

Policy options for IIA reform: treaty examples and data

**Supplementary material to
World Investment Report 2015**



Introduction

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

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

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Explanatory note

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

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

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

Disclaimer

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

Options for IIA reform: Preamble				
Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
<p>Include public policy interests as treaty objectives</p> <p>Clarify that the IIA is not only about investment protection and promotion, but also is intended to serve other public policy interests, such as sustainable development, job creation, technology and know-how transfer.</p>	1.1.1	<ul style="list-style-type: none"> • Japan-Mongolia EPA (2015), Preamble • Costa Rica-EFTA-Panama FTA (2013), Preamble • Canada-Honduras FTA (2013), Preamble • SADC Model BIT (2012), Preamble 	• 67% (41 IIAs)	• 11% (92 IIAs)
<p>Clarify that the treaty is not intended to override national development objectives and the State's right to regulate in the public interest (for legitimate policy objectives such as public health, safety, environment, public morals, cultural diversity).</p>	1.1.2	<ul style="list-style-type: none"> • New Zealand-Taiwan Province of China ECA (2013), Preamble • Colombia-EFTA FTA (2008), Preamble • India-Singapore CECA (2005), Preamble • SADC Model BIT (2012), Preamble 	• 11% (7 IIAs)	• 0% (3 IIAs)
<p>Clarify that the treaty is understood to be in line with Parties' obligations under international law in other areas</p> <p>For example, state that the treaty is meant to be in line with the parties' other international obligations (e.g. treaties on human rights, environment, cultural heritage), and that the parties should not derogate from such obligations in order to promote and protect investment.</p>	1.1.3	<ul style="list-style-type: none"> • Canada-Honduras FTA (2013), Preamble • Pakistan-Turkey BIT (2012), Preamble • Rwanda-United States BIT (2008), Preamble 	• 21% (13 IIAs)	• No data

Options for IIA reform: Definition of covered investment				
Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
<p>Require investment to fulfill specific characteristics</p> <p>Treaty practice has converged on a number of such characteristics, notably, the commitment of capital, the expectation of profit and the assumption of risk. Some IIAs include further criteria, e.g. “a certain duration” or “establishing lasting economic relations”. A policy debate is under way as to whether an investment’s positive contribution to (sustainable) development should constitute an additional criterion, and what indicators to use in this regard.</p>	2.1.2	<ul style="list-style-type: none"> • Eurasian Economic Union – Viet Nam FTA (2015), Article 8.28(a) • Belgium-Luxembourg Economic Union-Colombia BIT (2009), Article I(2.3) • Republic of Korea-United States FTA (2007), Article 11.28 <p><i>“A certain duration”</i></p> <ul style="list-style-type: none"> • Canada-EU CETA (draft, 2014), Article X.3 <p><i>“Lasting economic relations”</i></p> <ul style="list-style-type: none"> • Nigeria-Turkey BIT (2011), Article 1 <p><i>“Contribution to (sustainable) development”</i></p> <ul style="list-style-type: none"> • Egypt-Mauritius BIT (2014), Article 1(1) • Indian Model BIT (draft, 2015), Article 1.2.1 	• 31% (20 IIAs)	• 2% (21 IIAs)
<p>Compile an exhaustive list of covered investments and/or expressly exclude specific types of assets¹</p> <p>(i) Compile an exhaustive list of covered investments or (ii) expressly exclude specific types of assets. Examples of assets that could be considered for exclusion are short-term, speculative or portfolio investments; sovereign debt obligations; claims to money arising from commercial contracts; or intellectual property rights that are not protected under the host State’s law.</p>	2.1.1	<p>(i)</p> <ul style="list-style-type: none"> • Mexico-Panama FTA (2014), Article 10.1 • Canada-Honduras FTA (2013), Article 10.1 • Belarus-Mexico BIT (2008), Article 1(5) <p>(ii)</p> <ul style="list-style-type: none"> • Kuwait-Turkey BIT (2010), Article 1(1) • Colombia-UK BIT (2010), Article I(2) • CAFTA-DR FTA (2004), Article 10.28 	<p>(i)</p> <ul style="list-style-type: none"> • 3% (2 IIAs) <p>(ii)</p> <ul style="list-style-type: none"> • 48% (29 IIAs) 	<p>(i)</p> <ul style="list-style-type: none"> • 1% (5 IIAs) <p>(ii)</p> <ul style="list-style-type: none"> • 5% (47 IIAs)
<p>Adopt a narrow, enterprise-based definition</p> <p>Only enterprises owned or controlled by investor are covered investments (i.e. no other types of assets are included in the</p>	New option	• Indian Model BIT (draft, 2015), Articles 1.2 and 1.6	• No data	• No data

