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Policy options for IIA reform: treaty examples and data

Supplementary material to World Investment Report 2015

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Introduction

Policy options discussed in Chapter IV "Reforming the International Investment Regime: An Action Menu" of UNCTAD's World Investment Report 2015 are listed below, offering selected treaty examples and, where available, data on the prevalence of the reform option in treaty practice. Sample treaty formulations can also be found in the APEC-UNCTAD Handbook for IIA Negotiators (2012).

Treaty elements are currently limited to those discussed in section IV.B.3(a) of the WIR 2015 and are ordered to match the typical structure of an IIA. This is work-in-progress subject to possible revisions and updating.

Explanatory note

Treaty examples include those from (i) IIAs concluded to date (regardless of whether they have entered into force), (ii) draft IIAs, and (iii) model IIAs. Within the group of concluded IIAs, examples appear in reverse chronological order.

Preliminary data on the prevalence of reform options is provided where available. It is based on the mapping of IIAs by law students from universities worldwide, with general guidance from UNCTAD and under the supervision of law professors. While every effort has been made to ensure accuracy, it cannot be guaranteed.

The large treaty sample consists of 868 IIAs (BITs and "other IIAs") signed between 1962 and 2011, by countries of different levels of development and located in different regions of the world. The small sample ("recent IIAs") consists of all 61 IIAs signed between 2012 and 2014, for which texts are available as of mid-May 2015. Draft treaties and model treaties have not been taken into account when calculating percentages. All available treaty texts can be found in UNCTAD's IIA Database.

Disclaimer

The underlying analysis of treaty provisions is not exhaustive or official, does not affect the rights and obligations of the contracting parties and is not intended to provide any authoritative or official legal interpretation.

Options for IIA reform: Preamble

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
Include public policy interests as treaty objectives Clarify that the IIA is not only about investment protection and promotion, but also is intended to serve other public policy interests, such as sustainable development, job creation, technology and know-how transfer.	1.1.1	• Japan-Mongolia EPA (2015), Preamble • Costa Rica-EFTA-Panama FTA (2013), Preamble • Canada-Honduras FTA (2013), Preamble • SADC Model BIT (2012), Preamble	• 67% (41 IIAs)	• 11% (92 IIAs)
Clarify that the treaty is not intended to override national development objectives and the State's right to regulate in the public interest (for legitimate policy objectives such as public health, safety, environment, public morals, cultural diversity).	1.1.2	• New Zealand-Taiwan Province of China ECA (2013), Preamble • Colombia-EFTA FTA (2008), Preamble • India-Singapore CECA (2005), Preamble • SADC Model BIT (2012), Preamble	• 11% (7 IIAs)	• 0% (3 IIAs)
Clarify that the treaty is understood to be in line with Parties' obligations under international law in other areas For example, state that the treaty is meant to be in line with the parties' other international obligations (e.g. treaties on human rights, environment, cultural heritage), and that the parties should not derogate from such obligations in order to promote and protect investment.	1.1.3	• Canada-Honduras FTA (2013), Preamble • Pakistan-Turkey BIT (2012), Preamble • Rwanda-United States BIT (2008), Preamble	• 21% (13 IIAs)	• No data

Options for IIA reform: Definition of covered investment

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
Require investment to fulfill specific characteristics Treaty practice has converged on a number of such characteristics, notably, the commitment of capital, the expectation of profit and the assumption of risk. Some IIAs include further criteria, e.g. "a certain duration" or "establishing lasting economic relations". A policy debate is under way as to whether an investment's positive contribution to (sustainable) development should constitute an additional criterion, and what indicators to use in this regard.	2.1.2	• Eurasian Economic Union – Viet Nam FTA (2015), Article 8.28(a) • Belgium-Luxembourg Economic Union-Colombia BIT (2009), Article I(2.3) • Republic of Korea-United States FTA (2007), Article 11.28 *"A certain duration"* • Canada-EU CETA (draft, 2014), Article X.3 *"Lasting economic relations"* • Nigeria-Turkey BIT (2011), Article 1 *"Contribution to (sustainable) development"* • Egypt-Mauritius BIT (2014), Article 1(1) • Indian Model BIT (draft, 2015), Article 1.2.1	• 31% (20 IIAs)	• 2% (21 IIAs)
Compile an exhaustive list of covered investments and/or expressly exclude specific types of assets[1] (i) Compile an exhaustive list of covered investments or (ii) expressly exclude specific types of assets. Examples of assets that could be considered for exclusion are short-term, speculative or portfolio investments; sovereign debt obligations; claims to money arising from commercial contracts; or intellectual property rights that are not protected under the host State's law.	2.1.1	(i) • Mexico-Panama FTA (2014), Article 10.1 • Canada-Honduras FTA (2013), Article 10.1 • Belarus-Mexico BIT (2008), Article 1(5) (ii) • Kuwait-Turkey BIT (2010), Article 1(1) • Colombia-UK BIT (2010), Article I(2) • CAFTA-DR FTA (2004), Article 10.28	(i) • 3% (2 IIAs) (ii) • 48% (29 IIAs)	(i) • 1% (5 IIAs) (ii) • 5% (47 IIAs)
Adopt a narrow, enterprise-based definition Only enterprises owned or controlled by investor are covered investments (i.e. no other types of assets are included in the	New option	• Indian Model BIT (draft, 2015), Articles 1.2 and 1.6	• No data	• No data

[1] In some IIAs, the nature of the list (indicative or exhaustive) is not clear and may be subject to diverging views and interpretations.

