Caribbean and African SIDS' International Investment Agreements and Climate Action

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Acknowledgements

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EXECUTIVE SUMMARY

Encouraging foreign direct investment (FDI) in sustainable and climate-friendly sectors could help countries finance and support the transition from high to low carbon or carbon-neutral economies. This, however, is not automatic. Growing consensus in policy and academic circles exists that the international investment law regime privileges the protection of private investors over States' regulatory rights and is ill-suited to the task of supporting States' sustainable development and climate action efforts. Indeed, as countries accelerate the shift from fossil fuels to more climate-friendly fuel sources, for example, potential exists for conflict between these measures and investors' treaty-based protections, potentially subjecting States to costly investor-State disputes and to multimillion dollar compensation awards, if found in breach.

Reform of international investment agreements (IIAs) is crucial to ensuring that foreign investment complements and does not derail climate action that States have committed to undertake under various treaties, most notably the Paris Agreement (2015). In recent years and thanks in large part to the advocacy by several organisations[1], many countries around the world have begun to reform their IIA regimes in an attempt to rebalance investor protections and states' rights, drawing on the reform tools provided by these organisations. Unfortunately, even some of the more recent IIAs still do not explicitly mention or promote climate action. Much of the reform work at the domestic level has been prospective, that is, geared toward reforming model BITs as the basis for future IIA negotiations but still retaining their older generation treaties.

Caribbean countries, and those countries in Africa which fall under the Small Island Developing State (SIDS) category, are among those whose IIA networks remain largely unchanged despite on-going reform discussions, and containing broad and vague investor protections. Fiscally constrained and on the frontlines of the climate crisis, these SIDS could find their climate actions being thwarted by investment disputes brought under these anti-development older treaties. Additionally, while this Brief focuses on the treaty-based threats to States' climate action, it recognizes that reforming the IIA system is not a panacea.

[1] These include, for example, the United Nations Conference on Trade and Development (UNCTAD), the International Institute for Sustainable Development (IISD), the Columbia Center on Sustainable Investment (CCSI), the UN Commission on International Trade Law (UNCITRAL), the Organisation for Economic Cooperation and Development (OECD), the World Economic Forum (WEF), among others.

Scope of Brief

This SRC Policy Brief analyses the IIAs of SIDS in the Caribbean, as well as those African countries which fall under the SIDS category. It probes whether these IIAs potentially help or hinder these countries' climate action. To answer the research question posed, the Brief reviews the publicly available legal texts of 138 extant BITs and 35 treaties with investment provisions (TIPs)[2] signed and in force in these countries, specifically the preambular provisions and substantive provisions around investment liberalization, protection, promotion, facilitation, and dispute settlement.

The Brief finds that while there have not been a significant number of claims under Caribbean and African SIDS IIAs, the expansive investor protections in these IIAs place these fiscally constrained SIDS at legal exposure from investor claims challenging their climate measures. The Brief also explores some possible ways in which the countries concerned could make their IIAs more in sync with their goal of promoting investment for sustainable development and for supporting their climate goals. It ultimately concludes that these countries' current stock of IIAs is unfit for the purpose of promoting investment that serves their climate action goals.

Outline

The Brief is outlined as follows:

- **Section I** introduces the brief.
- **Section II** provides an overview of the IIA networks of SIDS in Africa and the Caribbean
- **Section III** reviews the substantive provisions of the IIAs under study.
- **Section IV** summarises the findings and presents key recommendations.

[2] This Brief adopts this term from UNCTAD's IIA navigator. In the UNCTAD context, the term "treaties with investment provisions" refers to non-BIT investment treaties. According to UNCTAD's IIA navigator, "three main types of TIPs can be distinguished:

1. broad economic treaties that include obligations commonly found in BITs (e.g., a free trade agreement with an investment chapter);

2. treaties with limited investment-related provisions (e.g., only those concerning establishment of investments or free transfer of investment-related funds); and

3. treaties that only contain "framework" clauses such as the ones on cooperation in the area of investment and/or for a mandate for future negotiations on investment issues."
See further UNCTAD's IIA Navigator: https://investmentpolicy.unctad.org/international-investment-agreements.

- **Section V** concludes.

Main Findings

The main findings of the Brief are as follows:

- Most IIAs concluded by Caribbean and African SIDS are older generation treaties with broad investment protection provisions, while safeguards for state regulatory action for the environment and climate action are either non-existent or limited. They are therefore unaligned with these countries' sustainable development policies and climate goals. Like many BITs of their vintage, there is limited emphasis on the promotion or facilitation of sustainable and climate-aligned investment.
- Although Caribbean and African SIDS are participating in international investment law reform discussions at the national, regional, and international levels, much of the reform of their IIAs has so far only applied to prospective IIAs. Therefore, their existing problematic stock of older generation treaties remains intact.
- The risk of legal exposure to treaty-based investor-state dispute settlement (ISDS) cases varies among the SIDS examined and depends on several factors, including the number of IIAs in force for each of them and the volumes of inward FDI covered by their IIA networks.
- Newer IIAs, more specifically those concluded as investment chapters in FTAs signed by Caribbean and African SIDS, tend to be slightly more development-friendly but do not generally mention climate action in their preambles or substantive provisions.
- There have not been a large number of known BIT-based claims against Caribbean and African SIDS so far. This may be among the reasons for what appears to be limited political will to address these problematic treaties.
- The IIA practice of Caribbean and African SIDS has varied and in recent years there seems to be less appetite for negotiating and signing IIAs, which is consistent with a global slowing down in IIA conclusion.
- Reform of these States' IIA regimes is key if their investment treaties are to complement and promote their climate action objectives. While IIA reform is not a panacea, it is important if countries' investment policies are to be better aligned with their sustainable development imperatives and climate action goals. In their reform efforts, countries should consider ways of measuring the development impact of

their IIAs and the potential role of alternative policy instruments that are fit for the purpose of attracting sustainable investment.

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INTRODUCTION

Scholarly and policy discourse about the negative impact of investment treaty-based litigation on governments' sovereign climate adaptation and mitigation efforts has intensified in recent years.[3] It is part of a wider on-going international investment law reform conversation which recognises that this regime is heavily skewed towards the protection of foreign investors even where a host State's development interests might be harmed. There is, therefore, the need to ensure that treaty-based investor protections do not constrain host States' ability to regulate in the public interest, particularly in environmental, public health and human rights matters.

Unlike other international law regimes, the international investment law regime principally comprises the network of international investment agreements (IIAs) [4] countries have negotiated among themselves since the 1950s and increasing in the 1980s-2000s.[5] Traditional BITs, often referred to as 'older-generation BITs' are creatures of an era when States' emphasis in treaty negotiations was on attempting to attract investment for economic growth by mitigating the political risks investors faced when investing abroad.[6] Climate change and broader development concerns were not top of mind for IIA negotiators. As such, in an aim to assuage foreign investors and attract precious capital needed for fostering economic development, these agreements were focused almost exclusively on investment protection from unfair State action.[7]

Man-made climate change is already causing significant damage to some of the most vulnerable countries and communities. The climate science shows that the world is rapidly approaching the point of no return, that is, where the impacts of climate change might soon reach an irreversible point (IPCC 2023). Loosely stated, climate action refers to actions taken to mitigate or adapt to climate change.[8] While a review of SIDS' Nationally

[3] See for example, Akinkugbe and Majelolagbe (2023), Brauch (2022), Tienhaara (2018), Van Harten (2016), inter alia. See also Bernasconi & Johnson's book (2010) of key international investment arbitration cases touching on and concerning sustainable development from 2000 to 2010.

[4] According to UNCTAD's IIA navigator, there are presently 2,829 IIAs signed worldwide (2219 in force) and 435 treaties with investment provisions signed worldwide and 364 in force. See https://investmentpolicy.unctad.org/international-investment-agreements.

[5] Some authors like Akinkugbe and Majelolagbe (2023) extend this definition of the international investment law regime beyond simply BITs and free trade agreements with investment chapters to further include "their investor-state dispute settlement system, as well as international, national and sub-national laws and contracts that govern international investment".

[6] The rationale was that the investor needed to be protected from the heavy hand of the State and therefore there was need for guarantees against unlawful expropriation, for example. This logic however did not consider the power imbalance that existed between investors and FDI-dependent developing countries, particularly small States.

[7] In more recent times economic development has come to be seen as only one facet of development. Sustainable development, a more holistic approach to development, has been adopted by the international community and recognizes not just economic, but also social and environment development as pillars. See Sachs (2015).

[8] Mitigation refers to efforts taken to reduce or eliminate the amount of greenhouse gases in the atmosphere and thereby lessen the impacts of climate change. Adaptation refers to adjusting to the existing effects of climate change.

Determined Contributions (NDCs) is outside of this Brief's scope, their NDCs vary based on their target, sectors identified and ambition level.[9] Countries' stated measures include setting sector-specific mitigation targets, phasing out fossil fuels and ramping up renewable energy usage, while adaptation actions include, for example, integrating climate risks in their national development policies in order to reduce vulnerability and build resilience. These are effected through policies, legalization, and special programmes. For example, Barbados is one of the growing number of countries which has set a net zero target and aims to achieve it by 2030.[10] However, their ability to decarbonize and implement far-reaching climate policies could be impacted by investors' claims brought under their existing IIAs.

