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INTERNATIONAL INVESTMENT AGREEMENTS AND THEIR IMPLICATIONS FOR TAX MEASURES: WHAT TAX POLICYMAKERS NEED TO KNOW

A guide based on UNCTAD's Investment Policy Framework for Sustainable Development

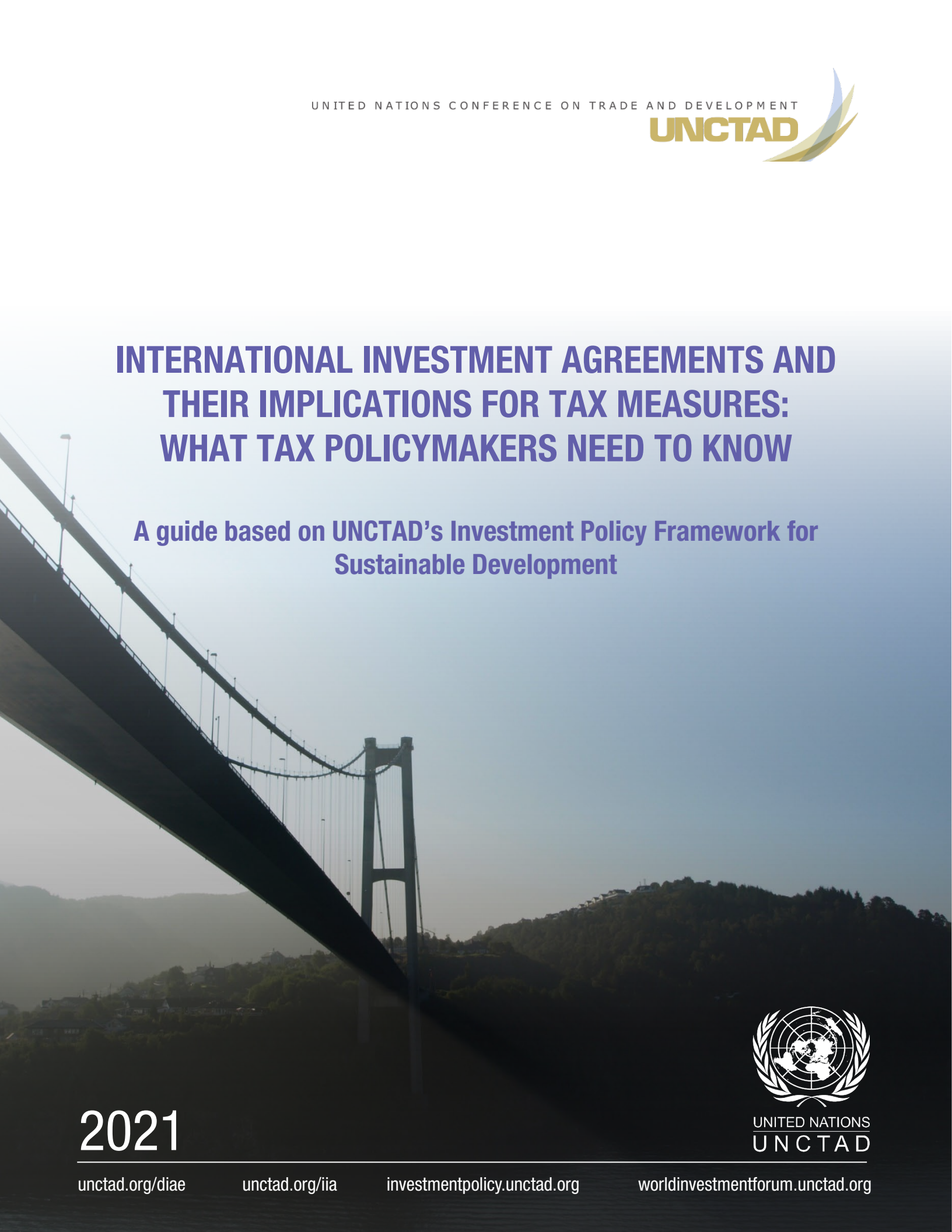

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TABLE OF CONTENTS

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Preface

The UNCTAD Division on Investment and Enterprise is the focal point within the United Nations system for all issues related to investment and enterprise development. It conducts cutting-edge policy analysis, provides technical assistance and builds international consensus on investment and enterprise. The Division takes a lead role in advancing solutions to the development challenges faced by the international community in this area and is dedicated to support investment in sustainable development with its investment and enterprise policy toolkits.

Since the launch of the Investment Policy Framework for Sustainable Development in 2012 (updated in 2015), UNCTAD has been at the forefront of efforts to reform the international investment regime and has provided valuable backstopping to this process.

Building on UNCTAD's long-standing expertise on FDI, investment policymaking and international investment agreements (IIAs), this guide on IIAs and their implications for tax measures complements a paper on "The Interaction of Tax, Trade and Investment Agreements" issued by the Secretariat of the Committee of Experts on International Cooperation in Tax Matters (UN Tax Committee) in April 2019. The paper of the UN Tax Committee Secretariat outlined some key issues and questions surrounding the interaction of tax and non-tax treaties, including trade agreements and IIAs. The Secretariat paper was presented at the eighteenth session of the UN Tax Committee and the Committee endorsed the proposal for follow-up work on these issues.

This guide produced by UNCTAD in cooperation with the WU Global Tax Policy Center assesses the most relevant IIA provisions regarding their implications for tax measures, using the Investment Policy Framework for Sustainable Development (UNCTAD, 2015b) as a basis. To help address potential tax-related challenges arising from IIAs, it gives guidance on the questions and "possible further lines of enquiry" identified in the April 2019 paper by providing concrete policy options for each IIA clause. It also draws on UNCTAD's previous work on the coherence between international tax and investment policies, the theme of the World Investment Report 2015 (UNCTAD, 2015c) and two special issues of the Transnational Corporations Journal released in 2018 (UNCTAD, 2018a; UNCTAD, 2018b).

Executive summary: What tax policymakers need to know about IIAs

This guide primarily addresses tax policymakers by providing insights on the functioning of provisions included in the stock of old-generation IIAs with a focus on their interaction with tax measures. It also discusses available reform options and trends in IIA practice based on UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2015b) and its most recent reform toolkit, the IIA Reform Accelerator (UNCTAD, 2020a). The guide is intended to encourage and facilitate an ongoing dialogue between the tax and investment communities.

Most IIAs do not exclude taxation from their scope, which means that a wide range of tax-related measures, whether of general or specific application, are covered by them. Some 2,500 old-generation IIAs are in force today, which typically feature broad provisions and include few exceptions or safeguards. The majority of these IIAs were negotiated in the 1990s or earlier, and countries' experiences with investor–State dispute settlement (ISDS) cases show that "old treaties bite". Most known ISDS cases have been filed pursuant to old-generation IIAs. Overall, investors have brought more than 1,000 ISDS cases based on IIAs against at least 120 countries. UNCTAD data suggests that in some 140 of these cases investors have challenged tax-related measures that were taken by developed countries, developing countries and countries with economies in transition. This guide is thus addressed to tax and investment policymakers worldwide.

IIAs impose obligations on States and can interact with regulatory action in the field of tax aimed to raise revenue, eliminate double taxation or limit opportunities to engage in tax avoidance or evasion. During the last decade, investment policymakers worldwide have reassessed the role of IIAs in national development plans and weighed the pros/cons of signing them. Many countries have embarked on the reform of the IIA regime to address challenges for public policymaking arising from broad and vague substantive protection standards coupled with wide access to investor–State arbitration in IIAs.

It is an appropriate time to provide this guidance since both the tax and investment communities are undergoing an in-depth review of the approaches embedded in the respective agreements. Modernizing and rebalancing the clauses contained in old-generation IIAs as part of countries' broader IIA reform strategies can reduce attendant risks. Countries can choose from a set of reform actions, including the interpretation, amendment and replacement of provisions in old-generation IIAs (UNCTAD, 2020a). The need to assess the costs and benefits of IIAs, which considers each country's specific circumstances and development priorities, has been part of the reform discussion (UNCTAD, 2015b). The objective of IIA reform is to better balance investment protection with the host State's right to regulate and make the IIA regime more conducive to sustainable development.

The IIA reform process has been facilitated by UNCTAD's policy research, intergovernmental processes, and toolkits: The Investment Policy Framework for Sustainable Development (Investment Policy Framework; UNCTAD, 2015b) and the Reform Package for the IIA Regime (UNCTAD, 2018c). UNCTAD has put forward concrete actions to modernize old-generation IIAs. Most recently, it launched the IIA Reform Accelerator (UNCTAD, 2020a) to speed up the reform of unbalanced provisions prevalent in the existing stock of IIAs.

This guide focuses on the tax-related implications of the most relevant IIA provisions: What tax policymakers need to know about the unreformed clauses prevalent in old-generation IIAs as well as options available to reform these clauses and address the respective risks.

It also aims to stimulate the interaction between tax policymakers and IIA negotiators. The joint expertise of these two policy communities could help accelerate the IIA reform process and increase the coherence between tax and investment policymaking.

Definitions of investment and investor

The definitions of investment and investor sets out the types of assets and persons covered by the IIA. Old-generation IIAs frequently rely on broad definitions, covering an open-ended list of assets held by foreign investors. A major challenge for government agencies in a host country is to know whether an investment is a foreign investment and by which (if any) IIA

relationships it could be covered. Tax administrations and tax policymakers cannot necessarily ascertain whether certain actions or measures are affecting a foreign investor covered by an IIA. The ownership chains behind a local investment may be complex and designed to gain access to IIA benefits through indirect ownership stakes. Reformed IIA clauses seek to address these problems by narrowing the scope of covered investments and investors, including through denial-of-benefits clauses.

Substantive scope of IIAs

Most old-generation IIAs do not contain exclusions from their substantive scope for taxation, which means that tax-related measures, whether of general or specific application, are covered by IIAs. This includes tax measures that fall within the scope of a double taxation treaty (DTT) between the two countries. Even where exclusions exist, ISDS tribunals adopt their own interpretation or definition of "taxes" and do not necessarily rely on domestic law guidance. Policy options for reform include carve-outs for tax measures from all or certain IIA provisions as well as procedural mechanisms for joint determinations involving decision-making by the competent domestic authorities.

Temporal scope of IIAs

Old-generation IIAs frequently extend treaty protection to investments made before the entry into force of the agreement. A measure that was taken prior to entry into force of the IIA but with "lasting effects" on such investments could under certain circumstances give rise to ISDS proceedings, creating uncertainties for tax policymakers. Reform options generally seek to clarify and limit the IIA's temporal scope.

National treatment

The national treatment (NT) provision protects foreign investors/investments against discrimination vis-à-vis domestic investors. Although a similar clause can be found in DTTs, the content is different as the NT provisions of IIAs cover *de facto* and *de jure* discriminatory treatment, and distinctions based on residence are not *per se* accepted under IIAs. Preferential treatment exclusively granted to national investors such as tax exemptions may be challenged under IIAs even where this treatment is in accordance with the host State's legislation. Reform options for this IIA clause seek to clarify the circumstances that are relevant for foreign and domestic investors to be in "like circumstances" and explicitly allow derogations on the basis of legitimate regulatory objectives such as the equitable and effective collection of taxes.

Most-favoured-nation treatment

The most-favoured-nation treatment (MFN) provision protects foreign investors/investments against discrimination vis-à-vis other foreign investors. Investors have rarely invoked the MFN provision to challenge the actual level of material treatment given to foreign investors from third States. More frequently, investors invoked the MFN clause to import more investor-friendly provisions from the host State's IIAs with third States, thereby "cherry-picking" advantageous IIA standards. For example, investors can attempt to circumvent tax exceptions in the IIA under which the ISDS case is brought, on the basis that another IIA signed by the host country does not contain them. Reform options among others seek to explicitly limit this practice.

Fair and equitable treatment

Fair and equitable treatment (FET) is the clause most frequently invoked by investors in ISDS cases. Old-generation IIAs typically include an FET provision drafted in a minimalist, open-ended way. ISDS tribunals' interpretations of FET have grown over time and covered, among others, expectations of regulatory stability and compliance with the legitimate expectations of investors, expectations of transparency and participation in governmental decision-making, and proportionality tests for State measures. For tax administrations and tax policymakers working in an environment of evolving tax regulations, these FET concepts can expose tax authorities to ISDS claims. New-generation IIAs often provide more guidance as to what the standard covers, for example through the inclusion of exhaustive lists of types of treatment that are prohibited by the FET clause. Some recent IIAs entirely omit the FET clause.

Full protection and security

Many old-generation IIAs contain a full protection and security (FPS) clause without clarifications. ISDS tribunals have in some cases extended the scope of FPS to legal security, economic/commercial or other security. Notions and concepts such as the stability of the tax framework, stability of the commercial environment and protection against economic impairment of the investment can be relevant under this provision. New-generation IIAs often clarify that FPS exclusively relates to physical or police protection.

Expropriation

The expropriation provision protects foreign investors in case of dispossession of their investments by the host country. Most old-generation IIAs equally include protection in case of indirect expropriation, without explicit safeguards for non-discriminatory regulatory actions in the public interest. Tax measures with the effect of (substantially) depriving the investor of the value of their investment are vulnerable to challenge. Expropriation clauses constitute a source of uncertainty for States and tax authorities as there is no bright line separating permissible tax measures from tax measures that amount to confiscation or expropriation of an investment and require compensation. Reform options such as the inclusion of specific criteria that seek to guide a tribunal's assessment are frequently encountered in new-generation IIAs.

Transfer of funds obligation

The transfer-of-funds provision grants the right to free movement of investment-related financial flows into and out of the host country. Many old-generation IIAs contain a transfer-of-funds provision without exceptions. In most IIAs no explicit guidance is provided on the types of restrictive measures that may be permitted or conditions for their application. While the good faith application of tax measures is unlikely to violate this standard, including clear guidance in IIA texts can provide certainty to tax policymakers and investors, and will limit arbitral tribunals' discretion in ISDS cases.

"Umbrella" clause

The "umbrella" clause establishes a commitment on the part of the host State to respect its obligations regarding specific investments, for example those arising from contractual arrangements. Revising or withdrawing bilateral (and potentially unilateral) commitments the host State entered into with respect to a foreign investor such as tax stabilization clauses in investment contracts or tax rulings can come within the ambit of the IIA. Through the umbrella clause, contractual obligations or unilateral commitments could, thus, be elevated to IIA obligations and lead to ISDS proceedings. The majority of new IIAs do not include umbrella clauses.

Public policy exceptions

Largely absent from old-generation IIAs, public policy exceptions permit measures otherwise inconsistent with the IIA to be taken under specified circumstances. They can provide a higher degree of flexibility in implementing tax measures when these are justified with respect to specific policy objectives (e.g. for the protection of the environment or public health), and can have implications for the outcomes of tax-related ISDS cases. Tax-specific exceptions that aim at, for example, the effective and equitable collection of taxes can be included.

Access to investor–State arbitration

About 95 per cent of IIAs provide for States' advance consent to international arbitration proceedings between an investor claimant and the respondent State. Investors can directly challenge State measures before an ISDS tribunal. Recourse to domestic courts or the exhaustion of local remedies is not required under most IIAs. Tax matters are generally not excluded from ISDS. The types of tax-related claims that have arisen under IIAs were diverse (e.g. withdrawal of incentives, increases in windfall profit taxes) and were often intertwined with non-tax measures (e.g. forced liquidation, interference with or termination of contracts). Such claims can, but do not necessarily overlap, with the subject matter covered by DTTs and mutual agreement procedures (MAPs). Policy options for new-generation IIAs include limitations to ISDS access for tax-related cases or joint determinations by the competent domestic authorities allowing them to declare that certain tax measures do not breach substantive IIA obligations.

