



IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS



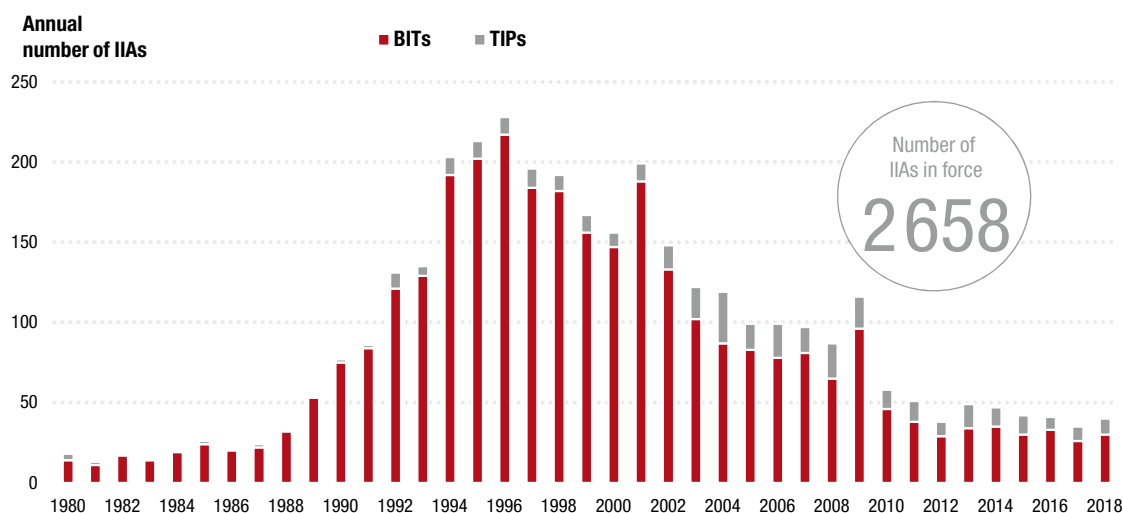
UNITED NATIONS
UNCTAD

TAKING STOCK OF IIA REFORM: RECENT DEVELOPMENTS

H I G H L I G H T S

- In 2018, countries concluded 40 international investment agreements (IIAs): 30 bilateral investment treaties (BITs) and 10 treaties with investment provisions (TIPs). This brought the size of the IIA universe to 3,317 agreements (2,932 BITs and 385 TIPs). By the end of the year, at least 2,658 IIAs were in force (figure 1).
- Forward-looking IIA reform is well under way and involves countries at all levels of development and from all geographical regions. Chapter III of the World Investment Report 2019, to be launched on 12 June, tracks progress on Phases 1 and 2 of IIA Reform.
- Almost all the treaties concluded in 2018 contain a large number of reform features (Phase 1 of IIA Reform), and the core focus of reform action is moving towards investor–State dispute settlement (ISDS). Different approaches to ISDS reform range from traditional ad hoc tribunals to a standing court or to no ISDS.
- UNCTAD's reform tools are spurring action on Phase 2 reforms. However, a lot remains to be done, as the stock of old-generation treaties is 10 times larger than the number of new, reform-oriented treaties.
- IIA reform actions are also creating new challenges. New treaties aim to improve balance and flexibility, but they also make the IIA regime less homogenous. Effectively harnessing international investment relations for the pursuit of sustainable development requires holistic and synchronized reform through an inclusive and transparent process. UNCTAD can play an important facilitating role in this regard.

Figure 1. Number of IIAs signed, 1980–2018



Source: UNCTAD, IIA Navigator.

1. Taking stock of IIA reform

a. Phase 1: concluding new-generation IIAs

All of today's new IIAs include several clauses that were set out in UNCTAD's Investment Policy Framework for Sustainable Development (WIR12, updated in 2015) or follow UNCTAD's Road Map for IIA Reform as included in UNCTAD's Reform Package for the International Investment Regime (UNCTAD, 2018). The latter sets out 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.

(i) Treaties concluded in 2018: key features of substantive clauses

Twenty-seven of the 29 IIAs concluded in 2018 (with texts available, annex table 1) contain at least six reform features and 20 of the 29 contain at least nine reform features. Provisions that were considered innovative in pre-2012 IIAs now appear regularly. Highlights of modern treaty making include a sustainable development orientation, preservation of regulatory space, and improvements to or omissions of investment dispute settlement. The most broadly pursued area of reform is preservation of regulatory space.

