



# IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS



## RECENT DEVELOPMENTS IN THE INTERNATIONAL INVESTMENT REGIME

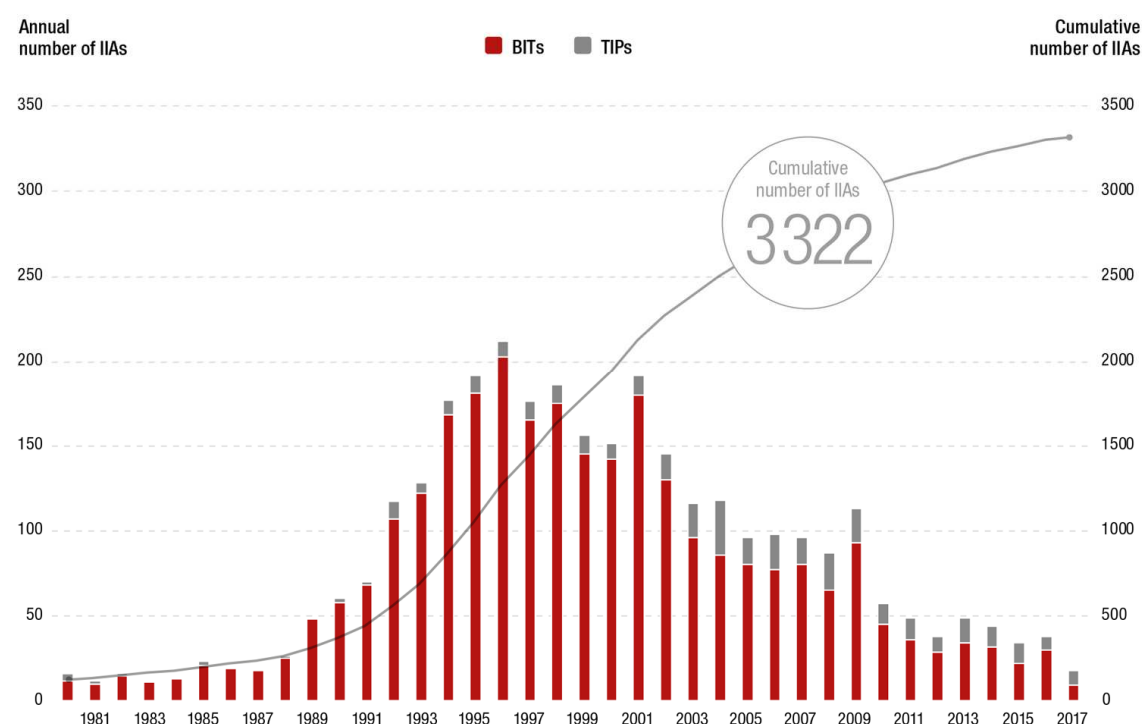
### H I G H L I G H T S

- Investment treaty making has reached a turning point. The year 2017 concluded with the lowest number of new international investment agreements (IIAs) since 1983, signaling a period of reflection on, and review of, international investment policies.
- For the first time, the number of effective treaty terminations outpaced the number of new IIA conclusions. In contrast, negotiations for certain megaregional agreements maintained momentum, especially in Africa and Asia. In addition, a number of country groups are developing non-binding guiding principles for investment policymaking.
- IIA reform is well under way across all regions. Most of today's new IIAs include sustainable development-oriented reform elements. Highlights of modern treaty making include a sustainable development orientation, preservation of regulatory space and improvements to or omissions of ISDS.
- Countries are engaging in modernizing the existing stock of old-generation treaties. Initial reform actions correspond to UNCTAD's 10 Options for Phase 2 of IIA Reform (*WIR17*). In particular, in the past year, countries have been engaging in multilateral reform discussions, including with regard to ISDS, and a small but growing number of countries are issuing interpretations or replacing their old-generation agreements.
- Countries have different but related motivations to engage in Phase 2 reform actions, and they face a number of challenges in tackling their outdated IIAs effectively.
- Through its evidence-based policy analysis and advisory work, together with its intergovernmental consensus-building function, UNCTAD can help countries overcome challenges related to Phase 2 of IIA reform, and move towards the third, and last phase of reform. UNCTAD's 2018 World Investment Report (WIR) and UNCTAD's next High-level IIA Conference, part of the October 2018 World Investment Forum (WIF) will be milestones in this endeavour.