As the ICC notes, "commercial disputes with a climate change related genesis are increasingly likely to be brought by businesses as they adjust to increasing regulation of emissions following the entry into force of the Paris Agreement" (ICC 2019).This brief adopts the International Chamber of Commerce's definition of a climate change related dispute as "any dispute arising out of or in relation to the effect of climate change and climate change policy, the United Nations Framework Convention on Climate Change (UNFCCC) and the Paris Agreement" (ICC 2019). The fear that investor claims could derail governments' sovereign mitigation and adaptation action is not unfounded[11]. Multimillion dollar ISDS cases[12] involving investors' claims against governments' environmental policies are increasing, including those directly related to climate action. As Beharry and Kuritzy (2015) note, these claims have spanned a plethora of sectors and targeted a variety of government environment measures. However, as DiSalvatore (2021) highlights, the fossil fuel industry is not only the most significant contributor to climate change but, comprising almost 20% of the total known ISDS cases, it is the most prevalent sector in international investment arbitration.

Resolving this conflict between investor protections in IIAs and governments' climate policies is particularly pressing given that the climate crisis is one of the gravest threats confronting the global community. For low-lying coastal communities and SIDS, this threat is existential. Yet governments' present climate action ambitions

[9] On Caribbean SIDS' NDCs, see the work of Haynes, Remy and Ellis (2021).
[10] See Barbados' National Energy Policy 2019-2030 and its 2021 Barbados NDC Update of July 21, 2021.
[11] Many of the existing cases arose under the Energy Charter Treaty, a multilateral framework for energy cooperation among the world's most powerful countries since 1991. The vast number of fossil fuel related ISDS cases brought under the treaty has caused criticism that it is a hindrance to enacting national policies to promote the transition to renewable energy. In June 2022, a deal was reached to modernize the treaty, but critics argue that this tinkering falls short. See generally Tienhaara and Downie (2018).
[12] Investment arbitration disputes can arise under investment treaties, but also investor-State contracts and domestic law. This Brief focused on treaty-based exposure. Contract-based investment arbitration claims also suffer from limited transparency because the judgments are often not published.

are insufficient to meet the Paris Agreement[13] goal of "holding the increase in the global average temperature to well below 2°C above pre-industrial levels".[14] Reform of the IIA system is at least one component[15] needed if international investment law is to serve and not impede climate action or cause a 'chilling' of regulatory action.[16] [17]

A growing corpus of academic literature exists on this tension between international investment law and climate action. Some studies look at IIAs in general to ascertain their inclusion of environmental concerns. In a review of 1,623 IIAs, Gordon & Pohl (2011) found that all 30 non-BIT IIAs they reviewed contained environmental references, compared to just 6.5% of BITs. A growing list of studies examines the use by investors, particularly in the fossil fuel industry, of the investor-State dispute settlement system (DiSalvatore 2021; Beharry & Kuritzy 2015). However, authors differ on the extent to which these two regimes could be reconciled, if at all. Akinkugbe and Majekolagbe (2023) argue that these two regimes are fundamentally misaligned and must be recentered on climate justice. Others like Stephenson & Zhan (2022) argue that FDI could assist in climate action, but this is not automatic. For this to happen, they outlined three broad proposals, each with subcomponents, for the G20 to consider: first, a clear definition of climate FDI, second, climate FDI policies and measures are adopted and third, supporting new initiatives for investment and climate goals.

However, there is limited focus on this topic specifically from the perspective of SIDS, particularly those in Africa and the Caribbean.[18] SIDS deserve special focus in the discussion of the intersection between international investment law and climate action for at least the following reasons. First, SIDS are on the frontlines of climate change[19] and have been vociferous advocates of enhanced climate action internationally. SIDS, like other UN

[13] The Paris Agreement was a landmark treaty signed by 196 parties at COP21 in Paris, France on December 12, 2015. It entered into force on November 4, 2016.
[14] The Paris Agreement also includes a best-endeavour goal to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius as it was recognized that beyond 1.5 degrees Celsius could cause even more severe climate impacts. SIDS were critical in having this as part of the Agreement's text, albeit in a best endeavour format. See Article 2(1)(a) of the Paris Agreement.
[15] Akinkugbe and Majekolagbe (2023) assert that international climate law and international investment law are misaligned and that merely tinkering with IIAs without deep-seated reform risks perpetuating inequities and is not enough to ensure IIL works for climate action. Mann (2013) similarly argues that the purpose and rationale of investment treaties must go beyond merely investor protection and must encompass a relationship between FDI and sustainable development.
[16] Some of these reform initiatives include UNCITRAL's Working Group III on ISDS reform, work being done by UNCTAD, the OECD, IISD, among others.
[17] See Tienhaara 2018.
[18] Haynes (2023) in his review of 55 BITs concluded by 12 Caribbean countries finds that these BITs' broad and vague provisions place these States at legal exposure. He urges these countries to consider reforms.
[19] Despite accounting for only 1% of global greenhouse gas (GHG) emissions, Small Island Developing States (SIDS) are disproportionately vulnerable to the most adverse effects of climate change. Severe weather disasters have on average caused damage equivalent to 2.1 percent of SIDS' GDP annually over the period 1980 to 2018 (Slany 2020).

Member Countries, signed on to the Sustainable Development Goals (SDGs), including Goal 13 (Climate Action) in 2015. Also in 2015, over 190 countries, including Caribbean and African SIDS, signed the Paris Agreement on Climate Change at UNFCCC COP23 in which they committed, inter alia, to take action to ensure a global average temperature increase of no more than 2.0 degrees Celsius. The Paris Agreement leaves it to parties to determine their Nationally Determined Contributions (NDCs), their levels of ambition and the measures they will take to meet these obligations. Most Caribbean and African SIDS have submitted at least one NDC document to the Secretariat so far (Remy, Haynes & Ellis-Bourne 2021).

Second, SIDS are the clearest example of the power imbalance between investors and cash-strapped and FDI-dependent host States which is rooted in historic inequalities borne out of colonialism and imperialism (Haynes and Hippolyte 2023). They are not only unable to fund their mitigation and adaptation efforts.[20] They are constrained in their ability to defend themselves against costly investor claims and could face significant payouts when international tribunals find in favour of the claimant investor. Third, SIDS are resource-constrained and highly dependent on foreign capital inflows and would need to increase investment inflows to help fund their energy transition. Moreover, significant payouts due to investment claims could cripple their public finances. Fourth, while this might seem incongruous to the goal of promoting climate action, some fiscally-constrained SIDS are intensifying efforts to find commercial quantities of fossil fuels (mainly oil) to fund their energy transition.[21] As fossil fuel investors are among the leading users of the ISDS system, increased fossil fuel activity could put these countries at risk of greater disputes when seeking to ensure that oil companies behave in an environmentally sustainable manner or to adopt policies to transition to greener alternatives.

Third, SIDS are also characterized by their open economies and high dependence on trade and foreign capital inflows for macro-economic stability.[22] To varying extents, Caribbean and African SIDS have signed and ratified IIAs, often with larger capital-exporting States, to attempt to stimulate and boost capital inflows. The evidence of the impact of IIAs on signatory countries' FDI inflows remains unsettled (Frenkel & Walter (2019); Busse, Königer & Nunnenkamp 2010; Hallward-Driemeier 2005; Neumayer & Spess 2005). There seems to be some agreement that the quality of the treaty provisions matters. One study found that high quality investor

[20] The climate finance gap is large and to close it requires investment from both public and private sources.
[21] See Akinkugbe and Majekolagbe (2023) for a deeper discussion of some of the ways in which the green transition is actually negatively impacting developing countries, including extreme poverty and access to energy.
[22] Among the SIDS under study, some are also classified by the UN as least developed countries, that is, countries with structural impediments to attaining sustainable development. These are Haiti in the Caribbean and Guinea-Bissau, Comoros, and Sao Tome e Principe in Africa.

protections promote South-South FDI (Dixon and Haslam 2016). Because of their fiscal constraints, SIDS are more likely to be adversely affected financially if they have to pay for legal representation to defend against a claim or even worse, to pay compensation if found in breach. Arbitral awards can be in the multi-billion dollar range (Rosert 2014).

The pace of signature of these treaties has slowed and like many countries internationally, the majority of these countries' IIAs were signed between the 1980s and 2000s.[23] These treaties, often referred to as 'older generation IIAs', were focused primarily on protecting investors and their investments with little to no reference to sustainable development, far less, climate action. They often had little or no investor obligations, carve-outs, or restatements of States' inherent sovereign right to regulate in the public interest, including on climate and environmental matters.[24]

This SRC Policy Brief undertakes an analysis of Caribbean and African SIDS' IIAs and discusses whether their current stock of IIAs is fit for the purpose of promoting investment that serves their climate action goals or whether current protections in these agreements could possibly open their climate adaptation and mitigation measures to legal exposure to investor claims. The Brief finds that while there have not been a large number of claims under Caribbean and African SIDS IIAs, the broad investor protections, and limited development provisions in these IIAs do little to complement or facilitate meaningful and effective climate action and could place these countries at risk for investor disputes arising from their climate action efforts. The Brief also explores some possible ways in which the countries concerned could make their IIAs more in sync with their goal of promoting investment for sustainable development and for supporting their climate goals. However, it further notes that while reforming their IIAs is important, it is not a panacea and there is not even conclusive evidence to suggest that negotiating IIAs even attracts investment. Solely focusing on IIA reform would still leave them vulnerable to contract-based disputes if their investor-State contract practice is not similarly reformed bearing in mind the asymmetric power dynamic between capital-owning investors and capital-dependent SIDS host State governments. In sum, IIA reform must be part of a wider investment law reform which is informed by sustainable development policies.

