERED INVESTOR Include "denial of benefits" clause	2.2.2	7%	58%
MOST-FAVOURLED-NATION TREATMENT Specify that not applicable to other IIAs' ISDS provisions	4.2.2	3%	33%
FAIR AND EQUITABLE TREATMENT Refer to minimum standard of treatment/customary int'l law	4.3.1	4%	40%
INDIRECT EXPROPRIATION Establish criteria to be taken into consideration by tribunals	4.5.1	4%	35%
FREE TRANSFER OF FUNDS Include exceptions for serious balance-of-payments difficulties or other financial and economic crises	4.7.2	8%	70%
PUBLIC POLICY EXCEPTIONS Include public policy exceptions	5.1.1	12%	58%

\* The numbering refers to the policy options set out in the table "Policy Options for IIAs: Part A" in the 2015 Version of UNCTAD's Investment Policy Framework for Sustainable Development.

Source: ©UNCTAD.

- A draft regional model for the **East African Community (EAC)** was submitted to the Sectoral Council on Trade, Industry, Finance and Investment for adoption and guidance in autumn 2015. The model includes carefully drafted national treatment and MFN provisions, and replaces FET with a provision focusing on administrative, legislative and judicial processes. It includes provisions on the right to regulate investment for development objectives, on investor obligations and on business ethics. It circumscribes ISDS by requiring the exhaustion of local remedies.

- In 2012, shortly after the launch of the UNCTAD Policy Framework, Member States of the **South African Development Community (SADC)** completed their model BIT. For some IIA clauses the SADC model provides countries with options to choose from. For FET, for example, one option clarifies that a FET violation only occurs if the government act was “an outrage, in bad faith, a willful neglect of duty...” and the second option is a provision based on administrative law approaches to fair administrative treatment and due process of law. For ISDS, one option excludes ISDS, the other requires the exhaustion of domestic remedies before ISDS. The model also provides greater details on investor obligations (e.g. provisions on anti-corruption, compliance with domestic laws, environmental assessment and management, and human rights). The 2012 model BIT does not contain an MFN clause. SADC Member States are currently engaged in a review of the 2012 model, as contemplated when the document was completed.
- There is the special case of the **European Union**, currently negotiating a number of regional or megaregional IIAs. While the EU does not use a “model agreement” per se, there are several documents that guide its negotiations and whose functions resemble those of a “model”. In terms of content, several of the EU’s policy documents break new ground with respect to IIA and ISDS reform.

In May and November<sup>5</sup> 2015, the European Commission proposed new approaches to substantive IIA clauses and ISDS, some of these documents being part of the negotiating proposals for the TTIP and possibly, future IIAs. Key features of the new approach include the protection of the right to regulate and the establishment of a new Investment Court system, which would consist of a first instance tribunal and an appeal tribunal, both composed of judges appointed by the Contracting Parties and subject to strict ethical standards. The current IIA reform proposals at the EU level correspond to a large extent to the action menu detailed in the UNCTAD Roadmap and the UNCTAD Policy Framework.

The new approach has since been incorporated in the EU-Viet Nam FTA for which negotiations were concluded in December 2015, and in CETA (see February 2016 text resulting from “legal scrubbing” following the official conclusion of negotiations in 2014).

- ii) *Regional or Megaregional Treaties.* Countries have increasingly engaged in regional or megaregional IIA rulemaking (2014 WIR, chapter III), and some of these treaties display features of IIA reform. To the extent that megaregionals consolidate and streamline the IIA regime, they can also help manage the relationship between IIAs and help enhance the systemic consistency of the IIA regime, as suggested in the UNCTAD Roadmap for IIA Reform.
- In October 2015, 12 Pacific Rim countries concluded negotiations for the **TPP Agreement**. The TPP investment chapter overlaps with at least 23 BITs and 29 bilateral and regional FTAs with investment provisions already in existence between the TPP Parties. The TPP is largely similar to the US model BIT (2012). It includes some refined IIA clauses (e.g. clarification of FET and expropriation provisions, ISDS carve-out from MFN, a special denial of benefits clause for tobacco-related claims etc.). In addition, several Contracting Parties use side letters to clarify, “reserve” or carve-out certain issues, including with respect to ISDS (through Annex 9-H, Australia, Canada, Mexico and New Zealand opt-out of being subject to the ISDS provisions with regard to certain investment-related measures).
- iii) *Regional Organizations.* Some regional organizations have work streams with elements of IIA reform, and sometimes, countries in a region take initiative.

