



# IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS



UNITED NATIONS  
UNCTAD

## THE INTERNATIONAL INVESTMENT TREATY REGIME AND CLIMATE ACTION

### H I G H L I G H T S

- The international investment agreements (IIA) regime comprises about 3,300 treaties. Old-generation IIAs from the 1980s until the early 2010s were often concluded with little or no attention to host States' regulatory flexibility for environmental protection and climate action. New-generation IIAs signed since 2010 fare relatively better in safeguarding the States' right to regulate and in incorporating specific provisions on the protection of the environment, climate action and sustainable development. However, both old and recent IIAs lack proactive provisions aimed at effectively supporting climate action.
- IIAs do not distinguish between low-carbon and high-carbon investments. IIAs generally cover investments across all sectors and typically offer high levels of protection.
- As old-generation IIAs significantly outnumber new-generation ones, it is critical to address the problems and risks posed by old-generation IIAs.
- States have options and tools at their disposal to reform their existing IIAs, including based on UNCTAD's IIA Reform Accelerator (2020), the IIA Reform Package (2018) and the Investment Policy Framework for Sustainable Development (2015).
- The current IIA regime can constrain States when implementing measures to combat climate change. States may need to fast-track IIA reform to make it more aligned with climate action as well as other public policy imperatives. Two broad approaches can be considered:
  - Making individual IIAs climate-responsive by ensuring that only low-carbon and sustainable investments are covered and by safeguarding the right and duty of States to regulate in the public interest. This can be coupled with provisions aimed at promoting and facilitating sustainable investment.
  - Exploring the possibilities to reconceptualize the scope, purpose and design of the IIA regime through engagement in holistic IIA reform actions at the multilateral, regional, bilateral and national levels.
- Many past investor–State dispute settlement (ISDS) cases were related to measures or sectors of direct relevance to climate action. A complementary publication looks at such ISDS cases (IIA Issues Note, No. 4, September 2022).

## 1. Introduction: the IIA regime and climate action

Goal 13 of the Sustainable Development Goals adopted in September 2015 calls for “urgent action to combat climate change and its impacts” (A/RES/70/1). The Paris Agreement – the benchmark for climate action – was adopted shortly after, in December 2015, under the umbrella of the 1992 United Nations Framework Convention on Climate Change (UNFCCC). More recently, on 28 July 2022, the United Nations General Assembly recognized the right to a clean, healthy and sustainable environment as a human right (A/RES/76/300). IIA policymaking has so far shown limited consideration for climate action and environmental protection as a specific concern.

The international investment agreements (IIA) regime consists of 3,300 treaties: 2,871 bilateral investment treaties (BITs) and 429 other treaties with investment provisions (TIPs). IIAs contain substantive protection standards for foreign investors and investments, coupled with access to investor–State arbitration, known as investor–State dispute settlement (ISDS). IIAs proliferated in the 1990s as an instrument of global investment policymaking and have become increasingly contentious over the past decade, including due to the fast-growing number of ISDS claims and States’ increased exposure to ISDS risks and costs.<sup>1</sup>

The urgency of climate action has added attention to the need to reform the IIA regime. The 2022 Intergovernmental Panel on Climate Change (IPCC) report highlighted the risks of ISDS being used to challenge climate policies (box 1). To substantially reduce greenhouse gas emissions in order to meet climate change objectives, a transition to a low-carbon economy and significant changes in investment patterns are needed (IPCC, 2014, p. 30). Many governments and other actors in public and private sectors are taking steps to align financial flows with net-zero targets for greenhouse gas emissions and Paris Agreement objectives, notably in the financial sector (lending, asset management and insurance).<sup>2</sup>

Reform of existing IIAs is essential to ensure that IIAs do not hinder States from implementing climate change measures and from achieving a just transition to low-carbon economies. The reform should minimize the States’ risk of facing ISDS claims related to climate change policies and those related to high-carbon investments.

Many past ISDS cases were related to measures or sectors of direct relevance to climate action (UNCTAD, 2022a). Using IIAs as the legal basis, investor claimants brought at least 175 ISDS cases concerning measures taken for the protection of the environment. Moreover, investors in the fossil fuel sector have been frequent ISDS claimants, initiating at least 192 ISDS cases against different types of State conduct. The last decade has also seen the emergence and proliferation of ISDS cases brought by investors in the renewable energy sector, with 80 known cases. Many of these cases challenged Governments’ legislative changes involving reductions in feed-in-tariffs for renewable energy production. A complementary publication looks at these three types of ISDS cases (IIA Issues Note, No. 4, September 2022).

While IIA reform is underway in many countries, a lot remains to be done. The large stock of old-generation IIAs can constrain States when implementing measures to combat climate change and protect the environment, among other public policy imperatives. The narrow window available to keep warming within 1.5°C and the unprecedented aggregate scale of potential ISDS claims that could challenge climate measures such as fossil fuel phase-outs call for States to deepen and accelerate IIA reform processes (UNCTAD-IIED, 2022). These reforms should align IIAs with the Paris Agreement and net-zero targets by promoting and facilitating investment into climate-related projects – such as renewable energy ones – and limit or exclude coverage of high-carbon investments under IIAs. Such reforms can be taken at the multilateral, regional, bilateral and national levels. A coordinated multilateral approach to IIA reform is preferable as it could result in an international instrument creating legal certainty for multiple stakeholders. More immediate, smaller scale reforms at the bilateral or regional level should be pursued in parallel. Individual regions and countries can lead the way in fast-tracking IIA reforms.

<sup>1</sup> For the evolution of the IIA regime, including the shift from the era of proliferation to the era of re-orientation, see UNCTAD, 2015.

<sup>2</sup> E.g. <https://www.unepfi.org/news/industries/insurance/partnership-for-carbon-accounting-financials-collaborates-with-un-convened-net-zero-insurance-alliance-to-develop-standard-to-measure-insured-emissions/>; <https://www.gfanzero.com/about/>; [https://ec.europa.eu/info/sites/default/files/business\\_economy\\_euro/accounting\\_and\\_taxes/documents/211104-international-platform-sustainable-finance-cop26-statement\\_en.pdf](https://ec.europa.eu/info/sites/default/files/business_economy_euro/accounting_and_taxes/documents/211104-international-platform-sustainable-finance-cop26-statement_en.pdf); [https://group30.org/images/uploads/publications/G30\\_Mainstreaming\\_the\\_Transition\\_to\\_a\\_Net-Zero\\_Economy.pdf](https://group30.org/images/uploads/publications/G30_Mainstreaming_the_Transition_to_a_Net-Zero_Economy.pdf).

This may require a reconceptualization of the scope, purpose and design of IIAs. Intergovernmental and multistakeholder dialogue can play a role in identifying and devising investment policy tools to promote and facilitate sustainable investments, in support of climate action.

States have options and tools at their disposal to reform their existing IIAs, including based on UNCTAD's IIA Reform Accelerator (2020), the IIA Reform Package (2018) and the Investment Policy Framework for Sustainable Development (2015). A recent UNCTAD-IIED Policy Brief highlighted key policy recommendations supporting the reform of the IIA regime in order to advance climate goals (UNCTAD-IIED, 2022).

### Box 1. The 2022 Report of the Intergovernmental Panel on Climate Change (IPCC) and ISDS

Climate change is among the most pressing global challenges of our time. The Intergovernmental Panel on Climate Change (IPCC) found that human-induced global warming has already caused changes in the climate system and that global warming will exceed 2°C unless “deep reductions” in greenhouse gas emissions occur (IPCC, 2022, Chapter 15). The achievement of the Sustainable Development Goals (SDGs) is directly at stake, as are human rights including the rights to life, health, water, and a clean and healthy environment.