[23] According to UNCTAD's Report on New IIAs and IIA Reform Processes 2020-2021, "as in 2019, the number of effective treaty terminations in 2020 exceeded that of new IIAs, with 42 terminations".

[24] Several international organisations have called for a comprehensive overhaul of the global IIA regime and have provided thought leadership on how this could be achieved. Chief among those, UNCTAD, has made available a wide array of tools and technical assistance for countries seeking to make their IIAs more sustainable development friendly. Multilateral initiatives on ISDS reform include the UNCITRAL Working Group III discussions.

Methodology and Limitations

To answer the research question posed, the policy brief relied on desk research using available information. It consisted of a review of the legal texts of extant IIAs (BITs and TIPs) in force for the 6 African SIDS (Cabo Verde, Comoros, Guinea-Bissau, Mauritius, Sao Tome e Principe and Seychelles) and 16 Caribbean SIDS (Antigua and Barbuda, The Bahamas, Barbados, Belize, Cuba, Dominica, The Dominican Republic, Grenada, Guyana, Haiti, Jamaica, St Kitts and Nevis, St. Lucia, St. Vincent and the Grenadines, Suriname and Trinidad and Tobago), according to the United Nations (UN) classification. The scope of the analysis is limited to those IIAs currently in force and whose texts were publicly available in English, French, Portuguese, or Spanish. An exception was made in the case of the BITs with Brazil as these are among the best example of newer IIA practice among the Caribbean countries studied. The researcher utilized the UNCTAD IIA Navigator to obtain the texts of the IIAs reviewed. The analysis focused on the preambular and substantive provisions of the texts, including the provisions on investment liberalization, protection, promotion, facilitation, and the dispute settlement provisions.

This brief is policy focused. Therefore, an in-depth legal analysis, including a review of case law, is outside of its scope. In total 138 BITs and 35 TIPs were reviewed. The list of the agreements reviewed is available in the Annexes (Annex A and B respectively) to this Brief.

Some of these countries have model BITs but only the model BIT of Mauritius (as of 2002) is publicly available.[25] As such, the model BITs were not part of this analysis and evidence of recent treaty practice was taken from those few IIAs signed after 2015 when the Paris Agreement was adopted. Since 2015, the majority of BITs signed by Caribbean and African SIDS were with the UAE. As only one UAE text was publicly available most could not be analysed for this Brief.

[25] Mauritius' model BIT (2002) is publicly available. Barbados recently revised its model BIT but this is not public. The CARICOM Guidelines for Use in the Negotiation of Bilateral Treaties 1985) is publicly available. However, this document is likely outdated given the current reform work at the regional level, including longstanding work to craft a CARICOM Investment Code. The 1985 Guidelines may be found here: https://investmentpolicy.unctad.org/international-investment-agreements/treaty-files/2879/download.

Outline of Brief

The remainder of the Brief is outlined as follows. **Section II** provides an overview of the IIA networks of Caribbean and African SIDS. **Section III** reviews the substantive provisions of the IIAs under study and discusses the extent to which they are fit for the purpose of promoting and facilitating climate-friendly investment that supports State climate action and does not leave these SIDS vulnerable to investor claims. **Section IV** summarises the findings and presents key recommendations. **Section V** concludes.

CARIBBEAN AND AFRICAN SIDS' IIAS

The concluded IIAs of Caribbean and African States comprise mostly BITs signed primarily in the 1980s and 1990s. These countries signed IIAs for both economic and political reasons, believing that providing guarantees to investors would lead to inflows of needed capital for economic development. Some IIAs were also signed for political reasons to promote and strengthen commercial links with strategic partners. These countries' IIAs are with both developed and developing country partners. As shown in Figure 1, a good number of these IIAs have been signed, but are not yet in force. These SIDS' IIA networks differ by country, with some African and Caribbean SIDS having extensive networks, while others having a handful.[26] The networks include BITs, but also TIPs, including investment chapters in free trade agreements, regional investment agreements[27] and trade and investment framework agreements. Only a few of these agreements have been terminated and have usually been unilateral termination by the treaty partner.[28] Since the 2000s, the number of IIAs signed by Caribbean and African SIDS per year has slowed down, consistent with the global trend in the reduction of new BITs being signed by countries globally compared to the in the 1980s to early 2000s.[29] Caribbean and African SIDS have had limited investor claims to date and the main known ones from the UNCTAD Dispute Settlement Navigator database are outlined in Annex C.

[26] Some countries, notably Barbados, have concluded BITs and double taxation agreements as part of their strategy of positioning themselves as attractive locales for foreign investment. However, other countries seem to place less importance on IIA negotiations.
[27] These include for example the investment provisions in the Revised Treaty of Chaguaramas which provides the right of establishment to CARICOM nationals in each other's territories. Another example is the COMESA Investment Agreement (2007).
[28] See for example the BITs with India.
[29] See UNCTAD (2021) generally for trends in IIAs and IIAs processes for the period 2020-2021, as well as its World Investment Report (2022).

Figure 1: Table showing Caribbean and African SIDS' BITs signed, in force and terminated.

Country	BITs signed	BITs in force	BITs terminated
Antigua & Barbuda	3	2	0
Bahamas	1	0	0
Barbados	11	9	0
Belize	8	5	0
Cabo Verde	12	9	1
Comoros	7	3	0
Cuba	60	41	0
Dominica	3	2	0
Dominican Republic	15	11	1
Grenada	2	2	0
Guinea-Bissau	4	1	0
Guyana	9	5	0
Haiti	8	3	0
Jamaica	17	11	0
Mauritius	48	30	2
Sao Tome e Principe	3	0	0
Seychelles	5	2	1
St. Kitts & Nevis	1	0	0
St. Lucia	2	2	0
St. Vincent & the Grenadines	3	2	0
Suriname	5	1	0
Trinidad & Tobago	13	12	1

Source: UNCTAD IIA Navigator Database. Data as of January 20, 2023.

These states have also concluded treaties with investment provisions. Figure 2 below shows these.

Figure 2: Table showing Caribbean and African SIDS' TIPs signed, in force and provisionally applied.

Country	TIPs signed	TIPs in force	TIPs provisionally applied
Antigua & Barbuda	8	7	1
Bahamas	8	7	1
Barbados	8	7	1
Belize	8	7	1
Cabo Verde	8	6	0
Comoros	9	7	0
Cuba	3	3	0
Dominica	8	7	1
Dominican Republic	6	5	1
Grenada	8	7	1
Guinea-Bissau	10	8	0
Guyana	8	7	1
Haiti	8	7	1
Jamaica	8	7	1
Mauritius	12	10	0
Sao Tome e Principe	3	3	0
Seychelles	9	7	0
St. Kitts & Nevis	8	7	1
St. Lucia	8	7	1
St. Vincent & the Grenadines	8	7	1
Suriname	8	7	1
Trinidad & Tobago	8	7	1

Source: UNCTAD IIA Navigator Database. Data as of January 20, 2023.

These differ from UNCTAD's as the author took out older treaties which had been replaced.

PREAMBULAR TEXT

Rules of treaty interpretation require that a treaty be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their 'context' and in the light of its object and purpose.[30] The preamble of an agreement forms part of its context for the purpose of the interpretation of a treaty.[31]

Therefore, while preambles are not substantive commitments, they assist in the interpretation of such commitments.[32] Unlike most of the TIPs[33], many of the BIT texts under consideration lack references to the goal of promoting sustainable development in their preambles. The majority of Caribbean and African SIDS' BITs' preambles speak to protecting and promoting investment and contributing to economic growth exclusively. They generally do not expressly include environmental protection and have traditionally identified the protection of investors and the promotion of investments between the parties as the treaty's "object and purpose". The preambular text of most of the IIAs under study do not reference sustainable development or climate change. This is not unusual for agreements of that vintage since neither was as high on governments' policy agendas as they are now.

In recognition of this, the model BITs of some countries internationally now include more development friendly language by making references to sustainable development in their preamble and in the substantive text. The model Mauritius BIT of 2002 does not include this and since the model BITs of other SIDS are not available publicly, it is unclear whether Caribbean and African SIDS' model BITs have also followed this international trend. Caribbean and African SIDS' TIPs, as well as those few BITs concluded after 2010, generally tend to include at least some reference to the environment but do not explicitly reference climate change.

