MAY 2018 ISSUE 1

IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS

RECENT DEVELOPMENTS IN THE INTERNATIONAL INVESTMENT REGIME

HIGHLIGHTS

- Investment treaty making has reached a turning point. The year 2017 concluded with the lowest number of new international investment agreements (IIAs) since 1983, signaling a period of reflection on, and review of, international investment policies.

- For the first time, the number of effective treaty terminations outpaced the number of new IIA conclusions. In contrast, negotiations for certain megaregional agreements maintained momentum, especially in Africa and Asia. In addition, a number of country groups are developing non-binding guiding principles for investment policymaking.

- IIA reform is well under way across all regions. Most of today's new IIAs include sustainable development-oriented reform elements. Highlights of modern treaty making include a sustainable development orientation, preservation of regulatory space and improvements to or omissions of ISDS.

- Countries are engaging in modernizing the existing stock of old-generation treaties. Initial reform actions correspond to UNCTAD's 10 Options for Phase 2 of IIA Reform (*WIR17*). In particular, in the past year, countries have been engaging in multilateral reform discussions, including with regard to ISDS, and a small but growing number of countries are issuing interpretations or replacing their old-generation agreements.

- Countries have different but related motivations to engage in Phase 2 reform actions, and they face a number of challenges in tackling their outdated IIAs effectively.

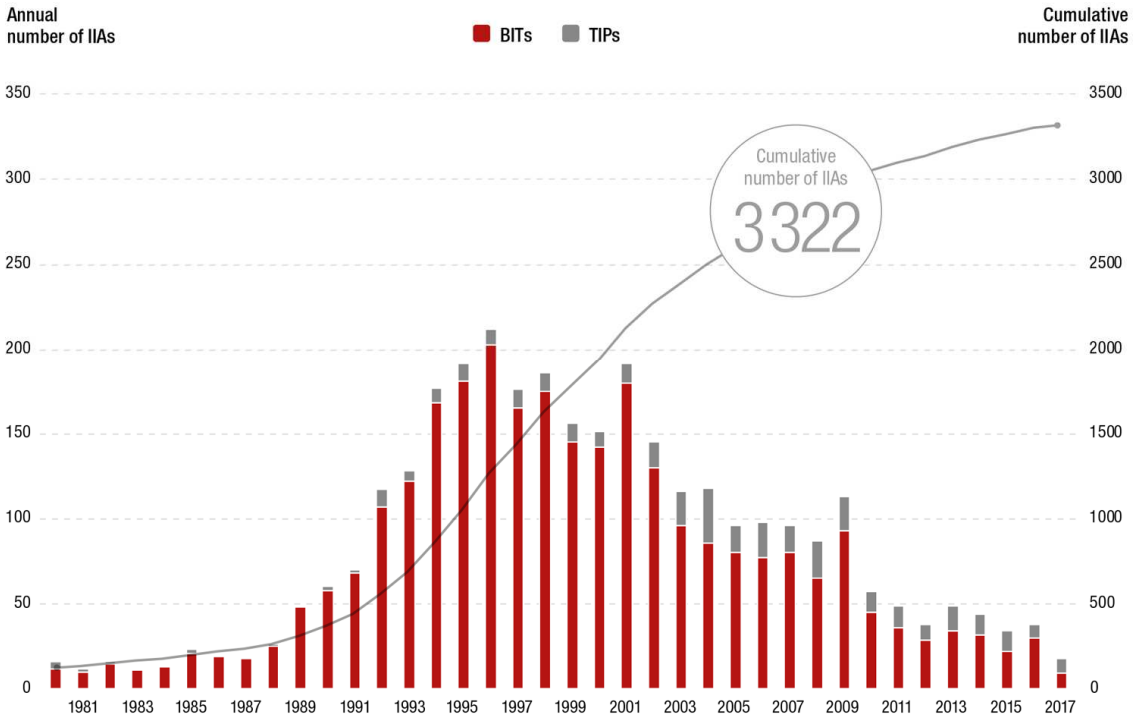
- Through its evidence-based policy analysis and advisory work, together with its intergovernmental consensus-building function, UNCTAD can help countries overcome challenges related to Phase 2 of IIA reform, and move towards the third, and last phase of reform. UNCTAD's 2018 World Investment Report (WIR) and UNCTAD's next High-level IIA Conference, part of the October 2018 World Investment Forum (WIF) will be milestones in this endeavour.

