

Taking Stock of IIA Reform

1. Imperative and Roadmap for IIA Reform

There is a pressing need for systematic reform of the global regime of international investment agreements (IIAs) to bring it in line with today's sustainable development imperative. Today, the question is not whether or not to reform, but about the *what*, *how* and the *extent* of such reform. UNCTAD's 2015 World Investment Report (WIR) lays out an Action Menu and a Roadmap for IIA Reform.

IIA reform is happening against the backdrop of the global trend to formulate a "new generation investment policies" that place inclusive growth and sustainable development at the heart of efforts to attract and benefit from investment. UNCTAD's Investment Policy Framework for Sustainable Development (the UNCTAD Policy Framework), launched in 2012 and updated in 2015, serves as a reference point for policymakers in formulating such new generation investment policies.

The role of new generation investment policies in mobilizing investment, maximizing sustainable development benefits and minimizing risks, is also recognised in the Addis Ababa Action Agenda (AAAA), the outcome document of the Third United Nations (UN) Financing for Development (FfD) Conference, July 2015. In paragraph 91, UN Member States declare that "[t]he goal of protecting and encouraging investment should not affect our ability to pursue public policy objectives. We will endeavour to craft trade and investment agreements with appropriate safeguards so as not to constrain domestic policies and regulation in the public interest."

In the AAAA, UN Member States also "request UNCTAD to continue its existing programme of meetings and consultations with Member States on investment agreements." The 16 March 2016 UNCTAD Expert Meeting on "Taking Stock of IIA Reform" responds to this mandate, convening Member States as well as the investment and development community to share their experiences with IIA reform.

This paper serves as input into the deliberations. It takes stock of efforts towards IIA reform, as they have been undertaken at the national, bilateral, regional and multilateral levels. It is meant for an in-depth discussion on lessons learned, challenges ahead and the way forward.



1.1. Reforming the International Investment Regime: the UNCTAD Roadmap

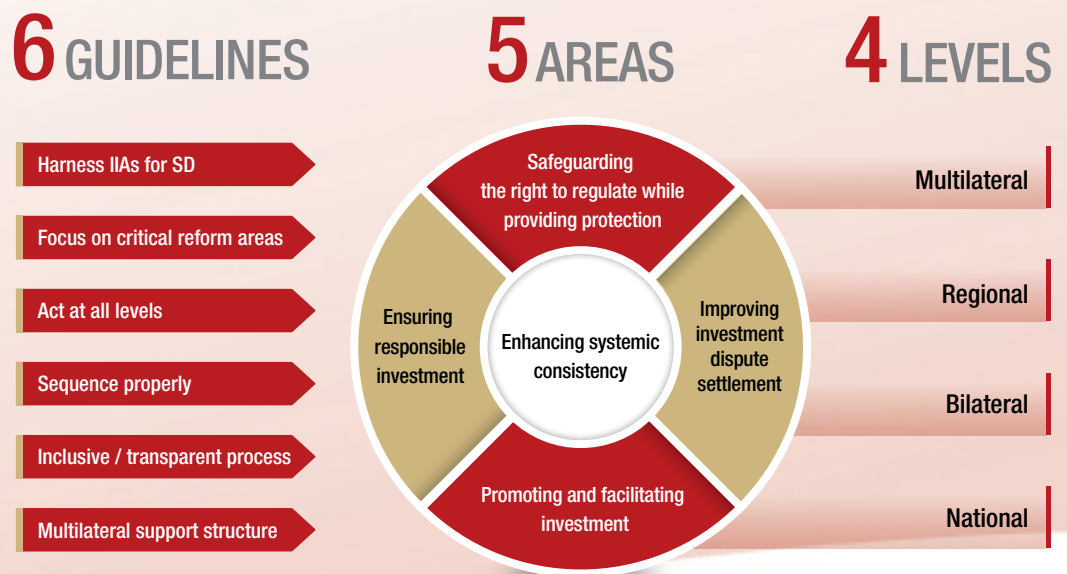
UNCTAD's advocacy for a systemic and sustainable development-oriented approach to reforming the international investment regime started in 2010. Based on UNCTAD's long-standing experience with its Work Programme on IIAs, WIR 2010 highlighted the need to reflect broader policy considerations in IIAs, with a view to formulating a new generation of investment policies. WIR 2012 then launched the UNCTAD Policy Framework (see below), offering concrete policy options to negotiate sustainable-development-friendly IIAs. In 2013, the WIR proposed five paths of reform for investor-State arbitration and subsequently, WIR 2014 presented four pathways of reform for the IIA regime as they were emerging from State practice. With its thematic focus on investing in the sustainable development goals (SDGs), WIR 2014 linked these pathways to the overall objective of mobilizing foreign investment and channeling it to key SDG sectors.

