MARCH 2019 ISSUE 1

IIA ISSUES NOTE
INTERNATIONAL INVESTMENT AGREEMENTS

UNITED NATIONS
UNCTAD

REFORMING INVESTMENT DISPUTE SETTLEMENT: A STOCKTAKING

HIGHLIGHTS

- Investor-State dispute settlement (ISDS) continues to be controversial, spurring debate in the investment and development community and the public at large. States are responding to challenges and concerns surrounding ISDS through different avenues.
- In the international investment agreements (IIAs) signed in recent years, countries have implemented a large number of ISDS reform elements as part of broader IIA reform. Nearly all IIAs concluded in 2018 contain at least one, and most contain several, mapped ISDS reform elements (annex table 1). Most of these elements resonate with reform options identified by UNCTAD since 2013.
- Five principal approaches emerge from IIAs signed in 2018: I. No ISDS, II. Standing ISDS tribunal, III. Limited ISDS, IV. Improved ISDS procedure and V. Unreformed ISDS mechanism (figure 1). 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.
- ISDS reform is pursued across various country groupings, by countries at different levels of development and from different geographical regions. At the same time, individual countries and regions have been the driving forces behind certain approaches (e.g. Brazil, India, the European Union (EU)).
- ISDS reform is making its way into plurilateral and megaregional initiatives, such as the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP), the United States–Mexico–Canada Agreement (USMCA) and the EU–Singapore Investment Protection Agreement (IPA). Also, multilateral engagement on ISDS reform is gaining prominence, including through UNCITRAL Working Group III discussions on the possible reform of ISDS and processes at ICSID for the amendment of its rules.
- Investment dispute settlement must be designed to produce just outcomes that are viewed as reflecting key societal values. Developments outside of the traditional realm of investment policymaking may provide insights for further thinking on the rebalancing of investment dispute settlement (e.g. the Sustainable Development Goals (SDGs), particularly goal 16; the UN Guiding Principles on Business and Human Rights; and the "zero draft" on a legally binding instrument released by the UN Working Group on Business and Human Rights).
- UNCTAD, as the United Nations' focal point for international investment and development, backstops ongoing policymaking processes with a view to ensuring that the IIA regime – including the way in which investment disputes are settled – works for sustainable development. UNCTAD supports sustainable development-oriented IIA reform through its three pillars of work: development of policy tools based on research and policy analysis; technical assistance, and intergovernmental consensus building.

Executive summary

Section 1: Reform options emerging from recently concluded IIAs

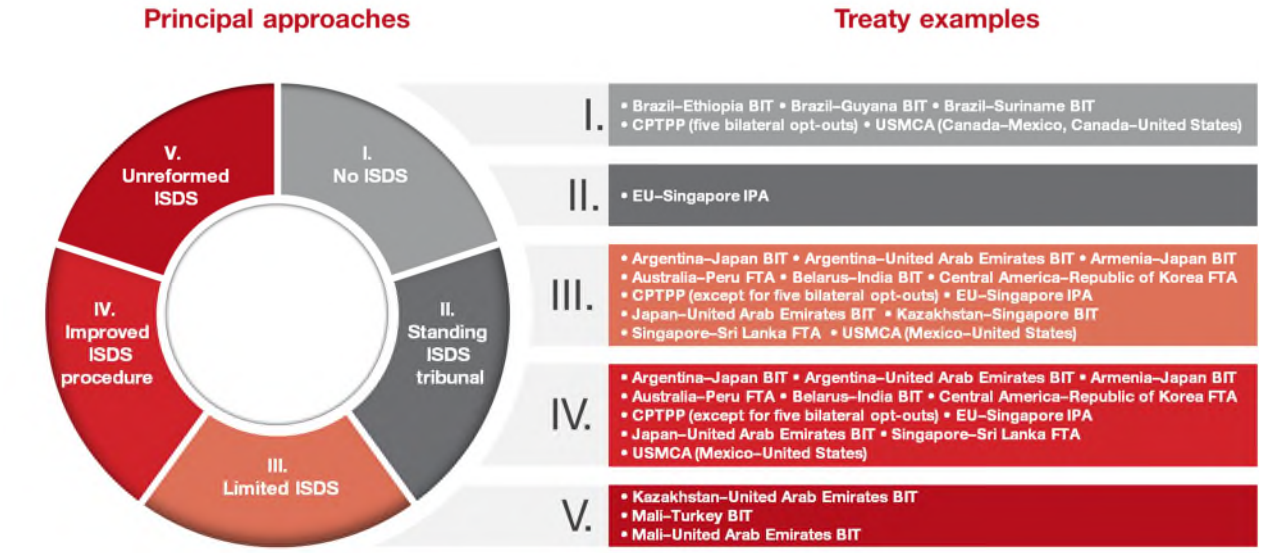
In their recent IIAs, countries have implemented a large number of ISDS reform elements as part of broader IIA reform. Nearly all IIAs concluded in 2018 contain at least one, and most contain several, mapped ISDS reform elements (annex table 1). Five mapped treaties stand out by containing 15 or more (the Australia–Peru FTA, the Central America–Republic of Korea FTA, CPTPP, the EU–Singapore IPA and the USMCA).

Most of these elements resonate with the options identified by UNCTAD in the Investment Policy Framework for Sustainable Development (2015) and in the Road Map for IIA Reform (2015), subsequently included in the Reform Package for the International Investment Regime (2018).

Alongside ISDS-specific reform elements, many of the IIAs reviewed also include important modifications to other treaty components that have implications for ISDS reform (e.g. a refined treaty scope, clarified substantive provisions and added exceptions). These are not the focus of this IIA Issues Note, however.

Overall, five principal approaches emerge from IIAs signed in 2018 (figure 1). These include: I. No ISDS, II. Standing ISDS tribunal, III. Limited ISDS, IV. Improved ISDS procedure and V. Unreformed ISDS mechanism. 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.

Figure 1. Taking stock of ISDS reform: Principal approaches used in IIAs concluded in 2018



Source: UNCTAD.

ISDS reform (approaches I to IV) is pursued across various country groupings, by countries at different levels of development and from different geographical regions. At the same time, individual countries and regions have been the driving forces behind certain approaches (e.g. Brazil, India, the EU). Sometimes, specific negotiating dynamics may result in a situation where the treaty practice of individual countries is not fully coherent. Also, asymmetric approaches are used in some plurilateral treaties, which results in different ISDS-related arrangements for specific treaty relationships (e.g. CPTPP, USMCA).

Section 2: Developments by country grouping and geographical region

Developing and transition economies

- In Africa, several regional instruments have adopted a cautious attitude towards ISDS and have often omitted it. Domestic developments in some African countries have also moved into this direction.
- In Asia, regional ISDS reform efforts have been limited. The future outcomes of large regional negotiations are difficult to predict. At the country level, India has been a main innovator in the ISDS area. Also, two countries (Singapore and Viet Nam) have agreed to the investment tribunal system in recent treaties with the EU.
- In Latin America, a variety of reform efforts have been embraced at the regional and country-level. Brazil has spearheaded the move towards dispute prevention and State-State mechanisms as alternatives to ISDS with its Cooperation and Investment Facilitation (CIFA) model.
- ISDS reform developments in transition economies are characterized by two diverging approaches. The South-East Europe (SEE) group of countries are in the process of moving closer to the EU's new investment policy approach. No major policy shifts have occurred on ISDS in other transition economies.

Developed economies

- Procedural improvements and ISDS limitations are frequent treaty features in recent IIAs signed by developed countries. At the same time, developed countries take different approaches to IIA reform.
- The EU is proceeding with plans for establishing a multilateral investment court. Recent EU member States' bilateral investment treaties (BITs) with third countries include certain procedural improvements, aligned with the EU's broader investment policy approach. New policy documents have set a timeline for the termination of intra-EU BITs, which will remove access to the ISDS mechanisms contained therein.
- In North America, Canada and the United States are reassessing and readjusting their approaches. Their recent treaties display a wide spectrum of ISDS reform approaches, from improved procedures to omission of ISDS.
- Other developed countries such as Australia have selectively included ISDS (with procedural improvements) on a treaty-by-treaty basis. New Zealand selectively excluded compulsory ISDS under CPTPP (with several parties) and announced opposition to ISDS in future FTA negotiations. Japan has adopted procedural reform features in some recent treaties.

Section 3: Plurilateral and megaregional developments

ISDS reform is making its way into plurilateral and megaregional initiatives, such as the CPTPP, USMCA and the EU–Singapore IPA.

- In the CPTPP, signatories have adopted an ISDS mechanism with procedural improvements. Some variety in ISDS approaches among CPTPP signatories was created by side letters signed by several countries on a bilateral basis. The bilateral side letters (1) removed or modified ISDS provisions between specific countries or (2) terminated pre-existing IIAs (replacing overlapping ISDS commitments). Overall, this created asymmetric ISDS arrangements under CPTPP, with ISDS opt-outs done in parallel to the creation of many new treaty relationships offering ISDS.
- Compared to the North American Free Trade Agreement (NAFTA), the USMCA's investment chapter (Chapter 14) significantly curtails ISDS. Recourse to ISDS will not be available between Canada–United States and Canada–Mexico (however, access to ISDS in the Canada–Mexico relationship is available under the CPTPP). Between Mexico and the United States, the USMCA includes a 30-months local remedies requirement and strictly circumscribes the substantive provisions subject to ISDS.
- A key feature of the EU's investment policy approach, first set out in 2015, is the two-tier investment court system. It consists of a first instance tribunal and an appeal tribunal. Party-appointed arbitrators (selected by the disputing parties) are replaced by tribunal members appointed by State Parties, assigned to specific cases on a rotational basis. The new institutional set-up for dispute settlement between investors and States has since been implemented with slight variations in the Canada–EU Comprehensive Economic and Trade Agreement (CETA), the EU–Singapore IPA and the EU–Viet Nam IPA. Any pre-existing BITs between the EU member States and the relevant third country, including the ISDS mechanisms contained therein, are set for termination.

Section 4: Multilateral developments

Multilateral engagement on ISDS reform is gaining prominence. According to the three-phase mandate provided by the UNCITRAL Commission in July 2017, Working Group III is tasked i) to identify and consider concerns regarding ISDS; ii) to consider whether ISDS reform was desirable; and iii) if it were to conclude that reform was desirable, to develop any relevant solutions to be recommended to the Commission.

The explicit focus on ISDS – procedural aspects of dispute settlement – of the Working Group's mandate means that certain broader aspects that affect the legitimacy of the system (such as balanced substantive IIA rules) and some of the other possible solutions (e.g. replacing ISDS with domestic dispute resolution or State-State proceedings) are not a central part of the deliberations. UNCITRAL deliberations have been receiving considerable attention, from policymakers as well as the broader investment and development community. For example, in March 2019, several independent human rights experts published a letter outlining concerns related to the current scope of deliberations in the Working Group.

The ICSID Secretariat recently published proposed amended arbitration rules (under the ICSID Convention and the Additional Facility). The current process to amend the rules was commenced by the Secretariat in 2016 with a particular focus on the time and cost of ICSID arbitration proceedings. Aiming at comprehensive changes to modernize the rules, the proposed amendments address topics such as third-party funding, publication of awards, initial procedures, security for costs, disqualification of arbitrators, timing of awards and expedited proceedings. A vote on the amendments is expected in 2019 or 2020.

Section 5: Rebalancing investment dispute settlement

Pursuit of the SDGs and the 2030 agenda also implies changes to international investment policymaking, including IIAs. Both substantive rules and rules on dispute settlement need to be oriented towards today's sustainable development imperative, which is the overarching objective of IIA reform.

The following developments outside of the traditional realm of investment policymaking may provide insights for further thinking on the rebalancing of investment dispute settlement:

- SDG 16 (Peaceful and inclusive societies for sustainable development), which calls on States to "promote the rule of law at the national and international levels and ensure equal access to justice for all";
- The UN Guiding Principles on Business and Human Rights;
- The "zero draft" on a legally binding instrument to regulate – in international human rights law – the activities of TNCs (UN Working Group on Business and Human Rights);
- "The Hague Rules on Business and Human Rights Arbitration" project; and
- Other research and policy analysis on access to justice and IIAs conducted by academia and think tanks.

Conclusions and way forward

While it is too early to assess the concrete impact of today's reform efforts, two points that have guided UNCTAD's work on improving investment dispute settlement remain crucial. First, reform of investment dispute settlement must not be viewed in isolation. It needs to be synchronized with reform of the substantive investment protection rules embodied in IIAs. Second, reform of both substantive rules and rules on dispute settlement needs to be oriented towards today's sustainable development imperative. Creating a policy regime that effectively mobilizes investment and channels it towards the SDGs is the goalpost. The investment dispute settlement system must be designed to produce just outcomes that are viewed as reflecting key societal values. Transparent and inclusive decision-making on reform as well as cross-fertilization and coordination between different processes, such as the 2030 agenda for sustainable development, are essential in this regard.

