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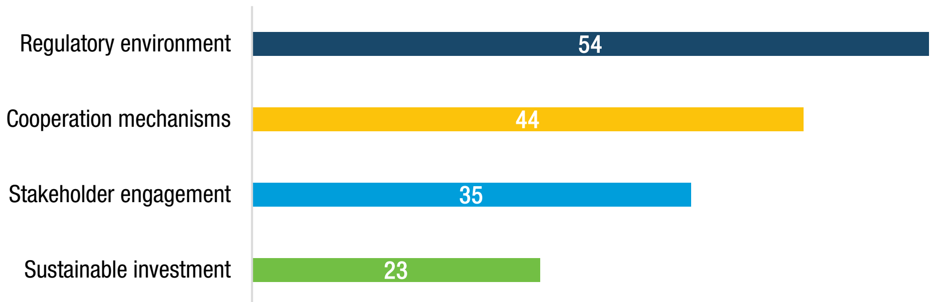
INVESTMENT FACILITATION IN INTERNATIONAL INVESTMENT AGREEMENTS: TRENDS AND POLICY OPTIONS

HIGHLIGHTS

- New-generation international investment agreements (IIAs) are increasingly embracing investment facilitation features. These features are becoming more common, more diverse and more specific, with prominent examples across all continents.
- Over half of all recent IIAs contain transparency requirements for investment measures and the share of other investment facilitation provisions related to the host country's regulatory environment is also growing.
- While old-generation IIAs were typically seen as one-off deals, the share of IIAs that set up an institutional framework for cooperation has increased substantially. Over 70 per cent of IIAs signed since 2020 include such an institutional mechanism.
- While virtually absent in the past, over 30 per cent of new generation IIAs contain commitments on the part of States for stakeholder engagement, including through the right to comment on proposed regulatory measures or the establishment of a focal point with competencies related to investment.
- Some new-generation IIAs also contain references to technical assistance or to facilitation measures targeted at investment for sustainable development.
- Yet, much more is needed. Save for a few exceptions, new IIAs continue to lack clear and proactive investment facilitation commitments specific to sustainable investment or the necessary level of technical assistance and capacity-building for developing countries.
- Building on best practices, UNCTAD has developed a set of policy options and ground-level actions that can enable governments to transform their IIAs into tools to effectively channel investment towards sustainable development and further national investment facilitation priorities.

Types of investment facilitation features in recent IIAs, 2015–2023 (Per cent of IIAs)



Source: UNCTAD.

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Introduction

Promoting and facilitating investment is of fundamental importance for growth and sustainable development. Investment is critical for achieving the Sustainable Development Goals (SDGs) and the 2030 Agenda. Developing countries face a growing SDG-investment gap of now approximately $4 trillion per year (UNCTAD, 2023a). It is also crucial for ensuring a just transition to a carbon neutral economy, among other emerging global challenges (UNCTAD, 2022a). However, to achieve these goals, increasing the quantity of investment is not enough. It has to go hand in hand with its quality, i.e. investment must deliver concrete sustainable development benefits.

Investment facilitation initiatives aim to tackle ground-level obstacles to investment. Investment promotion and facilitation measures often work together, but they are two different types of activities. One is about promoting a location as an investment destination (and is therefore often country-specific and competitive in nature), while the other is about making it easier for investors to establish or expand their investments, as well as to conduct their day-to-day business in host countries.

Introducing proactive investment promotion and facilitation measures is one of the five priority areas in UNCTAD's Road Map for International Investment Agreements (IIA) Reform (UNCTAD, 2015) and is part of UNCTAD's IIA toolbox for promoting sustainable energy investment (UNCTAD, 2023a). When geared towards sustainable investment, investment facilitation features could complement or even provide an alternative to the "investment protection only" approach that is commonly used in the existing stock of IIAs. The overwhelming majority of the 3,200 existing IIAs (of which 2,500 are in force) lack sustainable investment facilitation provisions.

New-generation international investment governance instruments, including IIAs, are increasingly embracing proactive facilitation features. Investment facilitation policies are advancing worldwide through international, regional and bilateral initiatives. At the international level, negotiations were concluded on the text of the Investment Facilitation for Development (IFD) Agreement in the context of the World Trade Organization (WTO). At the regional level, notable examples of investment governance instruments include the Protocol on Investment (negotiations concluded) to the African Continental Free Trade Area (AfCFTA), the Association of Southeast Asian Nations (ASEAN) Investment Facilitation Framework (IFF) (2021), and the Intra-MERCOSUR Cooperation and Facilitation Investment Protocol (2017). At the bilateral level one can find, for example, the Cooperation and Facilitation of Investments Agreements (CFIAs) concluded by Brazil, the Angola–European Union (EU) Sustainable Investment Facilitation Agreement (SIFA) (negotiations concluded) and the Australia–Singapore Green Economy Agreement (GEA) (2022). Yet, much more remains to be done to gear facilitation features specifically towards sustainable investment and provide the necessary technical assistance for developing countries to reap the maximum benefits from them.

This Issues Note analyses the recent trend of including facilitation provisions in IIAs and related investment governance instruments. It takes stock of the increasing share of instruments with investment facilitation features and their shift towards more diverse and deeper commitments. On that basis, it provides policy options and best practices to focus investment facilitation features in IIAs towards sustainable development, while mitigating the challenges that can arise for the coexistence of IIAs focused on facilitation and protection.

1. Investment facilitation features in IIAs: emerging trends

Investment facilitation features in recent international investment governance instruments are more common, more diverse and are increasing in depth and specificity, with examples existing across all continents. Yet, much more is needed to channel investment towards sustainable development and to ensure the necessary level of technical assistance for developing countries.

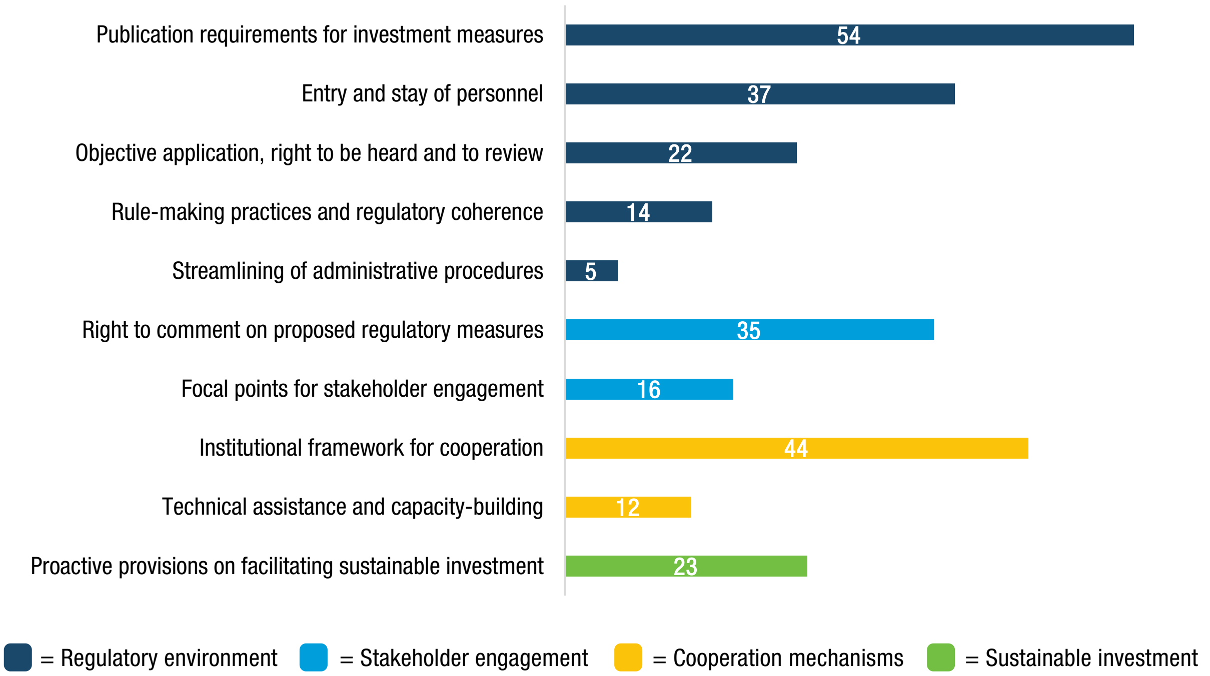
Until recently, investment facilitation provisions have been largely absent in IIAs (UNCTAD, 2017). Since 2015, they have become more common and more diverse and are moving towards cooperative approaches to implementation. This may be due to a growing awareness of the shortcomings of IIAs with regard to their stated investment promotion goals (UNCTAD, 2015) as well as an increasing number of initiatives to close the international policy gap on investment facilitation (UNCTAD, 2016). Yet, this trend remains nascent, and much more is needed to operationalize and gear these provisions towards investment in sustainable development.