Rising to this challenge will require transformations in economies and societies. Regarding the energy sector, the International Energy Agency noted that a global transition to net-zero emissions energy involves “nothing less than a complete transformation of how we produce, transport and consume energy” (IEA, 2021, p. 13). This transformation includes phasing out unabated coal power plants and reorienting energy sources from fossil fuels to renewables. Energy scenarios consistent with limiting global warming to 1.5°C require more investments in renewable energy.

The IPCC Report highlighted that ISDS based on IIAs might significantly hamper governments in adopting necessary climate policies:

“A large number of bilateral and multilateral agreements, including the 1994 Energy Charter Treaty, include provisions for using a system of investor-state dispute settlement (ISDS) designed to protect the interests of investors in energy projects from national policies that could lead their assets to be stranded. Numerous scholars have pointed to ISDS being able to be used by fossil-fuel companies to block national legislation aimed at phasing out the use of their assets [...]” (IPCC, 2022, Chapter 14, p. 81, citations omitted)

“In particular, transactions in the energy sector show a high level of investor protection also against much needed climate action which is also well illustrated by share of claims settled in favour of foreign investors under the Energy Charter Treaty and investor-state dispute settlement [...]” (IPCC, 2022, Chapter 15, p. 66, citations omitted)

According to a recent study on this issue, climate adaption ISDS claims may run as high as USD 340 billion (Tienhaara et al., 2022).

*Source:* UNCTAD, based on IPCC and others.

## 2. Stocktaking of IIA provisions relevant to climate action

Some 3,300 IIAs were concluded between 1959 and 2009 representing over 85 per cent of all IIAs ever signed.<sup>3</sup> About 2,300 of them are still in force today. Typically, these are old-generation IIAs that do not contain explicit provisions to preserve States' regulatory space for environmental protection or climate action. They feature broad and vague formulations for substantive treatment standards, with few exceptions or safeguards. Such old-generation IIAs serve as a basis for virtually all existing ISDS claims. As old IIAs significantly outnumber more recent ones, it is critical to address the problems and risks posed by them (UNCTAD, 2018).

New-generation IIAs fare relatively better in safeguarding the States' right to regulate and in incorporating specific provisions on the protection of the environment, climate action and sustainable development. As documented in UNCTAD's World Investment Reports, new-generation IIAs generally contain more circumscribed and clarified substantive provisions, often accompanied by narrower access to ISDS (UNCTAD, 2020b). Questions remain whether refined provisions in newer IIAs will shield climate change measures from ISDS claims or prevent investors with high-carbon investments from invoking ISDS to claim compensation.

<sup>3</sup> This includes about 500 IIAs that were signed but have not entered into force and 500 IIAs that have been terminated.

Since 2010, some 500 IIAs were concluded and about half of them are in force. While climate change and the environment feature more prominently in these IIAs (figure 1), they are still relatively rare. Some newer IIAs contain:

- General environmental provisions aimed at safeguarding the State's policy space
- Specific climate action provisions

Moreover, both old and recent IIAs lack pro-active provisions aimed at effectively supporting climate action. For example, IIAs generally do not distinguish between low-carbon and high-carbon investments.<sup>4</sup> They cover investments across all sectors and typically offer high levels of protection. Old IIAs and most new IIAs also still lack detailed provisions for promoting and facilitating investments. Some IIAs, such as the Cooperation and Facilitation Agreements spearheaded by Brazil, are notable exceptions.

**Figure 1. Selected provisions relevant to climate action in IIAs concluded between 2010–2021**  
(Per cent)



Source: UNCTAD, based on IHEID International Economic Law Clinic Report "IIAs and Climate Action", May 2022.

Note: The survey analysed 347 IIAs signed between 2010 and 2021, with available texts.

\* The percentage concerns only the IIAs that include performance requirements provisions, i.e. 103 out of the 347 analysed IIAs.

### (i) General environment-related provisions safeguarding the State's policy space

A small share of IIAs concluded since 2010 contain general environmental provisions and provisions dealing with sustainable development that might help safeguarding climate action. While they do not explicitly refer to climate action, they are essential because climate action forms part of sustainable development (e.g. as part of Goal 13 of the SDGs). Provisions of this kind include:

- preambular clauses pertaining to environmental protection
- substantive provisions directly related to environmental protection
- environmental protection as a carve-out from standards of treatment
- procedures for compliance and implementation of environmental protection
- environmental protection as a general exception

*Preambular clauses pertaining to environmental protection* help establish the overall objective of the IIA. Such references are helpful since the entire treaty must be interpreted in a manner consistent with the aim of environmental protection. Well-drafted preambular clauses serve to clarify the application of substantive provisions. Preambles can contain references to sustainable development and environmental protection, reaffirm the right to regulate in the area of environment and reiterate commitments to uphold levels of environmental protection.

<sup>4</sup> See further Brauch, 2022 (forthcoming), available at <https://academiccommons.columbia.edu/doi/10.7916/d8-300v-7h63>.

## Box 2. Preambular clauses pertaining to environmental protection: recent treaty examples (illustrative)

### Myanmar–Singapore BIT (2019), Preamble

“RECOGNISING the important contribution investments can make to sustainable economic growth and development, and seeking to promote, protect, and facilitate such investments within the territories of the Parties.

REAFFIRMING the Parties’ right to regulate and to introduce new measures, such as health, safety, and environmental measures relating to investments in their territories in order to meet legitimate public policy objectives.”

### Colombia–Spain BIT (2021), Preamble

“Convencidos de que la inversión tiene el potencial de contribuir al desarrollo sostenible y a aumentar la prosperidad en ambos países.

Reafirmando el derecho de cada Parte Contratante a regular las Inversiones hechas en su Territorio para cumplir objetivos legítimos de bienestar público, que se pueden lograr sin disminuir sus estándares de salud, orden público y seguridad, derechos laborales y de medio ambiente de aplicación general.”

Source: UNCTAD.

*Substantive provisions directly related to environmental protection* can be found in the main text of the IIA. For example, new-generation IIAs contain specific sections on environmental protection and sustainable development or the implementation of multilateral environmental agreements. They can also have clauses for the non-lowering of environmental protection, the promotion and facilitation of sustainable investment, the right to regulate, requirements for environmental impact assessments and the maintenance of an environmental management system, and corporate social responsibility (box 3).

## Box 3. Substantive provisions directly related to environmental protection: recent treaty examples (illustrative)

### Implementation of environmental agreements

#### China–Switzerland FTA (2013), Art. 12.2

“1. The Parties reaffirm their commitment to the effective implementation in their laws and practices of multilateral environmental agreements to which they are a party, as well as of the environmental principles and obligations reflected namely in the international instruments referred to in Article 12.1. They shall strive to further improve the level of environmental protection by all means, including by effective implementation of their environmental laws and regulations.

2. The Parties recognise that it is inappropriate to encourage trade or investment by weakening or reducing the protections afforded in domestic environmental laws, regulations, policies and practices. The Parties agree that environmental standards shall not be used for protectionist trade purposes.

3. The Parties recognise the importance, when preparing and implementing measures related to the environment, of taking account of scientific, technical and other information, and relevant international guidelines.”

