

## CHAPTER III

# RECENT POLICY DEVELOPMENTS AND KEY ISSUES



# A. INVESTMENT POLICY RESPONSES TO THE PANDEMIC

Investment policies make an important contribution to tackling the devastating economic and social effects of the COVID-19 pandemic. Numerous countries around the globe have undertaken measures in support of investment or to protect critical domestic industries in the crisis. At the international level, the pandemic will slow the pace of investment treaty-making. At the same time, policy responses taken by governments to address the pandemic and its economic fallout could create friction with existing IIA obligations. Looking ahead, the pandemic is likely to have lasting effects on investment policymaking.

The global spread of COVID-19 is strongly affecting foreign investment. UNCTAD predicts a drastic drop in global foreign direct investment (FDI) flows – by up to 40 per cent – during 2020-2021 (chapter I). A Special Issue of UNCTAD’s *Investment Policy Monitor* documents and analyses how investment policies have responded to the crisis.<sup>1</sup> This section summarizes its main content.

## 1. Investment policies counter the crisis in numerous ways

Fiscal and financial support for companies and employees are at the core of economic policies implemented in response to the crisis. National and international investment policies can play an important complementary role in various ways, although not all of them can be of immediate effect (table III.1).

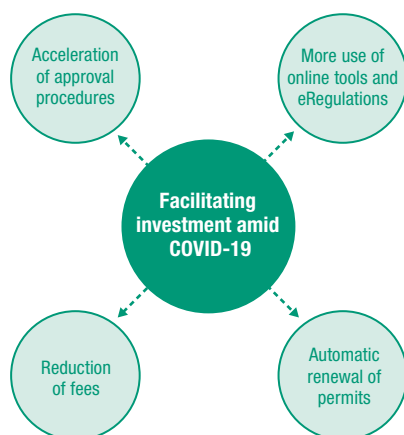
### a. Investment policies at the national level

#### (i) Facilitating investment

Several countries (e.g. China, Myanmar, Serbia, Thailand) have taken steps to alleviate the administrative burden for firms and to reduce bureaucratic obstacles with the aim of speeding up production processes and delivery of goods during the pandemic. Measures include, for instance, the acceleration of approvals for investments in labour-intensive and infrastructure projects, faster approvals for health care and medical equipment businesses, and the reduction of investment application fees. Other examples are the prolongation of the validity of identity documentation as well as residence and work permits for legally present foreigners until the end of the pandemic, so that there is no need for their renewal (figure III.1).<sup>2</sup>

Furthermore, the pandemic and the resulting closure or disruption of regular governmental services have

Figure III.1. Main investment facilitation responses to the pandemic



Source: UNCTAD.

**Table III.1. Investment policy instruments for responding to the pandemic**

Investment policy area	Policy measures (examples)
<b>Policy actions at the national level</b>	
Investment facilitation	<ul style="list-style-type: none"> <li>Alleviation of administrative burdens and bureaucratic obstacles for firms</li> <li>Use of online tools and e-platforms</li> </ul>
Investment retention and aftercare by investment promotion agencies (IPAs)	<ul style="list-style-type: none"> <li>COVID-19-related information services</li> <li>Administrative and operational support during the crisis</li> <li>Move to online services</li> </ul>
Investment incentives	<ul style="list-style-type: none"> <li>Financial or fiscal incentives to produce COVID-19-related medical equipment</li> <li>Incentives for conversion of production lines</li> <li>Incentives for enhancement of contracted economic activities</li> </ul>
State participation in crisis-affected industries	<ul style="list-style-type: none"> <li>Acquisition of equity in companies, including nationalization</li> </ul>
Local small and medium enterprises (SMEs) and supply chains	<ul style="list-style-type: none"> <li>Financial or fiscal support for domestic suppliers (such as SMEs)</li> </ul>
National security and public health	<ul style="list-style-type: none"> <li>Application and potential reinforcement of FDI screening in pandemic-relevant industries</li> </ul>
Other State intervention in the health industry	<ul style="list-style-type: none"> <li>Mandatory production</li> <li>Export bans</li> <li>Import facilitation</li> </ul>
Intellectual property (IP)	<ul style="list-style-type: none"> <li>General authorization of non-voluntary licensing, to speed up research and development (R&amp;D)</li> <li>IP holder-specific non-voluntary licensing, to enable imports of medication</li> </ul>
<b>Policy actions at the international level</b>	
International support measures for investment	<ul style="list-style-type: none"> <li>International pledges in support of cross-border investment</li> </ul>
IAs	<ul style="list-style-type: none"> <li>Reform of IAs in support of public health policies and to minimize investor–State dispute risks</li> </ul>

Source: UNCTAD.

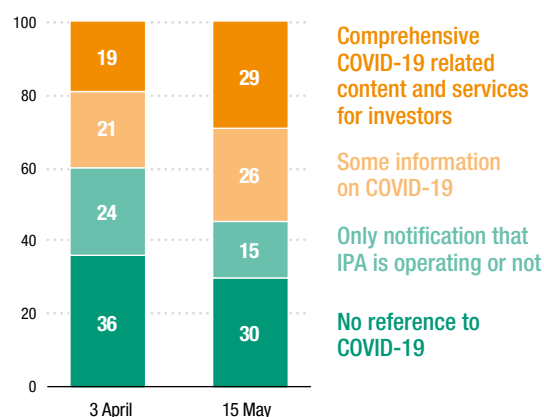
accelerated the use of online tools and e-platforms that enable the continuity of essential services. These solutions are implemented with assistance from international organizations, including UNCTAD through its eRegistrations tool.<sup>3</sup> Several countries (e.g. Guatemala, Lesotho, Mali) have recently used UNCTAD’s assistance in this matter.

### (ii) Retaining investment and intensifying aftercare by IPAs

The COVID-19 pandemic has created manifold economic, logistical and operational difficulties for foreign companies. Investment facilitation and aftercare measures, including those aimed at investment retention, are an important and immediately effective means to help foreign investors through the crisis.

The response of national investment promotion agencies (IPAs) to the crisis has been mixed. The majority (64 per cent on 3 April 2020) responded rapidly and moved their investor services online, with 19 per cent expanding their online facilitator role. Over one month later, on 15 May, seven out of 10 offered online information and services related to COVID-19. Moreover, an increasing number of agencies (29 per cent) were providing comprehensive COVID-19-related content and services, not only on their websites but also through social media (figure III.2).

**Figure III.2. Online reaction by IPAs to the pandemic: type of information added to websites, as of 3 April and 15 May 2020 (Per cent)**



Source: UNCTAD.  
Note: Data cover 174 IPAs on 3 April and 178 IPAs on 15 May.

There are, however, big regional differences: in early April 2020, four of 10 European IPAs already offered comprehensive pandemic-related content and services online, while in mid-May in the developing world most IPA websites still did not refer to the pandemic or only notified clients of office closures during government lockdowns. In Africa in particular, many IPAs have been struggling. Nearly half (48 per cent on 15 May 2020, compared with 30 per cent globally) had posted online no information related to the pandemic, which is problematic when many investors are desperately looking for information on quarantine measures, conditions and procedures of government business support, supply of essential goods and services, and customs issues.

In the *IPA Observer* of April 2020, UNCTAD compiled current efforts and best practices of IPAs worldwide to respond to the emergency (for selected examples, see box III.1).<sup>4</sup> Additional information can be found in UNCTAD's *Investment Policy Monitor* issued in April 2020.<sup>5</sup>

### **(iii) Incentivizing investment to enhance production in the health sector**

In order to address the adverse impact of the pandemic, several economies have recently adopted policy measures to boost investment in those industries that are crucial to containing the spread of the virus. They provide various incentives to increase research and development (R&D) efforts and expenditures in such fields as medical and pharmaceutical research for developing vaccines and treatments (e.g. Czechia, the Republic of Korea, the European Union (EU)).

Other incentive schemes concern measures to encourage manufacturers to expand or shift production lines to medical equipment and personal protective equipment (PPE) in order to increase the quantity available (e.g. India, State of Tamil Nadu; Italy; the United States).

A third group of incentives aims to enhance contracted economic activities. They include, for example, subsidy programmes for training and capacity-building and reductions in the price of natural gas or electricity for industrial use (e.g. Canada, Province of Quebec; China; Egypt).

Finally, major supply chain disruptions have caused some countries (e.g. Japan) to encourage their companies to divest from host countries that are heavily affected by the pandemic.

### **(iv) Acquiring shares in crisis-affected companies**

Several governments have voiced their readiness to intervene more actively in the market to keep strategic businesses afloat. This includes the options of capitalization, equity investment and even full or partial nationalization. These measures focus particularly on national airlines (box III.2).

### **(v) Supporting local SMEs in supply chains**

In many economies, SMEs are struggling for economic survival and risk losing their backward linkages with foreign investors as the latter hold off on buying parts, components, materials and services from local suppliers or as international value chains are disrupted for other reasons. Other negative effects on SMEs include the potential loss of technology and skill transfers.<sup>6</sup> These effects may create particular challenges in developing countries and affect various industries, such as textiles or mining.

Financial and fiscal aid for SMEs is a core part of most State aid packages related to the pandemic. Packages include, in general, guaranteed recovery of delayed payments, indirect financing to suppliers through their buyers, tax credits and other fiscal benefits to firms, co-financing of development programmes and direct provision of financing

IPAs and government ministries in charge of investment around the globe have taken rapid actions to adapt their services to investor needs during the pandemic:

**Brazil:** *APEX-Brasil* is Brazil's trade and investment promotion agency. It has developed a comprehensive platform with tools to support exporters and investors during the COVID-19 crisis. For example, it developed an online market intelligence tool that provides economic and trade updates by sector and has organized a webinar to familiarize users with it. Other useful tools include a model action plan for businesses in crisis management, a support guide for suppliers and checklists for exporters. Recently, APEX-Brasil launched an exclusive area on the platform with pandemic-related information for foreign investors in English. It includes an online survey on how the agency and the federal Government can assist foreign investors in investment facilitation and mitigation of pandemic impacts.

Source: <https://portal.apexbrasil.com.br>.

**Germany:** *Germany Trade and Invest* has developed a special pandemic website to assure the investment community that the IPA continues to work on their behalf. The website provides regular updates on matters including financial support for businesses, supply chains and economic developments. It also closely follows German industry-specific developments, highlighting information on sectors where the pandemic has generated increased demand such as digital solutions in education, logistics and health. A series of webinars has been held on topics including the latest pandemic-related regulatory changes and the novel fast track programme for medical apps as the demand for digital solutions in the health care system continues to grow. Recently, a webinar by the IPA's CEO and the Association of German Chambers of Commerce and Industry discussed how companies have managed the crisis and what possible exit scenarios look like.

Source: <https://www.gtai.de/gtai-en/invest>.

**India:** The Business Immunity Platform, developed by *Invest India*, is a comprehensive portal devoted to pandemic-related news and tools targeted at the investment community. The platform keeps track of pandemic-related developments, provides the latest information on various central and state government initiatives, has dedicated communication lines for pandemic-related investor queries, monitors the number and nature of queries received and provides IPA expert analysis and market reports. The platform also facilitates strategic collaboration to identify and fill shortages in the supplies required to fight the disease. In addition, through this platform as well as through active social media engagement, Invest India has been channelling feedback from the private sector to the relevant government institutions.

Source: [www.investindia.gov.in](http://www.investindia.gov.in).

**Japan:** The *Japan External Trade Organization (JETRO)* is responsible for both outward and inward investment promotion. Throughout the pandemic, it has focused on providing up-to-date information on Japan's policy measures and market environment. In order to understand the needs of investors, the agency established an "Invest in Japan" hotline and conducted an emergency survey to better gauge the impact of the pandemic on foreign-affiliated companies, publishing the results online. JETRO has been active in communicating the needs of its clients to the Government. To prepare the economy for accelerated digitalization, the organization has launched the Digital Transformation Partnership Programme, which fosters open innovation between Japanese and foreign companies.