# 1. Trends in the conclusion and negotiation of IIAs

In 2017, countries concluded 18 new IIAs: 9 bilateral investment treaties (BITs) and 9 treaties with investment provisions (TIPs).<sup>1</sup> This brought the size of the IIA universe to 3,322 agreements (2,946 BITs and 376 TIPs), of which 2,638 were in force at year-end (figure 1). The most active economy was Turkey, concluding four treaties, followed by Hong Kong, China with two. Forty-five economies were parties to one new treaty each. Of the 18 new IIAs, three were regional agreements (the ASEAN–Hong Kong, China Investment Agreement, the Intra-MERCOSUR Investment Facilitation Protocol and the Pacific Agreement on Closer Economic Relations (PACER) Plus Agreement between Australia, New Zealand and 12 Pacific island States).<sup>2</sup> In addition, 15 IIAs entered into force. Between January and March 2018, three additional IIAs were signed.<sup>3</sup>

**Figure 1. Trends in IIAs signed, 1980–2017**



Source: UNCTAD, IIA Navigator.

Note: The cumulative number of all signed IIAs, independently of whether they have entered into force, is 3,322. IIAs for which termination has entered into effect are not included.

At the same time, at least 22 terminations entered into effect (“effective termination”). Particularly active in terminating treaties was India with 17. Ecuador sent 16 notices of termination in 2017.<sup>4</sup> Among intra-European Union (EU) BITs, at least two terminations took effect in 2017 (see also *WIR17*).<sup>5</sup>

For the first time, the number of effectively terminated IIAs (22) exceeded the number of newly concluded treaties (18) and the number of new treaties entering into force (15). However, the low number of IIAs concluded in 2017 does not necessarily translate into fewer treaty relationships among countries. Unlike BITs, a single regional IIA creates many treaty relationships, depending on the number of contracting parties.<sup>6</sup>

Moreover, effective treaty termination must also be seen in light of survival clauses, according to which treaty application is extended for a further period after termination (some for 5 years, but most commonly for 10, 15 or even 20 years). And the stock of IIAs remains very large, comprising more than 3,300 treaties, most of them belonging to the “first generation” IIAs that are in need of reform.

<sup>1</sup> For the list of IIAs signed and entered into force in 2017, see UNCTAD’s IIA Navigator, <http://investmentpolicyhub.unctad.org/IIA>.

<sup>2</sup> Cook Islands, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.

<sup>3</sup> The Australia–Peru Free Trade Agreement (FTA), the Comprehensive and Progressive Agreement for a Trans-Pacific Partnership Agreement (CPTPP) and the FTA between the Republic of Korea and the Republics of Central America. In addition, in March 2018, a number of side agreements to the CPTPP were signed related to ISDS. For example, ISDS is excluded between Peru and New Zealand, and a respondent host State must provide specific consent for an investor claim to proceed to arbitration (side agreements between Brunei Darussalam and New Zealand, and between Malaysia and Viet Nam).

<sup>4</sup> Terminations not effective as of April 2018.

<sup>5</sup> The BITs of Denmark with Estonia (1991) and with Romania (1994).

<sup>6</sup> For example, the Intra-MERCOSUR Investment Facilitation Protocol (2017) creates six IIA relationships between the four contracting parties, and the CPTPP (2018) creates 55.