On this basis, WIR 2015 laid out a comprehensive Action Menu and a Roadmap for IIA Reform. Again, WIR 2015 took a broader perspective, complementing its Roadmap for IIA Reform with a set of guidelines for coherent international tax and investment policies aimed at realizing the synergies between investment policy and initiatives to counter tax avoidance.

The Roadmap for IIA Reform was developed in response to call from the 2014 IIA Conference, held as part of the World Investment Forum (Box 1, p 13). Following its launch in the 2015 WIR, the Roadmap was considered by Member States and was met with positive feedback in the 62nd Session of the UNCTAD Trade and Development Board (TDB), September 2015.

UNCTAD's guidance for IIA reform suggests that it should: address five main challenges, take place at four levels of policymaking, and be directed by Six Guidelines (Figure 1).

Figure 1. UNCTAD's Roadmap for IIA Reform



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Five reform areas. IIA reform can build on lessons learned from 60 years of IIA rulemaking. In so doing, it should address five main challenges: (i) safeguarding the right to regulate while providing protection; (ii) improving investment dispute settlement; (iii) adding a component of investment promotion and facilitation to

the regime; (iv) ensuring responsible investment; and (v) enhancing the systemic consistency of the IIA regime. UNCTAD's 2015 WIR offers policy options to address these challenges (substantive IIA clauses, investment dispute settlement). By and large, these policy options address the standard elements covered in an IIA and match its typical clauses. Some of these reform options can be combined and tailored to meet several objectives.

Four levels of reform action. Actions for sustainable-development-oriented IIA reform can be and have to be undertaken at all levels of policymaking: national, bilateral, regional and multilateral levels. At each level, the reform process would broadly follow a sequence of steps that includes (i) taking stock and identifying problems; (ii) developing a strategic approach and an action plan for reform; and (iii) implementing actions and achieving the desired outcomes.

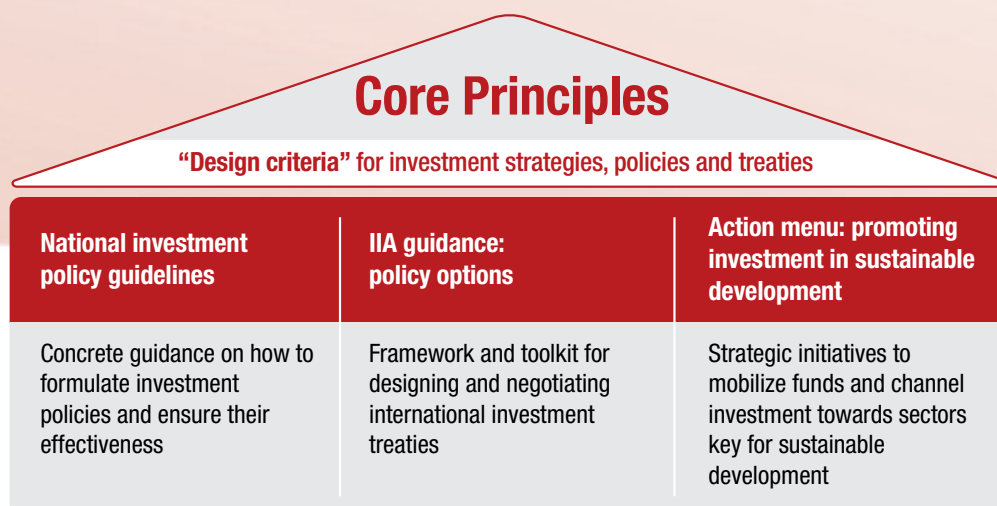
Six Guidelines for IIA Reform. 2015 WIR also offers Six Guidelines for IIA Reform, inspired by the Core Principles of the UNCTAD Investment Policy Framework. The Six Guidelines are: (i) harness IIAs for sustainable development; (ii) focus on critical reform areas; (iii) act at all levels; (iv) sequence properly for concrete solutions; (v) ensure an inclusive and transparent reform process; and (vi) strengthen the multilateral supportive structure.