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

Options for IIA reform: Definition of covered investment

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
definition).				
<p>Include a legality requirement (compliance with domestic laws)</p> <p>Specify that investment must be made in accordance with the laws and regulations of the host State.</p>	2.1.2	<ul style="list-style-type: none"> • Egypt-Mauritius BIT (2014), Article 1(1) • Algeria-Serbia BIT (2012), Article 1(1) • ASEAN Comprehensive Investment Agreement (2009), Article 4(a) • Canada-Romania BIT (2009), Article 1(g) 	• 38% (23 IIAs)	• 65% (560 IIAs)

Options for IIA reform: Definition of covered investors

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
Include criteria additional to the “incorporation” requirement for companies, e.g. require a company to also have its “seat” and engage in “real/substantial business” activities in the home State	2.2.1	<ul style="list-style-type: none"> • Canada-EU CETA (draft, 2014), Article X.3 	• 28% (17 IIAs)	• 15% (129 IIAs)
<p>Include a “denial of benefits” (DoB) clause</p> <p>Allow States to deny treaty benefits to (i) “mailbox” companies (which are identified using the criteria of “substantial business activity” and the nationality of the company’s ultimate controller) and/or (ii) investors ultimately controlled by persons from countries that have no diplomatic relations with the host State and/or from countries under economic embargo. When designing a DoB clause, attention needs to be given to the time when the clause can be invoked.</p>	2.2.2	<p><i>With DoB clause</i></p> <ul style="list-style-type: none"> • Japan-Kazakhstan BIT (2014), Article 25 • ASEAN Comprehensive Investment Agreement (2009), Article 19 • China-Peru FTA (2009), Article 137 • Canada-Colombia FTA (2008), Article 814 <p><i>Specifying that the DoB clause can also be invoked once ISDS proceeding have started</i></p> <ul style="list-style-type: none"> • Azerbaijan-Croatia BIT (2007), Article 12(1) • Indian Model BIT (draft, 2015), Article 20 	<p><i>With DoB clause</i></p> <ul style="list-style-type: none"> • 59% (36 IIAs) <p><i>Related to substantive business operations</i></p> <ul style="list-style-type: none"> • 57% (35 IIAs) <p><i>Related to diplomatic relations or under economic embargo</i></p> <ul style="list-style-type: none"> • 31% (19 IIAs) 	<p><i>With DoB clause</i></p> <ul style="list-style-type: none"> • 8% (66 IIAs) <p><i>Related to substantive business operations</i></p> <ul style="list-style-type: none"> • 6% (55 IIAs) <p><i>Related to diplomatic relations or under economic embargo</i></p> <ul style="list-style-type: none"> • 4% (34 IIAs)
Exclude individuals with dual nationality (one of which is that of the host State)	2.2.1	<ul style="list-style-type: none"> • Egypt-Mauritius BIT (2014), Article 1(3) • Israel-Myanmar BIT (2014), Article 1(1)(d) • Colombia-Panama FTA (2013), Article 14.37 	• 21% (13 IIAs)	• 5% (44 IIAs)

Options for IIA reform: Scope of the treaty				
Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
<p>Exclude specific sensitive sectors and/or industries from treaty coverage</p> <p>Sensitive industries may include social sectors (e.g. education, health, the provision of water), cultural industries, defence and others. Exclusion can be full (from all treaty obligations) or partial (from some obligations only).</p>	2.3.2	<ul style="list-style-type: none"> • Colombia-Republic of Korea FTA (2013), Article 8.1(4-5) • ASEAN-China Investment Agreement (2009), Article 3(4)(d-e) 	• No data	• No data
<p>Exclude specific policy areas from treaty coverage</p> <p>Excluded policy areas may include taxation, subsidies/grants, government procurement, issues related to the restructuring of sovereign debt and others. Exclusion can be full (from all treaty obligations) or partial (from some obligations only).</p>	2.3.1	<ul style="list-style-type: none"> • Japan-Mozambique BIT (2013), Article 22 • Belgium and Luxembourg-Colombia BIT (2009), Article II(4) • India-Republic of Korea CEPA (2009), Article 10.2(8) 	• 62% (38 IIAs)	• 12% (107 IIAs)