### Non-lowering of environmental standards

#### Belarus–Hungary BIT (2019), Art. 2(7)

“The Contracting Party shall not encourage investment by lowering domestic environmental, labour or occupational health and safety legislation or by relaxing core labour standards. Where a Contracting Party considers that the other Contracting Party has offered such an encouragement, it may request consultations with the other Contracting Party and the two Contracting Parties shall consult with a view to avoid any such encouragement.”

### Promotion and facilitation of sustainable investment

#### China–Switzerland FTA (2013), Art. 12.3

“1. The Parties shall strive to facilitate and promote investment and dissemination of goods, services, and technologies beneficial to the environment.

2. For the purpose of paragraph 1, the Parties agree to exchange views and will consider cooperation in this area.

3. The Parties shall encourage cooperation between enterprises in relation to goods, services and technologies that are beneficial to the environment.”

### Box 3. Substantive provisions directly related to environmental protection: recent treaty examples (illustrative)

#### Right to regulate

##### Rwanda–United Arab Emirates BIT (2017), Art. 9

“1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining, or enforcing any measure that it considers appropriate to ensure that an investment activity in its territory is undertaken in accordance with the applicable public health, security, environmental and labour law of the Contracting Party, such measures should not be applied in a manner that would constitute arbitrary or unjustifiable discrimination between investments or investors. 2. The Contracting Parties recognise that it is inappropriate to encourage investment by relaxing domestic public health, security, labour or environmental measures. Accordingly, a Contracting Party should not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such measures as an encouragement for the establishment, expansion or retention in its territory of an investment of an investor, as long as such derogation or waiver diminish its public health, security, labour and environmental standards.”

##### Canada–EU CETA (2016), Chapter 8 Investment, Art. 8.9

“1. For the purpose of this Chapter, the Parties reaffirm their right to regulate within their territories to achieve legitimate policy objectives, such as the protection of public health, safety, the environment or public morals, social or consumer protection or the promotion and protection of cultural diversity.”

#### Environmental impact assessment

##### Morocco–Nigeria BIT (2016), Art. 14

“1) Investors or the investment shall comply with environmental assessment screening and assessment processes applicable to their proposed investments prior to their establishment, as required by the laws of the host state for such an investment or the laws of the home state for such an investment, whichever is more rigorous in relation to the investment in question.

2) Investors or the investment shall conduct a social impact assessment of the potential investment. The Parties shall adopt standards for this purpose at the meeting of the Joint Committee.

3) Investors, their investment and host state authorities shall apply the precautionary principle to their environmental impact assessment and to decisions taken in relation to a proposed investment, including any necessary mitigation or alternative approaches of the precautionary principle by investors and investments shall be described in the environmental impact assessment they undertake.”

#### Environmental management system

##### Morocco–Nigeria BIT (2016), Art. 18

“1) Investments shall, in keeping with good practice requirements relating to the size and nature of the investment, maintain an environmental management system. Companies in areas of resource exploitation and high-risk industrial enterprises shall maintain a current certification to ISO 14001 or an equivalent environmental management standard.

2) Investors and investments shall uphold human rights in the host state.

3) Investors and investments shall act in accordance with core labour standards as required by the ILO Declaration on Fundamental Principles and Rights of Work, 1998.

4) Investors and investments shall not manage or operate the investments in a manner that circumvents international environmental, labour and human rights obligations to which the host state and/or home state are Parties.”

Source: UNCTAD.

*Environmental protection as a carve-out from and clarification of standards of treatment* aims at safeguarding policy space and reducing the discretion of ISDS tribunals in relation to environmental matters. Several IIAs have introduced carve-outs and clarifications in provisions dealing with indirect expropriation, national treatment and the prohibition of performance requirements (box 4).

Notably, the reviewed new-generation IIAs do not include environmental carve-outs from fair and equitable treatment (FET). Given the broad interpretations of FET in ISDS practice, this could be seen as a shortcoming of the recent reform efforts.

#### Box 4. Environmental protection as a carve-out from and clarification of standards of treatment: recent treaty examples (illustrative)

##### Expropriation

###### India–Kyrgyzstan BIT (2019), Art. 5(5)

“Non-discriminatory regulatory measures by a Party or measures or awards by judicial bodies of a Party that are designed and applied to protect legitimate public interest or public purpose objectives such as public health, safety and the environment shall not constitute expropriation under this Article.”

##### National treatment and most-favoured-nation treatment

###### Iran–Slovakia BIT (2016), Art. 4(3)

“For greater certainty, a determination of whether an investment or an investor is in comparable situations for the purposes of paragraphs 1. and 2. of this Article shall be made based on an assessment of the totality of circumstances related to the investor or the investment, including:

- a) the effect of the investment on
  - i. the local community where investment is located;
  - ii. the environment, including effects that relate to the cumulative impact of all investments within a jurisdiction;
- b) the character of the measure, including its nature, purpose, duration and rationale; and
- c) the regulations that apply to investments or investors.”

##### Performance requirements

###### China–Mauritius FTA (2019), Art. 8.9

“(d) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraph 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

- (i) necessary to secure compliance with the laws and regulations that are not inconsistent with this Agreement;
- (ii) necessary to protect human, animal, or plant life or health; or
- (iii) related to the conservation of living and non-living exhaustible natural resources.”

Source: UNCTAD.

*Procedures for cooperation in and implementation of environmental protection.* Some recent IIAs require their contracting parties to effectively enforce their environmental laws and establish institutional mechanisms for cooperation (box 5). These procedures include joint-committee mechanisms, public participation, consultations, panel of experts, national focal points and expert reports. These procedures do not preclude investors from challenging environmental measures in arbitration, i.e. environmental measures would not be shielded (as IIAs generally do not carve-out such measures from the scope of ISDS).

#### Box 5. Procedures for cooperation in and implementation of environmental protection: recent treaty examples (illustrative)

##### Environmental cooperation

###### USMCA (2018), Chapter 24 Environment

###### Art. 24.25

“1. The Parties recognize the importance of cooperation as a mechanism to implement this Chapter, to enhance its benefits, and to strengthen the Parties’ joint and individual capacities to protect the environment, and to promote sustainable development as they strengthen their trade and investment relations.

2. The Parties are committed to expanding their cooperative relationship on environmental matters, recognizing it will help them achieve their shared environmental goals and objectives, including the development and improvement of environmental protection, practices, and technologies.

3. The Parties are committed to undertaking cooperative environmental activities pursuant to the Agreement on Environmental Cooperation among the Governments of Canada, the United Mexican States, and the United States of America (ECA) signed by the Parties, including activities related to implementation of this Chapter. Activities that the Parties undertake pursuant to the Environmental Cooperation Agreement will be coordinated and reviewed by the Commission for Environmental Cooperation as provided for in the ECA.”

###### Art. 24.26

“1. Each Party shall designate and notify a contact point from its relevant authorities within 90 days of the date of entry into force of this Agreement, in order to facilitate communication between the Parties in the implementation of this Chapter. Each Party shall promptly notify, in writing, the other Parties in the event of any change of its contact point.