Source: <https://www.jetro.go.jp>.

**Mauritius:** The website of the *Economic Development Board* of Mauritius provides comprehensive and updated pandemic-related information about measures taken by the Government to support businesses and facilitate investment, including the wage support scheme and contact information for import permits and clearances. The site also offers online application forms for government support to enterprises affected by the pandemic and features the Business Support Plan of the Ministry of Finance, Economic Planning and Development.

Source: <https://www.edbmauritius.org>.

**Saudi Arabia:** The *Ministry of Investment* of the Kingdom of Saudi Arabia has established a COVID-19 Response Centre. Its website also hosts a "Business Continuity" section that aims to support investors during the pandemic. It includes information about initiatives and services introduced by the Government to support businesses as well as a guidebook and a list of investors' frequently asked questions.

Source: [www.misa.gov.sa/en](http://www.misa.gov.sa/en).

**United Arab Emirates:** The online portal "Stimulating the Business Environment to Address COVID-19 Virus Effects", developed by the *Ministry of Economy*, encompasses a wide range of relevant information for the investor community, including the latest pandemic-related developments, best practices for doing business in the crisis, and analysis and reports on the impact of the pandemic on investment. The Ministry is also conducting a survey of the impact on private sector activities of precautionary measures linked to the crisis.

Source: [www.economy.gov.ae](http://www.economy.gov.ae).

to local firms. Another measure is the possibility to adopt reduced or flexible working arrangements. Examples are the aid packages of Australia, Brazil, Malaysia, the Netherlands, Saudi Arabia and South Africa.<sup>7</sup>

### (vi) Protecting national security and public health through foreign investment screening

The pandemic has resulted in intensified screening of foreign investment for national security reasons as countries strengthen their legal frameworks or introduce new regimes. These measures aim at safeguarding domestic capacities relating to health care, pharmaceuticals, medical supplies and equipment. Consequently, countries either expand their screening mechanisms to cover these sectors or broaden the meaning of national security and public interest to include health emergencies. Furthermore, they employ FDI reviews to protect other critical domestic businesses and technologies that may be particularly vulnerable to hostile foreign takeovers. More specifically, foreign investment screening thresholds have been lowered, and the possibility of initiating ex officio screening procedures has been enhanced (box III.3).

### (vii) Intervening in the health industry in other ways

To protect public health and national security during the crisis, some countries have resorted to interventions that specifically target the health industry. These measures include the obligation for private firms to shift production to manufactured goods related to the COVID-19 emergency; the possibility of intervening and temporarily occupying factories, production units and private health care facilities; and the possibility of requisitioning goods related to public health. These types of measures have been adopted, for instance, in Spain, Switzerland and the United States.

Looking beyond investment policies, approximately 50 countries have implemented one or more measures regulating or restricting exports of products or subproducts

## Box III.2. State participation in national airlines, country examples

Besides providing loans and State guarantees to struggling domestic air carriers, several governments have acquired shares in these companies or are considering such steps:

- *Italy* is nationalizing Alitalia and has announced a €3 billion injection of capital for the carrier.
- *Germany* has announced the forthcoming nationalization of Condor Airlines and has reached an agreement with Lufthansa on a €9 billion rescue package. The German State will take a 20 per cent stake in Lufthansa (for €300 million) and provide a €5.7 billion non-voting capital contribution, which the company will pay back in whole or in quarterly installments. Non-voting capital can be partially converted into an extra 5 per cent equity in case of payment failure or to allow the Government to block hostile takeovers. Another €3 billion in credit lines will be facilitated by KfW, the State-owned development bank. In line with competition-related conditions set out by the EU Commission, Lufthansa's supervisory board has agreed to forego several take-off and landing slots in two major German hubs. Final shareholder approval of the agreement is expected by 25 June 2020.
- *Norway* has made available State-backed guarantees up to €900 million for Norwegian Air, under condition of a debt-for-equity swap scheme that has already been accepted by the company.
- *Finland* has announced a €600 million recapitalization package for Finnair, which has been approved by the EU Commission. The Finnish State currently holds 55 per cent of the airline's stock.
- The *United States* approved a \$25 billion aid package for the aviation industry. Under the bailout conditions, the Government could acquire shares in American Airlines (3 per cent), United Airlines (2.3 per cent), JetBlue (1.3 per cent), Delta Airlines (1 per cent) and Southwest Airlines (0.6 per cent).
- *Brazil's* national development bank is negotiating rescue terms with national airlines Azul and Gol and regional carrier Latam, as well as aircraft manufacturer Embraer. The rescue package for Embraer is expected by July and should reach \$600 million. The company has cited China and India as potential new partners for the firm. Aid plans for airlines are under negotiation and could involve shareholding of the bank in the companies.

Source: UNCTAD.

used in the public health response to the pandemic.<sup>8</sup> Such products include medical supplies and other devices, drugs, pharmaceutical ingredients and raw materials for PPE manufacturing.<sup>9</sup> At the same time, several economies (e.g. the EU, the United States) have lifted or reduced import duties on goods needed to combat the effects of the pandemic.

### (viii) Instrumentalizing intellectual property

Given the extraordinary situation and the R&D challenges related to COVID-19, some countries (e.g. Canada, Chile, Ecuador, Germany) have implemented measures to encourage the joint use of technologies protected by intellectual property (IP) rights so as to

#### Box III.3. New FDI screening legislation related to the pandemic, country examples

To protect key domestic industries during the pandemic, several countries have adopted new regulations on FDI screening or reinforced existing laws:

- On 18 March 2020, Royal Decree-Law 8/2020 entered into force in *Spain*. One element of this COVID-19 response policy package is the suspension of the FDI liberalization regime, as the pandemic is seen to threaten both listed and unlisted Spanish companies, including some in strategic sectors. Thus, governmental authorization is now required for a foreign acquisition of 10 per cent or more of stock in certain sectors, including critical infrastructure, critical technologies, media and food security.
- At the regional level, on 25 March 2020, the *European Commission* issued a Guidance to Member States addressing the possibility of non-EU investors attempting to acquire health care capacities or related industries through FDI during the pandemic. The Commission recommended full use of national FDI screening regimes and urged member States that do not have screening regimes to set them up.
- On 29 March 2020, the monetary screening threshold for all foreign investments in *Australia* was temporarily lowered to zero to protect national interests. Consequently, all foreign acquisitions now require prior approval. In addition, the time frame for screening procedures has been extended from 30 days to six months.
- On 8 April 2020, as one of the urgent measures relating to the pandemic, *Italy* expanded the scope of FDI screening by adding finance, credit and insurance to the list of strategic sectors. Furthermore, the screening will temporarily apply to foreign acquisitions from within the EU.
- On 17 April 2020, *India* introduced a requirement for prior governmental approval for all investment originating from countries that share land borders with India as a response to concerns about company vulnerabilities during the pandemic.
- On 18 April 2020, *Canada* announced “enhanced scrutiny” of any FDI in a business that is critical to the pandemic response. This measure was a reaction to “opportunistic investment behaviour” caused by declines in valuations of Canadian businesses as well as by investment of State-owned enterprises that could threaten the country’s economic or national security interests. The new policy will apply until the economy recovers from the pandemic.
- On 27 April 2020, *France* added biotechnology to the list of critical sectors in which foreign acquisitions are subject to prior governmental approval. Furthermore, a temporary regime lowering the voting right threshold in listed companies that triggers FDI screening – from 25 per cent to 10 per cent – is to be introduced upon approval from the Conseil d’État.
- On 20 May 2020, *Germany* amended the Foreign Trade and Payments Ordinance, focusing on critical public health sectors. It envisages that foreign acquisitions of 10 per cent stock in German companies developing, manufacturing or producing vaccines, medicines, protective medical equipment and other medical goods for the treatment of highly infectious diseases would require prior governmental authorization.
- On 26 May 2020, Governmental Decree no. 227/2020 entered into force in *Hungary*. It introduced a temporary foreign investment screening mechanism applicable to investors from both inside and outside the EU and will be effective until 31 December 2020. Prior governmental approval is needed in 21 industries, including health care, pharmaceuticals and medical device manufacturing, as well as non-medical industries. Approval will be denied if an investment violates or threatens public security or order, in particular the security of supply of basic social needs.

In addition, other countries are contemplating changing their FDI screening mechanisms in response to the pandemic and related economic challenges. For instance, *Japan* was reported at the end of April 2020 to be planning to amend its list of sectors considered critical to national security by adding the production of vaccines, medicines and advanced medical equipment, such as ventilators. In *Poland*, a bill aimed at introducing a rigid temporal FDI screening regime is being advanced in the Parliament. It is intended to apply to foreign acquisitions (of 20 per cent or more) in public listed companies, companies controlling strategic infrastructure or developing critical IT software, or companies active in 21 industries, including pharmaceuticals, manufacturing of medical devices, food processing and utilities.

Source: UNCTAD.



speed up effective R&D and to facilitate mass production of needed treatments, diagnostics and vaccines. These measures include facilitating the grant of non-voluntary licenses to make use of existing technologies. At the international level, the World Health Organization (WHO) has begun consultation for the creation of a voluntary IP pool to develop products to fight the disease and its spread.<sup>10</sup>

## **b. Investment policies at the international level**

### **(i) International declarations in support of investment**

At the multilateral level, several groupings issued declarations in support of international investment and value chains. These include the G20, the G7, Asia Pacific Economic Cooperation and the Inter-Governmental Authority on Development.

More recently, on 14 May 2020, the trade and investment ministers of the G20 and guest countries issued a statement endorsing the “G20 Actions to Support World Trade and Investment in Response to COVID-19”, a list of short-term and long-term collective actions to support the multilateral trading system, build resilience in global supply chains and strengthen international investment (e.g. through sharing best practices on promoting investments, identifying critical medical supplies where investment is needed, encouraging technical assistance and capacity building to developing countries and least developed countries) (box III.4). The statement welcomed the work carried out by UNCTAD and other international organizations in providing in-depth analysis of the impact of COVID-19 on world trade, investment and global supply chains.

In general, these statements aim at minimizing the economic and social damage from the pandemic, restoring global growth, maintaining market stability and strengthening resilience. To this end, announcements have been made of the mobilization of the full range of instruments, including monetary and fiscal measures as well as targeted actions, to support immediately and as much as necessary the workers, companies and industries most affected. The continuity of supply chains has been highlighted as another important challenge.<sup>11</sup>

### **(ii) International investment agreements**

The pandemic will slow down the pace of treaty-making. To date, a number of negotiating rounds for bilateral investment treaties (BITs) and treaties with investment provisions (TIPs) have been cancelled or postponed due to the pandemic.<sup>12</sup> This is in addition to the postponement of a number of high-level bilateral summits that typically address trade and investment agreements.<sup>13</sup> It is likely that 2020 will register the lowest number of IIAs concluded since 1985. Key international meetings dedicated to reform aspects, such as those organized in the Organization for Economic Cooperation and Development, the United Nations Commission on International Trade Law and UNCTAD, are being postponed or are under consideration for postponement.

The pandemic and its mitigation measures are also likely to result in a reassessment by countries of the role of IIAs in national development. Indeed, IIAs can come into play in relation to the policy responses undertaken by governments to address the economic fallout of the pandemic as these measures also affect the operations of foreign investors. Although these measures are implemented for the protection of the public interest and to 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 and/or investor–State contracts.