UNCTAD, as the United Nations' focal point for international investment and development, backstops ongoing policymaking processes with a view to ensuring that the IIA regime – including the way in which investment disputes are settled – works for sustainable development. UNCTAD supports sustainable development-oriented IIA reform through its three pillars of work: development of policy tools based on research and policy analysis; technical assistance, and intergovernmental consensus building.

Introduction

ISDS remains a controversial and dynamic aspect of international investment policymaking. The annual number of known treaty-based ISDS cases remains at record level, with most cases invoking old-generation treaties. As evidenced by recent debates, ISDS concerns set out by UNCTAD in 2013 largely persist today. The seven ISDS challenges set out in UNCTAD's 2013 World Investment Report (*WIR13*) include: legitimacy, transparency, nationality planning, consistency of arbitral decisions, erroneous decisions, arbitrators' independence and impartiality, and financial stakes. UNCTAD's options for reforming investment dispute settlement were launched in response to these concerns (*WIR15,* table 1).

During the past few years, ISDS reform has been making its way into mainstream investment policymaking and UNCTAD options have shaped such reform. At the same time, reform depth varies: some countries seek more comprehensive reforms covering a wider array of issues, while others seek rather marginal reforms. Most of the reform activity continues to take place at the treaty level, including bilateral, regional, plurilateral agreements. Moreover, different stakeholders have different understandings of what the term "reform" entails in the context of investment dispute settlement, which also becomes evident in multilateral processes (e.g. at UNCITRAL).

Taking stock of where reform stands today, this IIA Issues Note traces ISDS-related reform developments in recently concluded IIAs (section 1); reform actions by country grouping and geographical region (section 2); recent plurilateral and megaregional treaties (section 3); multilateral processes (section 4); and relevant processes occurring outside the traditional realm of investment policymaking (section 5).

1. Reform options emerging from recent treaty practice

In the IIAs signed in recent years, countries have implemented a large number of ISDS reform elements as part of broader IIA reform. Most of these elements follow the options identified by UNCTAD in the Investment Policy Framework for Sustainable Development (2015) and in the Road Map for IIA Reform (2015) (table 1), subsequently included in the Reform Package for the International Investment Regime (2018).

Alongside ISDS-specific reform elements, many of the IIAs reviewed also include important modifications to other treaty components that have implications for ISDS reform. Among others, these are the treaty scope (refined definitions of investment and investor, exclusions of sectors or policy areas from the treaty scope), key substantive rules (e.g. refined provisions on fair and equitable treatment and indirect expropriation) and exceptions (e.g. general public policy exceptions, security exceptions). While these elements have a pronounced effect on the breadth and "bite" of a treaty's ISDS mechanism, they are not the focus of this IIA Issues Note.

Table 1. Sets of options for reforming investment dispute settlement

Reforming existing investor-State arbitration		Replacing existing investor-State arbitration
Fixing existing ISDS mechanisms	Adding new elements to existing ISDS mechanisms	
1. **Improving the arbitral process**, e.g. by making it more transparent and streamlined, discouraging submission of unfounded claims, addressing ongoing concerns about arbitrator appointments and potential conflicts	1. **Building in effective alternative dispute resolution** (ADR)	1. **Creating a standing international investment court**
2. **Limiting investors' access**, e.g. by reducing the subject-matter scope, circumscribing the range of arbitrable claims, setting time limits, and preventing abuse by "mailbox" companies	2. **Introducing an appeals facility** (whether bilateral, regional or multilateral)	2. **Replacing ISDS by State-State dispute settlement**
3. **Using filters for channelling sensitive cases** to State-State dispute settlement		3. **Replacing ISDS by domestic dispute resolution**
4. **Introducing local litigation requirements** as a precondition for ISDS		

Source: UNCTAD, *WIR15* and Reform Package for the International Investment Regime (2018).

a. IIAs signed in 2018

This section examines the take-up of ISDS reform in IIAs concluded in 2018.[1] Annex table 1 contains a detailed mapping of the 2018 IIAs.

- **Overall prevalence of reform elements:** Nearly all IIAs concluded in 2018 contain at least one, and most contain several, mapped ISDS reform elements. Five treaties contain 15 or more (table 2). Looking at reform elements that relate to procedural issues, some procedural reform elements are used particularly often, while others appear in a very small number of IIAs (box 1).

Table 2. Prevalence of mapped ISDS reform elements in IIAs concluded in 2018

2–4 reform elements	5–8 reform elements	9–12 reform elements	13–24 reform elements
• Japan–United Arab Emirates BIT (4) • Kazakhstan–Singapore BIT (2)	• Armenia–Japan BIT (5) • Singapore–Sri Lanka FTA (7)	• Argentina–Japan BIT (11) • Argentina–United Arab Emirates BIT (11)	• Belarus–India BIT (13) • Australia–Peru FTA (15) • Central America–Republic of Korea FTA (15) • CPTPP (15) • EU–Singapore IPA (15) • USMCA (16)

Source: UNCTAD, based on annex table 1.

Note: This table does not include treaty examples that omit ISDS (Brazil–Ethiopia BIT, Brazil–Guyana BIT, Brazil–Suriname BIT) or contain an unreformed ISDS mechanism (Kazakhstan–United Arab Emirates BIT, Mali–Turkey BIT, Mali–United Arab Emirates BIT), which are shown in table 3.

Five principal approaches

Overall, five principal approaches emerge from IIAs signed in 2018 (table 3):

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 a so-called "case-by-case consent").

II. **Standing ISDS tribunal:** The system of ad hoc investor-State arbitration and party appointments is replaced with a standing court-like tribunal (including appellate level), with members appointed by contracting parties for a fixed term.

III. **Limited ISDS:** This may involve a requirement to exhaust local judicial remedies (or to litigate in local courts for a prolonged time-period) before turning to arbitration, the narrowing of the ISDS subject-matter scope (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from the ISDS scope) and/or the setting of a time limit for submitting ISDS claims.

IV. **Improved ISDS procedure:** The treaty preserves the existing system of investor-State arbitration but with certain important modifications (box 1). Such modifications may aim, amongst others, at increasing States' control over the proceedings, opening them up to the public and third parties, enhancing suitability and impartiality of arbitrators, increasing efficiency of proceedings, and limiting remedial powers of ISDS tribunals.

V. **Unreformed ISDS mechanism:** The treaty preserves the basic ISDS design typically used in the old-generation IIAs, characterized by broad scope and lack of procedural refinements.

A number of observations can be made with respect to these five principal approaches to ISDS-related reform.

- **Depth of individual reform approaches:** Some of the approaches are more far-reaching than others. "No ISDS" and "Unreformed ISDS mechanism" are at the outer ends of the spectrum, each coming with its own set of significant implications. The extent of reform engagement within each approach can also vary (significantly) from treaty to treaty. "Limited ISDS" may range from a treaty that requires exhaustion of local remedies to a treaty that sets a three-year time limit for submitting claims. "Improved ISDS procedure" is the approach with the largest number of mapped reform elements, covering different aspects of reform (box 1).

[1] Eighteen IIAs concluded in 2018 with texts available were reviewed for this section.

- **Combination of reform approaches:** Three of the five principal approaches are not mutually exclusive and can be combined. For example, procedural improvements (approach IV) can be used as a standalone approach or in combination with approaches II or III. "I. No ISDS" and "V. Unreformed ISDS mechanism" are self-standing approaches.
- **Frequency of reform approaches:** It varies how often each approach is used (table 3). For 2018, the most frequently used approaches have been "Limited ISDS" and "Improved ISDS procedure", often used in combination.

Table 3. Principal approaches to ISDS reform: distribution of IIAs concluded in 2018

No ISDS	Standing ISDS tribunal[a]	Limited ISDS[b]	Improved ISDS procedure[c]	Unreformed ISDS mechanism[d]
• Brazil–Ethiopia BIT • Brazil–Guyana BIT • Brazil–Suriname BIT • CPTPP (five bilateral opt-outs) • USMCA (Canada–Mexico, Canada–United States)	• EU–Singapore IPA	• Argentina–Japan BIT • Argentina–United Arab Emirates BIT • Armenia–Japan BIT • Australia–Peru FTA • Belarus–India BIT • Central America–Republic of Korea FTA • CPTPP (except for five bilateral opt-outs) • EU–Singapore IPA • Japan–United Arab Emirates BIT • Kazakhstan–Singapore BIT • Singapore–Sri Lanka FTA • USMCA (Mexico–United States)	• Argentina–Japan BIT • Argentina–United Arab Emirates BIT • Armenia–Japan BIT • Australia–Peru FTA • Belarus–India BIT • Central America–Republic of Korea FTA • CPTPP (except for five bilateral opt-outs) • EU–Singapore IPA • Japan–United Arab Emirates BIT • Singapore–Sri Lanka FTA • USMCA (Mexico–United States)	• Kazakhstan–United Arab Emirates BIT • Mali–Turkey BIT • Mali–United Arab Emirates BIT

Source: UNCTAD, based on annex table 1.

Note: [a] Excluding treaties envisaging a possible future appellate mechanism (bilateral or multilateral) to review ISDS awards. [b] The extent of reform engagement within this approach can (significantly) vary from treaty to treaty. [c] Treaties that include at least two mapped procedural innovations (box 1) are included in the "Improved ISDS procedure" category. [d] Treaties that include no more than one mapped procedural innovation (box 1) and none of the characteristics present in other categories are placed in the "Unreformed ISDS mechanism" category.

Box 1. Improved ISDS procedure: reform elements

Mapped reform elements grouped under the "Improved ISDS procedure" approach:

Enhancing States' role in ISDS

1. Enabling State Parties to issue joint treaty interpretations binding on tribunals
2. Requiring certain questions to be submitted to State Parties for joint determination
3. Enabling non-disputing State Parties to participate in the proceedings
4. Enabling disputing parties to review and comment on the draft arbitral award
5. Enabling the respondent State to submit counterclaims

Enhancing the suitability and impartiality of arbitrators/adjudicators

6. Including rules on qualifications of arbitrators/adjudicators, a code of conduct and/or rules on conflicts of interest
7. Prohibiting "double-hatting" of arbitrators/adjudicators (simultaneously acting as counsels or experts in other ISDS proceedings)

Enhancing the efficiency of dispute settlement

8. Enabling early dismissal of manifestly unmeritorious (frivolous) claims
9. Enabling consolidation of related claims
10. Establishing a time limit on the maximum duration of ISDS proceedings
11. Allowing for voluntary non-binding ADR procedures to resolve investor-State disputes

Box 1. Improved ISDS procedure: reform elements

Opening up ISDS proceedings to the public and third parties

12. Including rules on transparency of ISDS proceedings (requiring publication of ISDS documents and/or holding public hearings)
13. Enabling participation in proceedings of interested third parties (amici curiae)

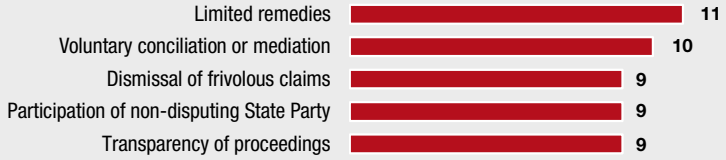
Limiting remedial powers of tribunals

14. Limiting legal remedies that tribunals may grant to investors
15. Limiting the types of damages that may be awarded as compensation for a treaty breach

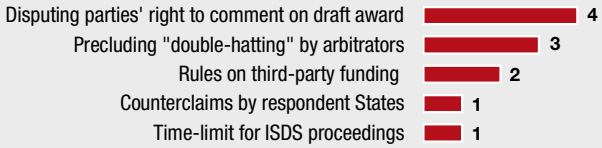
Other improvements

16. Including rules on third-party funding (prohibiting it, or requiring disclosure)

Box figure 1. Most frequent procedural reform elements in 2018 IIA (Number of IIAs)



Box figure 2. Least frequent procedural reform elements in 2018 IIAs (Number of IIAs)



Source: UNCTAD, based on annex table 1.