Introduction

This guide primarily addresses tax policymakers by providing insights into the functioning of provisions included in the stock of old-generation international investment agreements (IIAs),[1] with a focus on their interaction with tax measures. It also discusses available reform options for IIAs and trends based on UNCTAD's Investment Policy Framework (UNCTAD, 2015b), the Reform Package for the IIA Regime (UNCTAD, 2018c) and its most recent reform toolkit, the IIA Reform Accelerator (UNCTAD, 2020a). This guide is intended to encourage and facilitate an ongoing dialogue between the tax and investment communities.

Most IIAs do not exclude taxation from their scope, which means that a wide range of tax-related measures, whether of general or specific application, are covered by them. The actions of tax authorities, as organs of the State, and tax policymaking more generally can potentially engage the international responsibility of a State under an IIA when adversely affecting foreign investors and investments. This can involve costly arbitration proceedings, known as investor–State dispute settlement (ISDS). UNCTAD data suggests that some 140 ISDS cases have challenged tax-related measures based on IIAs. The respondent States in these cases were developed countries, developing countries and countries with economies in transition. This guide is thus addressed to tax and investment policymakers worldwide.

Some 2,500 old-generation IIAs are in force today, which typically feature broad provisions and include few exceptions or safeguards (table 1). The majority of these IIAs were negotiated in the 1990s or earlier. Countries' experiences with investor–State dispute settlement (ISDS) cases show that "old treaties bite". Most known ISDS cases have been filed pursuant to old-generation IIAs. Recent IIAs tend to include more reform-oriented features.

Table 1. Reform-oriented elements in IIAs – comparison of "old" and "new" BITs

Treaty provisions Options for IIA Reform	UNCTAD Policy Framework Option	Earlier BITs (1959–2010) (2,432)	Recent BITs (2011–2016) (110)
Preamble Refer to the protection of health and safety, labour rights, the environment or sustainable development	1.1.2	8%	56%
Definition of covered investment Expressly exclude portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts	2.1.1	4%	39%
Definition of covered investor Include a "denial of benefits" clause	2.2.2	5%	58%
Most-favoured-nation treatment Specify that such treatment is not applicable to other IIAs' ISDS provisions	4.2.2	2%	45%
Fair and equitable treatment Refer to the minimum standard of treatment under customary international law	4.3.1	1%	29%
Indirect expropriation Clarify what does and does not constitute an indirect expropriation	4.5.1	5%	42%

[1] According to UNCTAD methodology, international investment agreements (IIAs) are divided into two types: (1) bilateral investment treaties and (2) treaties with investment provisions. A bilateral investment treaty (BIT) is an agreement between two countries regarding the promotion and protection of investments made by investors from the respective countries in each other's territory. The great majority of IIAs are BITs. The category of treaties with investment provisions (TIPs) brings together various types of investment treaties that are not BITs, such as broad economic treaties that include obligations commonly found in BITs (e.g. free trade agreements with investment chapters).

Table 1.	Reform-oriented elements in IIAs – comparison of "old" and "new" BITs			
Free transfer of funds Include exceptions for balance-of-payments difficulties and/or the enforcement of national laws	4.7.2 4.7.3	18%	74%
Public policy exceptions Include general exceptions, e.g. for the protection of human, animal or plant life, or health; or the conservation of exhaustible natural resources	5.1.1	7%	43%

Source: UNCTAD, 2017.

Overall, investors have brought more than 1,000 IIA-based ISDS arbitrations against at least 120 countries.[2] Even if States are fully aware of their obligations under IIAs, the broad clauses of unreformed IIAs can expose them to legal challenges when it comes to raising tax revenue or preventing tax avoidance or evasion. Various types of tax measures have been challenged in past ISDS cases:

- Legislative reforms in the renewable energy sector related to feed-in tariffs and incentives for solar energy
- Withdrawal of value added tax (VAT) subsidies, VAT exemptions, or non-payment of VAT refunds
- Increases in windfall profit taxes and royalties
- Imposition of capital gains taxes
- Large tax assessments
- Withdrawal or decisions not to grant additional incentives, subsidies or tax exemptions
- Initiation of tax investigations or tax audit proceedings
- (Forcible) collection of taxes, customs or other liabilities allegedly due

Claimants often challenge a series of measures at the same time, i.e. an ISDS case is not necessarily limited to a single event or action. Tax measures may feature as one aspect of proceedings interwoven with other challenged measures, such as money laundering investigations, seizure or freeze of bank accounts or assets, or bankruptcy proceedings. The compound effect of different challenged measures may reach the level of an indirect expropriation if single measures do not.

The amounts at stake in ISDS proceedings can be in the hundreds of millions and even billions of dollars. However, not all claims brought by investors under IIAs are successful (UNCTAD, 2020b). Looking at 674 concluded ISDS cases by the end of 2019, about 29 per cent were decided in favour of the claimant investor, i.e. the arbitral tribunal found IIA breaches and ordered the respondent State to pay monetary compensation. About 17 per cent of cases were dismissed for lack of jurisdiction and another 20 per cent failed on the merits (no IIA breaches found). Taken together, this makes 37 per cent of cases decided in favour of the State.[3] Views can diverge on what constitutes a "win" for one or the other party. In general, the disputing parties – including the respondent States – incur significant costs for the arbitrators' work, the administration of proceedings and legal representation, all of which usually amount to several million dollars or more. In addition, claimants and respondent States face several years of uncertainty, while ISDS proceedings concerning the challenged measures are ongoing.

Tax policymakers may be particularly interested in understanding the implications of provisions frequently encountered within the existing stock of IIAs. Being aware of the different reform options that exist for IIAs can also be useful for tax policymakers. Many countries (and regions) are currently reviewing the IIAs they have signed in the past or are developing new model IIAs for use in future negotiations or amendment processes. There may be a window of opportunity for increased coordination between tax policymakers and IIA negotiators.

[2] Information on known ISDS cases by country is available at https://investmentpolicy.unctad.org/investment-dispute-settlement.
[3] The remaining cases were settled (21 per cent), discontinued (11 per cent) or IIA breaches were found but no damages awarded (2 per cent).

Efforts to reform the IIA regime call for broad internal policy coordination within a country, since commitments under IIAs have implications for numerous policy areas at the national, subnational and municipal levels within countries (UNCTAD, 2018c).

Broad consensus exists in the investment policymaking community on the need to reform the IIA regime and the reform is well underway, visible in countries' new approaches to IIAs and the modernized provisions of recent IIAs (UNCTAD, 2020c). During the first phase of IIA reform, countries identified reform areas and approaches, reviewed their IIA networks, developed new model IIAs and started to negotiate new, more modern IIAs. As part of the second phase of IIA reform, policy attention started to shift towards comprehensively modernizing the stock of old-generation IIAs (UNCTAD, 2017; UNCTAD, 2018c). UNCTAD's most recent IIA policy tool, the IIA Reform Accelerator, focuses on how to expedite these reform efforts (UNCTAD, 2020a).

IIA reform is pursued across various country groupings, by countries at different levels of development and from different geographical regions. The overall approaches taken show a clear trend towards reform, but they are not uniform. Individual countries and regions have been the driving forces behind certain approaches (e.g. Brazil, India, South Africa, the European Union (EU)).[4]

Before embarking on IIA reform, a first strategic choice is about whether "to have or not to have" IIAs (UNCTAD, 2018c). This requires a careful assessment of the pros and cons of such agreements. Countries may come to different conclusions, depending on their individual development strategies, their domestic investment policies, their role as a home or host country of investment, their prior experience with IIAs/ISDS and the way they conduct their international investment relations. How to engage in IIA reform and modernize a country's IIAs is the next strategic question. One way of addressing the challenges arising out of old-generation IIAs is to clarify key provisions through the interpretation, amendment or replacement of the original IIA (UNCTAD, 2020a). Countries may choose to pursue other policy tools, each with their pros and cons (e.g. terminating IIAs; UNCTAD, 2018c).

This guide identifies the most important IIA provisions with implications for tax policymaking and tax-related measures:

- Definition of investment
- Definition of investor
- Substantive scope of the IIA
- Temporal scope of the IIA
- National treatment
- Most-favoured-nation treatment
- Fair and equitable treatment
- Full protection and security
- Expropriation
- Transfer of funds
- "Umbrella" clause
- Public policy exceptions
- Investor–State dispute settlement: scope and conditions of access

For each of these provisions, this guide sets out the implications of the unreformed clause frequently encountered in old-generation IIAs. It then introduces reform options for each clause from the Investment Policy Framework and recent IIAs that are most relevant to tax policymakers and can help alleviate the problems arising from unreformed IIA formulations.

[4] For example, Brazil has signed IIAs based on a new model that excludes ISDS and instead focuses on dispute prevention and State-State dispute settlement. India has terminated most of its IIAs, adopted a reform-oriented model IIA and started signing new IIAs. South Africa terminated BITs and adopted a national investment law, the protection of investment act. The EU has signed IIAs with third countries that contain reformed substantive provisions and an investment court system. Some countries have issued moratoriums on the conclusion of new BITs or abstain from signing new IIAs.

Terms and concepts used in the tax policy context and in double taxation treaties (DTTs) may resemble those in IIAs, but often have different – usually broader – implications under IIAs (e.g. non-discrimination standards). Some phenomena, such as "treaty shopping" or "nationality planning" through "mailbox" companies, are a concern in both the IIA regime and the tax regime. Such similar, yet different concepts could provide opportunities for cross-regime learning.

This guide seeks to stimulate the interaction between tax policymakers and IIA negotiators. It aims to increase tax policymakers' understanding of IIA obligations and guide them in assessing potential risks arising from IIAs for tax legislation or practices. It can also serve as a tool for IIA negotiators to increase their awareness of these tax implications. Bringing the two policy communities closer and use their joint expertise could help to accelerate the IIA reform process, while enhancing the coherence between tax and investment policymaking.

Selected IIA provisions and their implications for tax measures

The majority of IIAs in force today consist of old-generation agreements with a broad subject-matter scope, broadly worded substantive obligations, few exceptions or safeguards and direct access for investors to international arbitration proceedings against host States. Recent IIAs increasingly feature reform-oriented provisions that better balance investment protection with the host State's right to regulate. Reform options for IIAs include clarifying and limiting the scope of IIA provisions (e.g. through exceptions and closed lists), omitting certain provisions or adding new ones. Reforms can be implemented by countries when they negotiate new IIAs or modernize the existing stock of old-generation IIAs (e.g. through interpretation, amendment, replacement). The available reform paths include the option of deciding not to sign an IIA after a cost-benefit analysis and the option of terminating an existing IIA without replacing it.

1. Definition of investment

The definition of investment sets out the types of investment covered by the IIA.

What tax policymakers need to know about the definition of investment

Frequently used in old-generation IIAs, a broad asset-based definition (table 2) includes various types of interests in companies such as stockholding that can be held directly or indirectly. A major challenge for government agencies in a host country – including tax administrations and tax policymakers – is to know whether an investment is a foreign investment and by which (if any) IIA relationships it could be covered. So-called round-tripping investments, alongside other forms of indirect investments, could come within the ambit of an IIA. Information on the full ownership structure behind a locally incorporated company may not be readily available. An investment in the host State could be covered by multiple IIAs due to ownership chains with multiple cross-border links. There could also be a *de facto* multilateralizing effect emanating from ownership complexity (i.e. extensive networks of affiliates of large MNEs and the ease of establishing legal entities in many jurisdictions), resulting in the actual coverage of an IIA being far larger than initially anticipated.

Table 2. Definition of investment: approach frequently used in old-generation IIAs

Approach	General implications
2.1.0 Offer coverage of *any* tangible and intangible assets in the host State (through an illustrative/open-ended list), directly or indirectly owned/controlled by covered investors.	A traditional open-ended definition of "investment" grants protection to all types of assets. It may have the strongest investment attraction effect but can end up covering economic transactions not contemplated by the Parties or investments/assets with questionable contribution to countries' development objectives. It may also expose States to unexpected liabilities.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

IIAs with a broad asset-based definition often list examples of protected assets, such as shares of companies (whether a passive portfolio stake or an active direct interest), bonds, concessions, intellectual property rights, movable and immovable property and other types of assets (e.g. claims to money). The question has arisen in arbitral decisions whether certain types of commercial transactions (e.g. general sales transactions, sales of services, short-term loans and certain debt securities) and ordinary commercial contracts constitute a covered investment, where these are not explicitly excluded (UNCTAD, 2011). Covering "all types of assets" may invite an expansive interpretation protecting assets not contemplated at the time contracting parties entered into an agreement.

The broad asset-based definition of investment is frequently used in old-generation IIAs. It encompasses direct and indirect investments and, thus, raises issues related to complex ownership structures that are common for many multinational

corporations (MNEs) (UNCTAD, 2016, Chapter 4.). This has significant implications for the way in which the term "investment" may be seen when applied to the situation of complex corporate structures (UNCTAD, 2011).

Which investments come within the scope of an IIA is closely tied to the definition of investor. The broad asset-based definition that is common in the existing stock of unreformed IIAs does not require the investment in the host State to be beneficially owned or be majority controlled by an investor of the other contracting party. A broad definition of both investment and investor, combined with the reality of complex ownership structures, thus significantly expands the protective coverage of an IIA.

The following types of indirect investments could come within the ambit of the definition of investment and have caused some controversy in arbitral awards:

- Indirect investments via intermediate holding companies in a contracting party, involving a parent company or ultimate owner originating in the host State (also known as round-tripping investments)
- Indirect investments via intermediate holding companies in a contracting party, involving a parent company or ultimate owner originating in a non-contracting party
- Indirect investments structured through a non-contracting party, involving a company in the ownership chain that is incorporated in a contracting party

An investment in the host State could be covered by multiple IIAs due to ownership chains with multiple cross-border links. The challenge for government agencies in a host country is to know whether an investment is a foreign investment and by which (if any) IIA relationships it could be covered. Information on the full ownership structure behind a locally incorporated company may not be readily available. This has important policy implications.

IIAs and many national policies related to investments are premised on policymakers and their agents being able to establish clearly and unequivocally the "foreignness" of an investment (UNCTAD, 2016). Benefits accrue for covered investments and investors of the contracting parties under a specific treaty. However, there could be a *de facto* multilateralizing effect emanating from complex ownership structures (i.e. extensive networks of affiliates of large MNEs and the ease of establishing legal entities in many jurisdictions), resulting in the actual coverage of an IIA being far larger than initially anticipated.

To qualify as an investment under the broad asset-based definition, it is not necessary that the investment gives rise to permanent establishment status as commonly defined in DTTs or that taxable activities take place in the host State (UNCTAD, 2015c).

Takeaways for tax policymakers: reform options for the definition of investment

Many new IIAs specifically exclude certain types of assets from the definition of "investment" (UNCTAD, 2020a; table 3). For example, some new-generation IIAs exclude portfolio investments from the definition of investment by specifying a threshold for shareholdings (e.g. shares or voting power of less than 10 per cent), among other types of excluded assets. An enterprise-based definition could also help circumscribe covered investments.

Explicitly including a requirement for investments to be made in "accordance with host country laws and regulations" can help ensure that only investments that comply with national tax laws are covered by the IIA. When allegations of domestic law violations by the investor are raised by the respondent State in an ISDS case, the arbitral tribunal has to determine, based on the specific facts of the case, whether it lacks jurisdiction. However, this does not mean that the mere existence of domestic judicial, administrative or criminal proceedings (pending or concluded) against covered investments or investors under an IIA – related to the collection of taxes, or to allegations of tax avoidance or evasion – would automatically result in the tribunal lacking jurisdiction over an ISDS case brought by these investors.

A related question is whether an investment could lose IIA protection due to minor or technical violations of host State law. Past arbitral decisions suggest that it would depend on the gravity of the investor's misconduct whether a denial of IIA protection is the proportionate response.