Based on UNCTAD's 2015 Action Menu and Guidelines for IIA Reform, countries can develop their own roadmap, selecting processes and formats in line with their development strategies and needs, as well as their strategic choices about the priority, intensity, depth and character of their engagement in IIA reform. However, IIA reform also needs to be pursued with a common agenda and vision in mind, since any reform step taken without multilateral coordination will only worsen fragmentation.

1.2. New Generation Investment Policies: the UNCTAD Policy Framework

In 2012, the special theme of WIR launched UNCTAD's Investment Policy Framework for Sustainable Development (Figure 2). The UNCTAD Policy Framework responds to the recognition that at a time of persistent crises and pressing social and environmental challenges, mobilizing investment and ensuring that it contributes to sustainable development objectives is a priority for all countries. In so doing, the UNCTAD Policy Framework builds on the emerging new generation of investment policies.

Figure 2. UNCTAD's Investment Policy Framework for Sustainable Development



Source: ©UNCTAD.

The Framework first details the drivers of change in the investment policy environment and the challenges that need to be addressed; it then proposes a set of Core Principles for investment policymaking, which serve as “design criteria” for national and international investment policies. On this basis, it presents guidelines for national investment policies and policy options for the formulation and negotiation of IIAs. UNCTAD’s Policy Framework has since served as a reference point for policymakers, including through Investment Policy Reviews (IPRs), in formulating national investment policies and negotiating IIAs, as a basis for building capacity on investment policy, and as a point of convergence for international cooperation on investment issues. It has been used by more than 100 countries (including members of five regional economic integration organizations (REIOs)) in the revision of their national or regional model IIAs.

Three years after its launch, new insight gained through policy debates and technical assistance experience, feedback received from experts as well as new policymaking priorities, had accumulated to the point that an update of the Policy Framework was opportune (the 2015 Update). The 2015 Update incorporates this information into the national investment policy guidelines and the IIA menu of options, elaborates on the “pre-establishment” component and proposes concrete policy measures from UNCTAD’s 2014 WIR Action Plan for Investment in Sustainable Development, aimed at promoting investments with a specific sustainable development orientation. In July 2015 UNCTAD launched the update at the Third FfD Conference in Addis Ababa, Ethiopia.

2. Reform in Progress

IIA reform is taking place against the background of an expanding IIA regime, with intensified efforts of investment policy-making at the regional level. By the end of 2015 the IIA universe consisted of 3,286 agreements (2,928 BITs and 358 “other IIAs”). “Other IIAs” refer to economic agreements, other than BITs that include investment-related provisions (e.g. investment chapters in economic partnership agreements (EPAs) and free trade agreements (FTAs), regional investment agreements and framework agreements on economic cooperation).

