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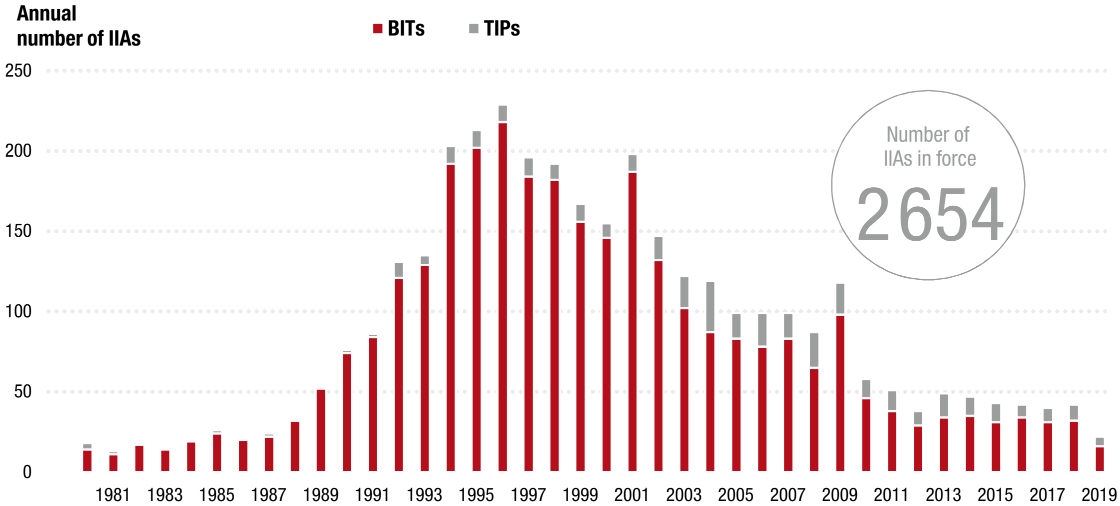
THE CHANGING IIA LANDSCAPE: NEW TREATIES AND RECENT POLICY DEVELOPMENTS

HIGHLIGHTS

- Change in the international investment agreements (IIA) regime is underway. In 2019, the number of IIA terminations (34) exceeded the number of new IIAs (22). This brought the total to 3,284 IIAs and 349 effective terminations. By the end of the year, at least 2,654 IIAs were in force (figure 1).
- Several other developments will affect the international investment policy landscape, including the agreement by EU member States to terminate intra-EU bilateral investment treaties, Brexit and the entry into force of the agreement establishing the African Continental Free Trade Area.
- Policy responses taken by governments to address the COVID-19 pandemic and its economic fallout could create friction with existing IIA obligations. This highlights the need to safeguard sufficient regulatory space in IIAs to protect public health and to minimize the risk of investor–State dispute settlement (ISDS) proceedings, while protecting and promoting international investment for development.
- Progress on the reform of the IIA regime is visible in treaties concluded in 2019. Nearly all new IIAs contain features in line with UNCTAD's Reform Package for the International Investment Regime, with the preservation of States' regulatory space being the most frequently seen area of reform. Countries also continued to implement ISDS reform elements in new IIAs. To support the IIA reform process, UNCTAD will launch its IIA Reform Accelerator later in 2020.

Figure 1. Number of IIAs signed, 1980–2019



Source: UNCTAD, IIA Navigator.

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1. Trends in IIAs: new treaties and other policy developments

a. Developments in the conclusion of IIAs

In 2019, countries concluded at least 22 IIAs: 16 BITs and six TIPs. The most active economies were Australia, Brazil and the United Arab Emirates, each with three new IIAs. This brought the size of the IIA universe to 3,284 (2,895 BITs and 389 TIPs).[1] In addition, at least 12 IIAs entered into force in 2019, bringing the total to at least 2,654 IIAs by the end of the year (figure 1).

