UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
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UNITED NATIONS
UNCTAD

IIA ISSUES NOTE

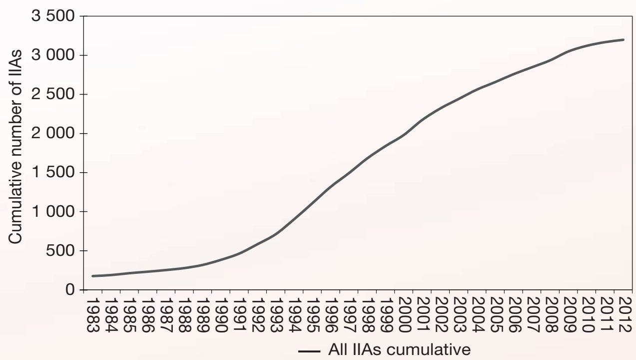
No. 4
June 2013

INTERNATIONAL INVESTMENT POLICYMAKING IN TRANSITION: CHALLENGES AND OPPORTUNITIES OF TREATY RENEWAL

Highlights

- Today, the international investment regime consists of more than 3,200 agreements, which includes over 2,860 bilateral investment treaties (BITs) and over 340 "other international investment agreements" (e.g. free trade agreements (FTAs), economic partnership agreements (EPAs) or framework agreements with an investment dimension) (Figure 1).

Figure 1. Trends in IIAs, 1983–2012



- The international investment regime poses a series of systemic, capacity and development challenges. Systemic challenges arise from the gaps, overlaps and inconsistencies resulting from the multi-faceted and multi-layered regime of international investment treaties and deficiencies in investor-State dispute settlement (ISDS). Capacity challenges manifest themselves as countries and firms find it increasingly difficult to navigate through a highly fragmented treaty regime. Development challenges include how to preserve appropriate regulatory space for host countries, and how to balance the rights and obligations of States and investors.
- Countries are taking actions to address these challenges, including through clarifying the meaning of treaty provisions (e.g. through authoritative interpretations), revising treaties (e.g. through amendments), replacing older treaties (e.g. through renegotiation), or terminating/consolidating treaties (either unilaterally or by mutual consent). Depending on the depth of change they wish to achieve, countries choose between different avenues for improving the international investment regime.
- The expiration of treaties provides opportunities for several of the above options. According to an UNCTAD analysis, by the end of 2013, more than 1,300 bilateral treaties will be at the stage where they could be terminated or renegotiated at any time. Furthermore, between 2014 and 2018, at least 350 bilateral treaties will reach the end of their initial duration.
- Treaty expiration creates a window of opportunity to address inconsistencies and overlaps in the multi-faceted and multi-layered regime of international investment treaties, and to update the investment regime in light of development paradigm shifts. In taking such actions, countries need to weigh the pros and cons in the context of their investment climate and their overall development strategies.

1. Options to improve the IIA regime

Interpretation, revision, replacement, termination – they all offer opportunities to improve the international investment regime.

Many countries have accumulated a stock of older bilateral treaties that were concluded in the 1990s, before the rise of investor-State dispute cases prompted a more cautious approach. The risks exposed by this growing number of disputes, together with countries' desire to harness the sustainable development contribution of foreign investment, has led to the emergence of "new generation" agreements (*World Investment Report 2012, WIR12*). The desire to move towards a more sustainable regime has precipitated a debate about possible ways to reform the IIA regime.

Countries have several avenues for taking pre-emptive or corrective action, depending on the depth of change they wish to achieve:

Interpretation. As drafters and masters of their treaties, States retain interpretive authority over them. While it is the task of arbitral tribunals to rule on investors' claims and interpret and apply international investment agreements to this end, the contracting States retain the power to *clarify* the meaning of treaty provisions through authoritative interpretations – stopping short, however, of attaching a new or *different* meaning to treaty provisions that would amount to their amendment.[1] The interpretative statement issued by the NAFTA Free Trade Commission (clarifying, among other things, the "minimum standard of treatment") is an example of this approach.[2]

Revision. Revision can be pursued through amendments that are used to modify or suppress existing provisions in a treaty or to add new ones. Amendments are employed when the envisaged changes do not affect the overall design and philosophy of the treaty and, usually, are limited in number and length. Amendments require the consent of all contracting parties, often take the form of a protocol to the treaty and typically require domestic ratification. An example is the amendment of 21 bilateral investment treaties by the Czech Republic, following its accession to the EU in May 2004, which was aimed at ensuring consistency between those treaties and EU law with regard to exceptions to the free transfer-of-payments provision.