On 14 May 2020, the G20 trade and investment ministers endorsed, in the Ministerial Statement, the following investment-related actions in response to the pandemic:

- “Recalling the voluntary G20 Guiding Principles for Global Investment Policymaking, share information on actions taken to strengthen international investment for sustainable development
- “Share best practices on promoting investments in sectors related to or impacted by the COVID-19 pandemic
- “Work together to identify key areas, such as critical medical supplies and equipment and sustainable agriculture production, where investment is needed
- “Encourage investment in new capacity for producing medical supplies, medical equipment, and personal protective equipment
- “Encourage government agencies to work with companies and investors in identifying investment opportunities and activities
- “Encourage consultations with the private sector on their needs as necessary, as part of policy making on FDI
- “Encourage cooperation on technical assistance and capacity building provided to developing and least developed countries on investment promotion
- “Call for international organizations to prepare in-depth reports, within their mandates, on the disruption of global value chains caused by the pandemic on [micro and SMEs]
- “Encourage enhancement of communication channels and networks for [micro and SMEs], including through deepened collaboration with the private sector
- “Work together to deliver a free, fair, inclusive, non-discriminatory, transparent, predictable and stable trade and investment environment and to keep [...] markets open”

Source: G20 Trade and Investment Ministerial Meeting, Ministerial Statement, 14 May 2020.

This highlights the need to safeguard sufficient regulatory space in IIAs to protect public health and to minimize the risk of investor–State dispute settlement (ISDS) proceedings, while protecting and promoting international investment for development.

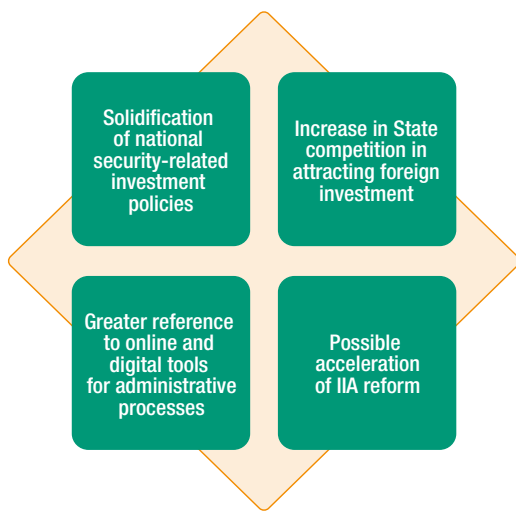
On 6 May 2020, the Columbia Center on Sustainable Investment published a call signed by a number of leaders on human rights and sustainable development for an immediate and complete moratorium on all investor–State arbitration claims by foreign investors against governments using IIAs until the end of the pandemic, as well as a permanent restriction on all arbitration claims related to government measures targeting health, economic and social dimensions of the pandemic and its effects.<sup>14</sup> The signatories also called on governments to agree on principles to ensure that future arbitration cases do not hinder countries’ good faith recovery efforts and that any damages awarded in ISDS cases respect the dire financial situation facing governments following the pandemic.

In its *Special Investment Policy Monitor* dedicated to the COVID-19 pandemic (UNCTAD, 2020d), UNCTAD has highlighted the most relevant IIA provisions in the context of the pandemic and made recommendations to shield State measures from a finding of a treaty violation in line with UNCTAD’s Investment Policy Framework for Sustainable Development (2015) and UNCTAD’s Reform Package for the International Investment Regime (2018). Countries can use UNCTAD’s policy tools for Phase 2 of IIA Reform to modernize their old-generation treaties and implement selected reform options.

## 2. Likely lasting impact of the pandemic on investment policymaking

Looking ahead, the pandemic is likely to have lasting effects on investment policymaking (figure III.3). It may reinforce and solidify the ongoing trend towards more restrictive admission policies for foreign investment in industries considered as being of critical importance for host countries. At the same time, it may result in more competition in attracting investment in other industries, as economies strive to recover from the crisis and re-establish disrupted supply chains. In addition, the crisis may enhance the use of online administrative approval procedures for investors and government staff.

**Figure III.3.** Main investment policy trends in response to the pandemic



Source: UNCTAD.

It is also expected that the post-pandemic period will witness an acceleration of countries' efforts to reform their IIAs to ensure their right to regulate in the public interest, while maintaining effective levels of investment protection. To support these efforts, UNCTAD will launch the IIA Reform Accelerator in the summer of 2020. The Accelerator will provide an actionable policy tool for economies that wish to expedite the reform of their existing and aging network of IIAs to better respond to today's challenges while maintaining investment protection.

The magnitude of the post-pandemic reconstruction task and the priorities in this process will differ from country to country. However, all governments will face the common challenge of how best to make use of investment policies in bringing their economies back onto a sustainable development path. In addition to national efforts, successful international cooperation will be crucial, especially for the recovery of developing countries, including

least developed countries.

# B. NATIONAL INVESTMENT POLICIES

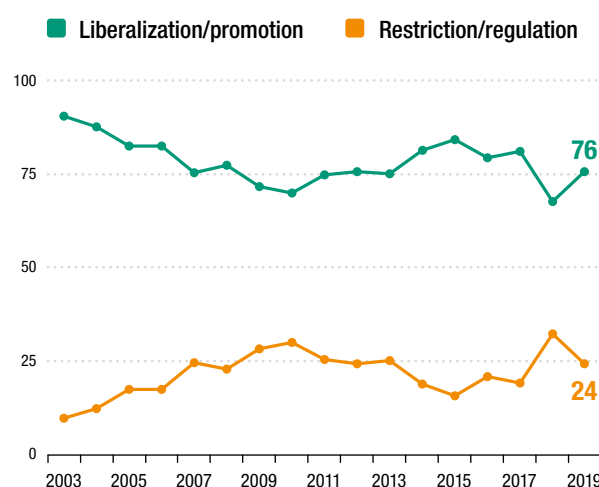
## 1. Overall trends

In 2019, according to UNCTAD's count, 54 economies introduced 107 new policy measures affecting foreign investment. The number of policy measures continued to decrease for the second consecutive year after the peak in 2017. Of the 107 investment policy measures, 66 liberalized, promoted or facilitated investment, while 21 introduced restrictions or regulations. The remaining 20 measures were of a neutral or indeterminate nature (table III.2). Accordingly, the proportion of liberalization and promotion measures increased to 76 per cent, bouncing back from the dip in 2018 (figure III.4). Thus, the percentage of more restrictive or more regulatory policy measures decreased to 24 per cent.

Even though the proportion of restrictions and regulations declined overall, the policy trend of recent years towards more investment rules related to national security continued in 2019. Most of these measures have been adopted in the developed economies. This trend is expected to accelerate in the wake of the COVID-19 pandemic, which has raised concerns in numerous countries that essential domestic industries may fall prey to foreign takeovers.

At the same time, many countries introduced policy measures in 2019 for liberalizing, promoting or facilitating foreign investment. Steps toward liberalization were made in various industries, including mining, energy, finance, transportation, and telecommunication. In addition, many countries made efforts to simplify or streamline administrative procedures, and some others expanded their investment incentive regimes with a view to attract more foreign investment.

Figure III.4. Changes in national investment policies, 2003–2019 (Per cent)



Source: UNCTAD, Investment Policy Hub.

Table III.2. Changes in national investment policies, 2004–2019 (Number of measures)

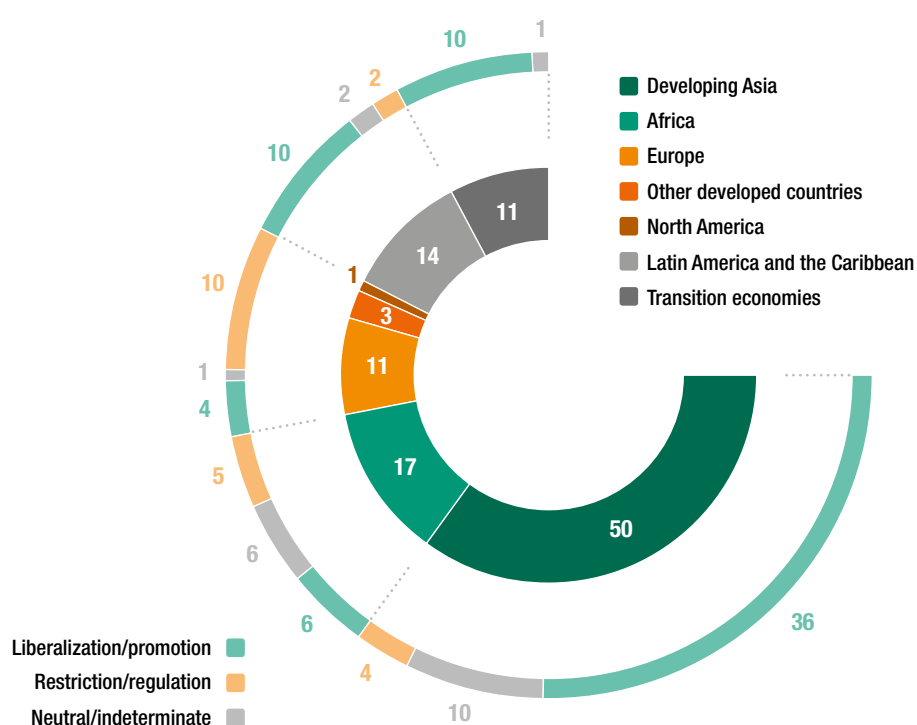
Item	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018	2019
Number of countries that introduced changes	79	77	70	49	40	46	54	51	57	60	41	49	59	65	55	54
<b>Number of regulatory changes</b>	<b>164</b>	<b>144</b>	<b>126</b>	<b>79</b>	<b>68</b>	<b>89</b>	<b>116</b>	<b>86</b>	<b>92</b>	<b>87</b>	<b>74</b>	<b>100</b>	<b>125</b>	<b>144</b>	<b>112</b>	<b>107</b>
Liberalization/promotion	142	118	104	58	51	61	77	62	65	63	52	75	84	98	65	66
Restriction/regulation <sup>a</sup>	20	25	22	19	15	24	33	21	21	21	12	14	22	23	31	21
Neutral/indeterminate	2	1	-	2	2	4	6	3	6	3	10	11	19	23	16	20

Source: UNCTAD, Investment Policy Hub.

<sup>a</sup> "Restriction" means a policy measure that introduces limitations on the establishment of foreign investment; "regulation" means a policy measure that introduces obligations for established investment, be it domestically controlled or foreign-controlled.

In geographical terms, developing countries in Asia continued to take the lead in adopting new investment policy measures and became much more active than in 2018, followed by African countries (figure III.5). The nature of the new measures, however, differed significantly between regions. Fifty-two policy measures adopted in the developing economies were about liberalization, promotion and facilitation of investment, while only 11 related to restrictions or regulations. In contrast, more than half of investment policy measures introduced in developed countries aimed at reinforcing restrictions or regulations.

**Figure III.5. Regional distribution of national investment policy measures in 2019**  
(Number of measures)



Source: UNCTAD.

### a. National security concerns about foreign investment intensified

The policy trend observed in 2018 towards more investment regulations and restrictions related to national security, particularly in respect of foreign investment in strategic industries and critical infrastructure, continued and intensified in 2019 and in the first months of 2020. Numerous countries, almost all of them developed countries, adopted more stringent screening regimes for foreign investment with the main objective of protecting their national security. A significant number of these changes were made in reaction to the COVID-19 pandemic (section A).

For example,

- The Government of Flanders in *Belgium* established a new mechanism to intervene in foreign acquisitions under certain conditions.
- *France* revised its mechanism for managing acquisition- and ownership-related risks to its essential security interests by strengthening regulations related to governmental injunctions and mitigation measures, among others. It also strengthened

the transparency of the mechanism by implementing parliamentary control and obliging the Government to publish an annual report, including aggregate statistics, about the procedure. Furthermore, later in 2019, it reinforced the screening system by lowering the threshold that triggers mandatory investment reviews for non-EU/EEA investors from 33.33 per cent of the share capital or voting rights of a French entity to 25 per cent and broadened the sectoral scope of the screening mechanism, including numerous key activities. This revision applies to authorization requests submitted as of April 2020.

