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INTERNATIONAL INVESTMENT AGREEMENTS

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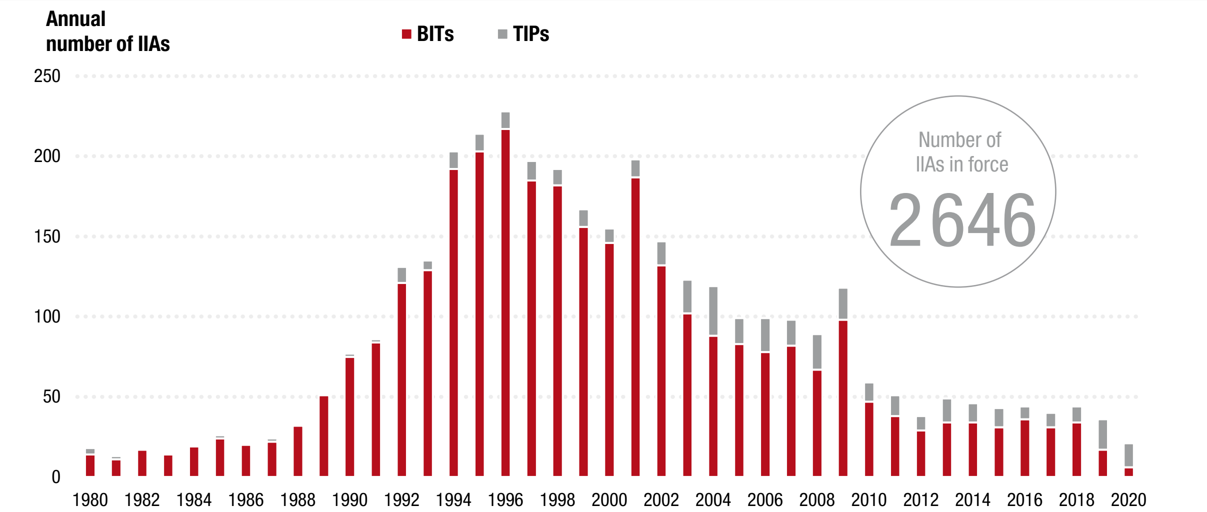
RECENT DEVELOPMENTS IN THE IIA REGIME: ACCELERATING IIA REFORM

HIGHLIGHTS

- Several notable developments took place in 2020 and 2021 that continued to rationalize the international investment agreement (IIA) regime, by consolidating bilateral investment policymaking and accelerating regional rulemaking. These developments include the entry into force of the EU agreement to terminate all intra-EU bilateral investment treaties (BITs) and the emergence of new megaregional IIAs, as well as other developments that continue to influence international investment rules such as multilateral discussions for the reform of the ISDS system.
- In 2020, countries concluded 21 IIAs, over half of which were rollover agreements concluded by the United Kingdom. As in 2019, the number of effective treaty terminations in 2020 exceeded that of new IIAs, with 42 terminations. By the end of the year, at least 2,646 IIAs were in force (figure 1).
- Reform-oriented clauses significantly permeate IIAs concluded in 2020. UNCTAD launched its IIA Reform Accelerator in November 2020 to support the reform process.

Figure 1. Number of IIAs signed, 1980–2020



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

1. Trends in IIAs: bilateral consolidation and acceleration of regional rulemaking

a. Developments in the conclusion and termination of IIAs

In 2020, countries concluded at least 21 new IIAs: 6 BITs and 15 treaties with investment provisions (TIPs). Of these 21 IIAs, 12 were rollover agreements concluded by the United Kingdom to maintain existing trade and investment relationships with third countries following its withdrawal from the EU. In addition, at least 18 IIAs that had already been concluded entered into force in 2020, bringing the total to at least 2,646 IIAs in force by the end of the year (figure 1).

At the same time, the number of terminations exceeded the number of newly concluded IIAs: at least 42 IIA terminations entered into effect in 2020 ("effective terminations"), of which 10 were unilateral terminations, 7 were replacements (through the entry into force of a newer treaty), 24 IIAs were terminated by mutual consent, and 1 expired. Of the 42 terminations, 20 were the consequence of the entry into force of the agreement to terminate all intra-EU BITs on 29 August 2020. Moreover, as in 2019, India was particularly active in terminating treaties, with six BITs terminated, followed by Australia with three, and Italy and Poland with two each. By the end of the year, the total number of effective IIA terminations reached at least 393, bringing the IIA universe to 3,360 (2,943 BITs and 417 TIPs).[1]

The 15 TIPs concluded in 2020 for which texts are available can be grouped into three categories.