For instance, the Guatemala-Trinidad & Tobago BIT (2013) in its preamble states:

[30] Vienna Convention on the Law of Treaties (Article 31 (1)
[31] Vienna Convention on the Law of Treaties (Article 31(2)
[32] See Societe Generale de Surveillance S.A. v Republic of the Philippines, ICSID Case No. ARB/02/6, Decision on Jurisdiction (29 January 2004), para. 116
[33] For example, the Investment Agreement For the COMESA Common Investment Area(2007), commonly referred to as the COMESA Investment Agreement (2007), provides, inter alia, in its preamble "BEARING IN MIND that the measures agreed upon shall contribute towards the realisation of the Common Market and the achievement of sustainable development in the region." Similarly, the CARIFORUM-EU EPA at Article 60(1) provides the object, scope and coverage of the investment chapter as follows: "The Parties and the Signatory CARIFORUM States, reaffirming their commitments under the WTO Agreement and with a view to facilitating the regional integration and sustainable development of the Signatory CARIFORUM States and their smooth and gradual integration in the world economy, hereby lay down the necessary arrangements for the progressive, reciprocal and asymmetric liberalisation of investment and trade in services and for cooperation on e-commerce".

> CONVINCED of the necessity for the promotion and reciprocal protection of foreign investments with the objective of stimulating productive capital flows for the technological and economic development of both Contracting Parties;
>
> UNDERSTANDING that these objectives should be achieved in a manner consistent with the protection of health, security, the environment, and labor rights of each Contracting Party;

Another example is the Mauritius-Egypt BIT (2014) whose preamble includes "convinced that these objectives can be achieved without relaxing health, safety, environmental standards of general application, and prevention and combating of transnational organized crimes".

This is not to imply that merely including this language in the preamble makes these BITs more climate friendly. However, if Caribbean and African SIDS' IIAs are to be aligned with their climate goals, their preambles should at the very least mention the parties' commitment to climate action, promoting investment that is climate-friendly and commitment to cooperating on climate action and climate finance. Doing such could assist tribunals in their interpretation.

SCOPE OF APPLICATION

a. Definition of "investment"

The importance of defining the term "investment" stems from the fact that only investments of the parties which meet that agreement's definition of investment are covered and therefore protected under the agreement. Generally, both Caribbean and African SIDS have tended to use the traditional broad, asset-based definition of "investment" which usually covers both tangible and intangible assets. Most have included the "every kind of asset" or "any kind of asset" formulations followed by an illustrative, non-exhaustive list of assets. A typical formulation is that found in the Mauritius-UK BIT (1986) (Article 1).[34] This means that all types of

[34] Article 1 of the Mauritius-UK BIT provides "Every kind of asset and in particular, though not exclusively, includes:
(i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
(ii) shares, stock and debenture of companies or interests in the property of such companies;
(iii) claims to money or to any performance under contract having a financial value;
(iv) intellectual property rights and goodwill;

investment, whether FDI or portfolio and whether sustainable development or climate-friendly or not, would be protected.

The requirement that the investment should be made "in accordance with the laws of the State" is mainly found in Caribbean and African BITs with Asian countries.[35]The formulation of "investment" in the Barbados-Canada (Article 1(a)(f)) and the Trinidad & Tobago-Canada (Article I(f)) BITs goes further as it covers not just those assets owned or controlled directly by an investor of one Contracting Party in the territory of the other Contracting Party, but also those assets owned indirectly by an investor of one Contracting Party through an investor of a third state. This might not be the best approach as it means that they are protecting assets of an unknown origin. The Barbados-Canada BIT at Article 1(a)(f) specifically excludes real estate or other tangible or intangible property not acquired in the expectation or used for the purpose of economic benefit or other business purposes from the definition of investment.

The majority of BITs state that the change in the form in which assets are invested does not affect their character as investments. Some BITs, however, include the caveat provided that the change does not contravene the laws and regulations of the party in which the investments were made.[36]

The broad definition of "investment" extends protection to the broadest array of existing forms of investment and recognizes the evolving forms of investment. However, this has led to an inconsistent approach in how tribunals determine whether an asset at the center of a dispute qualifies as a 'covered investment'. This situation is compounded by Article 25 of the ICSID convention which limits its jurisdiction to disputes "arising directly out of an investment" but itself lacks a definition of "investment".[37] The *Fedax v Venezuela*[38] tribunal attempted to

(v) business concessions conferred by law or under contract including concessions to search for, cultivate, extract, or exploit natural resources."

[35] The St Vincent and the Grenadines-Taiwan BIT (Article I) provides that "the term "investment" shall comprise every kind of asset owned or controlled either directly or indirectly by an investor of one Contracting Party in the territory of the other Contracting Party in accordance with the latter's laws and, in particular, though not exclusively, includes" and is followed by a non-exhaustive illustrative list.

[36] See for example, Seychelles-Cyprus BIT (Article 1)

[37] ICSID Convention, Article 25(1) provides as follows: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally".

[38] Fedax NV v. The Republic of Venezuela, ICSID Case No. ARB/96/3, Decision of the Tribunal on Objections to Jurisdiction, 11 July 1997, paras. 18–20.

provide a definition of characteristics of what comprises an "investment", and this test, later refined by the tribunal in *Salini v Morocco*[39], has come to be known as the 'Salini test'.

Caribbean and African SIDS should think carefully about the definition of investment used in their agreements so that protection is given only to those investments which contribute to development, and which are climate-friendly[40]. Several countries, even capital exporting countries, have started to reformulate the definition of investment in their agreements.[41] A closed list approach can be used in which only those asset types listed in the definition qualify for treatment and protection as investments under the agreements. If these countries prefer to keep the broad asset-based approach, they can on the other hand include a list of exclusions, whereby all types of assets are covered with the exception of those stated in the exclusion list. This approach was taken by Article 1(9) of the Investment Agreement for the COMESA Common Investment Area which specifically excludes certain types of assets from the definition of investment.[42] Some authors have recommended limiting or excluding investment in high-carbon investment under the IIA's coverage (UNCTAD 2022; Brauch 2022).

b. Definition of "investor"

The definition of "investor" determines whether the person (natural or juridical) qualifies as a covered investor for the purposes of the IIA in question. Investors of the party can be either natural persons or juridical persons. Countries could consider definitions of an investor which include some measure of sustainability.

Article 1 (a) of the Antigua and Barbuda-United Kingdom BIT (1987) contains a typical example of the definition of a national in most of the agreements.[43] Although the majority of BITs limit 'natural investors' to citizens, Caribbean BITs with Canada extend the definition of "investor" to include natural persons permanently residing

[39] Salini Costruttori SPA and Italstrade SPA v. Kingdom of Morocco, ICSID Case No. ARB/00/4, Decision on Jurisdiction, 23 July 2001, paras. 50–52. These are: a certain duration of performance of the contract and a participation in the risks of the transaction and the contribution to the economic development of the host State.
[40] UNCTAD has advocated for States to distinguish between climate-friendly and climate-harmful investments in their IIAs and to give preference to low-carbon investments (UNCTAD 2020). Also see Brauch (2022).
[41] See for example, the US Model BIT 2012 which may be accessed here: https://ustr.gov/sites/default/files/BIT%20text%20for%20ACIEP%20Meeting.pdf.
[42] Article 1(9) expresses excludes the following "goodwill market share, whether or not it is based on foreign origin trade, or rights to trade; claims to money deriving solely from commercial contracts for the sale of goods and services to or from the territory of a Member State to the territory of another Member State, or a loan to a Member State or to a Member State enterprise; a bank letter of credit; or the extension of credit in connection with a commercial transaction, such as trade financing."
[43] Antigua & Barbuda-UK BIT (Article 1(a)) provides that "Nationals" means: in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom; in respect of Antigua and Barbuda: physical persons deriving their status as citizens of Antigua and Barbuda from the Antigua and Barbuda Constitution Order 1981, or any amendment thereof. (Article 1(c)).

in the contracting parties in accordance with the laws of those countries and who do not possess citizenship of the other contracting party.[44]

The formulation of the definition of a company differs across the agreements, but most use the test of incorporation or the place of business (siege social).[45] In some agreements countries have different definitions of a company for their own purpose even within the same agreement. An example is Article 1(2) of the Jamaica-People's Republic of China BIT (1994).[46]

Some IIAs are more specific in terms of the definition of a "company". The Trinidad & Tobago-France BIT (1993) at Article 1(3) states that it must be a legal person constituted on the territory of one Contracting Party in accordance with the law in force that Party. Other requirements are a registered office in the territory of one contracting Party and it must be constituted in accordance with the law in force of that Party. Some IIAs require that the legal entity not merely be incorporated in one of the parties, but its effective management must also be in that party.[47] Caribbean and African SIDS could consider defining what would be considered a "sustainable investor" and this could be guided by on-going academic and other multilateral efforts on this.

INVESTMENT LIBERALISATION

Not all of the Caribbean and African IIAs provide market access commitments. For example, those which are Trade and Investment Framework Agreements only establish a framework between the parties for cooperation on investment matters.[48] Under those Caribbean and African SIDS' IIAs which provide market access

[44] Barbados-Canada BIT (Article 1) and Trinidad & Tobago-Canada BIT (Article 1)
[45] Antigua & Barbuda-UK (Article 1)
"Corporations, firms, and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 11.
[46] Article 1(2) of the Jamaica-People's Republic of China BIT provides that "Companies" means: In respect of the People's Republic of China; economic entities established in accordance with the laws of the people's republic of China and domiciled in the territory of the People's Republic of China.