Replacement/consolidation. Replacement can be done in two ways. First, a treaty might be replaced by a new one as a result of a renegotiation (i.e. conclusion of a new treaty between the same two parties).[3] Second, one or several bilateral treaties can be replaced through the conclusion of a new plurilateral/regional agreement. The latter case leads to the consolidation of the IIA network if one new treaty replaces several old ones, entailing a reduction in the overall number of existing treaties. One of the few examples of this second approach is the Central America–Mexico FTA, which provides for the replacement of a number of FTAs: i.e. the FTAs between Mexico and Costa Rica (1994); Mexico and El Salvador, Guatemala and Honduras (2000); and Mexico and Nicaragua (1997) (see IIA Issues Note No. 3, June 2013).

Termination. A treaty can be terminated unilaterally or by mutual consent. The Vienna Convention allows parties to terminate their agreements by mutual consent at any time.[4] Rules for unilateral treaty termination are typically set out in the BIT itself.[5] Treaty termination may result from a renegotiation (replacing the old BIT with a new one). It can also be done with the intent to relieve respective States of their treaty commitments (eliminating the treaty). Furthermore, a notice of termination can be an attempt to bring the other contracting party back to the negotiation table. Countries that have terminated their bilateral investment treaties include

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1 On various interpretative tools that can be used by States, see UNCTAD, "Interpretation of IIAs: What States Can Do", IIA Issues Note, No.3, December 2011.

2 "Notes of Interpretation of Certain NAFTA Chapter 11 Provisions", NAFTA Free Trade Commission, 31 July 2001. Available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

3 As opposed to amendments, renegotiations are used when the parties wish to make extensive modifications to the treaty.

4 Article 54(b) of the Vienna Convention on the Law of Treaties.

5 If not, and if needed, in addition to the rules set out in the treaty, the rules of the Vienna Convention on the Law of Treaties apply.

the Bolivarian Republic of Venezuela (denouncing its BIT with the Netherlands in 2008), Ecuador (denouncing nine of its bilateral investment treaties in 2008),[6] the Plurinational State of Bolivia (denouncing its bilateral investment treaty with the United States in 2011) and South Africa (denouncing one BIT in 2012). Countries wishing to unilaterally terminate their international investment agreements – for whatever reason – need to have a clear understanding of the relevant treaty provisions (Box 1), as well as the implications of such actions.

Depending on their IIA strategy (see section E.1. of the Investment Policy Framework for Sustainable Development (IPFSD)) and the degree of change they wish to achieve, countries may wish to carefully consider the options that are appropriate to reach their particular policy goals and accordingly adapt tools to implement them. To the extent that contracting parties embark on changes by mutual consent, the range of options is vast and straightforward. The situation becomes more complex, however, if only one party to an IIA wishes to amend, renegotiate or terminate the treaty.

2. *Treaty expirations*

The conclusion of bilateral investment treaties peaked in the 1990s. Fifteen years later, the inclination to enter into such treaties has decreased. This has brought the international investment regime to a juncture that provides a window of opportunity to undertake systemic improvement.[7] As agreements reach their expiry date, a treaty partner can opt for automatic prolongation of the treaty or notify its wish to revoke a treaty.[8] The latter option gives treaty partners an opportunity to revisit their agreements, with a view to addressing inconsistencies and overlaps in the multi-faceted and multi-layered investment treaty regime. Moreover, it presents an opportunity to strengthen the regime's development dimension.

By the end of 2013, more than 1,300 bilateral investment treaties will have reached their "anytime termination stage".

For example, in September 2012, South Africa informed the Belgo–Luxembourg Economic Union, through a notice of termination, that it would not renew the existing bilateral investment treaty, which was set to expire in March 2013. South Africa further stated its intent to revoke its treaties with other European partners, as most of these treaties were reaching their time-bound window for termination which, if not used, would trigger the automatic extension of these agreements for 10 years or more.[9]

The significant number of expired or soon-to-expired bilateral investment treaties creates distinct opportunities for updating and improving the international investment regime. Between 2014 and 2018, at least 350 bilateral treaties will reach the end of their initial duration. In 2014 alone, the initial fixed term of 103 bilateral treaties will expire (figure 2). After reaching the end of the initial fixed term, most BITs can be unilaterally terminated at any time by giving notice ("anytime termination"); the minority of BITs – if not terminated at the end of the initial term – are extended for subsequent fixed terms and can be unilaterally terminated only at the end of each subsequent term ("end-of-term termination") (see Box 1).