1. Three agreements with obligations commonly found in BITs, such as substantive standards of investment protection:

- Canada–United Kingdom Trade Continuity Agreement
- Regional Comprehensive Economic Partnership (RCEP)[2]
- Republic of Korea–Indonesia Comprehensive Economic Partnership Agreement (CEPA)

2. Eight agreements with limited investment provisions (e.g. national treatment (NT) and most-favoured-nation (MFN) treatment with regard to commercial presence or the right of establishment of companies) or provisions on the free movement of capital relating to direct investments:

- EU–United Kingdom Trade and Cooperation Agreement (TCA)
- United Kingdom–Viet Nam Free Trade Agreement (FTA)
- Moldova–United Kingdom Strategic Partnership, Trade and Cooperation Agreement
- Singapore–United Kingdom FTA
- Egypt–United Kingdom Association Agreement
- North Macedonia–United Kingdom Partnership, Trade and Cooperation Agreement
- Japan–United Kingdom Comprehensive Economic Partnership Agreement (CEPA)
- Ukraine–United Kingdom Political, Free Trade and Strategic Partnership Agreement

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

- Turkey–United Kingdom FTA
- Fiji–United States Trade and Investment Framework Agreement
- Kenya–United Kingdom Economic Partnership Agreement
- Côte d'Ivoire–United Kingdom Stepping Stone Economic Partnership Agreement

b. Developments related to megaregional IIAs

Megaregional agreements are broad economic agreements among a group of countries that together carry significant economic weight and in which investment is only one of several subjects addressed. A review of selected recent megaregional IIAs – the Sustainable Investment Protocol of the African Continental Free Trade

[1] The total number of IIAs is revised in an ongoing manner as a result of retroactive adjustments to UNCTAD's IIA Navigator.
[2] The 15 signatory countries include Australia, Brunei Darussalam, Cambodia, China, Indonesia, Japan, the Lao People's Democratic Republic, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, Viet Nam, the Republic of Korea and Thailand.

Area (AfCFTA); the EU–United Kingdom TCA; the China–EU Comprehensive Agreement on Investment (CAI); the RCEP; the United States–Mexico–Canada Agreement (USMCA); and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP) – reveals variations in the way they approach investment obligations. At the same time, all converge towards including reform-oriented provisions aimed at ensuring a balance between investment protection and the right of States to regulate (table 1).

They regulate investment protection and liberalization in different ways because of variations in how the parties approach investment provisions. Most importantly, recently concluded megaregional IIAs include many of the IIA reform approaches identified in UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2015) and UNCTAD's Reform Package for the International Investment Regime (UNCTAD, 2018), which continue to shape investment policymaking. Regarding ISDS, there is an increasingly cautious approach, with some megaregional IIAs excluding ISDS altogether (the RCEP, the CAI and the EU–United Kingdom TCA),[3] while others preserve ISDS with certain exceptions or tailored arrangements (the USMCA and the CPTPP).

The trend toward megaregional IIAs is resulting in a smaller number of IIAs but with multiple parties, significantly expanding the investment treaty network as each of them creates multiple bilateral IIA relationships (see table 1). These megaregionals merit attention because of their sheer size, among other reasons (*WIR14*). The following paragraphs summarize the key developments for these agreements:

Negotiations of the "Sustainable Investment Protocol" under the African Continental Free Trade Area: Trading under the AfCFTA officially started on 1 January 2021, after being postponed from 1 July 2020 because of the pandemic. The AfCFTA Agreement was signed on 21 March 2018 and entered into force on 30 May 2019; as of February 2021, 36 countries had ratified it. Negotiations of the Protocol on Sustainable Investment started on 31 March 2021. The negotiations were initially expected to be completed in December 2020, but the deadline could not be met on account of the pandemic. The new deadline for the conclusion of the negotiations is December 2021.[4] The Negotiating Principles for the AfCFTA Protocol on Sustainable Investment refer to UNCTAD's work on IIA reform and mention the Investment Policy Framework for Sustainable Development (UNCTAD, 2015) and the IIA Reform Accelerator (UNCTAD, 2020). The substantive content of the Protocol is likely to be inspired by the Pan-African Investment Code as well as other African and international investment agreements and instruments.[5] UNCTAD is providing technical assistance and capacity-building support to the African Union in the process leading to the conclusion of the Protocol.