In respect of Jamaica, companies, association, or firms incorporated or constituted in accordance with the laws of Jamaica.

[47] Cape Verde-Hungary BIT (Article I)
[48] See for example the US TIFAs with CARICOM, COMESA, the East African Community and Mauritius, respectively. Under these agreements, there is agreement by the parties to cooperate on promoting trade and investment flows between them, to promote an attractive investment climate, the establishment of a joint council which would facilitate cooperation between the parties on trade and investment matters. Any party may raise trade and investment matters of concern to them to the Joint Council. It is unknown to what extent these joint councils have been effective, including how often they meet and whether any investment concerns have been raised and resolved.

commitments, the majority do not provide pre-establishment rights to investors and use the "admission clause" model which makes the admission and establishment of foreign investment subject to the domestic laws of the host country. A typical formulation of such a clause is seen in the Antigua & Barbuda-UK BIT (Article 2(1)):

> Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws currently in force, shall admit such capital.

Not surprisingly, the BITs with Canada and the US are non-traditional and contain pre-establishment rights for investors.[49] It is questionable, however, whether SIDS should seek to provide investors with pre-establishment rights as this limits their ability to screen investments for sustainability. The better approach would be the 'admission clause model' - only guaranteeing such rights once the investment has been admitted in accordance with the laws and regulations of the State. Caribbean and African SIDS could further specify that the investment must be sustainable and made in accordance with the environmental laws and regulations of the State. Defining what is characterized as sustainable investment is beyond the scope of this Brief but there is growing literature on this, including work being done to identify characteristics of sustainable investment (Sauvant & Mann 2019 and 2017).

INVESTMENT PROTECTION: STANDARDS OF TREATMENT

It should be noted that, outside of the BITs and some of the investment chapters in FTAs, not all Caribbean and African SIDS' IIAs contain investment protection provisions. The EPAs with the EU focus moreso on market access as the European Commission had only had competence for investment liberalisation at the time of negotiation (Nicholls 2010). Additionally, the TIFAs with the US do not contain investment protection provisions. The discussion below, therefore, focuses only on those IIAs which do contain such provisions.

a. Fair and Equitable Treatment (FET)

The FET standard is frequently invoked by investors[50] in ISDS disputes, including in the energy and mining sectors. It therefore has become one of the most notorious and problematic provisions in international

[49] The Barbados-Canada and Trinidad & Tobago- Canada Agreements provide for MFN and national treatment "in like circumstances" during the pre and post establishment phases.
[50] American Manufacturing & Trading, Inc. (AMT) (US) v. Republic of Zaire, ICSID case No. ARB/93/1 Award, 21 February, 1997, reprinted in 36 International Legal Materials 1531 (1997).

investment law. The standard is imprecise (Shreuer 2006). [51] Moreover, tribunals have not been consistent in their approach as some have limited it to the minimum standard under international law whether others have seen it as a more autonomous standard[52].

Africa and Caribbean SIDS' BITs have adopted a broad and vague formulation of the FET standard. Three approaches can be discerned from the FET provisions in these BITs.

The first approach is the vaguest and only states that the investments of nationals or companies are to be accorded FET and does not make reference to the standard of such treatment. This approach often pairs the FET standard with the requirement to provide full protection and security in its territory to an investor of the other party.[53]

The second approach accords FET in accordance with principles of international law.

> The Trinidad & Tobago-Canada BIT (Article 2(2)(a)) provides:
>
> Each Contracting Party shall accord investments or returns of investors of the other Contracting Party fair and equitable treatment in accordance with principles of international law.

Slightly different wording is used in the BITs with the US.[54]

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[51] See also generally, Eric de Brabandere, Fair and Equitable Treatment and (Full) Protection and Security in African Investment Treaties: Between Generality and Contextual Specificity, 18 J. WORLD INV & TRADE 530, 531 (2017).

[52] See Waste Management, Inc. v. The United Mexican States, ICSID Case No. ARB(AF)/00/3, para 99 where, the tribunal stated that "Evidently the standard is to some extent a flexible one which must be adapted to the circumstances of each case. Accordingly, it is to the facts of the present case that the Tribunal turns".[52]
In contrast, in Alex Genin, Eastern Credit Limited, Inc. and A.S. Baltoil Genin v. Republic of Estonia, ICSID Case no ARB/99/2 (Award) (June 25, 2001), available at https://www.italaw.com/sites/default/files/case-documents/ita0359.pdf, the tribunal, dismissing the claim, noted, inter alia, that:
"Under international law, this requirement is generally understood to 'provide a basic and general standard which is detached from the host State's domestic law'. While the exact content of the standard is not clear, the Tribunal understands it to require an 'international minimum standard that is separate from domestic law, but that is, indeed, a minimum standard."[52]

[53] Guyana-United Kingdom BIT (Article 2(2)) provides:

> Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and enjoy full protection and security in the territory of the other Contracting Party.
> Even in the more recent Mauritius-United Arab Emirates BIT signed in 2016, Article 3(1) provides as follows: Investments and returns of investors of either Contracting party shall at all times be accorded fair and equitable treatment in the territory of the other Contracting Party.

[54] The Grenada-US BIT (Article II (2)):
Investments shall at all times be accorded fair and equitable treatment…and shall in no case be accorded treatment less favourable than that required by international law.

CAFTA-DR's Investment Chapter provides "for greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights". [55]

The Dominican Republic-Italy BIT uses the term "just and fair treatment" (Article III (3)).

The third approach is rare and excludes the FET standard. The Suriname and Guyana BITs with Brazil expressly exclude the FET and full protection and security standards from the Agreement's coverage.[56]

Caribbean and African SIDS should either avoid the inclusion of the FET altogether in their BITs or adopt a narrow and more precise definition of the FET standard by pairing it to the minimum standard under customary international law. However, even this by itself is still too general as customary international law is constantly evolving. For specificity, the agreement can list the conducts that would be in breach of the minimum standard as understood by the parties. A Joint Interpretative Statement on the FET is also an option.[57] Another is carving out energy sector disputes from the scope of the FET standard.

c. Expropriation

Indirect expropriation is another one of the most frequently used provisions by investors in ISDS claims. Unlike direct expropriate which leads to a formal transfer of title to property, indirect expropriation covers State interference with a private investor's property which is tantamount to expropriation (UNCTAD 2004). Practically all Caribbean and African BITs include a clause which prohibits host Governments from taking "any measures

[55] Article 10.5 (2) of CAFTA-DR (2004)

[56] Suriname-Brazil BIT (Article 4(3))

For greater certainty, the standards of "fair and equitable treatment" and "full protection and security" are not covered by this Agreement and shall not be used as interpretative standards in investment dispute settlement procedures.

[57] On July 31, 2001, the NAFTA Free Trade Commission (now the USMCA) issued a Joint Note of Interpretation as follows: Minimum Standard of Treatment in Accordance with International Law

1. Article 1105(1) prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to investments of investors of another Party.
2. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by the customary international law minimum standard of treatment of aliens.
3. A determination that there has been a breach of another provision of the NAFTA, or of a separate international agreement, does not establish that there has been a breach of Article 1105(1).

having similar effects" and therefore prohibit both direct and indirect expropriation and nationalization by the government of investors' assets. The risk of unlawful expropriation of the investments of foreign investors by the host state was one of the main drivers behind BITs. Under customary international law, states have the right to expropriate foreign-owned property as long as it is done for a public purpose and in a non-discriminatory manner. BITs therefore "reinforce existing customary law as found in the practice of developed states".[58]

All of the BITs also include a clause on the conditions for lawful expropriation. Parties have the right to nationalize or expropriate foreign investor's property provided that four substantive conditions are met. The investment had to be taken for a public purpose, on a non-discriminatory basis, under due process of the law and after the payment of compensation. A good portion of BITs give the national or company affected by the expropriation the right under the law of the expropriating contracting party, to judicial review.[59] Some allow the right for valuation of his or its assessment in accordance with the principles of the Treaty.[60]

The large majority, though not all of the IIAs, use the Hull formula of compensation. Those particularly with Italy, Germany, Switzerland do not contain the Hull Formula – prompt, adequate and effective compensation. Jamaica-Italy uses "immediate, adequate and effective compensation" (Article 5(3)). Although all of the BITs speak to the issue of compensation for expropriation or nationalization in some way, they vary according to specificity. A few are vague[61].

Compensation is to be made according to the "value" of the expropriated investment. The term used varies across agreements[62]. Even agreements by the same country use different standards e.g.: Barbados-Canada "fair market value", but Barbados-Italy uses "market value". Caribbean and African BITs typically do not include language that clearly defines the scope of the expropriation provision and therefore do not say which type of government measures to which the expropriation provisions apply.

d. National Treatment

[58] Sornarajah, *supra*, p.208.
[59] See for example, Barbados-Germany Article 4(2)
[60] See for example, Antigua and Barbuda-United Kingdom Article 5(1).
[61] The Barbados-Germany BIT (Article 4(2)) is an example:
"Such compensation shall be equivalent to the value of the expropriated investment, immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known" (Article 4(2)).
[62] The Suriname-Netherlands BIT uses "genuine value", the Antigua & Barbuda-United Kingdom BIT uses "market value", Trinidad and Tobago-France BIT uses "real market value" and Barbados-Canada BIT uses "fair market value".

