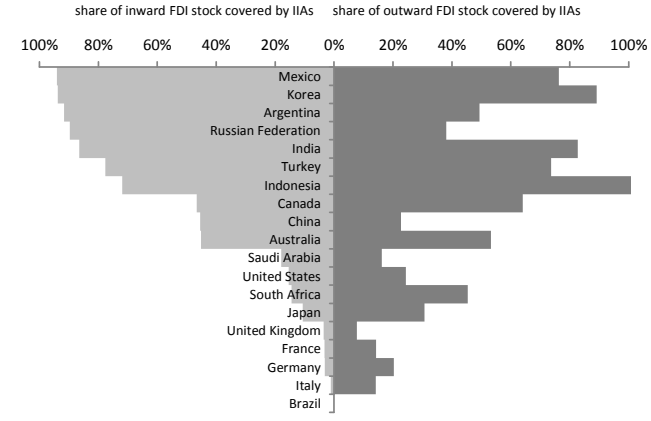
Key issues on International Investment Agreements

Views on whether and which areas of the IIA regime need improvements vary widely. Policy dialogue among a broad range of countries has shown that some countries consider either no or only moderate, incremental changes to their own treaties appropriate, while others deem that more fundamental reform is required. A large group of countries has yet to assess their position and define which reforms they would wish for their own treaties.

This diversity of views stems in part from countries' different experience with and exposure to the IIA system, and in part from the design of an individual country's IIAs, which may or may not reflect these countries' interests. For instance, some countries have greater exposure to IIAs as a result of the share of inward FDI stock that is covered by IIAs (Figure 1).

Figure 1: Share of inward and outward FDI stock under treaty cover in total inward and outward FDI stock of 19 G20 Members



Source: OECD.

Also, different views exist on whether identified issues should be addressed through changes of the substantive provisions – e.g. through rebalancing of investor protection and governments' right to regulate – or whether adjustments should be made in the dispute settlement system, or both.

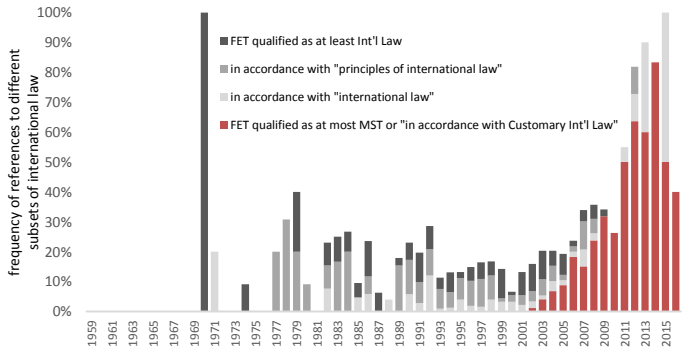
The following items address some areas of reform that commonly emerge in intergovernmental exchanges and public discussion in relation to the IIA system. These elements are neither exclusive nor enumerative.

Balancing investor protection and governments' right to regulate

With the growing public debate about investment treaties and investment disputes, governments are now frequently called on to explain their policy choices, in particular with respect to the balance between governments' right to regulate and the protection of foreign and domestic investors. Suggested methods to address the balance can include adjustments to substantive law including (1) defining or limiting individual treaty protections for foreign investors; (2) establishing carve-outs or special regimes for particular sectors; (3) incorporating general exceptions, right-to-regulate clauses or clarifications;

(4) establishing or clarifying the existence of conditions on access to treaty benefits, such as compliance with domestic law; or (5) aligning the treatment of foreign and domestic investors. They can also include the design of dispute resolution mechanisms.

Figure 2: References to elements or aspects relating to international law in the context of 'fair' and 'equitable' treatment in IIAs concluded between 1959 and 2016



Source: OECD.