At the same time, the number of IIA terminations continued to increase: In 2019, at least 34 terminations entered into effect ("effective terminations"), of which 22 were unilateral terminations, six were terminated by consent, four were replacements (through the entry into force of a newer treaty) and two expired. Particularly active in terminating treaties was Poland, with 17 BITs terminated; it was followed by India, with seven. For the second time since 2017, the number of IIA terminations in a year exceeded the number of treaty conclusions. By the end of the year, the total number of effective terminations reached 349.

The five TIPs concluded in 2019 for which texts are available can be grouped into two categories.

1. Four agreements with obligations commonly found in BITs, including substantive standards of investment protection and ISDS:

- Armenia–Singapore Agreement on Trade in Services and Investment Agreement
- Australia–Indonesia Comprehensive Economic Partnership Agreement (CEPA)
- Australia–Hong Kong, China Investment Agreement
- EU–Viet Nam Investment Protection Agreement

2. One agreement with limited investment provisions (e.g. national treatment with regard to commercial presence or the right of establishment of companies) or provisions on free movement of capital relating to direct investments:

- Caribbean Forum (CARIFORUM) States–United Kingdom Economic Partnership Agreement (EPA)

b. Developments at the regional level

Significant developments have taken place in almost all regions and continue to shape the international investment regime.

African Continental Free Trade Area: On 30 May 2019, the AfCFTA entered into force for the 24 countries that had deposited their instruments of ratification. As of 6 May 2020, 30 countries had ratified it. The operational phase of the agreement was launched during a high-level summit of the African Union in Niamey, Niger, on 7 July 2019. Phase I, which focuses primarily on areas such as trade in goods and services as well as dispute settlement, is in the process of being completed, although negotiations on key elements such as rules of origin and tariff concessions are ongoing. Prior to the COVID-19 pandemic, trading under the AfCFTA was slated to begin on 1 July 2020. Negotiations on the protocols on investment, competition and intellectual property rights, which constitute Phase II of the process, were expected to be completed in December 2020. In terms of content, the protocol on investment is likely to draw on the Pan-African Investment Code, which was finalized in 2015. The resulting draft legal texts are to be submitted to the January 2021 session of the African Union Assembly for adoption. The investment protocol of the AfCFTA is expected to take into account the key development objectives of African countries in order to formulate provisions that will support the promotion and facilitation of sustainable investment.

Brexit and the transition period: On 31 January 2020, the United Kingdom's withdrawal from the EU officially came into effect. The Withdrawal Agreement concluded between the EU and the United Kingdom provides for an 11-month transition period, from 1 February 2020 to 31 December 2020, during which the United Kingdom will continue to apply EU trade policy and will continue to be covered and bound by trade agreements between the EU

[1] The total number of IIAs is revised in an ongoing manner as a result of retroactive adjustments to UNCTAD's IIA Navigator.

and third countries. The EU is in the process of notifying third countries of this period. During the transition period, the United Kingdom will be able to negotiate and sign trade agreements; however, they will be able to enter into force only at the end of the transition period. After the transition period, EU trade agreements will cease to apply to the United Kingdom.

To prepare for the end of the transition period, the United Kingdom has continued to conclude so-called "rollover" or continuity agreements, to replicate the effects of the current agreements and prevent disruption of trade relationships with relevant third countries as a result of Brexit. As of 4 February 2020, the country had concluded 20 continuity agreements that together cover 49 partner countries.[2] In addition, it is engaged in ongoing discussions with 16 countries.[3] The pact with the CARIFORUM States contains a chapter on commercial presence (not confined to the services sector), whereas the agreement with the Eastern and Southern Africa (ESA) States includes provisions on investment-related cooperation, including in specific areas such as industrial development, SMEs, mining and tourism. None of the continuity agreements contain rules on investment protection; the latter remain confined to the United Kingdom's BITs.