Agreement in principle for the China–EU Comprehensive Agreement on Investment[6] was reached on 30 December 2020. The agreement contains a section dedicated to investment liberalization, providing for NT and MFN treatment for investors and covered enterprises in like situations with respect to their establishment and operation. Exceptions to the MFN provision exclude the importation of substantive provisions and dispute settlement procedures from other IIAs. The CAI does not include all investment protection standards commonly found in BITs or an investment dispute settlement mechanism. Instead, it provides for a State–State mechanism for avoiding and settling disputes between the parties using a two-step approach consisting of consultations and recourse to an arbitration panel. The parties agree to continue the negotiations with a view to negotiate an agreement on investment protection and investment dispute settlement within two years of the signature of the CAI. The agreement includes a specific section on sustainable development which includes commitments on labour and environmental protection, as well as provisions on a separate and dedicated mechanism to address differences.

[3] The RCEP states that the parties are to enter into discussions on ISDS no later than two years after its entry into force, and the CAI states that the parties agree to continue the negotiations with a view to negotiate an agreement on investment protection and investment dispute settlement within two years of the signature of the agreement.
[4] Assembly of the African Union, Thirteenth extraordinary session (on the AfCTA), 5 December 2020, Ext/Assembly/AU/ Decl.1(XIII) Johannesburg, South Africa, https://www.tralac.org/documents/resources/cfta/4247-au-assembly-thirteenth-extraordinary-session-on-the-afcfta-decision-and-declaration-5- december-2020/file.html.
[5] African Union, "Pan-African Investment Code", 31 December 2016, https://au.int/en/documents/20161231/pan-african-investment-code-paic.
[6] European Commission, "EU–China Comprehensive Agreement on Investment (CAI)", https://trade.ec.europa.eu/doclib/press/index.cfm?id=2237.

Table 1. Selected recent megaregional IIAs at a glance

Megaregional IIA	IIA reformed provisions	Economic significance: Population (Number)	GDP (Trillions of dollars)	Total FDI stock covered (Billions of dollars)	Bilateral investment relationships created
China–EU CAI	• NT and MFN pre- and post-establishment with "in like situation" comparator • MFN exception excluding ISDS • Specific section on investment and sustainable development • No ISDS	1.9 billion	30	188	27
EU–UK TCA	• NT and MFN pre- and post-establishment with "in like circumstances" comparator • No FET clause • No expropriation clause • No ISDS • Commitment to enhance the contribution of investment to sustainable development	513.5 million	18.4	1 684	27
RCEP	• Refined definition of investment • NT and MFN pre- and post-establishment with "in like circumstances" comparator • Qualified FET • Indirect expropriation defined • Transfer-of-funds exceptions • Security exception • Investment promotion and facilitation provisions • No ISDS	2.3 billion	26.3	2 690	105
USMCA	• Refined definition of investment • NT and MFN pre- and post-establishment with "in like circumstances" comparator • Qualified FET • Indirect expropriation defined • Transfer-of-funds exceptions • Reference to environment, health and CSR • Limited ISDS scope • Tailored ISDS arrangements (only between the United States and Mexico)	500 million	24.3	2 181	3
CPTPP	• Refined definition of investment • NT and MFN pre- and post-establishment with "in like circumstances" comparator • MFN exception excluding ISDS • Qualified FET • Indirect expropriation defined • Transfer-of-funds exceptions • Reference to environment, health and CSR • Limited ISDS scope • Tailored ISDS arrangements	499 million	10.6	1 230	55

Source: UNCTAD, calculations based on publicly available data.
Note: The AfCFTA Protocol on sustainable investment is not included as negotiations are ongoing and no text has been adopted yet.

EU–United Kingdom Trade and Cooperation Agreement: The EU and the United Kingdom concluded a TCA to govern their future relationship on 30 December 2020. The agreement consists of three main pillars: (i) an FTA covering, among other things, trade in goods and services, investment liberalization, competition, State aid, fisheries, energy and sustainability; (ii) a new partnership on citizens' security establishing a framework for law enforcement and judicial cooperation in criminal and civil law matters; and (iii) an overarching governance framework providing for binding enforcement and dispute settlement.[7] The chapter on investment liberalization includes NT and MFN treatment of investors and covered enterprises with respect to their establishment and operation. It does not include investment protection provisions such as fair and equitable treatment (FET) or expropriation and does not provide for ISDS. Also of direct relevance to investment regulation, the agreement contains a level playing field and rebalancing mechanism which includes a non-regression clause in the chapters dealing with labour and social standards as well as environment and climate, ensuring that the current levels of protection will continue to be upheld.