Country and treaty practice

- **Adoption of reform approaches across country groupings:** ISDS reform (approaches I to IV) is pursued by countries at different levels of development and across geographical regions.
- **Driving forces:** At the same time, individual countries and regions have been the driving forces behind certain approaches, based on their new models and negotiating approaches. For example, Brazil's CIFA model has been operationalized, with some variations, in treaties that exclude ISDS and focus instead on dispute prevention and State-State dispute settlement. The EU's approach is reflected in treaties that dispose of the ad hoc arbitration procedure and party-appointed arbitrators in favour of standing tribunals (including appellate level) staffed with fixed-term adjudicators. India's new model BIT, reflected in one signed treaty so far, has started to shape the country's new treaty practice. The Belarus–India BIT requires exhaustion of local remedies, excludes certain disputes, limits the jurisdiction of the tribunal, increases Contracting States' involvements and refers to a possible future appellate mechanism.
- **Negotiating dynamics:** Individual countries' treaty practice is the result of specific negotiating dynamics and hence not always coherent. For example, the treaties of the United Arab Emirates with Mali and Kazakhstan display less than two reform elements, while the country's BIT with Argentina displays more than 10 elements. Japan's treaties with Armenia and the United Arab Emirates display five and four reform elements. However, Japan adopted eleven reform elements in its BIT with Argentina and 15 in the CPTPP.
- **Asymmetric approaches:** Some plurilateral treaties have adopted an asymmetric approach where ISDS-related obligations of the contracting parties differ for different treaty relationships. For example, in the context of CPTPP, New Zealand has partnered with five countries to omit access to ISDS under this treaty. Under the USMCA, Canada opted out of the ISDS system altogether. The treaty's ISDS provisions apply to the Mexico–United States relationship only and access has been significantly curtailed.[2]

[2] The USMCA limits the scope of ISDS to alleged breaches of only three substantive obligations – national treatment, most-favoured-nation treatment (both limited to post-establishment treatment only) and direct expropriation. In addition, the USMCA requires that investors seek recourse in local courts for a minimum of 30 months before turning to arbitration. Investors who are party to "covered

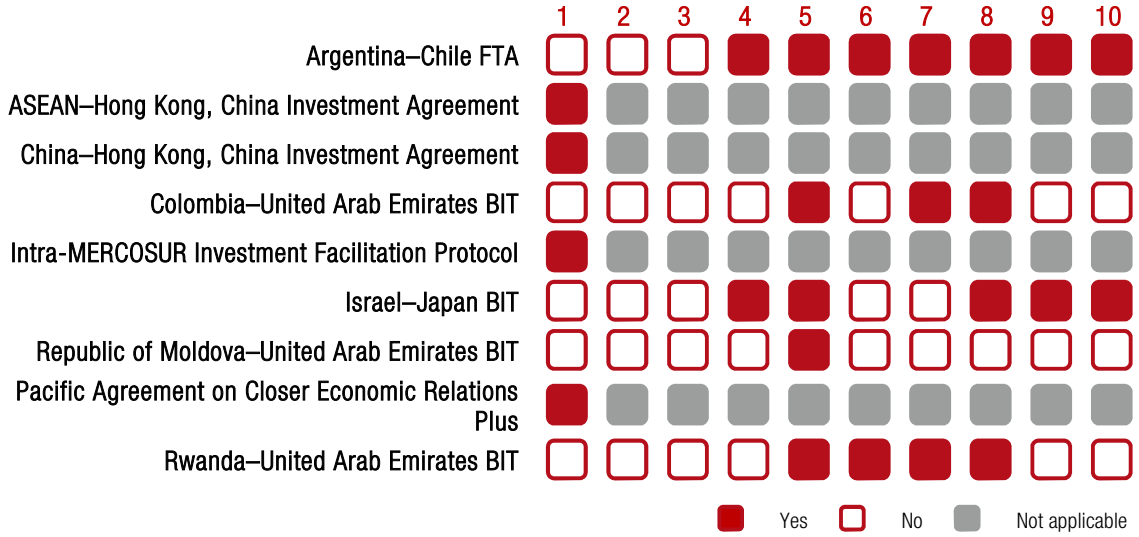
b. IIAs signed in 2017

The reviewed IIAs for 2017, although fewer in number compared to 2018, display some of the same general approaches to ISDS overall (table 4). For example:

- **No ISDS:** ASEAN–Hong Kong, China Investment Agreement (with a placeholder for a future ISDS provision), China–Hong Kong Investment Agreement, the Intra-MERCOSUR Investment Facilitation Protocol, the Pacific Agreement on Closer Economic Relations Plus.
- **Limited ISDS:** Argentina–Chile FTA, Colombia–United Arab Emirates BIT, Israel–Japan BIT, Republic of Moldova–United Arab Emirates BIT, Rwanda–United Arab Emirates BIT.
- **Improved ISDS procedure:** Argentina–Chile FTA, Colombia–United Arab Emirates BIT, Israel–Japan BIT, Rwanda–United Arab Emirates BIT.

No treaties reviewed for that year used the "Standing ISDS tribunal" approach or contained an "Unreformed ISDS mechanism".

Table 4. Overview of ISDS reform elements in 2017 IIAs



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 appellate level) consisting of fixed-term adjudicators

III. Limited ISDS

3 Requiring investors to pursue local remedies (for 18 months or more) or to exhaust of 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 procedure

6 Enhancing States' 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/adjudicators: rules on qualifications, code of conduct, conflict of interest rules; "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 ADR procedures

9 Opening up 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: Based on 9 IIAs concluded in 2017 for which texts are publicly available, not including "framework agreements" that lack substantive investment provisions. Available IIA texts can be accessed at UNCTAD's IIA Navigator at http://investmentpolicyhub.unctad.org/IIA.

government contracts" in certain sectors may claim breach of the wider range of treaty protections, including e.g. minimum standard of treatment and indirect expropriation (USMCA, Annex 14-E).

2. Developments by country grouping and geographical region

a. Developing economies: Africa, Asia, Latin America and the Caribbean

Africa

Several African regional instruments have adopted a cautious attitude towards ISDS and have often omitted it. Domestic developments in some African countries also moved into this direction. The Continental Free Trade Agreement, currently under negotiation, will unveil the latest thinking in the area.

Selected examples include:

- The amendments to the SADC Finance and Investment Protocol (2016)[3] stipulate investors' right of access to domestic courts, judicial and administrative tribunals, and omit access to ISDS (international arbitration).[4]
- Under the draft Pan-African Investment Code (PAIC) (2016), envisaged as a guiding instrument for African Union member States, States "may, in line with their domestic policies, agree to utilize the Investor–State dispute settlement mechanism" (i.e. provide case-by-case consent), subject to the exhaustion of local remedies and other conditions.[5] The Code also stipulates that arbitrations may be conducted at African public or private alternative dispute resolution centres. PAIC strengthens the role of defending host States by allowing them to initiate counterclaims against investors.
- The ECOWAS Supplementary Investment Act (2009) does not grant ISDS but directs investors to use local remedies.[6]
- The COMESA Common Investment Agreement (CIA) (2007) sets out a number of procedural improvements (e.g. time limit on the submission of claims of 3 years, transparency requirements). Also the CIA allows member States to bring counterclaims.[7]
- In the phase II of negotiations under the African Continental Free Trade Agreement (2018), expert discussions on investment dispute settlement are currently under way (preparing the technical issues for negotiations). Different reform-oriented approaches and options are being envisaged.

In terms of developments at the country level, the Morocco–Nigeria BIT (2016) may serve as an example for a treaty using a "Limited ISDS" approach, as it requires consultations and negotiations by the State Parties' joint committee as well as the exhaustion of local remedies prior to ISDS recourse. Moreover, some countries have recently adopted national investment laws that focus on ADR and domestic remedies (box 2). Several countries have also issued moratoriums on the conclusion of new BITs (e.g. Botswana in 2013, Namibia in 2014) or terminated BITs (e.g. South Africa).

Box 2. The interaction between IIAs and national investment laws

Although national and international investment policymaking is structurally distinct (*WIR17*, *WIR18*), there are instances where the two dimensions interact. The resolution of investment disputes is one such instance.

ISDS is less common in national investment laws than in IIAs. Some 59 per cent of national investment laws have ISDS clauses, often using so-called case-by-case consent (only 24 out of 66 laws provide advance consent to ISDS). Under the case-by-case approach, national laws offer the possibility of ISDS but require an additional act of consent by the host State government before an ISDS arbitration can go forward.

[3] The 16 member States of the Southern African Development Community (SADC) are Angola, Botswana, Comoros, Democratic Republic of Congo, Eswatini, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Tanzania, Zambia and Zimbabwe.
[4] Amended Annex, Art. 25.
[5] The draft PAIC is available at https://au.int/sites/default/files/documents/32844-doc-draft_pan-african_investment_code_december_2016_en.pdf.
[6] Art. 33(6). The 15 member States of the Economic Community of West African States (ECOWAS) are Benin, Burkina Faso, Cabo Verde, Côte d'Ivoire, Gambia, Ghana, Guinea, Guinea-Bissau, Liberia, Mali, Niger, Nigeria, Senegal, Sierra Leone and Togo.
[7] Art. 28. The 19 member States of the Common Market for Eastern and Southern Africa (COMESA) are Burundi, Comoros, the Democratic Republic of Congo, Djibouti, Egypt, Eritrea, Eswatini, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Sudan, Seychelles, Uganda, Zambia and Zimbabwe.

Box 2. The interaction between IIAs and national investment laws

Some African countries have recently adopted national investment laws that focus on amicable settlement or ADR (e.g. mediation) and domestic remedies, without providing advance consent to ISDS (international arbitration). Examples include:

- Egypt's Investment Law (2017) (no advance consent to ISDS)
- Namibia's Investment Promotion Act (2016) (no advance consent to ISDS; arbitration in Namibia possible upon explicit consent)
- South Africa's Protection of Investment Act (2015) (case-by-case consent to ISDS possible; prior exhaustion of local remedies required)
- Tanzania's Natural Wealth and Resources Act (2017) (precludes proceedings in foreign courts or tribunals)

Source: UNCTAD. See also *WIR17* and *WIR18*, Chapter III.

Asia

Regional ISDS reform efforts in Asia have been limited, and the future outcomes of large regional negotiations are difficult to predict. At the country level, India has been a main innovator in the ISDS area. Two countries (Singapore and Viet Nam) have agreed to the investment tribunal system in recent treaties with the EU.

Selected examples of regional agreements and negotiations include:

- The ASEAN–Hong Kong, China Investment Agreement (2017) contains a placeholder for an ISDS provision, with the parties agreeing to conclude their discussions on ISDS within one year after the agreement's entry into force.[8]
- Little is known about the approach taken on ISDS at the current stage of negotiations for a Regional Comprehensive Economic Partnership (RCEP).[9] The Guiding Principles and Objectives for the RCEP (2012) provide that "the RCEP will include a dispute settlement mechanism that would provide an effective, efficient and transparent process for consultations and dispute resolution".[10]

In terms of county-specific actions, India has revised its approach to ISDS. The new model BIT (2015) includes a requirement to exhaust local remedies and strict time limits for the submission of claims. Following the adoption of its new model treaty, India initiated the termination of its existing BITs with a view to replace them with agreements aligned with its new model BIT. So far, 60 of these treaty terminations have entered into effect.

As part of Indonesia's model BIT review process, the country considered the option to provide access to ISDS on a case-by-case basis, requiring the exhaustion of local remedies as a pre-condition. It also considered mandatory mediation and ADR procedures. Indonesia has also pursued the termination of BITs. Since 2014, some 22 BITs have effectively been terminated (mostly on a unilateral basis).[11]

In the EU–Viet Nam IPA (pending signature), Viet Nam has agreed on a standing ISDS tribunal. The EU–Singapore IPA, which also contains provisions establishing a standing ISDS tribunal, was signed in 2018. Singapore and Viet Nam have also ratified the CPTPP, which contains an improved ISDS mechanism. Viet Nam has made arrangements with Australia and New Zealand to reduce overlapping ISDS commitments in pre-existing treaties (by providing case-by-case consent to ISDS in CPTPP or terminating some pre-existing agreements).

[8] The member States of the Association of Southeast Asian Nations (ASEAN) are Brunei Darussalam, Cambodia, Indonesia, Lao People's Democratic Republic, Malaysia, Myanmar, Philippines, Singapore, Thailand, and Viet Nam.
[9] RCEP is being negotiated between the 10-member countries of ASEAN and Australia, New Zealand, China, India, Republic of Korea and Japan since 2012. The current schedule foresees the completion of negotiations by the end of 2019.
[10] https://dfat.gov.au/trade/agreements/negotiations/rcep/Documents/guiding-principles-rcep.pdf.
[11] More recently, Indonesia signed a BIT with Singapore (2018) and a CEPA with Australia (2019). The Indonesia–Singapore BIT is reported to contain an ISDS provision, but the scope and formulation of the provision have not been revealed yet. The Australia–Indonesia CEPA contains an ISDS provision with certain limitations.

Latin America and the Caribbean

A variety of reform efforts have been embraced at the regional and country level in Latin America. Brazil has spearheaded the move towards dispute prevention and State-State mechanisms, as an alternative to and without providing ISDS access.