The great majority of bilateral investment treaties set the initial treaty term at 10 years or 15 years, and about 80 per cent of all bilateral investment treaties provide

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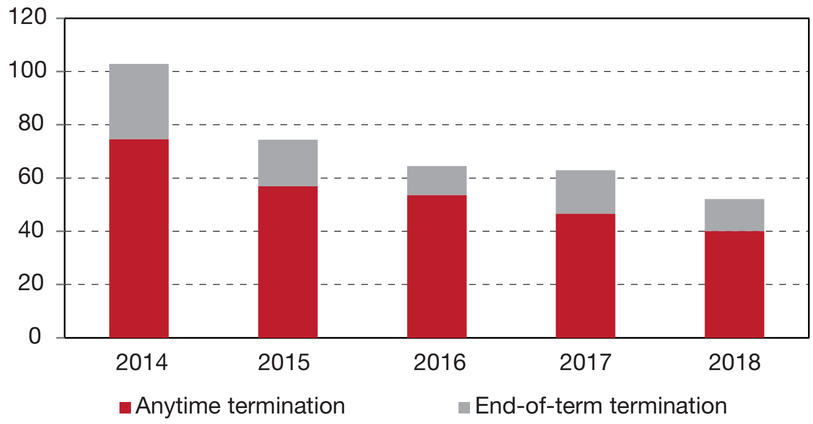
[6] These were BITs with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. Subsequently, on 9 March 2013, Ecuador announced its intent to terminate all remaining IIAs and that the legislative assembly would work on the requisite measures to that effect from 15 May 2013 onward. See Declaration by the President of Ecuador Rafael Correa, ENLACE Nro 312 desde Piquiucho - Carchi, published 10 March 2013. Available at http://www.youtube.com/watch?v=CkC5i4gW15E (at 2:37:00).

[7] This section is limited to BITs and does not apply to "other IIAs" as the latter raise a different set of issues. Importantly, an investment chapter in a broad economic agreement such as an FTA cannot be terminated separately, without terminating the whole treaty.

[8] In accordance with general international law, a treaty may also be terminated by consent of the contracting parties at any time, regardless of whether the treaty has reached the end of its initial fixed term (Article 54(b) of the Vienna Convention on the Law of Treaties).

[9] Publication by a spokesman of South Africa's Department of Trade and Industry. Available at http://www.bdlive.co.za/opinion/letters/2012/10/01/letter-critical-issues-ignored.

Figure 2. BITs reaching the end of their initial term, 2014–2018



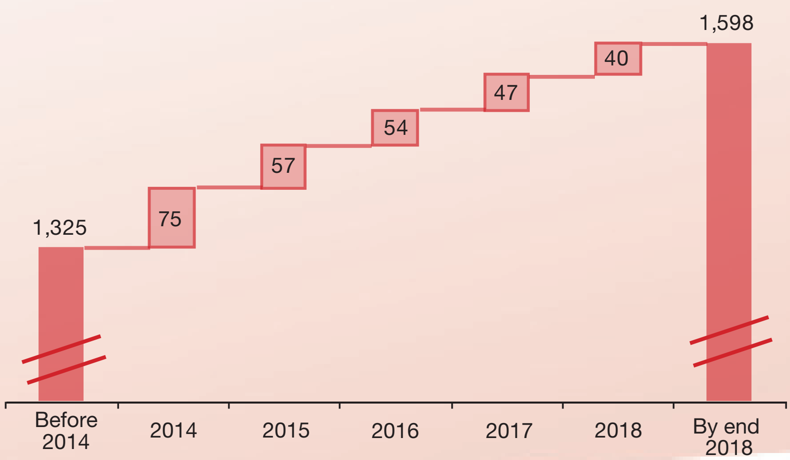
Source: UNCTAD.
Methodology: Data for BITs in force; derived from an examination of BITs for which texts were available, extrapolated to BITs for which texts were unavailable. Extrapolation parameters were obtained on the basis of a representative sample of more than 300 BITs.

for the "anytime termination" approach after the end of the initial term. Given that a large proportion of the existing bilateral treaties were signed in the 1990s and that most of them have reached the end of their initial period, the overall number of bilateral investment treaties that can be terminated by a party at any time is estimated to exceed 1,300 by the end of 2013. This number will continue to grow as bilateral investment treaties with the "anytime termination" option reach their expiry dates (Figures 2 and 3).