Note: This report can be freely cited provided appropriate acknowledgement is given to UNCTAD. This is an unedited publication.

1. Trends in the conclusion and negotiation of IIAs

In 2017, countries concluded 18 new IIAs: 9 bilateral investment treaties (BITs) and 9 treaties with investment provisions (TIPs).[1] This brought the size of the IIA universe to 3,322 agreements (2,946 BITs and 376 TIPs), of which 2,638 were in force at year-end (figure 1). The most active economy was Turkey, concluding four treaties, followed by Hong Kong, China with two. Forty-five economies were parties to one new treaty each. Of the 18 new IIAs, three were regional agreements (the ASEAN–Hong Kong, China Investment Agreement, the Intra-MERCOSUR Investment Facilitation Protocol and the Pacific Agreement on Closer Economic Relations (PACER) Plus Agreement between Australia, New Zealand and 12 Pacific island States).[2] In addition, 15 IIAs entered into force. Between January and March 2018, three additional IIAs were signed.[3]

Figure 1. Trends in IIAs signed, 1980–2017



Source: UNCTAD, IIA Navigator.
Note: The cumulative number of all signed IIAs, independently of whether they have entered into force, is 3,322. IIAs for which termination has entered into effect are not included.

At the same time, at least 22 terminations entered into effect ("effective termination"). Particularly active in terminating treaties was India with 17. Ecuador sent 16 notices of termination in 2017.[4] Among intra-European Union (EU) BITs, at least two terminations took effect in 2017 (see also *WIR17*).[5]

For the first time, the number of effectively terminated IIAs (22) exceeded the number of newly concluded treaties (18) and the number of new treaties entering into force (15). However, the low number of IIAs concluded in 2017 does not necessarily translate into fewer treaty relationships among countries. Unlike BITs, a single regional IIA creates many treaty relationships, depending on the number of contracting parties.[6]

Moreover, effective treaty termination must also be seen in light of survival clauses, according to which treaty application is extended for a further period after termination (some for 5 years, but most commonly for 10, 15 or even 20 years). And the stock of IIAs remains very large, comprising more than 3,300 treaties, most of them belonging to the "first generation" IIAs that are in need of reform.

[1] For the list of IIAs signed and entered into force in 2017, see UNCTAD's IIA Navigator, http:// investmentpolicyhub.unctad.org/IIA.
[2] Cook Islands, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.
[3] The Australia–Peru Free Trade Agreement (FTA), the Comprehensive and Progressive Agreement for a Trans-Pacific Partnership Agreement (CPTPP) and the FTA between the Republic of Korea and the Republics of Central America. In addition, in March 2018, a number of side agreements to the CPTPP were signed related to ISDS. For example, ISDS is excluded between Peru and New Zealand, and a respondent host State must provide specific consent for an investor claim to proceed to arbitration (side agreements between Brunei Darussalam and New Zealand, and between Malaysia and Viet Nam).
[4] Terminations not effective as of April 2018.
[5] The BITs of Denmark with Estonia (1991) and with Romania (1994).
[6] For example, the Intra-MERCOSUR Investment Facilitation Protocol (2017) creates six IIA relationships between the four contracting parties, and the CPTPP (2018) creates 55.

The nine TIPs concluded in 2017 can be grouped into four categories:

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

- Argentina–Chile Free Trade Agreement (FTA)
- ASEAN–Hong Kong, China Investment Agreement[7]
- China–Hong Kong, China Investment Agreement[8]
- Pacific Agreement on Closer Economic Relations (PACER) Plus[9]

2. One agreement with investment provisions emphasizing investment promotion and facilitation as well as a number of investment protection provisions – although no investor–State dispute settlement (ISDS) clause:

- Intra-MERCOSUR Investment Facilitation Protocol (2017)

3. One agreement with limited investment provisions (e.g. national treatment (NT) and most favoured nation (MFN) treatment with regard to the right of establishment of companies) or provisions on free movement of capital relating to direct investments:

- Armenia–EU Comprehensive and Enhanced Partnership Agreement

4. Three agreements that establish a process for negotiation or an institutional framework to promote and cooperate on investment but do not contain substantive investment protection provisions:

- Paraguay–United States Trade and Investment Framework Agreement (TIFA)
- Chile–Indonesia Comprehensive Economic Partnership Agreement[10]
- China–Georgia Free Trade Agreement (FTA)

2. Content of new IIAs

Since 2012, over 150 countries have undertaken at least one action in the pursuit of sustainable development-oriented IIAs as set out in UNCTAD's Reform Package for the International Investment Regime (including either Phase 1 or Phase 2 reform actions, discussed below). For example, they have reviewed their treaty networks or revised treaty models.