Selected examples include:

- The Intra-MERCOSUR Investment Facilitation Protocol (2017) focuses on dispute prevention and establishes an ombudsperson mechanism, based on elements from Brazil's CIFA model.[12]
- FTA negotiations are ongoing between the current Pacific Alliance members (Colombia, Chile, Mexico and Peru) and Australia, Canada, New Zealand and Singapore. The scope of engagement on investment and access to ISDS are also under consideration.[13]
- Until 2016 UNASUR consultations and national experts' meetings discussed the constituting agreement of the region's investment dispute resolution centre, with no specific outcome.[14]

In terms of country-specific developments, Brazil has operationalized a dispute prevention and State-State dispute settlement mechanism in its recent treaties, in line with the main pillars of its CIFA model. Since 2015, Brazil concluded 10 agreements with countries in Africa and Latin America. Brazil's CIFA model omits ISDS and was developed in the context of constitutional requirements that impeded the ratification of BITs signed by the country in the 1990s.[15] Another noteworthy development at country level is the "agreement in principle" reached by Mexico and the EU on a standing ISDS tribunal in the context of their trade and investment negotiations in 2018.[16]

Other Latin American countries have been pursuing procedural improvements to ISDS reform, including by amending old-generation IIAs (e.g. Chile, together with Canada, amended the 1996 FTA in 2017).[17] In some countries, BITs are undergoing constitutional court scrutiny:

- Colombia's constitutional court has been requested to analyse the constitutionality of substantive and procedural provisions of the Colombia–France BIT (2014), including ISDS. The review is ongoing and the treaty is pending ratification.
- Following a January 2018 request by Ecuador's national assembly, the constitutional court is reviewing the constitutionality of arbitration clauses in BITs.[18]

b. Transition economies: South-East Europe and Commonwealth of Independent States

ISDS reform developments in transition economies are characterized by two diverging approaches. ISDS reform, with a focus on dispute prevention, features on the reform agenda of the SEE group of countries.[19] Within the Commonwealth of Independent States (CIS), no major ISDS policy shifts have occurred.

- With several SEE economies either being candidates for accession to the EU (Albania, Montenegro, Serbia, North Macedonia) or potential candidates (Bosnia and Herzegovina, Kosovo), they are seeking to align their policymaking with EU law as well as the EU's new trade and investment approach.
- ISDS is among the reform areas identified in the SEE economies' regional investment reform agenda for the Western Balkan Six (2018).[20] One central objective is to align the legal framework with the EU standards and international best practices. Another is to strengthen the investment dispute prevention mechanism in the region.

[12] The four current member States of the Mercado Común del Sur (MERCOSUR, Southern Common Market) are Argentina, Brazil, Paraguay and Uruguay.
[13] E.g. during the second round of negotiations, in January/February 2018, http://www.tlc.gov.co/loader.php?lServicio=Documentos&lFuncion=verPdf&id=83286&name=AMInversion.pdf&prefijo=file; http://www.tlc.gov.co/publicaciones/39301/Rondas.
[14] *WIR17*, pp. 123-124.
[15] Brazil abandoned 14 BITs signed in the 1990s after some of them were rejected by its Congress, as certain provisions were deemed unconstitutional. See *WIR17*, Chapter III.
[16] http://trade.ec.europa.eu/doclib/press/index.cfm?id=1833.
[17] With respect to ISDS, the amendment addressed mediation, transparency, third party funding and arbitrators' conflicts of interest.
[18] Earlier developments include the country's unilateral termination of BITs, after the adoption of a new constitution in 2008 and 2009.
[19] SEE economies include Albania, Bosnia and Herzegovina, North Macedonia, Montenegro and Serbia.
[20] https://www.rcc.int/docs/410/regional-investment-reform-agenda-for-the-western-balkans-six.

- Several CIS economies, namely Armenia, Belarus, Kazakhstan, Kyrgyzstan and the Russian Federation, have signed and ratified the Treaty on the Eurasian Economic Union (2014). The treaty protocol contains a largely unreformed ISDS mechanism.
- The Eurasian Investment Agreement (2008) does not contain ISDS reform elements or procedural improvements.[21]

At the country level in the SEE, Bosnia and Herzegovina is in the process of drafting a new model BIT reflecting elements of the EU's new approach, with a specific focus on ISDS provisions. As to other transition economies, one notable development is the recent BIT signed by Belarus with India which contains reform elements limiting access to ISDS.

c. Developed economies: Europe, North America, Asia and the Pacific

While procedural improvements are becoming frequent treaty features, large-scale ISDS reform takes different forms across developed countries. The EU and its member States have focused on the establishment of an investment court system. Other developed countries selectively agreed to the inclusion of ISDS in some treaties and/or adopted procedural improvements to ISDS.

Europe

The EU is proceeding with plans for establishing a multilateral investment court. Recent EU member States' BITs with third countries include certain procedural improvements, aligned with the EU's broader investment policy approach. New policy documents have set a timeline for the termination of intra-EU BITs, which will also remove access to the ISDS mechanisms contained therein.

EU: the multilateral investment court initiative

The Council of the European Union gave the European Commission permission to proceed with negotiations for a convention establishing a multilateral court for the settlement of investment disputes.[22] The March 2018 negotiating directives mandate the Commission to start inclusive and transparent negotiations under the auspices of UNCITRAL. According to the mandate, the convention should provide for appropriate procedural safeguards, including against frivolous claims, and set up a multilateral court composed of a first instance tribunal and an appeal tribunal. The latter should have the competence to review first instance decisions (including on grounds of errors of law or manifest errors in the appreciation of facts or serious procedural shortcomings) and to remand the case to the first instance. To guarantee the independence of the court, the convention should also contain stringent requirements regarding tribunal members' qualifications and impartiality, rules on ethics and conflicts of interests, and necessary flexibilities to adapt to an evolving membership.

In case such a multilateral court is established, it will replace the two-tier investment tribunal system that the EU introduced in its recent treaties with third countries. Under this system – as opposed to the arbitration framework – parties to the dispute may not choose their tribunal members. These will instead be selected on a rotational basis from a group of adjudicators, appointed for a specified period. The outcome of a pending case at the Court of Justice of the European Union (CJEU) may have important implications for the EU in this respect. The CJEU is currently assessing the compatibility with EU law of the investment tribunal system in the Canada–EU CETA, following a request made by Belgium in 2017.

EU member States' BITs with third countries: procedural improvements

In parallel to EU-wide treaty making, individual EU member States have continued signing BITs with third countries, albeit at a much slower pace than prior to the entry into force of the EU Lisbon Treaty (47 BITs signed since 2010, contributing to a stock of some 1,200 BITs between EU member States and third countries). A 2012 regulation at EU level aimed to ensure consistency between member States' third country BITs with EU law and the EU's investment policy.[23] Recent BITs of individual EU member States are influenced by the European Commission's guidance,[24] and include certain procedural ISDS improvements.

[21] Signed by Belarus, Kazakhstan, Kyrgyzstan, the Russian Federation and Tajikistan.
[22] Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 20 March 2018, http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf.
[23] Individual member States' negotiations, conclusions and amendments of agreements with third countries are subject to authorization by the European Commission. See Regulation (EU) No 1219/2012 of The European Parliament and of The Council of 12 December 2012

At member-state level, the 2018 model BIT of the Netherlands and Czechia's model BIT 2016 reflect novel approaches to ISDS. For example, the Dutch model BIT limits ISDS by excluding time-sensitive corporate restructuring claims and claims based on fraudulent investments (e.g. involving corruption, concealment or behaviour amounting to abuse of process). The model also adopts other procedural improvements (e.g. arbitrators are to be appointed by the Secretary-General of either ICSID or the Permanent Court of Arbitration, instead of party-appointed arbitrators). In addition, it includes a reference to the multilateral investment court. Czechia's model contains a 5-year time limit for bringing an ISDS claim and a 7-year limitation if the dispute is first submitted to a domestic court.

Slovakia's BIT with Iran (2016) also contains ISDS reform elements, e.g. tasking tribunals to dismiss ISDS claims of investors where they or the investment have violated host State laws (e.g. those related to fraud, tax evasion, corruption) or where the investment was made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to abuse of process.

Intra-EU BITs: Precluding recourse to ISDS between EU member States

According to the European Commission's long-held position, intra-EU BITs providing EU investors with access to investor-State arbitration are inconsistent with EU law.[25] This position was confirmed by the CJEU's judgment in the *Achmea* case in March 2018 (box 3).

Following up on the "legal consequences" of the *Achmea* ruling, in a January 2019 declaration, 22 EU member States announced their intention to terminate all BITs concluded between them by 6 December 2019.[26] Such terminations would also preclude access to ISDS for the respective investment relationships and the declaration clarifies the non-application of the survival clauses. The 22 EU members further pledged to "request the courts, including in any third country, which are to decide in proceedings relating to an intra-EU investment arbitration award, to set these awards aside or not to enforce them due to a lack of valid consent". Finally, the 22 signatories agreed with the EU Commission that the ISDS mechanism under the Energy Charter Treaty, if applicable to intra-EU relations, would be incompatible with EU law.

In a separate declaration published immediately after, Finland, Luxemburg, Malta, Slovenia and Sweden reaffirmed in essence the declaration by the 22 member States.[27] However, they abstained from expressing any view on whether the intra-EU application of the Energy Charter Treaty is compatible with EU law. Hungary issued another declaration, explicitly opining that the *Achmea* judgment only concerned intra-EU BITs, and not the Energy Charter Treaty.[28]

Box 3. The CJEU's *Achmea* judgment: ISDS in intra-EU BITs

In its judgment of 6 March 2018, the CJEU examined the ISDS clause in the Netherlands–Slovakia BIT (1991) and ruled that it was incompatible with the Treaty on the Functioning of the European Union. The CJEU's reasoning implied, more generally, that ISDS provisions in other intra-EU BITs were also incompatible with EU law. With reference to the CJEU's judgment, the German Federal Court of Justice (Bundesgerichtshof) proceeded to set aside the final award rendered in the *Achmea v. Slovakia* arbitration. In its decision of 31 October 2018, the German Federal Court of Justice held that no valid arbitration agreement existed between the parties.

Source: UNCTAD.

establishing transitional arrangements for bilateral investment agreements between Member States and third countries, https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2012:351:0040:0046:EN:PDF.

[24] http://ec.europa.eu/trade/policy/accessing-markets/investment/.

[25] Some 190 BITs are currently in force between EU member States. All EU member States are also individually parties to the Energy Charter Treaty, except for Italy which effectively withdrew as of 1 January 2016.

[26] Declaration of the Representatives of the Governments of the Member States, of 15 January 2019, on the Legal Consequences of the Judgment of the Court of Justice in Achmea and on Investment Protection in the European Union, https://ec.europa.eu/info/sites/info/files/business_economy_euro/banking_and_finance/documents/190117-bilateral-investment-treaties_en.pdf.

[27] https://www.regeringen.se/48ee19/contentassets/d759689c0c804a9ea7af6b2de7320128/achmea-declaration.pdf.

[28] http://www.kormany.hu/download/5/1b/81000/Hungarys%20Declaration%20on%20Achmea.pdf.

North America

Canada and the United States are reassessing and readjusting their approaches. Their recent treaties display a wide spectrum of ISDS reform approaches, from improved procedures to omission of ISDS.

In its recently concluded agreements, Canada agreed to different types of ISDS mechanisms: the Canada–EU CETA (2016) contains a standing tribunal system, the CPTPP (2018) includes an improved ISDS mechanism and under the USMCA (2018), Canada opted out of ISDS altogether.[29]

The USMCA (2018) marks a shift in the United States' approach to ISDS compared to its 2012 model BIT and the approach used in NAFTA (1992), which will be replaced by the USMCA upon its entry into force. The USMCA includes a 30-months local remedies requirement and strictly circumscribes the substantive provisions subject to ISDS.

The 2018 amendment of the Republic of Korea–United States FTA (2007) includes a "for greater certainty" clarification related to ISDS provisions. It also tasks the joint committee to "consider any potential improvements, to ensure that [the investment chapter] continues to meet the objectives of the Parties, including providing meaningful procedures for resolving investment disputes and effective mechanisms to eliminate frivolous claims and to deter the filing of frivolous claims".

Asia and the Pacific

There is a diversity of approaches in this region. Australia has selectively included ISDS (with procedural improvements) on a treaty-by-treaty basis, New Zealand announced opposition to the inclusion of ISDS in future FTA negotiations, and Japan has adopted procedural reform features in some recent treaties.

Australia takes a case-by-case approach to the inclusion of ISDS provisions in FTAs. The country's recent FTAs, such as the Australia–Peru FTA (2018), contain limitations and refinements to the ISDS mechanism. No ISDS is available between Australia and New Zealand under the relevant agreements between the two countries. In the CPTPP (2018), the Australia–New Zealand ISDS relationship is excluded by a bilateral side letter. The Pacific Agreement on Closer Economic Relations Plus (2017), which counts Australia and New Zealand as parties, omits ISDS.

New Zealand agreed to ISDS in a number of recent FTAs (e.g. the CPTPP (2018) and Republic of Korea–New Zealand FTA (2015)). Under CPTPP, it signed reciprocal side letters with several parties, albeit not all, to exclude compulsory ISDS. In 2017, New Zealand announced opposition to the inclusion of ISDS provisions in future FTA negotiations as the new policy approach.

Japan has selectively adopted procedural improvements to ISDS and limitations to the ISDS scope in recent agreements (annex table 1).

3. Plurilateral and megaregional developments

a. CPTPP: different approaches to ISDS across multiple treaty relationships

In the CPTPP,[30] signatories have adopted an ISDS mechanism with procedural improvements. A few countries have made ISDS-related adjustments through bilateral side letters, overall creating some variety in ISDS approaches among CPTPP signatories. From an ISDS reform perspective, two issues merit attention: (1) the removal or modification of ISDS provisions between specific countries, and (2) the termination and replacement of pre-existing IIAs (which may contain unreformed ISDS provisions).