Options for IIA reform: National treatment (NT)				
Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
<p>Clarify that the NT standard applies only to investors/investments “in like circumstances”</p> <p>(i) Clarify that the NT standard applies only to investors/investments “in like circumstances”, and (ii) consider setting out criteria for determining whether investors/investments are in “like circumstances”.</p>	4.1.0	<p>(i)</p> <ul style="list-style-type: none"> • Canada-China BIT (2012), Article 6(1-2) • Azerbaijan-Croatia BIT (2007), Article 4(2) <p>(ii)</p> <ul style="list-style-type: none"> • ASEAN-India Investment Agreement (2014), Article 3(4) • COMESA Investment Agreement (2007), Article 17(2) • Indian Model BIT (draft, 2015), Article 4 	<p>(i)</p> <ul style="list-style-type: none"> • 77% (47 IIAs) <p>(ii)</p> <ul style="list-style-type: none"> • No data 	<p>(i)</p> <ul style="list-style-type: none"> • 14% (122 IIAs) <p>(ii)</p> <ul style="list-style-type: none"> • No data
<p>Allow for carve-outs or country-specific reservations</p> <p>Carve out from the NT obligation certain sectors or industries or certain policy measures through a general carve-out (applicable to both parties) or through country-specific reservations.</p>	4.1.1 4.1.2	<ul style="list-style-type: none"> • Canada-Nigeria BIT (2014), Article 17, Annex I • China-Peru FTA (2009), Article 129(3), Article 130 • Rwanda-United States BIT (2008), Article 14, Annex I to III 	<ul style="list-style-type: none"> • 59% (36 IIAs) 	<ul style="list-style-type: none"> • No data
<p>Make national treatment “subject to domestic laws and regulations”</p>	4.1.1	<ul style="list-style-type: none"> • Colombia-Israel FTA (2013), Article 10.4 • Morocco-Viet Nam BIT (2012), Article 3(3) • China-Russian Federation BIT (2006), Article 3(2) • India-Indonesia BIT (1999), Article 4(3) 	<ul style="list-style-type: none"> • No data 	<ul style="list-style-type: none"> • No data
<p>Omit national treatment clause</p>	4.1.3	<ul style="list-style-type: none"> • United Arab Emirates-Viet Nam BIT (2009) • Chile-Indonesia BIT (1999) • Australia-Peru BIT (1995) 	<ul style="list-style-type: none"> • 0% (0 IIAs) 	<ul style="list-style-type: none"> • 17% (146 IIAs)

Options for IIA reform: Most-favoured-nation (MFN) treatment

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
<p>Do not apply to earlier IIAs</p> <p>Specify that the MFN clause does not allow for the importation of substantive or ISDS-related obligations contained in older treaties.</p>	4.2.1	<ul style="list-style-type: none"> • Canada-Senegal BIT (2014), Annex II(1) • Colombia-Singapore BIT (2013), Article 6(3)(b) • Malaysia-Pakistan CEPA (2007), Article 90(2) 	• 8% (5 IIAs)	• No data
<p>Do not apply to other treaties' ISDS provisions</p> <p>Specify that MFN treatment does not apply to ISDS provisions found in other IIAs (existing or future).</p>	4.2.1	<ul style="list-style-type: none"> • Australia-Republic of Korea FTA (2014), Article 11.4 • Bangladesh-Turkey (2012), Article 3(4)(c) • Canada-EU CETA (draft, 2014), Article X.7(4) 	• 48% (29 IIAs)	• 3% (25 IIAs)
<p>Do not apply to other treaties' substantive obligations (existing or future)</p> <p>Specify that the MFN clause does not apply to substantive obligations undertaken in (existing or future) IIAs. To this end, a treaty can clarify that substantive obligations in other IIAs do not in themselves constitute "treatment", absent measures adopted by a State pursuant to such obligations.</p>	4.2.1 4.2.2	<ul style="list-style-type: none"> • Canada-EU CETA (draft, 2014), Article X.7(4) 	• 0% (0 IIAs)	• No data
<p>Allow for carve-outs or country-specific reservations</p> <p>Carve out from the MFN obligation certain sectors or industries or certain policy measures through a general carve-out (applicable to both parties) or through country-specific reservations.</p>	4.2.3	<ul style="list-style-type: none"> • Australia-Japan EPA (2014), Article 14.10, Annex 6 • China-Peru FTA (2009), Article 131(3) • Rwanda-United States BIT (2008), Article 14, Annex I to III 	• 46% (28 IIAs)	• No data
<p>Apply only to investors/investments in "like circumstances"</p> <p>Clarify that the MFN obligation requires comparison of investors/investments that are "in like circumstances". A related option is to set out criteria for determining whether investors/investments are in "like circumstances".</p>	4.2.0	<ul style="list-style-type: none"> • Guatemala-Trinidad and Tobago BIT (2013), Article 6 • Canada-China BIT (2012), Article 5 • Peru-Singapore FTA (2008), Article 10.4 <p><i>With criteria</i></p> <ul style="list-style-type: none"> • Azerbaijan-Croatia BIT (2007), Article 4(2) 	• 72% (44 IIAs)	• No data
<p>Omit MFN clause</p>	New option	<ul style="list-style-type: none"> • ASEAN-India Investment Agreement (2014) • India-Malaysia FTA (2011) 	• 5% (3 IIAs)	• 1% (11 IIAs)