- *Israel* established an advisory committee to assess the national security implications of foreign investment.
- *Italy* amended its FDI screening regime several times. It added 5G technology to the list of technologies strategic for the national defense and security system; any transaction involving a foreign investor is to be notified in advance. Later in the year, it temporarily strengthened its mechanisms to safeguard essential security interests. Among other fortifications, the changes extended the review period for the exercise of the special powers, broadened the scope of information that investors have to disclose and broadened powers to prohibit a transaction. Towards the end of the year, the Cybernetic National Security Perimeter Law entered into force, tightening once again the FDI screening regime. Many of the aforementioned temporary amendments were maintained and a new screening condition was added. As a result, foreign takeovers are to be evaluated against vulnerabilities that could compromise the integrity and security of networks and data. Also, the sanctions scheme was reinforced with significant administrative fines.
- *Japan* expanded the scope of businesses subject to the foreign investment screening mechanism by adding businesses or expanding the scope of already listed businesses. In addition, the Government further tightened existing rules by lowering from 10 per cent to 1 per cent the stake in Japanese firms listed as relevant to national security in 12 industries for which foreign investors are required to seek prior approval from the Government. This law came into effect on 7 May 2020. In addition, on 8 May 2020, the Ministry of Finance released a list of 518 companies in the 12 industries deemed important to national security. The list allocates 3,800 companies into three categories – those requiring prior notification, those not requiring prior notification and those with exemption in some cases.
- *South Africa* introduced a screening mechanism for foreign investments. The new law requires the establishment of a special committee responsible for assessing whether a merger involving a foreign acquiring firm may have an adverse effect on national security.
- In February 2020, *Romania* empowered its National Agency for Mineral Resources to refuse the award of a petroleum concession agreement to any non-EU entity on the grounds of national security.
- Also in February 2020, the *United States* promulgated an implementing regulation concerning foreign acquisitions that are subject to national security-related reviews. The regulation introduced changes to make the review process more effective and efficient and to strengthen the jurisdiction of the Committee on Foreign Investment in the United States. In addition, in April 2020, the President established the Committee for the Assessment of Foreign Participation in the United States Telecommunications Services Sector.

## b. Other new investment regulations cover a broad variety of issues

Several countries, mostly developing countries and emerging economies, introduced other types of investment regulations or restrictions. For example,

- *Argentina* suspended, in January 2020, its existing incentives regime, which aimed at promoting investments that require significant R&D and technological know-how.
- *Egypt* obligated all companies to submit certain information and data to the Government in order to calculate the amount of foreign investment capital.
- *India* introduced several restrictive changes in its FDI policy for e-commerce. The new rules are reported to aim at safeguarding the interests of domestic offline retailers.
- *Nepal* raised the minimum capital requirement for foreign investment to Rs 50 million from Rs 5 million.
- *Nigeria* increased the Government's share of profits from oil activities conducted under production-sharing contracts.
- *Senegal* changed its petroleum code to reinforce the preservation of national interests and local content.

## c. Investment promotion and facilitation remain prominent

Investment facilitation and promotion continued to be a substantial part of newly adopted investment policy measures.

### (i) Newly adopted promotion measures show great variety

Numerous countries have undertaken new measures to promote inward investment. For example,

- *China* enacted a Foreign Investment Law that aims at improving the transparency of FDI policies and investment protection. The country also liberalized and streamlined the foreign exchange control over cross-border investment and trade. In January 2020, *China* also introduced detailed implementing regulations for the newly enacted law. Among others, *China* emphasized that it would provide equal treatment of domestic and foreign enterprises in the implementing regulations. It also published in January 2020 a set of trial measures to promote foreign investment in the Yangtze River Delta area.
- *Indonesia* amended guidelines and procedures for licensing and facilities under its foreign investment regime.
- *Italy* established the Ionian special economic zone.
- *Kazakhstan* liberalized its arbitration framework, allowing the parties to choose a foreign law in a dispute involving the State and bringing enforcement provisions in line with the New York Convention.
- *Myanmar* established a government body for promoting quality investment and now allows foreign companies and joint ventures to purchase shares on the Yangon Stock Exchange.
- *Oman* promulgated a set of laws governing public-private partnership, privatization and foreign capital investment, with the aim of creating a more favourable regulatory environment for investment.
- The *Philippines* relaxed the mandatory local employment requirement for foreign investors.
- *Qatar* created an investment promotion agency to attract foreign investment.

- *Ukraine* abolished the limit on the repatriation of proceeds from foreign investments.
- The *United Arab Emirates* established the Abu Dhabi Investment Office to increase FDI in the emirate.
- *Uzbekistan* set up a legal framework to regulate public-private partnerships, with fiscal benefits provided for selected private partners, and established a presidential advisory body for investment. In January 2020, it also introduced a multi-tiered mechanism for investor–State dispute settlement and in February 2020, it adopted a law on special economic zones.
- *Viet Nam* clarified the definition of foreign-invested enterprises and abolished the mandatory remittance timeline for unused pre-establishment costs.
- *North Macedonia* adopted a new law in January 2020 to create more favourable conditions for strategic investments.
- *India* clarified in February 2020 that single-brand retailers, owned by foreign companies, can fulfill their local sourcing requirements by procuring goods produced in units based in special economic zones.
- The *Russian Federation* introduced in April 2020 agreements on the protection and promotion of investment as a new investment policy instrument. These agreements, to be concluded between public entities and private investors, are to provide stabilization clauses relating to import customs duties, measures of state support and rules regulating land use, as well as ecological and utilization fees and taxes. Eligible investments need to fulfil certain minimum capital requirements, depending on the sector involved.

## **(ii) Fiscal incentives remain an important investment promotion tool**

Several countries introduced new tax benefits for investors:

- *Algeria* introduced a set of fiscal incentives to attract foreign investment in the oil and gas industry.
- *Cameroon* introduced several tax incentives for the rehabilitation of an economic disaster area.
- *Colombia* established a preferential corporate tax regime for investment projects, which will produce large amounts of taxable income and create a multitude of jobs.
- *Ecuador* provided additional tax incentives for foreign investment.
- *Guatemala* established fiscal incentives for companies operating in its new special economic zones, called special public economic development zones. Among the tax benefits provided are an exemption for 10 years from income tax and a temporary suspension of taxes associated with imports.
- *Indonesia* set out tax incentives for businesses investing in specific industries and provinces.
- *Kenya* revised its taxation system to provide exemptions for investment in various industries.
- *Turkey* revised its investment incentive regimes so as to encourage investment in targeted sectors.
- *Uzbekistan* began to provide subsidies for investors constructing hotels if fulfilling certain requirements.
- *Panama* extended its fiscal incentives for the tourism industry until 2025. In January 2020, it further amended its incentive regime for investment in the tourism industry to promote such investment.
- *Poland* introduced financial incentives aimed at boosting the audiovisual industry.



- The *United States* clarified the tax incentive programme in so-called “Opportunity Zones” which are created by the Tax Cuts and Jobs Act.
- *Azerbaijan* expanded tax incentives for industrial and high-tech parks in January 2020.

### **(iii) Administrative procedures were streamlined or simplified**

Numerous countries facilitated administrative procedures for investors. For instance,

- *Brazil* simplified the entry procedures for foreign financial institutions and foreign investors and abolished the different treatment of foreign and domestic investors in the licensing process.
- *Ecuador* introduced regulations to clarify the Productive Development Law and to simplify environmental rules.
- *India* eased the administrative regulations for foreign investors in certain industries by abolishing the requirement for approval from the Reserve Bank of India under certain conditions. The country also eliminated the approval procedure for foreign companies in defense, telecommunication and private security, among other industries, that wish to open branch offices.
- *Oman* streamlined procedures for initiating foreign investment and provided foreign investors with incentives and guarantees. It also established an investment portal designed to enable local companies to attract foreign investors worldwide.
- *Tunisia* simplified the creation of businesses, facilitated access to finance, promoted PPPs and implemented measures to improve corporate governance.
- *Uganda* strengthened the Uganda Investment Authority, establishing it as a one-stop investment centre.
- *Ukraine* simplified and lowered the costs of the registration procedure for representative offices of foreign business entities.
- In January 2020, *Uzbekistan* created a one-stop shop mechanism to facilitate investment.
- In March 2020, *Australia* revised its regulatory guide to introduce a financial services licensing regime for foreign financial services providers to Australian wholesale clients. This revision also adopted licensing relief for providers of financial fund management services, seeking to attract certain types of professional investors.
- In March 2020, *India* amended its FDI policy on civil aviation, permitting non-resident Indian nationals to own up to 100 per cent of the stakes of Air India under the automatic route. Previously, they were permitted to own only up to 49 per cent.

### **(iv) FDI liberalization ongoing**

Twenty-nine policy measures – about 30 per cent of those introduced in 2019 – concern partial or full liberalization of investment in a variety of industries, including mining, oil and gas, airlines, telecommunication, education and defence. As in previous years, developing economies in Asia were the most active in liberalizing FDI.

- *Bahrain* now allows full foreign ownership in companies involved in oil and gas drilling activities.
- *China* amended its “negative list”, relaxing or removing restrictions on foreign investments in several industries and further opening the financial industry to foreign capital. It also allowed Chinese natural persons to establish new foreign-funded enterprises with foreign investors directly.
- *Ethiopia* opened the telecommunication industry to both domestic and foreign investors. In April 2020, it in principle opened up all industries to foreign investment if investors allocate a minimum capital of \$200,000 for a single investment project.

This move is intended to improve the investment environment and enhance the competitiveness of the national economy by promoting investments in productive and enabling sectors.

- *Greece* enabled the national natural gas company to spin off into three entities, two of which are to be completely privatized.
- *India* abolished or adjusted the foreign ownership ceilings in several industries. In March 2020, it also opened up the coal mining industry for non-coal companies, which are now allowed to bid for coal mines.
- *Indonesia* established a mechanism to allow foreign bank branches to become Indonesian banks.
- *Malaysia* lowered the threshold for foreign ownership of real estate.
- The *Philippines* allowed foreign higher education institutions to set up educational facilities and liberalized professional services.
- *Qatar* permitted, in principle, 100 per cent foreign ownership in all economic sectors except some businesses such as banking and insurance.
- *Saudi Arabia* now allows foreign companies to list on the Saudi Stock Exchange and has removed the ownership limits for foreign strategic investors. In March 2020, it also approved the listing on the Saudi Stock Exchange of Government assets planned for privatization after an initial public offering.
- *Thailand* abolished three ministerial regulations on minimum capital for foreign companies.
- The *United Arab Emirates* adopted the “Positive List of Activities”, identifying 13 industries eligible for up to 100 per cent foreign ownership. In March 2020, it officially issued a detailed list of 122 economic activities in those industries.
- The *United Republic of Tanzania* relaxed the foreign ownership limitation in the mining sector.
- In January 2020, *Viet Nam* raised the foreign ownership cap in domestic airlines.

## 2. Merger controls affecting foreign investors

In 2019, several host-country governments raised objections against a number of foreign takeover proposals, in particular when they involved the sale of critical or strategic domestic assets to foreign investors. Among the cross-border merger and acquisition (M&A) attempts with a value over \$50 million, at least 11 deals were withdrawn for regulatory or political reasons and two more were withdrawn while waiting for governmental approval. The gross value of M&As withdrawn for these reasons was roughly \$87.3 billion, equivalent to 47.3 per cent of all such M&As in 2019. This figure is approximately 42 per cent lower than the one reported for 2018 (\$154.5 billion) (*WIR19*). The main businesses in which M&A proposals were withdrawn for regulatory or political reasons were critical industries (e.g. energy, automotive, information technology, logistics, utility services, medical services, financial services and infrastructure business).

Among the 13 withdrawn M&A deals in 2019, three were terminated in industries relevant for national security, two of which were related to attempts by Chinese investors to acquire businesses in key industries such as energy and medical services, in Portugal and Australia. Three more deals affecting a great variety of activities, from groceries and car manufacturing to credit rating services, were discontinued because of the concerns of competition authorities. In addition, five M&As were withdrawn for regulatory reasons, the details of which could not be identified from publicly available sources. Finally, two cases were terminated due to delays in receiving approval from the host-country authorities (table III.3).

Table III.3.