Sustainable development orientation. IIAs concluded in 2018 include a large number of provisions explicitly referring to sustainable development issues (including the right to regulate for sustainable development-oriented policy objectives). Of the 29 agreements reviewed, 19 have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources. Sixteen recognize that the parties should not relax health, safety or environmental standards to attract investment. Twenty-five of the preambles refer to the protection of health and safety, labour rights, the environment or sustainable development. Finally, corporate social responsibility (CSR) obligations and the inclusion of pro-active investment promotion and facilitation provisions are becoming more prevalent, but they still do not feature consistently in recent IIAs. This is especially true for CSR provisions, which appeared in only 13 of the 29 IIAs.

Preservation of regulatory space. Treaties concluded in 2018 include elements that aim more broadly than ever at preserving regulatory space and/or at minimizing exposure to investment arbitration. The number of new treaties that incorporate these reforms are substantial. Elements include (i) general exceptions (19 IIAs), (ii) clauses that limit the treaty scope (e.g. by excluding certain types of assets from the definition of investment (27 IIAs)), (iii) clauses that limit or clarify obligations (e.g. by omitting or including more detailed clauses on FET (all 29 IIAs) and/or indirect expropriation (23 IIAs)) and (iv) clauses that contain exceptions to transfer-of-funds obligations and/or carve-outs for prudential measures (all 29 IIAs). Notably, 28 of the 29 treaties omit the so-called umbrella clause (thus also narrowing the range of possible ISDS claims).

Investment dispute settlement. Nineteen of the 29 IIAs concluded in 2018 carefully regulate ISDS, and four omit ISDS (see next subsection).

It is worth highlighting a number of innovative features included in IIAs in 2018. These features either go beyond traditional reform-oriented clauses, have rarely been encountered in earlier IIAs and/or break new ground:

- Conditioning treaty coverage on the economic contribution of the investment to the host State economy, by including this requirement in the definition of investment (e.g. Argentina–United Arab Emirates BIT, Belarus–India BIT, Belarus–Turkey BIT, Lithuania–Turkey BIT, State of Palestine–Turkey BIT).
- Excluding intangible rights from the definition of investment. Noting that rights such as goodwill, brand value and market share are excluded from the definition of investment (e.g. Belarus–India BIT).
- Excluding measures by local governments from the scope of the treaty. Clarifying that measures taken by local governments fall outside the scope of the treaty (e.g. Belarus–India BIT).
- Formulating general public policy exceptions as self-judging (e.g. Argentina–United Arab Emirates BIT).

Gender balance. Some recent IIAs or treaty models also contain explicit references to gender: The Netherlands model BIT emphasizes the importance of women's contribution to economic growth through their participation in international investment and encourages the contracting parties to remove barriers to women's participation in

the economy by promoting gender-responsive policies. The USMCA, in the CSR provision of its investment chapter, refers to gender equality as an example of CSR policies that the contracting parties should encourage investors to comply with. The CPTPP reaffirms the promotion of gender equality in its preamble (which also applies to investment).

(ii) Treaties concluded in 2018: ISDS reform approaches

As part of broader IIA reform, countries have implemented many ISDS reform elements in recent IIAs. From the IIAs signed in 2018 emerge five principal approaches to ISDS, used alone or in combination:

(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") (four IIAs entirely omit ISDS and two IIAs have bilateral ISDS opt-outs between specific parties).¹

(ii) *Standing ISDS tribunal*: The treaty replaces the system of ad hoc investor–State arbitration and party appointments 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*: The treaty may include 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 subject to ISDS, excluding policy areas from the ISDS scope) and/or the setting of a time limit for submitting ISDS claims (19 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 (15 IIAs).

(v) *Unreformed ISDS mechanism*: The treaty preserves the basic ISDS design typically used in old-generation IIAs, characterized by broad scope and lack of procedural improvements (six IIAs).

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 a treaty that sets a three-year time limit for submitting claims.

For 2018, the most frequently used approaches were "limited ISDS" and "improved ISDS procedures", often in combination.