Most of today's new IIAs follow UNCTAD's Road Map (*WIR15*), which sets out 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) or include clauses that were set out in UNCTAD's Investment Policy Framework for Sustainable Development (*WIR12*, updated in 2015). In addition, some IIAs concluded in 2017 contain innovative features that have rarely been encountered in earlier IIAs.

Today's reform-oriented treaty making is in striking contrast to treaty making at the turn of the millennium. A comparison between the 13 IIAs concluded in 2017 for which texts are available (eight BITs and five TIPs) and a sample of 13 IIAs concluded in 2000 shows remarkable differences (table 1). Clearly, reform-oriented clauses are becoming more common in modern treaties. All IIAs concluded in 2017 contain at least six reform features, and some provisions that were considered innovative in pre-2010 IIAs now appear regularly.

Highlights of modern treaty making include a sustainable development orientation, preservation of regulatory space and improvements to or omissions of investment dispute settlement.

[7] The treaty contains a placeholder for an ISDS clause (Article 21); the parties agreed to conclude the discussions on ISDS within one year from the date of the agreement's entry into force.
[8] The agreement includes an ISDS clause that does not provide for international arbitration as an option.
[9] The agreement does not include an ISDS clause.
[10] The text of the agreement is not publicly available. The parties agreed that in the future the scope of the agreement will be expanded to include trade in services and investment protection.

Table 1. Reform-oriented provisions in IIAs concluded in 2000 and in 2017

2000

	1	2	3	4	5	6	7	8	9	10	11
Austria–Bangladesh BIT	No	No	No	No	Yes	No	No	No	No	Yes	Yes
Belarus–Singapore BIT	No	No	No	No	No	No	Yes	No	No	No	Yes
Brunei Darussalam–China BIT	No	No	No	No	No	No	No	No	No	No	Yes
Chile–Dominican Republic BIT	No	No	No	No	No	Yes	No	No	No	No	No
Cuba–Paraguay BIT	No	No	No	No	Yes	No	No	No	No	No	No
Ethiopia–Turkey BIT	No	No	No	No	No	Yes	No	No	No	No	No
Greece–Mexico BIT	No	Yes	No	No	Yes	No	No	No	No	Yes	No
India–Lao People's Democratic Republic BIT	No	No	No	No	No	Yes	No	No	No	No	Yes
Italy–Libya BIT	No	No	Not applicable	No	No	Yes	No	No	No	No	No
Malaysia–Saudi Arabia BIT	No	No	Not applicable	No	No	Yes	No	No	No	No	No
Mongolia–Philippines BIT	No	No	No	No	No	No	No	No	No	No	Yes
Nigeria–Switzerland BIT	No	No	No	No	No	No	No	No	No	No	Yes
Rwanda–South Africa BIT	No	No	No	No	No	No	No	No	No	No	Yes

Yes No Not applicable

2017

	1	2	3	4	5	6	7	8	9	10	11
Argentina–Chile FTA	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
ASEAN–Hong-Kong, China Investment Agreement	No	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Burundi–Turkey BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No
China–Hong Kong, China Investment Agreement	No	Yes	Yes	Yes	Yes	No	Yes	Yes	No	Yes	Yes
Colombia–United Arab Emirates BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No
Intra-MERCOSUR Investment Facilitation Protocol	Yes	Yes	Not applicable	Not applicable	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Israel–Japan BIT	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No	Yes	No
Jordan–Saudi Arabia BIT	Yes	No	Yes	No	Yes	Yes	No	Yes	No	No	Yes
Mozambique–Turkey BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No
Pacific Agreement on Closer Economic Relations Plus	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Rwanda–United Arab Emirates BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Turkey–Ukraine BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No
Turkey–Uzbekistan BIT	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	Yes	No

Yes No Not applicable

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 fair and equitable treatment (with reference to customary international law (CIL), equated to the minimum standard of treatment of aliens under CIL or clarified with a list of State obligations

4 Clarification of what does and does not constitute an indirect expropriation

5 Detailed exceptions from the free-transfer-of-funds obligation, including 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 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 an ISDS mechanism)

11 Specific proactive provisions on investment promotion and/or facilitation

Source: UNCTAD.