## Foreign takeovers withdrawn for regulatory or political reasons in 2019

(Illustrative list)

### For national security reasons

China Three Gorges (Europe) SA Portugal–EDP Energias de Portugal SA <sup>a</sup>	On 24 April 2019, shareholders of Energias de Portugal rejected a \$10 billion takeover bid by State-owned China Three Gorges because of a regulator requirement that their voting rights be modified. The voting rights reform had been demanded by the Portuguese stock exchange as a condition for its green light to the Chinese offer.
IHS Holding Ltd–Mobile Telecommunications Co Saudi Arabia SJSC <sup>b</sup>	On 25 June 2019, Mobile Telecommunications Co Saudi Arabia announced that it decided not to execute the \$672 million sale of its towers to IHS Holding (Mauritius), after receiving a letter from Saudi Arabia's Communications and Information Technology Commission stating that IHS Holding had not met the regulatory requirements and had not obtained the necessary licence for the lease and purchase of the towers.
Jangho Hong Kong Ltd–Healius Ltd <sup>c</sup>	On 16 August 2019, Healius (Australia) dismissed a \$2 billion takeover bid by Jangho (China) because the bid raised concerns about the security of Australian Defence Force medical records.

### For competition reasons

Alstom SA–Siemens AG <sup>d</sup>	On 6 February 2019, the \$17 billion merger proposal by Alstom (France) to acquire the mobility business of Siemens (Germany) – which aimed at creating a European rail champion – was terminated due to serious competition concerns from the European Commission. According to Commissioner Margrethe Vestager, “without sufficient remedies, this merger would have resulted in higher prices for the signaling systems that keep passengers safe and for the next generations of very high-speed trains”.
Experian Plc–ClearScore Technology Ltd <sup>e</sup>	On 27 February 2019, Experian (the world's largest credit data firm, Ireland) and ClearScore (United Kingdom) withdrew from their \$364 million merger agreement after the British Competition and Markets Authority demonstrated its reluctance to approve the deal.
J Sainsbury PLC–ASDA Group Ltd <sup>f</sup>	On 25 April 2019, J Sainsbury (United Kingdom) withdrew its \$10 billion agreement to acquire the entire share capital of ASDA Group of United Kingdom (subsidiary of Walmart, United States) after the United Kingdom Competition and Markets Authority blocked it nearly a year after the two grocers first agreed to combine, announcing that the merger between the country's second- and third-largest grocers would lead to a substantial lessening of competition in a number of domestic markets and therefore deciding to prohibit the merger in its entirety.

### For other regulatory reasons

Hydro One Ltd–Avista Corp <sup>g</sup>	On 23 January 2019, the State-owned Hydro One (Canada) and Avista (United States) agreed to end their \$5 billion merger agreement after the Washington Utilities and Transportation Commission and the Idaho Public Utilities Commission denied approval. According to the Washington Utilities and Transportation Commission, “the proposed merger agreement did not adequately protect Avista or its customers from political and financial risk or provide a net benefit to customers as required by state law.”
Harman International Industries Inc–Nuheara Ltd <sup>h</sup>	On 8 July 2019, Harman International Industries (United States) withdrew its \$59 million offer for Australian audio device maker Nuheara (Australia) after discovering that the disclosure documents had to be submitted to the Australian Securities Exchange.
Fiat Chrysler Automobiles NV–Regie Nationale Des Usines Renault SA <sup>i</sup>	On 5 June 2019, Fiat Chrysler Automobiles (United Kingdom) withdrew its \$40 billion proposal for a merger with Renault (France) after the French Government – its largest shareholder, with a 15 per cent stake – had requested to postpone the vote to a later council.
Abanca Corporación Bancaria SA–Liberbank SA <sup>j</sup>	On 25 February 2019, Abanca Corporación (Spain; subsidiary of Banesco Banco Universal SACA (Bolivarian Republic of Venezuela)) withdrew its \$1.9 billion acquisition deal for Liberbank (Spain) after the National Stock Market Commission (Comisión Nacional del Mercado de Valores) barred it from analyzing Liberbank's balance sheet without previously establishing a bid, an action required by the national stock market rules.
Investor Group–PNB Housing Finance Ltd <sup>k</sup>	On 17 May 2019, Punjab National Bank (India) terminated a sale worth \$267 million in equity shares of PNB Housing Finance, previously agreed with an investor group composed of General Atlantic Group (United States) and Verde Holdings (United States). The sale would have involved two separate transactions with each buyer. The Punjab National Bank did not conclude the deal as it could not receive proper clearance from India's Central Bank for the transaction involving General Atlantic.

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Table III.3.

**Foreign takeovers withdrawn for regulatory or political reasons in 2019**

(Illustrative list) (Concluded)

**While waiting for host-country approval**

Tuvalu Sp. z o.o.–Serenada and Krokus Shopping Centers <sup>l</sup>	On 4 January 2019, NEPI Rockcastle (Isle of Man) announced the termination of the \$546 million acquisition deal between its subsidiary, Tuvalu (Poland), and Serenada and Krokus Shopping Centers (Poland), because certain regulatory approvals and the waiver of the right of first refusal had not been completed by the December 2018 deadline.
Hebsteel Global Holding Pte Ltd–Tata Steel (Thailand) Pcl <sup>m</sup>	On 6 August 2019, Tata Steel (Thailand) decided not to extend the deadline for a \$327 million share sale agreement with Hebsteel (Singapore) because Tata Steel had not been able to procure the requisite approvals from the Government, which was one of the key conditions precedent for the proposed deal.

Source: UNCTAD.

<sup>a</sup> <https://www.france24.com/en/20190424-energias-de-portugal-shareholders-block-takeover-bid-china-three-gorges>.<sup>b</sup> <https://www.commsupdate.com/articles/2019/06/25/zain-ksa-cancels-tower-sale-agreement-with-ihs/>.<sup>c</sup> <https://www.smh.com.au/business/companies/no-bid-on-table-healius-dismisses-china-takeover-that-raised-concerns-20190816-p52hss.html>.<sup>d</sup> [https://ec.europa.eu/commission/presscorner/detail/en/IP\\_19\\_881](https://ec.europa.eu/commission/presscorner/detail/en/IP_19_881).<sup>e</sup> <https://www.reuters.com/article/us-clearscore-m-a-experian/experian-clearscore-scrap-merger-plans-idUSKCN1QG1CA>;<https://www.proactiveinvestors.co.uk/companies/news/215392/experian-abandons-clearscore-deal-after-cma-objections-215392.html>.<sup>f</sup> <https://www.marketwatch.com/story/sainsbury-asda-cancel-merger-plans-2019-04-25>.<sup>g</sup> <https://www.wsj.com/articles/hydro-one-and-avista-terminate-deal-11548285424>;<https://www.newswire.ca/news-releases/hydro-one-and-avista-mutually-agree-to-terminate-merger-agreement-822704964.html>.<sup>h</sup> <https://hearinghealthmatters.org/hearingnewswatch/2019/samsung-failed-takeover-bid-nuheara-hearables>.<sup>i</sup> <https://www.ft.com/content/ba034774-87e1-11e9-97ea-05ac2431f453>.<sup>j</sup> <https://www.reuters.com/article/liberbank-ma-abanca/spains-abanca-drops-takeover-bid-for-liberbank-idUSL5N20L25Z>.<sup>k</sup> <https://indianexpress.com/article/business/economy/punjab-national-bank-pnb-varde-holdings-general-atlantic-5731937>.<sup>l</sup> [https://www.spglobal.com/marketintelligence/en/news-insights/trending/GtINn2CToc\\_Ywu61h2BdnA2](https://www.spglobal.com/marketintelligence/en/news-insights/trending/GtINn2CToc_Ywu61h2BdnA2);[https://www.sharenet.co.za/v3/sens\\_display.php?tdate=20190104171500&seq=25](https://www.sharenet.co.za/v3/sens_display.php?tdate=20190104171500&seq=25).<sup>m</sup> <https://www.set.or.th/set/newsdetails.do?newsId=15650461926990&language=en&country=US>;<https://www.bangkokpost.com/business/1623734/tata-steel-to-cut-southeast-asia-footprint>.

In the first four months of 2020, at least three M&A deals were terminated because of the concerns of competition authorities (table III.4). The total value of these deals amounted to \$1.6 billion.

Table III.4.

**Foreign takeovers withdrawn for regulatory or political reasons in 2020, January–April**

(Illustrative list)

**For competition reasons**

Aurobindo Pharma USA Inc–Sandoz Inc (United States) (genetic oral solids and dermatology businesses) <sup>a</sup>	On 2 April 2020, Aurobindo (United States; subsidiary of Aurobindo Pharma Ltd (India)) announced its mutual agreement with Sandoz (United States; subsidiary of Novartis AG (Switzerland)) to terminate the \$1 billion plan to buy the United States generic oral solids and dermatology businesses from Sandoz because approval for the transaction from the United States Federal Trade Commission was not obtained within anticipated timelines.
Ethicon Inc–Takeda Pharmaceutical Co Ltd (TachoSil business) <sup>b</sup>	On 10 April 2020, Johnson & Johnson (United States), parent company of Ethicon (United States), announced that Ethicon and Takeda (Japan) mutually decided to terminate the \$400 million transaction of Takeda's TachoSil business after EU antitrust regulators and the United States Federal Trade Commission expressed significant concerns about potential anticompetitive effects.
Prosafe SE–Floatel International Ltd <sup>c</sup>	On 13 February 2020, Prosafe (Cyprus) and Floatel International (Bermuda) declared their mutual agreement to terminate the plan to achieve a \$199 million merger between the two companies after the Competition and Markets Authority of the United Kingdom raised serious concerns about competition.

Source: UNCTAD.

<sup>a</sup> <https://www.pharmalife.com/after-failing-to-gain-ftc-approval-sandoz-and-aurobindo-call-off-1-billion-deal>.<sup>b</sup> <https://www.reuters.com/article/us-tachosil-m-a-johnson-johnson/johnson-johnson-abandons-deal-for-takedas-tachosil-surgical-patch-idUSKCN21S1XG>.<sup>c</sup> <https://www.energylive.com/2020/02/13/prosafe-and-floatel-merger-falls-through>.

# C. INTERNATIONAL INVESTMENT POLICIES

## 1. Trends in IIAs: new treaties and other policy developments

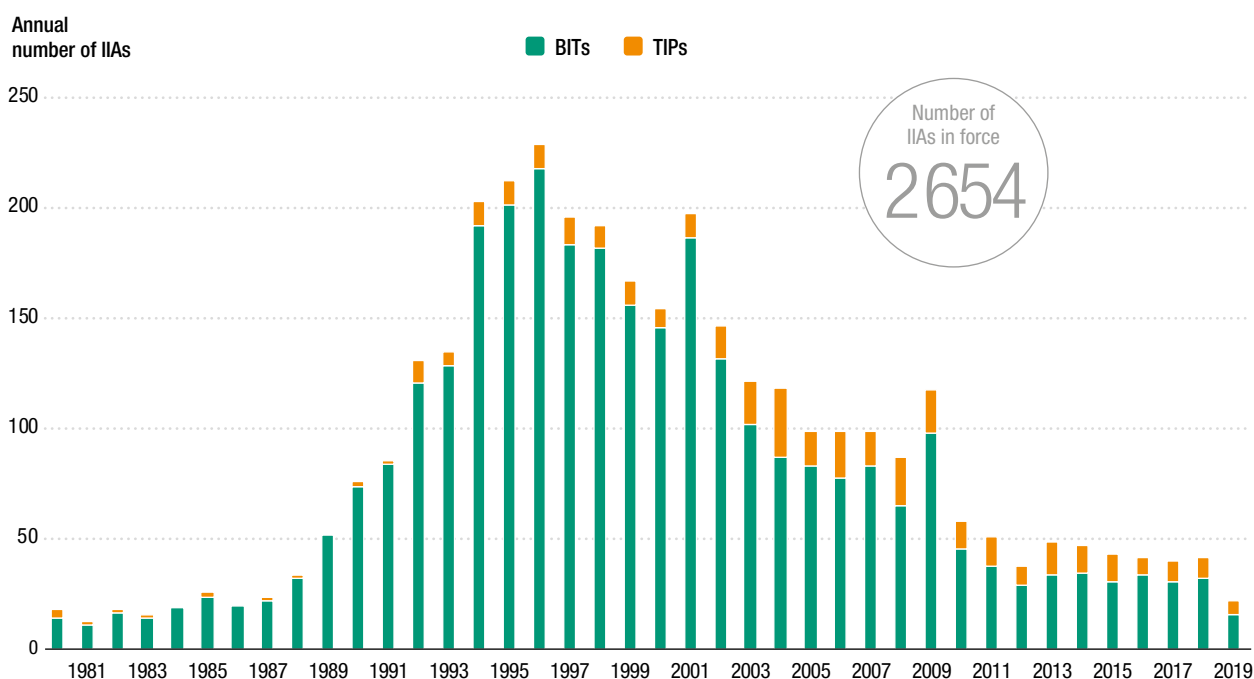
In 2019 and 2020, several significant developments affected the international investment policy landscape. They include notably an agreement by EU member States to terminate intra-EU BITs, as well as Brexit and the entry into force of the agreement establishing the African Continental Free Trade Area (AfCFTA). Although the approaches to these developments differed, some of them reflect aspects of IIA reform.

