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TRENDS IN THE INVESTMENT TREATY REGIME AND A REFORM TOOLBOX FOR THE ENERGY TRANSITION

HIGHLIGHTS

- Work to reform the international investment agreement (IIA) regime continued in 2022–2023. This included new types of investment-related agreements, the termination of existing bilateral investment treaties and ongoing multilateral discussions on reforming investor–State dispute settlement mechanisms.
- For the third consecutive year, treaty terminations exceeded new IIAs. This brought the IIA universe to 3,265 treaties, of which 2,584 are in force.
- In 2022 claimants filed 46 new ISDS cases under IIAs, bringing the total count of publicly known cases to 1,257. Most new ISDS cases were brought under old-generation IIAs.
- The landscape is still largely dominated by old-generation IIAs, which are characterized by inconsistencies with the global sustainability imperative and can hinder governments' policy space to implement measures needed for the energy transition. This makes reforming the IIA regime even more urgent.
- UNCTAD developed an IIA toolbox for the promotion of sustainable energy investment. The objective is to transform IIAs into instruments that actively support the energy transition.

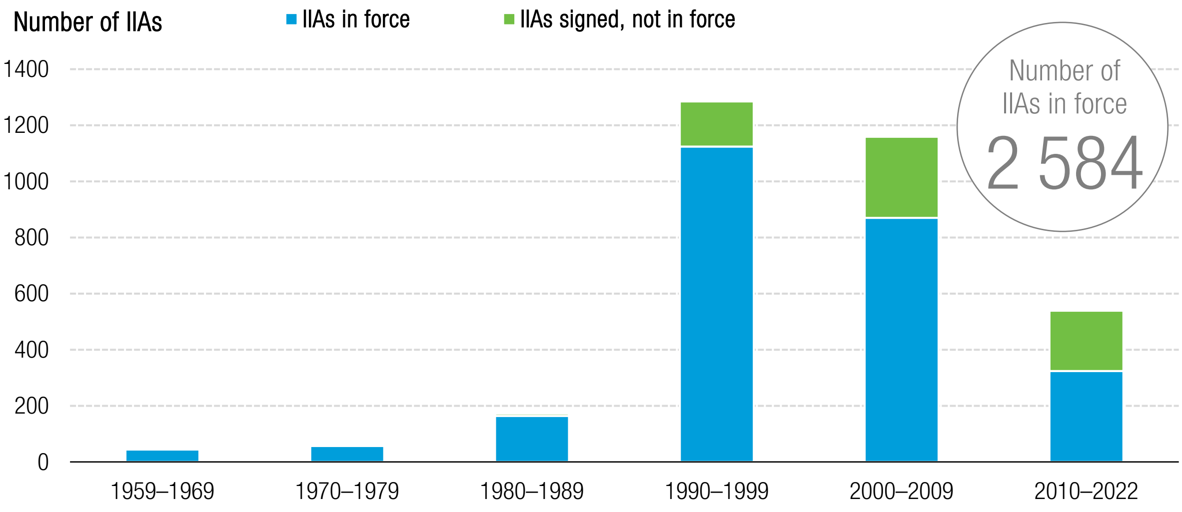
1. Trends in IIAs: new treaties and other policy developments

Several notable developments in 2022 continued the reform of international investment agreements (IIA) regime at the bilateral, regional and multilateral levels. These include new types of investment-related agreements, the termination of bilateral investment treaties (BITs) and continued multilateral discussions on the reform of investor–State dispute settlement (ISDS) mechanisms.

a. Developments in the conclusion and termination of IIAs

In 2022, countries concluded at least 15 new IIAs: 10 BITs and 5 treaties with investment provisions (TIPs). This brought the size of the IIA universe to 3,265 (2,830 BITs and 435 TIPs).[1] In addition, at least 17 IIAs entered into force in 2022, bringing the total of IIAs in force to at least 2,584 by the end of the year (figure 1). The network of IIAs currently in force is complex and largely dominated by old-generation IIAs (figure 2).

Figure 1. Stock of IIAs signed and in force, 1959–2022 (By date of signature)



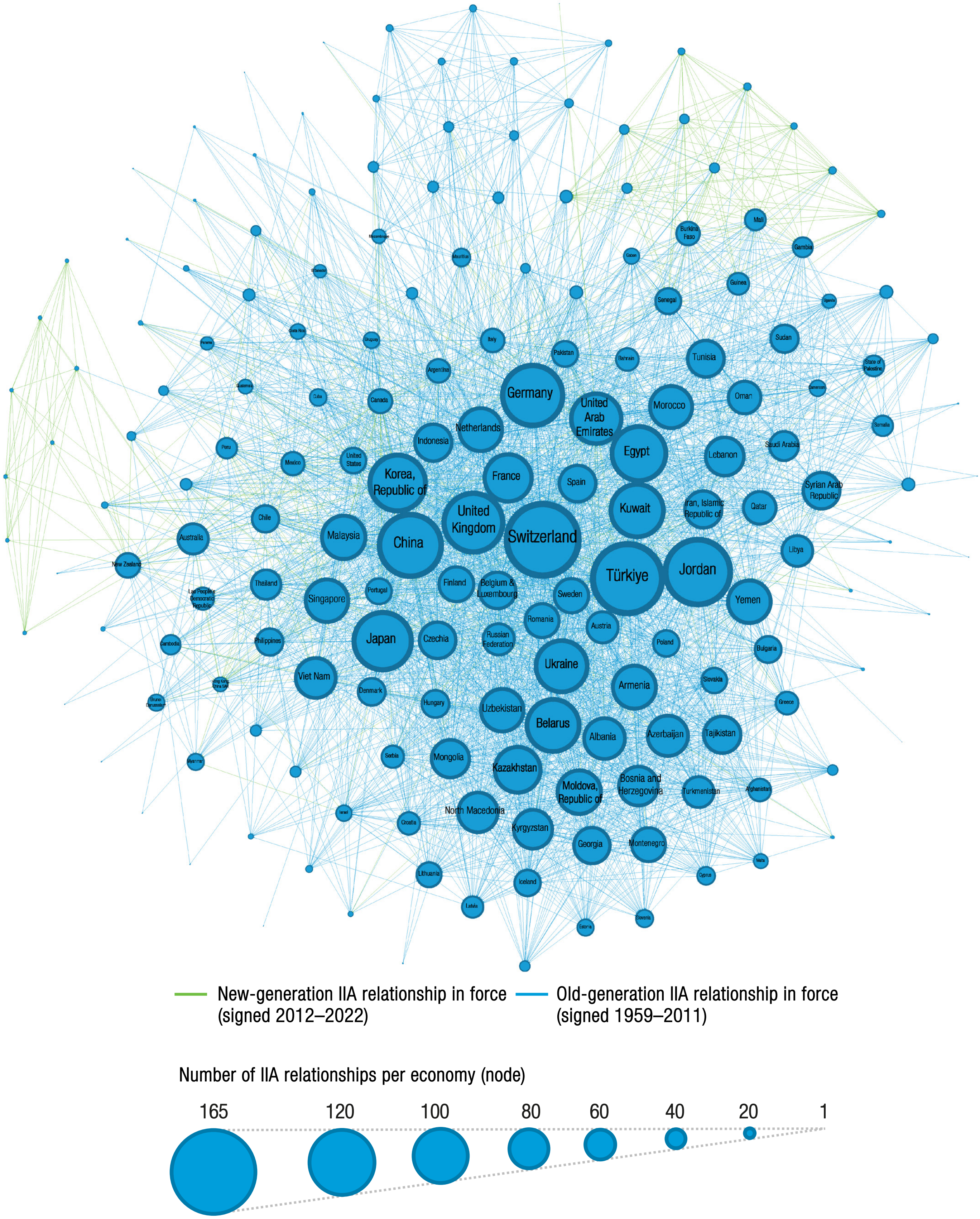
Source: UNCTAD, IIA Navigator.
Note: The figure does not include IIAs that were effectively terminated.