- The **African Union** is developing a **Pan African Investment Code (PAIC)**, expected to include innovative provisions aimed at balancing between the rights and obligations of host African States and investors.
- Since 2013, the **Energy Charter Secretariat** has proposed to the working groups of the contracting Parties a number of measures to improve investment dispute settlement under Article 26 of the Energy Charter Treaty. In 2015, the Secretariat, together with a group of experts, started drafting guidelines to facilitate investment mediation decisions between host governments and investors. Contracting Parties also discussed the possibility of making an express, general statement denying certain treaty benefits to investors controlled by a national of a non-Contracting Party and without substantial business activities in the host State.

## 2.4. Multilateral Level

UNCTAD's Action Menu for IIA Reform identifies several stages of multilateral IIA reform, with different intensity, depth and character of engagement (stocktaking, strategic approach, options for actions and outcomes). At all of these stages, multilateral actions interact with the steps and actions undertaken at other levels of policymaking. A global review of the IIA regime (stocktaking) and multilateral consensus-building on key and emerging issues can help develop a shared vision on systemic reform, supported by multilateral backstopping.

Work related to issues of IIA reform is also undertaken in a number of multilateral fora, including UNCITRAL, the Working Group on the issue of human rights and transnational corporations (TNCs) and other business enterprises, or the Annual Forum on Business and Human Rights.

- **UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (The UNCITRAL Transparency Rules).** The UNCITRAL Transparency Rules provide States with procedural rules for greater transparency in investor-State arbitrations conducted under the UNCITRAL Arbitration Rules. The rules came into effect on 1 April 2014 and are incorporated into the latest version of the UNCITRAL Arbitration Rules. The rules are now applicable to a number of treaties concluded *after* 1 April 2014 (e.g. Japan-Ukraine BIT 2015).
- **UN Convention on Transparency in Treaty-based Investor-State Arbitration (The UN Transparency Convention).** The UN Transparency Convention, open for signature since 17 March 2015, is an instrument for States (as well as REIOs) that wish to make the UNCITRAL Transparency Rules applicable to their IIAs concluded *prior* to 1 April 2014.<sup>6</sup> To date, the UN Transparency Convention has been signed by 16 States (Belgium, Canada, Congo, Finland, France, Gabon, Germany, Italy, Luxembourg, Madagascar, Mauritius, Sweden, Switzerland, the Syrian Arab Republic, the United Kingdom and the United States). One State, Mauritius, has ratified it. The entry into force requires the deposit of three ratification instruments.
- **Human Rights.** Following the United Nations Human Rights Council Resolution 26/9 of 14 July 2014, an open-ended inter-governmental working group was established to work on TNCs and other business enterprises with respect to human rights. The objective is to elaborate an international legally binding instrument to regulate, in international human rights law, the activities of TNCs and other business enterprises. The first session of the working group took place from 6 to 10 July 2015 in Geneva, Switzerland where participants discussed the principles which should underlie the legally binding instrument regulating TNCs' respect of human rights. In November 2015, the fourth edition of the Annual Forum

on Business and Human Rights held in Geneva gathered some 2,300 stakeholders (e.g. participants from government, business, community groups civil society, investor organizations, trade unions, international organizations and academia) to discuss the theme of “Tracking Progress and Ensuring Coherence” in the implementation of the United Nations Guiding Principles (UNGPs) on Business and Human Rights. The Forum addressed issues related to IIA reform; among others, participants explored ways in which the current trend in investment policy reform could serve as an opportunity to implement the UNGPs and integrate human rights into investment policymaking.