Another question that has arisen in this regard is whether such a legality requirement would apply beyond the "making" of the investment, i.e. during the operation of the investment. Depending on the exact formulation of the requirement, it could conceivably be used to deprive an investor of the IIA protection for serious violations of host country law committed after the investment is "made" (UNCTAD, 2011). A related reform option would thus be to explicitly require investors to comply with host State laws at both the entry and the post-entry stage (Investment Policy Framework, Option 7.1.1; UNCTAD, 2015b).

Some ISDS tribunals have confirmed that the legality requirement applied even when such requirement was not explicitly mentioned in the IIA and that jurisdiction over investments made in violation of domestic law can be declined under certain circumstances (UNCTAD, 2019b). A few recent IIAs explicitly state in their ISDS provisions that claims cannot be submitted to arbitration if serious violations of domestic law have been committed in connection with the investment (e.g. fraudulent misrepresentation, corruption, abuse of process).

Table 3. Definition of investment: reform-oriented policy options

Reform options	General implications
2.1.1 Compile an exhaustive list of covered investments and/or exclude specific types of assets from coverage, e.g.: - portfolio investment (with or without the definition of the term) - sovereign debt instruments - commercial contracts for the sale of goods or services - assets for non-business purposes - intellectual property rights not protected under domestic law. 2.1.2 Require investments to fulfill specific characteristics, e.g. that the investment: - involves commitment of capital, expectation of profit and assumption of risk - involves assets acquired for the purpose of establishing lasting economic relations - delivers a positive development impact on the host country (i.e. Parties could list specific criteria according to their needs and expectations). 2.1.3 Use a narrow, exclusively enterprise-based definition, which covers only enterprises owned/controlled by an investor (i.e. no other assets are covered by the treaty). 2.1.4 Include a legality requirement, i.e. that investment must be made in "accordance with host country laws and regulations".	States may want to tailor their definition of investment to target assets conducive to sustainable development by granting protection only to investments that bring concrete benefits to the host country, e.g. long-term capital commitment, employment generation, etc. To that effect, the Parties may wish to develop criteria for development-friendly investments. A treaty may further specifically exclude certain types of assets from the definition of "investment" (e.g. portfolio investment – which can include short-term and speculative investments – or intellectual property rights that are not protected under domestic legislation). A further option is to adopt a narrow, enterprise-based definition, offering protection only to enterprises owned or controlled (or with a certain minimum share held) by the investor. This would cover the most typical way to invest (including through M&A transactions) but would remove other types of assets from treaty coverage. States may also wish to explicitly exclude from coverage investments made with violations of the host State's domestic law.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

2. Definition of investor

The definition of investor sets out the types of investors protected under the IIA.

What tax policymakers need to know about the definition of investor

A broad definition of investor (table 4) extends benefits under the IIA to investors with an interest in a covered investment (any kind of asset under a broad definition of investment), directly or indirectly owned or controlled. The actions taken by tax administrations and the taxation measures applied in relation to business operations/investment activities may engage international obligations under IIAs. However, tax policymakers cannot necessarily ascertain whether these measures are affecting a foreign investor covered by an IIA. The ownership chains behind a local investment may be complex. It can include entities incorporated in a contracting party that have an indirect minority interest in the investment. Moreover, corporate restructuring to gain investment coverage or reliance on "mailbox" companies to bring an ISDS claim does not by itself amount to treaty abuse or abuse of process under IIAs.

Table 4. Definition of investor: approach frequently used in old-generation IIAs

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

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

The broad definition of investor extends benefits under the IIA to investors with an interest in a covered investment (meaning "every kind of asset" under a broad definition of investment), directly or indirectly owned or controlled. Whether a legal entity can be considered an investor of the other contracting party under a broad definition of investor has often been determined in ISDS awards following a simple incorporation test. This means that indirect investments will be covered that are held by investors within ownership chains with multiple cross-border links, involving a succession of one or several entities incorporated in at least one contracting party to an IIA (and potentially also channeled through non-contracting parties).

A broad definition of investor typically does not contain the requirement for direct ownership, majority ownership or ultimate beneficial ownership of an investment in one contracting party by investors from the other contracting party. Nor does not it indicate the percentage required for the presumed investor's interest or participation in an asset. It typically does not require that the investor's interest or participation in a company be a controlling one (e.g. "every kind of asset … owned or controlled, directly or indirectly" by covered investors, including shares and stocks in companies and other forms of participation). Under a broad definition, minority shareholders could generally be considered covered (UNCTAD, 2011).

Tax policymakers cannot necessarily ascertain whether a local subsidiary is linked to a foreign investor covered by an IIA. However, the actions taken by tax administrations and the taxation measures that are applied in relation to business operations/investment activities may engage international obligations under IIAs and result in unexpected liabilities.

Investors that are incorporated in the "home State" contracting party but have their effective place of management or principal place of business in the "host State" contracting party or a non-contracting party may potentially be considered covered investors under IIAs, depending on the formulation of the relevant IIA provisions and the specific facts of the case. This has raised policy concerns about the coverage of "mailbox" companies, minority shareholders, non-controlling and indirect shareholders under IIAs (and related risks such as round-tripping, IIA treaty shopping and multiple claims). The resulting complex ownership structures can also have implications for access to specific benefits reserved for foreign investors (e.g. fiscal incentives), among others. The round-tripping investments may be driven by the prospect of fiscal advantages as well as IIA benefits.

The broad definition of investor does not set out clear guidelines for determining when or how legal or natural persons originate from a contracting party. Most existing IIAs use the incorporation approach to define qualifying corporate investors, without any reference to substantial business activities, effective management and control, or "seat". This permissive language in many IIAs creates possibilities for treaty shopping (UNCTAD, 2011). It has emerged from ISDS awards under IIAs that corporate restructuring to gain investment coverage or reliance on "mailbox" companies to bring an ISDS claim does not by itself amount to treaty abuse or abuse of process (UNCTAD, 2016). Structuring an investment to take advantage of IIAs concluded by the host State has generally been considered acceptable by arbitral tribunals. However, jurisdiction over claims has been denied in cases of last-minute corporate restructuring for the main purpose of gaining access to investor-State dispute settlement under an IIA at a time when the dispute with the host country had arisen or was foreseeable, known as time-sensitive restructuring (UNCTAD, 2016).[5]

Takeaway for tax policymakers: reform options for the definition of investor

When providing for coverage of investors with directly or indirectly owned/controlled assets under IIAs, countries may opt to define a threshold or add other requirements (table 5). Tax policymakers are familiar with concepts to limit access to treaty benefits in inappropriate circumstances in the context of DTTs (Article 29 of the OECD and UN Model Tax Treaties, which provide for a more "automatic" limitation-of-benefits provision as well as a general principal purpose test). Reform options for IIAs include, for example, that a significant percentage of shareholding (e.g. more than 50 per cent) should be owned by natural or legal persons from the other contracting party, and/or covered investors should have substantial influence over the running of the business in the form of considerable decision-making powers (e.g. power to name a majority of directors). IIAs could require "effective control" and clarify its meaning by including indicators or criteria (UNCTAD, 2016). Some ISDS tribunals have considered the following factors when inquiring into effective control: The ability to effectively decide and implement the key decisions of the business activity of an enterprise; participation in the day-to-day management of the entity; access to know-how; and authoritative reputation.[6]

Several key elements from the OECD/G20 Base Erosion and Profit Shifting (BEPS) Action Plan[7] are relevant for IIAs as they address challenges that resemble those the IIA regime is facing in the context of complex ownership: indirect ownership, mailbox companies and time-sensitive restructuring (UNCTAD, 2016). For example, Action 3 on Controlled Foreign Company Rules and Action 6 on Preventing treaty abuse. Significant multilateral efforts have been undertaken to develop solutions to prevent the granting of tax treaty benefits in inappropriate circumstances. The BEPS outcome can provide insights for harmonizing the treatment of indirect ownership and for reducing the potential for treaty shopping in both tax and investment policymaking.

Addressing indirect ownership, mailbox companies and corporate restructuring may also be linked with the extensive work carried out by the OECD Forum on Harmful Tax Practices. In support of efforts addressing harmful tax practices (BEPS Action 5), the reform options for the definition of investor in IIAs could also help to exclude legal persons taking advantage

[5] See also Baumgartner, J. K. (2016). *Treaty Shopping in International Investment Law.* Oxford: Oxford University Press.
[6] See further p. 177 and box IV.11 in UNCTAD, 2016.
[7] Available at https://www.oecd.org/tax/beps/beps-actions/.

of preferential tax regimes deemed to be harmful by the OECD. The increasing attention in tax policymaking on determining ultimate beneficial ownership may provide an impetus for reform in IIA policymaking.[8]

A denial-of-benefits clause can go in the same direction in ensuring that IIA benefits only accrue to investors effectively originating from the other contracting party rather than the host State or a third State. This safeguard is particularly important where the parties to the treaty decide to broadly cover "any natural and legal persons originating from the other Contracting Party". The denial-of-benefits clause is akin to a limitation of benefits clause in DTTs.

Better information on ownership chains and ultimate beneficial ownership (e.g. through disclosure requirements) could be useful for both tax authorities and investment policymakers (UNCTAD, 2016). The information asymmetry on corporate structures existing between investors and host States also creates a barrier for Governments' effective defence against ISDS claims (e.g. to use the denial-of-benefits clause or to raise objections to the tribunal's jurisdiction). Tax authorities of host States can play a role in providing evidence to identify time-sensitive restructurings, mailbox companies and round-tripping investments, particularly if stronger cooperation is established between the tax authorities of home and host States.

Another issue that could be of relevance is whether dual nationals of both parties to the IIA (home and host countries) should be permitted to bring any claims against one of their home States (UNCTAD, 2021). Most IIAs are silent on the matter of dual nationality and typically they do not explicitly refer to effective and dominant nationality. Decisions of ISDS tribunals on this question continue to diverge. Some recent IIAs address this issue by specifying the circumstances under which natural persons with dual nationality are covered or by excluding certain dual nationals from coverage (UNCTAD, 2020a).

Table 5. Definition of investor: reform-oriented policy options

Reform options	General implications
2.2.1 Exclude certain categories of natural or legal persons from treaty coverage, e.g.: - investors with double nationality (of which one is the host country nationality) - permanent residents of the host country - legal entities that do not have their seat or any real economic activity in the home country.	There are various options to narrow the range of covered persons. For example, to eliminate the risk of abuse and enhance legal predictability, a treaty may add a requirement that a company must have its seat in the home State and carry out real economic activities there. The volume of investments channeled through "special purpose entities" may make such a clause increasingly relevant.
2.2.2 Include a denial-of-benefits clause that enables the host State to deny treaty protection to: - legal entities that are owned/controlled by third-country nationals or host State nationals and that do not have real economic activity in the of the home Party ("mailbox" companies) - legal entities owned/controlled by investors from countries with which the host country does not have diplomatic relations or those countries that are subject to an economic embargo. Indicate whether denial-of-benefits clause can be invoked by a State "retrospectively", i.e. after the institution of ISDS proceedings.	An alternative to adding the above features to the definition of a covered investor is to use a denial-of-benefits clause that would allow denying protection to "mailbox" companies / "special purpose entities". To ensure the effectiveness of the denial-of-benefits clause in light of the contradictory arbitral practice, it may be useful to clarify that the clause can be invoked also after the commencement of arbitral proceedings.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

[8] For example, the WU Global Tax Policy Center in collaboration with others conducts research on beneficial ownership and provides a platform for policy dialogue as part of a project on "Tax Transparency and Corruption". See https://www.wu.ac.at/en/taxlaw/institute/gtpc/current-projects/tax-transparency-and-corruption.

3. Substantive scope of the IIA

The substantive scope of the IIA covers all policy areas and sectors, unless it contains exclusions that carve out specific policy areas (e.g. taxes or government procurement) and/or industries.

What tax policymakers need to know about the substantive scope

Most old-generation IIAs do not exclude tax measures (table 6), which means that tax-related measures, whether of general or specific application, are covered by IIAs. This includes tax measures that fall within the scope of a DTT between the two countries.

Table 6. Substantive scope: approach frequently used in old-generation IIAs

Approach	General implications
2.3.0 No exclusions.	The broader a treaty's scope, the wider its protective effect and its potential contribution to the attraction of foreign investment. However, a broad treaty also reduces a host State's right to regulate and flexibility and ultimately heightens its exposure to investors' claims. States can tailor the scope of the agreement to meet the country's development agenda.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

Most old-generation IIAs do not contain any exclusions from their scope: No exclusions for taxation, subsidies and grants, public procurement or other subject matters.[9] If not explicitly excluded from treaty coverage, tax-related matters are generally within the scope of IIAs. A specific tax-related matter may simultaneously fall within the scope of a DTT as well as an IIA between the relevant countries. Most IIAs are silent on their relationship with DTTs and generally no special mechanism exists for addressing tax-related claims under IIAs (e.g. a renvoi for binding interpretation by the contracting parties or joint determination by competent authorities).

A number of tax-related measures have given rise to ISDS proceedings in the past, with different outcomes. Potentially, a taxpayer could request the relevant competent authority for a mutual agreement procedure (MAP) and, concurrently or afterwards, pursue ISDS claims as an investor under an IIA concerning the same matter. A MAP between the competent authorities of the contracting parties or a State-State tax arbitration could be ongoing when an ISDS proceeding is initiated. The outcome of a MAP, tax arbitration or tax litigation could also give rise to ISDS cases.

Moreover, many old-generation IIAs do not address the relationship between domestic proceedings (administrative or judicial) and ISDS. This means that an investor could pursue international arbitration while domestic proceedings (e.g. related to tax or other matters) are pending or could start both simultaneously. The lack of clarifications on the interaction between domestic proceedings and ISDS as well as ambiguous IIA formulations may leave greater discretion to tribunals.

Takeaway for tax policymakers: reform options for the substantive scope

A general carve-out for taxation from all IIA obligations could help ensure that there is no overlap between the scope of the IIA with the subject matters covered by DTTs and overall national tax legislation and regulation (table 7). This carve-out would, however, go well beyond the scope of a DTT (which covers only direct taxes) and include indirect taxes such as VAT or sales taxes. A carve-out would limit an investor's ability to seek compensation for tax measures allegedly in violation of substantive treaty standards (e.g. in breach of the fair and equitable treatment clause, non-discrimination standards or amounting to indirect expropriation).

[9] See UNCTAD, IIA Mapping Project, available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping.

As compared to old-generation IIAs, exclusions of specific policy areas from the treaty scope (e.g. taxation, subsidies and grants, government procurement, sovereign debt) are more frequently encountered in recent IIAs, but not all include them (UNCTAD, 2015a). Some of the IIAs that contain a carve-out simply indicate that the IIA shall not apply to matters of taxation, without further explanations or clarifications. Others exclude tax measures from the IIA scope except for specific provisions that explicitly cover taxation measures (such as expropriation and/or transfer of funds) and they allow for claims to be submitted to ISDS (only for alleged breaches of those provisions that cover taxation measures). This means that taxation measures are not fully carved out.

An explicit tax carve-out from the IIA scope does not lead to a quasi-automatic dismissal of any claims involving tax-related measures. Tax-related measures could still be challenged by investors through arbitration proceedings and it would be for the ISDS tribunal to determine jurisdiction over the claims. The determination of the arbitral tribunal may be different from the characterization of the challenged measure under domestic law. In past ISDS cases where the invoked IIAs specifically excluded taxation from their scope, tribunals typically examined whether a measure was a "tax". Some tribunals declined jurisdiction over the relevant measure under the applicable IIA because it was a "tax" (UNCTAD, 2019b; UNCTAD, 2021). In a few cases, ISDS tribunals decided that the challenged measure was not a "tax" (despite its formal nomination as such) and, therefore, did not qualify for the applicable IIA's tax carve-out (UNCTAD, 2019b; UNCTAD, 2021). Whether a challenged measure constitutes a *bona fide* tax measure within the meaning of the tax carve-out of the applicable IIA may also play a role. As claimants may challenge several taxation and non-tax measures in the same arbitral proceeding, ISDS tribunals can decline jurisdiction over some measures and proceed to an examination of the merits on others.