The IIAs currently in force create a network of more than 4,400 bilateral IIA relationships between pairs of economies. Close to a third of them overlap with at least one other IIA between the same economies. Over 88 per cent of IIA relationships are based on IIAs signed before 2012, and the IIA networks of all but eight economies contain such old-generation IIAs. In addition, at least 40 per cent of the relationships created by new-generation IIAs coexist with an earlier one between the same economies. This is the case also for the majority of relationships created by megaregional agreements such as the Regional Comprehensive Economic Partnership (2020) and the Comprehensive and Progressive Agreement for Trans-Pacific Partnership (2018) (UNCTAD, 2019).

The number of terminations in 2022 exceeded the number of newly concluded IIAs: At least 58 IIAs were effectively terminated, of which 54 were by mutual consent, 1 was unilateral and 3 were replacements (through the entry into force of a newer treaty). Most terminations by mutual consent were based on the agreement to terminate intra-EU BITs, which became effective in 2022 among all 23 EU Member States that had signed it.[2] By the end of the year, the total number of effective terminations reached at least 569, with about 70 per cent of IIAs terminated in the last decade (figure 4).

[1] The total number of IIAs is revised in an ongoing manner as a result of retroactive adjustments to UNCTAD's IIA Navigator.
[2] For more information on this agreement, see https://finance.ec.europa.eu/publications/eu-member-states-sign- agreement-termination-intra-eu-bilateral-investment-treaties_en.

Figure 2. Network of old-generation and new-generation IIAs, 1959–2022 (Bilateral IIA relationships)



Source: UNCTAD, IIA Navigator; data visualization through Gephi (https://gephi.org).
Note: Based on IIAs in force, not including "framework agreements" that lack substantive investment provisions or agreements with limited investment-related provisions. The IIA relationships of Belgium and Luxembourg and of Switzerland and Liechtenstein have been counted only once. IIAs between member States of a country grouping and an external partner have been considered not to create intracountry grouping effects unless the IIA text explicitly clarifies it to have such effects.

The TIPs signed in 2022 can be grouped into two categories:

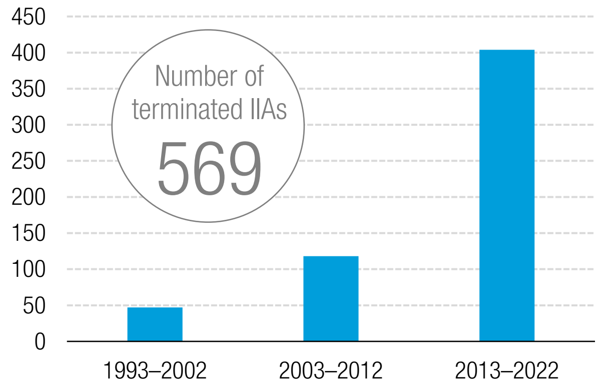
1. Agreements with obligations commonly found in BITs, such as substantive standards of investment protection:
   - New Zealand–United Kingdom FTA
   - Pacific Alliance (Chile, Colombia, Peru)–Singapore FTA

2. Agreements with limited investment provisions (e.g. market access, national treatment (NT) and most-favoured-nation treatment (MFN) with respect to commercial presence, investment promotion, facilitation and cooperation):
   - Australia–India Economic Cooperation and Trade Agreement
   - India–United Arab Emirates Comprehensive Economic Partnership Agreement
   - Indonesia–United Arab Emirates Comprehensive Economic Partnership Agreement

IIAs signed since 2020 feature many reformed provisions aimed at safeguarding States' right to regulate and reforming ISDS (figure 5). In light of emerging interpretations of reformed provisions in investment treaty arbitration cases, it remains to be seen whether they are sufficiently robust to support and not hinder countries' implementation of legitimate measures and their efforts towards achieving the SDGs. In addition, hortatory references to the protection of broader policy goals or sustainable development in the treaty preamble continue to be the most common reform feature (96 per cent of surveyed IIAs), despite their limited effect. Only a minority of new-generation IIAs address other important areas of IIA reform. Less than half of the IIAs reviewed contain proactive provisions that promote and facilitate investment and only 13 per cent include investor obligations.

The problems arising from the limited depth of these reforms are compounded by the fact that most recent IIAs continue to bind countries for long periods, with an initial period of validity of 10 years or more, automatic renewal and a survival clause. This can limit countries' ability to adapt to changing economic realities and new regulatory imperatives, such as the urgency of addressing climate change and other global challenges.

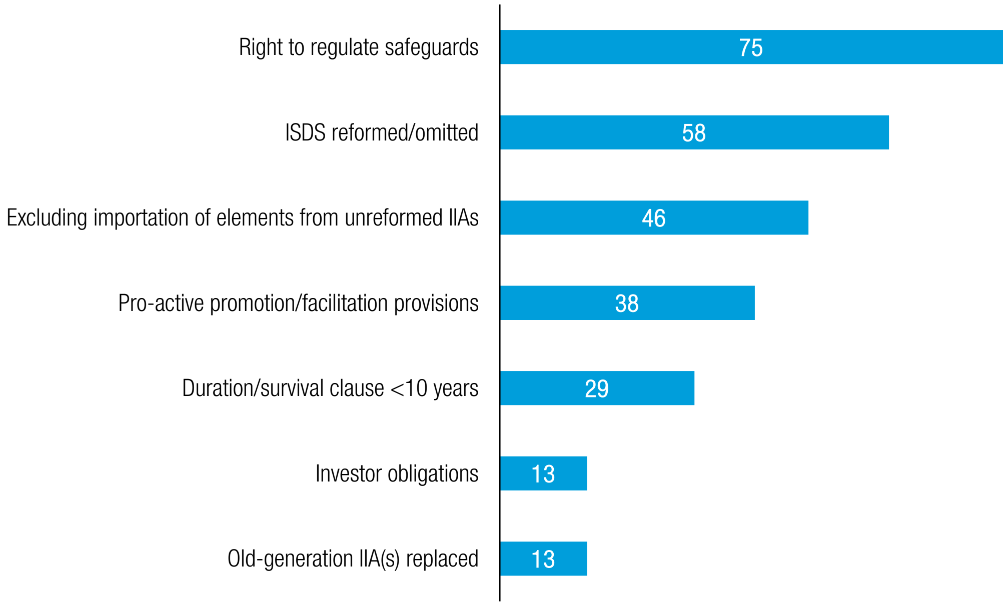
Figure 4. Number of terminated IIAs, 1993–2022 (By date of effective termination)



Source: UNCTAD, IIA Navigator.