- **The Third UN FfD Conference.** The importance of multilateral consultations on IIAs in the pursuit of today’s sustainable development agenda is also recognized in the AAAA, the outcome document of the Third UN Conference on FfD. The AAAA emphasizes the need for governments to establish the signals and enabling environments that can effectively catalyse and harness investment, channeling it into areas essential for achieving the SDGs and away from areas that are inconsistent with that agenda. Paragraph 91 of the AAAA is devoted to IIAs and states: “The goal of protecting and encouraging investment should not affect our ability to pursue public policy objectives. We will endeavour to craft trade and investment agreements with appropriate safeguards so as not to constrain domestic policies and regulation in the public interest. We will implement such agreements in a transparent manner. We commit to supporting capacity-building including through bilateral and multilateral channels, in particular to least developed countries, in order to benefit from opportunities in international trade and investment agreements. We request UNCTAD to continue its existing programme of meetings and consultations with Member States on investment agreements.”

For several years, **UNCTAD’s Work Programme on IIAs** has assisted countries in the design of new generation IIAs. UNCTAD’s work on IIAs covers all four pillars of UNCTAD’s activities, i.e. research and policy analysis, technical assistance, policy development, and intergovernmental consensus-building.

- **UNCTAD’s Research and Policy Analysis on IIAs.** This work-stream consists of policy research and policy monitoring, including monitoring of progress on IIA reform. Key outputs and publications, all of which accessible through the [Investment Policy Hub](#), include: i) the two “Navigators”, user-friendly, free-of-charge databases (the [IIA Navigator](#) offers the world’s most comprehensive collection of IIAs, covering texts of 74 per cent of all BITs and 93 per cent of all “other IIAs” signed until today; the [ISDS Navigator](#) provides information on close to 700 known ISDS cases); and ii) policy monitoring, as included in chapter III on “recent policy developments” of the annual WIR, the IIA Issues Notes, the [Investment Policy Monitors \(IPMs\)](#) and the [joint UNCTAD/OECD Report on G20 Investment Measures](#).
- **UNCTAD’s Policy Development on IIAs.** This work-stream results in the formulation of policy instruments for development such as UNCTAD’s [Investment Policy Framework for Sustainable Development](#), UNCTAD’s [Roadmap for IIA Reform](#), UNCTAD’s [Principles on Coherent International Tax and Investment Policies](#), [UNCTAD’s Action Plan for Investing in the SDGs](#), or UNCTAD’s [Specific Initiatives on Global Value Chains](#). One prominent example is UNCTAD’s [Action Menu on Investment Facilitation](#), launched on 26 January 2016. The Action Menu proposes 10 action lines with a series of options for investment policymakers to adapt and adopt for national and international policy needs. It is based on UNCTAD’s [Investment Policy Framework](#), which proposed a set of

actions on investment promotion and facilitation already in its first edition in 2012, as well as on earlier work, including a 2008 study on investment promotion provisions in IIAs. The Action Menu also draws on UNCTAD's rich experiences and lessons learned in investment promotion and facilitation efforts worldwide over the past decades.

- **UNCTAD's Intergovernmental Consensus-Building on IIAs.** This work-stream includes servicing the UNCTAD intergovernmental machinery, in particular the TDB, the Commission on Investment, Enterprise and Development and its regular expert meetings, as well as convening ad hoc expert meetings. Central to this work-stream is the biennial WIF (Box 1), including its Ministerial Roundtable and its IIA Conference. Multi-stakeholder engagement is ensured, both regarding participation in UNCTAD meetings, as well as regards co-organization (e.g. the 10th Annual Columbia International Investment Conference: "Investment Treaty Reform: Reshaping Economic Governance in the Era of Sustainable Development" co-organized with the Columbia Center for Sustainable Investment (10 November 2015)).

### **Box 1. The World Investment Forum: Filling the Gap in Global Investment Governance**

Established in 2008, the UNCTAD World Investment Forum (WIF) is a high-level, biennial, multi-stakeholder gathering designed to facilitate dialogue and action on the world's key and emerging investment-related challenges. It strives to fill a gap in the global economic governance architecture by establishing a global platform for engaging policymakers, the private sector, and other stakeholders at the highest level on investment issues. It is recognized by governments and business leaders as the most important event for the international investment community.