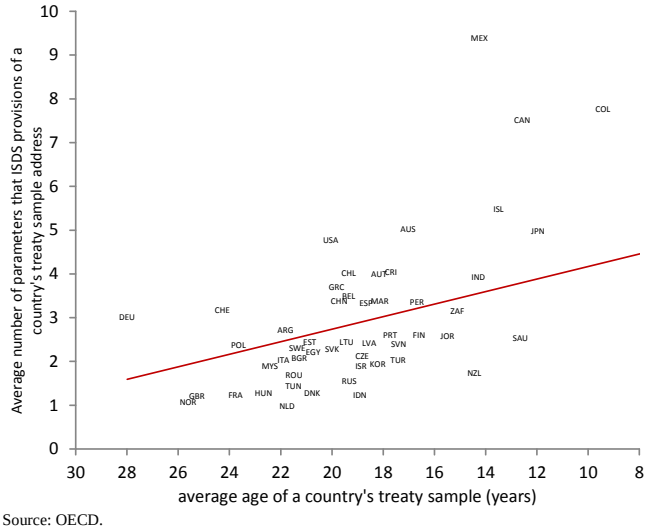
The fair and equitable treatment (FET) provision has leapt to prominence in the last 15 years as the principal ground of liability at issue in many if not most investment treaty arbitration claims. It is second only to ISDS as the most-cited provision in debates about the impact of treaties on the right to regulate. Several differing approaches to FET have become clearer in governments' treaty practice, and particularly noticeable with regard to the degree of protection they imply. Recently, governments have taken action to address the balance between investor protection and the right to regulate by limiting fair and equitable treatment provisions to the minimum standard of treatment under customary international law (Figure 2).

- *The balance between investor protection and the right to regulate in investment treaties: A scoping paper,* OECD 2017.
- *Addressing the balance of interests in investment treaties: The limitation of fair and equitable treatment provisions to the minimum standard of treatment under customary international law,* OECD 2017.
- References to "fair" and "equitable treatment in International Investment Agreements: A large sample survey of treaty provisions, OECD (forthcoming).

Reforming the investment dispute settlement system

The arbitration-based investor-state dispute settlement mechanism is among the features of the IIA regime that has drawn most criticism among governments and the public. Also, it has motivated some countries to remain outside the IIA regime altogether. ISDS has been criticised, among other things, for inconsistent outcomes, high costs, secrecy, and bias of adjudicators, which may be exacerbated by economic incentives for arbitrators to interpret treaties expansively and in favour of investors' interests. Additional issues arise from the exclusive availability of the system to foreign investors and the possibility to obtain pecuniary remedies that include lost profits, while domestic systems of law offer essentially primary (non-pecuniary) remedies.

Figure 3: Detail of ISDS provisions in IIAs: average detail score per country in relation to average age of treaty population and global trend (red trendline)



Source: OECD.

Others consider that the current ISDS system is fundamentally sound and that improvements should concentrate on: better treaty drafting, increasing governmental capacity to defend cases, or expanding the pool of arbitrators.

A large sample survey of ISDS provisions in IIAs has revealed features such as wide opportunities for forum shopping or very limited regulation of ISDS in the overwhelming majority of IIAs which leaves arbitrators great leeway for interpretation on procedures increasing unpredictability and uncertainty (Figure 3).

Different alternative modes of dispute settlement as well as institutional reforms have been proposed; some economies are currently evaluating or have already implemented these changes in recent treaty practice. These include the substitution of ISDS by State-to-State dispute settlement (SSDS) procedures or the establishment of a permanent investment court and appellate tribunal.