Prominent examples of IIAs and other investment governance instruments with an investment facilitation focus are emerging on all continents (see figures 3, 4, 5, 7). Two clear indicators of this trend are the increase in the share of IIAs that set up an institutional framework for cooperation and those that contain regulatory transparency requirements (see figures 2 and 6 below).

Recent IIAs also contain more diverse facilitation features that are evolving towards deeper and more specific content. Guided by UNCTAD's Investment Policy Framework for Sustainable Development (2015) and informed by UNCTAD's Global Action Menu for Investment Facilitation published in 2016 (UNCTAD, 2016), this Issues Note identifies and maps the prominence of four categories of investment facilitation provisions in IIAs:

(a) clauses regarding the regulatory environment in the host country of investment;
(b) processes aimed at creating shareholder engagement;
(c) mechanisms establishing lasting cooperation between the treaty parties and their institutions; and
(d) proactive features geared specifically towards sustainable investment (figure 1).

Figure 1. Prevalence of selected investment facilitation features in recent IIAs, 2015–2023
(Per cent of IIAs)



Source: UNCTAD.
Note: Based on 221 IIAs, 142 bilateral investment treaties (BITs) and 79 broader treaties with investment provisions (TIPs) concluded in the period 2015–2023 for which texts are available. For TIPs, the mapping included provisions in all parts of the treaty that apply to investment, including chapters on economic and development cooperation, good regulatory practices, transparency and anti-corruption, movement of natural persons, among others. The mapped investment facilitation provisions include strict and best-effort commitments, including ones subject to the countries' domestic laws, as well as softer language.

a. Regulatory environment in the host country

Investment facilitation features that target the investment regulatory environment in the host country are most common among the four types of facilitation provisions and have evolved the most in terms of depth and specificity in recent IIAs. They include:

(i) commitments to transparency for investment-related measures and
(ii) commitments aimed at the improvement of the regulatory environment.

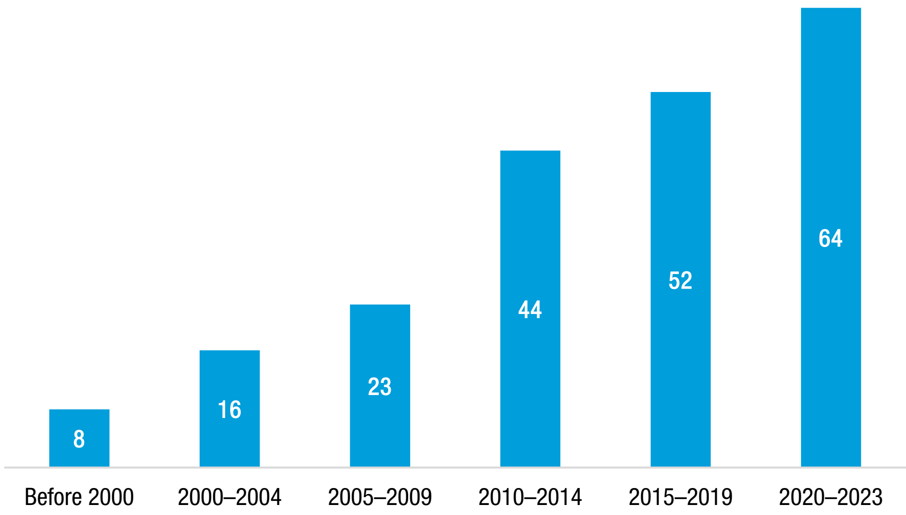
These provisions often mirror the types of measures on which countries are making progress already through domestic action (UNCTAD, 2022b) and they commonly align with aspects of the WTO IFD Agreement (negotiations on the text concluded) (WTO, 2023). Depending on their scope and focus, implementing such commitments can be resource- and capacity-intensive, rendering them burdensome for developing countries.

(i) Regulatory transparency

Publication requirements for investment-related measures. Over half of IIAs signed since 2015 contain a transparency commitment. Regulatory transparency provisions in IIAs are part of the earliest investment facilitation commitments to appear in IIAs and the share of IIAs that contain them has steadily grown over time (figure 2).

The scope and specificity of transparency commitments have also evolved. While older IIAs would often limit their transparency requirements to the publication of the IIA and other international agreements, recent treaties extend this obligation to all measures related to the scope of the IIA, at times including an indicative list of such measures. They can cover regulations directed specifically at investors such as incentive schemes, as well as those that are susceptible to affect investments indirectly, like the regulatory framework for corporate governance, insolvency, property, tax, etc. Over 35 per cent of recent IIAs with a transparency provision also extend transparency obligations to proposed regulatory measures. Several recent instruments operationalize the provision further and specify that the measures must be made available online or through a single informational portal.

Figure 2. Share of IIAs with transparency provisions over time (Per cent of IIAs)



Source: UNCTAD, IIA Navigator.
Note: Based on the mapping of 2,776 IIAs, (2,673 BITs and 103 TIPs), signed between 1959 and 2023. Data derived in part from UNCTAD's IIA Mapping Project. The Mapping Project is an UNCTAD-led collaboration of more than 45 universities around the globe. Over 2,500 IIAs have been mapped to date, for over 100 features each. The Mapping Project's results are available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping. While every effort has been made to ensure accuracy, UNCTAD assumes no responsibility for possible errors or omissions in the mapping data.