Options for IIA reform: Most-favoured-nation (MFN) treatment

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
		<ul style="list-style-type: none"> • ASEAN-Australia-New Zealand FTA (2009) • EU-Singapore FTA (draft, 2014) • SADC Model BIT (2012) 		

Options for IIA reform: Fair and equitable treatment (FET)				
Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
<p>Add reference to MST/CIL</p> <p>Qualify the FET standard by reference to the minimum standard of treatment of aliens under customary international law (MST/CIL).</p>	4.3.1	<ul style="list-style-type: none"> • Colombia-Costa Rica FTA (2013), Article 12.4(2) • Canada-United Republic of Tanzania BIT (2013), Article 6 • Chile-Japan FTA (2007), Article 75(Note 1) • CAFTA-DR FTA (2004), Article 10.5(2) • United States Model BIT (2012), Article 5(2) 	• 48% (29 IIAs)	• 4% (32 IIAs)
<p>Clarify through an open-ended list of FET obligations</p> <p>(i) The formulation may be “positive”, specifying what the standard includes (e.g. the obligation not to deny justice in criminal, civil or administrative adjudicatory proceedings) or (ii) “negative”, explaining what the standard does not include (e.g. establishing that the FET standard does not include a stabilization obligation that would prevent the host State from changing its legislation), or a combination thereof.</p>	4.3.3	<p>(i)</p> <ul style="list-style-type: none"> • Australia-Republic of Korea FTA (2014), 11.5(2) • COMESA Investment Agreement (2007), Article 14 • Rwanda-United States BIT (2008), Article 5 • Republic of Korea-Peru FTA (2010), Article 9.5 • India-Mexico BIT (2007), Article 5 <p>(ii)</p> <ul style="list-style-type: none"> • Japan-Mongolia EPA (2015), Article 10.5, Note 1 • Colombia-France BIT (2014), Article 4(1) 	<p>(i)</p> <ul style="list-style-type: none"> • 25% (15 IIAs) <p>(ii)</p> <ul style="list-style-type: none"> • 44% (27 IIAs) 	<p>(i)</p> <ul style="list-style-type: none"> • No data <p>(ii)</p> <ul style="list-style-type: none"> • No data
<p>Clarify through an exhaustive list of FET obligations²</p> <p>Clarify or replace the general FET clause with an exhaustive, i.e. “closed” list of more specific obligations (e.g. a prohibition to deny justice or flagrantly violate due process, engage in manifestly abusive or arbitrary treatment).</p>	4.3.2	<ul style="list-style-type: none"> • Canada-EU CETA (draft, 2014), Article X.9 • EU-Singapore FTA (draft, 2014), Article 9.4 • Indian Model BIT (draft, 2015), Article 3 	• 0% (0 IIAs)	• No data

² In some IIAs, the nature of the list (indicative or exhaustive) is not clear and may be subject to diverging views and interpretations.