New-generation IIAs also continue to exist in parallel with older IIAs (see figure 3), highlighting the importance of expediting the modernization and consolidation of the existing stock of treaties through amendment, replacement or termination. Few of the IIAs signed since 2020 replace an earlier treaty or ensure that the reformed provisions they contain would be effectively applied (where parallel old-generation IIAs exist).

Figure 5. Prevalence of selected reform features in recent IIAs, 2020–2023 (Per cent of IIAs)



Selected features of IIAs

Right to regulate safeguards. Reforms language of the majority of key substantive IIA provisions, as defined in UNCTAD's IIA Reform Accelerator, including those most often invoked in ISDS.[a]

Duration/survival clause <10 years. Provides for initial duration of validity and survival clause of fewer than 10 years or omits them.

ISDS reformed. Contains procedural improvements or limits the access to ISDS for certain types of claims or omits ISDS altogether.

Investor obligations. Contains obligations applicable to investors, such as responsible business behaviour, avoiding corruption, environmental management and the like.

Excluding importation of elements from unreformed IIAs. Excludes application of most-favoured-nation and non-derogation provisions to obligations in other IIAs.

Old-generation IIA(s) replaced. Provides for the termination or suspension of at least one IIA upon entry into force.

Proactive promotion/facilitation provisions. Includes specific commitments such as transparency and regulatory coherence.

Source: UNCTAD.
Note: Based on 24 IIAs concluded in 2020–2023 for which texts are available, not including "framework agreements" that lack substantive investment provisions or agreements with limited investment-related provisions.
[a] For this category, IIAs are counted that contain reform language for at least five key substantive IIA provisions, including at least a circumscribed fair and equitable treatment standard and a clarified indirect expropriation clause, or a general exceptions clause alongside other reformed clauses, in line with UNCTAD's IIA Reform Accelerator (UNCTAD, 2020a).

b. Other developments relating to investment rulemaking

The year was marked by the conclusion of negotiations of several investment governance instruments that contain proactive investment facilitation features and pay greater attention to responsible investment and to the right of host States to regulate in the public interest. African Heads of State and Government adopted the African Continental Free Trade Area (AfCFTA) Investment Protocol, recognizing UNCTAD's work on IIA reform in its preamble. At the same time, plurilateral efforts to amend the ECT appeared to reach a stalemate, highlighting the difficulty of reforming the existing stock of IIAs (table 1).

Table 1. IIA negotiations and new investment-related instruments

	IIA negotiations and amendments
AfCFTA Investment Protocol[a]	• The draft Investment Protocol was adopted by the Heads of State and Government during the Assembly of the African Union in February 2023. Negotiations on the Investment Dispute Settlement Annex to the Protocol are ongoing. • The Investment Protocol - Contains reformed provisions aimed at promoting, facilitating and protecting intra-African investment that fosters sustainable development while safeguarding the State Parties' right to regulate. - Recognizes UNCTAD's work on IIA reform in its preamble. • UNCTAD is a member of the task force assisting the AfCFTA Secretariat in the negotiations of the Investment Protocol and the Investment Dispute Settlement Annex.
Angola–EU Sustainable Investment Facilitation Agreement[b]	• Negotiations concluded in November 2022. • The agreement aims at rendering investment - Easier (e.g. by simplifying investment authorization procedures, fostering e-government and establishing focal points and stakeholder consultations). - More sustainable (e.g. by implementing international labour and environmental agreements and strengthening bilateral cooperation on investment-related aspects of climate change and gender equality policies).
ECT developments[c]	• The Contracting Parties' vote on adopting the agreement on the modernization of the ECT (agreed upon in principle on 24 June 2022) was postponed to 2023. • In November 2022, the European Parliament adopted a resolution calling for a coordinated withdrawal from the ECT by the EU and its Member States. • In December 2022, France, Germany and Poland formally notified their withdrawal from the ECT.[d]
	New investment-related instruments
Australia–Singapore Green Economy Agreement[e]	• The agreement was signed on 18 October 2022. • The agreement - Is a non-binding flexible instrument that excludes dispute settlement. - Seeks to foster common rules and standards specific to trade and investment in green goods, services and technologies. - Comprises Government-to-Government commitments and cooperative projects across a broad range of policy areas.
MERCOSUR Agreement on the Prevention	• The agreement was signed on 6 July 2022. • The agreement - Affirms the contracting States' commitments to prevent and combat corruption in international trade and investment. - Provides for the adoption of legislative and other measures as may be necessary.

Source: UNCTAD, based on various sources.

AfCFTA = African Continental Free Trade Area, ECT = Energy Charter Treaty, MERCOSUR = Southern Common Market.
[a] African Union, "Opening of the 36th Ordinary Session of The Assembly of the African Union", 18 February 2023, https://au.int/en/summit/36. For more information, see resolutions at https://au.int/en/decisions/decisions-declarations-and-resolution-thirty-six-ordinary-session-assembly-union.
[b] For more information on this agreement, see https://ec.europa.eu/commission/presscorner/detail/en/IP_22_6136.
[c] See also https://www.energychartertreaty.org/modernisation-of-the-treaty.
[d] Energy Charter Treaty, "Written notifications of withdrawal from the Energy Charter Treaty", 22 March 2023, https://www.energycharter.org/media/all-news.
[e] For more information on this agreement, see https://www.dfat.gov.au/geo/singapore/singapore-australia-green-economy-agreement.
[f] For more information on this agreement, see https://www.mercosur.int/firma-de-acuerdos-en-materia-de-reconocimiento-de-titulos-lucha-contra-la-corrupcion-y-comercio.

Several investment policy guidance documents were launched in 2022 that built on UNCTAD's Core Investment Principles and its Investment Policy Framework for Sustainable Development. They provide overarching principles for countries in their efforts to reform their IIA networks in line with sustainable development and climate action objectives, taking into account countries' national development objectives (table 2.

International organizations' work continued on diverse aspects of international investment governance, with advances in negotiations on investment facilitation and first outputs agreed upon for the reform of ISDS (table 3). All these developments and their implications for the IIA regime and climate change will be discussed at the IIA Conference, an inclusive, multi-stakeholder dialogue platform on IIAs and ISDS, during the 2023 World Investment Forum.