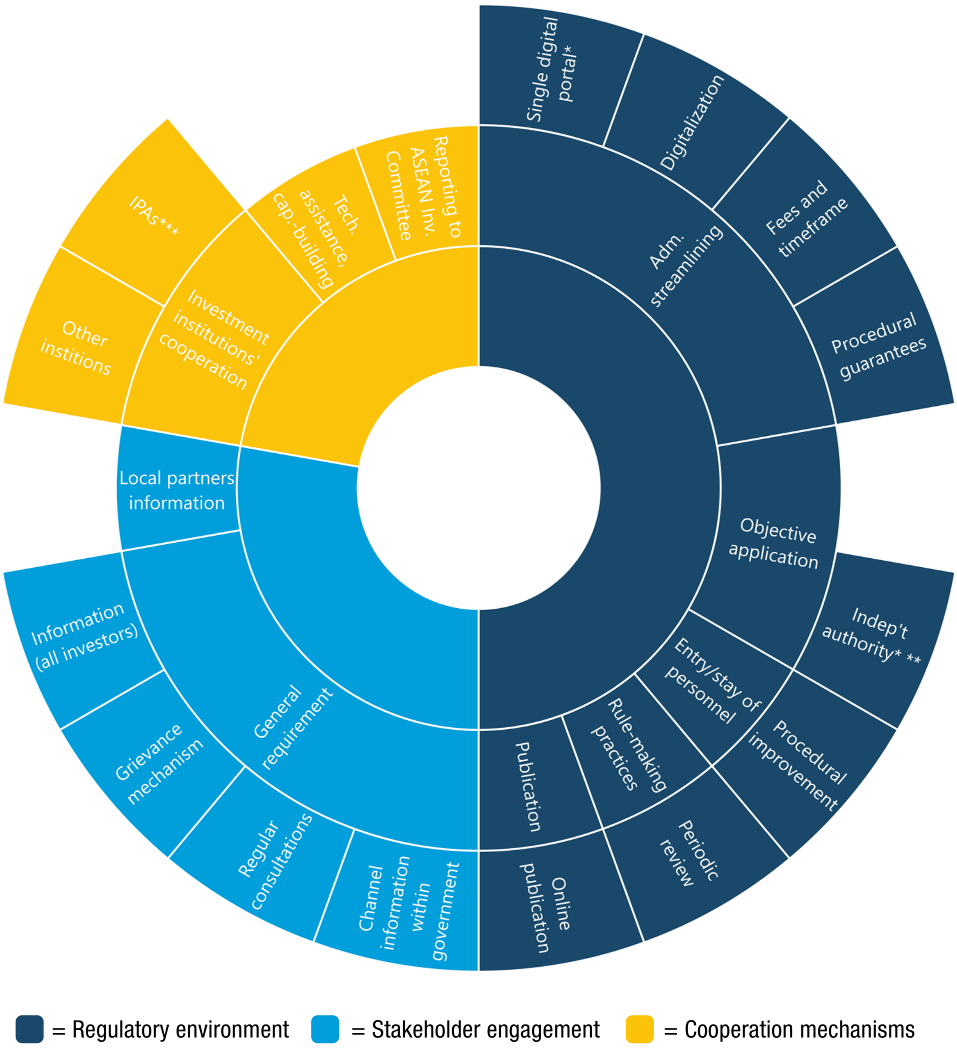
Objective and predictable application of investment measures, including the right to be heard and the right to review. Transparency commitments in economic treaties with investment provisions (TIPs) often contain additional requirements of objective and predictable application of investment measures, the right to be heard and the right to review. Under these requirements the parties commit to provide an opportunity to individuals and companies to be heard within the administrative process, as well as to establish and maintain review mechanisms. Recent instruments also sometimes encourage the independence of overseeing authorities from any actor with economic interest in the activities they oversee (ASEAN IFF (2021), Angola–EU SIFA (negotiations concluded), AfCFTA Protocol on Investment (negotiations concluded)).

(ii) Improvement of the regulatory environment

A growing share of recent IIAs contain provisions aimed at the improvement of the regulatory environment with respect to investment-related procedures. Those provisions tend to be marked by a great diversity not only in scope, but also in focus. While certain IIAs put the emphasis on streamlining administrative procedures, others emphasize rule-making practices or the improvement of regulatory coherence. More specific commitments also include the simplification of entry, stay or recognition of qualifications of key investor personnel in the host country.

Simplification and streamlining of administrative procedures. A common component of investment facilitation at the national level that recent IIAs have begun to incorporate is the simplification and streamlining of investment-related administrative procedures. In addition to the WTO IFD Agreement (negotiations on the text concluded), the practice of ASEAN and China typically focuses on this aspect (ESCAP, 2022). While the provisions vary in depth, they usually aim to eliminate redundant bureaucratic steps and to clarify the administrative framework. They often provide for a reasonable timeframe and cost for permit applications. They also commonly encourage strategic digitalization, including through measures that have proven to be effective on the ground, such as single portal submissions or commitments to accept the submission of electronic documents and payments. An important difference in the scope of streamlining commitments relates to the procedures that they cover. Their scope can be as broad as to cover all "investment procedures", more modestly refer to "authorization procedures" for a range of investment-related activities, or, most restrictively, only include the authorization procedure for admission, to acquire and operate an investment in the host country.

Figure 3. ASEAN Investment Facilitation Framework (2021): profile of investment facilitation features