A few recent IIAs contain a complete carve-out of tax measures from their scope that gives full discretion to the host State to decide (before or after the start of arbitral proceedings) whether a challenged measure falls under the carve-out, making the host State's decision non-justiciable (i.e. not subject to review or adjudication by arbitral tribunals).

Some IIAs establish a filter mechanism that gives a greater role to government authorities on taxation claims under IIAs. They prescribe a joint determination mechanism by the competent tax authorities for tax measures challenged by claimants under the specific provision such as expropriation or transfer of funds (when taxation claims are carved out from any other IIA provisions). Under such mechanisms, the designated competent authorities of the respective contracting parties are given a time frame of typically 6 months to examine the issue. If they agree that the measure does not amount to expropriation or falls within an exception for transfer of funds, the dispute cannot proceed to arbitration. If no agreement is reached within the set time, the claimant is allowed to initiate arbitration proceedings.

Joint determination by the competent tax authorities could also be prescribed in IIAs that contain a general tax carve-out, since disputes can arise between an investor and the host State as to whether or not the carve-out applies in a specific case.

A few IIAs define what is meant by "taxation measure" (e.g. direct and indirect taxes; laws and measures regarding taxation; imposition, enforcement or collection of taxes). This can be useful in combination with a complete or partial tax carve-out.

Another option is to define the general relationship between the IIA and DTTs. The IIA could state that nothing in the agreement affects the rights and obligations of the contracting parties under any DTT applicable between them and that, in the event of any inconsistency relating to a taxation measure between the IIA and such DTT, the DTT shall prevail to the extent of the inconsistency. However, this leaves open the question of how and by whom inconsistencies should be settled. Only a few IIAs that contain such a provision specify that questions as to the existence of an inconsistency shall be settled by the competent (tax) authorities of the contracting parties. This option would have a limited effect on narrowing the scope of the IIA, as taxes covered by a DTT are usually direct taxes (imposed by the state itself or its political subdivisions or local authorities). Indirect taxes or other kinds of contributions would still be covered by the IIA in the absence of exceptions for "taxation" more generally. An exception for "taxation measures" rather than a reference to "obligations under tax conventions" would be a stronger and more effective safeguard for avoiding overlaps between IIAs and tax policymaking.

Table 7.	Substantive scope: reform-oriented policy options
Reform option	General implications
2.3.1 Exclude specific policy areas from treaty coverage (from all or some treaty obligations), e.g.: - subsidies and grants - public procurement - taxation 2.3.2 Exclude specific sectors and industries from treaty coverage (from all or some treaty obligations), e.g.: - essential social services (e.g. health, education) - specific sensitive industries (e.g. cultural industries, fisheries, nuclear energy, defence industry, natural resources).	By carving out specific policy areas and sectors/industries from treaty coverage, States preserve flexibility to implement national development strategies (e.g. to grant preferential treatment to domestic investors or to impose performance requirements), or to ensure access to essential/ public services. A less far-reaching approach would be to carve out sectors and policy areas (e.g. taxation) from most treaty obligations, but keep them subject to some (e.g. expropriation).

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

4. Temporal scope of the IIA

The temporal scope of the IIA determines whether the treaty applies to investments and/or measures pre-dating the IIA.

What tax policymakers need to know about the temporal scope

The most common approach in old-generation IIAs is to extend treaty protection to any investment whether made before or after the entry into force of the agreement (table 8). A measure that was taken prior to entry into force of the IIA but with "lasting effects" on such investments could under certain circumstances give rise to ISDS proceedings, creating uncertainties for different government departments or agencies, including tax policymakers. This does not mean that the IIA has retroactive effect. The treaty's obligations generally apply with respect to acts or facts occurring – or continuing to exist – after the treaty's entry into force.

Table 8.	Temporal scope: approach frequently used in old-generation IIAs
Approach	General implications
2.4.0 Extend the treaty scope to investments established both before and after the treaty's entry into force.	The treaty's scope will be widest if its application is extended to all investments, regardless of the time of their establishment in the host State.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

Extending IIA protection to investments made before the entry into force of the agreement can significantly enlarge the number of covered investments. This provision is included in many IIAs. The effect of such a provision is to ensure that an investment tribunal will have jurisdiction to hear any claim arising after the entry into force of the agreement but related to an investment made before the agreement entered force (UNCTAD, 2011). Some IIAs include a "for greater certainty" provision specifically excluding claims arising out of events which occurred prior to the IIA's entry into force and disputes which existed prior to that date (UNCTAD, 2014). However, the absence of explicit wording confirming the principle of non-retroactivity of treaties (Article 28 of the Vienna Convention on the Law of Treaties) does not mean that an IIA acquires retroactive effect. The common understanding is that IIA obligations apply only with respect to acts or facts occurring (or continuing to exist) after the IIA's entry into force (UNCTAD, 2014).

Still, this may entail some uncertainties for different government departments or agencies, including tax policymakers, as to whether a particular measure taken prior to a treaty's entry into force may be considered to have "lasting effects" that

could give rise to ISDS arbitrations. A State's pre-existing non-conforming measures could potentially be challenged for their continuing existence and lasting effects.

Takeaway for tax policymakers: reform options for the temporal scope

With regard to the temporal scope of an IIA, a question of interest for tax policymakers may be how an IIA could apply to State conduct or measures taken prior to the IIA's entry into force. One option for future IIAs or IIA amendments is to explicitly exclude ISDS claims concerning such measures even if they have lasting effects (in the form of a "for greater certainty" provision; table 9). Some IIAs, including a few more recent ones, limit the temporal scope to investments made after the entry into force of the IIA, thereby also excluding prior measures from their scope.

Table 9. Temporal scope: reform-oriented policy options

Reform options	General implications
2.4.1 Limit temporal scope to investments made after the conclusion/entry into force of the treaty. 2.4.2 Clarify that the treaty shall not allow IIA claims arising out of any State acts which ceased to exist prior to the IIA's entry into force, even though they may still have an ongoing effect on the investor. 2.4.3 Clarify that the treaty shall not allow IIA claims based on measures adopted prior to conclusion of the treaty.	One approach is to exclude already "attracted" (i.e. pre-treaty) investments: it could be seen as preventing free-riding by "old" investors but at the same time would result in discrimination between "old" and "new" investments. Moreover, this can create uncertainty with respect to re-investments by "old" investors. Policymakers should consider the effect of the treaty on State acts adopted prior to the treaty's entry into force, but with a lasting effect: "continuing" breaches (e.g. maintenance of an earlier legislative provision which comes into conflict with treaty obligations), individual acts whose effects continue over time (e.g. effect of a direct expropriation on the former owner of the asset) and "composite" acts (i.e. a series of actions or omissions which, taken together, are wrongful). It is useful to provide additional language to clarify whether the treaty would cover or exclude such lasting acts or effects. An express provision that precludes the application of the treaty to acts (or situations) that ceased to exist before the treaty's entry into force would enhance legal certainty, especially with regard to the period between the date of the treaty's signature and its entry into force. This approach would nevertheless keep open to challenge those pre-existing laws and regulations that come into contradiction with the new treaty once it enters into force. An alternative is to apply the treaty only to those measures that are adopted after the treaty's entry into force: this would automatically preclude all of the State's earlier non-conforming measures from being challenged, eliminating the need to identify and schedule such measures individually.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

5. National treatment (NT)

The national treatment (NT) provision protects foreign investors/investments against discrimination vis-à-vis domestic investors.

What tax policymakers need to know about national treatment (NT)

Old-generation IIAs commonly include a broad NT clause without restrictions or qualifications (table 10). The IIA NT standard is different from the non-discrimination provision in DTTs, and it can impose important limitations on tax measures and tax administrations. The NT standard under IIAs requires that the host State does not discriminate *de jure* or *de facto* between domestic and foreign investors on grounds of nationality. For example, in the absence of explicit exemptions, a broadly formulated NT clause impedes host States from granting preferential treatment exclusively to national investors/investments (e.g. in the form of temporary grants or subsidies, including tax benefits) even where this treatment is in accordance with the country's legislation. Specific exceptions for different treatment based on residence are usually absent from IIAs. This can raise the question of whether applying different tax rates to non-residents or using different ways to calculate the tax base could potentially conflict with IIA obligations. There are factors that may justify differential treatment of investors.

Table 10. National treatment (NT): approach frequently used in old-generation IIAs

Approach	General implications
4.1.0 Prohibit less favourable treatment of covered foreign investors/investments vis-à-vis comparable ("in like circumstances") domestic investors/investments, without restrictions or qualifications.	NT prevents nationality-based discrimination and guarantees foreign investors a level-playing field vis-à-vis comparable domestic investors. This standard is generally considered conducive to good governance.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

Old-generation IIAs commonly include a broad NT clause without restrictions or qualifications. The scope and implications of the NT clause included in most IIAs are different from those of the non-discrimination provision in DTTs (article 24 of the OECD and UN model tax treaty). The IIA NT standard can impose important limitations on tax measures and tax administrations. The NT treatment requires that the host State does not discriminate – *de jure* or *de facto* – between domestic and foreign investors on grounds of nationality. There is "*de jure*" discrimination when a measure formally targets foreign investors (including the covered foreign investor) and "*de facto*" discrimination when the measure, while apparently being of general application, disproportionately affects foreign investors (UNCTAD, 2010).

Among others, a broadly formulated NT clause impedes host States from granting preferential treatment exclusively to national investors/investments (e.g. in the form of tax subsidies or exemptions) if the treaty does not explicitly exempt the relevant policy areas, measures or economic sectors/industries from the scope of obligations. Preferential treatment reserved for national investors/investments might also conflict with treaty obligations even where this treatment is in accordance with the country's legislation.

Under domestic tax laws and in line with the OECD and UN model tax treaties Article 24(1), non-residents can be subject to different tax rates and withholding taxes. A broadly formulated NT clause as commonly included in old-generation IIAs does not contain a specific exception for different treatment based on residence.

It is generally understood that, under IIAs, host States can accord different treatment among investors that are not legitimate comparators based on factors other than nationality, e.g. on the basis of different economic sectors or enterprise size. There are factors that may justify differential treatment of investors on the part of the State and could be considered "legitimate" under IIAs. However, in the absence of explicit guidance on these issues in the actual IIA provisions, arbitral

tribunals have wide discretion to determine the scope of the NT obligation in each specific case, and this has led to conflicting outcomes in the past.

Takeaway for tax policymakers: reform options for national treatment

Some more recent IIAs clarify in the NT and MFN provisions that the determination of "like circumstances" depends on the totality of circumstances, including whether the relevant treatment distinguishes between investors or investments based on legitimate public welfare or regulatory objectives (table 11). The different treatment of residents vis-à-vis non-residents for tax purposes is often justified for socio-economic reasons. This is the case, for example, when it comes to the administration of tax rules, the exercise of fiscal jurisdiction or the prevention of tax avoidance (e.g. thin capitalization rules that only apply to foreign debt). Such distinctions between differently situated investors/investments are generally widely accepted internationally. Nevertheless, an explicit clarification will go some way in aligning IIA provisions with the principles of DTTs and domestic tax laws.

A few IIAs contain specific carve-outs in the NT clause for laws (and regulations) relating to taxation. Some other new IIAs explicitly state that the NT provision (or any provision in the IIA) shall not be construed to prevent a contracting party from adopting or enforcing measures:

- distinguishing, in the application of the fiscal legislation, between taxpayers who are not in the same situation, in particular with regard to their place of residence or with regard to the place where their capital is invested
- aimed at ensuring the effective or equitable imposition or collection of direct taxes in respect of economic activities or investors of the other Party;
- aimed at preventing the avoidance or evasion of taxes pursuant to the provisions of agreements to avoid double taxation or other tax arrangements or domestic fiscal legislation.

Country-specific reservations in IIAs can also be crafted to provide flexibility for certain tax-related measures or specific economic sectors or activities.

Table 11. National treatment (NT): reform-oriented policy options

Reform options	General implications
4.1.1 Set out criteria for determining whether investors/investment are "in like circumstances". 4.1.2 Circumscribe the scope of the NT clause (for both/all Contracting Parties), noting that it, e.g.: - subordinates the right of NT to a host country's domestic laws - reserves the right of each Party to derogate from NT. 4.1.3 Include country-specific reservations to NT, e.g. carve out: - certain policies/measures (e.g. subsidies and grants, government procurement, measures regarding government bonds) - specific sectors/industries where the host country wishes to preserve the right to favour domestic investors - certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities) - measures related to companies of a specific size (e.g. SMEs).	A clarification that the NT obligation requires comparison of investors/investments that are "in like circumstances" can go some way in safeguarding the right to regulate, but it can also raise questions about the specific criteria for comparison. Therefore, a treaty may need to set out the relevant criteria. In some situations, and in accordance with their development strategies, States may want to be able to accord preferential treatment to national investors/investments (e.g. through temporary grants or subsidies) without extending the same benefits to comparable foreign-owned companies. In this case, NT provisions need to allow flexibility to regulate for development goals. For example, countries that are reluctant to rescind the right to discriminate in favour of domestic investors can make the NT obligation "subject to their domestic laws and regulations". This approach gives full flexibility to grant preferential (e.g. differentiated) treatment to domestic investors as long as this is in accordance with the country's legislation. However, such a significant limitation to the NT obligation may be perceived as a disincentive to foreign investors. Also omitting the NT clause from the treaty preserves the right to regulate but reduces the treaty's protective value.

Table 11.	National treatment (NT): reform-oriented policy options
4.1.4 Omit the NT clause.	There can be a middle ground between full policy freedom, on the one hand, and a rigid guarantee of non-discrimination, on the other. For example, States may exempt specific policy areas or measures as well as sensitive or vital economic sectors/industries from the scope of the obligation in order to meet both current and future regulatory or public-policy needs such as addressing market failures (this can be done either as an exception applicable to both Contracting Parties or as a country-specific reservation).

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

6. Most-favoured-nation (MFN) treatment

The most-favoured-nation treatment (MFN) provision protects foreign investors/investments against discrimination vis-à-vis other foreign investors.

What tax policymakers need to know about most-favoured-nation (MFN) treatment

Old-generation IIAs often feature an MFN clause without carve-outs and clarifications (table 12). Similar to the NT clause, MFN treatment requires that the host State does not discriminate *de jure* or *de facto* between foreign investors on grounds of nationality. In ISDS practice, investors have rarely invoked the MFN provision to challenge the actual level of material treatment given to foreign investors from third States. More frequently, investors invoked the MFN clause to import more investor-friendly provisions from the host State's IIAs with third States. This can result in investors "cherry-picking" the most advantageous clauses from IIAs concluded by the host State with third countries. For example, claimants could attempt to circumvent tax exceptions in the IIA under which the ISDS case is brought (on the basis that another IIA signed by the host country does not contain them) or try to import an umbrella clause. As such, the MFN clause can have ramifications for taxation measures. Potentially, the MFN clause could also be used by covered investors to claim more favourable tax treatment (which could also mean less stringent tax avoidance and evasion rules) from a DTT between the host State and a third country.

Table 12.	Most-favoured-nation (MFN) treatment: approach frequently used in old-generation IIAs
Approach	General implications
4.2.0 Prohibit less favourable treatment of covered investors/investments vis-à-vis comparable ("in like circumstances") investors/investments of any third country.	The MFN provision is designed to prevent nationality-based discrimination and to ensure a level-playing field between investors from the IIA home country and comparable investors from any third country. However, competing objectives and implications may come into play when designing an MFN clause. While an MFN clause may be used to ensure upward harmonization of IIA treaty standards, it can also result in the unanticipated incorporation of stronger investor rights from IIAs with third countries and complicate conscious treatymaking. This is particularly the case if the MFN clause extends to pre-establishment issues or when the treaty includes carefully balanced provisions that could be rendered ineffective by an overly broad MFN clause.