Table 2. Investment policy guidance

27th Conference of the Parties of the UNFCCC (COP27)[a] Sharm El Sheikh (Egypt), 6–18 November 2022	• The Sharm El Sheikh Guidebook for Just Financing (2022)[b] was launched through the coordination of the Government of Egypt in partnership with a broad range of stakeholders, including UNCTAD. The Guidebook highlights the need to minimize the risk of climate-action-related ISDS cases and suggests options for IIAs to proactively promote and facilitate investments that are conducive to climate change objectives. • The High-Level Forum on Global Investment and Trade for Climate Transformation (co-organized by UNCTAD and the World Trade Organization) discussed how the international investment and trade regimes can align with the Paris Agreement and how they can facilitate the achievement of climate goals.
IsDB–UNCTAD Non-Binding Guiding Principles for Investment Policies (2022)[c]	• The Islamic Development Bank (IsDB) Group and UNCTAD jointly developed a set of Non-Binding Guiding Principles for Investment Policymaking to support improvement of the investment climate in the IsDB member countries. • The Principles aim at - Promoting inclusive economic growth and sustainable development. - Enhancing coherence in national and international investment policymaking. - Fostering an open, transparent and conducive global policy environment for investment. - Aligning investment promotion and facilitation policies with sustainable development goals.

Source: UNCTAD, based on various sources.

[a] UNFCCC, https://unfccc.int/cop27.
[b] See Sharm El Sheikh Guidebook for Just Financing, https://guidebookforjustfinancing.com.
[c] See Islamic Development Bank–UNCTAD Guiding Principles for Investment Policies, https://investmentpolicy.unctad.org/publications/1276/islamic-development-bank---unctad- guiding-principles-for-investment-policies.

Table 3. Work relating to investment rulemaking at international organizations, 2022–2023

Organization/project	Work progress
Expert Mechanism on the Right to Development, Office of the United Nations High Commissioner for Human Rights[a]	• The fifth and sixth session of the Expert Mechanism took place in 2022; the seventh session took place in April 2023. • Delegates discussed the ongoing study on the "Right to development in international investment law".
International Centre for Settlement of Investment Disputes[b]	• The amended ICSID Arbitration Rules came into effect on 1 July 2022. • The amended rules - Incorporate greater transparency in the conduct and outcome of proceedings. - Contain expedited arbitration rules for parties wishing to shorten further the procedural calendar. - Broaden access to ICSID's procedural rules and administrative services.

Table 3.	Work relating to investment rulemaking at international organizations, 2022–2023
Investment Facilitation for Development, World Trade Organization[c]	• On 16 December 2022, the draft Investment Facilitation for Development Agreement was circulated to all participating members. A finalized text is expected to be reached by mid-2023. • In February 2023, Türkiye announced it is taking a "reflection pause" from the process, while continuing to observe the negotiations at the World Trade Organization. • A Working Group of international organizations that work on investment facilitation, including UNCTAD, was established in February 2022 to develop a Self-Assessment Guide to help developing and least developed countries assess their needs in terms of implementing the future agreement.
OECD Work Programme on the Future of Investment Treaties[d]	• Track 1 of the programme, considering challenges facing future IIAs and changes to the current treaty regime, in particular in relation to climate change, advanced through two conferences held in May 2022 and April 2023. • Track 2 of the programme, discussing the possible modernization of provisions found in old-generation IIAs, advanced through meetings held in April and November 2022.
Open-Ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights[e]	• Two sessions were convened in 2022 to discuss the third revised draft of the legally binding instrument, which aims to ensure that - New investment agreements be compatible with countries' human rights obligations. - Existing investment agreements be interpreted and implemented in a manner that does not affect countries' ability to fulfill their human rights obligations.
Organisation of Islamic Cooperation Intergovernmental Experts Group on ISDS[f]	• The first Organisation of Islamic Cooperation intergovernmental expert meeting on the establishment of a permanent mechanism for the settlement of investment disputes (under Article 17 of the OIC Agreement) took place in October 2022 in Casablanca, Morocco. • Delegates benefited from inputs from Member countries, UNCTAD and external experts.
UNCITRAL Working Group III[g]	• UNCITRAL Working Group III held four sessions on investor–State dispute settlement reform in the reporting period. • At the 45th Session held in March 2023, delegates agreed on draft provisions on mediation and on a draft code of conduct for arbitrators and judges. • The 46th Session is scheduled for October 2023.
UNCTAD	• Developed guiding principles on investment policymaking for sustainable development that benefit 57 countries. • Delivered technical assistance and capacity building to 159 countries and advisory services to 88 countries. • Provided backstopping support and technical assistance as part of the task force working with the AfCFTA Secretariat on the Investment Protocol. • At the 8th World Investment Forum, scheduled for 16–20 October 2023 (Abu Dhabi, United Arab Emirates), the IIA High-Level Conference will - Discuss the implications of the IIA regime for climate change action. - Offer a global multi-stakeholder platform for high-level discussions and action on investment policymaking.

Source: UNCTAD, based on various sources.

[a] Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/en/hrc-subsidiaries/expert-mechanism-on-right-to-development.
[b] International Center for Settlement of Investment Disputes, https://icsid.worldbank.org/resources/rules-amendments.
[c] World Trade Organization, https://www.wto.org/english/tratop_e/invfac_public_e/invfac_e.htm.
[d] Organisation for Economic Co-operation and Development, https://www.oecd.org/investment/investment-policy/investment-treaties.htm.
[e] Office of the United Nations High Commissioner for Human Rights, https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc.
[f] Islamic Center for Development of Trade, https://icdt-cidc.org/meeting-the-oic-intergovernmental-experts-group-on-the-establishment-of-a-permanent-organ-mechanism-for-the-settlement-on-investment-disputes.
[g] United Nations Commission on International Trade Law, https://uncitral.un.org/en/working_groups/3/investor-state.

2. Trends in ISDS: new cases and outcomes

As of 1 January 2023, the total number of publicly known ISDS claims had reached 1,257. To date, 132 countries and one economic grouping are known to have been respondents to one or more ISDS claims.

a. New cases initiated in 2022

In 2022 claimants filed 46 new publicly known ISDS cases under IIAs (figure 6), the lowest annual number of known cases since 2010 and significantly below the 10-year average of 75 cases per year (2012–2021). As some arbitrations can be kept confidential, the actual number of disputes filed in 2022 (and previous years) is likely higher.[3]

(i) Respondent States

The new ISDS cases in 2022 were initiated against 32 countries. Mexico, Romania, Slovenia and the Bolivarian Republic of Venezuela were the most frequent respondents, with three new known cases each. Two countries – Portugal and Sweden – faced their first known ISDS claims. As in previous years, the majority of new cases (about 65 per cent) were brought against developing countries.