EU agreement for the termination of intra-EU BITs: Following the interpretive declarations of EU member States in January 2019 on the legal consequences of the judgment of the Court of Justice of the EU in the *Achmea* case and on investment protection in the EU, on 24 October 2019 they reached a deal on the text of a plurilateral agreement for the termination of intra-EU BITs, although a small minority of member States was not able to endorse it. On 5 May 2020, 23 member States[4] signed the agreement for the termination of intra-EU BITs in order to implement the ruling in the *Achmea* case, which found that investor–State arbitration clauses in intra-EU BITs are incompatible with EU law. The agreement contains one annex with a list of about 125 intra-EU BITs currently in force that will be terminated upon entry into force of the agreement for the relevant member States and clarifies that their sunset clauses will also be terminated. A second annex lists 11 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. The agreement does not cover intra-EU proceedings under the Energy Charter Treaty (ECT). It indicates that the EU as a group and the member States will address this matter at a later stage.

EU–Mercosur Trade Agreement: On 28 June 2019, the EU and the Mercosur States[5] reached a political agreement for a comprehensive trade agreement. The trade agreement is part of a wider association agreement between the two regions. The agreement will contain a chapter on trade in services and establishment (including mode 3, commercial presence of services trade) but will not have a chapter on investment. Other notable provisions of the envisaged agreement include chapters on environmental protection and labour conditions, e-commerce, SMEs and the involvement of civil society.

Joint D-8 Organization for Economic Cooperation – UNCTAD Guiding Principles for Investment Policymaking: In January 2020, members of the D-8 Organization for Economic Cooperation (Bangladesh, Egypt, Nigeria, Indonesia, the Islamic Republic of Iran, Malaysia, Pakistan, and Turkey) endorsed a set of Guiding Principles for Investment Policymaking jointly developed with UNCTAD. The Principles were developed in line with the recommendations of the UNCTAD-D-8 Expert Meeting on "International Investment Policy Reform for Sustainable Development", held in Istanbul, Turkey in September 2019, which "called on UNCTAD and the D-8 organization to develop non-binding development-oriented guiding principles for investment policymaking for D-8 countries". The Principles provide guidance for investment policymaking with a view to promoting inclusive economic growth and sustainable development; promoting coherence in national and international investment policymaking; fostering an open, transparent and conducive global policy environment for investment; and

[2] These are agreements with the Andean Countries, the CARIFORUM States, Central America, Chile, the ESA States, the Faroe Islands, Georgia, Iceland and Norway, Israel, Jordan, Lebanon, Liechtenstein, Morocco, the Pacific States, the Republic of Korea, the Southern Africa Customs Union and Mozambique, the State of Palestine, Switzerland, Tunisia and Kosovo (United Nations Administrative Region, Security Council resolution 1244 (1999)). The concluded agreements are not homogenous: 14 of them incorporate by reference the provisions of the relevant pre-existing EU agreements, listing only the required amendments. The remaining six treaties – with the CARIFORUM States, the ESA States, Georgia, the Pacific States (Fiji and Papua New Guinea), the Southern Africa Customs Union and Mozambique, and the Republic of Korea – set out their provisions in full.

[3] These are Albania, Algeria, Bosnia and Herzegovina, Cameroon, Canada, Côte d'Ivoire, Egypt, Ghana, Kenya, Mexico, the Republic of Moldova, Montenegro, North Macedonia, Serbia, Singapore and Ukraine.

[4] These 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.

[5] Mercosur is the Southern Common Market, made up of Argentina, Brazil, Paraguay, Uruguay and the Bolivarian Republic of Venezuela (whose membership has been suspended since 1 December 2016).

aligning investment promotion and facilitation policies with sustainable development goals. A number of economies, economic groupings and regional organizations have adopted similar principles for investment policymaking to guide the development of national and international investment policies (box 1).

Box 1. Guiding Principles on Investment Policymaking

Several economies, economic groupings and regional organizations have adopted non-binding principles for investment policymaking aimed at guiding the development of national and international investment policies. The principles are typically informed by the Core Principles set out in UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2015). Examples of guiding principles elaborated by countries and organizations in collaboration or jointly with UNCTAD include the following:

- *G20 Guiding Principles for Global Investment Policymaking.* In September 2016, G20 leaders endorsed the guiding principles of the Hangzhou Summit. Drawing on the UNCTAD Policy Framework, the G20 Principles constituted the first time that multilateral consensus on investment matters had been reached between a varied group of developed, developing and transition economies.
- *Joint African, Caribbean and Pacific Group of States (ACP) – UNCTAD Guiding Principles for Investment Policymaking.* In June 2017, the ACP Committee of Ambassadors approved these principles, which were jointly developed by UNCTAD and the ACP Secretariat. The non-binding principles reflect ACP countries' specificities and priorities for investment policymaking, building on key ACP policy documents and the UNCTAD Policy Framework.
- *Joint D-8 Organization for Economic Cooperation – UNCTAD Guiding Principles for Investment Policymaking.* In January 2020, country members of the D-8 endorsed a set of guiding principles developed in line with the recommendations of the UNCTAD–D-8 Expert Meeting in September 2019 and on the basis of existing key D-8 declarations.
- *Organization of Islamic Cooperation Guiding Principles for Investment Policymaking.* In 2018, high-level experts of the member States agreed on 10 principles in line with the OIC Action Programme (OIC-2025) and the UNCTAD Policy Framework.
- *Saudi Arabia Guiding Principles for Investment Policymaking.* In 2019, Saudi Arabia adopted a set of seven guiding principles elaborated in line with its Vision 2030 agenda and the UNCTAD Policy Framework.

Source: UNCTAD.

Modernization of the Energy Charter Treaty: On 6 November 2019, the highest decision-making body of the International Energy Charter, the Energy Charter Conference, adopted a decision on the procedural issues and timeline for negotiations for the modernization of the ECT. Some of the previously approved topics that will be addressed in the negotiations for modernization include the definition of investment, the right to regulate, the most-favoured-nation clause, the definition of indirect expropriation, sustainable development and corporate social responsibility. The Modernization Group of the Energy Charter Conference held its first meeting on 12 December 2019, in Brussels. Before the pandemic, this meeting was to be followed by negotiating sessions and a stocktaking meeting of the Conference in 2020.

Ratification of the United States–Mexico–Canada Agreement: In June 2019, the Mexican Senate approved the implementing legislation for the United States–Mexico– Canada Agreement (USMCA), making Mexico the first country to ratify the agreement. Following the approval of the USMCA, in December 2019, by the United States House of Representatives, on 29 January 2020 the agreement was signed into law by the President, marking the United States' effective ratification of the new agreement. Canada ratified the USMCA on 13 March 2020. The agreement is set to enter into force on 1 July 2020. Among the major changes brought about by the new agreement are the revised ISDS provisions, which limit the application of ISDS exclusively to investor–State disputes between the United States and Mexico and narrow the claims that investors can bring under that provision.

Regional Comprehensive Economic Partnership: The 3rd Regional Comprehensive Economic Partnership Summit was held in November 2019, in Bangkok, Thailand, bringing together the leaders of the 16 participating countries[6] to review developments in the negotiations. Fifteen participating countries have concluded text-based negotiations. The proposed agreement will comprise 20 chapters, including one on investment. The latter will, reportedly, not provide for ISDS; instead, the participating countries agreed to address it in the future. India appears to have disengaged from the negotiations until a satisfactory resolution is found for significant outstanding issues. The other participating countries have reaffirmed their commitment to continue working with India on these issues. Before the outbreak of COVID-19, the agreement had been set to be finalized for signature by the participating countries in 2020.

c. Developments related to the COVID-19 pandemic

The COVID-19 pandemic is likely to have lasting effects on investment policymaking worldwide, including a reassessment by countries of the role of IIAs in national development. IIAs can come into play in relation to government measures in response to the pandemic and could create friction with existing IIA obligations (box 2).

All governments will face the common challenge of how best to make use of investment policies in bringing their economies back onto a sustainable development path. It is also expected that the post-pandemic period will witness an acceleration of countries' efforts to reform their IIAs to ensure their right to regulate in the public interest, while maintaining effective levels of investment protection.