Options for IIA reform: Fair and equitable treatment (FET)				
Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
Omit FET clause (i) Omit the FET clause altogether; or (ii) reduce it to a softer commitment; for example, by referring to FET in the preamble but not in the main treaty text.	4.3.4	(i) <ul style="list-style-type: none"> • Guatemala-Trinidad and Tobago BIT (2013) • Morocco-Serbia BIT (2013) • Australia-Singapore FTA (2003) (ii) <ul style="list-style-type: none"> • Azerbaijan-Estonia BIT (2010), Preamble³ • Turkey-United Arab Emirates BIT (2005), Preamble 	(i) <ul style="list-style-type: none"> • 13% (8 IIAs) (ii) <ul style="list-style-type: none"> • No data 	(i) <ul style="list-style-type: none"> • 6% (52 IIAs) (ii) <ul style="list-style-type: none"> • No data

³ The treaty preamble refers to “fair and equitable conditions”.

Options for IIA reform: Indirect expropriation

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
<p>Establish criteria for indirect expropriation</p> <p>Relevant criteria may include the economic impact of the government action; the extent of government interference with distinct, reasonable investment backed expectations; or the character of the government action (e.g. whether it is discriminatory or disproportionate to the purpose of the measure under challenge). Another possible criterion is whether the measure(s) have produced a direct economic benefit for the State.</p>	4.5.1	<ul style="list-style-type: none"> • Canada-Côte d’Ivoire BIT (2014), Annex B.10(2) • ASEAN-India Investment Agreement (2014), Article 8(3) • Costa Rica-Singapore FTA (2010), Annex 11.1(4) • Colombia-United States FTA (2006), Annex 10-B(3) 	<p><i>Indirect expropriation defined</i></p> <ul style="list-style-type: none"> • 46% (28 IIAs) 	<p><i>Indirect expropriation defined</i></p> <ul style="list-style-type: none"> • 5% (41 IIAs)
<p>Define what does not constitute indirect expropriation</p> <p>(i) For example, specify that “normal regulatory activities” (e.g. non-discriminatory, good faith regulations relating to public policy objectives) do not constitute indirect expropriation. Similarly, it can be clarified that a measure’s adverse effect on the economic value of the investment is not enough to establish an indirect expropriation.</p> <p>(ii) Clarify that certain specific measures (e.g. compulsory licensing in accordance with WTO rules) do not constitute indirect expropriation.</p>	4.5.1	<p>(i)</p> <ul style="list-style-type: none"> • Colombia-Republic of Korea FTA (2013), ANNEX 8-B(3) • ASEAN Comprehensive Investment Agreement (2009), Annex 2(4) <p>(ii)</p> <ul style="list-style-type: none"> • Japan-Uruguay BIT (2015), Article 16(4) • Canada-Serbia BIT (2014), Article 10(5) • Egypt-Switzerland BIT (2010), Article 6(6) 	<p>(i)</p> <ul style="list-style-type: none"> • 52% (32 IIAs) <p>(ii)</p> <ul style="list-style-type: none"> • 41% (25 IIAs) 	<p>(i)</p> <ul style="list-style-type: none"> • 15% (133 IIAs) <p>(ii)</p> <ul style="list-style-type: none"> • 3% (29 IIAs)
<p>Omit a reference to, or explicitly exclude, indirect expropriation</p>	New option	<ul style="list-style-type: none"> • Brazil-Mozambique CFIA (2015), Article 9 • Morocco-Serbia BIT (2013), Article 4 • Jordan-Lebanon BIT (2002), Article 4 • Macedonia-Malaysia BIT (1997), Article 5 	<ul style="list-style-type: none"> • 2% (1 IIA) <p><i>Note: IIAs without a reference to indirect expropriation in the expropriation provision.</i></p>	<ul style="list-style-type: none"> • 3% (25 IIAs) <p><i>Note: See left.</i></p>

Options for IIA reform: Exceptions to free transfer of funds obligation				
Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
Include an exception for serious balance-of-payments difficulties or other financial and economic crises (e.g. serious difficulties for macroeconomic management, in particular, monetary and exchange rate policies)	4.7.2	<ul style="list-style-type: none"> • Japan-Saudi Arabia BIT (2013), Article 15 • Albania-San Marino BIT (2012), Article 7(3) • ASEAN Comprehensive Investment Agreement (2009), Article 16 • Mexico-UK BIT (2006), Article 8(4) 	• 70% (43 IIAs)	• 9% (74 IIAs)
Provide an exhaustive list of the types of funds that are freely transferable ⁴	4.7.1	<ul style="list-style-type: none"> • Canada-Republic of Korea FTA (2014), Article 8.12(1) • Colombia-Israel FTA (2013), Article 10.6(1) • Cuba-Denmark BIT (2001), Article 8(1) 	• 11% (7 IIAs)	• No data
Subject the free transfer obligation to investors' compliance with certain key laws that aim at the protection of third parties (e.g. creditors) and prevention of illegal activities	4.7.3	<ul style="list-style-type: none"> • ASEAN-India Investment Agreement (2014), Article 11(3) • Austria-Nigeria BIT (2013), Article 9(4) • Canada-China BIT (2012), Article 12(3) 	• 66% (40 IIAs)	• 13% (114 IIAs)