Regional Comprehensive Economic Partnership: The RCEP Agreement was signed on 15 November 2020. The negotiations were initiated in 2012, originally including India, which opted out in 2019. The agreement contains a chapter on investment that features reform-oriented provisions such as the inclusion of a refined definition of investment, specifying in a non-exhaustive manner the characteristics that a covered investment should have (such as commitment of capital or other resources, expectation of gain or profit, and the assumption of risk) and the forms that an investment may take. Provisions on investment promotion and facilitation are included, such as simplifying procedures for investment approvals and establishing one-stop investment centres to provide assistance and advisory services. The chapter does not provide for ISDS; the parties are to enter into discussions on ISDS no later than two years after the date of entry into force of the agreement and conclude them within three years of the commencement of the discussions. In addition to specific provisions on investment, RCEP coverage of non-investment issues will also have an impact on international investment. This includes for example the RCEP's rules-of-origin regulations and their impact on regional value chains.

Entry into force of the United States–Mexico–Canada Agreement: On 1 July 2020 the USMCA entered into force following its ratification by the United States on 29 January 2020, Mexico on 19 June 2019 and Canada on 13 March 2020. The USMCA replaces the North American Free Trade Agreement (NAFTA), which was signed in 1992. The agreement features reform-oriented language, including its preamble, which recognizes the States' right to regulate in areas such as health, safety and the environment. It limits the definition of investment to assets with the characteristics of an investment and provides explicit exclusions. The parties reaffirm in the treaty the importance of corporate social responsibility (CSR) guidelines. Among the major changes brought about by the new agreement are the revised ISDS provisions, which limit the application of ISDS exclusively to disputes between the United States and Mexico and narrow the claims that investors can bring under the provision. In addition to investment provisions, other clauses on rules of origin and labour costs may have an impact on Mexico's attractiveness as an investment location for North American manufacturing value chains.

Comprehensive and Progressive Agreement for Trans-Pacific Partnership: The CPTPP, which entered into effect on 30 December 2018, is a treaty concluded between Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam. In February 2021, the United Kingdom formally requested the commencement of negotiations on its accession to the CPTPP.[8] With respect to investment (chapter 9 of the agreement), the traditional ISDS model remains in force. However, the parties agreed to suspend the application of the provisions relating to "investment agreement" (investor–State contract) and "investment authorization", including for the submission of ISDS claims (i.e. limiting the submission of claims to the breach of a treaty obligation). There is therefore narrower scope for challenging government measures, as claims by private companies in relation to investment contracts and approvals are now excluded. Multiple side letters were signed on a bilateral basis between participating countries, to terminate existing BITs, to exclude the application of ISDS provisions or to provide for tailored ISDS arrangements, among other matters. The agreement also includes specific measures to assist small and medium-sized enterprises in taking full advantage of the opportunities it creates.

[7] European Commission, "EU-UK Trade and Cooperation Agreement: protecting European interests, ensuring fair competition, and continued cooperation in areas of mutual interest", 24 December 2020, https://ec.europa.eu/commission/presscorner/detail/en/ip_20_2531.

[8] Government of the United Kingdom, "Formal request to commence UK accession negotiations to CPTPP", 1 February 2021, https://www.gov.uk/government/news/formal-request-to-commence-uk-accession-negotiations-to-cptpp.

c. Other developments related to investment rulemaking

Modernization of the Energy Charter Treaty: The first three rounds of negotiations on the modernization of the Energy Charter Treaty (ECT) took place on 6–9 July, 8–11 September and 3–6 November 2020, respectively. Pursuant to the agreed list of topics for modernization, the first round of negotiations saw discussions on, among others, the definition of investment and investor, clarification of most constant protection and security, compensation for losses, definition of FET and the right to regulate. The topics addressed in the second round of negotiations included dispute settlement (e.g. frivolous claims, valuation of damages and third-party funding) as well as sustainable development and CSR, and the discussions of the third round centred on pre-investment, regional economic integration organizations and obsolete provisions. In relation to the modernization of ISDS provisions in the ECT, a group of nearly 100 representatives from the European Parliament as well as national parliaments signed and issued a declaration calling on "EU negotiators to ensure that the provisions in the ECT that protect foreign investment in fossil fuels are deleted and thus removed from the ECT" and for "ISDS provisions (…) to be scrapped or fundamentally reformed or limited."[9] Five rounds of negotiations are scheduled for 2021.[10]