Note: BITs listed for 2000 are a sample of IIAs signed in that year. IIAs listed for 2017 are those concluded in that year for which texts are available; this list does not include "framework agreements" that lack substantive investment provisions. Available IIA texts can be accessed at UNCTAD's IIA Navigator at http://investmentpolicyhub.unctad.org/IIA.

Sustainable development orientation. In contrast to the IIAs signed in 2000, the 2017 IIAs include a larger number of provisions explicitly referring to sustainable development issues (including by preserving the right to regulate for sustainable development-oriented policy objectives). Of the 13 agreements concluded in 2017, 12 have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources. All but one also explicitly recognize that the parties should not relax health, safety or environmental standards to attract investment; and 11 refer to the protection of health and safety, labour rights, the environment or sustainable development in their preambles.

Preservation of regulatory space. Recent treaties frequently differ from old-generation treaties in other elements that aim more broadly at preserving regulatory space and/or at minimizing exposure to investment arbitration. These elements include clauses that (i) limit the treaty scope (e.g. by excluding certain types of assets from the definition of investment) (12 IIAs); (ii) clarify obligations (e.g. by including more detailed clauses on FET (11 IIAs) and/or indirect expropriation (10 IIAs)); and (iii) contain exceptions to transfer-of-funds obligations and/or carve-outs for prudential measures (all 13 IIAs). Notably, all but one of the treaties reviewed omit the so-called umbrella clause (thus also reducing access to ISDS). Interestingly, already in 2000, 5 of the 13 treaties did not include umbrella clauses.

Investment dispute settlement. Modern IIAs carefully regulate ISDS (e.g. by specifying treaty provisions that are subject to ISDS, excluding certain policy areas from ISDS, setting out a special mechanism for taxation and prudential measures, and/or restricting the allotted time period within which claims can be submitted) (eight IIAs). In addition, four IIAs omit ISDS-type international arbitration (or note that parties agree to discuss ISDS in the future).

With the current momentum of ISDS reform, important questions of policy coherence arise. Taking the examples of Canada and Mexico, in their respective arrangements with the EU, they have committed to a multilateral initiative for an investment court, replacing the traditional ISDS system. By contrast, in the recently concluded CPTPP, Canada and Mexico have agreed to maintain a more traditional ISDS mechanism. And finally, in NAFTA renegotiations, the parties have considered a number of proposals since the start of 2018, among them removing ISDS, including an opt-out provision and providing for binding arbitration for Canada and Mexico only.

In addition to the reform-oriented elements presented in table 1, some of the IIAs concluded in 2017 contain innovative features that have rarely been encountered in earlier IIAs:

- *Conditioning treaty coverage on investors' contribution to sustainable development.* Requiring that a covered investment contribute to the host State's economy or sustainable development (e.g. Burundi–Turkey BIT, Mozambique–Turkey BIT, Turkey– Ukraine BIT)
- *Reducing the role of investor expectations in FET.* Specifying that the mere act of taking, or the failure to take, an action that may be inconsistent with an investor's expectations does not constitute a breach of FET, even if it results in loss or damage to the investment (e.g. China–Hong Kong, China Investment Agreement)
- *Fostering responsible investment.* Including a "best efforts" obligation for investors to respect the human rights of the people involved in investment activities and to promote the building of local capacity and the development of human capital (e.g. Intra-MERCOSUR Agreement)
- *Building capacity for investment facilitation.* Requiring the home State to assist host States in the promotion and facilitation of investment through capacity-building, insurance programmes or technology transfer (e.g. China–Hong Kong, China Investment Agreement; ASEAN–Hong Kong, China Agreement; PACER Plus)
- *Facilitating counterclaims by the respondent party against the claimant investor.* Establishing a mechanism for obtaining investor's consent for counterclaims (e.g. Colombia–United Arab Emirates BIT)

It must be noted that these innovative features do not necessarily translate into a reduced level of investment protection, as most of the IIAs signed in 2017 maintain substantive investment protection standards.

3. Modernizing the existing stock of old-generation treaties

Countries are engaging in modernizing the existing stock of old-generation treaties. Initial reform actions correspond to UNCTAD's 10 Options for Phase 2 of IIA Reform (*WIR17*). In particular, in the past year, countries have been engaging in multilateral reform discussions, including with regard to ISDS, and a small but growing number of countries are issuing interpretations or replacing their old-generation agreements.

This stocktaking of Phase 2 reform actions (table 2) focuses on progress made in 2017 and during the first months of 2018 (and, where relevant, 2016) (figure 2).