About 75 per cent of IIAs concluded in 2018 contain at least one mapped ISDS reform element, and many contain several (annex table 2). Most of these reform elements resonate with the options identified by UNCTAD in the Investment Policy Framework for Sustainable Development (*WIR12*, updated in 2015) and in the Road Map for IIA Reform (2015), subsequently included in UNCTAD's Reform Package for the International Investment Regime (2018).

Alongside ISDS-specific reform elements, a large number of the IIAs reviewed also include important modifications to other treaty components that have implications for ISDS reform (e.g. refined treaty scope, clarified substantive provisions and added exceptions; annex table 1). ISDS reform is being pursued across various regions and by countries at different levels of development. Some countries and regions have been the driving forces behind certain approaches (e.g. Brazil for the "no ISDS" approach, India for "limited ISDS", the EU for the "standing ISDS tribunal").

¹ The two IIAs with ISDS opt-outs between specific parties are the CPTPP (five bilateral ISDS opt-outs) and the USMCA (ISDS opt-out for Canada–Mexico and for Canada–United States).

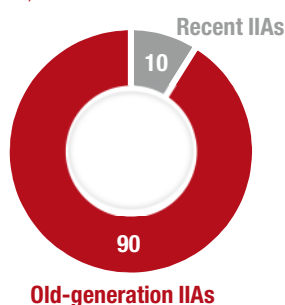
In parallel, multilateral engagement on ISDS reform is gaining prominence at UNCITRAL and ICSID, among other institutions. On the basis of the three-phase mandate provided by the UNCITRAL Commission in July 2017, deliberations in UNCITRAL Working Group III on possible reform options have so far focused mostly on the “improved ISDS procedures” approach, while giving some consideration to the “standing ISDS tribunal” approach. The proposed amendments to the ICSID Arbitration Rules published by the ICSID Secretariat in August 2018 put forward procedural improvements.

These plurilateral and multilateral efforts have the potential to contribute to Phase 2 of IIA Reform. However, the current undertakings may be unlikely to generate “big picture” results for Phase 2, as a number of caveats apply (e.g. related to the processes’ focus on procedural improvements to ISDS).

b. Phase 2: modernizing old-generation treaties

Since the launch of UNCTAD’s options for Phase 2 of IIA Reform (*WIR17*), a growing number of countries have taken steps to modernize their old-generation treaties. Given that so far such reform actions have addressed a relatively small number of IIAs, there is broad scope and urgency to pursue them further. The stock of old-generation IIAs, which typically do not include reform-oriented features, still amounts to more than 3,000 (10 times larger than the number of IIAs concluded since 2012) (figure 2). The great majority of known ISDS cases have thus far been based on old-generation treaties. Modernization of treaties remains an important policy challenge. An overview of recent Phase 2 reform actions follows.

Figure 2. Stock of old-generation (1959–2011) and recent (2012–2018) IIAs
(Per cent)



Source: UNCTAD, IIA Navigator.

(i) Jointly interpreting treaty provisions

Several countries have recently issued joint interpretations for existing IIAs and/or established joint bodies in their IIAs with a mandate to issue binding interpretations of treaty provisions. This can help reduce uncertainty and enhance predictability for investors, contracting parties and tribunals.

In 2018, Colombia and India signed a joint interpretative declaration on their 2009 BIT. It refines key clauses found in the 2009 treaty to reflect sustainable development objectives, to strengthen the right of the parties to regulate in the public interest and to clarify the provisions on FET, expropriation, national treatment, most-favoured-nation treatment and ISDS.

In 2017, Bangladesh and India signed a similar joint declaration on their 2009 BIT. Also in 2017, Colombia and France signed a joint interpretative declaration for their 2014 BIT. The latter clarifies that Article 16 on “Other Dispositions” should not be read as a stabilization clause and that a violation of a state contract between an investor and a party does not constitute a treaty violation.

Several recent IIAs and models establish joint bodies with a mandate to issue binding interpretations of treaty provisions (e.g. the Australia–Peru FTA (2018), the Belarus–India BIT (2018), the Central America–Republic of Korea FTA (2018), the CPTPP (2018), the EU–Singapore IPA (2018), the proposed EU–Viet Nam IPA, the 2018 amendments to the Republic of Korea–United States FTA (2007), the USMCA (2018), the Netherlands model BIT (2018)).