Table 1. Roadmap for IIA Reform

	Take stock/ identify problem	Strategic approach/ action plan	Level
National	<ul style="list-style-type: none"> National IIA review 	<ul style="list-style-type: none"> National IIA action plan 	<ul style="list-style-type: none"> New model treaty Implementation
Bilateral	<ul style="list-style-type: none"> Joint IIA consultations to identify reform needs 	<ul style="list-style-type: none"> Plan for a joint course of action 	<ul style="list-style-type: none"> Joint interpretation Renegotiation / amendment
Regional	<ul style="list-style-type: none"> Collective review 	<ul style="list-style-type: none"> Collective IIA action plan 	<ul style="list-style-type: none"> Consolidation / rationalization of BIT networks Common model Joint interpretation Renegotiation / amendment Implementation / aid facility
Multilateral	<ul style="list-style-type: none"> Global review of the IIA regime (e.g. WIR15) 	<ul style="list-style-type: none"> Multilateral consensus-building on key and emerging issues Shared vision on systemic reform 	<ul style="list-style-type: none"> Multilateral Action Plan Multilateral backstopping

Source: ©UNCTAD.

IIA reform is taking place at four levels of policymaking: national, bilateral, regional and multilateral.

2.1. National Level

National level reform options include national IIA reviews and action plans, resulting, among others, in new model treaties. Since 2012, at least 110 countries have reviewed their national and/or international investment policies. About 100 of them (including member States of five REIOs) have used the UNCTAD Policy Framework.

i) *National Model IIAs*. Since 2012 at least sixty countries have developed or are developing new model IIAs. Until the 1990s, mainly developed countries used IIA models (e.g. Canada, Germany, United States). Today, both developed and developing countries use model treaties, which can indicate a country's overall approach to IIAs.

In terms of content, most of the new models include provisions safeguarding the right to regulate, including for sustainable development objectives, and provisions aimed at minimizing exposure to investment arbitration. Many of these elements are in line with UNCTAD's Policy Framework and match policy options included in UNCTAD's Roadmap for IIA Reform. While new IIA models differ in the extent to which they include reform elements, many of them demonstrate countries' intentions to move away from the "protection (only) model" to a more balanced "investment for sustainable development model".

- **Brazil's** model agreement on the cooperation and facilitation of investment (CFIA) was approved in 2013.¹ It was the model for concluding CFIAs with Angola, Chile, Colombia, Malawi, Mexico and Mozambique. It is currently the basis for negotiations (Peru) or for envisaged negotiations with several other countries. The model benefited from domestic consultations with the Brazilian private sector and experiences of other countries and international organizations. Central to this model is the establishment of mechanisms for the prevention of disputes (focal points, Ombudsmen, joint committees of government representatives of both parties) and for the promotion and facilitation of investment. The model includes clarified substantive protections (e.g. expropriation, national treatment and most favoured nation (MFN) treatment provisions), but does not include investor-State dispute settlement (ISDS) (i.e. only State-State dispute settlement).
- **Colombia's** 2011 model BIT is currently under revision (with public consultations) and its update is expected in 2016. The country's 2016 review is expected to continue the reform effort for its 2011 model to preserve the right to regulate and ensure responsible investment. The latter includes provisions to safeguard the State's right to regulate through public policy exceptions, excludes investments made with assets of illegal origin, closely circumscribes (i.e. clarifies) fair and equitable treatment (FET) and indirect expropriation, and contains provisions promoting certain standards on corporate social responsibility (CSR). The 2016 update is expected to continue this trend of preserving the right to regulate and ensuring responsible investment.
- **Germany** published an expert opinion on a model BIT for developed countries in May 2015. The expert opinion was transmitted to the European Commission and published on the website of the German Ministry for Economic Affairs and Energy. Central to it are the establishment of a bilateral investment court or tribunal for each specific treaty, with judges pre-selected by the parties to the agreement, individual cases being assigned to the judges by abstract rules and a standing appellate review mechanism. The expert opinion also includes public policy exceptions, policy options ensuring that foreign investors are not conferred greater

rights than those enjoyed by domestic investors, and clarifications to the FET and indirect expropriation provisions.