Table 12.	Most-favoured-nation (MFN) treatment: approach frequently used in old-generation IIAs
	A number of arbitral decisions have read the MFN obligation as allowing investors to invoke more investor-friendly provisions from third treaties, e.g. to incorporate standards not included in the base treaty, to benefit from higher protection standards compared to the ones found in the base treaty or to circumvent procedural (ISDS-related) requirements in the base treaty.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

While absent from the OECD and UN model tax conventions as well as most DTTs, the large majority of IIAs include an MFN clause. Old-generation IIAs often feature an MFN clause with limited carve-outs and clarifications.

MFN treatment requires that the host State does not discriminate – *de jure* or *de facto* – between foreign investors on grounds of nationality (UNCTAD, 2010). MFN treatment does not prevent host States from according different treatment among investors that are not legitimate comparators based on factors other than nationality, e.g. on the basis of different economic sectors or enterprise size. The original purpose of the MFN provision was to ensure competitive equality in the host State between foreign investors of different nationalities with regard to concrete host State conduct and treatment under domestic laws and regulations (UNCTAD, 2010).

However, in ISDS practice, investors have rarely invoked the MFN provision to challenge the actual level of material treatment given to foreign investors in specific circumstances, e.g. arising out of the more favourable application of domestic measures to investors from third States (UNCTAD, 2010; UNCTAD, 2018c). More frequently, investors invoked the MFN clause to import more investor-friendly provisions from the host State's IIAs with third States. This has raised concerns as some ISDS tribunals allowed while others dismissed this application of the MFN clause. It can result in investors "cherry-picking" the most advantageous clauses from IIAs concluded by the host State with third countries, sidelining the negotiated outcome of the IIA under which the ISDS case is originally brought (the base treaty) by replacing provisions in the base treaty or adding to them (UNCTAD, 2018c). For example, claimants could attempt to circumvent tax exceptions in the base treaty (where another IIA signed by the host country does not contain them) or try to import an umbrella clause.

Many old-generation IIAs exclude advantages provided to third country investors under DTTs from the scope of the MFN clause; some (but not as many) also exclude taxation measures from MFN.[10] Without such an exception, the MFN clause in IIAs could potentially be used to claim more favourable tax treatment (which could also mean less effective tax avoidance and evasion rules) from a DTT between the host State and a third country. A broadly worded MFN clause can have ramifications for taxation measures and for commitments under DTTs, undermining individual bargains.

One of the primary reasons that a majority of countries opt not to introduce an MFN clause in their DTTs is because they are generally based on the principle of reciprocity and reflect concessions made between the respective parties.

Takeaway for tax policymakers: reform options for most-favoured-nation treatment

When setting out criteria for the determination of "like circumstances" in the NT and MFN provisions (table 13), some more recent IIAs suggest that legitimate public welfare or regulatory objectives may justify different treatment of investors or investments. Such formulations provide guidance to ISDS tribunals for any claims under the MFN provision, including potential tax-related cases. They may be of particular relevance in cases of differential treatment between two foreign investors where one of them is based in a country that is considered to be facilitating or engaging in harmful tax competition.

A few IIAs explicitly state that the NT and MFN provisions do not prevent the contracting parties from treating investors differently if this is in accordance with their legislation relating to taxes.

[10] See UNCTAD, IIA Mapping Project, available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping.

Since differences in tax treatment resulting from DTTs concluded by the host State with third countries can potentially create friction with IIA obligations under the MFN clause, a specific exception for any preferential treatment granted under DTTs may be warranted and is indeed frequently encountered in older as well as more recent IIAs.

A complete carve-out of tax measures from the scope of the MFN provision would have a broader effect than the exception for more favourable treatment stemming from DTTs. For example, under a complete carve-out, the MFN clause would then also not cover anti-avoidance rules that some countries have introduced at the domestic level that permit the revenue authority to treat transactions with or investors from low-tax or secrecy jurisdictions differently. Without an exception, these types of rules and efforts to restrict tax exemptions or other benefits to entities taking advantage of any harmful regimes may potentially come into conflict with broad MFN clauses included in IIAs.

A limitation of the MFN clause to treatment accorded to foreign investors under domestic laws, regulations, administrative practices and *de facto* treatment would leave domestic taxation within the ambit of the MFN clause. This limitation would, however, help ensure that the MFN clause cannot be invoked to by-pass a limited treaty scope in the base IIA – such as a general exclusion of taxation matters from its scope – on the ground that IIAs with third countries have a broader subject matter scope. Similarly, substantive treatment standards not found in the base IIA, including umbrella clauses, could not be imported.

Table 13. Most-favoured nation (MFN) treatment: reform-oriented policy options

Reform options	General implications
4.2.1 Set out criteria for determining whether investors/investment are "in like circumstances". 4.2.2 Circumscribe the scope of the MFN clause, noting that MFN does not apply to more favourable treatment granted to third-country investors under, e.g.: - Economic integration agreements - Double taxation treaties - IIAs concluded prior to (and/or after) the conclusion of the IIA in question (e.g. if the latter contains rules that are less favourable to investors, as compared to earlier IIAs) - ISDS clauses/procedural rights. 4.2.3 Limit the application of the MFN clause to treatment accorded to foreign investors under domestic laws, regulations, administrative practices and *de facto* treatment. (Clarify that substantive obligations in other IIAs do not in themselves constitute "treatment", absent measures adopted by a State pursuant to such obligations.) 4.2.4 Include general carve-outs (applicable to both/all Parties) or country-specific reservations to MFN, e.g. carve out: - certain policies/measures (e.g. subsidies, etc.) - specific sectors/industries - certain policy areas (e.g. issues related to minorities, rural populations, marginalized or indigenous communities or certain ethnic or cultural groups). 4.2.5 Omit the MFN clause.	Should a country wish to preclude the MFN clause from applying to any relevant international agreement, it can do so by excluding specific types of treaties from the scope of the MFN clause (see section 4.2.2) or, in a broader manner, by restricting the scope of the MFN clause to domestic treatment (see section 4.2.3). Carving out certain sectors/industries or policy measures through country-specific reservations, catering for both current and future regulatory needs, is an additional tool that allows managing the scope of the MFN clause in a manner targeted to the specific needs of individual IIA Parties. A final option is to omit the MFN clause. While such an approach preserves a maximum of flexibility, omitting a standard that many consider to be one of the cornerstones of international economic law may raise questions. The MFN clause is a crucial provision for IIA reform. Failure to take appropriate action with respect to the MFN clause can undermine improved formulations of treaty provisions.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

7. Fair and equitable treatment (FET)

The fair and equitable treatment (FET) provision protects foreign investors/investments against, e.g. denial of justice, arbitrary and abusive treatment.

What tax policymakers need to know about fair and equitable treatment (FET)

Old-generation IIAs typically include a fair and equitable treatment (FET) provision drafted in a minimalist, open-ended way (table 14). The FET provision is the most likely standard to be invoked in tax-related ISDS cases. It is the most frequently alleged breach in ISDS cases overall. Many notions and concepts have transpired from ISDS awards that are not explicitly mentioned in the FET clause: expectations of regulatory stability and compliance with the legitimate expectations of investors, expectations of transparency and participation in governmental decision-making, proportionality tests for State measures. General regulations that are put in place specifically to induce (foreign) investments and on which an investor relies can expose a State to liability if these regulations are subsequently changed or withdrawn. For tax administrations and tax policymakers working in an environment of evolving tax regulations, the various elements subsumed under a broad FET provision would merit special attention when assessing the risks of tax-related ISDS claims. The potential obligations arising from the FET provision could be perceived as particularly onerous for developing countries.

Table 14. Fair and equitable treatment (FET): approach frequently used in old-generation IIAs

Approach	General implications
4.3.0 Give an unqualified commitment to treat foreign investors/investments "fairly and equitably".	FET is an important standard of treatment that merits particular attention: while it is considered to help attract foreign investors and foster good governance in the host State, almost all claims[a] brought to date by investors against States have included an allegation of the breach of this all-encompassing standard of protection. Through an unqualified promise to treat investors "fairly and equitably", a country provides maximum protection for investors but also risks posing limits on its right to regulate, raising its exposure to foreign investors' claims and the resulting financial liabilities. Some of these implications stem from the fact that there is a great deal of uncertainty concerning the precise meaning of the concept, because the notions of "fairness" and "equity" do not connote a clear set of legal prescriptions and are open to subjective interpretations. A particularly problematic issue concerns the use of the FET standard to protect investors' "legitimate expectations", which may restrict the ability of countries to change policies or to introduce new policies that may have a negative impact on foreign investors.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).
[a] According to UNCTAD's ISDS Navigator, claimants alleged breaches of FET in over 80 per cent of known ISDS cases.

Owing to its open-ended and largely undefined nature, the FET standard, especially as it has been drafted in traditional IIAs, has turned into an all-encompassing provision that investors have used to challenge any type of governmental conduct that they deem to hurt their interests (UNCTAD, 2018c). This also makes it a likely standard to be invoked in tax-related ISDS cases.

Under the FET standard, arbitral tribunals have addressed questions that may be particularly relevant when considering IIA implications for tax policymakers and assessing the risk of tax-related ISDS cases (UNCTAD, 2019b):

- Whether the challenged State conduct or measure was unreasonable, arbitrary, abusive or discriminatory?
- Whether it lacked transparency, did not afford due process or amounted to a denial of justice?

- Whether the investor had a legitimate expectation to regulatory stability or stability of the legal regime under the FET standard?
- Whether assurances – in the form of promises to the specific investor or through general acts and regulations – had been provided, which gave rise to the investor's legitimate expectations?
- Whether the challenged measure was proportionate to the objectives pursued?
- Whether the measure (dramatically) reduced the profits arising from the investment?

The task of determining the meaning of the FET standard has been effectively left to ad hoc arbitral tribunals (UNCTAD, 2012). Under the FET standard, States are generally expected to:

- implement changes to the regulatory and legislative environment in good faith and in a non-abusive manner;
- not use public-interest arguments as a disguise for arbitrary and discriminatory measures.

In many ISDS decisions, arbitral tribunals have generally confirmed that the FET standard did not preclude States from exercising their regulatory powers in the public interest. However, arbitral tribunals established boundaries to permissible regulatory action (UNCTAD, 2019b) and at times reached divergent conclusions on the acceptable level of State discretion under the FET standard.

General regulations that are put in place to induce (foreign) investments and on which an investor relies can expose a State to liability if it subsequently decides to change or withdraw these regulations (UNCTAD, 2019b; UNCTAD, 2021). Much will depend on the extent of specific commitments made in the respective laws and regulations (e.g. assurances of long-term stability), on other representations towards investors, and the manner in which changes were implemented. In recent ISDS cases arising out of changes to general legislation, several arbitral tribunals found breaches of legitimate expectations under FET. A few other tribunals determined that the same measures could not give rise to expectations of regulatory stability in the first place (UNCTAD 2019b; UNCTAD, 2021).

Specific interactions between tax authorities and foreign investors could give rise to legitimate expectations claims under IIAs. For example, foreign investors could challenge revisions and cancellations of tax rulings or advance pricing agreements invoking legitimate expectations under the FET provision. Foreign investors could also rely on (tax) stabilization clauses in contracts to claim a breach of legitimate expectations under FET as well as umbrella clause breaches. The interaction of IIA provisions with stabilization obligations in investment contracts is further discussed in this guide's section on umbrella clauses.

It is important to note for tax policymakers that the notion of "non-discriminatory treatment" under FET greatly differs from the non-discrimination provisions under the OECD or UN tax treaty models (Article 24), as it can expand to a vast array of State conduct, the decision-making processes and intent behind the challenged State conduct, the actual implementation as well as the impact on the investor or investment.

The potential obligations arising for host States from an FET standard that is often drafted in a minimalist way in old-generation IIAs could be perceived as particularly onerous for developing countries, for example as they adapt their tax rules to new international tax norms. Notions and concepts that are not explicitly mentioned in the clause are emanating from ISDS awards over time, increasing the complexity and unpredictability surrounding the FET provision in IIAs.

Expectations of transparency and participation in governmental decision-making that transpired from ISDS awards have also raised concerns about inflexible and unrealistic standards for public policymaking processes set by IIAs that only few countries can attain (UNCTAD, 2012). It has not become a generally accepted practice by ISDS tribunals to consider the development status of a host State as a mitigating factor when applying the FET standard.

Not all deficiencies in governmental decision-making provide grounds for finding an FET violation (UNCTAD, 2012). Overall, claims for breaches of FET were successful in some 25 per cent of past ISDS cases (with monetary compensation awarded), sometimes together with findings of indirect expropriation or other IIA breaches.[11]

For tax administrations and tax policymakers working in an environment of evolving tax regulations, the various elements subsumed under a broad FET standard would merit special attention when assessing risks of tax-related ISDS claims.

Takeaway for tax policymakers: reform options for fair and equitable treatment (FET)

Including a clarified FET clause – with additional language on the meaning of the concept – is a common approach in recent IIAs (table 15). An emerging approach is to replace the FET standard with a closed or exhaustive list of State obligations, together with terms that set a high threshold of liability that only serious instances of host State misconduct could reach (e.g. for "flagrant", "manifest" or "fundamental" breach of due process). Legitimate expectations are generally not incorporated as part of this closed list in new IIAs (the term is not referred to in FET provisions in old-generation IIAs either). Instead, if at all included, legitimate expectations are to be "taken into account" in assessing a breach of one of the elements of the FET provision without giving rise to a self-standing claim.

A clarification in a number of new-generation IIAs specifies that a breach of a provisions of another treaty does not by itself give rise to a breach of the FET clause. This clarification has important implications for the relationship between IIAs and DTTs as it prevents investors from claiming a breach of the FET clause solely on the basis of a State's non-compliance with a DTT. What constitutes non-compliance with a DTT and whether a particular instance of non-compliance gives rise to host State liability under an IIA are questions that host States may not want to leave to the assessment of *investment* arbitrators (e.g. whether the failure to make a corresponding adjustment under Art. 9.2 of the OECD and UN Model Tax Treaties can give rise to a breach of the FET clause).

Some IIAs specify that the FET standard does not include a stabilization obligation that would prevent the host State from changing its legislation (even where this adversely affects foreign investors). This clarification is closely related to the concept of legitimate expectations and aims to limit its application. For example, it suggests that at the time of making the investment an investor could not legitimately expect tax rules to remain unchanged for the duration of the investment based on the FET clause.

In a few IIAs since 2015, contracting parties opted to avoid the words "fair and equitable" while including a closed list of State obligations for treatment of investors/investments. A limited number of treaties entirely omit the FET clause.

Given the widespread claims of breaches of FET clauses in ISDS proceedings, tax policymakers should be aware of the implications of unreformed clauses and how particular reform options can help increase the predictability of host State obligations under IIAs and ensure a higher level of deference for public policymaking. FET is one of the IIA standards that is most likely to be relevant in the implementation of tax reform (e.g. as a result of the OECD's BEPS process) as it may not only affect the substance of tax reform but also its process. FET reform options that increase policy space will help to deliver on broader objectives, including the sustainable development goals, and support policymaking to address global challenges in areas such as taxation.

[11] UNCTAD, ISDS Navigator (data as of 31 July 2020; accessed on 4 September 2020). A larger share of cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits); some cases were settled or discontinued before a finding on liability. A number of cases were decided in favour of the investor for breaches of IIA protection standards other than FET (e.g. full protection and security, umbrella clause).