### a. Developments in the conclusion of IIAs

In 2019, countries concluded 22 IIAs and at least 34 IIA terminations entered into effect. This brought the total number of treaties to 3,284 by year-end. As in 2017, the number of effective treaty terminations exceeded the number of new treaty conclusions.

In 2019, countries concluded at least 22 IIAs: 16 BITs and six TIPs. The most active economies were Australia, Brazil and the United Arab Emirates, each with three new IIAs. This brought the size of the IIA universe to 3,284 (2,895 BITs and 389 TIPs).<sup>15</sup> In addition, at least 12 IIAs entered into force in 2019, bringing the total to at least 2,654 IIAs by the end of the year (figure III.6).

Figure III.6. Number of IIAs signed, 1980–2019



Source: UNCTAD, IIA Navigator.

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

At the same time, the number of IIA terminations continued to increase: In 2019, at least 34 terminations entered into effect (“effective terminations”), of which 22 were unilateral terminations, six were terminated by consent, four were replacements (through the entry into force of a newer treaty) and two expired. Particularly active in terminating treaties was Poland, with 17 BITs terminated; it was followed by India, with seven. For the second time since 2017, the number of IIA terminations in a year exceeded the number of treaty conclusions. By the end of the year, the total number of effective terminations reached 349.

The five TIPs concluded in 2019 for which texts are available can be grouped into two categories.

1. Four agreements with obligations commonly found in BITs, including substantive standards of investment protection and ISDS:

- Armenia–Singapore Agreement on Trade in Services and Investment Agreement
- Australia–Indonesia Comprehensive Economic Partnership Agreement (CEPA)
- Australia–Hong Kong, China Investment Agreement
- EU–Viet Nam Investment Protection Agreement

2. One agreement with limited investment provisions (e.g. national treatment with regard to commercial presence or the right of establishment of companies) or provisions on free movement of capital relating to direct investments:

- Caribbean Forum (CARIFORUM) States–United Kingdom Economic Partnership Agreement (EPA)

## b. Developments at the regional level

*Significant developments have taken place in almost all regions and continue to shape the international investment regime.*

**African Continental Free Trade Area:** On 30 May 2019, the AfCFTA entered into force for the 24 countries that had deposited their instruments of ratification. As of 6 May 2020, 30 countries had ratified it. The operational phase of the agreement was launched during a high-level summit of the African Union in Niamey, Niger, on 7 July 2019. Phase I, which focuses primarily on areas such as trade in goods and services as well as dispute settlement, is in the process of being completed, although negotiations on key elements such as rules of origin and tariff concessions are ongoing. Prior to the COVID-19 pandemic, trading under the AfCFTA was slated to begin on 1 July 2020. Negotiations on the protocols on investment, competition and intellectual property rights, which constitute Phase II of the process, were expected to be completed in December 2020. In terms of content, the protocol on investment is likely to draw on the Pan-African Investment Code, which was finalized in 2015. The resulting draft legal texts are to be submitted to the January 2021 session of the African Union Assembly for adoption. The investment protocol of the AfCFTA is expected to take into account the key development objectives of African countries in order to formulate provisions that will support the promotion and facilitation of sustainable investment.

**Brexit and the transition period:** On 31 January 2020, the United Kingdom’s withdrawal from the EU officially came into effect. The Withdrawal Agreement concluded between the EU and the United Kingdom provides for an 11-month transition period, from 1 February 2020 to 31 December 2020, during which the United Kingdom will continue to apply EU trade policy and will continue to be covered and bound by trade agreements between the EU and third countries. The EU is in the process of notifying third countries of this period. During the transition period, the United Kingdom will be able to negotiate

and sign trade agreements; however, they will be able to enter into force only at the end of the transition period. After the transition period, EU trade agreements will cease to apply to the United Kingdom.

To prepare for the end of the transition period, the United Kingdom has continued to conclude so-called “rollover” or continuity agreements, to replicate the effects of the current agreements and prevent disruption of trade relationships with relevant third countries as a result of Brexit. As of 4 February 2020, the country had concluded 20 continuity agreements that together cover 49 partner economies.<sup>16</sup> In addition, it is engaged in ongoing discussions with 16 countries.<sup>17</sup> The pact with the CARIFORUM States contains a chapter on commercial presence (not confined to the services sector), whereas the agreement with the Eastern and Southern Africa (ESA) States includes provisions on investment-related cooperation, including in specific areas such as industrial development, SMEs, mining and tourism. None of the continuity agreements contain rules on investment protection; the latter remain confined to the United Kingdom’s BITs.

**EU agreement for the termination of intra-EU BITs:** Following the interpretive declarations of EU member States in January 2019 on the legal consequences of the judgment of the Court of Justice of the EU in the *Achmea* case and on investment protection in the EU, on 24 October 2019 they reached a deal on the text of a plurilateral agreement for the termination of intra-EU BITs, although a small minority of member States was not able to endorse it. On 5 May 2020, 23 member States<sup>18</sup> signed the agreement for the termination of intra-EU BITs in order to implement the ruling in the *Achmea* case, which found that investor–State arbitration clauses in intra-EU BITs are incompatible with EU law. The agreement contains one annex with a list of about 125 intra-EU BITs currently in force that will be terminated upon entry into force of the agreement for the relevant member States and clarifies that their sunset clauses will also be terminated. A second annex lists 11 already terminated intra-EU BITs whose sunset clauses will also cease to produce legal effect upon entry into force of the agreement for the relevant member States. The agreement does not cover intra-EU proceedings under the Energy Charter Treaty (ECT). It indicates that the EU as a group and the member States will address this matter at a later stage.

**EU–Mercosur Trade Agreement:** On 28 June 2019, the EU and the Mercosur States<sup>19</sup> reached a political agreement for a comprehensive trade agreement. The trade agreement is part of a wider association agreement between the two regions. The agreement will contain a chapter on trade in services and establishment (including mode 3, commercial presence of services trade) but will not have a chapter on investment. Other notable provisions of the envisaged agreement include chapters on environmental protection and labour conditions, e-commerce, SMEs and the involvement of civil society.

**Joint D-8 Organization for Economic Cooperation – UNCTAD Guiding Principles for Investment Policymaking:** In January 2020, members of the D-8 Organization for Economic Cooperation (Bangladesh, Egypt, Nigeria, Indonesia, the Islamic Republic of Iran, Malaysia, Pakistan, and Turkey) endorsed a set of Guiding Principles for Investment Policymaking jointly developed with UNCTAD. The Principles were developed in line with the recommendations of the UNCTAD-D-8 Expert Meeting on “International Investment Policy Reform for Sustainable Development”, held in Istanbul, Turkey in September 2019, which “called on UNCTAD and the D-8 organization to develop non-binding development-oriented guiding principles for investment policymaking for D-8 countries”. The Principles provide guidance for investment policymaking with a view to promoting inclusive economic growth and sustainable development; promoting coherence in national and international investment policymaking; fostering an open, transparent and conducive global policy environment for investment; and aligning investment promotion and facilitation policies with sustainable development goals. A number of economies, economic groupings and regional



Several economies, economic groupings and regional organizations have adopted non-binding principles for investment policymaking aimed at guiding the development of national and international investment policies. The principles are typically informed by the Core Principles set out in UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2015). Examples of guiding principles elaborated by countries and organizations in collaboration or jointly with UNCTAD include the following:

- *G20 Guiding Principles for Global Investment Policymaking.* In September 2016, G20 leaders endorsed the guiding principles of the Hangzhou Summit. Drawing on the UNCTAD Policy Framework, the G20 Principles constituted the first time that multilateral consensus on investment matters had been reached between a varied group of developed, developing and transition economies.
- *Joint African, Caribbean and Pacific Group of States (ACP) – UNCTAD Guiding Principles for Investment Policymaking.* In June 2017, the ACP Committee of Ambassadors approved these principles, which were jointly developed by UNCTAD and the ACP Secretariat. The non-binding principles reflect ACP countries' specificities and priorities for investment policymaking, building on key ACP policy documents and the UNCTAD Policy Framework.
- *Joint D-8 Organization for Economic Cooperation – UNCTAD Guiding Principles for Investment Policymaking.* In January 2020, country members of the D-8 endorsed a set of guiding principles developed in line with the recommendations of the UNCTAD–D-8 Expert Meeting in September 2019 and on the basis of existing key D-8 declarations.
- *Organization of Islamic Cooperation Guiding Principles for Investment Policymaking.* In 2018, high-level experts of the member States agreed on 10 principles in line with the OIC Action Programme (OIC-2025) and the UNCTAD Policy Framework.
- *Saudi Arabia Guiding Principles for Investment Policymaking.* In 2019, Saudi Arabia adopted a set of seven guiding principles elaborated in line with its Vision 2030 agenda and the UNCTAD Policy Framework.

Source: UNCTAD.

organizations have adopted similar principles for investment policymaking to guide the development of national and international investment policies (box III.5).

**Modernization of the Energy Charter Treaty:** On 6 November 2019, the highest decision-making body of the International Energy Charter, the Energy Charter Conference, adopted a decision on the procedural issues and timeline for negotiations for the modernization of the ECT. Some of the previously approved topics that will be addressed in the negotiations for modernization include the definition of investment, the right to regulate, the most-favoured-nation clause, the definition of indirect expropriation, sustainable development and corporate social responsibility. The Modernization Group of the Energy Charter Conference held its first meeting on 12 December 2019, in Brussels. Before the pandemic, this meeting was to be followed by negotiating sessions and a stocktaking meeting of the Conference in 2020.

**Ratification of the United States–Mexico–Canada Agreement:** In June 2019, the Mexican Senate approved the implementing legislation for the United States–Mexico–Canada Agreement (USMCA), making Mexico the first country to ratify the agreement. Following the approval of the USMCA, in December 2019, by the United States House of Representatives, on 29 January 2020 the agreement was signed into law by the President, marking the United States' effective ratification of the new agreement. Canada ratified the USMCA on 13 March 2020. The agreement is set to enter into force on 1 July 2020. Among the major changes brought about by the new agreement are the revised ISDS provisions, which limit the application of ISDS exclusively to investor–State disputes between the United States and Mexico and narrow the claims that investors can bring under that provision.

**Regional Comprehensive Economic Partnership:** The 3<sup>rd</sup> Regional Comprehensive Economic Partnership Summit was held in November 2019, in Bangkok, Thailand, bringing together the leaders of the 16 participating countries<sup>20</sup> to review developments in the negotiations. Fifteen participating countries have concluded text-based negotiations. The proposed agreement will comprise 20 chapters, including one on investment. The latter will, reportedly, not provide for ISDS; instead, the participating countries agreed to address it in the future. India appears to have disengaged from the negotiations until

a satisfactory resolution is found for significant outstanding issues. The other participating countries have reaffirmed their commitment to continue working with India on these issues. Before the outbreak of COVID-19, the agreement had been set to be finalized for signature by the participating countries in 2020.