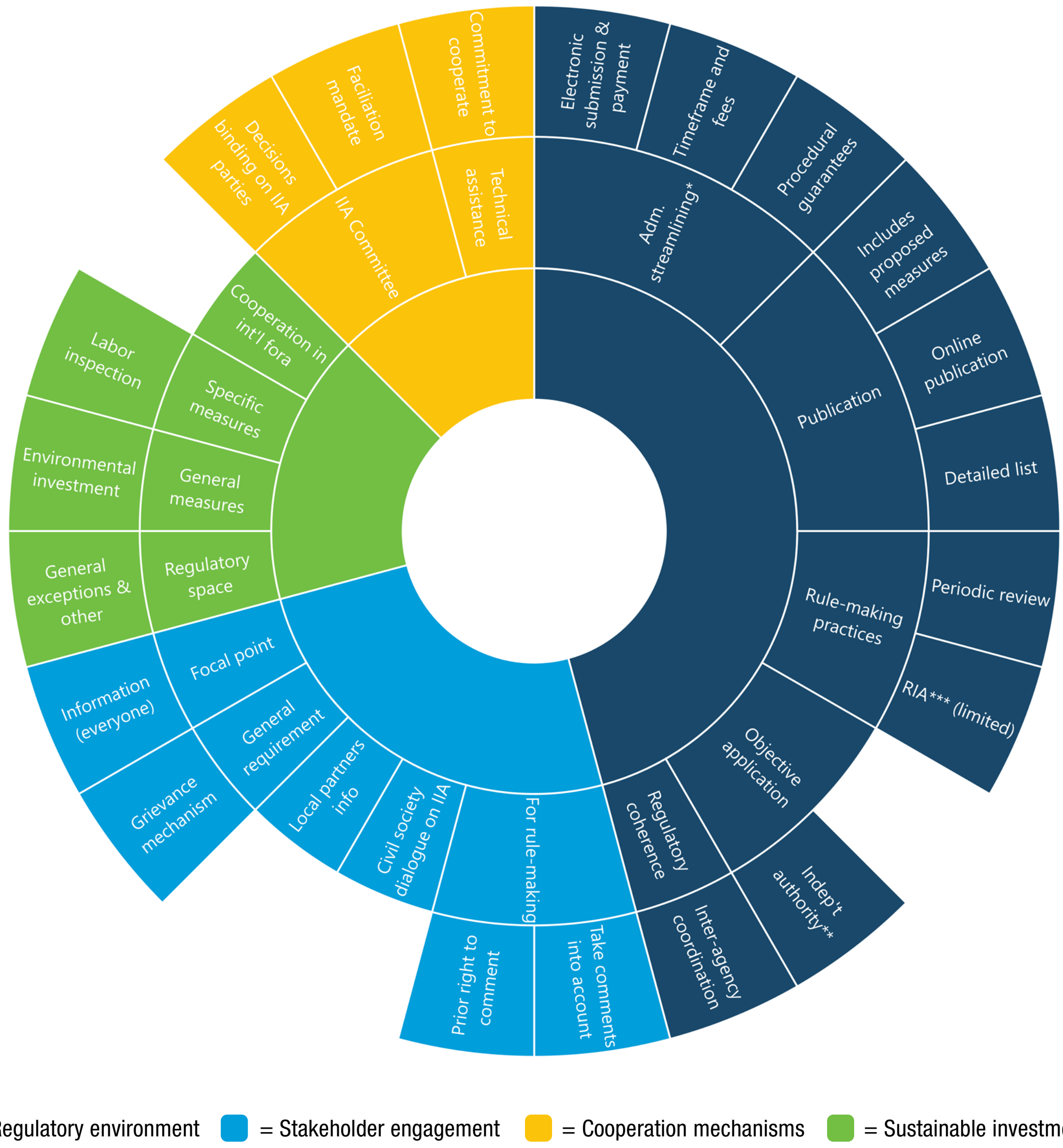


Source: UNCTAD.
Note: The ASEAN IFF is a non-legally binding investment governance instrument.
* Applies only to the procedure for authorization of an investment.
** The competent authority must be independent from interested economic actors.
*** IPAs = investment promotion agencies.

Improvement of rule-making practices. Recent TIPs may also contain provisions aimed at rendering rule-making practices more predictable, evidence-based and open to stakeholder engagement of varying depth. Countries commit, often in soft terms, to conducting a regulatory impact assessment for new regulations or significant amendments to existing ones as well as to setting up monitoring mechanisms for regular review of the impact of existing measures. Commonly, the commitment to undertake regulatory impact assessment also includes a list of criteria to be considered. Since the signature of Trans-Pacific Partnership, which included a chapter on "good regulatory practices" with such content, at least 18 other TIPs have done so as well (IISD, 2023).

Regulatory coherence. Recent TIPs may also include soft language or best-effort commitments aimed at ensuring regulatory coherence, often as part of the same chapter as provisions on the improvement of rule-making practices. This is the case for example under the WTO IFD Agreement (negotiations on the text concluded) and the Angola–EU SIFA (negotiations concluded). More detailed provisions of this type encourage the designation of a focal point agency or inter-institutional taskforce entrusted with eliminating duplicative regulations and administrative steps, as well as a commitment to include regulatory coherence as a consideration within the rule-making and monitoring procedures of the country.

Figure 4. Angola–European Union Sustainable Investment Facilitation Agreement (negotiations concluded): profile of investment facilitation features



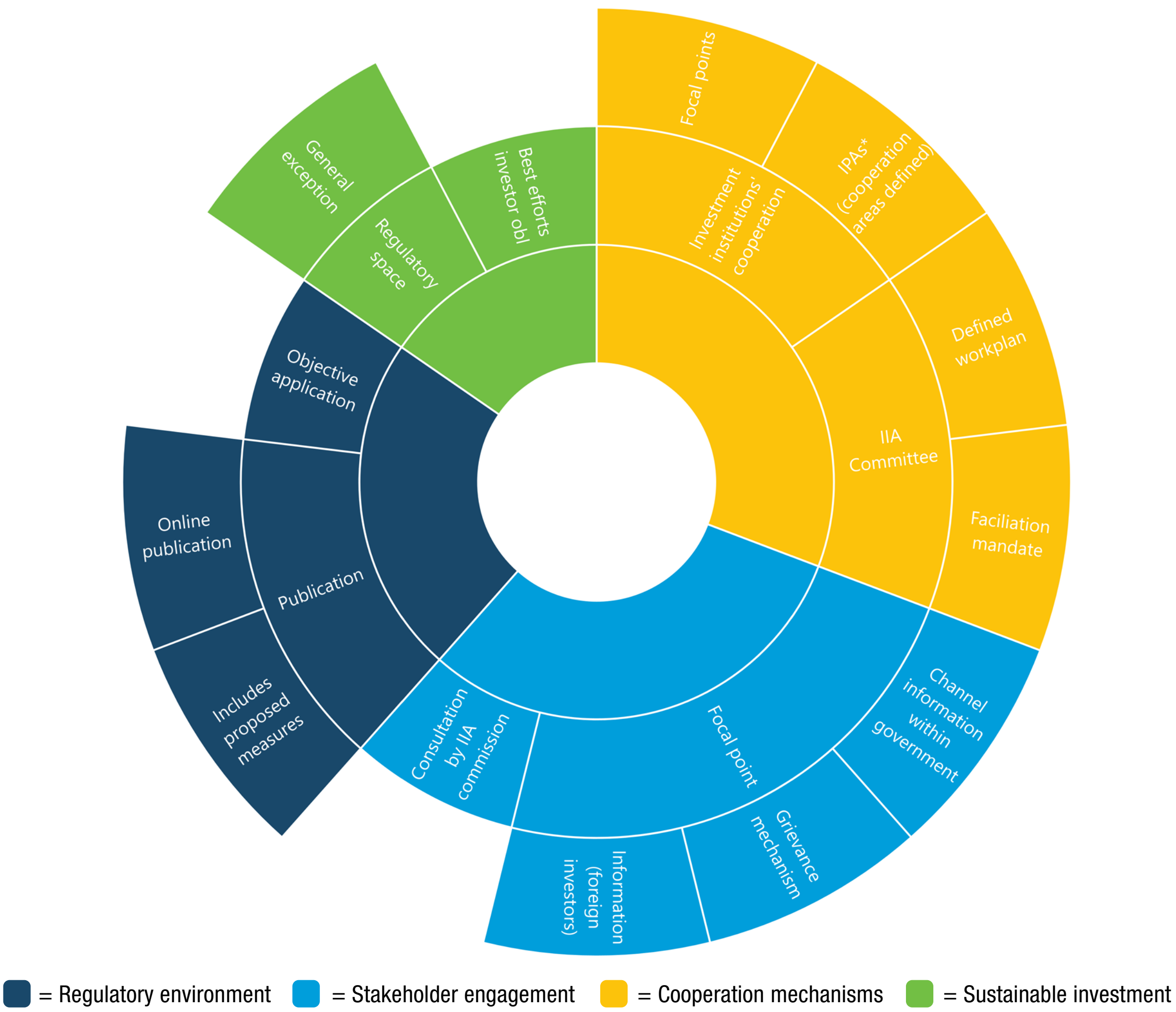
Source: UNCTAD.
* Applies only to authorization of economic activities.
** The competent authority must be independent from interested economic actors. Applies only to the procedure for authorization of investment activity.
*** RIA = regulatory impact assessment.