Table 2. Overview of reform options: actions and outcomes

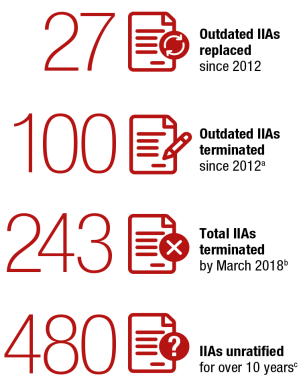
Action option	Outcome
1. Jointly interpreting treaty provisions	Clarifies the content of a treaty provision and narrows the scope of interpretive discretion of tribunals
2. Amending treaty provisions	Modifies an existing treaty's content by introducing new provisions or altering or removing existing ones
3. Replacing "outdated" treaties	Substitutes an old treaty with a new one
4. Consolidating the IIA network	Abrogates two or more old IIAs between parties and replaces them with a new, plurilateral IIA
5. Managing relationships between coexisting treaties	Establishes rules that determine which of the coexisting IIAs applies in a given situation
6. Referencing global standards	Fosters coherence and improves the interaction between IIAs and other areas of international law and policymaking
7. Engaging multilaterally	Establishes a common understanding or new rules among a multitude of countries, coupled with a mechanism that brings about change "in one go"
8. Abandoning unratified old treaties	Conveys a country's intent to not become a party to a concluded but as yet unratified treaty
9. Terminating existing old treaties	Releases the parties from their obligations under a treaty
10. Withdrawing from multilateral treaties	Similar in effect to termination, but leaves the treaty in force among the remaining parties who have not withdrawn

Source: UNCTAD.
Note: This classification is made for illustration purposes only. The table should not be seen as placing possible reform actions in any order of priority.

Jointly interpreting treaty provisions. Countries have not only developed – and sometimes adopted – joint interpretative statements for existing IIAs, but also strengthened the basis for binding interpretation in recently concluded treaties.

- In early 2016, India proposed a Joint Interpretative Statement to approximately 25 countries with which it has IIAs for which the initial period of validity had not expired.
- In October 2017, Bangladesh and India signed the Joint Interpretative Notes for the Bangladesh–India BIT (2009). The Notes add clarity to a number of BIT provisions, including the definitions of investment and investor, the exclusion of taxation measures, FET, NT and MFN, expropriation, essential security and ISDS.
- In October 2016, the EU, its member States and Canada agreed to a Joint Interpretative Instrument on the CETA that sets out the parties' agreement on a number of provisions that have been the subject of public debate and concern (such as the right to regulate and compensation).
- In October 2017, Colombia and France signed a Joint Interpretative Declaration for the Colombia–France BIT (2014) which clarified that the reference to "obligations that arise from international law" means treaties ratified by both parties and should not be interpreted as a legal stability clause or as allowing claims based upon mere breach of contract.
- In October 2017, the Joint Commission of the FTA between Canada and Colombia (2008) adopted a Joint Interpretative Declaration, which reaffirms the parties' right to regulate and clarifies the provisions on "like circumstances", full protection and security, and minimum standard of treatment.

Figure 2. Selected Phase 2 reform actions: facts and figures



Source: UNCTAD.
Note:
[a] These are IIAs for which termination has entered into effect (2012–2018). They include expired treaties, treaties replaced by new ones, terminations by consent and unilaterally denounced treaties.
[b] These are all IIAs for which termination has entered into effect. They include expired treaties, treaties replaced by new ones, terminations by consent and unilaterally denounced treaties.
[c] This includes IIAs concluded through December 2008.

- Several recent IIAs establish joint bodies with a mandate to issue binding interpretations of treaty provisions (e.g. Rwanda–United Arab Emirates BIT (2017); Australia–Peru FTA (2018); Republic of Korea–Republics of Central America FTA (2018)).

Amending treaty provisions. Although amendments were used relatively sparingly in the bilateral context, protocols or exchanges of letters or notes were used in important regional IIAs.

- In March 2018, the remaining 11 parties to the CPTPP agreed to an amended text in select areas while retaining the core elements. With respect to investment (in Chapter 9), the parties agreed to suspend the application of the provisions related to investment agreement, investment authorization and the selection of arbitrators (in part).

- Canada and Chile have updated the investment chapter in their FTA at least three times, the most recent being in 2017, when they added "new and progressive elements" to the chapter (e.g. clarifying existing obligations, reaffirming the States' right to regulate, including a provision on corporate social responsibility (CSR), improving the ISDS mechanism and adding a "rendezvous clause", enjoining the parties to adopt a permanent multilateral tribunal, should such a tribunal be established in the future).