The fourth WIF, held in October 2014 Geneva, Switzerland, was the largest Forum to date. Over four days and 50 events, the Forum brought together 3,000 stakeholders from all corners of the investment-development community, including Heads of State and ministers, chief executive officers (CEOs) of global TNCs, market regulators, stock exchange executives, investment promotion agencies, IIA negotiators, investment lawyers, private and institutional investors, corporate executives, sovereign wealth fund managers, private equity fund managers, social entrepreneurs, mayors from mega cities and prominent parliamentarians, academics in the area of international business, economics and law, and international media. The WIF is inclusive: half of the participants were from developing countries, and 41 per cent of the participants were women.

The 2014 Forum played an important role in the process of formulating the post-2015 Development Agenda, and in particular implementation and financing issues.

- The Forum's principle outcome, formulated in the Chairs' Summary of the Ministerial Round Table, constituting an input into the FfD Conference and the goal-setting Conference on the SDGs in New York, September 2015.
- The Forum's IIA Conference, convened high-level representatives from governments, the private sector and civil society called upon UNCTAD to develop a roadmap for IIA Reform, subsequently launched in the 2015 WIR.

The 2016 WIF is scheduled to take place in conjunction with the UNCTAD 14 Conference, 19-22 July 2016 in Nairobi, Kenya.

*Source:* UNCTAD.

- **UNCTAD's Technical Assistance on IIAs.** This work-stream includes advisory services ranging from intensive face-to-face national or regional training courses on IIAs, organized or co-organized by UNCTAD to demand-driven advisory services that include comments on countries' or regions' model BITs and IIAs, analyses of various aspects of countries' overall IIA or ISDS universe, as well as national laws. Beneficiaries include relevant ministries, agencies and parliamentary bodies.

Global IIA reform is a formidable challenge. Significant progress has been made, but much remains to be done. Comprehensive reform requires a two-pronged approach: modernizing existing treaties and treaty models and formulating new ones, both in line with today's sustainable development imperative. Only a common approach at all levels (bilateral, regional, multilateral, as well as national) will deliver an IIA regime in which stability, clarity and predictability help achieve the objectives of all stakeholders: effectively harnessing international investment relations for the pursuit of sustainable development. UNCTAD stands ready to provide the investment and development community with the necessary backstopping in this regard.

\* \* \*

The IIA Conference at the 2016 WIF, scheduled for July in Kenya, is the next occasion for the investment and development community to bring a new level of consensus to world-wide IIA reform.

\* \* \*

## Notes

- <sup>1</sup> Approved by the Council of Ministers of CAMEX, Brazil's Chamber of Foreign Trade.
- <sup>2</sup> Countries wishing to terminate their IIAs need to have a clear understanding of the relevant treaty provisions (especially the survival clause) and the broader implications of such actions. Among others, since 2012, South Africa has terminated nine IIAs, Indonesia nine, and Bolivia has terminated six agreements. Earlier examples include Ecuador's unilateral terminations of at least nine IIAs in 2008.
- <sup>3</sup> UNCTAD (2015), "Treaty-based ISDS cases brought under Dutch IIAs: An Overview", An overview study by UNCTAD/DIAE, commissioned by the Directorate General Foreign Economic Relations, Ministry of Foreign Affairs, the Netherlands, <http://investmentpolicyhub.unctad.org/Publications/Details/135>; "The Impact of Investor-State-Dispute Settlement (ISDS) in the Transatlantic Trade and Investment Partnership", Study prepared for: Minister for Foreign Trade and Development Cooperation, Ministry of Foreign Affairs, The Netherlands by Prof. Dr. Christian Tietje, University Halle, Germany, and Associate Prof. Dr. Freya Baetens, Leiden University (2014); Arjan Lejour, and Maria Salfi, "The Regional Impact of Bilateral Investment Treaties on Foreign Direct Investment", CPB Netherlands Bureau for Economic Policy Analysis.
- <sup>4</sup> The reviewed sample consists of 862 BITs grouped into "recent" BITs (signed 2012-2014) and "earlier" BITs (signed until 2011). UNCTAD (2015), "Policy Options for IIA Reform: Treaty Examples and Data" (Supplementary material to World Investment Report 2015), Working draft last updated 24 June 2015. <http://investmentpolicyhub.unctad.org/Upload/Documents/Policy-options-for-IIA-reform-WIR-2015.pdf>.
- <sup>5</sup> European Commission, Investment in TTIP and beyond- the path for reform, Concept Paper (12 May 2015) available at [http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc\\_153408.PDF](http://trade.ec.europa.eu/doclib/docs/2015/may/tradoc_153408.PDF), European Commission, Official proposal for Investment Protection and Resolution of Investment Disputes under the Transatlantic Trade and Investment Partnership (TTIP) (12 November 2015) available at [http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc\\_153955.pdf](http://trade.ec.europa.eu/doclib/docs/2015/november/tradoc_153955.pdf), <http://trade.ec.europa.eu/doclib/press/index.cfm?id=1396>, [http://europa.eu/rapid/press-release\\_MEMO-15-6060\\_en.htm](http://europa.eu/rapid/press-release_MEMO-15-6060_en.htm).
- <sup>6</sup> In the absence of reservations by the signatories, the Convention will apply to disputes where (i) both the respondent State and the home State of the claimant investor are parties to the Convention; and (ii) only the respondent State is party to the Convention but the claimant investor agrees to the application of the Rules.