The nine TIPs concluded in 2017 can be grouped into four categories:

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

- Argentina–Chile Free Trade Agreement (FTA)
- ASEAN–Hong Kong, China Investment Agreement<sup>7</sup>
- China–Hong Kong, China Investment Agreement<sup>8</sup>
- Pacific Agreement on Closer Economic Relations (PACER) Plus<sup>9</sup>

2. One agreement with investment provisions emphasizing investment promotion and facilitation as well as a number of investment protection provisions – although no investor–State dispute settlement (ISDS) clause:

- Intra-MERCOSUR Investment Facilitation Protocol (2017)

3. One agreement with limited investment provisions (e.g. national treatment (NT) and most favoured nation (MFN) treatment with regard to the right of establishment of companies) or provisions on free movement of capital relating to direct investments:

- Armenia–EU Comprehensive and Enhanced Partnership Agreement

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

- Paraguay–United States Trade and Investment Framework Agreement (TIFA)
- Chile–Indonesia Comprehensive Economic Partnership Agreement<sup>10</sup>
- China–Georgia Free Trade Agreement (FTA)

## 2. Content of new IIAs

Since 2012, over 150 countries have undertaken at least one action in the pursuit of sustainable development-oriented IIAs as set out in UNCTAD's Reform Package for the International Investment Regime (including either Phase 1 or Phase 2 reform actions, discussed below). For example, they have reviewed their treaty networks or revised treaty models.

Most of today's new IIAs follow UNCTAD's Road Map (*WIR15*), which 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) or include clauses that were set out in UNCTAD's Investment Policy Framework for Sustainable Development (*WIR12*, updated in 2015). In addition, some IIAs concluded in 2017 contain innovative features that have rarely been encountered in earlier IIAs.

Today's reform-oriented treaty making is in striking contrast to treaty making at the turn of the millennium. A comparison between the 13 IIAs concluded in 2017 for which texts are available (eight BITs and five TIPs) and a sample of 13 IIAs concluded in 2000 shows remarkable differences (table 1). Clearly, reform-oriented clauses are becoming more common in modern treaties. All IIAs concluded in 2017 contain at least six reform features, and some provisions that were considered innovative in pre-2010 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.

<sup>7</sup> The treaty contains a placeholder for an ISDS clause (Article 21); the parties agreed to conclude the discussions on ISDS within one year from the date of the agreement's entry into force.

<sup>8</sup> The agreement includes an ISDS clause that does not provide for international arbitration as an option.

<sup>9</sup> The agreement does not include an ISDS clause.

<sup>10</sup> The text of the agreement is not publicly available. The parties agreed that in the future the scope of the agreement will be expanded to include trade in services and investment protection.

**Table 1. Reform-oriented provisions in IIAs concluded in 2000 and in 2017**

**2000**

	1	2	3	4	5	6	7	8	9	10	11
Austria–Bangladesh BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Belarus–Singapore BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Brunei Darussalam–China BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Chile–Dominican Republic BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Cuba–Paraguay BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Ethiopia–Turkey BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Greece–Mexico BIT	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
India–Lao People's Democratic Republic BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Italy–Libya BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Malaysia–Saudi Arabia BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>
Mongolia–Philippines BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Nigeria–Switzerland BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Rwanda–South Africa BIT	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>

☒ Yes ☐ No ☐ Not applicable

**2017**

	1	2	3	4	5	6	7	8	9	10	11
Argentina–Chile FTA	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
ASEAN–Hong-Kong, China Investment Agreement	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Burundi–Turkey BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
China–Hong Kong, China Investment Agreement	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Colombia–United Arab Emirates BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Intra-MERCOSUR Investment Facilitation Protocol	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Israel–Japan BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Jordan–Saudi Arabia BIT	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>
Mozambique–Turkey BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Pacific Agreement on Closer Economic Relations Plus	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Rwanda–United Arab Emirates BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>
Turkey–Ukraine BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>
Turkey–Uzbekistan BIT	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>	<input checked="" type="checkbox"/>	<input type="checkbox"/>