Replacing "outdated" treaties. Since 2012, at least 27 outdated IIAs have been replaced by newer, more modern, treaties.[11]

- In 2017, at least 3 of the 13 IIAs signed replaced older-generation BITs (Argentina–Chile FTA (2017) replaced Argentina–Chile BIT (1991); Turkey–Ukraine BIT (2017) replaced Turkey–Ukraine BIT (1996); Turkey–Uzbekistan BIT (2017) replaced Turkey–Uzbekistan BIT (1992)).

- Since 2016, Turkey has replaced eight outdated treaties (with Belarus, Georgia, Jordan, Moldova, Serbia, Tunisia, Ukraine and Uzbekistan). Among the reforms implemented are more detailed definitions of investment, more precisely formulated general treatment standards (e.g. FET, NT and MFN treatment), new general exceptions and balance-of-payments exceptions, a denial of benefits clause and refinements to ISDS (i.e. exemptions from the scope of ISDS and time limitations for the referral of disputes to ISDS).

- In recent years, Australia has replaced several of its first-generation BITs with investment chapters upon the conclusion of comprehensive FTAs with BIT partner countries (e.g. Australia–Chile (1996)). Australia continues reviewing and renegotiating those BITs that are not captured by current FTA negotiations.

- In March 2018, Ecuador presented its new model treaty, which will be the basis for future negotiations, including with the countries' prior treaty partners. Among the model's most prominent features are a mechanism aimed at the prevention of disputes, exceptions to avoid possible conflicts between the disciplines and the pursuit of legitimate policy objectives by the States, and an appellate stage.

Consolidating the IIA network. Although consolidation is a prominent feature in the EU's nascent treaty practice, it is less common – or yet to be decided on – in other regional or megaregional agreements.

- In March 2018, in conjunction with its signing of the CPTPP, Australia is terminating the underlying BITs it had with Mexico, Peru and Viet Nam.[12]

- Negotiations have concluded for investment chapters in the FTA between the EU and Mexico but continue for investment chapters in the FTAs between the EU and Chile, and the EU and Tunisia and for an investment agreement with China. These agreements are expected to replace all prior BITs concluded with the respective countries by individual EU member States.

Managing relationships between coexisting treaties. Managing treaty relationships is crucial when pursuing policy coherence, an issue taken up in the updated version of UNCTAD's Reform Package for the International Investment Regime (UNCTAD, forthcoming).

[11] See e.g. CETA (2016), which will replace eight BITs between Canada and EU member States (Article 30.8), while the EU–Singapore FTA and the EU–Viet Nam FTA will replace 12 and 22 BITs respectively.
[12] Note that thus far other CPTPP parties have not taken steps to terminate their pre-existing IIAs.

Referencing global standards. Some recent IIAs have included provisions aimed at ensuring more responsible and regulated investment activities through reference to global standards:

- At least 13 recent IIAs refer to CSR standards in a general manner, typically to "internationally recognized standards" in areas such as labour, environment, human rights, anti-corruption and the like (e.g. Intra–MERCOSUR Investment Facilitation Protocol (2017); PACER Plus (2017)).

- At least 6 recent IIAs are more specific, referring to global standards such as the Sustainable Development Goals (SDGs) (e.g. Morocco–Nigeria BIT (2016)); the UN Charter, Universal Declaration of Human Rights and/or International Labour Organization instruments (e.g. EFTA–Georgia FTA (2016); CETA (2016); Armenia–EU Comprehensive and Enhanced Partnership Agreement (2017)); or the Organization for Economic Co-operation and Development (OECD) MNE Guidelines and OECD Principles of Corporate Governance (e.g. CETA (2016); Argentina–Chile FTA (2017)).

Engaging multilaterally. Multilateral developments on international investment issues have gained momentum in 2017, with some of them having a clear IIA reform dimension.

Most clearly related to IIA reform are multilateral discussions on improving ISDS:

- In January 2017, ICSID commenced a public consultation regarding amendments to its arbitration rules. The goal is to modernize and simplify the rules, with a particular focus on reducing the time and cost of ICSID arbitration. Topics under consideration include the appointment and disqualification of arbitrators, third-party funding, consolidation of cases, and transparency and non-disputing party participation.