Using treaty expirations to instigate change in the international investment regime is not a straightforward endeavour. First, there is a need to understand how treaty rules on treaty termination work, so as to identify when opportunities arise and what procedural steps are required (see Box 1).

A second challenge originates from the "survival clause", contained in most treaties, which prevents unilateral termination of the treaty with immediate effect. It prolongs the exposure of the host State to international responsibility by extending the treaty's application for a further period, typically 10 or 15 years.[10]

Figure 3. Cumulative number of BITs that can be terminated or renegotiated at any time



Source: UNCTAD.
Methodology: Data for BITs in force; derived from an examination of BITs for which texts were available, extrapolated to BITs for which texts were unavailable. Extrapolation parameters were obtained on the basis of a representative sample of more than 300 BITs.

[10] It is an open question whether the survival clause becomes operative only in cases of unilateral treaty termination or also applies in situations where the treaty is terminated by mutual consent by the contracting parties. This may depend on the wording of the specific clause and other interpretative factors.

Box 1. Treaty termination and prolongation clauses

Bilateral investment treaties (BITs) usually specify that they shall remain in force for an initial fixed period, most typically 10 or 15 years. Very few treaties do not set forth such an initial fixed term, providing for indefinite duration from the outset.

BITs that establish an initial term of application typically contain a mechanism for their prolongation. Two approaches are prevalent. The first states that, after the end of the initial fixed term and unless one party opts to terminate, the treaty shall continue to be in force indefinitely. However, each party retains the right to terminate the agreement at any time by giving written notice. The second approach provides that the treaty shall continue to be in force for additional fixed terms (usually equal in length to the initial term, sometimes shorter), in which case the treaty can be terminated only at the end of each fixed period.

The majority of BITs thus fall in one of the two categories: (1) those that can be terminated at any time after the end of an initial fixed term, and (2) those that can be terminated only at the end of each fixed term. These two options may be referred to as "anytime termination" and "end-of-term termination" (see Box Table 1.1).

Box Table 1.1. Types of BIT termination clauses

Anytime termination			End-of-term termination
Duration: Initial fixed term; automatic renewal for an indefinite period	**Duration:** Initial fixed term; automatic renewal for further fixed terms	**Duration:** No initial fixed term; indefinite duration from the start	**Duration:** Initial fixed term; automatic renewal for further fixed terms
Termination: (1) At the end of the initial fixed term (2) At any time after the end of the initial fixed term	**Termination:** (1) At the end of the initial fixed term (2) At any time after the end of the initial fixed term	**Termination:** At any time	**Termination:** (1) At the end of the initial fixed term (2) At the end of each subsequent fixed term
Example: Hungary–Thailand BIT (1991)	**Example:** Iceland–Mexico BIT (2005)	**Example:** Armenia–Canada BIT (1997)	**Example:** Azerbaijan–Belgium/Luxembourg BIT (2004)

The "anytime termination" model provides the most flexibility for review as the parties are not tied to a particular date by which they must notify the other party of their wish to terminate the BIT. The "end-of-period" model, in contrast, provides opportunities to terminate the treaty only once every few years. Failure to notify the intention to terminate within a specified notification period (usually either 6 or 12 months prior to the expiry date) will lock the parties into another multi-year period during which the treaty cannot be unilaterally terminated.

Source: UNCTAD.

Third, renegotiation efforts aimed at reducing or rebalancing treaty obligations can be rendered futile by the most favoured nation treatment (MFN) obligation. If the scope of the MFN clause in the new treaty is not limited, it can result in the unanticipated incorporation of stronger investor rights from international investment agreements with third countries into an IIA. Hence, in case of amendments and/or renegotiations that reduce investors's rights, negotiators may wish to formulate MFN provisions that preclude the importation of substantive provisions from other agreements.[11]

In addition, countries need to analyse the pros and cons of treaty termination and its implication for the overall investment climate (and foreign investors' perception of it), their own investors abroad, and their overall development strategies.

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[11] This will not automatically solve the issue of those older treaties that were not renegotiated; but it will gradually form a new basis on which negotiators can build a more balanced network.

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