Facilitation of the entry and stay of key personnel. IIAs have long contained commitments for the sympathetic consideration of requests for entry and stay of natural persons in the host country in relation to investment activities. Such provisions appear in about 40 per cent of IIAs since the 1980s. Yet, recent years have seen a transformation in the depth and specificity of the commitments that countries agree to, in particular under TIPs. Provisions range from WTO-based requirements of transparency regarding the procedure and conditions for entry to more specific commitments on the admission of specific categories of persons and of intra-corporate transferees. These may prohibit quotas, prescribe liberalization schedules and set timeframes for the processing of requests. Some recent IIAs also contain related types of commitments on the mutual recognition of certain professional qualifications.

b. Mechanisms for stakeholder engagement

Stakeholder engagement in the rule-making process. Closely linked to the commitments on the regulatory environment, stakeholder engagement for investors in the rule-making process is also common. Such provisions are present in about 30 per cent of TIPs signed since 2015. Depending on whether the regulatory commitments in the IIA focus on transparency or on improving rule-making practices, stakeholder engagement procedures vary. They can be commitments to offer investors the opportunity to comment on proposed measures or broader ones to hold a public consultation open to any person, that comply with certain procedural requirements and to take the results of that consultation into account when further examining the proposed measure. The EU–New Zealand Free Trade Agreement (FTA) (2023) provides a recent example of such a public consultation commitment.

Figure 5. Intra-MERCOSUR Investment Facilitation Protocol (2017): profile of investment facilitation features



Source: UNCTAD.
* IPAs = investment promotion agencies.

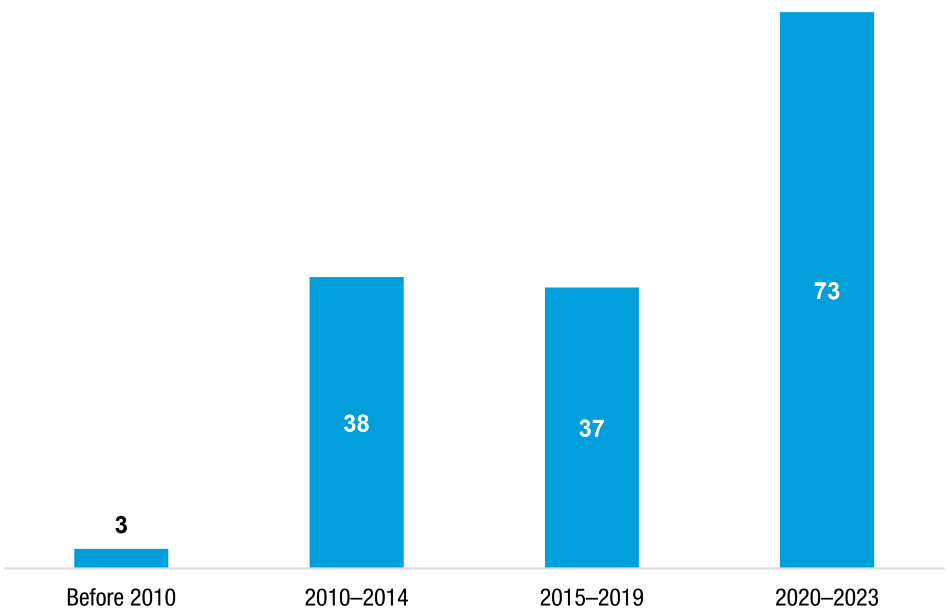
National focal points for stakeholder engagement. In addition, a growing number of IIAs require the establishment of national focal points with varying portfolios and competencies. Some of these institutions are designed to serve "any interested person", while others are specific to investors from the other IIA partner. A number of them only have informational functions. The role of some focal points goes much further. Notably, under Brazil's CFIAs and the intra-MERCOSUR Protocol on Investment Facilitation (2017), they hold aftercare and dispute avoidance functions and may escalate recurrent issues brought by investors to other parts of the government or to the joint committee under the IIA. A similar commitment, without a defined institutional framework, exists also under the ASEAN IFF (2021) and the Angola–EU SIFA (negotiations concluded). The Angola–EU SIFA (negotiations concluded) and a small number of other TIPs include a complementary commitment for both IIA Partners to jointly hold regular civil society dialogues specifically on the subject matter of the IIA.

c. Cooperation mechanisms on investment facilitation

A growing number of IIAs establish institutional frameworks for engagement, showing first steps towards transforming these treaties from one-off deals into platforms for lasting cooperation. In several recent IIAs such cooperation provisions are complemented by workplans or memorandums of understanding further specifying and operationalizing their content.

Institutional framework for cooperation between the IIA parties. Protection-focused IIAs were traditionally designed as one-off deals. Given the type of obligations included in them no specific implementation measures were planned and the compliance with the standards was left to the determination of arbitral tribunals. Since 2010, there has been a dramatic shift in this respect. The majority of IIAs signed today contain an institutional framework for cooperation between the treaty parties, compared to only 3 per cent of earlier treaties (figure 6). IIAs with an investment facilitation and development focus, such as the Brazilian CFIAs or the Kenya–United Kingdom Economic Partnership Agreement (EPA) (2020), also set a workplan for these institutions based on the contracting parties' shared priorities.

Figure 6. Share of IIAs with institutional framework for cooperation over time (Per cent of IIAs)



Source: UNCTAD, IIA Navigator.
Note: Based on the mapping of 2,776 IIAs (2,673 BITs and 103 TIPs), signed between 1959 and 2023. Data derived in part from UNCTAD's IIA Mapping Project. The Mapping Project is an UNCTAD-led collaboration of more than 45 universities around the globe. Over 2,500 IIAs have been mapped to date, for over 100 features each. The Mapping Project's results are available at https://investmentpolicy.unctad.org/international-investment-agreements/iia-mapping. While every effort has been made to ensure accuracy, UNCTAD assumes no responsibility for possible errors or omissions in the mapping data.

Cooperation between national agencies relevant to investment. Some IIAs complement cooperation at the inter-State level with more targeted links between their respective investment institutions, such as investment promotion agencies (IPAs) or between institutions relevant to the development of a certain priority sector or category of investment projects. IPA cooperation is most common, with examples in Brazilian CFIAs, among others. The Israel–Republic of Korea FTA (2021) offers a different example: It sets up a mechanism for cooperation between the countries' institutes that support start-ups in view of fostering joint initiatives and exchange on venture start-ups. This type of on-the-ground cooperation was recently operationalized to a higher degree in the Australia–Singapore GEA (2022). The agreement, aimed at enhancing the development of the green economy, establishes several joint programmes between relevant national agencies on matters such as environmental goods and services, investment in carbon neutral economy, green finance and carbon markets, human capital development, and is complemented by a memorandum of understanding between the countries' IPAs.