## 2. Trends in ISDS: new cases and outcomes

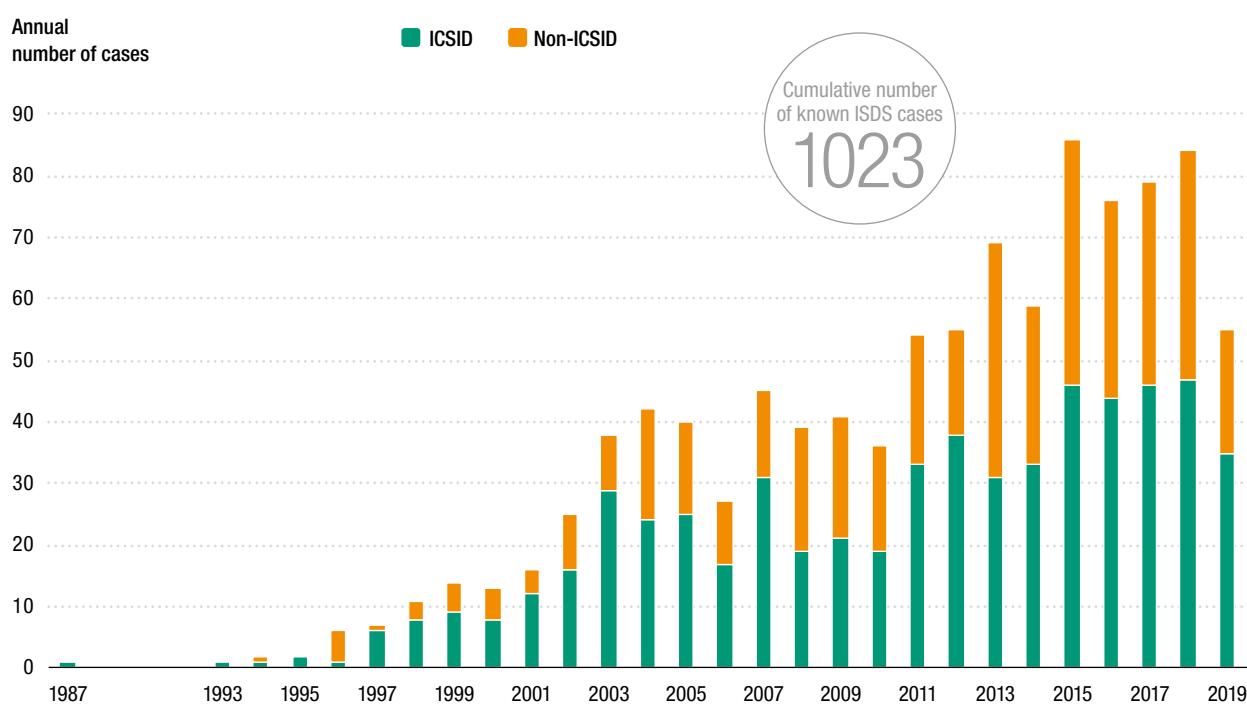
The total ISDS case count had reached over 1,000 by the end of 2019, with at least 55 new arbitrations initiated in 2019. Most investment arbitrations were brought under IIAs signed in the 1990s or earlier.

### a. New cases initiated in 2019

The number of new ISDS cases remained high but below the average of the past five years. In 2019, at least 55 new treaty-based ISDS cases were initiated, all under old-generation treaties signed before 2012.

In 2019, investors initiated 55 publicly known ISDS cases pursuant to IIAs (figure III.7), the lowest number in the preceding five years. On the basis of newly revealed information, the number of known cases for 2018 was adjusted to 84. As of 1 January 2020, the total number of publicly known ISDS claims had reached 1,023. As some arbitrations can be kept confidential, the actual number of disputes filed in 2019 and previous years is likely to be higher. To date, 120 countries and one economic grouping are known to have been respondents to one or more ISDS claims.

Figure III.7. Trends in known treaty-based ISDS cases, 1987–2019



Source: UNCTAD, ISDS Navigator.

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

### **(i) Respondent States**

The new ISDS cases in 2019 were initiated against 36 countries and one economic grouping (the EU). Colombia, Mexico, Peru and Spain were the most frequent respondents, with three known cases each. Three economies – the EU,<sup>21</sup> Nepal and Sierra Leone – faced their first known ISDS claims. As in previous years, the majority of new cases (80 per cent) were brought against developing countries and transition economies.

### **(ii) Claimant home States**

Developed-country investors brought most – about 70 per cent – of the 55 known cases in 2019. The highest numbers of cases were brought by investors from the United Kingdom and the United States, with seven cases each.

### **(iii) Intra-EU disputes**

About 15 per cent of the 55 known cases filed in 2019 were intra-EU disputes (seven cases), slightly below the historical average of 20 per cent. Five of these seven disputes were brought on the basis of the ECT; the remaining two invoked intra-EU BITs.

The overall number of known arbitrations initiated by an investor from one EU member State against another totalled 188 at the end of 2019. It remains to be seen whether recent EU-level developments related to intra-EU BITs and the ECT will greatly reduce or eventually eliminate new treaty-based intra-EU disputes.

### **(iv) Applicable investment treaties**

About 70 per cent of investment arbitrations in 2019 were brought under BITs and TIPs signed in the 1990s or earlier. The remaining cases were based on treaties signed between 2000 and 2011. The ECT (1994) was the IIA invoked most frequently in 2019, with seven cases, followed by the North American Free Trade Agreement (NAFTA (1992)) with three cases. Looking at the overall trend, about 20 per cent of the 1,023 known cases have invoked the ECT (128 cases) or NAFTA (67 cases).

## **b. ISDS outcomes**

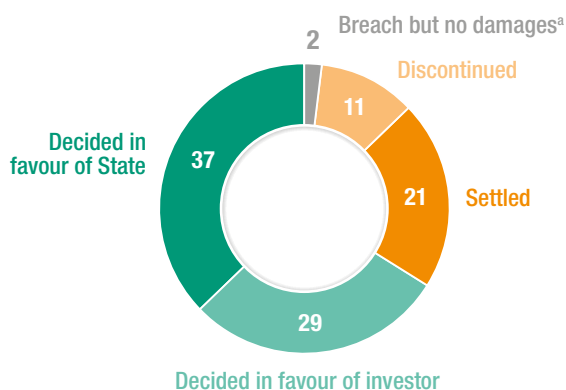
*Of the public arbitral decisions rendered in 2019, more than half of the decisions on jurisdictional issues were rendered in favour of the State, whereas those on the merits more frequently ended in favour of the investor.*

### **(i) Decisions and outcomes in 2019**

In 2019, ISDS tribunals rendered at least 71 substantive decisions in investor–State disputes, 39 of which were in the public domain at the time of writing. More than half of the public decisions on jurisdictional issues were decided in favour of the State, whereas on the merits more decisions were decided in favour of the investor.

- Fourteen decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with five upholding the tribunal's jurisdiction and nine declining jurisdiction.
- Twenty-five decisions on the merits were rendered, with 14 accepting at least some investor claims and 11 dismissing all the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the fair and equitable treatment (FET) provision. The amounts awarded ranged from less than 10 million (\$7.9 million in *Magyar Farming and others v. Hungary*) to several billions (\$4 billion in *Tethyan Copper v. Pakistan* and \$8.4 billion in *ConocoPhillips v. Venezuela*).

**Figure III.8. Results of concluded cases, 1987–2019 (Per cent)**



Source: UNCTAD, ISDS Navigator.

<sup>a</sup> Decided in favour of neither party (liability found but no damages awarded).

In addition, four publicly known decisions were rendered in annulment proceedings at the International Centre for Settlement of Investment Disputes (ICSID). Ad hoc committees of ICSID rejected the applications for annulment in all four cases.

### (ii) Overall outcomes

By the end of 2019, at least 674 ISDS proceedings had been concluded. The relative share of case outcomes changed only slightly from that in previous years (figure III.8).

## 3. Taking stock of IIA reform

Through its policy recommendations compiled in the Investment Policy Framework for Sustainable Development (WIR12, updated in 2015) and in the Road Map for IIA Reform (WIR15), subsequently included

in the comprehensive, consolidated Reform Package for the International Investment Regime (UNCTAD, 2018b), UNCTAD identified five action areas: safeguarding the right to regulate, while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency. This section reviews the extent to which recent treaties use reform features in their substantive and procedural clauses.

### a. Treaties concluded in 2019: key features of substantive clauses

*The reform of the IIA regime is well underway and is visible in the modernized provisions of the IIAs concluded in 2019.*

IIAs concluded in 2019 continued to feature heavily reform-oriented clauses: nearly all new IIAs with texts available (table III.5) – that is, 14 of 15 – contain at least seven reform features; 12 of 15 contain at least eight reform features; and ten of 15 include at least nine reform features. The preservation of States’ regulatory space remains the most predominant area of reform; other areas that continued to be the subject of heightened reform include investment dispute settlement and sustainable development. Investment promotion and/or facilitation is another area that saw increased attention.

*Preservation of regulatory space.* Elements aimed at safeguarding States’ policy space continued to abound in IIAs concluded in 2019. Of the 15 treaties reviewed, nine include general exceptions (e.g. for the protection of human health or the conservation of exhaustible natural resources); 12 incorporate limitations to the treaty scope (e.g. by excluding certain types of assets from the definition of investment); 14 circumscribe the FET obligation and clarify or omit indirect expropriation; and all 15 provide for detailed exceptions from the free-transfer-of-funds obligation. In addition, provisions with the potential to increase the exposure of States to arbitration claims (such as umbrella clauses) are omitted in 13 IIAs.

*Sustainable development orientation.* Provisions relating to the promotion of sustainable development permeate the 15 IIAs concluded in 2019 for which texts are available. Eleven of them make reference to the protection of health and safety, labour rights,

and environment or sustainable development, while nine provide for general exceptions. More than half (eight) include provisions for the promotion of corporate and social responsibility, and only four explicitly recognize that parties should not relax health, safety or environmental standards to attract investment. As observed in recent years, the inclusion of specific proactive provisions on investment promotion and/or facilitation continues to rise, with 12 of the agreements in 2019 featuring such provisions.

*Investment dispute settlement.* Fourteen of the 15 IIAs concluded in 2019 feature at least one type of limitation to ISDS, and at least three omit ISDS (see next subsection).

A few provisions found in some of the IIAs or treaty models concluded in 2019 are worth mentioning for their innovative features:

- Specifying that a required economic contribution to the host State economy – itself not an unusual practice in the definition of investment – be made towards sustainable development and providing indicators for measuring such a contribution (Morocco model BIT).
- Clarifying in the national treatment and most-favoured-nation provisions that one of the elements to take into consideration when determining the existence of like circumstances is whether a treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives (Australia–Indonesia CEPA, Brazil–United Arab Emirates BIT).
- Clarifying that measures undertaken for the protection of a State's essential security interests, whether before or after the commencement of arbitral proceedings, shall be non-justiciable (India–Kyrgyzstan BIT).
- Allowing for the termination of the treaty at any time after its entry into force, subject to survival clauses where applicable (Australia–Hong Kong, China Investment Agreement, Australia–Indonesia CEPA, Brazil–Ecuador BIT, Brazil–United Arab Emirates BIT, EU–Viet Nam Investment Protection Agreement, India–Kyrgyzstan BIT).

Other novel provisions can be found in the 2020 Brazil–India BIT (e.g. allowing the parties to adopt or maintain affirmative action measures towards vulnerable groups, prohibiting the parties from subjecting investments to measures that constitute targeted discrimination based on race, gender or religious beliefs).