Options for IIA reform: Definition of covered investment

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
definition).				
Include a legality requirement (compliance with domestic laws) Specify that investment must be made in accordance with the laws and regulations of the host State.	2.1.2	• Egypt-Mauritius BIT (2014), Article 1(1) • Algeria-Serbia BIT (2012), Article 1(1) • ASEAN Comprehensive Investment Agreement (2009), Article 4(a) • Canada-Romania BIT (2009), Article 1(g)	• 38% (23 IIAs)	• 65% (560 IIAs)

Options for IIA reform: Definition of covered investors

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
Include criteria additional to the "incorporation" requirement for companies, e.g. require a company to also have its "seat" and engage in "real/substantial business" activities in the home State	2.2.1	• Canada-EU CETA (draft, 2014), Article X.3	• 28% (17 IIAs)	• 15% (129 IIAs)
Include a "denial of benefits" (DoB) clause Allow States to deny treaty benefits to (i)"mailbox" companies (which are identified using the criteria of "substantial business activity" and the nationality of the company's ultimate controller) and/or (ii) investors ultimately controlled by persons from countries that have no diplomatic relations with the host State and/or from countries under economic embargo. When designing a DoB clause, attention needs to be given to the time when the clause can be invoked.	2.2.2	*With DoB clause* • Japan-Kazakhstan BIT (2014), Article 25 • ASEAN Comprehensive Investment Agreement (2009), Article 19 • China-Peru FTA (2009), Article 137 • Canada-Colombia FTA (2008), Article 814 *Specifying that the DoB clause can also be invoked once ISDS proceeding have started* • Azerbaijan-Croatia BIT (2007), Article 12(1) • Indian Model BIT (draft, 2015), Article 20	*With DoB clause* • 59% (36 IIAs) *Related to substantive business operations* • 57% (35 IIAs) *Related to diplomatic relations or under economic embargo* • 31% (19 IIAs)	*With DoB clause* • 8% (66 IIAs) *Related to substantive business operations* • 6% (55 IIAs) *Related to diplomatic relations or under economic embargo* • 4% (34 IIAs)
Exclude individuals with dual nationality (one of which is that of the host State)	2.2.1	• Egypt-Mauritius BIT (2014), Article 1(3) • Israel-Myanmar BIT (2014), Article 1(1)(d) • Colombia-Panama FTA (2013), Article 14.37	• 21% (13 IIAs)	• 5% (44 IIAs)

Options for IIA reform: Scope of the treaty

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
Exclude specific sensitive sectors and/or industries from treaty coverage Sensitive industries may include social sectors (e.g. education, health, the provision of water), cultural industries, defence and others. Exclusion can be full (from all treaty obligations) or partial (from some obligations only).	2.3.2	• Colombia-Republic of Korea FTA (2013), Article 8.1(4-5) • ASEAN-China Investment Agreement (2009), Article 3(4)(d-e)	• No data	• No data
Exclude specific policy areas from treaty coverage Excluded policy areas may include taxation, subsidies/grants, government procurement, issues related to the restructuring of sovereign debt and others. Exclusion can be full (from all treaty obligations) or partial (from some obligations only).	2.3.1	• Japan-Mozambique BIT (2013), Article 22 • Belgium and Luxembourg-Colombia BIT (2009), Article II(4) • India-Republic of Korea CEPA (2009), Article 10.2(8)	• 62% (38 IIAs)	• 12% (107 IIAs)

Options for IIA reform: National treatment (NT)

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
Clarify that the NT standard applies only to investors/investments "in like circumstances" (i) Clarify that the NT standard applies only to investors/investments "in like circumstances", and (ii) consider setting out criteria for determining whether investors/investments are in "like circumstances".	4.1.0	(i) • Canada-China BIT (2012), Article 6(1-2) • Azerbaijan-Croatia BIT (2007), Article 4(2) (ii) • ASEAN-India Investment Agreement (2014), Article 3(4) • COMESA Investment Agreement (2007), Article 17(2) • Indian Model BIT (draft, 2015), Article 4	(i) • 77% (47 IIAs) (ii) • No data	(i) • 14% (122 IIAs) (ii) • No data
Allow for carve-outs or country-specific reservations Carve out from the NT obligation certain sectors or industries or certain policy measures through a general carve-out (applicable to both parties) or through country-specific reservations.	4.1.1 4.1.2	• Canada-Nigeria BIT (2014), Article 17, Annex I • China-Peru FTA (2009), Article 129(3), Article 130 • Rwanda-United States BIT (2008), Article 14, Annex I to III	• 59% (36 IIAs)	• No data
[illegible]	[illegible]	[illegible]	• No data	• No data
[illegible]	[illegible]	[illegible]	• 0% (0 IIAs)	• 17% (146 IIAs)