Sustainable-development-friendly aspects of IIA provisions (in order of frequency)	Policy Objectives																								
	Focus on investments conducive to development	Preserve the right to regulate in the public interest	Avoid overexposure to ISDS claims	Stimulate responsible business practices	Australia–New Zealand Investment Protocol	Azerbaijan–Czech Republic BIT	Bosnia and Herzegovina–San Marino BIT	Central America–Mexico FTA	China–Japan–Republic of Korea TIA	Colombia–Japan BIT	Costa Rica–Peru FTA	Czech Republic–Sri Lanka BIT	Guatemala–Peru FTA	India–Japan EPA	India–Lithuania BIT	India–Malaysia FTA	India–Nepal BIT	India–Slovenia BIT	Japan–Papua New Guinea BIT	Paraguay–Peru FTA	Republic of Korea–Peru FTA	Mexico–Peru FTA	Nigeria–Turkey BIT	United Republic of Tanzania–Turkey BIT	
Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Omission of the so-called “umbrella” clause			X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Clarification of what does and does not constitute an indirect expropriation	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Fair and equitable treatment standard equated to the minimum standard of treatment of aliens under customary international law	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Explicit recognition that parties should not relax health, safety or environmental standards to attract investment	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
A carve-out for prudential measures in the financial services sector	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Exclusion of sovereign debt obligations from the range of assets protected by the treaty			X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Exclusion of portfolio investment (shares representing less than 10 per cent of a company's capital) from the range of assets protected by the treaty	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
No provision for investor–State arbitration	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X

Source: UNCTAD, *World Investment Report 2012*.

Note: Based on treaties signed in 2011 for which the full text is available.

Annex table 2.