Technical assistance and capacity-building for less developed contracting parties. References to technical assistance and/or capacity-building are becoming more common in recent IIAs: They are present in over 30 per cent of TIPs signed since 2015. Yet, these are mostly hortatory references with no commitment to specific activities or resources for them. The AfCFTA Protocol on Investment (negotiations concluded) is a notable exception. In addition to a firm commitment by member States to support technical assistance, the Protocol also establishes the Pan-African Trade and Investment Promotion Agency. The Agency, aimed at providing technical assistance and capacity-building to member States and their relevant institutions, is to be funded by the regular budget of the AfCFTA Secretariat. The few other TIPs that contain deeper provisions on technical assistance at times also commit resources and set up specific monitoring mechanisms for their spending (EU–Moldova Association Agreement (2014)) or provide that the parties can contribute to capacity-building based on their different level of development (PACER Plus Agreement (2017)). The WTO IFD Agreement (negotiations on text concluded) includes an institutional process for managing technical assistance both for the implementation of the Agreement and for developing and least-developed countries to assess their ability to meet their obligations and use the special and differential treatment provisions under the Agreement.

d. Facilitation features in IIAs and sustainable investments

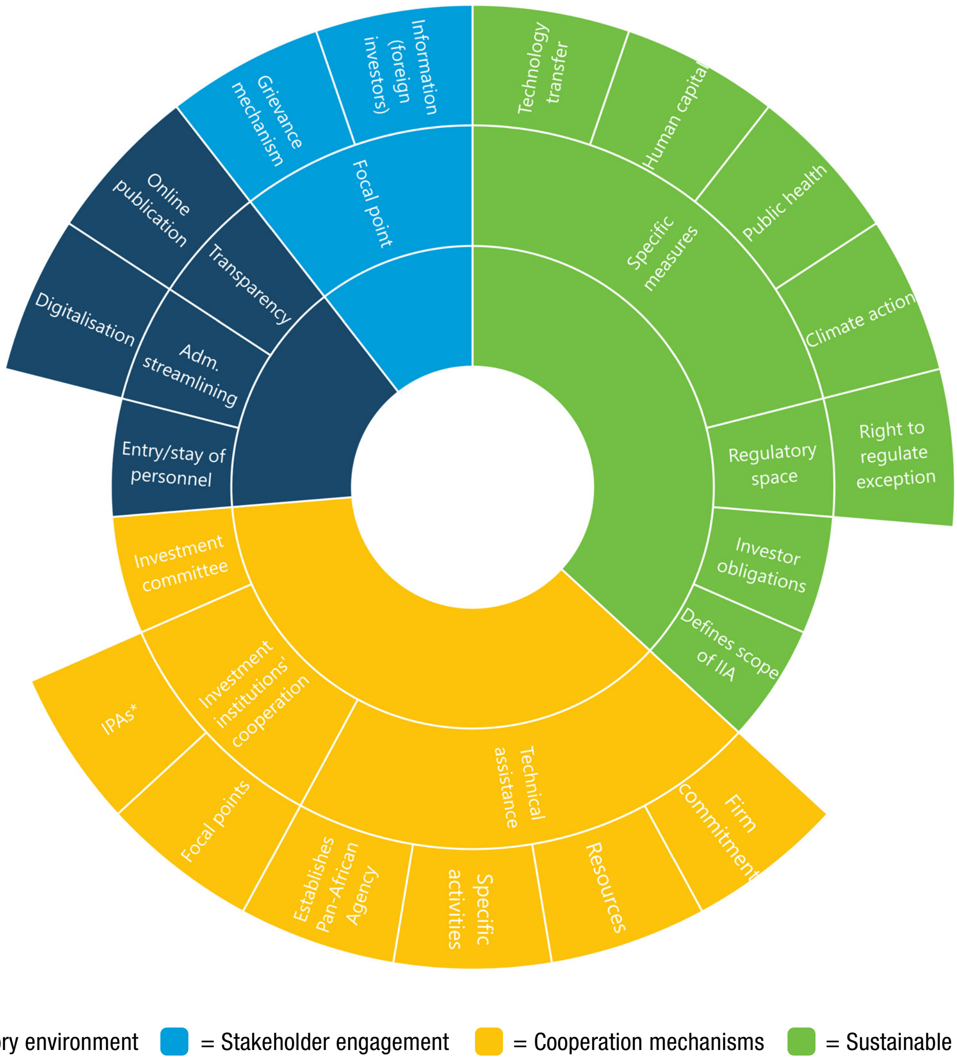
Save for rare exceptions, proactive facilitation measures for sustainable development are currently either absent in IIAs or weak (CCSI, 2022; ESCAP, 2022; Johnson, Sachs, Lobel, 2019). Much more remains to be done to effectively gear IIAs towards investment in sustainable development.

Scope of coverage of facilitation commitments and right to regulate in the public interest. Most investment governance instruments with facilitation features are broad and, while they may also facilitate investment in sustainable development, they do not provide for measures or actions specific to such investments (ESCAP, 2022). Apart from the Australia–Singapore GEA (2022), which is geared towards various green prongs of the economy, and the AfCFTA Protocol on Investment (negotiations concluded), which limits its application to investments that contribute to sustainable development, IIAs generally continue to have a broad coverage. When IIAs include environmental and social obligations for investors, they typically do not condition the benefits of the treaty on compliance with those obligations. In addition, without effective right to regulate safeguards, the investment facilitation language used in certain IIAs – for example, some IIAs require countries to facilitate the issuance of environmental permits or contain a broad affirmation that enhanced trade and investment contribute to sustainable development – may create the risk of undermining good faith government action in the public interest. The Angola–EU SIFA (negotiations concluded) is an example of a facilitation-focused IIA that, while broad in coverage, effectively preserves the parties' regulatory space, *inter alia* to pursue the SDGs, through a general exception and further commitments by the parties to facilitate investment in a way consistent with environmental, social and development goals.

Proactive promotion and facilitation for sustainable investment. Recent facilitation-focused investment instruments are beginning to include proactive measures aimed at promoting and facilitating investment linked to priority SDG goals such as climate action, public health, education, and biodiversity conservation. They, at times, also provide for cooperation to increase the role of under-represented investors, such as women or local communities and local SMEs. Certain of the provisions specify actions or measures for the achievement of these promotion and facilitation goals, which shows a welcome shift towards commitments that are more operational. Yet, the majority of IIAs remain shallow: Two thirds of facilitation provisions in IIAs specific to sustainable investment are best-effort commitments to "promote and facilitate trade and investment in environmental goods and services". Similarly generic language often permeates provisions on inclusive investment.

Home State outward investment measures and sustainability. Contracting parties can commit in their IIAs to safeguard key sustainability characteristics in their support instruments for outward investment, such as risk insurance, investment guarantees or development finance (UNCTAD, 2018). For example, the Democratic Republic of the Congo–Rwanda BIT (2021) contains a commitment on the part of the home country to condition outward investment support on the investor's respect of the responsible business conduct obligations in the treaty. While currently rare, this type of commitment can serve to ensure that both home and host countries channel their efforts towards quality investment. An alternative approach, provided for in the Kenya–United Kingdom EPA (2020) is a commitment to improve the access of host country enterprises with SDG impact, such as local SMEs, to home country sources of development finance.

Figure 7. AfCFTA Protocol on Investment (negotiations concluded): profile of investment facilitation features



Source: UNCTAD.
Note: Based on publicly available information regarding the content of the Protocol on Investment.
* IPAs = investment promotion agencies.

e. Approaches to the enforcement of investment facilitation features

While international investment instruments that focus on protection and liberalization have traditionally put an emphasis on legal enforceability, the shift towards investment facilitation is also marked by (i) the proliferation of non-binding instruments and softer formulations of commitments in otherwise legally binding instruments, as well as (ii) the exclusion of facilitation features from dispute settlement, in favour of (iii) amicable settlement and dispute avoidance mechanisms and (iv) implementation monitoring. These approaches to enforcement are aligned with the facilitation commitments' forward-looking nature, aimed at fostering continued engagement.