Table 15.	Fair and equitable treatment (FET): reform-oriented policy options
Reform options	General implications
4.3.1 Qualify the FET standard by reference to minimum standard of treatment of aliens under customary international law (MST/CIL). 4.3.2 Clarify or replace FET with an exhaustive list of State obligations, e.g. obligations not to: - deny justice in judicial or administrative proceedings - treat investors in a manifestly arbitrary manner - flagrantly violate due process - engage in manifestly abusive treatment involving continuous, unjustified coercion or harassment - infringe investors' legitimate expectations based on investment-inducing representations or measures. It may be provided that the Parties shall regularly, or upon request of a Party, review the content of the FET obligation. 4.3.3 Clarify (with a view to giving interpretative guidance to arbitral tribunals) that: - the FET standard includes an obligation not to deny justice in criminal, civil or administrative proceedings - a breach of another provision of the IIA or of another international agreement cannot establish a claim for breach of the clause - the FET clause does not preclude States from adopting good faith regulatory or other measures that pursue legitimate policy objectives. 4.3.4 Reduce FET to a political commitment instead of using it as an operative legal standard. 4.3.5 Omit the FET clause.	Several options exist to address the deficiencies of an unqualified FET standard, each with its pros and cons. The reference to customary international law may raise the threshold of State liability and help to preserve States' ability to adapt public policies in light of changing objectives (except when these measures constitute manifestly arbitrary conduct that amounts to egregious mistreatment of foreign investors). However, the exact contours of MST/CIL remain elusive. An option in this respect would be for the Parties to clarify their understanding of the standard by noting, for instance, that its breach requires an act that is an outrage, is made in bad faith, or constitutes a wilful neglect of duty or an insufficiency so far short of international standards that every reasonable and impartial person would readily recognize its insufficiency. This would confirm a high threshold for finding a breach of the standard. Another solution would be to replace the general FET clause with an exhaustive list of more specific obligations. While agreeing on such a list may turn out to be a challenging endeavour, its exhaustive nature would help avoid unanticipated and far-reaching interpretations by tribunals. The treaty could create a mechanism for periodic review of this exhaustive list by the Parties in order to keep it comprehensive and in line with developments in arbitral practice. A further option is to include FET as a political commitment (e.g. by mentioning it in the preamble only). On the one hand, this would come close to "omitting" FET, as the clause would not be legally binding, but only have best endeavor character. At the same time, if part of the preamble, FET language could give guidance for the interpretation of other treaty obligations. Finally, an omission of the FET clause would reduce States' exposure to investor claims, but would also reduce the protective value of the agreement.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

8. Full protection and security (FPS)

The full protection and security provision requires host States to exercise due diligence in protecting foreign investments.

What tax policymakers need to know about full protection and security (FPS)

Many old-generation IIAs contain a full protection and security (FPS) clause without clarifications (table 16). The FPS clause can raise similar issues as FET and involve the risk of claims arising out of tax measures or related conduct by tax authorities. ISDS tribunals have in some cases extended the scope of FPS to legal security, economic/commercial or other security. Notions and concepts such as the stability of the legal framework, stability of the commercial environment and protection against economic impairment of the investment have been considered by arbitral tribunals, with different outcomes.

Table 16.	Full protection and security (FPS): approach frequently used in old-generation IIAs
Approach	General implications
4.4.0 Include a guarantee to provide investors/investments full protection and security.	Most IIAs include a guarantee of full protection and security (FPS), which is generally regarded as codifying CIL obligations to grant a certain level of police protection and physical security. However, some tribunals may interpret the FPS obligation so as to cover more than just police protection: if FPS is understood to include economic, legal and other protection and security, it can constrain government regulatory prerogatives, including for sustainable development objectives.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

Many old-generation IIAs contain a full protection and security (FPS) clause without clarifications. In the absence of clarifications that FPS is limited to "physical" or "police" security, some ISDS tribunals have adopted an expansive approach (and others a more limited approach). The FPS clause can raise similar issues as FET when interpreted as an 'autonomous' standard subject to broad interpretation. FPS can thus involve the risk of claims arising out of tax measures or related conduct by the tax authorities. In about 40 per cent of all known ISDS cases, investors claimed a breach of FPS.

In ISDS decisions, notions of "due diligence" by the host State and the obligation to take reasonable measures (active and proactive) to prevent against harm caused by third parties have at times be considered part of FPS. Going beyond "physical protection", arbitral tribunals have in some cases extended the concept's coverage to legal security, economic/commercial or other security. For example, with reference to:

- The stability of the legal framework
- A functioning judicial system
- The stability of the commercial environment
- The security of the investment environment
- The protection against economic impairment of the investment

The analysis of alleged breaches under FPS can overlap with FET and expropriation issues. Many old-generation IIAs link full protection and security and the FET standard in the same clause (UNCTAD, 2012).

Takeaway for tax policymakers: reform options for full protection and security (FPS)

The most common reform approach in recent IIAs is to specify that FPS does not require treatment in addition to or beyond what is required under customary international law (CIL) (table 17). As the exact contours of the minimum standard of treatment under CIL remain elusive, providing more explicit guidance on the substantive content of the obligation can help reduce uncertainty about the types of measures that could potentially be challenged by claimants in ISDS proceedings. For example, if FPS is explicitly limited to "physical" protection or "police" security, tax-related claims are rather unlikely to arise under the provision (even if tax measures are not carved-out from the scope of the IIA).

Table 17.	Full protection and security (FPS): reform-oriented policy options
Reform options	General implications
4.4.1 Clarify the FPS clause by: - specifying that the standard refers only to "physical" security and protection - linking it to CIL (e.g. specifying that this obligation does not go beyond what is required by CIL) - providing that the expected level of police protection should be commensurate with the level of development of the country's police and security forces. 4.4.2 Omit the FPS clause.	Policymakers may follow a recent trend to qualify the FPS standard by explicitly linking it to customary international law or including a definition of the standard clarifying that it is limited to "physical" security. This would provide predictability and prevent expansive interpretations that could constrain regulatory prerogatives.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

9. Expropriation

The expropriation provision protects foreign investors in case of dispossession of their investments by the host country.

What tax policymakers need to know about the expropriation provision

Old-generation IIAs often include protection in cases of indirect expropriation without explicit safeguards for non-discriminatory regulatory actions in the public interest (table 18). Indirect expropriation is the second most frequent claim in ISDS cases, after FET. Under expropriation provisions, tribunals in ISDS cases have established some limits to State's sovereign rights to impose taxes. It is generally held that "confiscatory" taxation is expropriation. "Confiscatory" taxation is understood to occur in cases where the tax measure has the effect of substantially depriving the investor of the value of its investment. A source of uncertainty for States and tax authorities arises as different arbitral tribunals draw different lines between permissible tax measures and tax measures that amount to confiscation or expropriation of an investment and require compensation. Some arbitral tribunals have given greater deference to a State's power to tax, applied in a *bona fide* manner (e.g. for general tax measures), compared to others. Very limited or no guidance is provided on these issues in old-generation IIAs.

Table 18.	Expropriation: approach frequently used in old-generation IIAs
Approach	General implications
4.5.0 Provide that an expropriation must comply with/respect four conditions: public purpose, non-discrimination, due process and payment of compensation.	An expropriation provision is an important element of an IIA and merits particular attention. IIAs with expropriation clauses do not take away States' right to expropriate property, but protect investors against arbitrary or uncompensated expropriations, contributing to a stable and predictable legal framework, conducive to foreign investment. IIA provisions typically cover "indirect" expropriation, which refers to regulatory takings, creeping expropriation and acts "tantamount to" or "equivalent to" expropriation. Such provisions have been used to challenge general regulations with an alleged negative effect on the value of an investment. This raises the question of the proper borderline between expropriation and legitimate public policy making (e.g. environmental, social or health regulations).

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

Generally, IIAs allow States to expropriate investments as long as the taking is effected for a public purpose, in a non-discriminatory manner, under due process of law and against the payment of compensation (UNCTAD, 2011). *Direct* expropriations are comparatively straightforward to discern (e.g. outright takings or nationalizations, reflected in a formal law or decree or physical act). Old-generation IIAs generally also include protection in cases of *indirect* expropriation without explicit safeguards for non-discriminatory regulatory actions in the public interest. Indirect expropriation is the second most frequently invoked concept in ISDS cases, after FET.

Indirect takings involve the total or near-total deprivation of an investment but without a formal transfer of title or outright seizure. Under IIAs' expropriation provisions, arbitral tribunals have established some limits to States' sovereign rights to impose taxes. While the relationship between taxation and expropriation is often undefined in IIAs, it is generally held that "confiscatory" taxation amounts to expropriation. "Confiscatory" taxation is understood to occur in cases where the tax measure has the effect of substantially depriving the investor of the value of its investment and where this is not otherwise justified, for example, depending on the circumstances, as a penalty in tax or criminal proceedings or as an enforcement measure. The threshold for a finding of "substantial deprivation" is not defined in IIAs and subject to the case-by-case determination of arbitral tribunals. As a consequence, it is at times difficult to distinguish indirect expropriations from regulation in the public interest, which is non-compensable despite the economic impact on particular investments. Claims of indirect expropriation can involve discriminatory taxes that are deemed to amount to a substantial deprivation, or abusive tax measures or an abuse of tax laws that results in total loss or substantial impairment.

In ISDS cases alleging breaches of the expropriation provision, claimants often challenge a series of measures at the same time, i.e. the challenge is not limited to a single event or action. Tax measures may thus feature as one aspect of proceedings interwoven with other challenged measures, such as money laundering investigations, seizure or freezing of bank accounts or assets, or bankruptcy proceedings and forced liquidation. The compound effect of the challenged measures may reach the level of an indirect expropriation if single measures do not. This also includes situations where different governmental departments act independently. The individual measures are attributable to the State as a whole. As a consequence, tax administrations should be aware of related enforcement actions directed against the same foreign investor.

Different types of tax measures have been challenged in past ISDS cases as amounting to expropriation (and often as breaches of FET at the same time). These include:

- Non-payment of VAT refunds
- Initiation of tax investigations/tax audit proceedings
- Withdrawal of government subsidies
- Withdrawal of tax-free status
- Withdrawal of or decision not to grant tax exemptions
- Increases in windfall profit taxes and royalties
- Large tax assessments
- Withholding tax
- (Forcible) collection of taxes, customs or other liabilities

A few ISDS cases concerned the revocation of benefits (e.g. tax benefits or free zone status) related to investments in special economic zones (SEZs) (UNCTAD, 2019c). As IIAs apply to SEZ-hosted investments in the same way as to other covered investments, tax and regulatory changes related to SEZs can become the subject of ISDS claims. A number of developing countries regularly evaluate the economic benefits arising from incentive regimes (including SEZs) and this may result in the closure of these regimes where they see fit. Under BEPS Action 5 (Harmful tax practices), some features of countries' special economic zones can come under review and may require amendments to comply with BEPS requirements.[12] It is difficult to anticipate which legal status ISDS tribunals would accord to the BEPS inclusive framework, in particular the recommendations under Action 5, in cases challenging measures taken by countries to implement their

[12] See OECD (2019). *Harmful Tax Practices - 2018 Progress Report on Preferential Regimes: Inclusive Framework on BEPS: Action 5*, OECD/G20 Base Erosion and Profit Shifting Project. OECD Publishing: Paris, https://doi.org/10.1787/9789264311480-en.

BEPS commitments. ISDS tribunals would typically look at the manner in which (international) commitments have been implemented and whether the specific measures chosen were in conflict with IIA obligations (e.g. FET, indirect expropriation).

Some arbitral tribunals have given greater deference to a State's power to tax, applied in a *bona fide* manner (e.g. for general tax measures), compared to others. The absence of specific guidance as well as the case-by-case nature of indirect takings results in a high degree of uncertainty for States and tax authorities as to where an arbitral tribunal will draw the line between permissible tax measures and tax measures that amount to confiscation or expropriation of an investment and require compensation.

Overall, the following points provide guidance in assessing whether a taxation measure involves an expropriation (but cannot serve as definitive answers):

- In principle, the imposition of taxes does not constitute expropriation and is within the regulatory powers of a State;
- Taxation measures which are consistent with internationally recognized tax policies, principles and practices do not constitute expropriation;
- Taxation measures which are applied on a non-discriminatory basis, as opposed to being targeted at investors of a particular nationality or specific individual taxpayers, are less likely to constitute expropriation.

Takeaway for tax policymakers: reform options for the expropriation provision

A refinement of the expropriation provision (table 19) can provide reassurances to national decision makers, including tax policymakers, tax authorities and administrations, that States' prerogatives to regulate in the public interest and their tax powers will not be unduly constrained (e.g. by threats of ISDS arbitrations and the initiation of actual ISDS proceedings) .

Explicit references to the "permanent and complete or near complete deprivation" as part of the criteria for finding an indirect expropriation may create a barrier for some taxation claims, as arbitral tribunals would have to consider whether the challenged measures eroded the value of the investment to a substantial degree. While this clarification does not greatly differ from how ISDS tribunals have generally approached old-generation provisions on expropriation, codifying this standard in IIAs provides greater certainty to the host State's tax authorities. However, a substantial reduction or elimination of profits or intent to make the investment worthless may tilt a tribunal's assessment in the direction of an expropriation finding, even where the investor's physical assets remain intact and the investor is not deprived of the title to the investment or its use. It poses a challenging question in arbitral proceedings under what circumstances a State measure that extinguishes or significantly reduces the ability to generate profits from the investment (e.g. a 99 per cent windfall profit tax) will amount to an indirect expropriation. For this, arbitral tribunals may look at the impact of the individual measure as well as the aggregate impact of several challenged measures.

In addition to criteria guiding a tribunal's expropriation analysis, a few recent IIAs state for greater certainty that a Party's decision not to issue, renew, maintain, or to modify or reduce a subsidy or grant, standing alone, does not constitute an expropriation (on the condition that no specific commitments or terms and conditions suggested otherwise).

Specific tax exceptions from the expropriation standard have been rarely included in the expropriation provision itself. However, some treaties established in their ISDS provisions or in a dedicated article on taxation a joint determination mechanism by the competent tax authorities for tax measures challenged by claimants as expropriation. Under such mechanisms, the competent authorities of the respective Contracting Parties are given a time frame of typically 6 months to examine the issue. If they agree that the measure does not amount to an expropriation, the claim cannot proceed to arbitration. If no agreement is reached within the set time, the claimant is allowed to initiate arbitration proceedings. This filter mechanism gives a greater role to government authorities on taxation claims under IIAs than would otherwise be the case.

More recent IIAs typically establish criteria to be met for a finding of indirect expropriation and define in general terms what measures do not constitute an indirect expropriation (UNCTAD, 2020a). A few recent agreements opted to cover only direct expropriations and explicitly exclude claims of indirect expropriation from IIA coverage.