- In July 2017, during UNCITRAL's 50th annual session, the Commission asked its Working Group III to identify concerns regarding ISDS, to consider whether reform was desirable and, if so, to develop any relevant solutions. At sessions in November 2017 and April 2018, the Working Group completed a review of issues in relation to procedural aspects of ISDS, including the arbitral process, overall consistency and coherence of its outcomes, and issues relating to decision-makers in ISDS proceedings.

- In October 2017, the Mauritius Convention on Transparency in Treaty-based Investor– State Arbitration, also known as the Mauritius Convention on Transparency, entered into force.[13] According to the Convention, the UNCITRAL transparency rules will become part of treaty-based investor–State disputes involving countries that have ratified it. The Mauritius Convention effectively modifies a number of first-generation IIAs (of those countries that have ratified the Convention), thus rendering it a collective IIA reform action.

And one process potentially goes beyond dispute settlement:

- Work on the potential modernization of the Energy Charter Treaty is under way, with discussions set to take place in 2018, involving member States, observers and the industry. The process takes into consideration all the provisions of the ECT, not just the investment protection standards. It is expected that a list of topics for the potential negotiation on modernization will be decided upon by late 2018.

Following the issuance of the 2016 "G20 Guiding Principles for Global Investment Policymaking", some other country groups embarked on designing their own sets of principles, typically informed by those set out in UNCTAD's Investment Policy Framework for Sustainable Development. The formulation of the guiding principles is an important and efficient means to build consensus on the core issues related to international investment policymaking.

- In June 2017, the Joint ACP–UNCTAD Guiding Principles for Investment Policymaking, covering 79 countries, were approved by the ACP Committee of Ambassadors meeting.

- In January 2018, the Guiding Principles for Investment Policymaking for OIC countries, developed in cooperation with UNCTAD and covering 57 OIC countries, were examined at a high-level expert meeting.

[13] As of April 2018, the Convention has been signed by Australia, Belgium, Benin, the Plurinational State of Bolivia, Cameroon, Canada, the Congo, Finland, France, Gabon, The Gambia, Germany, Iraq, Italy, Luxembourg, Madagascar, Mauritius, the Netherlands, Sweden, Switzerland, Syria, the United Kingdom and the United States.

Two additional work streams address specific reform areas as set out in the UNCTAD Road Map:

- *Facilitating investment*. In December, 70 WTO members issued a Joint Ministerial Statement on Investment Facilitation for Development on the margins of the WTO's Eleventh Ministerial Conference. Many of the key elements of these proposals for an Investment Facilitation Agreement built on UNCTAD's Global Action Menu for Investment Facilitation.[14] These elements included transparency, efficiency in procedures, national focal points, technical assistance, investor principles and standards.

- *Ensuring responsible investment*. Initiated in 2014 by the Human Rights Council, work towards an international instrument to regulate the activities of transnational corporations and other business enterprises continued. The third meeting of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights focused its discussions on the content, scope and nature of a future agreement.

- *Multilateral platform for IIA reform*. Benefiting from UNCTAD's comprehensive platform for multilateral engagement, more than 300 experts, including high-level IIA negotiators, representatives from intergovernmental organizations, civil society, academia and the private sector convened in Geneva during 9–11 October 2017, for UNCTAD's Annual High-level IIA Conference. Attendees discussed UNCTAD's Reform Package for the International Investment Regime and exchanged experiences and good practices.

Abandoning unratified old treaties. Although explicit abandonment actions have not been taken, several countries seem to have – de facto – abandoned unratified treaties or put their BIT negotiations on hold:

- More than 480 IIAs that were concluded over 10 years ago have not entered into force, suggesting that the parties to these IIAs have decided to not pursue their ratification. Moreover, as stated in UNCTAD's October 2017 High-level IIA Conference, in 2008, Ecuador interrupted the ratification of treaties that had been signed but not ratified (with Costa Rica and with the Russian Federation) and, in 2017, Pakistan announced that it had halted certain BIT ratification processes.

- Several countries have also issued moratoriums on the conclusion of new BITs (e.g. Botswana, in 2013, citing implementation challenges; Namibia, in 2014, halting any future BIT negotiations until a new investment policy is implemented; Montenegro, in 2016, linking the moratorium to the development of a new model; Pakistan, in 2017, pending the design, in close cooperation with UNCTAD, of a new legal framework for future BITs and a road map for the existing ones). In addition, as of 2003, Chile stopped negotiating BITs, instead negotiating investment-related provisions as part of FTAs.