Entry into force of the EU agreement for the termination of intra-EU BITs: On 29 August 2020, the Agreement for the Termination of Bilateral Investment Treaties between the Member States of the EU entered into force following receipt by the Depositary of the second instrument of ratification. Twelve more countries have since ratified the agreement, and Spain is provisionally applying it.[11] The agreement, which had been signed by 23 EU Member States on 5 May 2020,[12] implements the March 2018 judgment of the Court of Justice of the EU in the *Achmea* case, which found that investor–State arbitration clauses in intra-EU BITs are incompatible with EU law. Annex A of the agreement contains a list of 124 intra-EU BITs that will be terminated, i.e. removed from the EU legal order, upon entry into force of the agreement for the relevant Member States, and clarifies that their sunset clauses will also be terminated. Annex B lists already terminated intra-EU BITs whose sunset clauses will also cease to produce legal effect upon entry into force of the agreement for the relevant Member States.[13] The agreement does not cover intra-EU proceedings on the basis of Article 26 of the ECT. It indicates that the EU as a group and its Member States will address this matter at a later stage.

Investment Facilitation for Development negotiations at the World Trade Organization: On 25 September 2020, participants in the structured discussions on investment facilitation for development at the World Trade Organization (WTO) began formal negotiations. The objective of the negotiations is to draft concrete proposals for specific provisions based on an "informal consolidated text". Within the context of these negotiations, investment facilitation is understood as the creation of a more transparent, efficient and investment-friendly business environment by making it easier for domestic and foreign investors to invest, conduct day-to-day business and expand their existing investments.[14] The objective is to achieve a concrete outcome by the 12th WTO Ministerial Conference scheduled for the week of 29 November 2021, to be held in Geneva, Switzerland.

Western Balkans regionally accepted standards for negotiating IIAs: On 10 November 2020, six economies of the Western Balkan region, with the support of the Regional Cooperation Council, endorsed the Regionally Accepted Standards for Negotiating International Investment Agreements, which set a common baseline for the negotiation of future investment agreements involving Albania, Bosnia and Herzegovina, Kosovo (United Nations Administrative Region, Security Council resolution 1244 (1999)), Montenegro, North Macedonia and Serbia. The standards were developed in line with the Regional Investment Reform Agenda, whose goal is to achieve greater alignment of the investment policies in the six economies with EU standards and international best practices, as

[9] "Statement on the modernisation of the Energy Charter Treaty", 8 September 2020, Euractiv, https://www.euractiv.com/wp-content/uploads/sites/2/2020/09/Statement-on-Energy-Charter-Treaty- ENG_080920.pdf.
[10] The 2021 rounds will take place on 2–5 March, 1–4 June, 6–9 July, 28–30 September, and 9–11 November (https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2020/CCDEC202017.pdf).
[11] For information on the status of contracting parties' ratification and acceptance of approval of the agreement, see https://www.consilium.europa.eu/en/documents-publications/treaties-agreements/agreement/?id=2019049&DocLanguage=en.
[12] The signatories are Belgium, Bulgaria, Croatia, Cyprus, Czechia, Denmark, Estonia, France, Germany, Greece, Hungary, Italy, Latvia, Lithuania, Luxembourg, Malta, the Netherlands, Poland, Portugal, Romania, Slovakia, Slovenia and Spain.
[13] Official Journal of the European Union, Vol. 63, 29 May 2020, https://eur-lex.europa.eu/legal-content/en/ALL/?uri=OJ%3AL%3A2020%3A169%3ATOC.
[14] World Trade Organization, "Structured discussions on investment facilitation for development move into negotiating mode", 25 September 2020, https://www.wto.org/english/news_e/news20_e/infac_25sep20_e.htm.

well as with latest trends in investment policymaking.[15] Some of the key provisions in the standards include qualified MFN treatment only in "like situations" and the exclusion of ISDS procedures in other IIAs from the scope of the MFN obligation; a qualified FET standard with a closed list of actions constituting FET violations; protection against expropriation (direct and indirect), with a carve-out for legitimate public policy measures; transfer of funds with accompanying exceptions; provisions on the protection of the right to regulate; sustainable development-related provisions such as clauses on "not lowering of standards" and CSR; and dispute settlement, with a limited scope for ISDS and improvements to the arbitral process (e.g. transparency, no-U-turn clause and disclosure of third-party funding).