⁴ In some IIAs, the nature of the list (indicative or exhaustive) is not clear and may be subject to diverging views and interpretations.

Options for IIA reform: Umbrella clause				
Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
Clarify that the clause covers only “written commitments” and that the obligations must be “entered into” with respect to specific investments	New option	<p>(i) “Written commitments”</p> <ul style="list-style-type: none"> • Japan-Uruguay BIT (2015), Article 6 • China-Japan-Republic of Korea Trilateral Investment Agreement (2012), Article 5(2) • Colombia-Japan BIT (2011), Article 4(3) <p>(ii) “Entered into”</p> <ul style="list-style-type: none"> • Austria-Nigeria BIT (2013), Article 11(1) • Croatia-Morocco BIT (2004), Article 4(1) 	<p><i>With umbrella clause</i></p> <ul style="list-style-type: none"> • 13% (8 IIAs) <p>(i) “Written commitments”</p> <ul style="list-style-type: none"> • 2% (1 IIA) <p>(ii) “Entered into”</p> <ul style="list-style-type: none"> • 13% (8 IIAs) 	<p><i>With umbrella clause</i></p> <ul style="list-style-type: none"> • 43% (369 IIAs) <p>(i) “Written commitments”</p> <ul style="list-style-type: none"> • No data <p>(ii) “Entered into”</p> <ul style="list-style-type: none"> • No data
Clarify that the umbrella clause applies only to conduct that constitutes an exercise of sovereign powers by a government, i.e. not an ordinary breach of contract by the State	4.10.1	<ul style="list-style-type: none"> • New option 	<ul style="list-style-type: none"> • 0% (0 IIAs) 	<ul style="list-style-type: none"> • No data
Exclude the applicability of the IIA dispute settlement mechanism to claims arising out of the umbrella clause, or clarify that the umbrella clause cannot be used to bypass specific dispute settlement mechanisms set out in a contract	4.10.1	<p><i>Full or partial exclusion (e.g. requiring additional consent)</i></p> <ul style="list-style-type: none"> • Iraq-Japan BIT (2012), Article 17(5) • Colombia-Japan BIT (2011), Article 28(1-2) • Germany-Pakistan BIT (2009), Article 7(2) and Article 10(5) • Greece-Mexico BIT (2000), Article 19(2) 	<ul style="list-style-type: none"> • 2% (1 IIA) 	<ul style="list-style-type: none"> • No data
Omit umbrella clause	4.10.3	<ul style="list-style-type: none"> • Australia-Japan EPA (2014) • ASEAN-India Investment Agreement (2014) • Colombia-France BIT (2014) • Egypt-Mauritius BIT (2014) • Canada-China BIT (2012) 	<ul style="list-style-type: none"> • 87% (53 IIAs) 	<ul style="list-style-type: none"> • 57% (499 IIAs)