☒ Yes ☐ No ☐ Not applicable

**Selected aspects of IIAs**

- 1 References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble
- 2 Refined definition of investment (e.g. reference to characteristics of investment; exclusion of portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts)
- 3 Circumscribed fair and equitable treatment (with reference to customary international law (CIL), equated to the minimum standard of treatment of aliens under CIL or clarified with a list of State obligations)
- 4 Clarification of what does and does not constitute an indirect expropriation
- 5 Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws

- 6 Omission of the so-called “umbrella” clause
- 7 General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources
- 8 Explicit recognition that parties should not relax health, safety or environmental standards to attract investment
- 9 Promotion of corporate and social responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble
- 10 Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, omitting an ISDS mechanism)
- 11 Specific proactive provisions on investment promotion and/or facilitation

Source: UNCTAD.

Note: BITs listed for 2000 are a sample of IIAs signed in that year. IIAs listed for 2017 are those concluded in that year for which texts are available; this list does not include “framework agreements” that lack substantive investment provisions. Available IIA texts can be accessed at UNCTAD’s IIA Navigator at <http://investmentpolicyhub.unctad.org/IIA>.

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

**Sustainable development orientation.** In contrast to the IIAs signed in 2000, the 2017 IIAs include a larger number of provisions explicitly referring to sustainable development issues (including by preserving the right to regulate for sustainable development-oriented policy objectives). Of the 13 agreements concluded in 2017, 12 have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources. All but one also explicitly recognize that the parties should not relax health, safety or environmental standards to attract investment; and 11 refer to the protection of health and safety, labour rights, the environment or sustainable development in their preambles.

**Preservation of regulatory space.** Recent treaties frequently differ from old-generation treaties in other elements that aim more broadly at preserving regulatory space and/or at minimizing exposure to investment arbitration. These elements include clauses that (i) limit the treaty scope (e.g. by excluding certain types of assets from the definition of investment) (12 IIAs); (ii) clarify obligations (e.g. by including more detailed clauses on FET (11 IIAs) and/or indirect expropriation (10 IIAs)); and (iii) contain exceptions to transfer-of-funds obligations and/or carve-outs for prudential measures (all 13 IIAs). Notably, all but one of the treaties reviewed omit the so-called umbrella clause (thus also reducing access to ISDS). Interestingly, already in 2000, 5 of the 13 treaties did not include umbrella clauses.

**Investment dispute settlement.** Modern IIAs carefully regulate ISDS (e.g. by specifying treaty provisions that are subject to ISDS, excluding certain policy areas from ISDS, setting out a special mechanism for taxation and prudential measures, and/or restricting the allotted time period within which claims can be submitted) (eight IIAs). In addition, four IIAs omit ISDS-type international arbitration (or note that parties agree to discuss ISDS in the future).

With the current momentum of ISDS reform, important questions of policy coherence arise. Taking the examples of Canada and Mexico, in their respective arrangements with the EU, they have committed to a multilateral initiative for an investment court, replacing the traditional ISDS system. By contrast, in the recently concluded CPTPP, Canada and Mexico have agreed to maintain a more traditional ISDS mechanism. And finally, in NAFTA renegotiations, the parties have considered a number of proposals since the start of 2018, among them removing ISDS, including an opt-out provision and providing for binding arbitration for Canada and Mexico only.

In addition to the reform-oriented elements presented in table 1, some of the IIAs concluded in 2017 contain innovative features that have rarely been encountered in earlier IIAs:

- *Conditioning treaty coverage on investors' contribution to sustainable development.* Requiring that a covered investment contribute to the host State's economy or sustainable development (e.g. Burundi–Turkey BIT, Mozambique–Turkey BIT, Turkey–Ukraine BIT)
- *Reducing the role of investor expectations in FET.* Specifying that the mere act of taking, or the failure to take, an action that may be inconsistent with an investor's expectations does not constitute a breach of FET, even if it results in loss or damage to the investment (e.g. China–Hong Kong, China Investment Agreement)
- *Fostering responsible investment.* Including a “best efforts” obligation for investors to respect the human rights of the people involved in investment activities and to promote the building of local capacity and the development of human capital (e.g. Intra-MERCOSUR Agreement)
- *Building capacity for investment facilitation.* Requiring the home State to assist host States in the promotion and facilitation of investment through capacity-building, insurance programmes or technology transfer (e.g. China–Hong Kong, China Investment Agreement; ASEAN–Hong Kong, China Agreement; PACER Plus)
- *Facilitating counterclaims by the respondent party against the claimant investor.* Establishing a mechanism for obtaining investor's consent for counterclaims (e.g. Colombia–United Arab Emirates BIT)