Since 2012, over 75 countries and REIOs benefited from UNCTAD support for the development of new model BITs and IIA reviews (*WIR19*). To support and accelerate IIA reform, UNCTAD will launch its IIA Reform Accelerator in the summer of 2020. The Accelerator will provide a concrete policy tool with actionable recommendations to assist economies in reforming their IIA regimes in line with sustainable development objectives.

## **b. Treaties concluded in 2019: ISDS reform approaches**

*As investor–State arbitration remains at the core of broader IIA reform actions, countries continued to implement many ISDS reform elements in IIAs signed in 2019, using four principal reform approaches: (i) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS and (iv) improved ISDS procedures.*

In *WIR19*, UNCTAD identified the principal approaches to ISDS emerging from recent IIAs. Countries continued implementing four ISDS reform approaches in IIAs signed in 2019 (table III.6):

- (i) *No ISDS:* The treaty does not entitle investors to refer their disputes with the host State to international arbitration (either ISDS is not covered at all or it is subject to the State's right to give or withhold arbitration consent for each specific dispute, in the form of the so-called "case-by-case consent") (three IIAs entirely omit ISDS).

- (ii) *Standing ISDS tribunal*: The system of ad hoc investor–State arbitration and party appointments is replaced with a standing court-like tribunal (including an appellate level), with members appointed by contracting parties for a fixed term (one IIA).
- (iii) *Limited ISDS*: Approaches may involve a requirement to exhaust local judicial remedies (or to litigate in local courts for a prolonged period) before turning to arbitration, the narrowing of the scope of ISDS subject matter (e.g. limiting treaty provisions that are subject to ISDS, excluding policy areas from the ISDS scope) and/or the setting of a time limit for submitting ISDS claims (11 IIAs).
- (iv) *Improved ISDS procedures*: The treaty preserves the system of investor–State arbitration but with certain important modifications. Among other goals, such modifications may aim at increasing State control over the proceedings, opening proceedings to the public and third parties, enhancing the suitability and impartiality of arbitrators, improving the efficiency of proceedings, or limiting the remedial powers of ISDS tribunals (nine IIAs).

For 2019, the most frequently used approaches were “limited ISDS” and “improved ISDS procedures”, often in combination.

Some of the reform approaches have more far-reaching implications than others. The extent of reform engagement within each approach can also vary (significantly) from treaty to treaty. For example, “limited ISDS” covers a very broad array of options, which may range from a treaty that requires exhaustion of local remedies to a treaty that sets a three-year time limit for submitting claims.

Fourteen of the 15 IIAs reviewed for 2019 contain at least one ISDS reform element, and many contain several (table III.6). One of the 15 IIAs reviewed contains no ISDS reform elements. The unreformed ISDS mechanism, which preserves the basic ISDS design typically used in old-generation IIAs, is characterized by broad scope and lack of procedural improvements.

Most of the ISDS reform elements in recent IIAs (table III.6) resonate with the options identified by UNCTAD in the Investment Policy Framework for Sustainable Development (*WIR12*, updated in 2015) and in the Road Map for IIA Reform (*WIR15*), subsequently included in UNCTAD’s comprehensive, consolidated Reform Package for the International Investment Regime (UNCTAD, 2018b).

In addition, IIAs signed in 2019 include several innovative ISDS reform features that have rarely been encountered in earlier IIAs and/or that break new ground:

- Excluding ISDS claims in relation to public health measures (Australia–Indonesia CEPA)
- Granting the respondent State the possibility to request mandatory conciliation before the investor can proceed to arbitration (Australia–Indonesia CEPA)
- Excluding jurisdiction over claims where the investment was acquired by an entity for the main purpose of submitting a claim, known as time-sensitive restructuring (EU–Viet Nam Investment Protection Agreement)

Alongside ISDS-specific reform elements, many IIAs reviewed also include important modifications to other treaty components that have implications for ISDS reform (e.g. refined treaty scope, clarified substantive provisions and added exceptions). ISDS reform is also being pursued at the regional, cross-regional and multilateral levels (at the United Nations Commission on International Trade Law and ICSID, among other institutions).

**Table III.5. Reform-oriented provisions in IIAs concluded in 2019**

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

Yes  No

**Selected aspects of IIAs**

The scope and depth of commitments in each provision varies from one IIA to another.

- 1 References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble
- 2 Refined definition of investment (e.g. reference to characteristics of investment; exclusion of portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts)
- 3 Circumscribed FET (in accordance with customary international law, equated to the minimum standard of treatment of aliens under customary international law or clarified with a list of State obligations), or FET omitted
- 4 Clarification of what does and does not constitute an indirect expropriation, or indirect expropriation omitted
- 5 Detailed exceptions from the free-transfer-of-funds obligation, including for balance-of-payments difficulties and/or enforcement of national laws
- 6 Omission of the so-called “umbrella” clause
- 7 General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources
- 8 Explicit recognition in the treaty text that parties should not relax health, safety or environmental standards to attract investment
- 9 Promotion of corporate and social responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble
- 10 Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, omitting the ISDS mechanism)
- 11 Specific proactive provisions on investment promotion and/or facilitation (e.g. facilitating the entry and sojourn of personnel, furthering transparency of relevant laws and regulations, enhancing exchange of information on investment opportunities)

Source: UNCTAD.

Note: On the basis of 15 IIAs concluded in 2019 for which texts are available, not including “framework agreements” that lack substantive investment provisions.



**Table III.6. ISDS reform elements in IIAs concluded in 2019**

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

Yes     No     Not applicable

**Selected aspects of IIAs**

The scope and depth of commitments in each provision varies from one IIA to another.

**I. No ISDS**

- 1 Omitting ISDS (e.g. in favour of domestic courts and/or State–State dispute settlement)

**II. Standing ISDS tribunal**

- 2 Replacing the system of ad hoc arbitrations and party-appointed arbitrators with a standing court-like tribunal (including an appellate level) consisting of adjudicators with fixed terms

**III. Limited ISDS**

- 3 Requiring investors to pursue local remedies (for 18 months or more) or to exhaust local remedies before turning to arbitration
- 4 Limiting treaty provisions subject to ISDS and/or excluding certain policy areas from ISDS
- 5 Setting a time limit for submitting ISDS claims (limitations period)

**IV. Improved ISDS procedures**

- 6 Enhancing the State role in ISDS: binding joint interpretations, renvoi for joint determination, non-disputing party participation, review of draft arbitral award, submission of counterclaims
- 7 Enhancing the suitability and impartiality of arbitrators or adjudicators: rules on qualifications, code of conduct, rules on conflicts of interest; “double hatting” prohibition
- 8 Enhancing the efficiency of dispute settlement: early dismissal of frivolous claims, consolidation of claims, time limit on maximum duration of proceedings, voluntary alternative dispute resolution procedures
- 9 Opening ISDS proceedings to the public and third parties: transparency rules, amicus curiae participation
- 10 Limiting remedial powers of tribunals: legal remedies, types of damages

Source: UNCTAD.

Note: On the basis of 15 IIAs concluded in 2019 for which texts are available, not including “framework agreements” that lack substantive investment provisions.

# NOTES

- <sup>1</sup> UNCTAD, Investment Policy Monitor, Special Issue No. 4, May 2020.
- <sup>2</sup> [www.pravno-informacioni-sistem.rs/SIGlasnikPortal/eli/rep/sgrs/vlada/odluka/2020/41/1/reg](http://www.pravno-informacioni-sistem.rs/SIGlasnikPortal/eli/rep/sgrs/vlada/odluka/2020/41/1/reg).
- <sup>3</sup> [https://unctad.org/en/PublicationsLibrary/diae2020inf1\\_en.pdf](https://unctad.org/en/PublicationsLibrary/diae2020inf1_en.pdf).
- <sup>4</sup> UNCTAD, IPA Observer, Special Issue No. 8, April 2020.
- <sup>5</sup> UNCTAD, Investment Policy Monitor, No. 23, April 2020.
- <sup>6</sup> UNCTAD, Creating Business Linkages – A Policy Perspective, 2010, [https://unctad.org/en/Docs/diae20091\\_en.pdf](https://unctad.org/en/Docs/diae20091_en.pdf).
- <sup>7</sup> OECD, “SME Policy Responses”, [https://read.oecd-ilibrary.org/view/?ref=119\\_119680-di6h3qgi4x&title=Covid-19\\_SME\\_Policy\\_Responses](https://read.oecd-ilibrary.org/view/?ref=119_119680-di6h3qgi4x&title=Covid-19_SME_Policy_Responses); SME South Africa, “COVID-19: Payment Relief and Other Government and Private Sector Interventions for SMEs”, <https://smesouthafrica.co.za/the-small-business-covid-19-survival-guide-where-to-get-help/>; KPMG, “Saudi Arabia, Government and Institution Measures in Response to COVID-19”, <https://home.kpmg/xx/en/home/insights/2020/04/saudi-arabia-government-and-institution-measures-in-response-to-covid.html>.
- <sup>8</sup> Including the 27 member States of the EU as well as the United Kingdom.
- <sup>9</sup> WTO, “Annex of COVID-19-related trade measures”, [https://www.wto.org/english/tratop\\_e/covid19\\_e/covid\\_measures\\_e.pdf](https://www.wto.org/english/tratop_e/covid19_e/covid_measures_e.pdf).
- <sup>10</sup> WHO, “WHO director-general endorses a voluntary intellectual property pool to develop Covid-19 products”, 6 April 2020.
- <sup>11</sup> For more information, see UNCTAD, Investment Policy Monitor, No. 23, April 2020, and UNCTAD, Investment Policy Monitor, Special Issue No. 4, May 2020.
- <sup>12</sup> Examples include the postponement of negotiations for a Brazil–Nigeria BIT; delays for the negotiations of the new investment protocol of the African Continental Free Trade Area and the postponement of the EU–United Kingdom Free Trade Agreement.
- <sup>13</sup> See, for example, the postponement of the EU–India Summit, which was scheduled to take place on 13 March 2020, and the EU–China Summit, which was scheduled for the end of March 2020.
- <sup>14</sup> The full text is available at <http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19>.
- <sup>15</sup> The total number of IIAs is revised in an ongoing manner as a result of retroactive adjustments to UNCTAD’s IIA Navigator.
- <sup>16</sup> These are agreements with the Andean Countries, the CARIFORUM States, Central America, Chile, the ESA States, the Faroe Islands, Georgia, Iceland and Norway, Israel, Jordan, Lebanon, Liechtenstein, Morocco, the Pacific States, the Republic of Korea, the Southern Africa Customs Union and Mozambique, the State of Palestine, Switzerland, Tunisia and Kosovo (United Nations Administrative Region, Security Council resolution 1244 (1999)). The concluded agreements are not homogenous: 14 of them incorporate by reference the provisions of the relevant pre-existing EU agreements, listing only the required amendments. The remaining six treaties – with the CARIFORUM States, the ESA States, Georgia, the Pacific States (Fiji and Papua New Guinea), the Southern Africa Customs Union and Mozambique, and the Republic of Korea – set out their provisions in full.
- <sup>17</sup> These are Albania, Algeria, Bosnia and Herzegovina, Cameroon, Canada, Côte d’Ivoire, Egypt, Ghana, Kenya, Mexico, the Republic of Moldova, Montenegro, North Macedonia, Serbia, Singapore and Ukraine.
- <sup>18</sup> These are Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.
- <sup>19</sup> Mercosur is the Southern Common Market, made up of Argentina, Brazil, Paraguay, Uruguay and the Bolivarian Republic of Venezuela (whose membership has been suspended since 1 December 2016).
- <sup>20</sup> These are Australia, Brunei Darussalam, Cambodia, China, India, Indonesia, Japan, the Republic of Korea, the Lao People’s Democratic Republic, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, Thailand and Viet Nam.
- <sup>21</sup> Nord Stream 2 AG (Switzerland), a subsidiary of Gazprom (Russian Federation), initiated an arbitration against the EU under the ECT on 26 September 2019 related to the EU Gas Directive amendment of 2019; see <https://investmentpolicy.unctad.org/investment-dispute-settlement/cases/1008/nord-stream-2-v-eu>.