Proliferating non-binding instruments. Several recent instruments specifically focused on investment facilitation are not legally binding, instead privilege consensus-building and diffusion of best practices, as well as operational inter-government action on the ground. They replace recourse to formal dispute settlement with amicable methods. The ASEAN IFF (2021) and the Australia–Singapore GEA (2022), as well as the Indo-Pacific Economic Partnership negotiations illustrate this trend. Other types of instruments that offer guidance include UNCTAD's guiding principles for investment policymaking, developed for several regional organizations (the African, Caribbean and Pacific Group of States, the Developing 8 Organization for Economic Cooperation, the Islamic Development Bank Group) which aim *inter alia*, at aligning investment promotion and facilitation policies with sustainable development goals.

Excluding dispute settlement. In addition to non-binding facilitation instruments, about half of the TIPs and some BITs with facilitation features exclude at least some of those provisions from formal dispute settlement. For example, the Angola–EU SIFA (negotiations concluded) reserves the parties' consent to inter-State arbitration, so that it needs to be given separately for each specific dispute. Certain instruments, including the WTO IFD Agreement text, explicitly clarify that investment facilitation features cannot be relied upon by investors in investor–State dispute settlement (ISDS) (see box 1).

Dispute avoidance and amicable settlement mechanisms. The trend away from litigation is also a trend towards more cooperative mechanisms, such as mediation, consultations or institutionalized dispute avoidance procedures. Many investment facilitation-focused IIAs, including the Brazilian treaties and the Angola–EU SIFA, provide for dispute avoidance and amicable settlement procedures, either as an alternative or as a mandatory step prior to formal State-to-State dispute resolution. These agreements also do not provide access to ISDS.

Implementation monitoring mechanisms. A growing number of IIAs incorporate softer cooperation-based mechanisms to ensure implementation, such as reporting commitments. One operational example to this effect is the requirement for the contracting parties to report on a yearly basis to the relevant committee on the progress and measures they have taken to implement their rule-making and regulatory coherence commitments (see e.g. Chile–Ecuador Economic Complementation Agreement No. 75 (2020)).

2. Gearing investment facilitation in IIAs towards sustainable development

Where countries decide to include investment facilitation features in their IIAs, they should gear them towards sustainable development. UNCTAD has developed a set of policy options to enable countries to transform facilitation features in their IIAs into operational tools aimed at channeling investment towards sustainable development, as part of a government-wide approach.

Regulatory environment, stakeholder engagement and cooperation for sustainable development. The investment facilitation commitments on regulatory environment and stakeholder engagement are general in nature, yet their scope and content may affect sustainable development differently. First, by elevating these commitments to the international sphere, countries should ensure that they do not reduce regulatory space for domestic measures that provide preferential treatment to investments based on sustainability criteria or for good faith action in the public interest. In addition, countries should aim to ensure that these measures improve the business environment for all and set up safeguard mechanisms against the potential negative effects of investment activities, without placing an excessive burden on the local administration. With respect to regulatory environment improvements, for example, this means that countries should privilege the digitalization and streamlining of procedures which apply to both local and foreign investors of all sizes (e.g. procedures such as setting up a business, acquiring the permits to exercise relevant activities or applying for intellectual property registration), rather than the procedure for admission of investments in the country which only benefits foreign investors. With respect to stakeholder engagement commitments, this would mean taking measures to ensure that the mechanisms take into account the voice of investors from underrepresented communities, as well as of the local population affected by investment activity. Finally, strong cooperation mechanisms and technical assistance can greatly enhance the effectiveness of IIA commitments and ensure they benefit developing countries. Investment facilitation measures are resource-intensive for local administrations. Hence, developing countries should carefully consider their capacity to implement any facilitation features that they introduce in their IIAs and ensure that investment facilitation commitments are coupled with firm and effective technical assistance commitments.

Proactive promotion and facilitation measures on investment for sustainable development. Commitments "to promote and facilitate investment in sustainable development" require action on the part of national agencies to be effective. This type of positive commitments is more likely to achieve its goals when the agency that has competencies for their implementation is identified and its role is clearly defined; when there are institutionalised mechanisms that monitor implementation and when the content of the commitments sets out specific actions on the ground. For IIAs, strong cooperation mechanisms between relevant national agencies in a defined set of fields that the partners consider most relevant are most likely to yield the desired results. The Australia–Singapore GEA (2022) offers examples for detailed commitments that translate the partners' general goal into seven complementary action areas (e.g. trade and investment, green and transition finance, clean energy, decarbonization and technology). For each action area, its competent authorities and a set of cooperative activities are identified, including lists of specific initiatives.

IIAs as tools to achieve national investment facilitation goals. Countries are already making progress on the ground through national investment facilitation policies (UNCTAD, 2022b). Based on decades of experience, UNCTAD has formulated best practices and guidance on how to gear resources to the activities with the highest return and address the specific needs and challenges related to investment in the SDGs (UNCTAD, 2023b). Well-designed facilitation features in IIAs focused on cooperation, network building and technical assistance can serve as springboards to achieve these nationally defined investment facilitation goals.

Mitigating the risk of ISDS in IIAs. Investment facilitation-focused IIAs are a minority compared to the over 2,500 IIAs already in force, the large majority of which are old-generation treaties focused on protection. These IIAs contain broadly formulated standards of treatment and offer investors direct recourse to dispute settlement against the host State of their investment (ISDS), which can create challenges for the protection of legitimate public policy concerns. To address such concerns in the context of investment facilitation provisions, IIA contracting parties have introduced "firewall" provisions in a number of their recent IIAs (box 1) and more generally are accelerating the reform of their existing stock of old-generation IIAs (UNCTAD, 2020; UNCTAD, 2023a).

Box 1. Firewall provisions for investment facilitation features in IIAs

Firewall provisions serve to insulate facilitation commitments in IIAs from investment protection, liberalization provisions and associated dispute settlement mechanisms, which place the onus on strict compliance and often offer investors direct access to binding international arbitration against the State (Bermann et al. 2020). Firewall provisions are incorporated in view of the different nature of facilitation commitments in IIAs, which are forward-looking, aimed at progressive implementation and intended to operate at the inter-State level. The WTO IFD Agreement (negotiations on the text concluded) offers a recent example of this approach (WTO, 2023). In addition, best-effort commitments and softer language on investment facilitation are less likely to create legal risks.

Effective firewall provisions ideally combine three elements. They:

- have a wide coverage that refers to both the IIA they are a part of and other IIAs;
- exclude investment facilitation provisions from the scope of ISDS and clarify that they cannot otherwise affect ISDS proceedings (e.g. as an interpretative tool); and
- clarify that investment facilitation provisions do not create, modify or otherwise affect the obligations created under investment liberalization or protection standards.

See e.g.: Indonesia–Switzerland BIT (2022), Art. 43(3); Angola–EU SIFA (negotiations concluded), Art. 2.3, Art. 55; WTO IFD Agreement (negotiations on the text concluded).

Source: UNCTAD, based on various sources.

UNCTAD's policy options for facilitating investment in sustainable development. IIAs continue to have underused potential as an instrument to further sustainable development objectives. UNCTAD has developed a set of policy options and ground-level actions that would enable countries to transform investment facilitation features in their IIAs into operational tools aimed at channeling investment towards sustainable development, as part of a government-wide approach (table 1).