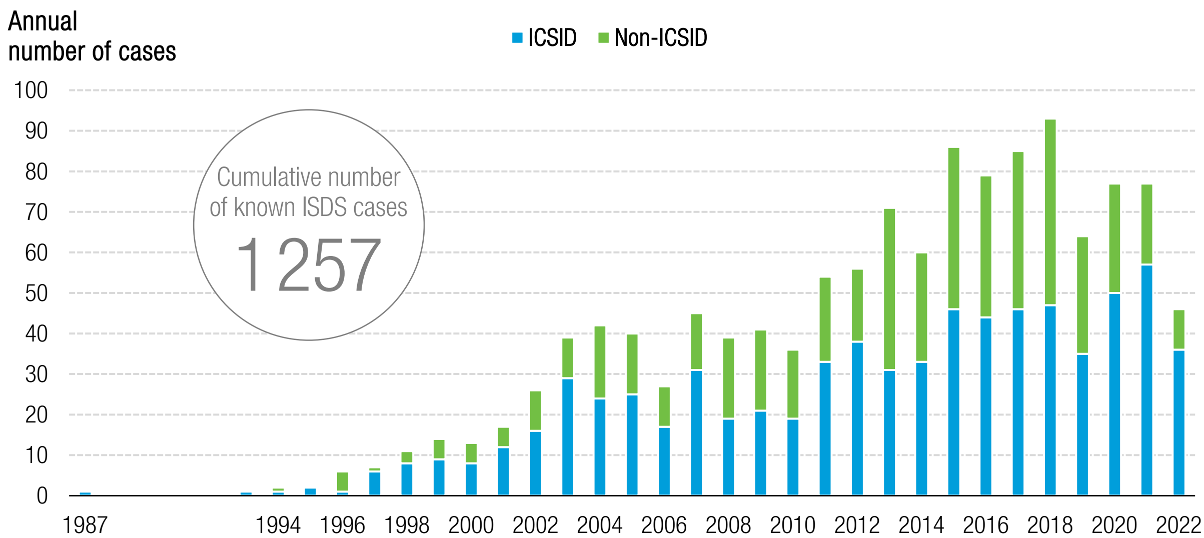
(ii) Claimant home States

Developed-country claimants brought most – about 65 per cent – of the 46 known cases in 2022. The highest numbers of cases were brought by developed-country claimants from the United States (eight), the Netherlands (five) and the United Kingdom (four). Four cases were brought by claimants from China. Between 1987 and 2022, claimants from five countries – the United States, the Netherlands, the United Kingdom, Germany and Spain – initiated about 45 per cent of the 1,257 known ISDS cases.

(iii) Applicable investment treaties

About 80 per cent of investment arbitrations in 2022 were brought under BITs and TIPs signed in the 1990s or earlier. The ECT (1994) was the IIA invoked most frequently in 2022, with 10 cases, followed by NAFTA (1992), the Netherlands–Bolivarian Republic of Venezuela BIT (1992) and the Panama–United States BIT (1982) with two cases each.[4] Between 1987 and 2022, about 20 per cent of the 1,257 known ISDS cases have invoked either the ECT (157 cases) or NAFTA (79 cases).

Figure 6. Trends in known treaty-based ISDS cases, 1987–2022



Source: UNCTAD, ISDS Navigator.
Note: Information has been compiled from public sources, including specialized reporting services. UNCTAD's statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continually adjusted as a result of verification processes and may not match exactly case numbers reported in previous years.

[3] On the basis of newly revealed information, the numbers of known cases for 2020 and 2021 were adjusted to 77 each.
[4] Under Annex 14-C of the USMCA, parties consent to the submission of so-called "legacy investment claims" under NAFTA until three years after the termination of NAFTA, i.e. 1 July 2023.

b. ISDS outcomes

(i) Decisions and outcomes in 2022

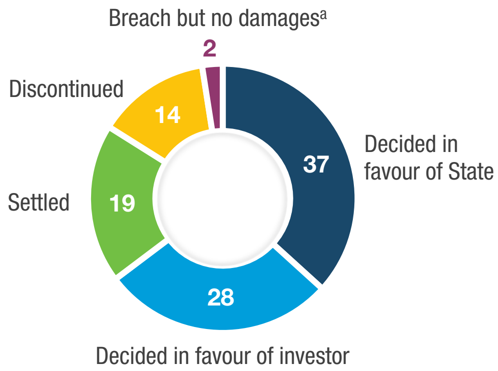
In 2022, ISDS tribunals rendered at least 44 substantive decisions in investor–State disputes, 25 of which were in the public domain at the time of writing. Ten of the public decisions principally addressed jurisdictional issues (including preliminary objections), and the tribunals declined jurisdiction in all of them. The remaining 15 public decisions were rendered on the merits, with 12 holding the State liable for IIA breaches and 3 dismissing all investor claims.

In addition, eight publicly known decisions were rendered in annulment proceedings at the International Centre for Settlement of Investment Disputes (ICSID). Ad hoc committees of the ICSID rejected the applications for annulment in all of them.

(ii) Overall outcomes

By the end of 2022, at least 890 ISDS proceedings had been concluded. The relative share of case outcomes changed only slightly from that in previous years (figure 7).

Figure 7. Results of concluded ISDS cases, 1987–2022 (Per cent)



Source: UNCTAD, ISDS Navigator.
[a] Decided in favour of neither party (liability found but no damages awarded).

3. International investment agreements and sustainable energy investment

The energy transition adds to the urgency of reform of international investment governance. Most IIAs do not include proactive investment promotion and facilitation provisions that support low-carbon investment. UNCTAD has developed a toolbox for transforming IIAs into instruments that are conducive to the energy transition.

a. The IIA regime and sustainable energy investment

Existing old-generation IIAs are insufficiently attuned to ensure an effective energy transition from high- to low-carbon economies. New IIAs fare relatively better by safeguarding States' right to regulate but remain weak in incorporating specific provisions relevant to sustainable energy investment and the energy transition.

(i) Taking stock of IIAs

Some 3,400 IIAs were concluded between 1959 and 2011, representing over 85 per cent of all IIAs ever signed; about 2,300 of these old-generation IIAs are still in force. Typically, they do not contain explicit provisions to preserve States' regulatory space for a sustainable energy transition. Their substantive treatment standards are formulated in broad and vague ways, with few exceptions or safeguards. Such old-generation IIAs serve as the basis for virtually all existing ISDS claims. As old IIAs significantly outnumber more recent ones, it is critical to address the problems and risks they pose (UNCTAD, 2018). The urgency of making an effective energy transition has generated more attention to the need to reform the IIA regime.

In addition to old-generation BITs, the IIAs regime includes plurilateral investment treaties such as the ECT, which governs energy-related investment, trade and transit. The ECT is the most frequently invoked IIA in ISDS cases.