Box 2. COVID-19 pandemic: Government responses could create friction with existing IIA obligations

Policy responses taken by governments to address the pandemic and its economic fallout could create friction with existing IIA obligations. Governments worldwide have adopted measures to contain the spread of the COVID-19 pandemic, including travel restrictions, border closures, mandatory quarantine and lockdowns. Various other – investment-related – measures have been undertaken to tackle the devastating economic and social effects of the pandemic (e.g. mandatory production; export bans; financial or fiscal support to domestic suppliers, such as SMEs; reinforcement of FDI screening in COVID-19 relevant industries; acquisition of equity in companies, including nationalization).

As these measures also affect the operations of foreign investors, some of them could, depending on the way they are implemented, expose governments to arbitration proceedings initiated by foreign investors under IIAs and/or investor–State contracts.

Concerns have been expressed that there could be a surge of ISDS cases with respect to COVID-related measures.[a] In May 2020, the Columbia Center on Sustainable Investment published a call for an immediate and complete moratorium on all investor-State arbitration claims by foreign investors against governments using IIAs until the end of the pandemic, as well as a permanent restriction on all arbitration claims related to government measures targeting health, economic and social dimensions of the pandemic and its effects.[b]

This highlights the need to safeguard sufficient regulatory space in IIAs to protect public health and to minimize the risk of investor–State dispute settlement (ISDS) proceedings, while protecting and promoting international investment for development. In its *Special Investment Policy Monitor* dedicated to the COVID-19 pandemic, UNCTAD has highlighted the most relevant IIA provisions in the context of the pandemic and made recommendations to shield State measures from a finding of a treaty violation in line with UNCTAD's Investment Policy Framework for Sustainable Development (2015) and UNCTAD's Reform Package for the International Investment Regime (2018). To support reform efforts, UNCTAD will launch its IIA Reform Accelerator later this year.

Source: UNCTAD, based on UNCTAD (2020) and *WIR20*.

[a] Bernasconi-Osterwalder, N., Brewin, S., and Maina, N. "Protecting Against Investor–State Claims Amidst COVID 19: A call to action for governments", IISD Commentary, https://www.iisd.org/sites/default/files/publications/investor-state-claims-covid-19.pdf

[b] The full text is available at http://ccsi.columbia.edu/2020/05/05/isds-moratorium-during-covid-19

[6] These are Australia, Brunei Darussalam, Cambodia, China, India, Indonesia, Japan, the Republic of Korea, the Lao People's Democratic Republic, Malaysia, Myanmar, New Zealand, the Philippines, Singapore, Thailand and Viet Nam.

2. Taking stock of IIA reform

Through its policy recommendations compiled in the Investment Policy Framework for Sustainable Development (*WIR12,* updated in 2015) and in the Road Map for IIA Reform (*WIR15*), subsequently included in the comprehensive, consolidated Reform Package for the International Investment Regime (UNCTAD, 2018), UNCTAD identified five action areas: safeguarding the right to regulate, while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency. This section reviews the extent to which recent treaties use reform features in their substantive and procedural clauses.

a. Treaties concluded in 2019: key features of substantive clauses

IIAs concluded in 2019 continued to feature heavily reform-oriented clauses: nearly all new IIAs with texts available (annex table 1) – that is, 14 of 15 – contain at least seven reform features; 12 of 15 contain at least eight reform features; and ten of 15 include at least nine reform features. The preservation of States' regulatory space remains the most predominant area of reform; other areas that continued to be the subject of heightened reform include investment dispute settlement and sustainable development. Investment promotion and/or facilitation is another area that saw increased attention.

Preservation of regulatory space. Elements aimed at safeguarding States' policy space continued to abound in IIAs concluded in 2019. Of the 15 treaties reviewed, nine include general exceptions (e.g. for the protection of human health or the conservation of exhaustible natural resources); 12 incorporate limitations to the treaty scope (e.g. by excluding certain types of assets from the definition of investment); 14 circumscribe the FET obligation and clarify or omit indirect expropriation; and all 15 provide for detailed exceptions from the free-transfer-of-funds obligation. In addition, provisions with the potential to increase the exposure of States to arbitration claims (such as umbrella clauses) are omitted in 13 IIAs.