Table 1. IIA policy options for facilitating investment in sustainable development

Policy options	Ground-level actions
Incorporate proactive facilitation and promotion commitments targeted at priority sustainable investment	• Privilege operational commitments in priority SDG sectors (e.g. renewable energy, agriculture, health, water and sanitation etc.) or of relevance to sustainable categories of investment projects (e.g. favouring underrepresented communities, leading to technology transfer and/or human resources development etc.) (see UNCTAD, 2014). • Determine concrete implementation measures and actions to be undertaken by all IIA partners and regularly assess the progress of implementation. • Complement these facilitation commitments with investment promotion tools specific to priority SDG impactful investments.
Strengthen the sustainable development aspect of cooperation mechanisms (e.g. investment committees)	• Include a strong cooperation mechanism regarding the IIA's commitments that are targeted at sustainable investment, by: (i) defining a clear workplan for cooperation; (ii) requiring periodic meetings and reporting on implementation progress; (iii) establishing an "investment committee" responsible for reporting and implementation functions; (iv) rendering the committee's decisions binding on the parties. • Create frameworks for direct cooperation between the parties' institutions working on the targeted SDG sectors and categories of investments (e.g. relevant ministries, start-up development bodies, development finance institutions, research and development stakeholders, human capital development bodies etc.). • Include firm commitments to provide technical assistance and capacity-building (and resources for them) specifically aimed at facilitating investment in priority SDG sectors and for priority categories of investments.
Condition home country support for investment on meeting sustainability criteria	• Condition support for outward investment (e.g. risk insurance, investment guarantees or development financing) on the sustainability performance of the beneficiaries based on workable and transparent criteria. • Facilitate the access to relevant support instruments, such as development finance, for sustainable investors from all IIA partners, especially for partners at different levels of economic development.
Prioritize regulatory environment measures with the highest impact for sustainable development	• Prioritize commitments on measures that reduce the ground-level hurdles that are most relevant to priority SDG sectors and for categories of SDG-impactful investors, including in order to create an environment favourable to technology transfer and diffusion. For example, countries could assess the needs of priority SDG sectors to ensure that the specific licensing requirements, connections to particular types of utilities and other procedures of relevance to the sector are covered. • Privilege impactful investment facilitation measures that: (i) are always available (not only when a dispute looms); (ii) benefit all sustainable investors (independently of nationality or size); (iii) are all encompassing (rather than putting in place dedicated processes for the admission of foreign investment). For example, countries could focus on improving transparency, streamlining and digitalizing procedures required for both foreign and local businesses. Countries could use a priority SDG sector as a pilot project. • Include safeguards preserving the IIA partners' regulatory space to take measures in the public interest and to promote priority sustainable investment. • Include special and differential treatment provisions and related technical assistance, to ensure that commitments are adapted to less developed IIA partners. • Encourage the parties to use resources effectively by building on existing legal and institutional infrastructure and avoiding duplicative competencies and/or procedures (IISD, 2022). • Investment facilitation commitments need not be subject to investor–State arbitration, to contribute to the goal of sustainable development.

Table 1. IIA policy options for facilitating investment in sustainable development

Policy options	Ground-level actions
Ensure that stakeholder engagement mechanisms have a positive impact on sustainable development	• Render stakeholder engagement mechanisms inclusive, offering effective participation for all relevant stakeholders (e.g. local communities and all investors, independently of nationality and size). • Use the digitalization of stakeholder engagement mechanisms to gather SDG-relevant data on users (e.g. gender, geographical distribution, etc.), in order to enable informed policy decision-making.
Harness IIAs to further national investment facilitation priorities	• Coordinate the country's negotiating objectives and priorities with its national focal point for investment promotion and facilitation (usually the IPA), to align facilitation commitments in IIAs with the country's overall investment facilitation agenda (UNCTAD, 2023b). • Tailor cooperation priorities of IIAs to each partner country, in line with shared interests, *inter alia* by using the knowledge of relevant diplomats in potential IIA partners (UNCTAD, 2021). • Use the IIA as a cooperation platform for the achievement of nationally defined goals, e.g. through technical assistance, network building, exchange of best practices. • Involve the national focal point on investment promotion and facilitation in implementation and cooperation mechanisms under IIAs.

Source: UNCTAD.

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REFERENCES

Bermann, Ayelet, N. Jansen Calamita, Manjiao Chi, Karl Sauvant (2020). "Insulating a WTO Investment Facilitation Framework from ISDS". Columbia FDI Perspectives, No. 286, September 2020.

CCSI (Columbia Center on Sustainable Investment) (2022). International Investment Governance and Achieving a Just Zero-Carbon Future. Briefing, July 2022.

ESCAP (2022). Investment Facilitation for Sustainable Development within the Context of the Regional Comprehensive Economic Partnership, the ASEAN Investment Facilitation Framework and the WTO Draft Investment Facilitation Framework for Development. Studies in Trade, Investment and Innovation No. 96. (Contributors: Calamita, N. Jansen, Schacherer, Stefanie.)

IISD (2022). Investment Dispute Prevention and Management Agencies: Toward a More Informed Policy Discussion. Winnipeg: IISD.

IISD (2023). Good Regulatory Practice Provisions in Regional Trade Agreements: Examples and Considerations for Developing Countries. Winnipeg: IISD.

Johnson, Lise, Lisa E. Sachs, Nathan Lobel (2019). Aligning Investment Treaties with Sustainable Development Goals, Columbia Journal of Transnational Law, Vol. 58, p. 58.

UNCTAD (2014). World Investment Report 2014: Investment in the SDGs: An Action Plan. New York and Geneva: United Nations.

UNCTAD (2015). Investment Policy Framework for Sustainable Development. New York and Geneva: United Nations.

UNCTAD (2016). UNCTAD Global Action Menu for Investment Facilitation. New York and Geneva: United Nations.

UNCTAD (2017). Investment Facilitation: A Review of Policy Practices. New York and Geneva: United Nations.

UNCTAD (2018). UNCTAD's Reform Package for the International Investment Regime. New York and Geneva: United Nations.

UNCTAD (2020). International Investment Agreements Reform Accelerator. New York and Geneva: United Nations.

UNCTAD (2021). Investing in the Sustainable Development Goals: The Role of Diplomats. Investment Advisory Series A, number 9.

UNCTAD (2022a). "The international investment treaty regime and climate action". IIA Issues Note, No. 3, September.

UNCTAD (2022b). "Investment Facilitation: Progress on the Ground". IPM Special Issue 6, January.

UNCTAD (2023a). World Investment Report 2023: Investing in Sustainable Energy for All. New York and Geneva: United Nations.

UNCTAD (2023b). Facilitating Investment in the Sustainable Development Goals. Investment Advisory Series A, number 10.

WTO (2023). Investment facilitation negotiators announce deal on Agreement's text. 6 July 2023.

UNCTAD Policy Tools for IIA Reform

Investment Policy Framework for Sustainable Development (2015)
https://unctad.org/system/files/official-document/diaepcb2015d5_en.pdf

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://investmentpolicy.unctad.org/pages/1072/trends-in-the-investment-treaty-regime-and-a-reform-toolbox-for-the-energy-transition

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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