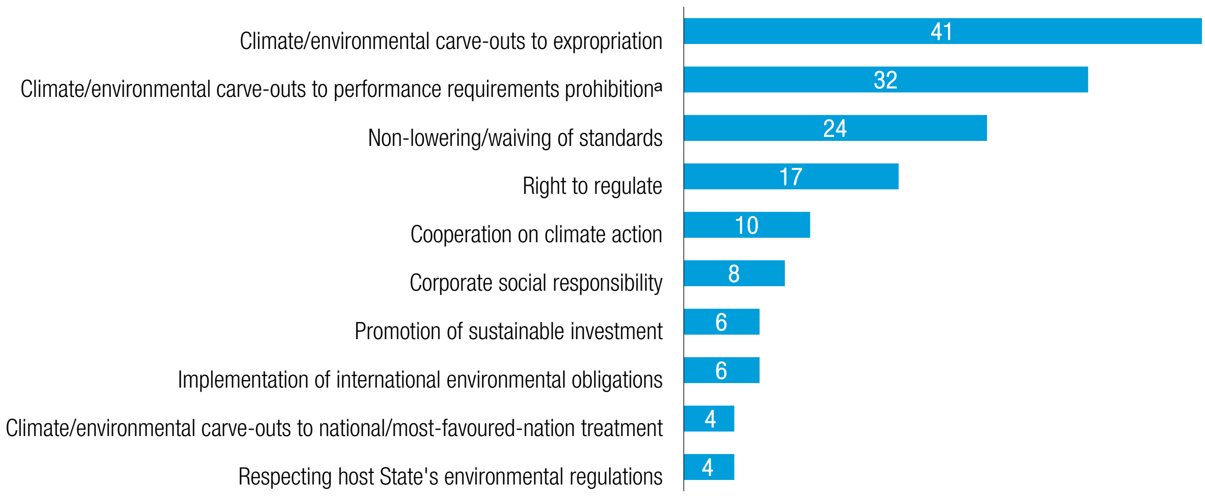
It can amplify existing burdens on countries that are trying to shift from traditional fossil fuel projects to renewable energies. A sustainable energy transition requires a deep and comprehensive reform of the ECT. The ECT's investment protection chapter is undergoing a modernization process that was formally initiated in 2020.

IIAs concluded in the last decade fare slightly better with respect to promoting and facilitating renewable energy investment. They more regularly safeguard States' right to regulate and incorporate specific provisions on the protection of the environment, climate action and sustainable development. They generally contain more circumscribed and clarified substantive provisions, often accompanied by narrower access to ISDS (UNCTAD, 2020b).

Yet, even in recent IIAs, provisions that effectively safeguard regulatory space are still relatively rare (figure 8). It remains to be seen whether more refined provisions in newer IIAs will significantly shield energy transition measures from ISDS claims or prevent investors with high-carbon investment from invoking ISDS to claim compensation.

Much more remains to be done. The reform of existing IIAs is essential to ensure that they do not prevent States from implementing measures aimed at promoting and facilitating sustainable energy investment, including the transition to low-carbon economies. The reform should minimize States' risk of facing ISDS claims related to phasing out investment that is not aligned with sustainable energy production. It should also recognize the rapidly shifting landscape, which requires flexibility in policymakers seeking to attract renewable energy investment.

Figure 8. Prevalence of IIA provisions relevant to the energy transition and climate action, 2012–2022
(Per cent)



Source: UNCTAD.
Note: The survey covered 284 IIAs concluded between 2012 and 2022 for which texts are available. It updates data originally published in UNCTAD (2022b).
[a] The percentage concerns only IIAs that include performance requirements provisions, i.e. 94 of the 284 IIAs analysed.

(ii) Proactive policy measures in IIAs in support of sustainable energy investment

Few new-generation IIAs (mostly broader economic agreements with investment provisions) include matters of relevance to the sustainable energy transition. These matters include general provisions on promoting and facilitating sustainable investment, cooperation on climate action, express recognition of the right to regulate for climate change and implementation of climate action treaties. Such provisions can come in the form of broad preambular references or be more specific in supporting the energy transition.

Old-generation IIAs and even most newer ones continue to lack detailed binding provisions for proactively promoting and facilitating investment and for encouraging the technology transfer needed to switch from high- to low-carbon energy production. Some notable exceptions exist: The AfCFTA Investment Protocol explicitly includes provisions for promoting and facilitating renewable energy investment. The Japan–United Kingdom Comprehensive Economic Partnership Agreement includes provisions facilitating investment of particular relevance to climate change mitigation, such as investment related to renewable energy and energy-efficient goods and services.

The Moldova–United Kingdom Trade and Cooperation Agreement is an example that includes provisions promoting the diffusion of safe and sustainable low-carbon and adaptation technologies.

Similarly, the Investment Cooperation and Facilitation Agreements spearheaded by Brazil as well as the recent Angola–EU Sustainable Investment Facilitation Agreement fare much better in supporting the energy transition. They do not refer to energy investment as such but contain clauses relating to sustainable development, environmental protection, investment promotion and facilitation, as well as corporate social responsibility.

Some new-generation IIAs also include specific procedures and mechanisms to implement States' climate action policies through inter-State cooperation. For example, they establish joint committees, joint dialogues, climate action consultations and panels of experts. The United States–Mexico–Canada Agreement is a case in point.

If IIAs are to be an effective tool to aid countries in the sustainable energy transition, far more is needed. Reliance on the nascent approach of including proactive promotion and facilitation elements for sustainable investment in IIAs needs to be significantly expanded. The same is needed with regard to provisions on corporate social responsibility and technology transfer, including associated know-how that is crucial to supporting a sustainable energy transition.

b. Energy-related ISDS

The 2022 Intergovernmental Panel on Climate Change (IPCC) report highlighted the risks of ISDS being used to challenge climate policies (IPCC, 2022). At this point, it is clear that these risks do not exist only in the abstract. Many IIA-based ISDS cases have related to the energy sector (UNCTAD, 2022c). ISDS cases in two areas are particularly relevant to the sustainable energy transition: (i) fossil fuels and (ii) renewable energy.

Energy-related ISDS cases show that IIAs may raise the costs of adapting energy-related regulatory frameworks in host States. States need flexibility for the necessary regulatory experiments that support the transition to low-carbon economies. While investors seek stability and guarantee of returns, States should not be unduly hindered in phasing out unsustainable investment and experimenting with incentive schemes in the renewable energy sector, including by adopting and later changing or abrogating such schemes.

Fossil fuel investors have been frequent ISDS claimants, initiating over 15 per cent (219) of all known treaty-based cases against different types of State conduct (box 1).

Box 1. Fossil fuel-related ISDS cases based on IIAs

At least 219 IIA-based ISDS cases have been brought in relation to fossil fuels. These arbitral proceedings involve investment in the following economic activities:[a]

- Mining of coal and lignite
- Extraction of crude petroleum and natural gas
- Power generation from coal, oil and gas
- Transportation and storage of fossil fuels

Not all these underlying disputes involved challenges of measures that were related to climate action or the protection of the environment. For example, fossil fuel investors alleged the violation of IIAs with respect to changes in regulatory frameworks applicable to the investment and the denial or revocation of permits on other than environmental grounds. Nonetheless, as fossil fuel investors have frequently resorted to ISDS, they can also be expected to use existing arbitral mechanisms to challenge climate action measures aimed at restricting or phasing out fossil fuels.