African Union declaration on the risks of investor–State arbitration for COVID-19-related measures: During the 14th meeting of African Union Ministers for Trade, held on 24 November 2020, the ministers adopted the Declaration on the Risk of Investor–State Dispute Settlement with Respect to COVID-19 Pandemic Related Measures.[16] It highlights the "potential for disputes arising between investors and states under investment treaties in relation to the measures taken by African governments to respond to the COVID-19 pandemic, as highlighted by a number of organizations including UNCTAD and the African Development Bank (AfDB)". It also expresses concern over the high costs associated with ISDS and the need to ensure that public budgets are directed towards responding to the pandemic. On this basis, the declaration, among other things, invites African Union Member States to explore all available options under international law to mitigate the risks of ISDS claims, including through a mutual temporary suspension of ISDS provisions in investment treaties with respect to COVID-19-related measures. It requests Member States to consider renegotiating their investment treaties by integrating provisions better suited to exceptional situations in accordance with new trends at the regional and international levels. It also requests the African Union Commission to provide support to Member States in the ongoing negotiations within different organizations that are working towards the development of legal instruments to address the risks of ISDS for COVID-19- related measures.

UNCITRAL Working Group III on ISDS reform: The United Nations Commission on International Trade Law (UNCITRAL) Working Group III resumed its 38th session in Vienna, Austria on 20–24 January 2020. In this session, the deliberations addressed three possible reform options: a stand-alone review or appellate mechanism, a standing multilateral investment court and selection of arbitrators. The 39th session, on ISDS reform, convened in a hybrid format (in person and virtually) in Vienna on 5–9 October 2020. The Working Group considered reform options for dispute prevention and mitigation as well as other means of alternative dispute resolution; reflective loss and shareholder claims; multiple proceedings, including counterclaims; security for costs and means to address frivolous claims; treaty interpretation by States parties; and a multilateral instrument on ISDS reform. In 2021, the Working Group held its 40th session in Vienna virtually on 8–12 February 2021 and resumed on 4–5 May 2021. The core of the discussions revolved around establishing a workplan for the next five to six years.

The ICSID's Fourth Working Paper on Rule Amendments: In February 2020, the International Centre for Settlement of Investor Disputes (ICSID) released its latest working paper with proposed amendments to its procedural rules for resolving international investment disputes, reflecting input received on the previous working paper, published in August 2019. Once in effect, the updated rules will, among other things, reduce the time and costs of ICSID proceedings, expand the range of dispute settlement mechanisms available to parties through new mediation rules and updated conciliation and fact-finding rules, enhance transparency and broaden access to the Additional Facility Arbitration and Conciliation Rules.[17]

2. Taking stock of IIA reform

All IIAs concluded in 2020 contain reform-oriented provisions aimed at preserving regulatory space and promoting sustainable investment. In particular, all 9 reviewed IIAs (table 2) contain at least 8 reform features, one IIA contains 10 reform features, and 2 IIAs meet all 11 reform features. Four of the five action areas

[15] Regional Cooperation Council, "Regional investment reform agenda for the West Balkans 6", 11 May 2018, https://www.rcc.int/docs/410/regional-investment-reform-agenda-for-the-western-balkans-six.
[16] IISD, "IISD welcomes AU Ministerial declaration on the risks of investor–State arbitration for COVID-19 measures", 21 December 2020, https://www.iisd.org/articles/iisd-welcomes-au-ministerial-declaration-risks-investor-state-arbitration-covid-19.
[17] ICSID, "ICSID publishes fourth working paper on rule amendments", 28 February 2020, https://icsid.worldbank.org/news-and-events/news-releases/icsid-publishes-fourth-working-paper-rule-amendments.

identified by UNCTAD continued to be the subject of heightened reform with a nearly equal level of focus: i.e. preservation of regulatory space; investment dispute settlement reform; responsible investment through, among other things, more sustainable development-oriented provisions; and investment promotion and facilitation.