- **India's** new model BIT was approved by the Union Cabinet (the Prime Minister and the Cabinet Ministers) in mid-December 2015. Notable are the absence of an MFN clause, as well as the inclusion of carve-outs, safeguards and clarifications covering a number of issues and a variety of policy areas (e.g. exclusion of portfolio investments from the definition of investment, exclusions of government procurement, taxation, subsidies, and compulsory licenses from the treaty scope, replacement of the FET standard with a list of State obligations under customary international law and a clarification of indirect expropriation). The model includes provisions on investor compliance with the State Parties' laws and on CSR. It requires the exhaustion of domestic remedies before ISDS may be commenced and mentions the possibility of establishing an appellate body to review awards rendered by investment tribunals.
- **Indonesia's** draft model BIT is in the process of being finalized. The draft version, prior to finalization, is characterized by carve-outs, safeguards and clarifications in order to strike a balance between the rights of investors and the right of States to regulate. The draft model excludes portfolio investments and applies the *Salini* test for defining an "investment". Moreover, national treatment is subject to exceptions as provided in the schedule of reservations. The MFN clause also contains several clarifications, e.g. the exclusion of dispute settlement. The FET provision contains clarifications and ISDS is subject to specific host country consent.
- **Egypt's** new model BIT text is currently subject to consultations involving Egyptian investors abroad, relevant government entities and international organizations. The draft model includes carve-outs that protect sustainable-development-oriented measures from the scope of indirect expropriation and from ISDS and a general exceptions for the protection of environmental, public health and labour standards. The model clarifies FET in a way that is sensitive to the parties' different levels of development and contains provisions on investor responsibilities, including for the fight against corruption. Amicable solution mechanisms (e.g. negotiation, mediation and conciliation) are the main tools for dispute settlement, conditioning access to ISDS on a specific agreement by the disputing parties.
- **Norway's** draft model BIT was presented for public consultations on 13 May 2015. The comments received during the public consultation and other international developments are currently being reviewed. The draft model contains a clause on the right to regulate and a section with exceptions, including a general exceptions clause and exceptions for essential security interests, cultural policy, prudential regulations and taxation. It clarifies indirect expropriation and establishes a joint committee tasked with supervising the implementation of the agreement, resolving disputes regarding its interpretation, working to remove barriers to investment, amending the agreement when necessary, and potentially adopting codes of conduct for arbitrators.
- **The United States'** 2012 model BIT builds upon an earlier model from 2004 and benefited from inputs from Congress, private sector, business associations, labour and environmental groups and academics. The 2012 model clarifies the clauses on national treatment, FET, full protection and security, indirect expropriation, and free transfer of funds. It also includes provisions on transparency and public participation (e.g. a requirement that

Parties consult periodically regarding how to improve their transparency practices, including in the context of ISDS). The model also contains a provision on the possibility of a future appellate mechanism and requires the Parties to strive to ensure that any such mechanism includes provisions on transparency and public participation. The 2012 model strengthens labour and environmental obligations by requiring the Parties to ensure that they do not waive or derogate from their labour and environmental laws. The model is intended to provide a balance of interests, facilitating and protecting investment, while protecting the ability of governments to regulate in the public interest.

- ii) *National IIA Reviews*. Most countries engaged in undertaking an investment policy review focused on the international policy dimension, i.e. conducted so-called “IIA reviews”. Among the 110 countries that have recently undertaken a review, eleven countries have benefited from an IIA review as part of an IPR. Since 2012, UNCTAD conducted IPRs for Bangladesh (2013), Bosnia and Herzegovina (2015), Congo (2015), Djibouti (2013), Kyrgyzstan (2015), Madagascar (2015), Republic of Moldova (2013), Mongolia (2013), Mozambique (2012), Sudan (2015), and Tajikistan (forthcoming). In such IIA reviews, countries analyze, among others, their treaty networks and content profiles, and also some of them undertake impact and risk assessments to identify specific reform needs in line with national development objectives. Some IIA reviews involved inter-ministerial consultations, parliamentary engagement, as well as inputs from academia, civil society and business. Countries which have recently reviewed their IIAs include Azerbaijan, Bosnia and Herzegovina, Brazil, Colombia, Egypt, Germany, Indonesia, South Africa, Sri Lanka, Switzerland, Thailand and the Netherlands (with some of these reviews ongoing).