[29] The CPTPP covers the Canada-Mexico relationship and includes ISDS.
[30] The 11 CPTPP signatories are Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam. CPTPP entered into effect on 30 December 2018, after the required threshold of six countries ratified the agreement (Australia, Canada, Japan, Mexico, New Zealand and Singapore). The CPTPP entered into force for Viet Nam on 14 January 2019.

Removing and modifying ISDS

Certain CPTPP Contracting Parties used side letters[31] to bilaterally opt out of ISDS or otherwise modify the ISDS arrangements applicable between them. For example, no ISDS will be available between Australia and New Zealand and New Zealand and Peru. In the bilateral relationships between New Zealand and three other parties (Brunei Darussalam, Malaysia and Viet Nam), ISDS remains in principle possible, but consent to arbitration by the respondent State needs to be given on a case-by-case basis. At the same time, ISDS remains possible by means of recourse to other, pre-existing IIAs that overlap with the treaty relationship in question (table 5).

Table 5. CPTPP: limited recourse to ISDS between certain parties

	Modified access to ISDS in CPTPP		
Bilateral relationship	No recourse to ISDS	Case-by-case consent for ISDS required	Access to ISDS under overlapping IIAs
Australia–New Zealand	X		No
Brunei Darussalam–New Zealand[a]		X	Yes, ASEAN–Australia–New Zealand FTA (2009)
Malaysia–New Zealand[a]		X	Yes, Malaysia–New Zealand FTA (2009), ASEAN–Australia–New Zealand FTA (2009)
New Zealand–Peru[a]	X		No
New Zealand–Viet Nam		X	Yes, ASEAN–Australia–New Zealand FTA (2009)

Source: UNCTAD, based on publicly available CPTPP bilateral side letters.

Note: [a] CPTPP is not yet in force between these parties.

Terminating and replacing pre-existing IIAs

Several CPTPP Parties have agreed to terminate or replace their pre-existing BITs in their respective side letters.[32] In so doing, they also reduce the availability of ISDS (as provided for in these BITs), while giving access to ISDS under the CPTPP. For example, Australia's BITs with Mexico, Peru and Viet Nam will be terminated and replaced by the CPTPP, under the terms set out in the relevant side letters. Interestingly, not all pre-existing, overlapping IIAs are set for termination for these and other CPTPP parties (table 6, figure 2).

Table 6. CPTPP: termination of overlapping IIAs with ISDS

Bilateral relationship	Agreement terminated	Access to ISDS under overlapping IIAs (not terminated)[b]
Australia–Mexico	BIT (2005)	No
Australia–Peru[a]	BIT (1995)	Yes, Australia–Peru FTA (2018) (not yet in force)
Australia–Viet Nam	BIT (1991)	Yes, ASEAN–Australia–New Zealand FTA (2009)

Source: UNCTAD, based on publicly available CPTPP bilateral side letters.

Note: [a] CPTPP is not yet in force between these parties. [b] In parallel, ISDS is available under the CPTPP.

By replacing pre-existing IIAs, the States concerned can reduce the number of treaties with ISDS provisions that apply between them. If this tool were to be used in a comprehensive way, access to ISDS would be available only under the most recent treaty signed between the parties (once any transitional period elapses). As of now, this is not the case.

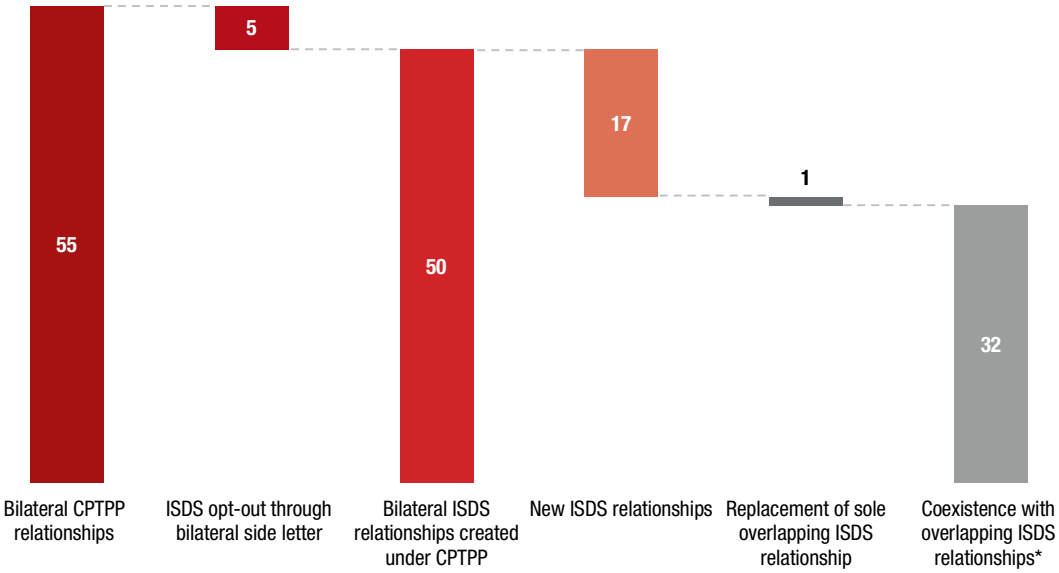
[31] The side letters are available at https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/sl15-australia-new-zealand-isds.pdf; https://www.mfat.govt.nz/assets/CPTPP/New-Zealand-Brunei-ISDS.pdf; https://www.mfat.govt.nz/assets/CPTPP/New-Zealand-Malaysia-ISDS.pdf; https://www.mfat.govt.nz/assets/CPTPP/New-Zealand-Peru-ISDS.pdf; https://www.mfat.govt.nz/assets/CPTPP/New-Zealand-Viet-Nam-ISDS.pdf.

[32] The side letters are available at https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/sl14-australia-mexico-ippa-termination.pdf; https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/sl16-australia-peru-rollover-tpp12-treaty-letters.pdf; https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/australia-peru-termination-of-investment-promotion-and-protection-agreement.PDF; https://dfat.gov.au/trade/agreements/in-force/cptpp/official-documents/Documents/australia-vietnam-termination-of-investment-promotion-and-protection-agreement.PDF.

Figure 2 presents the availability of ISDS for the bilateral treaty relationships between CPTPP parties. Upon entry into effect for all 11 contracting parties, the CPTPP will create 55 bilateral treaty relationships, including 50 ISDS relationships (reduced by the 5 ISDS-related side letters). Of these, 17 bilateral ISDS relationships will be new, i.e. previously non-existent. At the same time, many CPTPP parties remain bound by ISDS provisions found in earlier treaties signed between them in different constellations. For investors from these countries, the CPTPP creates an additional ISDS avenue. Specifically, 32 country pairs within the CPTPP have at least one overlapping IIA with access to ISDS. These overlapping IIAs include, for example, the ASEAN Comprehensive Investment Agreement (2009), the Energy Charter Treaty (1994), and other TIPs and BITs signed between the CPTPP parties.

Figure 2. Availability of ISDS for bilateral treaty relationships between CPTPP parties

(Number of bilateral relationships)



Source: UNCTAD.

Note: * This includes treaty relationships with at least one overlapping IIA (additional overlapping IIAs may have been terminated, see table 6).

b. USMCA: limiting provisions and relationships subject to ISDS

Compared to NAFTA, the USMCA's investment chapter (Chapter 14) significantly curtails ISDS.[33] Recourse to ISDS will not be available between Canada–Mexico and Canada–United States (however, access to ISDS in the Canada–Mexico relationship is available under the CPTPP). Between Mexico and the United States, the grounds for bringing an ISDS claim will be restricted to national treatment and most-favoured-nation treatment (excluding pre-establishment) and direct expropriation (excluding indirect expropriation).[34] Moreover, the claimant must first resort to local remedies in the host State for a significant period of time.[35] ISDS claims based on NAFTA ("legacy investment claims") may continue to be brought for another three years after the USMCA's entry into force.

The reduced availability of ISDS between Canada and the United States is interesting in light of past dispute settlement practice under NAFTA, where United States investors have been most active in bringing ISDS cases, accounting for two thirds of NAFTA claims, and Canada was the most frequent respondent.

[33] USMCA was signed on 30 November 2018. It will, upon its entry into force, replace NAFTA.
[34] However, investors who are party to "covered government contracts" in certain sectors may claim breaches of the wider range of treaty protections, including e.g. minimum standard of treatment and indirect expropriation (Annex 14-E).
[35] The claimant may commence arbitration proceedings either if it obtained a final decision from a court of last resort of the respondent State, or 30 months have elapsed from the date of initiation of local proceedings, but not more than 4 years from the date on which the claimant acquired, or should have acquired, knowledge of the breach alleged and the damage suffered (Art. 14.D.5(1)).

c. EU agreements with third countries: the two-tier investment court system

A key feature of the EU's new approach (first set out in 2015) is the establishment of a so-called investment court system. The investment court system consists of a first instance tribunal and an appeal tribunal. Party-appointed arbitrators (selected by the disputing parties) are replaced by tribunal members appointed by State Parties, assigned to specific cases on a rotational basis. The compatibility of the new investment tribunal system with EU law is currently undergoing a review by the CJEU (box 4).

The new institutional set-up for ISDS has since been implemented, with some slight variations (e.g. the number of tribunal members and term of their appointment), in the following agreements:

- The Canada–EU CETA (signed in 2016)[36]
- The EU–Singapore IPA (signed in 2018)
- The EU–Viet Nam IPA (text agreed in 2018, pending signature)

Once the respective agreement is in force and upon the expiry of any transitional period, the new investment court system will replace the ISDS mechanisms contained in any pre-existing BITs between the EU member States and the relevant third country (table 7). The pre-existing BITs are set for termination.

The new mechanism was also included in the EU negotiating texts for a Transatlantic Trade and Investment Partnership (TTIP) with the United States (as of 14 July 2016), which is on hold since the end of 2016. Negotiations with China, Mexico and Myanmar are continuing. No agreement on the investment court system has so far been achieved in the negotiations on an IPA with Japan, where the EU has tabled the issue.

In parallel to negotiations with individual countries, the EU is pursuing the establishment of an investment court at the multilateral level. The EU's recent agreements include provisions to allow for the replacement of the tribunal system with a multilateral mechanism in the future.

Table 7. EU investment agreements: access to ISDS under overlapping IIAs

Agreement	Status	Overlapping IIAs in force	Scenario for the future[a]
Canada–EU	Signed 2016	7 BITs	Set for termination as per Annex 30-A
EU–Singapore	Signed 2018	12 BITs	Set for termination as per Annex 5
EU–Viet Nam	Pending signature	21 BITs	Set for termination as per Annex 6
EU–Japan	Under negotiation	1 TIP	---
China–EU	Under negotiation	26 BITs	---
EU–Mexico	Agreement in principle	15 BITs	Set for termination as per draft Article 22
EU–Myanmar	Under negotiation	0	---
EU–United States	Negotiations on hold	9 BITs	---

Source: UNCTAD.

Note: [a] Subject to a transitional arrangement for ISDS claims.

Box 4. Compatibility of the investment court system with EU law

A pending CJEU proceeding concerns a request made by Belgium in 2017 to assess the compatibility with EU law of the new investment tribunal system in the Canada–EU CETA. In an opinion delivered on 29 January 2019, the CJEU's Advocate General concluded that the ISDS mechanism included in CETA is compatible with EU law. The Advocate General's opinion is not binding on the Court of Justice; the CJEU's forthcoming opinion (full court sitting) on CETA will have important implications for the EU.

Source: UNCTAD.

[36] Provisionally applied as of 21 September 2017. Provisional application does not cover the agreement's ISDS mechanism, which will become operational only upon the agreement's full entry into force. To date, CETA has been ratified by Canada, the European Parliament, and 12 EU member States (ratification by all EU member States is required for the agreement to enter into force).

4. Multilateral developments

a. UNCITRAL Working Group III discussions on the possible reform of ISDS

According to the three-phase mandate provided by the UNCITRAL Commission in July 2017, Working Group III[37] is tasked i) to identify and consider concerns regarding ISDS; ii) to consider whether ISDS reform was desirable; and iii) if it were to conclude that reform was desirable, to develop any relevant solutions to be recommended to the Commission.

The mandate specified that the deliberations would be government-led with high-level input from all governments, consensus-based and fully transparent, while benefiting from the widest possible breadth of available expertise from all stakeholders. Any solutions to be devised by the Working Group III "would be designed [...] with a view of allowing each State the choice of whether and to what extent it wishes to adopt the relevant solution(s)",[38] i.e. they would not automatically be binding on UNCITRAL member States or the remaining United Nations members.