Table 2. Reform–oriented provisions in IIAs concluded in 2020

	1	2	3	4	5	6	7	8	9	10	11
Brazil–India BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Canada–United Kingdom Trade Continuity Agreement	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Hungary–Kyrgyzstan BIT	Yes	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Japan–Morocco BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
RCEP	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Japan–Côte d'Ivoire BIT	Yes	No	Yes	No	Yes	Yes	Yes	Yes	No	Yes	Yes
Mexico–Hong Kong, China SAR BIT	No	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Israel–UAE BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Republic of Korea–Indonesia Comprehensive Economic Partnership Agreement	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No	Yes

Yes No

Selected aspects of IIAs

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

1 References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble

2 Refined definition of investment (e.g. reference to characteristics of investment; exclusion of portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts)

3 Circumscribed FET (in accordance with customary international law, equated to the minimum standard of treatment of aliens under customary international law or clarified with a list of State obligations), or FET omitted

4 Clarification of what does and does not constitute an indirect expropriation, or indirect expropriation omitted

5 Detailed exceptions from the free-transfer-of-funds obligation, including for balance-of-payments difficulties and/or enforcement of national laws

6 Omission of the so-called “umbrella” clause

7 General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources

8 Explicit recognition in the treaty text that parties should not relax health, safety or environmental standards to attract investment

9 Promotion of corporate and social responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble

10 Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, omitting the ISDS mechanism)

11 Specific proactive provisions on investment promotion and/or facilitation (e.g. facilitating the entry and sojourn of personnel, furthering transparency of relevant laws and regulations, enhancing exchange of information on investment opportunities)

Source: UNCTAD.
Note: Based on nine IIAs concluded in 2020 for which texts are available, not including “framework agreements” that lack substantive investment provisions or agreements with limited investment-related provisions.

Preservation of regulatory space. Safeguarding States’ policy space remained a driving concern behind the reform features contained in the IIAs concluded in 2020. All nine reviewed IIAs include limitations to the FET obligation, clarify or omit indirect expropriation, provide for detailed exceptions to the free-transfer-of-funds obligation, contain general exceptions (e.g. to protect human health or to conserve exhaustible natural resources) and omit umbrella clauses. Moreover, seven of the nine IIAs circumscribe the treaty scope by, for example, excluding certain types of assets from the definition of investment.

Responsible investment. In IIAs concluded in 2020, the commitment of States to ensure that investment is responsible translated into the systematic incorporation of provisions that promote responsible development.

Eight of the nine IIAs reviewed make reference to the protection of health and safety, labour rights, and environment or sustainable development and provide for general exceptions as well. Six of the nine IIAs explicitly recognize that parties should not relax health, safety or environmental standards to attract investment, while five include provisions for the promotion of CSR.

Investment dispute settlement reform. Reforming ISDS remained a priority in IIAs concluded in 2020. Eight of the nine IIAs reviewed contain at least one type of limitation to that omit ISDS altogether.[18] Other types of limitations commonly observed in IIAs concluded in 2020 involve time periods to submit claims and fork-in-the-road provisions.

Investment promotion and facilitation. In keeping with recent trends, IIAs concluded in 2020 continued to largely include specific proactive provisions on investment promotion and/or facilitation. Eight of the nine IIAs reviewed feature such provisions, which range from facilitating the entry, sojourn and residence of investors and enhancing exchange of information on investment opportunities, to providing for the establishment of an ombudsperson or facilitator.

Gender equality and women's empowerment. Provisions aimed at ensuring gender equality in IIAs remain rare. United Nations Sustainable Development Goal (SDG) 5 aims to "achieve gender equality and empower all women and girls".[19] Since foreign investment is recognized as an important way to achieve the SDGs (*WIR14*), IIA reform should take into account gender equality and women's empowerment (UNCTAD, 2014). A gender-inclusive IIA could, for instance, encourage the contracting parties to promote investments that contribute to gender equality and women's empowerment, whether in its preamble or as part of its investment promotion provision. Investment could be protected against gender-based discrimination in the context of NT, MFN or FET clauses. Investors could be encouraged, as part of CSR provisions, to ensure gender equality and inclusiveness in their activities. In addition, ISDS clauses could establish requirements to ensure gender diversity in the appointment of arbitrators.

To support and accelerate ongoing IIA reform efforts, UNCTAD launched the *IIA Reform Accelerator* on 12 November 2020 (UNCTAD, 2020). The Accelerator is a tool to assist States in modernizing the existing stock of old-generation investment treaties. It operationalizes the idea of gradual innovation by focusing on the reform of the substantive provisions of IIAs in selected key areas. The Accelerator focuses on eight IIA provisions that are most in need of reform in line with the SDGs and the State's right to regulate: (i) definition of investment, (ii) definition of investor, (iii) NT, (iv) MFN treatment, (v) FET, (vi) full protection and security, (vii) indirect expropriation and (viii) public policy exceptions. For each provision, the IIA Reform Accelerator identifies sustainable development-oriented policy options, building on UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2015), and proposes ready-to-use model language that reflects these options. The Accelerator further illustrates how these options have been used in recent IIAs and model BITs. Explanations accompany the model formulations to highlight their objective, provide background and explain how various reform options can be combined.