Table 19. Expropriation: reform-oriented policy options

Reform options	General implications
4.5.1 Limit protection in case of indirect expropriation (regulatory taking) by: - establishing criteria that need to be met for indirect expropriation to be found, including e.g.: o the economic impact of the government action (permanent and complete or near complete deprivation) o the extent of government interference with distinct, reasonable investment backed expectations o the character of the government action (e.g. whether it is discriminatory or disproportionate to the purpose of the measure under challenge) o the effect of the government action (whether it has resulted in a direct economic benefit for the State) - defining in general terms what measures do not constitute indirect expropriation (non-discriminatory good faith regulations relating to public health and safety, protection of the environment, etc.) - clarifying that certain specific measures do not constitute an indirect expropriation (e.g. compulsory licensing in compliance with WTO rules). 4.5.2 Omit a reference to indirect expropriation or explicitly exclude it. 4.5.3 Specify the compensation to be paid in case of lawful expropriation: - appropriate, just or equitable compensation (e.g. based on an equitable balance between public and private interests, where the fair market value of investment is only one of the factors to be taken into account) - prompt, adequate and effective compensation, i.e. full market value of the investment ("Hull formula"). (See also section 6.5 on remedies and compensation).	To avoid undue constraints on a State's prerogative to regulate in the public interest, an IIA may set out general criteria for State acts that may (or may not) be considered an indirect expropriation. While this does not exclude liability risks altogether, it allows for better balancing of investor and State interests. Another option is to omit a reference to indirect expropriation from the IIA or explicitly exclude it from the treaty coverage. Depending upon drafting, the bare reference to "expropriation" in an IIA may be interpreted as subsuming both direct and indirect expropriation. In contrast, expressly excluding indirect expropriation from the IIA may be perceived as considerably reducing the protective value of the IIA as it would leave investors unprotected from certain types of indirect expropriation such as "creeping" or "disguised" takings (noting that these measures could be covered by the FET standard). The standard of compensation for lawful expropriation is another important aspect. The use of terms such as "appropriate", "just" or "fair" in relation to compensation gives room for flexibility in the calculation of compensation. States may find it beneficial to provide further guidance to arbitrators on how to calculate compensation and clarify what factors should be taken into account.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

10. Transfer of funds

The transfer-of-funds provision grants the right to free movement of investment-related financial flows into and out of the host country.

What tax policymakers need to know about the transfer-of-funds provision

Many old-generation IIAs contain a transfer-of-funds provision without the exceptions that are commonly found in newer IIAs (table 20). Frequently, transfer-of-funds provisions do not explicitly mention that transfers related to an investment may be restricted if tax obligations have not been fulfilled. Bankruptcy proceedings, company restructuring or insolvency, or compliance with judicial or administrative decisions – which may also occur in conjunction with non-payment of taxes related to the investment or attempts to collect taxes due – can create questions as to what actions governments can take in light of their obligation to permit transfers to be made freely and without delay. Different circumstances may justify delays or restrictions for such transfers from the government's point of view (based on national laws or international regulations), but in most treaties no explicit guidance is provided on the types of restrictive measures that may be permitted or conditions for their application (temporary, good faith, etc.).

Table 20 Transfer of funds: approach frequently used in old-generation IIAs

Approach	General implications
4.7.0 Grant foreign investors the right to freely transfer any investment-related funds (e.g. open ended list) into and out of the host country.	IIAs virtually always contain a clause regarding investment-related transfers. The objective is to ensure that a foreign investor can make free use of invested capital, returns on investment and other payments related to the establishment, operation or disposal of an investment. However, an unqualified transfer-of-funds provision significantly reduces a host country's ability to deal with sudden and massive outflows or inflows of capital, balance-of-payments (BoP) difficulties and other macroeconomic problems.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

Many old-generation IIAs contain a transfer-of-funds provision without the exceptions that are common in newer IIAs. The provision contains an obligation for each contracting party to permit transfers related to an investment to be made freely and without delay into and out of its territory. This is usually accompanied by an indicative, but not exclusive, list of covered transfers such as contributions to capital, profits, dividends, capital gains, interest, royalty payments, management fees and other fees, amongst others.

While the transfer-of-funds provision was invoked in only 5 per cent of past ISDS cases, it may carry implications for governments and tax policymakers. Frequently, transfer-of-funds provisions do not explicitly mention that transfers related to an investment may be restricted if tax obligations have not been fulfilled. Bankruptcy proceedings, company restructuring or insolvency, or compliance with judicial or administrative decisions – which may also occur in conjunction with non-payment of taxes related to the investment or attempts to collect taxes due – can create questions as to what governments are permitted to do in light of their obligations under this provision. Different circumstances may justify delays or restrictions for such transfers, but no explicit guidance is provided on the types of measures that may be permitted or conditions for their application (temporary, good faith, etc.). Explicit guidance on these issues in the IIA is desirable. However, past jurisprudence does not suggest that the good faith application of tax measures conflicts with the transfer-of-funds provision despite the absence of such clarifications.

The IMF rules and other internationally recognized standards (e.g. on money laundering and terrorist financing) may provide some guidance, in the absence of explicit wording in the actual IIA text. However, in the case of an ISDS tribunal

examining an alleged breach of the transfer-of-funds provision, it will be for the tribunal to determine the extent to which such other sources are relevant in a specific case.

Takeaway for tax policymakers: reform options for the transfer-of-funds provision

A small but increasing share of IIAs mention tax obligations in the transfer-of-funds provision (table 21). For example, they specify that a contracting party may restrict or temporarily prevent transfers to ensure compliance with fiscal or tax obligations under certain limited conditions. Rather than framing this as an exception to the free-transfer-of-funds rule, a few treaties make the fulfillment of all tax obligations a condition for the application of the free transfer provision.

The transfer-of-funds provision can come into play when tax audits are conducted related to a transfer and, as a matter of law, revenue authorities are entitled to verify that the correct amount of tax has been declared and paid. The implementation of rules designed to discourage businesses from shifting their profits to low tax jurisdictions often also enable host country revenue authorities to tax those profits in their jurisdiction. As this may restrict or delay transfers, recent investment agreements tend to include explicit reservations for fiscal obligations.

Clarifications and exceptions help safeguard a government's ability to enforce the collection of taxes (including withholding taxes, capital gains taxes, exit taxes) and to prevent illicit financial activities. Where exceptions are included, it is often stated that the restrictions imposed must be based on national law applied in an equitable, non-discriminatory and good faith manner. Whether these conditions were fulfilled in a specific case could be probed if covered investors allege breaches of this provision by the government or by government authorities and initiate arbitration.

Another approach adopted in some recent IIAs that cover taxation measures under the transfer-of-funds provision requires that tax-related claims first be reviewed by the competent (tax) authorities of the contracting parties to determine whether the dispute can proceed to arbitration (similar to the joint determination under the expropriation clause, above). This can serve as another threshold to filter out claims against justified and reasonable tax-related measures.

Table 21. Transfer of funds: reform-oriented policy options

Reform options	General implications
4.7.1 Provide an exhaustive list of types of qualifying transfers. 4.7.2 Include exceptions (e.g. temporary derogations): - in the event of serious balance-of-payments and external financial difficulties or threat thereof - where movements of funds cause or threaten to cause serious difficulties in macro-economic management, in particular, related to monetary and exchange rate policies. Condition these exceptions to prevent their abuse (e.g. application in line with IMF rules and respecting conditions of temporality, equity, non-discrimination, good faith and proportionality). 4.7.3 Reserve the right of host States to restrict an investor's transfer of funds in connection with the country's (equitable, non-discriminatory, and good faith application of its) laws, relating to, e.g.: - fiscal obligations of the investor/investment in the host country - reporting requirements in relation to currency transfers	An exception increasingly found in recent IIAs allows States to impose restrictions on the free transfer of funds in specific circumstances, usually qualified by checks and balances (safeguards) to prevent misuse. Countries may also need to reserve their right to restrict transfers if this is required for the enforcement of the Party's laws (e.g. to prevent fraud on creditors etc.), again with checks and balances to prevent abuse.

Table 21.	Transfer of funds: reform-oriented policy options
- bankruptcy, insolvency, or the protection of the rights of creditors - issuing, trading, or dealing in securities, futures, options, or derivatives - criminal or penal offences (e.g. imposing criminal penalties) - prevention of money laundering - compliance with orders or judgments in judicial or administrative proceedings.	

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

11. "Umbrella" clause

The umbrella clause establishes a commitment on the part of the host State to respect its obligations regarding specific investments (including in investment contracts).

What tax policymakers need to know about the umbrella clause

About half of the old-generation IIAs contain an umbrella clause that is often broadly worded (table 22). An ISDS tribunal hearing a claim brought under the umbrella clause will often effectively be hearing a breach of contract claim (UNCTAD, 2014). Investor-State contracts may include stabilization clauses for changes in legislation, sometimes specifically related to taxation matters. These stabilization or tax stabilization clauses can come within the ambit of the IIA and potentially be subject to ISDS proceedings, with the effect of bypassing dispute settlement procedures set out in the individual contract (domestic courts or arbitration). Tax stabilization clauses could thus be elevated to IIA obligations.

Table 22.	"Umbrella" clause: approach frequently used in old-generation IIAs
Approach	General implications
4.10.0 Include a clause that requires each Party to observe any obligation (e.g. contractual) which it has assumed with respect to an investment of a covered investor.	An "umbrella" clause requires a host State to respect any obligation assumed by it with regard to a specific investment (for example, in an investment contract). The clause thus brings contractual and other individual obligations under the "umbrella" of the IIA, making them potentially enforceable through ISDS. By subjecting contractual violations to IIA arbitration an umbrella clause therefore makes it even more important for countries to have the technical capacity to carefully craft the respective contractual arrangements (e.g. when they enter into investment or concession contracts). The main difficulties with "umbrella" clauses are that they (1) effectively expand the scope of the IIA by incorporating non-treaty obligations of the host State into the treaty, which may increase the risk of being faced with costly legal proceedings, and (2) have given rise to conflicting interpretations by investor-State tribunals resulting in a high degree of unpredictability.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

About half of the old-generation IIAs contain an umbrella clause that is often broadly worded (UNCTAD, 2015a). An ISDS tribunal hearing a claim brought under the umbrella clause will often effectively be hearing a breach of contract claim (UNCTAD, 2014). Through "umbrella" or "observance of undertakings" clauses ISDS tribunals may have jurisdiction to hear certain investor-State disputes that would not otherwise fall within the scope of the IIA and be subject to the

jurisdiction of domestic courts or specific dispute settlement procedures set out in contracts between individual investors and the Government, Government agencies or state-owned enterprises.

The meaning of umbrella clauses, as interpreted and applied in ISDS cases, has been subject to significant controversy. Some arbitral tribunals only upheld jurisdiction over host State commitments undertaken specifically in relation to the claimants and based on contracts. In some other cases arbitral tribunals interpreted the umbrella clause more broadly to cover "obligations" outside of a contract, made in the form of both oral and written representations related to the investment (e.g. to the foreign investor or a local subsidiary). A few tribunals considered that obligations set out in legislative and regulatory instruments can also be covered by the umbrella clause (e.g. related to investment or of general application; UNCTAD, 2019b). There is a risk that this could also extend to changes to or withdrawals of tax incentives and tax holidays originally provided in an individual investor-State contract or for a specific industry under domestic law.

With respect to investor-specific commitments, umbrella clauses are relevant for tax authorities when other government agencies enter into agreements with foreign investors and whenever tax authorities themselves make commitments to foreign investors. It is important for tax authorities to be aware of the agreements of other agencies to the extent that these have tax implications, which requires inter-agency cooperation. Further, umbrella clauses come into play with respect to agreements entered into by the tax authorities themselves such as advance pricing agreements. Depending on the formulation of the clause and its interpretation by an ISDS tribunal, unilateral commitments such as tax rulings may be covered by the clause.

Investor-State contracts in particular may include stabilization clauses for changes in laws, sometimes specifically related to taxation matters. These stabilization or tax stabilization clauses can come within the ambit of the IIA and potentially be subject to ISDS proceedings, with the effect of bypassing dispute settlement procedures set out in the individual contract (domestic courts or arbitration). Tax stabilization clauses could thus be elevated to IIA obligations. In general, stabilization clauses may place limitations on a State's ability to effectively implement updated policy approaches to tackling tax base erosion and profit shifting (and other legislative changes adversely affecting investors or investments), creating potential liability for compensation under a specific contract. Making such contractual obligations enforceable under an IIA's ISDS mechanism, via the umbrella clause, adds a layer of risks for States.

Elements that arise under umbrella clauses can overlap with considerations under the FET clause (whether assurances were made to specific investors; whether changes to the regulatory and legislative environment were implemented in good faith etc.).

Takeaway for tax policymakers: reform options for the umbrella clause

Almost all recently concluded IIAs omit the umbrella clause (UNCTAD, 2019c; UNCTAD, 2020b; table 23). This option altogether removes some of the uncertainty surrounding the meaning and effect of umbrella clauses, and may thus help safeguard flexibility for tax policymaking to respond to global challenges such as base erosion and profit shifting.

Table 23. "Umbrella" clause: reform-oriented policy options

Reform options	General implications
4.10.1 Clarify that the clause covers only "written obligations" and that the obligations must be "entered into" with respect to specific investments. 4.10.2 Clarify that a breach of the "umbrella" clause may only result from an exercise of sovereign powers by a government (i.e. not an ordinary breach of contract by the State) and that disputes arising from such breaches shall be settled in the forum prescribed by the contract.	One way to narrow the scope of the clause is to clarify that it covers only "written obligations" and that these obligations must be "entered into" with respect to specific investments – this would exclude oral assurances by State officials as well as obligations expressed through the laws of general application. Further, a treaty may specify the nature of acts that can be subject to the umbrella clause (exercise of sovereign powers) and identify the competent dispute settlement forum (where more than one is available).

Table 23.	"Umbrella" clause: reform-oriented policy options
4.10.3 No "umbrella" clause.	Finally, today many countries omit the "umbrella" clause from their IIAs. This means that an investor party to an investment contract would always have to show a breach of an IIA obligation, and not a breach of the contract.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

12. Public policy exceptions

Public policy exceptions permit public policy measures, otherwise inconsistent with the treaty, to be taken under specified, exceptional circumstances.

What tax policymakers need to know about public policy exceptions

Most old-generation IIAs do not contain public policy exceptions (table 24). The absence of provisions aimed at preserving regulatory space and the lack of references to public policy objectives in IIAs (e.g. the protection of public health and safety, the preservation of the environment, the prevention of tax evasion) may not be conducive to encouraging a more balanced application of investment protection standards. This can have implications for the outcomes of ISDS cases, including tax-related ones.

Table 24.	Public policy exceptions: approach frequently used in old-generation IIAs
Approach	General implications
5.1.0 No public policy exceptions.	To date few IIAs include public policy exceptions. However, more recent treaties increasingly reaffirm States' right to regulate in the public interest by introducing general exceptions. Such provisions make IIAs more conducive to sustainable development; they foster coherence between IIAs and other public policy objectives, and reduce States' exposure to claims arising from conflicts that may occur between the interests of a foreign investor and the promotion and protection of legitimate public-interest objectives.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

Most old-generation IIAs do not contain public policy exceptions. On a number of occasions, respondent States lacked a sufficient legal basis in the treaty to defend themselves more effectively against ISDS claims, e.g. because the applicable treaties contained no public policy exceptions (UNCTAD, 2019b). The absence of explicit provisions aimed at preserving regulatory space and the lack of references to public policy objectives in IIAs (e.g. the protection of public health and safety, the preservation of the environment, the prevention of tax evasion) may not be conducive to encouraging a more balanced application of investment protection standards. This can also have implications for the outcomes of ISDS cases, including tax-related ones.

Takeaway for tax policymakers: reform options for public policy exceptions

Many recent IIAs include public policy exceptions (table 25). A number of them specifically list measures aimed at ensuring the effective or equitable imposition or collection of taxes. In general, the shift towards safeguarding the right to regulate in pursuit of public policy objectives in IIAs also provides an opportunity to explicitly recognize the role of taxation in this regard. While the nexus between taxation, public policy objectives and sustainable development has long been accepted, IIAs could provide more guidance for balancing investment protection and tax policy objectives.

If the public policy or general exceptions were designed to be "self-judging", the respondent State would have wide discretion to apply them (as it deems necessary) without review by ISDS tribunals. However, they are usually not "self-judging". In many cases, the application of the exceptions is limited to specific circumstances, they come with a high

threshold ("necessary to") and are subject to the determination of ISDS tribunals. A high threshold for application may guide ISDS tribunals towards a restrictive interpretation of the exceptions and make it difficult for respondent States to avail themselves of the exceptions. In order to adjust the threshold for the use of exceptions by States, the IIA could require that the measure be "designed" to achieve or "related" to the policy objective (UNCTAD, 2020a).