A recent high-profile example is the *RWE v. Netherlands* case. The case resulted from the Dutch Government's decision to ban the burning of coal for electricity generation by 2030 in compliance with the country's Paris Agreement commitments. The case is currently pending, with the proceedings being suspended since October 2022. It nevertheless demonstrates the risks that States face when implementing regulations for phasing out fossil fuels.

Source: UNCTAD.

[a] Building on the definition used in IISD (2021), fossil fuel ISDS cases relate to investment activities in the extraction, processing, distribution, supply, transportation and storage of coal, oil and gas, as well as the power generation from these fuels.

In addition to fossil fuel cases, at least 119 ISDS proceedings arose in relation to the renewable energy sector. Many of these cases challenged legislative initiatives involving reductions in feed-in-tariffs for renewable energy production (box 2).

Past ISDS cases related to the sustainable energy transition provide some insights. Investors in both fossil fuels and renewable energy frequently rely on investment arbitration, together accounting for about 25 per cent of total ISDS cases. Moreover, challenges to government conduct take aim at measures undertaken by both developed and developing countries. As in other sectors, the overwhelming majority of energy-related ISDS cases relied on old-generation IIAs.

ISDS is costly. In general, the disputing parties – including the respondent States – incur significant expenditures for the arbitrators' work, the administration of proceedings and legal representation, all of which usually amount to several million dollars or more per case. Spain, for example, the major respondent in the renewable energy cases, is reported to owe €1.2 billion in damages and €101 million in legal and arbitration fees (Mehranvar and Sasmal, 2022). In addition, claimants and respondent States face several years of uncertainty while ISDS proceedings concerning the challenged measures continue.

Box 2. Renewable energy–related ISDS cases based on IIAs

During the last decade, ISDS cases brought by investors in the renewable energy sector have proliferated, totaling at least 119. Many of these cases challenged legislative changes involving reductions in feed-in-tariffs for renewable energy production. The cases primarily concerned investment in solar photovoltaic power generation. A small number related to wind and hydroelectric power. Spain was the respondent State in about 45 per cent of cases, which typically related to the same set of legislative and regulatory measures.

The proceedings mainly concern evolving incentives to promote investment in renewable energy. Unsustainable State expenditures and budget deficits, as well as advances in technology for renewable energy, generally meant that incentives were lowered, prompting challenges by investors.

The vast majority of these cases were initiated on basis of the Energy Charter Treaty (1994) by claimants from developed regions against other developed countries. About 40 per cent of the ISDS cases are currently pending. Among those concluded, about 45 per cent were decided in favour of the investor (with damages awarded), and 35 per cent were decided in favour of the State. The remaining cases have been discontinued, settled or decided in favour of neither party, or the outcome is unknown. Investors in renewable energy cases have, thus, been more successful than the global average for investors in all ISDS cases (28 per cent of all cases have been decided in favour of the investor).

Source: UNCTAD.

c. IIA toolbox for promoting sustainable energy investment

Various options exist to transform IIAs into tools that promote and facilitate sustainable energy investment and climate objectives more generally. IIA reform actions should pursue a dual goal: (i) ensure that all provisions in IIAs appropriately safeguard the right and duty of States to regulate in the public interest, including in areas where frequent regulatory change is necessary such as energy investment, and (ii) enhance the ability of IIAs to positively contribute to the sustainable energy transition. The first goal secures that IIAs do not impede the transition to low-carbon economies. The second goal ensures that they effectively accelerate the transition. In implementing this second goal, attention should be paid to the objective of ensuring access to affordable, reliable, sustainable and modern energy for all (SDG 7).

UNCTAD has developed a toolbox with a focus on four related action areas (table 4). These four areas relate to the promotion and facilitation of sustainable energy investment, technology transfer, the right to regulate for climate action and the energy transition as well as corporate social responsibility. For each action area, different policy options, accompanied by explanations, are indicated. There are synergies between many of these options, and they can all be adopted in IIAs in accordance with countries' national development objectives.

Table 4. IIA toolbox for promoting sustainable energy investment

Action area	Policy options	Explanation
Promoting and facilitating sustainable energy investment	Incorporate IIA provisions that aim at actively promoting and facilitating sustainable energy investment.	Climate action policies will require significant new investment from both the public and the private sectors. Promotion and facilitation of sustainable investment appears only in a small number of existing IIAs. Novel IIA clauses can commit parties to promoting and facilitating investment in low-carbon energy production, including through the removal of obstacles that technologies and services such as renewable energy production may face. Such measures can include, for example, requirements to publish laws and regulations. In addition, parties could commit to implementing facilitation measures such as one-stop shops. Such promotion and facilitation measures do not need to be subject to investor–State arbitration to contribute to the goal of access to energy for all.
	Provide for preferential treatment of sustainable energy investment.	Low-carbon energy investors could benefit from preferential treatment through, for example, the adoption of fast-track procedures for approval of permits or licences. The specific focus on sustainable energy investment lowers the burden on State parties to implement such measures while ensuring an IIA contributes positively to the energy transition. Any preferential treatment granted to sustainable energy investment does not need to be enforceable in investor–State arbitration.
	Establish institutional mechanisms for cooperation on R&D of sustainable technologies.	The transition to a green economy will require investment in R&D, implementation of new technologies and establishment of infrastructure necessary for the sustainable use of such technologies. Treaty parties may want to create mechanisms for continuous cooperation on R&D of sustainable technologies. An IIA could thereby include provisions fostering joint initiatives through, for example, a work programme involving relevant government agencies of the contracting parties and other stakeholders.
	Commit to technical assistance on the adoption of investment facilitation measures for sustainable energy.	In the case of treaty parties that are at different levels of development, one party may want to commit to providing technical assistance in the adoption of investment facilitation measures for sustainable energy production. Home and host States will be the ultimate beneficiaries of such commitments, which aim to ensure access to energy for all.
Technology transfer and diffusion	Encourage transfer of low-carbon and sustainable technologies, including related know-how.	Article 4.1(c) of the United Nations Framework Convention on Climate Change requires States to "[p]romote and cooperate in the development, application and diffusion, including transfer, of technologies". Transfer and diffusion of technology is particularly crucial for energy generation, transmission and distribution in developing countries to ensure access to affordable, reliable, sustainable and modern energy for all (SDG 7). IIAs can serve as a tool to implement this commitment. This can be done by explicitly including provisions on the transfer of low-carbon technologies and related know-how.
	Make efforts to create an enabling environment for receiving technology.	Lack of the necessary physical and legal infrastructure can impede the operationalization of new technologies. The receiving State's efforts to create an enabling environment may be combined with commitments by the other treaty party or parties to provide technical assistance, especially where the treaty parties are at different levels of economic development.