- Several countries that previously had actively negotiated BITs have not concluded any new BITs for the past five years (among them, Malaysia, Namibia and the Philippines).

Terminating existing old treaties. Countries have continued the trend of terminating old treaties, with several new terminations coming into effect in 2017.

- At least 22 terminations entered into effect in 2017, including 17 for India. Ecuador sent 16 notices of termination.

- At least two intra-EU BITs were terminated in 2017 (Denmark's BITs with Estonia (1991) and Romania (1994)).

- Since 2012, at least 100 IIAs have been effectively terminated, either by consent or unilaterally.

Withdrawing from multilateral treaties. No example could be found for this reform option during this reporting period (*see WIR17*), suggesting that withdrawal from multilateral treaties is not currently a preferred reform path.

[14] In June 2016, UNCTAD launched its Global Action Menu for Investment Facilitation. Its more than 40 action items for countries to adapt and adopt are intended to fill a systemic gap in national and international investment policymaking. Since its launching, the Global Action Menu has received strong support from all investment development stakeholders, including at several high-level intergovernmental meetings.

4. Lessons learned and way forward

Phase 1 of IIA reform has seen steady progress and significant achievements, and Phase 2 is gaining significant momentum, as a small but growing number of countries have begun to directly tackle their outdated BITs. In addition, an increasing number of countries are actively considering the best policy options for initiating Phase 2 of IIA reform. The more than 3,000 first-generation treaties in existence today (representing some 90 per cent of the IIA universe) present further opportunities for Phase 2 reform actions.

A better understanding of the motivations and challenges related to Phase 2 of IIA reform can help strengthen current reform efforts. With a view to providing the best possible backstopping functions, UNCTAD has conducted a survey of negotiators, relating to motivations, challenges and early results of Phase 2. Some of the results are discussed here.

Countries have different but related motivations to start engaging in Phase 2 reform actions. Motivations relate predominantly to minimizing the risk of the State's exposure to ISDS claims as well as wishing to enhance the sustainable development dimension of IIAs and ensure the State's right to regulate.

When aiming to tackle their outdated IIAs effectively, countries face a number of challenges. These include opposition from treaty partners to reforming existing IIAs, insufficient or unavailable capacity (e.g. human resources, legal, financial), and challenges related to internal procedures and coordination processes for building consensus and political will on the need to reform (e.g. interministerial coordination challenges, identification of priority treaties to be reformed, assurance of coherence between reform efforts at different levels of policymaking).

Initial lessons learned can already be identified for engaging in Phase 2 of IIA reform. They relate overwhelmingly to the importance of developing a national IIA reform strategy in light of national development objectives, conducting an IIA review to identify inconsistencies and setting up interministerial working groups.

From the survey responses, one can distil potential reasons for the relatively slow progress associated with Phase 2 of reform:

- Reforming the existing stock of IIAs requires, for the most part, the agreement of more than one country (with the exception of unilateral terminations).
- Countries have a preference for adopting a more gradual approach (BIT by BIT reform) instead of reforming national IIA networks in a wholesale manner.
- Some policymakers may have the perception that Phase 2 IIA reform will reduce a country's attractiveness to foreign investors.
- There is lack of awareness at the domestic level of the importance of Phase 2 IIA reform.

Policymakers and IIA negotiators should carefully consider the pros and cons of maintaining the existing stock of outdated IIAs and formulate a comprehensive IIA policy in line with their country's national development strategy. Through its evidence-based policy analysis and advisory work, together with its intergovernmental consensus-building function, which create opportunities for sharing experiences and lessons learned, UNCTAD can help countries move forward on this endeavour. At the same time, consideration should also be given to maximizing synergies between IIAs and national legal frameworks for investment and managing the interaction between investment and other bodies of law, two issues taken up as part of "Phase 3 of Reform", in UNCTAD's forthcoming World Investment Report.

The next High-level IIA Conference, part of the part of the October 2018 World Investment Forum (WIF) will offer a forum to take stock of reform so far, and to chart the way forward to the third and final phase of IIA reform.

IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS

UNCTAD/DIAE/PCB/INF/2018/1

For the latest investment trends and policy developments, please visit the website of the UNCTAD Investment and Enterprise Division

unctad.org/diae **investmentpolicyhub.unctad.org**

@unctadwif

For further information, please contact
Mr. James X. Zhan
Director
Investment and Enterprise Division UNCTAD

diaeinfo@unctad.org **+41 22 917 57 60**

UNITED NATIONS
UNCTAD