The exceptions will typically serve as a defence in an IIA arbitration where the claimant alleges breaches of substantive IIA provisions, but not result in challenged measures being non-justiciable.

Table 25. Public policy exceptions: reform-oriented policy options

Reform options	General implications
5.1.1 Include exceptions for domestic regulatory measures that aim to pursue legitimate public policy objectives, e.g. to: - protect human rights - protect public health - preserve the environment (e.g. biodiversity, climate change) - protect public morals or maintain public order - preserve cultural and/or linguistic diversity - ensure compliance with laws and regulations that are not inconsistent with the treaty - allow for prudential measures (e.g. to preserve the integrity and stability of the financial system) - ensure the provision of essential social services (e.g. health, education, water supply) - allow for broader safeguards, including on developmental grounds (to address host countries' trade, financial and developmental needs) - counter aggressive tax planning - protect national treasures of artistic, historic or archaeological value (or "cultural heritage").	Exceptions allow for measures, otherwise prohibited by the agreement, to be taken under specified circumstances. General exceptions identify the policy areas for which flexibility is to be preserved in respect of all treaty protection standards. In order to lower the threshold for the use of exceptions by States, the provision may adjust the required link, or "nexus" between the measure and the alleged policy objective pursued by this measure. For example, instead of providing that the measure must be "necessary" to achieve the policy objective, the IIA could require that the measure be "designed" to achieve or "related" to the policy objective. In order to prevent abuse of exceptions, it is useful to clarify that "exceptional" measures must be applied in a non-arbitrary manner and not as disguised investment protectionism. Finally, to ensure the Parties' control over the interpretation of exceptions, the IIA may provide that questions of whether a measure at issue is justified by a public policy exception must be referred to the Parties for a joint determination.
5.1.2 Select the appropriate "nexus" between the measure and the policy objective pursued, e.g. that the measure must be: - "necessary" to achieve the alleged policy objective (strict test), or - "related to" ("aimed at", "directed to" or "designed to achieve") the policy objective (less strict test).	
5.1.3 Prevent abuse of the exceptions by host States by providing that "exceptional" measures shall not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors, or a disguised restriction on international trade or investment.	
5.1.4 Provide guidance for interpretation of exceptions, e.g. if a respondent State invokes a public policy exception in ISDS proceedings, the matter should be referred to the Contracting Parties for a joint binding determination of whether or not a measure falls within the scope of the exception.	

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

13. Investor–State dispute settlement (ISDS): scope and conditions of access

The scope and conditions for access to investor–State dispute settlement determine the range of disputes that can be brought to arbitration and establish the requirements investors have to meet to initiate ISDS proceedings.

What tax policymakers need to know about the scope and conditions of access to investor-State dispute settlement (ISDS)

About 95 per cent of IIAs provide for States' advance consent to international arbitration proceedings between an investor claimant and the respondent State (table 26). ISDS is a distinct feature of the IIA regime. Investors can directly challenge State measures before an arbitral tribunal comprised of three individuals. Under the great majority of ISDS provisions in IIAs, claimants are not required to first have recourse to domestic courts or exhaust local remedies. Most old-generation IIAs cover a wide range of State conduct across economic sectors, including tax matters. The types of tax-related claims that have arisen under IIAs were diverse (e.g. withdrawal of incentives, increases in windfall profit taxes) and often intertwined with non-tax measures (e.g. forced liquidation, interference with or termination of contracts). Such claims can, but do not necessarily overlap, with the subject matter covered by DTTs and MAPs.

Table 26. Investor–State dispute settlement (ISDS): approach frequently used in old-generation IIAs

Approach	General implications
6.2.0 Define the range of disputes that can be subject to ISDS: - any investment-related disputes (regardless of the legal basis for a claim, be it IIA, contract, domestic law or other) - disputes arising from specifically listed instruments (e.g. IIAs, contracts, investment authorisations/licenses) - disputes regarding IIA violations only - States' counterclaims.	The ISDS mechanism allows foreign investors to sue a host State. IIAs vary as to the types of disputes that the Parties agree to submit to arbitration (they can range from alleged violations of the treaty to any investment-related disputes, whether treaty-based or not). Most IIAs allow investors to bypass domestic courts of host States and bring international arbitration proceedings (e.g. to constitute an ad hoc 3-person tribunal, most often at ICSID or under the UNCITRAL arbitration rules). The goal is to take the dispute out of the domestic sphere, to ensure independence and impartiality of the arbitrators, speed and effectiveness of the process and finality and enforceability of arbitral awards.

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

About 95 per cent of IIAs provide for States' advance consent to international arbitration proceedings between an investor claimant and the respondent State, i.e. the investor can initiate an ISDS case without requiring additional consent from the respondent State (typically after a prior notice of dispute and a waiting period of 3 or 6 months). This is a distinct feature of the IIA regime, as investors are not required first to have recourse to domestic courts or exhaust local remedies (apart from a small number of treaties stating otherwise). Investors can directly challenge State measures in front of an arbitral tribunal comprised of three individuals (including one directly appointed by the investor and one appointed by the State) constituted for each specific case. Usually, the arbitrators are private lawyers or academics. The tribunal can hold a State liable for treaty breaches and order it to pay monetary compensation through a binding and internationally enforceable arbitral award. The average amount awarded in past cases decided in favour of the investor was about $500 million (UNCTAD, 2018d). Originally modelled on the system of ad hoc confidential commercial arbitration between private parties, today, the ISDS system suffers from a legitimacy crisis (UNCTAD, 2018c).

The dispute settlement procedure in DTTs – the MAP – is fundamentally different in many respects. It is conducted by the competent authorities of each Contracting State without third person intermediaries. MAPs are initiated on request of the taxpayer but are carried out between States. There is no deadline for a solution to be reached, the taxpayer has no legal status in the proceedings and cannot make any representation during the proceedings unless invited to do so. Binding tax arbitration exists as an extension of the MAP in cases where the competent authorities fail to come to an

agreement after a specified period of time (generally two years), but such provisions are limited to very few countries. Provisions for the application of tax arbitration between States are included, for example, in the BEPS Multilateral Instrument (applying on an opt-in basis to the DTTs of some BEPS signatories), a number of other DTTs as well as the EU Transfer Pricing Arbitration Convention. In stark contrast to ISDS proceedings, tax arbitration refers to a State-to-State process with the competent authorities of each tax jurisdiction as the disputing parties. It is not an arbitration proceeding directly between a taxpayer and a tax authority. Under the BEPS Multilateral Instrument signatories have a choice between final offer arbitration (the tribunal selects between the respective parties' positions without providing any reasons) and a process that is more akin to ISDS in that it involves a reasoned award.

Another important difference is the subject-matter scope of DTTs and the MAP. Most old-generation IIAs cover a wide range of State conduct across economic sectors, including tax matters. The types of tax-related ISDS claims that have arisen under IIAs were diverse (e.g. withdrawal of incentives, increases in windfall profit taxes) and often intertwined with non-tax measures (e.g. forced liquidation, interference with or termination of contracts). They can, but do not necessarily, overlap with the subject matter covered by DTTs and the MAP.

When considering possible lessons learned for dispute settlement under DTTs from the investor-State arbitration mechanism available under IIAs, the concerns that have been raised against ISDS by many developed and developing countries in the past decade and the steps taken to reform or replace this system merit tax policymakers' special attention.[13] Another insight from IIAs is that the State-State arbitration mechanism, which is commonly included alongside ISDS, has almost never been resorted too.

Takeaway for tax policymakers: reform options for the scope and conditions of access to investor-State dispute settlement

Some IIAs state that the treaty shall not apply to tax matters at all or that tax matters are only covered under certain provisions. Such tax exclusions are more frequently encountered in recent IIAs. An alternative option is to implicitly cover tax matters under the substantive provisions, but not make them subject to the ISDS mechanism (table 27), which is the primary enforcement mechanism for IIA obligations (tax matters could still be covered by State-State dispute settlement).

Both options could arguably have the same effect: They would not necessarily lead to a quasi-automatic dismissal of any claims involving tax-related measures. It would be for the ISDS tribunal in each specific case to determine the (lack of) jurisdiction over the claims, typically after examining the characterization of a measure as a "tax". As claimants may challenge a series of tax and non-tax measures in a single proceeding, tribunals could decline jurisdiction over some claims and decide to examine others on the merits.

Another possibility is to limit the scope of ISDS to alleged breaches of certain substantive obligations such as national treatment, most-favoured-nation treatment and direct expropriation. As FET and indirect expropriation have so far been the provisions most invoked in ISDS cases and are also the most likely provisions to be used for tax-related claims, this could greatly reduce the risk of facing ISDS claims (tax-related or not).

A procedural improvement that can enhance States' control over the adjudication of tax-related claims under IIAs is to require any tax-related claims to be referred to the competent authorities of the contracting parties for joint determination. Some recent IIAs established such a filter mechanism for taxation claims under IIAs. Under such mechanisms, the competent authorities of the respective contracting parties are given a time frame of typically 6 months to examine the issue. For instance, if they agree that the measure does not amount to an expropriation, the dispute cannot proceed to arbitration. If no agreement is reached within the set time, the claimant is allowed to initiate arbitration proceedings. Alternatively, contracting parties may state that if the competent authorities fail to issue a joint determination, the issue is to be referred to State-State dispute settlement.

[13] For a summary of these concerns, see UNCTAD (2017).

Other reform options exist that can limit access to ISDS and help States defend against specific types of cases. For greater certainty, a few recent IIAs require ISDS tribunals to dismiss cases if the following circumstances are met (UNCTAD, 2019a):

- The investor acquired an investment for the main purpose of submitting a claim at a time when the dispute had already arisen or was foreseeable ("time-sensitive restructuring" amounting to abuse of process).
- Serious violations of domestic law have been committed in connection with the investment (e.g. fraudulent misrepresentation, corruption, abuse of process).

ISDS continues to be controversial feature of the IIA regime, spurring debate in the investment and development community and the public at large. States have responded to challenges and concerns regarding ISDS by implementing the following approaches in recent IIAs (UNCTAD, 2019a): (I) No ISDS, (ii) Standing ISDS tribunal, (iii) Limited ISDS, and (iv) Improved ISDS procedures. For example, a small number of countries have opted to exclude ISDS provisions from any newly signed treaties (e.g. Brazil), while some countries include ISDS on a treaty-by-treaty basis, i.e. in some but not necessarily all IIAs (e.g. Australia, New Zealand). Others have decided not to sign any new IIAs for the time being.

Table 27. Investor-State dispute settlement (ISDS): reform-oriented policy options

Reform options	General implications
6.2.1 Circumscribe the scope of ISDS, e.g. by: - excluding certain treaty provisions and/or sensitive areas from ISDS - listing those issues/provisions to which ISDS applies (e.g. only to the expropriation provision) - prohibiting recourse to ISDS after a certain time period has passed from the events giving rise to the claim ("limitations period"), e.g. three years - denying ISDS access to investors who engage in "treaty shopping" or "nationality planning" through "mailbox" companies. 6.2.2 Introduce a local litigation requirement as a precondition to ISDS: - require investors to exhaust local remedies before accessing international arbitration (subject to a "futility" exception), or - authorize access to international arbitration if after the submission of a claim to domestic courts, the claim has not been resolved to investor's satisfaction within a certain period (e.g. 18 months). 6.2.3 Reserve State's consent to arbitration, so that it would need to be given separately for each specific dispute. 6.2.6 Omit ISDS (i.e. do not consent to investor-State arbitration in the treaty)	Originally modeled on the system of ad hoc confidential commercial arbitration between private parties, today the ISDS system is subject to criticism (see *WIR15*). Defining - and circumscribing - the scope and conditions of investors' access to ISDS can help. The Parties to an IIA may choose to allow ISDS only for disputes regarding violations of the respective IIA. They may also choose to only subject the most fundamental IIA protections to ISDS (i.e. excluding certain treaty provisions) and/or to exclude sensitive areas from ISDS. This can be done, among others, for national security issues; including the review of incoming investments; measures to protect the environment, health and human rights; prudential measures; measures relating to transfer of funds (or respective IIA provisions); tax measure that do not amount to expropriation, or IIA provisions on transparency. A related option is to deny ISDS access to investors who engage in "treaty shopping" or "nationality planning" through "mailbox" companies that channel investment but do not engage in any real business operations in the home State (see also section 2.2.2 on denial-of-benefits clause). Introducing local litigation requirements would retain the option of ISDS, but make it a remedy of last resort (see also *WIR15*). Finally, the Parties may choose to omit investor-State arbitration and replace it, e.g. with domestic dispute resolution (i.e. judicial and administrative procedures) in the host State or with State-State procedures at the international level (see also section 6.1). Relying exclusively on domestic courts has particular merits for countries with sound legal systems, good governance and effective local courts. There are a number of pros and cons with this option, including that many jurisdictions do not allow local courts to apply IIAs directly to the resolution of disputes (see also *WIR15*).

Source: UNCTAD, Investment Policy Framework for Sustainable Development (2015).

Conclusions

A State's exposure to IIA-based ISDS claims and the scope for challenges of tax-related measures under an IIA will depend a multitude of factors. The interplay of the IIA's overall subject-matter scope with its substantive and procedural provisions are arguably the most important ones.

The strongest safeguard for tax policymaking, resulting in a maximum of policy space, would perhaps be a complete and unambiguous tax carve-out from an IIA's scope (e.g. accompanied by a mechanism that gives the host State discretion to determine whether the carve-out applies in a specific dispute or that gives the competent authorities the power to decide). If the State parties negotiating or renegotiating an IIA do not desire or cannot agree on a complete tax carve-out, other options are available to limit a State's exposure to ISDS claims and safeguard the right to regulate in the public interest. Reform options can clarify and limit the scope of IIA provisions, narrow the interpretive discretion of ISDS tribunals and give respondent States a stronger legal basis in the IIA to defend themselves more effectively. Omitting a particular provision from the IIA is also an option. The available reform options are not necessarily tax-specific (table 28).

Table 28. IIA Reform Accelerator: options (not tax-specific)

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

Source: UNCTAD, 2020a.

Based on the guidance in this document, tax policymakers could seek to participate in the development of new IIAs and model agreements as well as the overall reform of old-generation IIAs with a view to preserving tax policy space. A two-pronged approach to IIA reform – addressing future and existing IIAs – is necessary in light of the challenges the IIA regime is facing. The IIA regime predominantly consists of old-generation IIAs, under which ISDS cases continue to be filed.

Different tools exist to implement IIA reform options and modernize the existing stock of old-generation IIAs (e.g. joint interpretation, amendment, replacement). Each tool comes with pros and cons (UNCTAD, 2018c; UNCTAD, 2020a). Policymakers can choose from these tools based on country-specific circumstances and preferences. Countries also have the option to terminate an existing IIA without replacing it or they may decide not to sign an IIA after a cost-benefit analysis.

Commitments under IIAs have implications for numerous policy areas at the national, subnational and municipal levels within countries (UNCTAD, 2018c). IIA reform efforts thus require broad internal policy coordination, which can benefit from the involvement of tax policymakers. Tax policymakers can provide information on past or planned tax measures of relevance for commitments under existing IIAs or for IIAs under negotiation, and contribute to assessing the interaction between IIAs and DTTs. For example, where special agencies or interministerial task forces with a mandate to coordinate investment policy-related work between different ministries and government units already exist or are established, tax policymakers can bring in their expertise and experiences in a more formal setting (UNCTAD, 2018c).

UNCTAD Investment Policy Online Databases

International Investment Agreements Navigator

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

IIA Mapping Project

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

Investment Dispute Settlement Navigator

https://investmentpolicy.unctad.org/investment-dispute-settlement

Investment Laws Navigator

https://investmentpolicy.unctad.org/investment-laws

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