Table 4.	IIA toolbox for promoting sustainable energy investment	
	Allow certain kinds of performance requirements relevant to the energy transition.	The transfer of technology may require flexibility to use certain performance requirements, in line with national development strategies, SDG action plans and international obligations. IIAs that prohibit the imposition of performance requirements can constrain the array of measures available to States to create a conducive environment for the transition to low-carbon energy. For IIAs that do not contain any provision on performance requirements, the way forward may be to continue to not include such provisions or, at a minimum, to ensure that appropriate carve-outs relating to climate action exist.
	Ensure that the protection of IP rights does not unduly impede the diffusion of technology.	Protection of IP rights will be conducive to the energy transition only if it facilitates rather than impedes the diffusion of technology. Unduly restrictive protection may limit achievement of this goal. This means that treaty parties should ensure that all TRIPS flexibilities can effectively be relied upon, including under IIAs and in ISDS cases. If necessary, the parties should consider additional flexibilities.
Right to regulate for climate action and the energy transition	Refine the content of investment protection standards and reform ISDS with regard to energy investments.	Refining the content of investment protection standards and reforming ISDS are the most important reform actions States can undertake. UNCTAD's IIA Reform Accelerator provides model language and reform options for eight of the most relevant IIA clauses (UNCTAD, 2020a). Reformed provisions should define and circumscribe the specific types of State conduct against which sustainable investors and investments are protected. In addition, States may limit or omit ISDS in their IIAs. Measures related to all or certain types of energy investments can be carved out from the treaty or, alternatively, from being challenged in ISDS proceedings. This can be achieved, for example, through a carve-out for fossil fuels, bearing in mind countries' development objectives.
	Acknowledge the need for regulatory flexibility.	The extensive interpretation of IIA clauses, including the arbitral practice of interpreting the fair and equitable treatment clause to protect investor expectations, has proven to add high costs for governments' modification or withdrawal of renewables incentives and entails high risks for the phasing out of high-carbon energy production. Treaty parties should explicitly acknowledge that climate change mitigation and adaptation, including the energy transition, takes place in a rapidly evolving policymaking environment. This implies a greater need for regulatory flexibility, including adjustments to as well as introduction or abrogation of existing rules, regulations and incentive programmes in all relevant areas.
	Include general exceptions related to climate change and the energy transition.	General exceptions related to the energy transition can be in the style of Article XX on General Exceptions of the WTO General Agreement on Trade and Tariffs, with appropriate refinements given recent arbitral findings with respect to such clauses. Whereas an exception for environmental protection as found in some new-generation IIAs generally covers climate change measures, parties may nevertheless wish to explicitly refer to climate change to avoid misinterpretations by arbitral tribunals.
	Clarify provisions on compensation and damages (where applicable).	If an IIA provides for substantive protection standards enforceable in ISDS proceedings, to ensure that it does not unduly limit the parties' ability to regulate for climate action and the energy transition, provisions on damages could be clarified. For example, States may wish to limit compensation in the rapidly developing energy environment to sunk costs as opposed to valuations based on projected future cash flow.

Table 4.	IIA toolbox for promoting sustainable energy investment	
Corporate social responsibility	Include binding obligations related to corporate social responsibility.	The private sector is vital for innovating, developing, transferring and diffusing technology necessary in the energy transition. As beneficiaries of IIA protection standards, energy investors should concomitantly be required to comply with obligations relating to human rights, labour, environmental and anti-corruption standards. Investment treaties should serve as tools to further compliance with best international practices of corporate social responsibility and good corporate governance.
	Specifically oblige energy investors to comply with requirements for sustainable investment.	This policy option recognizes that for investors that want to avail themselves of IIA benefits, voluntary standards should be turned into mandatory ones (e.g. by requiring environmental impact assessments and maintenance of environmental management systems). In that way, sustainable investment standards can complement efforts to rebalance the rights and obligations of States and investors and ensure that IIAs positively contribute to an enabling environment for the energy transition.

Source: UNCTAD.

d. Putting into action the IIA toolbox for promoting sustainable energy investment

Countries have numerous options for modernizing their stock of IIAs. As old-generation IIAs significantly outnumber new-generation ones, it is critical to address the problems and risks they pose. In 2017, UNCTAD presented countries with 10 IIA reform actions for old-generation IIAs, including joint interpretation, amendment, replacement and termination (UNCTAD, 2017).

The new IIA toolbox for promoting sustainable energy investment could primarily be put into place by amending or renegotiating existing treaties. Approaching a treaty afresh enables the parties to achieve a high degree of change and to be rigorous and conceptual in designing an IIA that reflects their contemporary shared vision. When new IIAs are concluded to replace old ones, countries may wish to formulate appropriate transition clauses and will need to be mindful of termination provisions and survival clauses in the earlier treaty (UNCTAD, 2018). The entry into force of new IIAs may take a significant amount of time. It may therefore be preferable to ensure that transitional arrangements are provisionally applied as of the date of signature of the new agreement. These transitional arrangements should (i) unequivocally disable the survival clause in the previous IIA and (ii) explicitly terminate all of its provisions. This can be done, for example, in the treaty text of the new IIA and/or a side letter.

Terminating an IIA is another reform option, including termination on a unilateral basis. The latter can be pursued alongside attempts to renegotiate an old-generation IIA. While the existence of survival clauses may have a deterrent effect on consideration of this option, many terminated BITs have or will in the next two to five years reach the end of the period of survival clause application.

UNCTAD’s World Investment Forum, to be held from 16 to 20 October 2023, will also present concrete solutions for the reform of the IIA regime to increase investment in sustainable energy and to tackle the global climate crisis. The forum will take place ahead of the annual climate summit (COP28) and as such will enable IIA policymakers and other stakeholders to find solutions and reach consensus on priority issues that could feed into COP28 negotiations.

This IIA Issues Note was prepared by UNCTAD’s IIA team, under the overall guidance of James X. Zhan. The IIA team is managed by Hamed El-Kady.

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UNCTAD Policy Tools for IIA Reform

Investment Policy Framework for Sustainable Development (2015)
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Reform Package for the International Investment Regime (2018)
https://investmentpolicy.unctad.org/uploaded-files/document/UNCTAD_Reform_Package_2018.pdf

Reforming Investment Dispute Settlement: A Stocktaking (IIA Issues Note, No. 1, March 2019)
https://unctad.org/system/files/official-document/diaepcbinf2019d3_en.pdf

International Investment Agreements Reform Accelerator (2020)
https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf

IIA Toolbox for Promoting Sustainable Energy Investment (2023)
https://unctad.org/system/files/official-document/wir2023_en.pdf

UNCTAD Investment Policy Online Databases

International Investment Agreements Navigator
https://investmentpolicy.unctad.org/international-investment-agreements

IIA Mapping Project
https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping

Investment Dispute Settlement Navigator
https://investmentpolicy.unctad.org/investment-dispute-settlement

Investment Laws Navigator
https://investmentpolicy.unctad.org/investment-laws

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