Under the national treatment standard, contracting parties are obliged to grant to investors of the other contracting party treatment no less favourable than the treatment they grant to investments of their own investors. The BITs of Caribbean and African SIDS typically address the national treatment standard in one of two ways. The first and by far the most common approach taken by is limiting the national treatment standard only to established investment, that is, only after the investment has entered the host country.[63]

A few, particularly those with the US and Canada, qualify the national treatment provision with "in like circumstances". Including the "in like circumstances" qualifier brings greater specificity to the provision as it clarifies that according different treatment to domestic and foreign investments and investors in a different circumstance would not be a violation of the provision.

Most of the BITs apply the national treatment standard only to investments or both to investments and returns of investors.[64] The Dominica-Germany BIT at Ad Article 3(a) further gives an illustrative but non-exclusive list of things which are to be deemed "activity" within the meaning of the above quoted paragraph. These include "the management, maintenance, use, and enjoyment of an investment". This BIT goes a step further to state what is deemed to be "treatment less favourable" within the meaning of Article 3.[65] The second less common approach provides national treatment to investors both in the pre- and post-establishment phase. This approach is taken in the BITs with the US and Canada, as these also focus on the liberalization of investment flows.[66]

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[63] A standard provision is seen in the Guyana-Germany BIT (Article 3(1):
"Neither Contracting Party shall subject *investments* in its territory owned or controlled by nationals or companies of the other Contracting Party to treatment less favorable than it accords to *investments* of its own nationals or companies of the other Contracting Party to treatment less favourable than it accords to investments of its own nationals or companies or to nationals or companies of any third State" (Article 3(1)).

[64] Dominica-Germany BIT at Article 3(2):
"Neither Contracting Party shall subject nationals or companies of the other Contracting Party, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to investments of its own nationals or companies…"

[65] It provides that "restricting the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, impeding the marketing of products inside [or] outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favourable" within the meaning of Article 3.
The Ad Article 3(b) states that:
"The provisions of Article 3 do not oblige a Contracting Party to extend to
natural persons or companies resident in the territory of the other Contracting Party
tax privileges, tax exemptions and tax reductions which according to its tax laws are
granted only to natural persons and companies resident in its territory.

[66] Trinidad and Tobago-Canada BIT (Article 2(3)(a) provides as follows:
"Each Contracting Party shall permit establishment of a new business enterprise or acquisition of an existing business enterprise or a share of such enterprise by investors
or prospective investors of the other Contracting Party on a basis no less favorable than that which, *in like circumstances*, it permits such acquisition or establishment by its own investors or prospective investors".

The national treatment provision is also increasingly being invoked in arbitral cases.[67] For example, an investor could claim that a host State's provision of certain incentives to low carbon investments is a violation of the national treatment obligation. Countries should include "in like circumstances" in their future BITs to reduce the likelihood of a broad interpretation by an arbitral tribunal. Further, (Brauch 2020) argued that countries should specify that low and high carbon investments do not count as being "in like circumstances".

b. Most Favoured Nation (MFN) Treatment

The MFN provision is a standard clause in many IIAs, including those of Caribbean and African SIDS. Essentially, contracting parties agree not to subject investments or returns of investors of the other contracting party to treatment less favourable than that which they accord to investments or returns of nationals or companies of any third State. Most BITs elaborate that the MFN provision applies to the "management, maintenance, use, enjoyment or disposal of their investments".

One approach pairs the MFN and NT treatment in a single clause and contains no exceptions. An example is the Antigua-Germany BIT. [68]A second approach outlines exceptions, such as the exception found at Article 3(1) of the Antigua-Barbuda –UK BIT.[69] Some BITs, such as the Barbados-Canada BIT are more specific and specify that MFN applies "in like circumstances". A third approach outlines a list of exceptions, including in cases of customs unions, common markets, and double taxation treaties.[70]

"Each Contracting Party shall grant to investments or returns of investors of the other Contracting Party treatment no less favorable than that which, in like circumstances, it grants to investments or returns of its own investors with respect to the expansion, management, conduct, operation and sale or disposition of investments (Article 4(1)).

[67] *Aguaytia Energy, LLC v. Republic of Peru* (ICSID Case No. ARB/06/13); Levy De Levi v Peru, Award, ICSID Case No ARB/10/17, IIC 728 (2014)

[68] Article 3 (1) Neither Contracting State shall subject investments in its territory owned or controlled by investors of the other Contracting State to treatment less favourable than it accords to investments of its own Investors or to investments of investors of any third State.
(2) Neither Contracting State shall subject investors of the other Contracting State, as regards their activity in connection with investments in its territory, to treatment less favourable than it accords to its own investors or to Investors of any third State. (3) Such treatment shall no! relate to privileges which either Contracting State accords to Investors of third States on account of its membership of, or association with, a customs or economic union, a common market, or a free trade area. (4) The treatment granted under this Article shall not relate to advantages which either Contracting State accords to investors of third States by virtue of a double taxation agreement or other agreements regarding mailers of taxation.

[69] Article 3(1)(3) provides that "Notwithstanding paragraphs (1) and (2) above, in exceptional circumstances Contracting Party is entitled in specific cases and on special grounds to give more different treatment to the nationals or companies of a third State where there is good reason justify this."

[70] The Mauritius-Switzerland BIT provides the following exceptions at Article 4(4) & 4(5):

Because of the vaguely drafted nature of many BITs' MFN clauses, they have been used in some instances to import more favourable substantive or even procedural provisions from other BITs (Nikiema 2017).[71] Some tribunals have also interpreted MFN clauses to allow investors the benefit of more favourable treatment under another treaty.[72] There is the risk of invocation of MFN clauses in older generation IIAs to circumvent provisions in more climate-friendly IIAs (Brauch 2022). As such, it is best for Caribbean and African SIDS to include precise language which expressly excludes the ability of investors to use the MFN clause to import more favourable language contained in other BITs.

INVESTOR OBLIGATIONS AND PROTECTIONS

Investor obligations and environmental protections are not standard in older generation IIAs and as such, it is hardly surprising that they do not feature in many Caribbean and African SIDS' IIAs of an older vintage. Newer IIAs do incorporate them to some extent. Article 14 of the Suriname-Brazil BIT places obligations on investors to comply with domestic legislation and corporate social responsibility (Article 15). Article 16 requires the parties to maintain measures to prevent and fight corruption, money laundering and terrorism financing with regard to matters covered by the Agreement and in accordance with their laws and regulations. Article 17 contains provisions on Investment and Environment, Labor Affairs and Health. These provisions are based on Brazil's new model BIT and are in-line with international best practices and should be considered by Caribbean and African SIDS in future investment rulemaking. The CARIFORUM-EU EPA's investment chapter and the CARIFORUM-UK EPA's investment chapter, which replicates the former also contain best endeavour obligations regarding investor behaviour and obliges States not to lower environmental and labour standards in order to attract investment.[73]

Going further, the ECOWAS Common Investment Code of 2019 requires investors to comply with all international best practices and regional and national laws around corporate governance and a best endeavour

(4) If a Contracting Party accords special advantages to investors of any third State by virtue of an agreement establishing a free trade area, a customs union, or a common market, of which it is or may become a member, or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party.
(5) For the avoidance of doubt, it is confirmed that the principles provided for in paragraphs (2) and (3) of this Article shall not be applicable in relation to special advantages, such as in the field of taxation, accorded to development finance institutions.

[71] Also see Dumberry (2017).

[72] See for example, Asian Agricultural Products Ltd (AAPL) v Democratic Socialist Republic of Sri Lanka, ICSID Case No. ARB/87/3, Award (27 June 1990) para 54 and MTD Equity Sdn Bhd and MTD Chile SA v Republic of Chile, ICSID Case No ARB/01/7, Award (25 May 2004).

[73] See Articles 72 (Behaviour of Investors) and 73 (Maintenance of Standards) of the CARIFORUM-EU EPA and the CARIFORUM-UK EPA, respectively.

provision for investors to promote and engage in corporate social responsibility.[74] It also contains anti-corruption provisions regarding trade and investment as well as obligations on investors to comply with international transfer pricing standards.[75] Additionally, it also contains home State measures and promotion of technology transfer[76].

DEFENCES

Many of the older-generation Caribbean and African BITs do not provide defences to liability within the treaty. This again is not surprising as the primary purpose of investment treaties was protection for investors and their investments and it is only in more recent times that these treaties have begun to explicitly incorporate defences based in international law, such as protection of the environment, human rights, and other public interest areas in order to bring some balance between investor protection and State's regulatory rights (Signarama 2021). Therefore, newer Caribbean and African country IIAs now include some defences. For example, the St. Vincent & the Grenadines-Taiwan BIT provides some defences at Article XVI. Similar provisions are also found in the Trinidad & Tobago BIT with Canada (Article XVII), the Trinidad & Tobago-Taiwan BIT (Article XVI) and the Barbados-Canada BIT (Article XVII).