It must be noted that these innovative features do not necessarily translate into a reduced level of investment protection, as most of the IIAs signed in 2017 maintain substantive investment protection standards.

### 3. Modernizing the existing stock of old-generation treaties

Countries are engaging in modernizing the existing stock of old-generation treaties. Initial reform actions correspond to UNCTAD's 10 Options for Phase 2 of IIA Reform (*WIR17*). In particular, in the past year, countries have been engaging in multilateral reform discussions, including with regard to ISDS, and a small but growing number of countries are issuing interpretations or replacing their old-generation agreements.

This stocktaking of Phase 2 reform actions (table 2) focuses on progress made in 2017 and during the first months of 2018 (and, where relevant, 2016) (figure 2).

**Table 2. Overview of reform options: actions and outcomes**

Action option	Outcome
<b>1. Jointly interpreting treaty provisions</b>	Clarifies the content of a treaty provision and narrows the scope of interpretive discretion of tribunals
<b>2. Amending treaty provisions</b>	Modifies an existing treaty's content by introducing new provisions or altering or removing existing ones
<b>3. Replacing "outdated" treaties</b>	Substitutes an old treaty with a new one
<b>4. Consolidating the IIA network</b>	Abrogates two or more old IIAs between parties and replaces them with a new, plurilateral IIA
<b>5. Managing relationships between coexisting treaties</b>	Establishes rules that determine which of the coexisting IIAs applies in a given situation
<b>6. Referencing global standards</b>	Fosters coherence and improves the interaction between IIAs and other areas of international law and policymaking
<b>7. Engaging multilaterally</b>	Establishes a common understanding or new rules among a multitude of countries, coupled with a mechanism that brings about change "in one go"
<b>8. Abandoning unratified old treaties</b>	Conveys a country's intent to not become a party to a concluded but as yet unratified treaty
<b>9. Terminating existing old treaties</b>	Releases the parties from their obligations under a treaty
<b>10. Withdrawing from multilateral treaties</b>	Similar in effect to termination, but leaves the treaty in force among the remaining parties who have not withdrawn

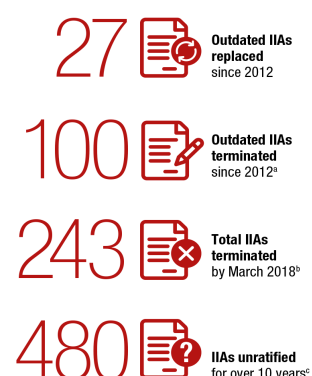
Source: UNCTAD.

Note: This classification is made for illustration purposes only. The table should not be seen as placing possible reform actions in any order of priority.

**Jointly interpreting treaty provisions.** Countries have not only developed – and sometimes adopted – joint interpretative statements for existing IIAs, but also strengthened the basis for binding interpretation in recently concluded treaties.

- In early 2016, India proposed a Joint Interpretative Statement to approximately 25 countries with which it has IIAs for which the initial period of validity had not expired.
- In October 2017, Bangladesh and India signed the Joint Interpretative Notes for the Bangladesh–India BIT (2009). The Notes add clarity to a number of BIT provisions, including the definitions of investment and investor, the exclusion of taxation measures, FET, NT and MFN, expropriation, essential security and ISDS.
- In October 2016, the EU, its member States and Canada agreed to a Joint Interpretative Instrument on the CETA that sets out the parties' agreement on a number of provisions that have been the subject of public debate and concern (such as the right to regulate and compensation).
- In October 2017, Colombia and France signed a Joint Interpretative Declaration for the Colombia–France BIT (2014) which clarified that the reference to "obligations that arise from international law" means treaties ratified by both parties and should not be interpreted as a legal stability clause or as allowing claims based upon mere breach of contract.
- In October 2017, the Joint Commission of the FTA between Canada and Colombia (2008) adopted a Joint Interpretative Declaration, which reaffirms the parties' right to regulate and clarifies the provisions on "like circumstances", full protection and security, and minimum standard of treatment.