Three Working Group meetings have taken place since.[39] A level of agreement was reached on the first and second phase of the mandate:

- At its first and second meeting, the Working Group identified three broad categories of concerns in the field of ISDS: i) the lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals; ii) arbitrators and decision makers; and iii) the cost and duration of ISDS cases (table 8).[40]
- In preparation of the third meeting, the Secretariat outlined possible reform options for each of the identified concerns in a framework for discussion, including through a table of options.[41]
- At its third meeting, the Working Group agreed on the desirability of developing reforms at UNCITRAL with respect to the three broad categories and on developing a work plan to address these concerns.[42] It also agreed to discuss concerns relating to third party funding and other concerns not covered by the broad categories identified.

Deliberations at the next meeting on 1-5 April 2019 in New York, United States, will consider the aforementioned concerns and focus on the development of a work plan, in preparation of the third pillar of the mandate.

Certain policy options discussed by the Working Group are already included in some recent IIAs, e.g. the right of contracting parties to issue binding interpretations, rules on the consolidation of claims, the right of disputing parties to review and comment on draft awards, rules concerning arbitrators' conflicts of interest, and the availability of ADR procedures. Other tabled options to be discussed by the Working Group are more far-reaching and, if adopted, may lead to significant changes in the ISDS landscape. Such options include the introduction of a system of binding precedent and the establishment of a system of preliminary rulings that would allow tribunals to refer questions regarding the interpretation of an applicable IIA to a different court or specific body (e.g. other international tribunals or domestic courts).[43]

[37] UNCITRAL Working Group III is composed of the 60 member States of the Commission and attended by observers from other UN member States, non-member States, intergovernmental organizations and invited non-governmental organizations.
[38] UNCITRAL, Report of Working Group III on the work of its thirty-fourth session (Vienna, 27 November–1 December 2017), A/CN.9/930/Rev.1, 19 December 2017, para. 6.
[39] The first meeting of UNCITRAL Working Group III on ISDS reform took place on 27 November–1 December 2017 in Vienna, Austria, its second meeting on 23–27 April 2018 in New York, United States, and its third meeting on 29 October–2 November 2018 in Vienna, Austria. Audio recordings of the meetings are available at http://www.uncitral.org/uncitral/audio/meetings.jsp; documents at https://uncitral.un.org/en/working_groups/3/investor-state.
[40] These categories of concerns resonate with the ISDS-related challenges identified by UNCTAD in 2013 (*WIR13*): legitimacy, transparency, nationality planning, consistency of arbitral decisions, erroneous decisions, arbitrators' independence and impartiality, financial stakes. Importantly, the UNCTAD document also discusses concerns related to a perceived deficit of legitimacy and transparency.
[41] For example, regarding the concern of diverging interpretations of substantive standards, the framework's annex lists – as one preliminary option for discussion – the possibility of enhancing Contracting States' control over their instruments by setting up mechanism(s) for treaty interpretation and related questions aimed at encouraging a more systemic use of unilateral, joint or multilateral interpretations. UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, A/CN.9/WG.III/WP.149, 5 September 2018.
[42] UNCITRAL, Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October–2 November 2018), A/CN.9/964, 6 November 2018; UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, A/CN.9/WG.III/WP.149, 5 September 2018.
[43] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, A/CN.9/WG.III/WP.149, 5 September 2018, para. 39 and annex option A.6. ("System of preliminary rulings by specific bodies").

Table 8. Categorization of ISDS-related concerns in the context of UNCITRAL deliberations

Broad category of concern	Specific issues
Lack of consistency, coherence, predictability and correctness of arbitral decisions by ISDS tribunals	• Divergent interpretations of substantive standards; divergent interpretations relating to jurisdiction and admissibility; and procedural inconsistency • Lack of a framework to address multiple proceedings • Limits of the current mechanisms to address inconsistency and incorrectness of arbitral decisions
Arbitrators and decision makers: • independence and impartiality • tribunal constitution (selection and appointment)	• Standards of independence and impartiality required of individual arbitrators; issue conflicts (e.g. double-hatting and pre-judgment of issues) and challenge mechanisms • Use of party-appointment mechanism and its limitations including as regards ensuring competence and qualifications of arbitrators; impact of party remuneration, dissenting opinions and repeat appointments; the limited number of individuals repeatedly appointed as arbitrators and the possible impact on cost and duration of proceedings; the lack of diversity in terms of gender, age, ethnicity and geographical distribution of appointed arbitrators
Cost and duration of ISDS cases	• Lengthy and costly ISDS proceedings • Allocation of costs by arbitral tribunals • Difficulties faced by successful States in recovering costs from claimant investors and the need for rules on security of costs • Lack of a mechanism to address frivolous or unmeritorious claims

Source: UNCTAD, based on UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, A/CN.9/WG.III/WP.149, 5 September 2018; UNCITRAL, Report of the Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-sixth session (Vienna, 29 October – 2 November 2018), A/CN.9/964, 6 November 2018.

"Setting up an international court system", an idea promoted by the EU and its member States, is among the set of reform options for the Working Group's deliberations, and could potentially have the furthest-reaching effect. The EU Commission has been authorized by EU member States to proceed with negotiations, under the auspices of UNCITRAL, for an international convention establishing such a court.[44] The Working Group has included it as one of the possible reform options, which could be envisioned as "a first instance tribunal, with or without an appeal tribunal […] composed of judges, obliged to adhere to underlying ethical standards".[45]

At the same time, the explicit focus on ISDS – procedural aspects of dispute settlement – of the Working Group's mandate means that certain broader aspects that affect the legitimacy of the system (such as balanced substantive IIA rules) and some of the other possible solutions (e.g. replacing ISDS with domestic dispute resolution or State-State proceedings) are not a central part of the deliberations.[46]

UNCITRAL deliberations have been receiving considerable attention, not only from policymakers. For example:

- In April 2018, at the side-lines of the UNCITRAL Working Group III, an informal "Academic Forum on ISDS" was created in April 2018, which groups academics active in the field.[47]
- In May 2018, a "Practitioner Group" was established to provide a forum for lawyers acting as counsel or arbitrator in ISDS cases.[48]
- In October 2018, 300 civil society groups and trade unions issued a joint letter addressed to member governments attending the UNCITRAL Working Group meetings. The signatory organisations demand that, "instead of focusing on procedural tweaks on the margins of the ISDS system, governments in UNCITRAL should put their efforts into discussing how to move away from the current investment treaty system altogether".[49]

[44] Council of the European Union, Negotiating directives for a Convention establishing a multilateral court for the settlement of investment disputes, 20 March 2018, http://data.consilium.europa.eu/doc/document/ST-12981-2017-ADD-1-DCL-1/en/pdf.
[45] UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, A/CN.9/WG.III/WP.149, 5 September 2018, para. 44.
[46] "In addition, the mandate focuses on the procedural aspects of dispute settlement rather than on the substantive provisions (A/CN.9/930, para. 20)." UNCITRAL, Possible reform of investor-State dispute settlement (ISDS), Note by the Secretariat, A/CN.9/WG.III/WP.149, 5 September 2018, para. 18.
[47] https://www.cids.ch/academic-forum.
[48] https://uncitral.un.org/sites/uncitral.un.org/files/practitioner_group_statement_of_purpose.pdf.
[49] https://www.epsu.org/article/more-300-civil-society-organizations-73-countries-urge-real-reform-united-nations.

- In March 2019, several independent human rights experts appointed and mandated by the UN Human Rights Council to report and advise on human rights issues published a letter outlining concerns and calling upon members of the Working Group III to take these concerns into account.[50] Among others, the letter notes that the current reform proposals do not go far enough to effectively address the deep-rooted deficiencies of the ISDS system. The letter suggests considering issues such as "access to remedy and participation of affected parties" in the deliberations.
- Subsequently, 65 leading scholars in the field of international investment law and policy sent an open letter on 26 March 2019, calling on the Working Group III and all participating States to include the asymmetry in ISDS as one of the concerns to be addressed in the current UNCITRAL reform efforts.[51]

b. UNCITRAL Transparency Rules and the Mauritius Convention

The Mauritius Convention

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. As of January 2019, 23 States have signed the Mauritius Convention and five of them have ratified it (Cameroon, Canada, Gambia, Mauritius, Switzerland).[52]

According to the Convention, the UNCITRAL Transparency Rules[53] will apply in investor-State arbitration proceedings under treaties signed before 1 April 2014, that involve countries that have ratified the Convention. The Mauritius Convention effectively modifies these pre-existing IIAs. The number of IIAs existing between the current signatories to the Convention is modest (box 5).

Box 5. IIAs and ISDS cases covered by the Mauritius Convention

The Mauritius Convention currently brings under its ambit four BITs with ISDS (advance consent to arbitration) signed prior to 1 April 2014, since the rules apply if both the respondent and the home State of the claimant are parties to the Convention (save for reservations). Three BITs are in force[a] and one is not.[b] In addition, a claimant of a home State not party to the Convention may agree to the application of the Transparency Rules against a respondent that has ratified it.

If all 23 current signatory States ratify the Convention, some 40 treaties in force will fall under its scope. To cover a significant share of IIAs and potential investor-State arbitrations, a larger number of countries would need to accede to the Convention.

Source: UNCTAD.

Note: [a] Cameroon–Canada BIT (2014), Mauritius–Switzerland BIT (1998) and Gambia–Switzerland BIT (1993). [b] Cameroon–Mauritius BIT (2001).

The Transparency Rules

Since the Transparency Rules became effective (1 April 2014), over 165 BITs and TIPs with substantive investment provisions were signed, of which some 50 entered into force. The UNCITRAL Transparency Rules will apply, by default, in cases brought under UNCITRAL Arbitration Rules pursuant to such treaties (with the possibility to opt-out). In some recent IIAs, contracting parties have agreed to apply the Transparency Rules in all ISDS cases regardless of the applicable arbitration rules.

The Transparency Registry

Established under the UNCITRAL Transparency Rules, the Transparency Registry publishes information and documents relating to eligible ISDS cases. In particular, cases are included in the Registry where the Transparency Rules apply pursuant to Article 1 of the Rules or where the Registry is appointed for the publication

[50] https://www.ohchr.org/Documents/Issues/Development/IEDebt/OL_ARM_07.03.19_1.2019.pdf.
[51] https://documentcloud.adobe.com/link/track?uri=urn:aaid:scds:US:f165cc95-6957-4e12-a042-9ec43387725e.
[52] http://www.uncitral.org/uncitral/uncitral_texts/arbitration/2014Transparency_Convention.html.
[53] UNCITRAL Rules on Transparency in Treaty-based investor-State Arbitration effective as of 1 April 2014 ("Transparency Rules")

of information and documents, either by parties to an investment treaty or by the disputing parties. So far, the Registry has been used to a limited extent. It contains basic information on three recent ISDS cases (against Bolivia, Guinea and Mauritius), two of which are treaty-based. In all three cases the Transparency Rules apply due to the disputing parties' agreement.[54]

c. ICSID: amendment of its rules

The ICSID Secretariat recently published proposed amended arbitration rules (under the ICSID Convention and the Additional Facility).[55] The current process to amend the rules was commenced by the Secretariat in 2016 with a particular focus on the time and cost of ICSID arbitration proceedings. Aiming at comprehensive changes to modernize the rules, the proposed amendments address a number of issues, including arbitration, conciliation, mediation and fact-finding.

Table 9 summarizes proposed amendments to the ICSID Arbitration Rules. Other notable proposals include:

- Expanded access to the ICSID Additional Facility Rules (arbitration and conciliation): Extending the availability of the Additional Facility to cases where both the claimant and the respondent are not ICSID Contracting States or nationals of a Contracting State.
- Inclusion of Regional Economic Integration Organizations (REIOs): Providing REIOs with access to Additional Facility dispute settlement.
- New rules on mediation: An entirely new set of rules on mediation of disputes.
- Revamped rules for conciliation and fact-finding: Revised rules for conciliation and rules for fact-finding, to make them more flexible, simple, user-friendly and cost-effective.

Table 9. Proposed amendments to ICSID Arbitration Rules

Topic	Summary of proposed amendment
Third-party funding	• Obligation by the parties to disclose whether they have third-party funding, and if so, the source of the funding.
Publication of awards	• A party will be deemed to have consented to publishing arbitral awards, decisions and orders unless it objects in writing within 60 days. Legal excerpts of awards will be made public regardless of disputing parties' consent.
Initial procedures	• Bifurcation of proceedings to be expressly allowed, and relevant timelines provided.
Security for costs	• Tribunal to be expressly allowed to order security for costs; and factors relevant to a decision on security for costs to be provided.
Disqualification of arbitrators	• Revision of the process for challenging arbitrators, including the introduction of an expedited schedule. An enhanced declaration of independence and impartiality is also proposed for arbitrators.
Timing of awards	• Introduction of timelines for issuing awards, including 240 days for a final award after the last party submission.
Expedited proceedings	• New rules for expedited proceedings that parties may opt to use.

Source: UNCTAD, based on ICSID, Backgrounder on Proposals for Amendment of the ICSID Rules, August 2018.