Sustainable development orientation. Provisions relating to the promotion of sustainable development permeate the 15 IIAs concluded in 2019 for which texts are available. Eleven of them make reference to the protection of health and safety, labour rights, and environment or sustainable development, while nine provide for general exceptions. More than half (eight) include provisions for the promotion of corporate and social responsibility, and only four explicitly recognize that parties should not relax health, safety or environmental standards to attract investment. As observed in recent years, the inclusion of specific proactive provisions on investment promotion and/or facilitation continues to rise, with 12 of the agreements in 2019 featuring such provisions.

Investment dispute settlement. Fourteen of the 15 IIAs concluded in 2019 feature at least one type of limitation to ISDS, and at least three omit ISDS (see next subsection).

A few provisions found in some of the IIAs or treaty models concluded in 2019 are worth mentioning for their innovative features:

- Specifying that a required economic contribution to the host State economy – itself not an unusual practice in the definition of investment – be made towards sustainable development and providing indicators for measuring such a contribution (Morocco model BIT).
- Clarifying in the national treatment and most-favoured-nation provisions that one of the elements to take into consideration when determining the existence of like circumstances is whether a treatment distinguishes between investors or investments on the basis of legitimate public welfare objectives (Australia–Indonesia CEPA, Brazil– United Arab Emirates BIT).
- Clarifying that measures undertaken for the protection of a State's essential security interests, whether before or after the commencement of arbitral proceedings, shall be non-justiciable (India–Kyrgyzstan BIT).
- Allowing for the termination of the treaty at any time after its entry into force, subject to survival clauses where applicable (Australia–Hong Kong, China Investment Agreement, Australia–Indonesia CEPA, Brazil–Ecuador BIT, Brazil–United Arab Emirates BIT, EU–Viet Nam Investment Protection Agreement, India–Kyrgyzstan BIT).

Other novel provisions can be found in the 2020 Brazil–India BIT (e.g. allowing the parties to adopt or maintain affirmative action measures towards vulnerable groups, prohibiting the parties from subjecting investments to measures that constitute targeted discrimination based on race, gender or religious beliefs).

Since 2012, over 75 countries and regional economic integration organisations benefited from UNCTAD's support for the development of new model BITs and IIA reviews. To further support and accelerate IIA reform, UNCTAD will launch its IIA Reform Accelerator later in 2020. The Accelerator will provide a concrete policy tool with actionable recommendations to assist economies in reforming their IIA regimes in line with sustainable development objectives.

b. Treaties concluded in 2019: ISDS reform approaches

In *WIR19*, UNCTAD identified the principal approaches to ISDS emerging from recent IIAs. Countries continued implementing four ISDS reform approaches in IIAs signed in 2019
(annex table 2):

(i) No ISDS: The treaty does not entitle investors to refer their disputes with the host State to international arbitration (either ISDS is not covered at all or it is subject to the State's right to give or withhold arbitration consent for each specific dispute, in the form of the so-called "case-by-case consent") (three IIAs entirely omit ISDS).

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

(iii) Limited ISDS: Approaches may involve a requirement to exhaust local judicial remedies (or to litigate in local courts for a prolonged period) before turning to arbitration, the narrowing of the scope of ISDS subject matter (e.g. limiting treaty provisions that are subject to ISDS, excluding policy areas from the ISDS scope) and/or the setting of a time limit for submitting ISDS claims (11 IIAs).

(iv) Improved ISDS procedures: The treaty preserves the system of investor–State arbitration but with certain important modifications. Among other goals, such modifications may aim at increasing State control over the proceedings, opening proceedings to the public and third parties, enhancing the suitability and impartiality of arbitrators, improving the efficiency of proceedings, or limiting the remedial powers of ISDS tribunals (nine IIAs).

For 2019, the most frequently used approaches were "limited ISDS" and "improved ISDS procedures", often in combination.

Some of the reform approaches have more far-reaching implications than others. The extent of reform engagement within each approach can also vary (significantly) from treaty to treaty. For example, "limited ISDS" covers a very broad array of options, which may range from a treaty that requires exhaustion of local remedies to