(ii) Amending treaty provisions

Amendments were used in both bilateral and regional contexts in 2018. In megaregional IIAs, parties used protocols and exchanges of side letters or notes. Amendments can achieve a higher degree of change and ensure that the amended treaty reflects evolving policy preferences.

The 11 parties to the CPTPP agreed to retain core elements of the TPP text with amendments in select areas. With respect to investment (Chapter 9), the parties agreed to suspend the application of the provisions related to investor–State contracts and investment authorizations.

In September 2018, the Republic of Korea and the United States signed an amendment to their FTA (2007). The amendment includes clarifications on the meaning of minimum standard of treatment and excludes ISDS procedures from the scope of the most-favoured-nation clause. It also tasks the joint committee to consider improvements to the ISDS provision that meet both countries’ objectives (e.g. ways to resolve disputes and eliminate frivolous claims).

The Energy Charter Conference approved the timeline for the discussion on modernization of the Energy Charter Treaty and agreed on a set of topics to be reviewed as part of its discussion. These include the right to regulate, sustainable development, CSR, FET and indirect expropriation. The modernization process will identify the possible policy options for each of the topics listed. The members of the Subgroup of the Energy Charter Conference will commence negotiations to modernize the Energy Charter Treaty in accordance with the proposed topics and the identified policy options.

(iii) Replacing “outdated” treaties

An increasing number of recently concluded IIAs are replacing old-generation treaties, typically substituting a new treaty for an old one. Replacement offers an opportunity to undertake a comprehensive revision of the treaty.

Of the 30 BITs signed in 2018, four replaced older BITs between the two countries (e.g. the Belarus–Turkey BIT replaced their 1995 BIT; the Kyrgyzstan–Turkey BIT replaced their 1992 BIT; the Lithuania–Turkey BIT replaced their 1994 BIT; the Serbia–Turkey BIT replaced their 2001 BIT).

Three TIPs concluded in 2018 replaced one treaty each or are set to do so. The Singapore–Sri Lanka FTA replaced one BIT (1980); the Australia–Peru FTA (2018) foresees the replacement of the Australia–Peru BIT (1995) (unless replaced upon the CPTPP’s entry into force for the two countries). Once in force, the USMCA will replace NAFTA (1992). Three other TIPs replaced several agreements at once (see next subsection).

The effective transition from an old to a new treaty can be ensured through transition clauses. Such clauses specify how long after an old IIA’s termination an investor may invoke the old IIA to bring an ISDS case. In three TIPs, this period is limited to three years after the entry into force of the new agreement (e.g. the USMCA (2018), the Singapore–Sri Lanka FTA (2018), the Australia–Peru FTA (2018)).

(iv) Consolidating the IIA network

A growing number of regional IIAs include specific clauses providing for the replacement of treaties between the parties. Abrogating two or more old treaties through the creation of a single new one can help to modernize treaty content and avoid fragmentation of the IIA network.

Three TIPs concluded in 2018 replaced more than one older BIT. Replacements were recorded in specific clauses in the text of the new IIAs or in side letters providing for termination and replacement. For example, the EU–Singapore FTA (2018) will replace 12 older BITs between the EU member States and Singapore. The Central America–Republic of Korea FTA (2018) will replace five BITs.

In the CPTPP, some parties provide for replacement of pre-existing BITs (e.g. the Australia–Viet Nam BIT (1991), the Australia–Peru BIT (1995), the Australia–Mexico BIT (2005)) under terms set out in relevant side letters.

The Investment Protocol of the AfCFTA, scheduled to be negotiated as part of phase II of the African continental integration process, could potentially replace over 170 intra-African BITs.

(v) Managing relationships between coexisting treaties

Managing treaty relationships is crucial when pursuing policy coherence.

In some TIPs, countries continue to be bound by overlapping, pre-existing treaties. In the case of the CPTPP, a total of 37 earlier IIAs remain in force and coexist with the CPTPP. For example, Australia and Singapore have an overlapping FTA (2003) between them. Japan and Viet Nam have two older treaties in force (Japan–Viet Nam BIT (2003) and Japan–Viet Nam EPA (2008)), with the BIT incorporated into the EPA.