## Selected aspects of IIAs signed in 2012

	Policy Objectives																							
	Sustainable development enhancing features	Focus on investments conducive to development	Preserve the right to regulate in the public interest	Avoid over-exposure to litigation	Stimulate responsible business practices	Pakistan–Turkey BIT	Nicaragua–Russian Federation BIT	Morocco–Viet Nam BIT	Japan–Kuwait BIT	Iraq–Japan BIT	Gabon–Turkey BIT	The FVR of Macedonia–Kazakhstan BIT	EU–Columbia–Peru FTA	EU–Central America Association Agreement	EU–Iraq Partnership and Cooperation Agreement	Chile–Hong Kong, China FTA	China–Republic of Korea–Japan TIA	Canada–China BIT	Cameroon–Turkey BIT	Bangladesh–Turkey BIT	Australia–Malaysia FTA	Albania–Azerbaijan BIT		
<b>Select aspects of IIAs commonly found in IIAs, in order of appearance</b>																								
References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble	X	X	X	X	X	X		X	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X
Refined definition of investment (exclusion of portfolio investment, sovereign debt obligations, or claims to money arising solely from commercial contracts)		X	X	X	X	X	X				X		X	X				X			X			X
A carve-out for prudential measures in the financial services sector			X	X				X	X			X	X		X	X	X							
Fair and equitable standard equated to the minimum standard of treatment of aliens under customary international law			X	X		X	X			X								X	X	X	X	X	X	X
Clarification of what does and does not constitute an indirect expropriation			X	X		X				X							X	X	X	X	X	X	X	X
Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws			X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Omission of the so-called “umbrella” clause			X			X	X	X		X	X	X	X	X	X			X	X	X	X	X	X	X
General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources	X	X	X			X		X	X	X		X	X	X	X	X		X	X	X	X	X	X	X
Explicit recognition that parties should not relax health, safety or environmental standards to attract investment	X	X			X			X	X			X	X		X	X	X				X			
Promotion of Corporate Social Responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble	X											X					X							
Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, granting consent to arbitration on a case-by-case basis, limiting the time period to submit claims, no ISDS mechanism)			X	X		X		X	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X

Source: UNCTAD, *World Investment Report 2013*.

Note: This table is based on those 17 IIAs concluded in 2012, for which a text was available. The table does not include three “framework agreements” (GCC–Peru, GCC–United States and EU–Viet Nam), for which texts are available but which do not include substantive investment provisions.



Annex table 3.

## Selected aspects of IIAs signed in 2013

	Policy Objectives																								
	Sustainable-development-enhancing features	Focus on investments conducive to development	Preserve the right to regulate in the public interest	Avoid overexposure to litigation	Stimulate responsible business practices	Serbia-United Arab Emirates BIT	Russian Federation-Uzbekistan BIT	New Zealand-Taiwan Province of China FTA	Morocco-Serbia BIT	Japan-Saudi Arabia BIT	Japan-Myanmar BIT	Japan-Mozambique BIT	EFTA-Costa Rica-Panama FTA	Colombia-Singapore BIT	Colombia-Republic of Korea FTA	Colombia-Panama FTA	Colombia-Israel FTA	Colombia-Costa Rica FTA	Canada-United Republic of Tanzania BIT	Canada-Honduras FTA	Benin-Canada BIT	Belarus-Lao People's Democratic Republic BIT	Austria-Nigeria BIT		
Select aspects of IIAs commonly found in IIAs, in order of appearance																									
References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Refined definition of investment (exclusion of portfolio investment, sovereign debt obligations or claims of money arising solely from commercial contracts)		X		X	X	X	X	X						X	X	X	X	X	X	X	X	X	X	X	
A carve-out for prudential measures in the financial services sector			X	X			X		X	X	X	X	X	X		X	X		X	X	X	X			
Fair and equitable standard equated to the minimum standard of treatment of aliens under customary international law			X	X			X							X	X	X		X	X	X	X	X	X		
Clarification of what does and does not constitute an indirect expropriation			X	X			X							X	X	X	X	X	X	X	X	X	X	X	X
Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws			X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Omission of the so-called "umbrella" clause			X			X	X	X	X	X			X	X	X	X	X	X	X	X	X	X	X	X	
General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources	X		X	X			X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	
Explicit recognition that parties should not relax health, safety or environmental standards to attract investment	X	X		X			X		X	X	X	X			X	X	X	X	X	X	X	X	X	X	
Promotion of corporate and social responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble	X												X			X		X		X	X				
Limiting access to ISDS (e.g., limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, no ISDS mechanism)			X	X			X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	

Source: UNCTAD, *World Investment Report 2014*.

Note: This table is based on IIAs concluded in 2013 for which the text was available. It does not include "framework agreements", which do not include substantive investment provisions.

Annex table 4.