A vote on the amendments is expected in 2019 or 2020. Amendments to the ICSID rules require the approval of two-thirds of ICSID member States. ICSID and UNCITRAL secretariats are currently also working on a code of conduct for arbitrators in ISDS cases.[56]

[54] The registry also includes documents provided by Canada related to six NAFTA ISDS cases concluded between 2002 and 2010.
[55] ICSID, Backgrounder on Proposals for Amendment of the ICSID Rules, August 2018, https://icsid.worldbank.org/en/Documents/Amendment_Backgrounder.pdf. States and the public were invited to submit written comments on the proposals. In January 2019, ICSID released a 458-page compendium of the received public comments. 34 States, the EU and the African Union, as well as 26 individuals and organizations, submitted written input. The ICSID Secretariat intends to publish a revised working paper in spring 2019. See https://icsid.worldbank.org/en/Pages/News.aspx?CID=311.
[56] ICSID Secretariat, Proposals for Amendment of the ICSID Rules — Synopsis, Volume 1, 2 August 2018, https://icsid.worldbank.org/en/Documents/Synopsis_English.pdf.

d. Energy Charter Treaty: ISDS issues among approved topics for modernization

At the Energy Charter Conference in November 2018, members approved a list of topics for discussion on the modernization of the Energy Charter Treaty.[57] The list includes the treaty's definitions (e.g. investment, investor), substantive clauses (e.g. fair and equitable treatment, most-favoured-nation treatment, indirect expropriation) and procedural ISDS issues (such as frivolous claims, transparency, security for costs, third-party funding). On this basis, a "subgroup on modernization" will identify potential policy options for each of the topics listed (including the context and the potential instruments to be used, such as clarification or amendment), and revert to the members of the Energy Charter Conference for further decisions. The Energy Charter Conference also adopted a model instrument on the management of investment disputes prepared by the Energy Charter Secretariat.[58]

5. Rebalancing investment dispute settlement: sustainable development and human rights

Pursuit of the SDGs and the 2030 agenda also implies changes to international investment policymaking, including IIAs. Both substantive rules and rules on dispute settlement need to be oriented towards today's sustainable development imperative, which is the overarching objective of IIA reform (box 6).

In the context of investment dispute settlement, SDG 16 (Peaceful and inclusive societies for sustainable development) is particularly important as it calls on States to "promote the rule of law at the national and international levels and ensure equal access to justice for all".

The following developments occurred outside of the traditional realm of investment policymaking and may provide insights for further thinking on the rebalancing of investment dispute settlement:

- The UN Guiding Principles on Business and Human Rights;
- The "zero draft" on a legally binding instrument to regulate – in international human rights law – the activities of TNCs (UN Working Group on Business and Human Rights);
- "The Hague Rules on Business and Human Rights Arbitration" project; and
- Other research and policy analysis on access to justice and IIAs conducted by academia and think tanks.

The general emphasis of these developments is on ensuring effective access to justice for those affected. Investment dispute settlement is considered one of the mechanisms that interacts with access to effective remedies.[59]

Investment dispute settlement typically deals with disputes between investors and host States (State-State dispute settlement is rarely used). ISDS, more specifically, has been criticized for being a "one-way street". The investor can bring a claim against the host State and not vice versa.[60] Added to this are concerns that individuals or communities affected by the activities of a foreign investor have no comparable avenues at hand. A rebalancing could address the "one-way-street" nature of ISDS (to improve access to remedies) and/or focus on ways to mitigate potential negative impacts on access to remedies.

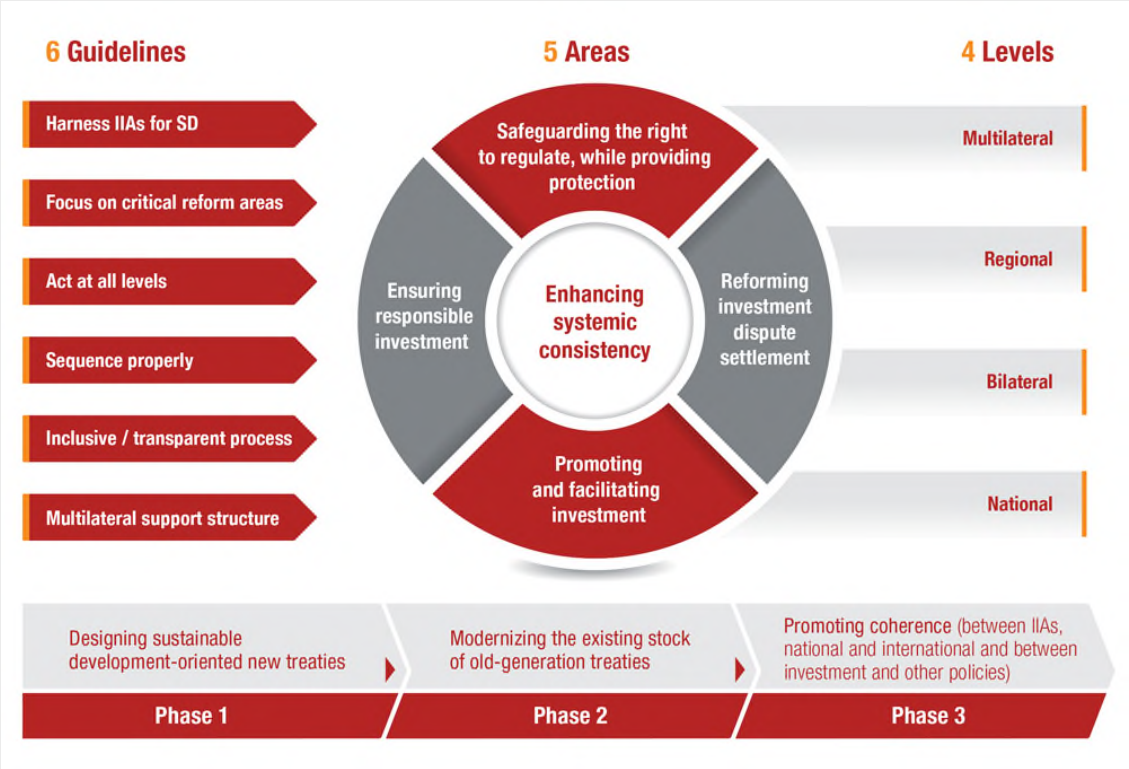
[57] https://energycharter.org/media/news/article/approved-topics-for-the-modernisation-of-the-energy-charter-treaty/.
[58] The model was adopted by correspondence in December 2018, https://energycharter.org/fileadmin/DocumentsMedia/CCDECS/2018/CCDEC201826_-_INV_Adoption_by_correspondence_-_Model_Instrument_on_Management_of_Investment_Disputes. For a commentary on the draft model Instrument, see Nathalie Bernasconi-Osterwalder and Howard Mann, International Energy Charter Draft Model Investment Dispute Prevention and Management Protocol, Commentary, IISD (2018), https://iisd.org/library/international-energy-charter-draft-model-investment-dispute-prevention-and-management.
[59] See, for example, CCSI and UN Working Group on Business and Human Rights (2018), Impacts of the International Investment Regime on Access to Justice (Roundtable Outcome Document), September 2018, https://www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf.
[60] The original drafters of the ICSID Convention envisaged proceedings brought by host States (against investors) and by investors (against host States). See Laborde, G. (2010). "The Case for Host State Claims in Investment Arbitration", *Journal of International Dispute Settlement*, 1(1): 97–122.

Box 6. UNCTAD's support to sustainable development-oriented IIA reform

Investment policies (including IIAs and ISDS) can no longer be designed in isolation, but need to be harmonized with, and made conducive to, the broader goal of sustainable development. This is even more so, given the importance of international investment for achieving the SDGs as part of the post-2015 development agenda, and for living up to the commitments undertaken by countries at the third "Financing for Development" Conference in Addis Ababa.

UNCTAD, as the United Nations' focal point for international investment and development, backstops ongoing policymaking processes with a view to ensuring that the IIA regime – including the way in which investment disputes are settled – works for sustainable development. Most of today's new IIAs follow UNCTAD's Road Map for IIA Reform (*WIR15*) or include clauses that were set out in UNCTAD's Investment Policy Framework for Sustainable Development (2015). The comprehensive Road Map for IIA Reform featured investment dispute settlement as one of the action areas for reform (box figure 3). UNCTAD's Reform Package for the International Investment Regime (2018) consolidates the research and policy analysis on phase 1 of IIA reform (moving to a new generation of IIAs), phase 2 (modernizing the existing stock of IIAs) and phase 3 (improving investment policy coherence and synergies) into one single document.

Box figure 3. UNCTAD's Road Map for IIA Reform (2015)



Source: UNCTAD, 2018 (based on *WIR15*).

The worldwide reform developments also benefited from UNCTAD's technical assistance work. Since 2010, UNCTAD has trained some 500 government officials on key issues in IIAs and ISDS; 130 countries have benefited from guiding principles on investment policymaking developed by UNCTAD or with UNCTAD's assistance; 75 countries and regional organizations have benefited from model BIT and IIA reviews.

Through its support to sustainable development-oriented IIA reform, UNCTAD responds to the mandates it received from the United Nations Financing for Development Conference, enshrined in the Addis Ababa Action Agenda (July 2015), and to its institutional mandates, in particular from UNCTAD's Ministerial Conferences (most recently, the Nairobi Maafikiano 2016).

Source: UNCTAD.

UN Guiding Principles on Business and Human Rights

Under the UN Guiding Principles on Business and Human Rights, endorsed by the Human Rights Council in 2017, "access to effective remedy" is part of States' duty to protect against business-related human rights abuse. States must thus take appropriate steps to ensure, through judicial, administrative, legislative or other appropriate means, that those affected by abuse occurring within their territory and/or jurisdiction, have access to effective remedy.[61] Investment dispute settlement may interact with access to effective remedies under the Guiding Principles. The UN Working Group on business and human rights points out that dispute settlement under trade or investment agreements may have a negative impact on access to effective remedies and that steps could be taken to address and improve this interaction.[62]

UN Working Group on Business and Human Rights: "zero draft" on a legally binding instrument

In 2018, the UN Working Group on Business and Human Rights released a "zero draft" on a legally binding instrument to regulate, in international human rights law, the activities of transnational corporations and other business enterprises.[63] One of the central objectives of the zero draft is to improve access to effective remedy for victims of human right abuses in the context of business activities of a transnational character, building on four pillars (prevention, victims' rights, international cooperation and monitoring mechanisms).[64]

Among others, in its provisions on the rights of victims (Art. 8) and legal liability (Art. 10), the zero draft:

- stresses the right of victims to "fair, effective and prompt access to justice and remedies in accordance with international law";
- imposes on State Parties the obligation to "guarantee the right of victims, individually or as a group, to present claims to their Courts";
- foresees the creation of an international fund for victims covered under the draft instrument, to provide legal and financial aid to victims;
- includes a provision on legal liability, where reparation to the victims is regulated, and
- obliges State parties to "provide for a comprehensive regime of civil liability for violations of human rights undertaken in the context of business activities and for fair, adequate and prompt compensation".

The zero draft does not explicitly address ISDS, but contains provisions related to existing and future trade and investment agreements, which stipulate States Parties' agreement to avoid conflict with the implementation of the zero draft, to ensure consistency with human rights and to safeguard States ability to respect and ensure their obligations.

Recent model IIAs and treaties: human rights and legal liability

A few recent model IIAs and treaties contain provisions that address States' duty to protect human rights, access to justice for victims of human rights abuses and legal liability.

For example:

- The model BIT of the Netherlands (2018) includes provisions that promote the rule of law, recall the duty of Contracting Parties to provide protection against business-related human rights abuse and the need to ensure access to effective remedies for those affected by human rights abuses (Art. 5). It contains a so-called "liability in the home State" clause, which provides that an "investor shall be liable in accordance with the rules concerning jurisdiction of their home state for the acts or decisions made in relation to the investment where such acts or decisions lead to significant damage, personal injuries or loss of life in the host state" (Art. 7.4).

[61] UN Guiding Principles on Business and Human Rights, pillar III, principle 25.
[62] The UN Working Group on the issue of human rights and transnational corporations and other business enterprises (UN Working Group on business and human rights) makes several suggestions in this regard. For a brief discussion on "Locating remedies in diverse settings", and the interaction with IIAs, see United Nations, Report of the UN Working Group on the issue of human rights and transnational corporations and other business enterprises, A/72/162, 18 July 2017, paras. 75-78.
[63] https://www.ohchr.org/Documents/HRBodies/HRCouncil/WGTransCorp/Session3/DraftLBI.pdf.
[64] UN Human Rights Council, Report on the fourth session of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights, A/HRC/40/48, January 2019, para. 28.

- The Morocco–Nigeria BIT (2016) calls upon each party to ensure (i) "high levels of labour and human rights protection appropriate to its economic and social situation" in its laws and regulations, and (ii) consistency with international human rights agreements. It also contains post-establishment obligations for investors and investment to uphold human rights in the host State (Art. 18) as well as a "liability in the home State" clause (Art. 20).
- The SADC model BIT template (2012) contains "minimum standards for human rights, environment and labour" (Art. 15) and provisions on legal liability (Art. 17).