Some IIA reviews culminate in the creation of a new model IIA (see above), while others contribute to an ongoing modernization of the country’s negotiating documents and approach to international investment policymaking. Some IIA reviews result in decisions about whether certain IIA relationships should be renegotiated, amended or terminated.² And sometimes, focus is given to codifying IIA concepts into national laws.

- **Canada** continuously updates its IIA policy on the basis of emerging issues and arbitral decisions in ISDS cases. Efforts resulted in a new model BIT in 2004 and its periodical updates for the purposes of IIA negotiations ever since. Recent Canadian IIAs contain clarifications of the standards of protection involved, including the meaning of indirect expropriation, FET, full protection and security, as well as a general exceptions clause and a refined ISDS mechanism, providing *inter alia* for transparency of the proceedings. They typically also include express provisions on labour and environmental protection as well as CSR.
- **The Netherlands** has recently been engaged in a review of its international investment policy engagement. The Ministry of Foreign Affairs requested expert studies on the issue (including one by UNCTAD, providing an overview of treaty-based ISDS cases brought under Dutch IIAs).³ The review led to a decision by the Ministry to revise the current portfolio of Dutch IIAs, subject to consultations with concerned stakeholders and subject to authorization of the European Commission. The update is expected to align the model with the European Union negotiating proposals for the Transatlantic Trade and Investment Partnership (TTIP), e.g. excluding “mailbox” companies from the scope of the BIT and providing for transparency in the context of investment dispute settlement, according to the United Nations Commission on International Trade Law (UNCITRAL) Transparency Rules.

- **South Africa** initiated a review of its international investment policy in 2008. Consultations involving a wide range of stakeholders took place over a three-year period. The review identified a range of concerns associated with BITs, notably the broadly drafted standards of protection and the risk of investment disputes. The review led to a decision by the South African cabinet in 2010 to develop a new investment bill to codify investment protection provisions into domestic law, to terminate BITs and offer partners the possibility of renegotiating their IIAs and, to refrain from entering into BITs in the future, unless there are compelling economic and political reasons for doing so. The Promotion and Protection of Investment Bill was published in 2013 for public comment and was passed by the National Assembly in 2015. The new Act includes important investment protection commitments while preserving the right of South Africa to pursue legitimate public policy objectives.
- **Switzerland** regularly updates its BIT model provisions (last update 2012). In February 2015 an interdepartmental working group took up its work to review provisions where necessary. The focus of their work lies on protection standards, the right to regulate as well as ISDS procedures. Ongoing discussions and developments in relevant international organizations (UNCTAD, the Organisation for Economic Co-operation and Development (OECD), the International Centre for Settlement of Investment Disputes (ICSID) and UNCITRAL) are taken into consideration. The conclusion of the work is foreseen for mid-2016.

2.2. Bilateral Level

Bilateral reform actions include joint IIA consultations and plans for a joint course of action. They can result in joint interpretations, renegotiations/amendments or consensual terminations of the Parties' current IIAs and in the conclusion of new treaties.

- Joint Interpretation.* As the “masters of the treaties”, the Parties to an IIA can and have used joint interpretative statements on an existing treaty (e.g. in the form of memoranda of understanding). Moreover, several recent IIAs include express provisions on the power of States to issue joint binding interpretations on all or specific provisions of the treaty in question (Trans-Pacific Partnership (TTP) Agreement (2016); The Comprehensive Trade and Economic Agreement (CETA) (draft); Australia-China FTA (2015); Australia-Republic of Korea FTA (2014); Canada-Serbia BIT (2014); Mexico-Panama FTA (2014)).
- Treaty Amendments or Renegotiations.* Since 2012 (date of launch of UNCTAD's Policy Framework), at least 19 new IIAs replaced (or will replace upon entry into force) existing treaties, constituting some 20 per cent of IIAs that

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