The reform-oriented formulations can be used directly at the national, bilateral, regional and multilateral levels to interpret, amend or replace old-generation treaties.

In addition, UNCTAD organized in November 2020 its Annual IIA Conference, focusing on "IIA Reform in Times of COVID-19", gathering more than 300 participants from government, the private sector, civil society and academia. They recognized that the pandemic and the ensuing economic crisis posed great challenges but also provided a new impetus for reform of the IIA regime. The Virtual IIA Conference 2020 echoed the need to ensure that the IIA regime promotes and facilitates investment for sustainable development and that it safeguards the right of States to regulate to protect public health in the post-pandemic era.

[18] The Brazil–India BIT and the RCEP are two IIAs that omit ISDS; the RCEP states that the parties are to enter into discussions on ISDS no later than two years after its entry into force.
[19] UN Sustainable Development Goals, https://sdgs.un.org/goals/goal5.

Parallel to the ongoing IIAs reform is the new round of global tax reform, which may exert a far-reaching impact on global investment patterns and investment policies. Some implications are highlighted in box 1. A key emerging issue that merits major efforts for research and policy analysis is the ever-growing interaction between industrial policy and investment and tax policy regimes. The recent worldwide proliferation of industrial policy (UNCTAD, 2018) has intensified such interactions. This has triggered extensive realignments of trade, investment and tax policies (Owens and Zhan, 2018). It poses challenges and opportunities for the effort towards a coherent international approach to trade, investment and tax policies, as well as the opportunity for synergies for sustainable development. The new holistic policy approach to investment in the health sector (see *WIR21*, chapter 3, section C) is a case in point.

Box 1. Ongoing tax reforms: implications for investment and investment policy

The global tax landscape is in transition, with significant implications not only for tax revenues in home and host countries of international investment, but also for global investment patterns, investment promotion strategies and SDG financing. As the initiatives under discussion will affect both national and international investment policies, they need to be fully understood by policymakers, particularly in developing countries.

Among the key reform proposals, tax policymakers are negotiating the adoption of a minimum tax for the largest MNEs. The global minimum tax proposal of at least 15 per cent adopted by the G7 on 5 June 2021 will be presented to the G20 and the OECD Inclusive Framework on Base Erosion and Profit Shifting. The G7 also committed to reform the allocation of taxing rights, with countries awarded taxing rights on at least 20 per cent of profit exceeding a 10 per cent margin for the largest and most profitable MNEs. Among the key implications, an international minimum tax is expected to (i) discourage MNEs from shifting profits and tax revenues to low-tax countries and also lead to less conduit investment through tax havens; (ii): reduce tax competition and the race to the bottom that has lowered tax revenues in many countries over the past three decades, particularly in developing and transition economies; and (iii) necessitate reviews of tax incentive regimes adopted by countries to attract investment.

In addition, corporate tax transparency obligations are likely to increase with a new EU provisional political agreement that will require public country-by-country reporting (disclosure of income tax information by certain undertakings and branches) by MNEs with activities in member States and in selected third countries. Although the proposal is still under consideration and will require political endorsement, MNEs with a presence in the EU will now be subject to a higher level of tax transparency. The proposal should be viewed as part of the general trend to improve tax transparency around the world. Other tax developments with significant investment policy implications include negotiations on proposals to tax the digital economy, which could introduce new complexities for remote investors.

These developments may create friction with the IIA framework, as State obligations under IIAs can interact with tax regulatory action intended to raise revenue, eliminate double taxation or limit opportunities to engage in tax avoidance or evasion. They can hence expose States to tax-related claims brought under their ISDS mechanisms (for how to handle this interaction, see UNCTAD's guide for tax policymakers on IIAs and their implications for tax measures; UNCTAD, 2021).

These issues are relevant for all countries, but developing and emerging economies are particularly exposed, as tax measures are an important part of the industrial policy and investment promotion toolkit. Keeping abreast of reforms and assessing potential impacts on the local economy will be key to enable these economies to participate effectively in the process of tax reform. Greater coordination and cooperation between tax and investment policymakers will also be crucial to ensure investment policy responses that optimize the impact of tax reforms on national investment climates.

Source: UNCTAD.

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

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