### Box 5. Procedures for cooperation in and implementation of environmental protection: recent treaty examples (illustrative)

2. The Parties establish an Environment Committee composed of senior government representatives, or their designees, of the relevant trade and environment central level of government authorities of each Party responsible for the implementation of this Chapter.
3. The purpose of the Environment Committee is to oversee the implementation of this Chapter, and its functions are to:
  - (a) provide a forum to discuss and review the implementation of this Chapter;
  - (b) periodically inform the Commission and the Council for the Commission for Environmental Cooperation (Council) established under Article 3 (Council Structures and Procedures) of the Environmental Cooperation Agreement regarding the implementation of this Chapter;
  - (c) consider and endeavor to resolve matters referred to it under Article 24.30 (Senior Representative Consultations);
  - (d) provide input, as appropriate, for consideration by the Council, relating to submissions on enforcement matters under this Chapter.
  - (e) coordinate with other committees established under this Agreement as appropriate; and
  - (f) perform any other functions as the Parties may decide.”

Source: UNCTAD.

*Environmental protection as a general exception.* General exceptions or public policy exceptions are included in an increasing number of IIAs (UNCTAD, 2020a). They identify the policy areas for which flexibility is to be preserved in respect of all (or specified) IIA protection standards. New-generation IIAs frequently include environmental protection as a legitimate policy objective in general exceptions clauses (box 6). However, it is critical to note that ISDS tribunals have applied general exception clauses in narrow and unexpected ways.<sup>5</sup>

### Box 6. Environmental protection as a general exception: recent treaty examples (illustrative)

#### Burkina Faso–Türkiye BIT (2019), Art. 5

“1. Nothing in this Agreement shall be construed to prevent a Contracting Party from adopting, maintaining or applying non-discriminatory legal measures:

- (a) designed and applied for the protection of human, animal or plant life or health, or the environment;
- (b) related to the conservation of living or non-living exhaustible natural resources.

[...]

4. This Agreement shall not imply in any way an obligation for the Contracting Parties to relax their laws and regulations regarding health, safety or environment in order to encourage investment. Neither Contracting Party is under any obligation to waive or otherwise derogate, or to offer to waive or otherwise derogate from such measures for the purpose of encouraging the establishment, acquisition, expansion or the maintenance of an investment in its territory by an investor of the other Contracting Party.”

Source: UNCTAD.

#### (ii) Specific climate action provisions

New-generation IIAs, and some recent model BITs,<sup>6</sup> occasionally include provisions relating specifically to climate action. These kinds of provisions generally feature in FTAs with investment chapters, not in standalone investment protection agreements. Examples include:

- preambular clauses pertaining to climate action
- provisions directly related to climate action
- procedures for compliance and implementation of climate action
- climate action as a general exception

*Preambular clauses pertaining to climate action.* Some new-generation IIAs’ preambles highlight the commitment to mitigate climate change and contain direct references to climate action treaties such as the UNFCCC (box 7).

<sup>5</sup> E.g. *Eco Oro v. Colombia*, *Decision on Jurisdiction, Liability and Directions on Quantum*, 9 September 2021; see also UNCTAD, 2022a.

<sup>6</sup> E.g. Netherlands Model BIT (2019), available at <https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/5832/download>.



### Box 7. Preambular clauses pertaining to climate action: recent treaty examples (illustrative)

#### Türkiye–United Kingdom FTA (2020), Preamble

“RECOGNISING the importance of sustainable development, including urgent action to protect the environment and combat climate change and its impacts, and the role of trade in pursuing these objectives, consistent with rules and principles under multilateral environmental agreements to which they are party, including the United Nations Framework Convention on Climate Change (UNFCCC)”

#### EU–United Kingdom Trade and Cooperation Agreement (2020), Preamble

“REAFFIRMING their commitment to democratic principles, to the rule of law, to human rights, to countering proliferation of weapons of mass destruction and to the fight against climate change, which constitute essential elements of this and supplementing agreements,

[...]

RECOGNISING the Parties’ respective autonomy and rights to regulate within their territories in order to achieve legitimate public policy objectives such as the protection and promotion of public health, social services, public education, safety, the environment including climate change, public morals, social or consumer protection, animal welfare, privacy and data protection and the promotion and protection of cultural diversity, while striving to improve their respective high levels of protection,

[...]

RECOGNISING the need for an ambitious, wide-ranging and balanced economic partnership to be underpinned by a level playing field for open and fair competition and sustainable development, through effective and robust frameworks for subsidies and competition and a commitment to uphold their respective high levels of protection in the areas of labour and social standards, environment, the fight against climate change, and taxation,”

Source: UNCTAD.

*Provisions directly related to climate action.* Several new-generation IIAs (mostly TIPs) include sections that deal with climate mitigation and adaptation measures, reaffirm the right to regulate on climate change, reiterate commitments to implement climate action treaties, contain non-lowering of standards provisions, and address facilitation and promotion of investment in climate-friendly technologies (box 8). A few new-generation IIAs include specific procedures and mechanisms to implement States’ climate action policies through inter-State cooperation. For example, they establish joint committees, joint dialogues, climate action consultations and panels of experts (see also box 5).<sup>7</sup> However, none of the reviewed IIAs distinguish between high- and low-carbon investments.

### Box 8. Provisions directly related to climate action: recent treaty examples (illustrative)

#### Promoting climate-friendly investment

##### Australia–United Kingdom FTA (2021), Art. 13.8

“1. The Parties recall the provisions of this Agreement that are applicable to promoting mutually supportive investment and environmental outcomes and that are consistent with the sovereign right of each Party to set its levels of environmental protection, including as set out in the relevant provisions, exceptions, and exclusions of this Chapter, of Annex I (Schedules of Non-Conforming Measures for Services and Investment) and Annex II (Schedules of Non-Conforming Measures for Services and Investment), of Chapter 31 (General Provisions and Exceptions), and of Chapter 22 (Environment).

2. The Parties further recall that such provisions, exceptions, and exclusions include those applicable to:

- (a) maintaining and effectively enforcing domestic environmental law and policies;
- (b) recognising that it is inappropriate to waive or derogate from environmental law to encourage investment;
- (c) affirming commitments under multilateral environmental agreements;
- (d) supporting the transition to low carbon and climate resilient economies; and
- (e) encouraging investment in environmental goods and services.”

#### Cooperation in the area of climate action

##### Moldova–United Kingdom Trade and Cooperation Agreement (2020), Chapter 17 Climate Action

##### Art. 83

“The Parties may develop and strengthen their cooperation to combat climate change. Cooperation shall be conducted considering the interests of the Parties on the basis of equality and mutual benefit and taking into account the interdependence existing between bilateral and multilateral commitments in this field.”

<sup>7</sup> Such provisions remain largely absent from BITs, including new-generation ones.

### Box 8. Provisions directly related to climate action: recent treaty examples (illustrative)

#### Art. 84

“Cooperation may promote measures at the domestic, regional and international level, including in the areas of:

- (a) mitigation of climate change;
- (b) adaptation to climate change;
- (c) carbon trading;
- (d) research, development, demonstration, deployment and diffusion of safe and sustainable low-carbon and adaptation technologies;
- (e) mainstreaming of climate considerations into sector policies; and
- (f) awareness raising, education and training.”

#### Art. 85

“The Parties may, inter alia:

- (a) exchange information and expertise;
- (b) implement joint research activities and exchanges of information on cleaner technologies;
- (c) implement joint activities at the regional and international level, including with regard to multilateral environment agreements ratified by the Parties, and joint activities in the framework of relevant agencies, as appropriate.

The Parties may pay special attention to transboundary issues.”