**Figure 2. Selected Phase 2 reform actions: facts and figures**



Source: UNCTAD.

Note:

<sup>a</sup> These are IIAs for which termination has entered into effect (2012–2018). They include expired treaties, treaties replaced by new ones, terminations by consent and unilaterally denounced treaties.

<sup>b</sup> These are all IIAs for which termination has entered into effect. They include expired treaties, treaties replaced by new ones, terminations by consent and unilaterally denounced treaties.

<sup>c</sup> This includes IIAs concluded through December 2008.



- Several recent IIAs establish joint bodies with a mandate to issue binding interpretations of treaty provisions (e.g. Rwanda–United Arab Emirates BIT (2017); Australia–Peru FTA (2018); Republic of Korea–Republics of Central America FTA (2018)).

**Amending treaty provisions.** Although amendments were used relatively sparingly in the bilateral context, protocols or exchanges of letters or notes were used in important regional IIAs.

- In March 2018, the remaining 11 parties to the CPTPP agreed to an amended text in select areas while retaining the core elements. With respect to investment (in Chapter 9), the parties agreed to suspend the application of the provisions related to investment agreement, investment authorization and the selection of arbitrators (in part).
- Canada and Chile have updated the investment chapter in their FTA at least three times, the most recent being in 2017, when they added “new and progressive elements” to the chapter (e.g. clarifying existing obligations, reaffirming the States’ right to regulate, including a provision on corporate social responsibility (CSR), improving the ISDS mechanism and adding a “rendezvous clause”, enjoining the parties to adopt a permanent multilateral tribunal, should such a tribunal be established in the future).

**Replacing “outdated” treaties.** Since 2012, at least 27 outdated IIAs have been replaced by newer, more modern, treaties.<sup>11</sup>

- In 2017, at least 3 of the 13 IIAs signed replaced older-generation BITs (Argentina–Chile FTA (2017) replaced Argentina–Chile BIT (1991); Turkey–Ukraine BIT (2017) replaced Turkey–Ukraine BIT (1996); Turkey–Uzbekistan BIT (2017) replaced Turkey–Uzbekistan BIT (1992)).
- Since 2016, Turkey has replaced eight outdated treaties (with Belarus, Georgia, Jordan, Moldova, Serbia, Tunisia, Ukraine and Uzbekistan). Among the reforms implemented are more detailed definitions of investment, more precisely formulated general treatment standards (e.g. FET, NT and MFN treatment), new general exceptions and balance-of-payments exceptions, a denial of benefits clause and refinements to ISDS (i.e. exemptions from the scope of ISDS and time limitations for the referral of disputes to ISDS).
- In recent years, Australia has replaced several of its first-generation BITs with investment chapters upon the conclusion of comprehensive FTAs with BIT partner countries (e.g. Australia–Chile (1996)). Australia continues reviewing and renegotiating those BITs that are not captured by current FTA negotiations.
- In March 2018, Ecuador presented its new model treaty, which will be the basis for future negotiations, including with the countries’ prior treaty partners. Among the model’s most prominent features are a mechanism aimed at the prevention of disputes, exceptions to avoid possible conflicts between the disciplines and the pursuit of legitimate policy objectives by the States, and an appellate stage.

**Consolidating the IIA network.** Although consolidation is a prominent feature in the EU’s nascent treaty practice, it is less common – or yet to be decided on – in other regional or megaregional agreements.

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