Options for IIA reform: Public policy exceptions				
Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
<p>Decide on public policy objectives to which exception applies</p> <p>List the public policy objectives to which the exception shall apply (e.g. the protection of public health, public order and morals, the preservation of the environment). This list can be inspired by the relevant WTO (GATT and GATS) clauses but can also include other objectives, such as the provision of essential social services (e.g. health, education, water supply); the prevention of tax evasion; the protection of national treasures of artistic, historic or archaeological value (or “cultural heritage”); cultural diversity; and media diversity, or allow for the pursuit of broader objectives, such as the host countries’ trade, financial and developmental needs.</p>	5.1.4	<ul style="list-style-type: none"> • Japan-Mozambique BIT (2013), Article 18 • Australia-Malaysia FTA (2012), Article 12.18 • Cameroon-Turkey BIT (2012), Article 5 • Macedonia-Morocco BIT (2010), Article 2(6) • New Zealand-Singapore CEPA (2000), Article 71 	<p><i>With public policy exceptions</i></p> <ul style="list-style-type: none"> • 67% (41 IIAs) <p><i>For public health and/or environment</i></p> <ul style="list-style-type: none"> • 64% (39 IIAs) <p><i>For other objectives (e.g. culture, public order)</i></p> <ul style="list-style-type: none"> • 51% (31 IIAs) 	<p><i>With public policy exceptions</i></p> <ul style="list-style-type: none"> • 12% (105 IIAs) <p><i>For public health and/or environment</i></p> <ul style="list-style-type: none"> • 8% (69 IIAs) <p><i>For other objectives (e.g. culture, public order)</i></p> <ul style="list-style-type: none"> • 7% (64 IIAs)
<p>Determine nexus (strict or loose)</p> <p>Define the required relationship (i.e. the “nexus”) between a measure and the policy objective it pursues. For example, the IIA can provide that</p> <p>(i) the measure must be “necessary” to achieve the policy objective (strict test) or</p> <p>(ii) that it must be “related to” (“aimed at”, “directed to” or “designed to achieve”) the policy objective (less strict test).</p>	5.1.5	<p>(i)</p> <ul style="list-style-type: none"> • Australia-Malaysia FTA (2012), Article 12.18 • Macedonia-Morocco BIT (2010), Article 2(6) • Canada-Latvia BIT (2009), Article XVII(3) <p>(ii)</p> <ul style="list-style-type: none"> • Colombia-Panama FTA (2013), Article 24.1(3) • Australia-Malaysia FTA (2012), Article 12.18 • Nigeria-Turkey BIT (2011), Article 6 	<p>(i)</p> <ul style="list-style-type: none"> • 57% (35 IIAs) <p>(ii)</p> <ul style="list-style-type: none"> • 36% (22 IIAs) <p><i>Note: IIAs that combine different types of “nexus” are counted in both (i) and (ii).</i></p>	<p>(i)</p> <ul style="list-style-type: none"> • No data <p>(ii)</p> <ul style="list-style-type: none"> • No data
Prevent abuse of exception	5.1.5	<ul style="list-style-type: none"> • Canada-Republic of Korea FTA (2014), 22.1(3) 	<ul style="list-style-type: none"> • 66% (40 IIAs) 	<ul style="list-style-type: none"> • No data

Options for IIA reform: Public policy exceptions				
Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
For example, clarify that “exceptional” measures must be applied in a non-arbitrary manner and not be used as disguised investment protectionism. These options can be inspired by the respective WTO (GATT and GATS) clauses.		<ul style="list-style-type: none"> • Japan-Mozambique BIT (2013), Article 18 • ASEAN-China Investment Agreement (2009), Article 16(1) • Canada-Panama FTA (2010), Article 23.02(3)(b) 		
<p>Provide guidance for interpretation of exceptions</p> <p>For example, establish a mandatory mechanism whereby cases in which a respondent State invokes a public policy exception are referred to a joint committee of the contracting parties. The committee could guide the interpretation or, alternatively, issue a binding determination of whether or not a measure falls within the scope of the public policy exception.</p>	New option	<p><i>Joint interpretation/joint committee</i></p> <ul style="list-style-type: none"> • ASEAN-India Investment Agreement (2014), Article 20(19) • New Zealand-Taiwan Province of China ECA (2013), Article 24 • Indian Model BIT (draft, 2015), Article 18 	<p><i>Joint interpretation /joint committee</i></p> <ul style="list-style-type: none"> • 3% (2 IIAs) 	<ul style="list-style-type: none"> • No data