#### Art. 86

“The cooperation may cover, among others, the development and implementation of:

- (a) an overall climate strategy and action plan for the long-term mitigation of and adaptation to climate change;
- (b) vulnerability and adaptation assessments;
- (c) a National Strategy for Adaptation to Climate Change;
- (d) a low-carbon development strategy;
- (e) long-term measures to reduce emissions of greenhouse gases;
- (f) measures to prepare for carbon trading;
- (g) measures to promote technology transfer on the basis of a technology needs assessment;
- (h) measures to mainstream climate considerations into sector policies; and
- (i) measures related to ozone-depleting substances.”

#### Art. 87

“A regular dialogue may take place between the Parties on the issues covered by this Chapter.”

See also e.g. USMCA (2018), Art. 24.25 (box 5); CPTPP (2018), Art. 20.12.

*Source:* UNCTAD.

### (iii) Other IIA provisions relevant to climate action

Virtually all IIA provisions could potentially impact climate action, constraining or supporting it. The following selected elements illustrate the two dimensions:

- The broad scope of IIAs (definitions of investment and investor), the inclusion of broad and vague substantive protections (e.g. FET, indirect expropriation and the prohibition of performance requirements) coupled with access to ISDS can make climate action more difficult and costly for host States.
- Clauses on investor obligations and responsibility, and on promoting investment in new technologies may support climate action.

*The broad scope of IIAs.* The issue of IIAs’ scope is highly relevant to climate action. Commonly, IIAs cover investments across all sectors and offer high levels of protection, including access to ISDS. Existing IIAs do not distinguish in their scope between low-carbon emission and high-emission investments.<sup>8</sup> The definitions of “investment” and “investor” are the entry point for investors and investments to obtain such protections.

*The inclusion of broad and vague substantive protections.* The FET clause constitutes by far the most litigated IIA provision in ISDS proceedings, often in combination with indirect expropriation claims (UNCTAD, 2020a). These two clauses are also the most likely basis for challenges to climate change measures. Provisions prohibiting the use of certain performance requirements can also be an issue. Provisions on performance requirements regulate the extent to which host States can impose certain operational conditions on foreign investors/investments (UNCTAD, 2015a). The transition to a low-carbon economy will require investments into research and development (R&D) for

<sup>8</sup> A few recent IIAs have excluded natural resources from their scope. One example is the Japan–United Arab Emirates BIT (2018), Art. 1.

low-carbon and sustainable technologies, the operationalization of such new technologies and the creation of the necessary infrastructure. Flexibility to use certain performance requirements, in line with national development strategies and SDG action plans, will be needed (e.g. related to the transfer of technology and know-how). IIAs with a prohibition on performance requirements can constrain the array of measures available to States to create a conducive environment for this transition.

*Access to investor–State arbitration.* ISDS is a distinct feature of the IIA regime. About 95 per cent of IIAs provide for States’ advance consent to international arbitration proceedings between an investor claimant and the respondent State (UNCTAD, 2021 a). Under the great majority of ISDS provisions in IIAs, claimants are not required first to have recourse to domestic courts or exhaust local remedies. Legitimacy concerns with ISDS have been a driver of global IIA reform efforts (UNCTAD, 2015).

*Promotion of investment in clean technologies.* Climate action policies will require significant new investments from both the public and private sectors. Promotion of sustainable investment appears in a small number of existing IIAs (box 9). A transition to a green economy will require investment into research and development (R&D), implementation of new technologies and infrastructures necessary for the sustainable use of such technologies.

### Box 9. Promotion of investment in clean technologies: recent treaty examples (illustrative)

#### Japan–United Kingdom CEPA (2020), Art. 16.5

“The Parties recognise the importance of enhancing the contribution of trade and investment to the goal of sustainable development in its economic, social and environmental dimensions.

Accordingly, the Parties:

[...]

(b) shall strive to facilitate and promote trade and investment in environmental goods and services, in a manner consistent with this Agreement;

(c) shall strive to facilitate trade and investment in goods and services of particular relevance to climate change mitigation, such as those related to sustainable renewable energy and energy efficient goods and services, in a manner consistent with this Agreement;

(d) shall strive to promote trade and investment in goods that contribute to enhanced social conditions and environmentally sound practices, including goods that are the subject of labelling schemes, and recognise the contribution of other voluntary initiatives, including private ones, to sustainability; and

(e) shall encourage corporate social responsibility and exchange views and information on this matter through the Committee on Trade and Sustainable Development, and as appropriate through other fora. In this regard, the Parties recognise the importance of the relevant internationally recognised principles and guidelines, including the OECD Guidelines for Multinational Enterprises which are part of the OECD Declaration on International Investment and Multinational Enterprises adopted by the OECD on 21 June 1976 and the Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy adopted by the Governing Body of the International Labour Office in November 1977.”

See also China–Switzerland FTA (2013), Art. 12.3 (box 3); Australia–United Kingdom FTA (2021), Art. 13.8 (box 8); EU–Kazakhstan EPCA (2015), Art. 154.

Source: UNCTAD.

*Strengthening investor responsibility for the protection of the environment.* New-generation IIAs increasingly recognize investors’ responsibility in contributing to the transition to a low-carbon economy. States have considered including references to various standards of corporate social responsibility (CSR), responsible business conduct (RBC) standards, such as the United Nations Guiding Principles on Business and Human Rights, OECD Guidelines for Multinational Enterprises and other codes of conduct as applicable to foreign investors within the treaty’s scope. Some IIAs also reiterate that investors are responsible for complying with domestic laws and specifically oblige investors to comply with environmental impact reporting practices (box 10).

### Box 10. Strengthening investor responsibility for the protection of the environment: recent treaty examples (illustrative)

#### Canada–Mongolia BIT (2016), Art. 14

“Each Party should encourage enterprises operating within its territory or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Parties. These principles address issues such as labour, the environment, human rights, community relations and anti-corruption. The Parties should remind those enterprises of the importance of incorporating such corporate social responsibility standards in their internal policies.”

#### Morocco–Nigeria BIT (2016), Art. 24

“1) In addition to the obligation to comply with all applicable laws and regulations of the Host State and the obligations in this Agreement, and in accordance with the size, capacities and nature of an investments, and taking into account the development plans and priorities of the Host State and the Sustainable Development Goals of the United Nations, investors and their investments should strive to make the maximum feasible contributions to the sustainable development of the Host State and local community through high levels of socially responsible practices.

2) Investors should apply the ILO Tripartite Declaration on Multinational Investments and Social Policy as well as specific or sectorial standards of responsible practice where these exist.

3) Where standards of corporate social responsibility increase, investors should strive to apply and achieve the higher level standards.”

#### Serbia–Türkiye BIT (2018), Art. 11

“Each Contracting Party should encourage legal persons operating within the territory of its State or subject to its jurisdiction to voluntarily incorporate internationally recognized standards of corporate social responsibility in their practices and internal policies, such as statements of principle that have been endorsed or are supported by the Contracting Parties. These principles address issues such as labor, the environment, human rights, community relations, and anti-corruption.”

See also Morocco–Nigeria BIT (2016), Art. 18 (box 3); Netherlands Model BIT (2019).

Source: UNCTAD.

## 3. Recent policy initiatives related to IIAs and climate action

Several recent initiatives aim to contribute to the reform of the IIA regime in light of climate change objectives.

**UNCTAD-IIED Cooperation on International Investment Agreements and Climate Action:** In 2022, UNCTAD and IIED organized a joint workshop in which government officials and experts shared their experience and ideas on IIAs and climate action.<sup>9</sup> The resulting policy brief outlines overarching recommendations from participants, aimed at supporting IIA reform to advance climate goals.<sup>10</sup> The high-level meeting called on policymakers to ensure that IIAs do not hinder States from implementing climate measures and accelerating the transition to low-carbon economies. UNCTAD and IIED will continue cooperation on issues relating to IIAs and climate action to ensure that investment policy is consistent with and supports national, regional and global climate commitments.