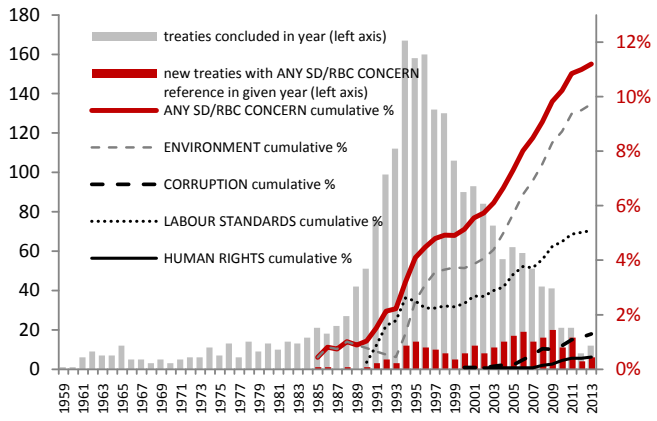
- *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD 2012.
- *Dispute Settlement Provisions in International Investment Agreements: A Large Sample Survey*, OECD 2012.
- *Government perspectives on investor-state dispute settlement: a progress report,* OECD 2012.
- *Public consultation on investor-state dispute settlement*, OECD 2012.

Ensuring responsible investment

Responsible investment, that is, investment that respects the standards and imperatives of responsible business conduct (RBC) and sustainable development (SD) is the type of investment host states seek to attract. To date, the potential of investment treaties in ensuring that business is conducted responsibly remains largely untapped. A survey of treaty provisions in over 2000 IIAs referring to RBC standards shows that only 12% of the surveyed IIAs contain references to RDB/SD, but the frequency of inclusion increases rapidly (Figure 4).

Individual countries have distinct approaches in this regard: some countries include such references systematically in their investment agreements (e.g. Canada and the United States), while others almost never include them (e.g. Argentina and Germany). Also, treaties make reference to RBC/SD standards in 9 distinct functions, including preambular references, clauses that discourage lowering standards or require compliance with domestic law on responsibility, and obligations to have specific legislation in place.

Figure 4: Evolution of the prevalence of references to RBC/SD concerns in bilateral IIAs (1959-2013)



Source: OECD.

Given that RBC and SD standards must apply generally, independent of the presence of a treaty, treaties are not the main vehicle to promote standards. IIAs can, however, reinforce the effect and respect of RBC/SD standards. Little efforts have so far been made to assess the practical role of RBC/SD content in IIAs for the effectiveness of these principles.

- *Investment Treaty Law, Sustainable Development and Responsible Business Conduct: A fact finding survey*, OECD 2014.

Enhancing systemic consistency

Consistency in adjudication helps meet the needs of traders and investors for security and predictability, contributes to the legitimacy and perceived fairness of the dispute settlement system and can facilitate dispute settlement. However, consistency, in a context where governments have consciously modified treaties with the intent of differing from the provisions of other treaties on similar issues, is a complex issue. Consistency is also not an absolute requirement of effective systems of dispute settlement – for

example, a certain tolerance for inconsistency is appropriate as dispute settlement mechanisms work out their approaches to unresolved legal issues. Active government interest and participation in the ongoing interpretation of the treaty, through tools such as joint interpretations or non-disputing party submissions, can assist in improving consistency. Nonetheless, despite these qualifications, many governments and stakeholders have serious concerns about inconsistencies in ISDS decisions on the same issue. The institutional structure of ISDS under most treaties with ad hoc panels composed of different arbitrators for each case is not designed to achieve consistency.

Consistency is also an issue in substantive law. The over 3000 investment treaties have many similarities but also many differences, both structural and in detail. Governments today are paying much more attention to their treaty language than in the past and there are both areas of convergence and divergence in recent practice. Some unique substantive rules in treaties (such as the wide acceptance of claims for reflective loss under many typical investment treaties) contribute to inconsistency including in cases arising out of the same factual situation.

Consistency also needs to be ensured with other bodies of international law, such as international environmental and human rights law.

- *Investor-State Dispute Settlement: A Scoping Paper for the Investment Policy Community*, OECD 2012.
- *Investment treaties as corporate law: Shareholder claims and issues of consistency*, OECD 2013.
- *The legal framework applicable to joint interpretive agreements of investment treaties*, OECD 2016.
- *Environmental Concerns in International Investment Agreements: A Survey*, OECD 2011.