Options for IIA reform: National security exception

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
<p>Decide on situations to which exception applies</p> <p>(i) Use a broadly formulated national security exception, e.g. for measures necessary for the protection of (or, with a looser nexus requirement, “directed to” or “designed to” protect) the State’s “essential security interests”.</p> <p>(ii) Define national security more specifically, e.g. as including measures taken to address a serious economic crisis situation or to maintain international peace and security.</p> <p>(iii) Circumscribe the coverage of treaty exceptions, for example, by including a reference to actions taken in pursuance of States’ obligations under the UN Charter or by specifying that the exception covers only certain types of measures such as those relating to trafficking in arms or nuclear non-proliferation, applied in times of war or armed conflict, etc. A national security exception can also refer to “public order” or to the protection of “public security”, with or without a clarification that this applies only to situations in which a genuine and sufficiently serious threat is posed to one of the fundamental interests of society.</p>	<p>5.1.1 5.1.2 5.1.3</p>	<p>(i)</p> <ul style="list-style-type: none"> • Colombia-Costa Rica FTA (2013), 12.1(5) • Bosnia and Herzegovina-India BIT (2006), Article 12 • Belgium and Luxemburg-Mauritius BIT (2005), Article 14 <p>(ii)</p> <ul style="list-style-type: none"> • New option <p>(iii)</p> <ul style="list-style-type: none"> • China-Japan-Republic of Korea Trilateral Investment Agreement (2012), Article 18 • India-Malaysia FTA (2011), Article 12.2 	<p><i>With national security exception</i></p> <ul style="list-style-type: none"> • 72% (44 IIAs) <p>(i)</p> <ul style="list-style-type: none"> • No data <p>(ii)</p> <ul style="list-style-type: none"> • No data <p>(iii)</p> <ul style="list-style-type: none"> • 62% (38 IIAs) 	<p><i>With national security exception</i></p> <ul style="list-style-type: none"> • 14% (121) <p>(i)</p> <ul style="list-style-type: none"> • No data <p>(ii)</p> <ul style="list-style-type: none"> • No data <p>(iii)</p> <ul style="list-style-type: none"> • 5% (43 IIAs)
<p>Decide on whether exception is self-judging or not</p>	<p>5.1.1</p>	<p><i>Formulated as “self-judging”</i></p> <ul style="list-style-type: none"> • Japan-Ukraine BIT (2015), Article 19 • Canada-Côte d’Ivoire BIT (2014), Article 17(4) • Gabon-Turkey BIT (2012), Article 5(2) • Panama-United States FTA (2007), Article 21.2(b) • India-Singapore CECA (2005), Article 6.12 <p><i>Not “self-judging”</i></p> <ul style="list-style-type: none"> • Israel-Myanmar BIT (2014), Article 7(1) • Colombia-France BIT (2014), Article 14 	<p><i>Formulated as “self-judging”</i></p> <ul style="list-style-type: none"> • 62% (38 IIAs) <p><i>Not “self-judging”</i></p> <ul style="list-style-type: none"> • 10% (6 IIAs) 	<p><i>Formulated as “self-judging”</i></p> <ul style="list-style-type: none"> • 6% (48 IIAs) <p><i>Not “self-judging”</i></p> <ul style="list-style-type: none"> • 8% (73 IIAs)

Options for IIA reform: Remedies and compensation

Reform option	IPFSD (2012) reference	Treaty examples	Prevalence: Recent IIAs (2012-2014) (61 IIAs)	Prevalence: Earlier IIAs (1962-2011) (868 IIAs)
<p>Set express limits on the remedial powers of tribunals</p> <p>Limit the available remedies to two forms: monetary damages and restitution of property.</p>	6.4.1	<ul style="list-style-type: none"> • Canada-Serbia BIT (2014), Article 35(2) • Colombia-Turkey BIT (2014), Article 12(10) • China-Japan-Republic of Korea Trilateral Investment Agreement (2012), Article 15(9) 	• 48% (29 IIAs)	• 4% (35 IIAs)
<p>Clarify rules on standard of compensation and calculation of compensation</p> <p>For example, consider terms such as “appropriate”, “fair” or “equitable” compensation and “relax” the link between the standard of compensation and the market value of investment. Another approach would be to provide that – in case of lawful expropriation – arbitrators should rely on asset-based valuation methods (as opposed to methods based on future cash flows) and that, in any case, the award may not exceed the amount of capital invested plus interest at a commercially reasonable rate.</p>	6.4.2	<ul style="list-style-type: none"> • SADC Model BIT (2012), Article 6.2 (Option 1 and 2) • Indian Model BIT (draft, 2015), Articles 5.6. and 5.7 	• No data	• No data
<p>Include provisions that address the calculation of damages for treaty breaches that do not involve expropriation, with a view to limiting the extent of States’ financial liabilities</p>	6.4.2	<ul style="list-style-type: none"> • Memorandum (“Gutachten”) on a model BIT for developed countries with a functioning legal system made public by the German Federal Ministry for Economic Affairs and Energy (2015), Article 31 	• No data	• No data