**The Energy Charter Treaty (ECT) Modernization:** Concluding the negotiations for a modernized Energy Charter Treaty (ECT), formally initiated in July 2020,<sup>11</sup> the contracting parties of the ECT reached an agreement in principle on 24 June 2022. The draft text was communicated to the contracting parties by 22 August 2022 for adoption by the Energy Charter Conference on 22 November 2022. The agreement in principle covers proposed revisions to definitions in part I of the ECT “Definitions and Purpose”, revisions and additions to investment protection provisions in part III of the ECT “Investment Promotion and Protection” and dispute settlement (part V, including ISDS).<sup>12</sup> It also covers provisions on sustainable development and corporate social responsibility, with references to

<sup>9</sup> <https://investmentpolicy.unctad.org/news/hub/1684/20220124-register-now-webinar-on-iias-climate-%20act>

<sup>10</sup> [https://unctad.org/system/files/non-official-document/IIED\\_UNCTAD\\_IIAs\\_climate\\_action.pdf](https://unctad.org/system/files/non-official-document/IIED_UNCTAD_IIAs_climate_action.pdf)

<sup>11</sup> <https://www.energychartertreaty.org/modernisation-of-the-treaty/>

<sup>12</sup> The revised provisions include: definition of investment, definition of investor, most constant protection and security, transfers, fair and equitable treatment, indirect expropriation, denial of benefits, most-favoured-nation, right to regulate and umbrella clause. For dispute settlement (ISDS), revisions/additions relate to transparency, frivolous claims, security for costs, third-party-funding and valuation of damages.

multilateral environmental agreements and climate change-related policies. According to the agreement in principle, a new provision will clarify that the ISDS mechanism “shall not apply among Contracting Parties that are members of the same Regional Economic Integration Organisation” (REIO). This new provision is aimed at precluding intra-EU ISDS claims under the ECT.<sup>13</sup>

Proposed revisions in part I of the ECT (“Definitions and Purpose”) build on three pillars:

- Pillar 1 contains an updated list of “Energy Materials and Products” covered by the investment protection provisions.
- Pillar 2 provides a “flexibility mechanism” that would allow contracting parties to exclude investment protection for fossil fuel-related investments in their territories, considering their individual energy security and climate goals.<sup>14</sup>
- Pillar 3 includes a “review mechanism” that would give contracting parties the possibility to review pillars 1 and 2 at specific intervals.

The revisions of IIA provisions in the ECT depend on the treaty’s amendment procedure (box 11).<sup>15</sup>

### Box 11. Amendment of the Energy Charter Treaty: relevant provisions

Texts of proposed amendments are submitted to the Charter Conference for adoption (Article 42). The Charter Conference consists of the contracting parties (50 countries and EU/Euratom). A unanimous vote by the contracting parties present at the Charter Conference is required for the adoption of proposed amendments (Article 36). A REIO, when voting, shall have the number of votes corresponding to its member states which are contracting parties.

According to Article 42 of the ECT, for the amendments to enter into force, it is required that at least three-fourths of the contracting parties have ratified, accepted or approved them. Based on the current number of contracting parties, this would correspond to 39 ratifications. The amendments would apply only between the contracting parties that have done so. The remaining contracting parties – pending ratification of the amendments – would continue to be bound by the ECT provisions as they stand (prior to this amendment).

However, the amendments adopted by the Charter Conference could potentially be applied on a provisional basis, pending ratification and entry into force (e.g. ECT contracting parties had agreed to the provisional application of the Trade Amendment of the ECT adopted in 1998).<sup>a</sup>

*Source:* UNCTAD.

<sup>a</sup> On the 1998 Trade Amendment of the ECT, see further <https://www.energychartertreaty.org/provisions/part-viii-final-provisions/article-45-provisional-application/provisional-application-of-the-amendment-to-the-trade-related-provisions/>; [https://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Trade\\_Amendment\\_Explanations-EN.pdf](https://www.energycharter.org/fileadmin/DocumentsMedia/Thematic/Trade_Amendment_Explanations-EN.pdf).

With 50 contracting parties and the EU/Euratom, the ECT is the world’s largest existing agreement that contains BIT-like investment protection provisions and ISDS.<sup>16</sup> It protects a large part of foreign investments in the energy sector (Tienhaara et al., 2022). The modernization of the ECT is of systemic relevance for IIA reform and climate action. A number of scholars and civil society groups have called for a withdrawal from the ECT.<sup>17</sup> The option to withdraw from the ECT is governed by Article 47 (box 12).

<sup>13</sup> The EU/Euratom and 26 out of 27 EU member States are currently Contracting Parties of the ECT (1994). Italy effectively withdrew as of 1 January 2016.

<sup>14</sup> According to the agreement in principle: “For example, the EU and the UK have opted to carve-out fossil fuel related investments from investment protection under the ECT, including for existing investments after 10 years from the entry into force of the relevant provisions and for new investments made after 15 August 2023 as of that date with limited exceptions.” Available at <https://www.energycharter.org/fileadmin/DocumentsMedia/CCDECS/2022/CCDEC202210.pdf>.

<sup>15</sup> Revisions of certain annexes (e.g. those related to the definitions of economic activity in the energy sector) could take the form of “modifications” (rather than “amendments”) and require unanimous approval by the Contracting Parties present at the Charter Conference (Article 36). Such modifications would apply based on a Conference decision and would not require procedures foreseen for amendments.

<sup>16</sup> The ECT Contracting Parties consist of 50 countries and the EU/Euratom for which the ECT is in force, following signature and ratification or accession. This excludes two signatories that have not ratified it: Belarus (for which provisional application and observer status were suspended as of 24 June 2022) and Norway (which provisionally applies Part VII of the ECT). It also excludes Italy (which effectively withdrew as of 1 January 2016), Australia (which notified of its intention not to become a Contracting Party) and the Russian Federation (which terminated provisional application in 2009 and is not considered a Signatory since 2015).

<sup>17</sup> Among others, a statement signed by 402 worldwide civil society organisations was released in July 2021 prior to COP26 asking governments to exit the ECT: <https://www.bilaterals.org/?more-than-400-civil-society>.

### Box 12. Withdrawal from the Energy Charter Treaty: relevant provisions

Based on Article 47, a contracting party can notify its withdrawal from the ECT under the following conditions:

- If the 5-year initial duration since entry into force for a contracting party has passed.
- With a 1-year notice period for withdrawal to take effect.
- Subject to a sunset or survival clause of 20 years for investments made until the effective date of withdrawal.

At the time of writing, 48 contracting parties and EU/Euratom are past the 5-year initial duration. Two contracting parties having joined more recently (Jordan and Yemen) are not yet eligible for withdrawal.

Italy effectively withdrew from the ECT as of 1 January 2016, subject to the survival clause application until 1 January 2036 (for investments made prior to the effective withdrawal date).

Specific rules govern the provisional application of the ECT by signatories and lay down conditions for termination of provisional application (Article 45).

*Source:* UNCTAD.