At least 12 BITs signed in 2018 have parallel treaty relationships. For example, the Azerbaijan–Turkmenistan BIT (2018) and the Belarus–Turkey BIT (2018) overlap with the Energy Charter Treaty (1994) for the sector in question. The Indonesia–Singapore BIT (2018) coexists with the ASEAN Comprehensive Investment Agreement (2009). The Kazakhstan–United Arab Emirates BIT (2018) and the Mauritania–Turkey BIT (2018), among others, overlap with the OIC Investment Agreement (1981).

The parties to the Australia–Indonesia CEPA remain bound by the Australia–Indonesia BIT (1992) and the ASEAN–Australia–New Zealand FTA (2009). The Australia–Indonesia CEPA includes a relationship clause that provides for consultations between the parties where a party considers there is an inconsistency between agreements, with a view to reaching a mutually satisfactory solution.

To mitigate the potentially adverse consequences arising from overlapping treaty relationships, some TIPs include conflict clauses clarifying which of the coexisting treaties will prevail in case of conflict or inconsistency. The relationship clause included in the Australia–Peru FTA (2018) provides that the parties should consult with each other in case of inconsistency between agreements.

(vi) Referencing global standards

Reference to global standards, with a view to ensuring more responsible and regulated investment activities, has become an increasingly prominent treaty feature. It can help overcome the fragmentation between IIAs and other bodies of international law and policymaking.

Of the 29 treaties signed in 2018 for which texts are available, at least 18 refer to the achievement of sustainable development objectives. At least four refer to one or more specific global standards related to the promotion of sustainable development. The UN Charter and the Universal Declaration of Human Rights were both mentioned three times. The UN Global Compact, obligations tied to membership in the International Labour Organization (ILO) and the OECD Guidelines for Multinational Enterprises were all mentioned in two treaties.

Most significantly, the EFTA–Indonesia EPA (2018) specifically refers to the UN 2030 Agenda for Sustainable Development (the second treaty to do so, after the Canada–EU CETA (2016)). EFTA treaties refer to the largest number of global standards (up to seven standards in the EFTA–Indonesia EPA (2018), followed by four in the Ecuador–EFTA EPA (2018)).

(vii) Engaging multilaterally

Multilateral engagement is potentially the most effective but also most difficult avenue for reforming pre-existing IIAs.

Multilateral developments in investment policymaking continued to gain prominence in 2018, with discussions taking place in several fora (e.g. ICSID, the OECD, the World Trade Organization, UNCITRAL, UN Working Group on Business and Human Rights). However, the current undertakings may be unlikely to generate “big picture” results for the sustainable development-oriented modernization of old-generation investment treaties. Of particular relevance is work at the Energy Charter, where the Conference approved a timeline for the discussion on modernization of the Energy Charter Treaty and agreed on a set of topics to be reviewed.

(viii) Abandoning unratified old treaties

For old-generation treaties that have not yet entered into force, a country can formally indicate its decision to not be bound by them as a means to help clean up its IIA network.

Although explicit actions to abandon unratified treaties have been rare, notable examples include India's "termination" of several BITs that had been signed but not entered into force (e.g. BITs with Ethiopia (2007), Ghana (2002), Nepal (2011) and Slovenia (2011)). Close to 480 IIAs were signed more than 10 years ago and have not yet entered into force. This may signal that States have abandoned efforts to ratify them.

(ix) Terminating existing old treaties

Terminating outdated BITs – whether unilaterally or jointly – is a straightforward (although not always instantaneous) way to release the parties from their obligations. IIA terminations are on the rise, reaching a total of 309 by the end of 2018.

Between 2010 and 2018 alone, 187 terminations of IIAs took effect (figure 3), of which 128 were the result of unilateral terminations. In 2018, at least 24 terminations entered into effect. Half (12) concerned BITs signed by Ecuador; another five were BITs signed by India.

At least two intra-EU BIT terminations took effect in 2017 and two more at the beginning of 2019.

A number of termination notifications were sent in 2017 and 2018 (e.g. by Poland), which have yet to enter into effect.

The number of treaty terminations is expected to increase in the years to come:

- The planned termination of intra-EU BITs, which concerns some 190 treaties in force between EU member States, will outpace previous termination actions. In a January 2019 declaration, 22 EU member States announced their intention to terminate all BITs concluded between them by 6 December 2019. In separate declarations, the six remaining member States reaffirmed, in essence, the statement on intra-EU BITs.
- Once several recently signed regional, plurilateral or megaregional treaties (e.g. the EU–Singapore IPA) enter into force, they will effectively replace older BITs; i.e. those BITs will be terminated.