Such clauses may provide avenues to strengthen the interaction between IIAs, business and human rights.

"The Hague Rules on Business and Human Rights Arbitration" project

An initiative developed by a group of international lawyers and academics called "The Hague Rules on Business and Human Rights Arbitration" aims to create an effective method to resolve the human rights disputes involving private parties, thereby contributing to filling the judicial remedy gap in the UN Guiding Principles on Business and Human Rights.[65] The group elaborated a set of rules for arbitration in the area of business and human rights, among others, with a view to improving access to remedies for the victims of corporate human rights violations.[66]

Academia and think tanks: interaction between access to justice and IIAs

To these policy developments adds an increasing amount of research and policy analysis on access to justice and IIAs conducted by academia and think tanks. Recent examples include the discussions on "Integrating Investor Obligations and Corporate Accountability Provisions in Trade and Investment Agreements"[67] hosted jointly by the International Institute for Sustainable Development and the Friedrich-Ebert-Stiftung in 2018, and a roundtable on the "Impacts of the International Investment Regime on Access to Justice" organized by Columbia Center on Sustainable Investment and the UN Working Group on Business and Human Rights in 2017,[68] as well as other sessions organized on related issues at the annual UN Forum on Business and Human Rights over the years.

Conclusions and way forward

Today, ISDS reform is part of the mainstream of international investment policymaking. At the same time, reform efforts differ in scope and depth. "Reform" has different meanings for different actors and stakeholders. It remains to be seen whether reform efforts will converge around a renewed treaty network with procedural improvements or result in a larger scale overhaul. The latter may bring about new mechanisms and institutions or a situation where ISDS is largely absent from the international investment regime.

To the extent that specific initiatives or multilateral deliberations are focused on improving ISDS as such, additional processes may be needed to respond to broader concerns about the legitimacy of the system. Transparent and inclusive multi-stakeholder discussions in different forums may help ensure that all avenues are explored in order to arrive at solutions that are bold enough to address existing problems, and "measured" enough to receive countries' widespread support.

While it is too early to assess the concrete impact of today's reform efforts, two points that have guided UNCTAD's work on improving investment dispute settlement remain crucial. First, reform of investment dispute settlement must not be viewed in isolation. It needs to be synchronized with reform of the substantive investment protection rules embodied in IIAs. Without a comprehensive package that addresses both the substantive content of IIAs and ISDS, any reform attempt risks achieving only piecemeal change and potentially creating new forms of fragmentation and uncertainty.

[65] https://www.cilc.nl/project/the-hague-rules-on-business-and-human-rights-arbitration/.
[66] Hague Rules on Business and Human Rights Arbitration, "International arbitration of business and human rights disputes: elements for consideration in draft arbitral rules, model clauses and other aspects of the arbitral process", November 2018, https://www.cilc.nl/cms/wp-content/uploads/2019/01/Elements-Paper_INTERNATIONAL-ARBITRATION-OF-BUSINESS-AND-HUMAN-RIGHTS-DISPUTE.font12.pdf.
[67] https://www.iisd.org/sites/default/files/publications/report-expert-meeting-versoix-switzerland-january-2018.pdf.
[68] https://www.ohchr.org/Documents/Issues/Business/CCSI_UNWGBHR_InternationalInvestmentRegime.pdf.

Second, reform of both substantive rules and rules on dispute settlement needs to be oriented towards today's sustainable development imperative. Creating a policy regime that effectively mobilizes investment and channels it towards the SDGs is the goalpost. The investment dispute settlement system must be designed to produce just outcomes that are viewed as reflecting key societal values. Investor accountability/responsibility and access to remedies for those affected by the activities of corporations are novel, but important issues in this regard. Transparent and inclusive decision-making on reform as well as cross-fertilization and coordination between different processes – such as the 2030 agenda for sustainable development – are also essential.

UNCTAD, as the United Nations' focal point for international investment and development, backstops ongoing policymaking processes with a view to ensuring that the IIA regime – including the way in which investment disputes are settled – works for sustainable development. UNCTAD supports sustainable development-oriented IIA reform through its three pillars of work: development of policy tools based on research and policy analysis; technical assistance, and intergovernmental consensus building.

UNCTAD Policy Tools for IIA Reform

Investment Policy Framework for Sustainable Development (2015 version)
https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf

Improving Investment Dispute Settlement: UNCTAD's Policy Tools (IIA Issues Note, No. 4, November 2018)
https://investmentpolicyhub.unctad.org/Publications/Details/1186

Reform Package for the International Investment Regime (2018 edition)
https://investmentpolicyhub.unctad.org/Publications/Details/1190

UNCTAD Investment Policy Online Databases

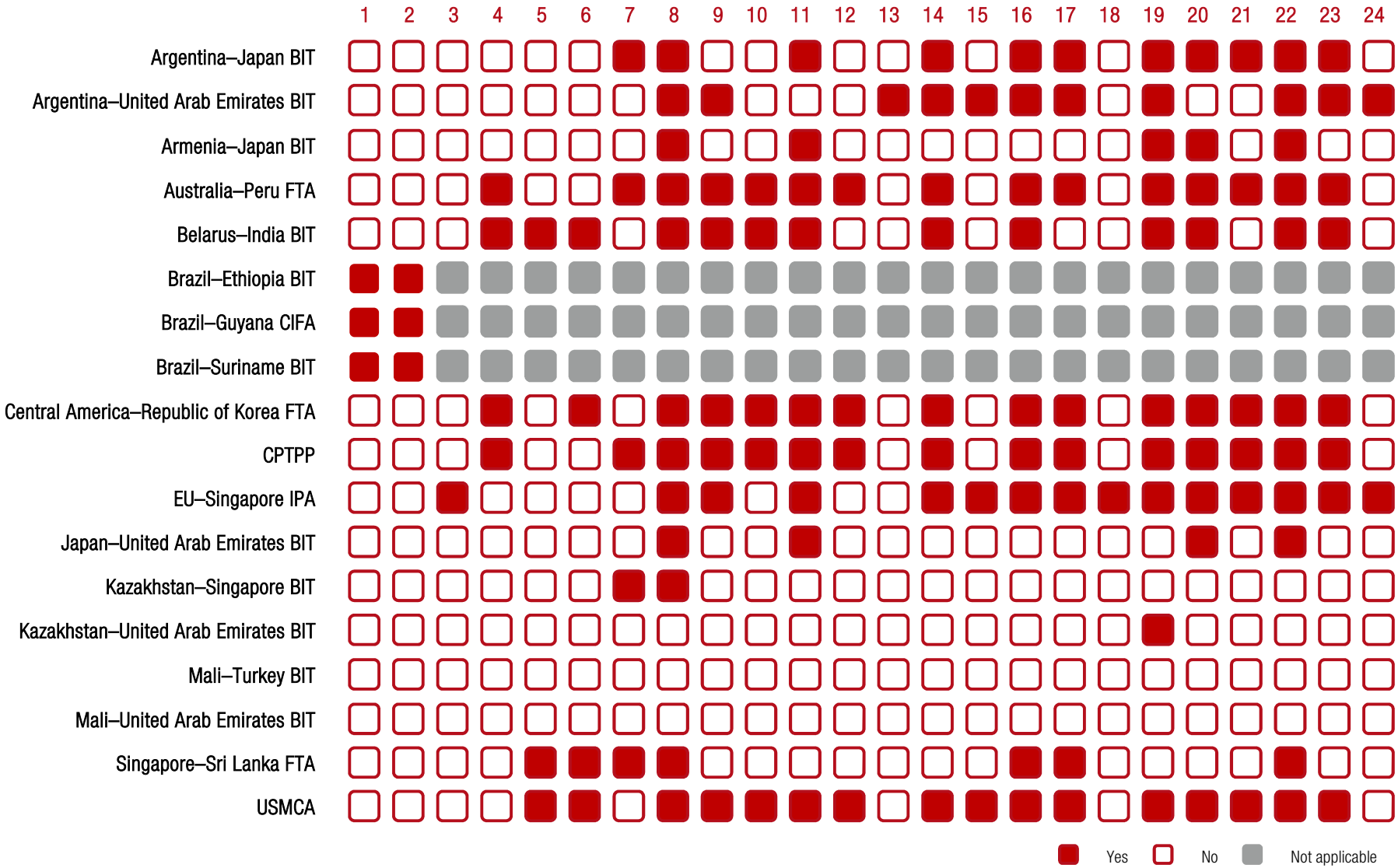
International Investment Agreements Navigator
https://investmentpolicyhub.unctad.org/IIA

IIA Mapping Project
https://investmentpolicyhub.unctad.org/IIA/mappedContent

Investment Dispute Settlement Navigator
https://investmentpolicyhub.unctad.org/ISDS

Investment Laws Navigator
https://investmentpolicyhub.unctad.org/InvestmentLaws

Annex table 1. Mapping of ISDS reform elements in IIAs concluded in 2018



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)

2 Establishing a preliminary dispute prevention procedure (through State Parties' joint committee) before a dispute can be referred to SSDS

II. Standing ISDS tribunal

3 Replacing the system of *ad hoc* arbitrations and party-appointed arbitrators with a standing court-like tribunal (including appellate level) consisting of fixed-term adjudicators appointed by State Parties

4 Envisaging a possible future appellate mechanism (bilateral or multilateral) to review ISDS awards

III. Limited ISDS

5 Requiring investors to pursue local remedies (for 18 months or more) or to exhaust of local remedies before turning to arbitration

6 Limiting treaty provisions subject to ISDS

7 Excluding certain policy areas from ISDS

8 Setting a time limit for submitting ISDS claims (limitations period)

IV. Improved ISDS procedure

Enhancing States' role in ISDS

9 Enabling State Parties to issue joint treaty interpretations binding on tribunals

10 Requiring certain questions to be submitted to State Parties for joint determination

11 Enabling non-disputing State Parties to participate in the proceedings

12 Enabling disputing parties to review and comment on the draft arbitral award

13 Enabling the respondent State to submit counterclaims

Enhancing the suitability and impartiality of arbitrators/adjudicators

14 Including rules on qualifications of arbitrators/adjudicators, a code of conduct and/or rules on conflicts of interest

15 Prohibiting "double-hatting" of arbitrators/adjudicators (simultaneously acting as counsels or experts in other ISDS proceedings)

Enhancing the efficiency of dispute settlement

16 Enabling early dismissal of manifestly unmeritorious (frivolous) claims

17 Enabling consolidation of related claims

18 Establishing a time limit on the maximum duration of ISDS proceedings

19 Allowing for voluntary non-binding ADR procedures to resolve investor-State disputes

Opening up ISDS proceedings to the public and third parties

20 Including rules on transparency of ISDS proceedings (requiring publication of ISDS documents and/or holding public hearings)

21 Enabling participation in proceedings of interested third parties (*amici curiae*)

Limiting remedial powers of tribunals

22 Limiting legal remedies that tribunals may grant to investors

23 Limiting the types of damages that may be awarded as compensation for a treaty breach

Other improvements

24 Including rules on third-party funding (prohibiting it, or requiring disclosure)

Source: UNCTAD.

Note: Based on 18 IIAs concluded in 2018 for which texts were publicly available at the time of writing, not including "framework agreements" that lack substantive investment provisions. Available IIA texts can be accessed at UNCTAD's IIA Navigator at http://investmentpolicyhub.unctad.org/IIA.

This IIA Issues Note was prepared by UNCTAD's IIA team led by Elisabeth Tuerk, under the supervision of Joerg Weber and the overall guidance of James Zhan.

The Note is based on a draft prepared by Jorun Baumgartner, Hamed El Kady, Sergey Ripinsky and Diana Rosert, with contributions from Yulia Levashova and Magdalena Bulit Goñi. Robert Kuhn provided helpful inputs and Alina Nazarova assisted with formatting.

We are grateful for the brainstorming ideas on ISDS reform received from the following individuals, in their personal capacity: Martin Dietrich Brauch, Lise Johnson, Facundo Pérez Aznar, Gustavo Prieto, Prabhash Ranjan, Jeremy Sharpe, Catharine Titi, Ignacio Torterola, Marina Trunk-Fedorova, Valentina Vadi, Carlos José Valderrama, Geraldo Vidigal, Tania Voon and Joe Zhang.

REFERENCES

UNCTAD (2015). *Investment Policy Framework for Sustainable Development.* New York and Geneva: United Nations.

UNCTAD (2018). *Reform Package for the International Investment Regime.* New York and Geneva: United Nations.

WIR12. World Investment Report 2012: Towards a New Generation of Investment Policies. New York and Geneva: United Nations.

WIR13. World Investment Report 2013: Global Value Chains: Investment and Trade for Development. New York and Geneva: United Nations.

WIR15. World Investment Report 2015: Reforming International Investment Governance. New York and Geneva: United Nations.

WIR17. World Investment Report 2017: Investment and the Digital Economy. New York and Geneva: United Nations.

WIR18. World Investment Report 2018: Investment and New Industrial Policies. New York and Geneva: United Nations.

IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS

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

UNCTAD/DIAE/PCB/INF/2019/3