**OECD work programme on the future of investment treaties:** This OECD work programme explores how future investment treaties could help address challenges such as the COVID-19 pandemic, the climate crisis and achievement of the SDGs.<sup>18</sup> It also considers how to deal with existing IIAs in a pragmatic way. The work programme is organized around two tracks: Track 1 addresses challenges facing future IIAs and changes to the current treaty regime, and track 2 discusses the possible modernization of provisions found in old-generation IIAs.

Some other recent policy initiatives propose to redesign IIAs, address ISDS risks in specific areas or operationalize specific IIA reform options:

- Draft Treaty on Sustainable Investment for Climate Change Mitigation and Adaptation (The Creative Disrupters – Stockholm Treaty Lab)<sup>19</sup>
- UN Working Group on Business and Human Rights' Report on Human Rights-Compatible IIAs<sup>20</sup>
- African Union declaration on the risk of ISDS with respect to COVID-19 pandemic related measures<sup>21</sup>
- UNCTAD policy options to mitigate the risks of ISDS claims related to global tax policymaking<sup>22</sup>
- Draft Withdrawal of Consent to Arbitrate and Termination of IIAs (CCSI-IIED-IISD)<sup>23</sup>

## 4. Accelerating the reform of the IIA regime for climate action

Progress on IIA reform is crucial for countries to address the challenges of climate change. Two broad strategic objectives need to be considered: 1. How to minimize the risk of ISDS based on measures taken for the protection of the environment or for mitigating climate change; and 2. how to ensure that IIAs pro-actively promote and facilitate investments that are conducive to climate change objectives. Both climate-specific objectives should be considered in light of the overarching need to reform IIAs for sustainable development.

UNCTAD has been advocating the reform and modernization of the IIA regime for over a decade. UNCTAD's Investment Policy Framework for Sustainable Development first launched in 2012, updated in 2015 contains:

- 10 guiding principles for investment policymaking
- guidelines for national investment policies
- guidance for the design and use of international investment agreements (IIAs)
- an action menu for the promotion of investment in sectors related to the sustainable development goals

<sup>18</sup> <https://www.oecd.org/investment/investment-policy/investment-treaties.htm>

<sup>19</sup> <https://martinbrauch.files.wordpress.com/2022/04/treaty-on-sustainable-investment-for-climate-change-mitigation-and-adaptation.pdf>

<sup>20</sup> <https://undocs.org/A/76/238>

<sup>21</sup> A draft text of the declaration is available at <https://ifrc.org/>.

<sup>22</sup> See UNCTAD, 2022, pp. 151–153.

<sup>23</sup> [https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii\\_withdrawalconsent\\_0.pdf](https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/wgiii_withdrawalconsent_0.pdf)

UNCTAD's 2018 Reform Package for the International Investment Agreements Regime analyses the pros and cons of the various policy options to reform the existing stock of IIAs (figure 12). Countries can adapt and adopt these options to pursue the reforms in line with their policy priorities. These policy options may be taken into account for climate-responsive IIA reform. To complement the Reform Package for the IIA regime, UNCTAD launched its IIA Reform Accelerator in 2020. The IIA Reform Accelerator aims to expedite the reform of old-generation IIAs. It operationalizes the idea of gradual innovation, focusing on the reform of key substantive provisions. The Accelerator identifies eight IIA provisions that are most in need of reform and have seen a clear reform trend. For each provision, the IIA Reform Accelerator identifies sustainable development-oriented policy options (building on UNCTAD's Investment Policy Framework for Sustainable Development 2015) and proposes ready-to-use model language that implements these options. The IIA Reform Accelerator can be used as the basis for joint interpretation, amendment or replacement of old treaty provisions. Countries may pursue other reform options, each with their pros and cons (e.g. terminating old-generation IIAs jointly or unilaterally).

**Figure 12. UNCTAD's 10 IIA Reform options**



Source: UNCTAD.

The IIA regime makes it more costly for States to take climate action. Considering the urgency to combat climate change, the global community may have to fast-track IIA reform to address climate change-related concerns and other public policy imperatives. Such reforms can be taken at the multilateral, regional, bilateral and national levels. Reforming individual IIAs should not be deferred in the hope of future reform of the whole IIA regime (e.g. via a coordinated multilateral approach). Individual regions and countries can lead the way in fast-tracking IIA reforms. Some 2,300 IIAs in force today were concluded before 2010. The overwhelming majority of the past ISDS cases – 99 per cent – have been filed pursuant to IIAs signed before 2010. While this highlights the importance of addressing the stock of old-generation IIAs, it does not exclude the possibility of future ISDS claims based on new-generation IIAs. As more new-generation IIAs signed in the past decade enter into force, they could give rise to ISDS cases in the future.<sup>24</sup>

### **(i) Making individual IIA provisions climate-responsive**

Climate-responsive reform of IIAs could focus on specific IIA components, building on various existing reform proposals (table 1). The policy options could help ensure that only low-carbon and sustainable investments are covered and that all provisions in IIAs safeguard the right and duty of States to regulate in the public interest. Provisions with pro-active measures for the promotion and facilitation of sustainable investment aimed at building national technology capacities could be added. As discussed in UNCTAD's World Investment Report 2015 and the

<sup>24</sup> A total of 511 IIAs were concluded since 2010 (247 are not yet in force and 264 are in force). Some 16 ISDS cases – 1 per cent of all known cases – invoked IIAs signed since 2010. In addition, 9 cases were based on both older and newer IIAs.

IIA Reform Package, the first strategic choice is whether “to have or not to have” an IIA, and whether to maintain or terminate existing agreements (UNCTAD, 2015b; UNCTAD, 2018).

In 2015, UNCTAD observed that the “ISDS system suffers from a legitimacy crisis” (UNCTAD, 2015b). As some recent IIAs have shown, different approaches exist regarding ISDS, including the option to limit access to ISDS or omit it (UNCTAD, 2020b; UNCTAD, 2018). 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).

**Table 1. Policy options for climate-responsive IIAs**

<b>IIA component</b>	<b>Selected reform actions</b>
<b>Preamble</b>	<ul style="list-style-type: none"> <li>Referencing commitment to combat climate change and undertake climate action</li> <li>Referencing relevant climate law principles and climate change treaties</li> <li>Committing not to lower environmental standards to attract foreign investment</li> <li>Committing to cooperation on climate change mitigation and sustainable development</li> </ul>
<b>Treaty scope</b>	<ul style="list-style-type: none"> <li>Distinguishing between climate-friendly and climate-harmful investments in the scope of the IIA, e.g. through:               <ul style="list-style-type: none"> <li>Exhaustive or non-exhaustive lists, schedules or annexes of covered investments (e.g. investments in renewable energy and low-carbon technology) that may be periodically reviewed</li> <li>Classification mechanisms that give the state discretion over determining whether a specific investment qualifies as sustainable</li> <li>Defining characteristics of sustainable investment (e.g. by using the emerging climate-related financial disclosures, emerging indicators of sustainable investment);<sup>a</sup> each country should consider what kind of investments are needed based on its national policy and capacity</li> </ul> </li> <li>States should reflect their national development policies and needs as well as their respective capacities in defining sustainable investment</li> </ul>
<b>Right to regulate for climate action</b>	<ul style="list-style-type: none"> <li>Clarifying the content of investment protection standards with regard to climate action</li> <li>Carving-out climate action measures from investment standards and/or ISDS</li> <li>Considering limiting the scope of FET or excluding it altogether, while detailing specific types of conduct against which sustainable investors and investments are protected</li> <li>Including general climate action exceptions</li> <li>Distinguishing the level of protection based on the climate-profile of the investment</li> <li>Clarifying provisions on compensation and damages</li> <li>Excluding ISDS</li> </ul>
<b>Investor obligations and responsibilities</b>	<ul style="list-style-type: none"> <li>Including corporate social responsibility (CSR) and other responsible business conduct codes and practices</li> <li>Reiterating investors’ obligation to comply with domestic and international law</li> <li>Specifically obliging investors to comply with requirements for sustainable investment (e.g. by requiring environmental impact assessments and maintenance of environmental management system)</li> </ul>
<b>Climate change and investment governance</b>	<ul style="list-style-type: none"> <li>Non-lowering of environmental standards</li> <li>Committing to cooperate on climate action through adequate institutional mechanisms (e.g. joint committees, experts panels)</li> <li>Committing to the implementation of the main environmental and climate change conventions</li> <li>Encouraging transparency of environmental regulations</li> </ul>
<b>Promotion and facilitation of sustainable investment</b>	<ul style="list-style-type: none"> <li>Promoting and facilitating sustainable investment</li> <li>Allowing performance requirements relevant to climate action</li> <li>Encouraging technology transfers of low-carbon and sustainable technologies</li> <li>Establishing institutional mechanisms for cooperation on research and development (R&amp;D) of sustainable technologies</li> <li>Preferential treatment of sustainable investments that contribute to national sustainable industrial policies and development of local capacities and infrastructures</li> </ul>