INVESTMENT PROMOTION AND FACILITATION

In general, investment promotion and facilitation provisions in Caribbean and African SIDS' IIAs tend to be very rudimentary. A typical provision simply calls on parties to promote investment in accordance with their laws and regulations. A good example is Article 2(1) of the Cyprus-Seychelles BIT:

> Each Party shall promote and shall admit, in accordance with its legislation, in its territory the investments by investors of the other Contracting Party.

In some cases, the parties agree to grant the necessary permits in accordance with its laws and regulations.[77]

[74] See Article 34 of the ECOWAS Common Investment Code 2019
[75] See Chapters 9 and 10 of the ECOWAS Common Investment Code 2019
[76] See Chapters 12 and 13 of the ECOWAS Common Investment Code 2019.
[77] See Cuba-Switzerland BIT Article 3 (Promotion, admission)

More extensive promotion provisions are found in the CARIFORUM-EU EPA and the Suriname/Guyana-Brazil BITs. However, none of the agreements analysed called on parties to promote climate-friendly investments.

Greater emphasis should be placed on the proactive promotion of investment in sectors, such as renewable energy. There could be the inclusion of home state obligations such as sharing information on investors to help the host State in conducting due diligence. There should be in-built mechanisms in the agreement for measuring and monitoring the operation of the IIA including the development and environment impact of investments. While some of the IIAs provide for joint councils, there is no public information on what extent these joint councils have been effective. Because IIAs are concluded between States themselves, there should be consideration given to more proactive technical assistance for climate mitigation and adaptation efforts and in promoting the dissemination of climate-friendly technologies.

DISPUTE SETTLEMENT

a. Settlement of Disputes between Contracting Parties

There is not much variation among Caribbean and African BITs with regard to their dispute settlement provisions. All of the BITs include the requirement that disputes between contracting parties on the interpretation or application should be settled, if possible, through diplomatic channels. If the dispute cannot be settled through diplomatic channels, it will at the request of either contracting party be submitted to an arbitral tribunal. Most BITs are precise in terms of the provisions on the constitution of the arbitral tribunal, including the number of arbitrators. They also state that the arbitral tribunal is to reach its decision by a majority of votes. The BITs with the US state that the disputes shall be decided “in accordance with the applicable rules of international law” (Article VII (1)).

b. Settlement of Disputes between a Contracting Party and an Investor

ISDS provisions are a common feature of most BITs. The ISDS provisions of the majority of Caribbean and African BITs are fairly standard. Most of Caribbean and African SIDS’ BITs include a “cooling off period”, a time period

usually of three or six months, depending on the IIA, in which countries are to attempt the amicable settlement of the dispute or "seek resolution through consultation and negotiation" (US BITs)[78].

Once this period has elapsed, Caribbean and African BITs differ in the forms of arbitration available for dispute settlement. The first approach refers the dispute only to ICSID[79]. The second approach allows the investor a choice between ICSID (if both countries are party to the ICSID) or the Additional Facility for ICSID (if only one of the countries is a party to the ICSID)[80]. The third approach allows the dispute at the request of either party to the dispute ICSID or the Court of the Contracting Party in which the investment was made[81]. The fourth approach allows the investor the choice of either ICSID or an ad hoc tribunal under UNCITRAL Arbitration Rules (if neither party is a member of ICSID)[82].

Most Caribbean and African countries' IIA outline the procedures for appointing arbitrators and include the obligation on States to consider the arbitration award to be final and binding. Some also include the obligation to provide for its enforcement in their respective territories. The BITs with the US and the Netherlands set out consent to international arbitration explicitly. Those with the US are generally the only ones to include a definition of an investment dispute. Article VI (1) of the Grenada-US BIT is an example.[83]

Many Caribbean and African SIDS have been parties to at least one ISDS dispute[84], mainly as the respondent State but there have been exceptions.[85] Of the SIDS studied, the Dominican Republic was party to the most treaty-based disputes as a respondent with 7 disputes as a respondent and one as the home State of the Claimant, while Mauritius was party to the most disputes overall with 3 as the respondent State and 8 as the home State of the claimant. Barbados was the respondent State in an interesting case under its BIT with Canada.

[78] An exception is the Barbados-Venezuela BIT which does not contain reference to amicable pre-arbitral settlement but refers the dispute directly to ICSID arbitration.
[79] This is the approach taken in the Barbados-Venezuela, Guyana-UK, and in BITs with Germany.
[80] Grenada-US BIT
[81] Jamaica-France BIT
[82] Jamaica-Argentina BIT
[83] Article VI(I) defines an investment dispute as "a dispute between a Party and a national or company of the other Party arising out of or relating to any investment authorization, investment agreement or alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment."
[84] *See* International Investment Dispute Navigator, UNCTAD INVESTMENT POLICY HUB, https://investmentpolicy.unctad.org/investment-dispute-settlement which is the most comprehensive database of treaty-based ISDS disputes.
[85] Barbados has been the respondent State in 1 dispute, but the home State of the claimant in 7. Mauritius has been the respondent State in 3 disputes and the home State of the claimant in 8. Seychelles has not been the respondent State in any dispute but has been the home State of the claimant in 1 dispute. The Bahamas has not been the respondent State in any but has been the home State of the claimant in 1 dispute.

A Canadian investor, the owner of a nature sanctuary occupying part of the island's last significant natural mangrove swamp, claimed government inaction had caused environmental damage to sanctuary and had amounted to an indirect expropriation.[86]

While these figures might look meagre, they do not take into account the costs incurred by SIDS in having to defend themselves against a claim or having to pay arbitral awards where a decision is made against their favour.[87] The expense is compounded because many SIDS lack the legal expertise in-country to defend against investor claims and often rely on foreign counsel, often based in the US or UK. In recent years there has been increasing critique of ISDS arbitral decisions.

ISDS reform has received significant attention in the international investment law reform discourse, with the UNCITRAL Working Group III ISDS reform process among some of the main reform initiatives. Besides the cost associated with these claims, another major critique of ISDS is that different cases brought on similar facts could sometimes lead to different decisions.[88] A third critique is that there is no appeals process so decisions on binding on the parties and enforceable via treaty. Investors have become increasingly litigious as evidenced by the growth in the number of ISDS cases, many of which have been brought under the 1994 Energy Charter Treaty.

Some of the recommendations made in both the policy and scholarly literature is that ISDS could be removed as an option for dispute settlement or that climate/environmental measures be carved out of ISDS (UNCTAD 2022; Brauch 2022). These are both options that Caribbean and African SIDS could consider in their future IIA practice.

SUNSET CLAUSES

Sunset clauses, also known as survival clauses, allow for investments made prior to the treaty's termination to be protected for a defined period of time after a party has withdrawn or the treaty has been terminated. They are meant to provide some legal certainty, or a cushion of sorts, to investors that their investments would be

[86] Peter A. Allard v. The Government of Barbados, PCA Case No. 2012-06– all claims were however dismissed on the merits.
[87] See as an example, *Dunkeld International Investment Ltd. v. The Government of Belize (Number 1), PCA Case No. 2010-13, UNCITRAL*.
[88] As with international law in general, international investment law does not use the English Common Law principle of stare decisis (binding precedent).

protected for a period time after the IIA has ended, giving them enough time to make any transitional arrangements necessary. It also gives investors the assurance that a State could not evade liability for a treaty breach by simply terminating the treaty. These survival clauses can be described as either 'fixed'[89] or 'tacit renewal'[90] clauses.[91]

The result is that such investors could continue to bring claims under the treaty for a defined period of time after it has been terminated and the State could still be found liable of a breach of a treaty obligation even after the treaty has been terminated.[92] In some cases, the period of time under Caribbean and African SIDS' IIAs could be as long as ten[93] or even twenty years.[94] This means that terminating the treaty is no guarantee that countries will be immune from an investor claim under that particular treaty. Notable exceptions are the Brazil BITs with Guyana and Suriname which contain no sunset clause. Sunset clauses are also not common in the TIPs signed by these countries. Caribbean and African SIDS could consider whether they wish to include sunset clauses in their future IIAs. For the existing IIAs, they could negotiate with treaty partners an amendment to the treaty to remove the sunset clause or the parties could agree to amend the BIT to remove the sunset clause prior to terminating the IIA. This however might not absolve States from liability from on-going claims, that is, claims brought before the IIA was terminated.