## Selected aspects of IIAs signed in 2014

Selected aspects of IIAs	Policy Objectives																							
	Sustainable development enhancing features	Focus on investments conducive to development	Preserve the right to regulate in the public interest	Avoid overexposure to litigation	Stimulate responsible business practices	Mexico–Panama FTA	Israel–Myanmar BIT	Treaty on Eurasian Economic Union	Japan–Kazakhstan BIT	Egypt–Mauritius BIT	Colombia–Turkey BIT	Colombia–France BIT	Canada–Serbia BIT	Canada–Senegal BIT	Canada–Nigeria BIT	Canada–Mali BIT	Canada–Republic of Korea FTA	Canada–Cote d'Ivoire BIT	Canada–Cameroon BIT	Australia–Republic of Korea FTA	Australia–Japan EPA	ASEAN–India Investment Agreement	Additional Protocol to the Framework Agreement of the Pacific Alliance	
References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble	X	X	X		X			X	X	X		X	X	X	X	X	X	X	X	X				X
Refined definition of investment (reference to characteristics of investment; exclusion of portfolio investment, sovereign debt obligations or claims of money arising solely from commercial contracts)		X		X		X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
A carve-out for prudential measures in the financial services sector			X	X		X		X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Fair and equitable treatment equated to the minimum standard of treatment of aliens under customary international law			X	X		X			X	X			X	X	X	X	X	X	X	X	X	X	X	X
Clarification of what does and does not constitute an indirect expropriation			X	X		X				X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws			X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Omission of the so-called "umbrella" clause				X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources	X		X	X		X			X	X			X	X	X	X	X	X	X	X	X	X	X	X
Explicit recognition that parties should not relax health, safety or environmental standards to attract investment	X	X			X	X		X	X		X	X	X	X	X	X	X	X	X	X				X
Promotion of Corporate and Social Responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble	X										X	X	X	X	X	X	X	X	X					X
Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, no ISDS mechanism)			X	X		X			X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X

Source: UNCTAD, *World Investment Report 2015*.

Note: Based on IIAs concluded in 2014 for which the text was available; does not include "framework agreements", which do not include substantive investment provisions.

Annex table 5.

## Selected aspects of IIAs signed in 2015

Selected aspects of IIAs	Policy Objectives				IIAs																	
	Sustainable development enhancing features	Focus on investments conducive to development	Preserve the right to regulate in the public interest	Avoid overexposure to litigation	Stimulate responsible business practices	Republic of Korea–Viet Nam FTA	Japan–Uruguay BIT	Japan–Ukraine BIT	Japan–Oman BIT	Japan–Mongolia EPA	Eurasian Economic Union–Viet Nam FTA	China–Republic of Korea FTA	Cambodia–Russian Federation BIT	Burkina Faso–Canada BIT	Brazil–Mozambique CFA	Brazil–Mexico CFA	Brazil–Malawi CFA	Brazil–Colombia CFA	Brazil–Chile CFA	Australia–China FTA	Angola–Brazil CFA	
References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble	X	X	X	X		X	X	X	X	X	X		X	X	X	X	X	X	X	X		X
Refined definition of investment (reference to characteristics of investment; exclusion of portfolio investment, sovereign debt obligations or claims of money arising solely from commercial contracts)		X		X		X	X	X	X	X	X		X	X	X	X	X	X	X	X		X
A carve-out for prudential measures in the financial services sector			X	X			X	X	X				X		X		X	X				
Fair and equitable treatment equated to the minimum standard of treatment of aliens under customary international law			X	X		X	X			X	X		X									
Clarification of what does and does not constitute an indirect expropriation			X	X		X			X	X	X		X									
Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws			X	X		X	X	X	X	X	X		X	X	X	X	X	X	X	X		X
Omission of the so-called “umbrella” clause				X		X				X	X	X	X	X	X	X	X	X	X	X		X
General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources	X		X	X		X	X		X	X			X					X	X	X		X
Explicit recognition that parties should not relax health, safety or environmental standards to attract investment	X	X			X	X	X	X	X	X	X		X				X	X				X
Promotion of Corporate and Social Responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble	X													X	X	X	X	X	X			X
Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, no ISDS mechanism)			X	X		X	X	X	X	X	X		X	X	X	X	X	X	X	X		X

Source: UNCTAD, *World Investment Report 2016* (forthcoming).

Note: Based on IIAs concluded in 2015 for which the text was available; does not include “framework agreements”, which do not include substantive investment provisions.

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