Source: UNCTAD, building on existing treaty practice and reform proposals.

<sup>a</sup> Sauvart, K. P., and H. Mann (2017); see also standards developed by the Task Force on Climate-related Financial Disclosures, Global Reporting Initiative (GRI), Sustainability Accounting Standards Board (SASB), International Integrated Reporting Council (IIRC), Climate Disclosure Standards Board (CDSB) and Carbon Disclosure Project (CDP).



## **(ii) Holistic climate-responsive reform of the IIA regime**

Effective and holistic climate-responsive IIA reform may require a reconceptualization of the scope, purpose and design of IIAs. IIA reform may take the form of multilateral, regional, bilateral and national action.

A coordinated multilateral approach to IIA reform is preferable as it could result in an international instrument creating legal certainty for multiple stakeholders. Such an instrument may, for instance, provide for a moratorium on ISDS claims related to climate change measures, an ISDS carve-out for such measures or a general carve-out of high-carbon investments from the scope of IIAs. The application of the carve-out may be subject to a special review mechanism.

States may also pursue such actions at the bilateral and regional level. This approach could be faster in bringing about effective reforms among smaller groups of countries and could be pursued in parallel to multilateral reform processes. States may move towards the termination, renegotiation and replacement of old IIAs. Alternatively, they could adopt joint interpretations that clarify the non-applicability of IIAs to climate change measures in line with States' international climate change commitments. Depending on each country's specific circumstances and policy choices, preference may be given to different reform paths. This includes the option of foreclosing on an IIA relationship in its entirety (by terminating an existing agreement by consent or unilaterally, without replacing it; or by deciding not to sign an IIA after a cost-benefit analysis).

All of the above calls for a multistakeholder dialogue on the scope, purpose and design of the international investment policy regime to ensure that: (i) it contributes to sustainable development, (ii) it is coherent with domestic policies, and (iii) it is consistent with international obligations, including those relating to climate action.

This IIA Issues Note was prepared by UNCTAD's IIA team, under the supervision of Joerg Weber and the overall guidance of James Zhan. The IIA Section is managed by Hamed El-Kady.

The note is based on research conducted by Josef Ostřanský, with contributions provided by Hamed El-Kady and Diana Rosert.

Section 2 "Stocktaking of IIA provisions relevant to climate action" benefited from findings of the IHEID International Economic Law Clinic Report "IIAs and Climate Action" prepared by Rukiya Ibrahim, Syed Muhammad Raza Ali, Tathagata Choudhury, under the supervision of Makane Moïse Mbengue (May 2022).

We wish to thank Olabisi Akinkugbe, Martin Dietrich Brauch, Lorenzo Cotula, Lea di Salvatore and Lise Johnson for their feedback on draft versions of this IIA Issues Note.

## REFERENCES

- Brauch, M. D. (2022, forthcoming). “Reforming International Investment Law for Climate Change Goals”. In *Research Handbook on Climate Finance and Investment*, Edward Elgar Publishing.
- IPCC (Intergovernmental Panel on Climate Change) (2014). *Climate Change 2014: Synthesis Report*. Contribution of Working Groups I, II and III to the Fifth Assessment Report of the Intergovernmental Panel on Climate Change [Core Writing Team, R.K. Pachauri and L.A. Meyer (eds.)]. Geneva: IPCC.
- IPCC (2022). *Climate Change 2022: Mitigation of Climate Change*. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change. Geneva: IPCC.
- IEA (International Energy Agency) (2021). *Net Zero by 2050: A Roadmap for the Global Energy Sector*. Paris: IEA.
- Owens, J., and J. Zhan (2018). “Trade, investment and taxation: policy linkages”. *Transnational Corporations Special Issue on Investment and International Taxation*, Part 1, 25 (2): 1–8.
- Sauvant, K. P., and H. Mann (2017). “Towards an Indicative List of FDI Sustainability Characteristics”. *The E15 Initiative*. Geneva: ICTSD and World Economic Forum.
- Tienhaara, K., R. Thrasher, B. A. Simmons, K. P. Gallagher (2022). “Investor-state disputes threaten the global green energy transition”. *Science*, 376 (6594): 701–703.
- UNCTAD (2015a). *Investment Policy Framework for Sustainable Development*. New York and Geneva: United Nations.
- UNCTAD (2015b). *World Investment Report 2015: Reforming International Investment Governance*. New York and Geneva: United Nations.
- UNCTAD (2018). *UNCTAD’s Reform Package for the International Investment Regime*. New York and Geneva: United Nations.
- UNCTAD (2019). *World Investment Report 2019: Special Economic Zones*. New York and Geneva: United Nations.
- UNCTAD (2020a). *International Investment Agreements Reform Accelerator*. New York and Geneva: United Nations.
- UNCTAD (2020b). *World Investment Report 2020: International Production Beyond the Pandemic*. New York and Geneva: United Nations.
- UNCTAD (2021a). *International Investment Agreements and Their Implications for Tax Measures*. New York and Geneva: United Nations.
- UNCTAD (2021b). *World Investment Report 2021: Investing in Sustainable Recovery*. New York and Geneva: United Nations.
- UNCTAD (2022a). “Treaty-based investor–State dispute cases and climate action”. *IIA Issues Note*, No. 4, September 2022.
- UNCTAD (2022b). *World Investment Report 2022: International Tax Reforms and Sustainable Investment*. New York and Geneva: United Nations.
- UNCTAD-IIED (International Institute for Environment and Development) (2022). “International Investment Agreements and Climate Action”. *Policy brief based on a UNCTAD-IIED joint webinar held on 4 February 2022*.



### 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/iaa-mapping>

Investment Dispute Settlement Navigator

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

Investment Laws Navigator

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



# IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS

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

 [unctad.org/diae](https://unctad.org/diae)

 [investmentpolicy.unctad.org](https://investmentpolicy.unctad.org)

 @unctadwif

For further information, please contact

Mr. James X. Zhan

Director

Investment and Enterprise Division UNCTAD

 [diaeinfo@unctad.org](mailto:diaeinfo@unctad.org)

 +41 22 917 57 60



UNITED NATIONS  
UNCTAD