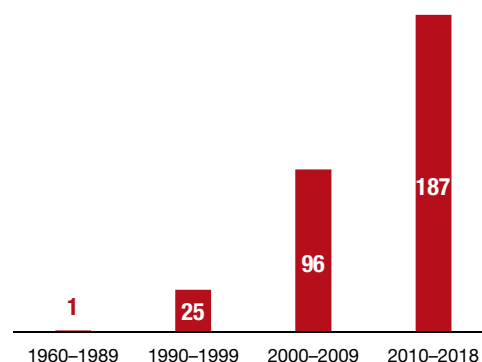
Terminating IIAs does not necessarily mean that a country envisages fully disengaging from the system. Terminations can form part of a country's overall approach to recalibrating its international investment policymaking, accompanied by the development of a revised treaty model and the start of new IIA negotiations. Two countries – India and Indonesia – that recently terminated a large number of their IIAs, many of them on a unilateral basis, concluded new BITs in 2018 (e.g. the Belarus–India BIT, the Indonesia–Singapore BIT).

Moreover, terminations do not always instantaneously release the parties from their treaty obligations. They may trigger the operation of a survival clause, typically included in IIAs, unless it is neutralized by the treaty parties at the time of termination. Survival clauses are designed to prolong a treaty's application to covered investments made prior to the termination date for an additional period (commonly ranging between 10 and 20 years).

(x) Withdrawing from multilateral treaties

No example could be found of this reform option during this reporting period, suggesting that withdrawal from multilateral treaties is not currently a preferred reform path.

Figure 3. Effective IIA terminations
(Number of IIAs by selected period)



Source: UNCTAD, IIA Navigator.

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

Conclusions: lessons learned and way forward

Sustainable development-oriented reform has made its way into today's investment policymaking. Reform actions have taken place at all levels (national, bilateral, regional and multilateral), and they cover all five areas of reform set out in UNCTAD's Reform Package for the International Investment Regime.

Following the gradual changes in investment treaty making practices over the past 15 years, today's IIA regime is characterized by a number of distinctive features (table 1). Key among them is diversity, and the fact that modern treaties aim to pursue sustainable development by providing clarity, parity and flexibility. However, some new clauses remain untested, and much remains to be done.

In their further pursuit of sustainable development-oriented IIA reform, policymakers need to consider four key issues.

First, modernizing old-generation treaties remains a priority. Despite ongoing reform efforts, the stock of treaties belonging to the old generation of IIAs that do not include reform-oriented features still accounts for over 3,000 IIAs (10 times as many as the number of "modern" IIAs concluded since 2012) (figure 2). This illustrates the magnitude of the task of reforming the bulk of the IIA regime to make it more balanced, manageable and sustainable development-friendly.

Second, reform needs to be holistic. Although reform efforts converge in their objective to make the IIA regime more sustainable development-oriented, they are implemented only intermittently by countries and they focus on specific aspects of the regime that are often addressed in isolation. The reform of investment dispute settlement for example, a focus of worldwide attention recently, is not synchronized with the reform of the substantive rules embodied in IIAs. However, reorienting the investment policy regime towards sustainable development requires reforming both the rules on dispute settlement and the treaties' substantive rules.

Third, some reform clauses may yet be tested. It is too early to assess the effectiveness of some of the innovative language introduced in IIAs in achieving their objectives of safeguarding countries' right to regulate. Many of the new refinements in IIAs have yet to be tested in investment disputes, and doubts remain about how arbitrators may interpret them in ISDS proceedings. This applies to both new clauses that are widely used in treaties and those that have been used relatively rarely so far.

Fourth, reform efforts must be inclusive and not be constrained by capacity constraints. Successful reform requires a transparent and inclusive process. Governments and international fora need to ensure the availability of possibilities for meaningful stakeholder engagement and build the skills and experience of negotiators and policymakers. Bilateral or regional technical assistance programmes can follow up on the capacity-building needs identified by governments. Sharing of experiences and best practices on IIA reform can foster peer-to-peer learning about sustainable development-oriented reform options.

UNCTAD, as the United Nations' focal point for international investment and development, backstops ongoing

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