[89] Barbados-Mauritius BIT (Article 13) adopts a typical formulation of a sunset clause:
1. This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination of this Agreement to the other Contracting Party.
2. In respect of investments made prior to the date when the notice of termination of this Agreement becomes effective, the provisions of Articles 1 to 11 shall remain in force for a further period of ten years from the date.
[90] Dominican Republic-Netherlands BIT (Article 14) adopts a different approach:
1) The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have notified each other in writing that their constitutionally required procedures have been complied with and shall remain in force for a period of fifteen years.
2) Unless notice of termination has been given by either Contracting Party at least six months before the date of the expiry of its validity, the present Agreement shall be extended tacitly to periods of ten years, whereby each Contracting Party reserves the right to terminate the Agreement upon notice of at least six months before the date of expiry of the current period of validity.
3) In respect of investments made before the date of the termination of the present Agreement, the foregoing Articles shall continue to be effective for a further period of fifteen years from that date. 4) Subject to the period mentioned in paragraph (2) of this Article, the Kingdom of the Netherlands shall be entitled to terminate the application of the present Agreement separately in respect of any of the parts of the Kingdom.
[91] See generally Bernasconi-Osterwalder et.al (2020).
[92] Several cases have been brought by investors after treaties have ended using these sunset clauses. Marco Gavazzi and Stefano Gavazzi v. Romania.
[93] See for example, the Mauritius-UAB BIT Article 16(3)
[94] See for example, the Barbados-UK BIT Article 14

SUMMARY ANALYSIS

From the preceding analysis, **Caribbean and African SIDS have not adopted a consistent approach to their IIAs. There is a significant amount of variance among the IIAs in terms of their scope and ambition, as well as the content and wording of their substantive provisions.** The wording and details of their substantive provisions vary according to the country with which the IIA was negotiated. Therefore, Caribbean and African SIDS' IIAs with the same country partner tend to be highly similar or almost identical, reflecting the negotiating power of the treaty partner. A key reason for the high degree of divergence among these IIAs is that the bargaining strength of the parties to a negotiation often determines the final text of the agreement. This is not unique to these countries and is in fact typical of many developing countries' IIAs.

A second trend noted is that the vast majority of Caribbean and African SIDS' BITs in particular focus primarily on investment protection and very few contain a development dimension or express language on sustainable development and none of the publicly available IIA texts contains explicit reference to climate change or climate action. These agreements are unaligned, therefore, with these countries' climate and wider sustainable development goals. This, as noted, is not surprising and is consistent with other IIAs of that vintage. The preambles do not typically include environmental protection or commitment to climate action or obligations on parties not to lower environmental standards to attract investment. They also have few carve-outs for State regulation for environmental/climate purposes. They also generally lack obligations on investor behavior, including encouragement to behave in an environmentally responsible manner. However, some of the most recent investment chapters signed by these countries as part of free trade agreements have seen the incorporation of more explicit development-oriented provisions[95].

Third, **although most Caribbean and African countries' experience thus far with investor claims have been limited, the threat of treaty-based claims is more acute as more SIDS turn to oil exploration which seems incongruous to the aim of emissions reduction**. Countries worldwide have begun amending and renegotiating their existing IIAs to include more express environmental protections. As Caribbean and African SIDS' experience with ISDS has been quite limited, there does not appear to be the same level of urgency to reform our existing treaty stock as seen in countries which have frequently been on the losing end of ISDS rulings.

[95] UNCTAD's IIA Reform Accelerator has been an invaluable tool for many States seeking to reform their IIAs, especially their existing older-generation BITs. See https://unctad.org/system/files/official-document/diaepcbinf2020d8_en.pdf.

Aside from some reviews of existing IIAs, the reform efforts seem to be focused on agreements going forward, such as revisions of their model BITs, but not so much what to do about existing agreements. There is the Pan-African Investment Code and the Investment Protocol to the AfCFTA. Additionally, UNCTAD has provided a wealth of technical assistance and resources for States interested in reforming their IIAs. These tools include UNCTAD's IIA Reform Accelerator (2020) and the Investment Policy Framework for Sustainable Development (2015) (UNCTAD 2022a). UNCTAD also recently released a research note on IIAs and climate action in which it advanced policy options for how countries could make their IIAs more climate responsive.[96]

POLICY RECOMMENDATIONS

Reform of Caribbean and African SIDS' IIA regimes should have two components: prospective agreements and current agreements.

As such, the Brief offers the following recommendations.

1. **Caribbean and African SIDS must conduct a systematic review of their existing IIAs to determine whether they are supportive of, or inimical to the goal of promoting and facilitating investment for sustainable development**. To some extent, this process has already begun. If they are found to not be supportive of this goal, as this Brief has found, those governments must weigh the pros and cons of some of the available options, that is, terminating or renegotiating the existing BITs or the inclusion of joint interpretive notes. In many cases, the treaty partner's IIA practice has since evolved and there might be more willingness by the treaty partner to renegotiate the agreement to include more development-friendly provisions. In weighing the option of termination, States must give consideration to sunset clauses which are contained in many of the treaties and whether they could mutually agree with their treaty partner(s) to terminate these clauses (Bernasconi-Osterwalder et. al 2020).[97]
2. **Caribbean and African SIDS which make IIAs a key part of their investment attraction strategy should reform their model BITs taking into account growing international best practices and other policy tools.** Building on its previous reform work, UNCTAD (2022b) in its recent Brief outlines several policy options for making IIAs climate responsive. Some of the policy recommendations include referencing

[96] See UNCTAD. 2022b. The International Investment Treaty Regime and Climate Action. UNCTAD Research Note. https://unctad.org/system/files/official-document/diaepcbinf2022d6_en.pdf.

[97] In *Rockhopper Italia S.p.A., Rockhopper Mediterranean Ltd, and Rockhopper Exploration Plc v. Italian Republic, ICSID Case No. ARB/17/14*, the tribunal found in favour of UK oil and gas company Rockhopper finding an unlawful expropriation and utilized the sunset provision of the Energy Charter Treaty. The tribunal awarded Rockhopper 185 million euros in compensation, 240 million once interest is included.

climate commitment in the preamble, distinguishing between climate friendly and climate harmful investments, carving out climate action measures from investment standards and/or ISDS, obliging investors to comply with domestic and international law, committing to cooperation on action through institutional mechanisms and proactive promotion and facilitation of sustainable investment. For example, countries could identify the areas which count as 'sustainable investment', and expressly exclude from the scope of investment protection certain types of investment deemed harmful to the climate or identifying in their agreements those investments considered to be climate-friendly for the purposes of the agreement and which would benefit from the protections. Johnson, Sachs and Lobel (2019) argue that IIAs can help in identifying and overcoming barriers to SDG-supportive investment, through for example, provisions to increase investment into the less develop country partner or into particular sectors or activities. ISDS could be excluded as an option for dispute settlement. IIAs should include corporate social responsibility and other investor obligations, as well as obligations on states to not lower their environmental standards.

3. **Third, the treaty text should also include prioritizing financing for climate action as an objective or an area for cooperation, as well as direct reference to climate action in the preamble and objectives**. With regard to the substantive provisions, there should be express preservation of the State's right to regulate including to promote its climate action goals, the imposition of investor obligations such as the obligation not to engage in activities harmful to the environment. The treaty text should narrow the scope of certain provisions, such as the Fair and Equitable Treatment (FET) standard, if they are included, and excluding environmental regulation from indirect expropriation.
4. **Fourth, Caribbean and African SIDS must consider whether IIAs are actually attracting investment and whether other instruments might not be more useful.** There is, however, little evidence that IIAs actually lead to greater investments to the countries which sign them and that the legal risks to States are outweighed by the benefit of greater investment flows. Caribbean and African SIDS governments can give consideration to instead negotiating Trade and Investment Cooperation Agreements, similar to what Brazil is currently doing, which provide for cooperation between States on promoting investment for sustainable development but do not contain the hard investment protections that are found in traditional IIAs. However, further research would need to be done to ascertain to what extent these types of agreements are any more effective at attracting FDI than traditional BITs. Additionally, countries

should place greater importance on monitoring whether the joint councils as provided for under some of these IIAs are effective.

5. **Lastly, reforming IIAs is important but must be part of a wider national investment for sustainable development strategy.** It is incumbent on Caribbean and African SIDS to align their investment policies and strategies with their development goals. Moreover, to minimize challenges, Governments should be transparent in their environmental regulation and policy making, giving proper notice of legal changes, and applying changes or incentives in a non-discriminatory way.

CONCLUSION

In summary, this policy brief has sought to discuss whether Caribbean and African SIDS' current stock of IIAs could potentially support or hinder their climate action efforts. It has been shown that in large part, these countries' current stock of IIAs are generally older generation BITs which contain no express environmental protections, with generous investor protections and they might expose these countries to legal challenges as they ramp up their climate action efforts. It notes in concluding that these countries should continue to review their existing IIA stock to determine whether they should terminate or renegotiate these agreements. It is also advised that Caribbean and African SIDS should determine whether IIAs are indeed the best approach for sustainable investment attraction given the inconclusive evidence that IIAs actually attract investment, and whether other measures could not be used to attain the end goal of promoting investment that aligns with and advances their climate goals.

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ANNEXES

Annex A: List of BITs reviewed

No.	Short title	Status	Date of signature	Date of entry into force
1	Antigua and Barbuda - Germany BIT (1998)	In force	05/11/1998	28/02/2001
2	Antigua and Barbuda - United Kingdom BIT (1987)	In force	12/06/1987	12/06/1987
3	Barbados - Canada BIT (1996)	In force	29/05/1996	17/01/1997
4	Barbados - China BIT (1998)	In force	20/07/1998	01/10/1999
5	Barbados - Cuba BIT (1996)	In force	19/02/1996	13/08/1998
6	Barbados - Germany BIT (1994)	In force	02/12/1994	11/05/2002
7	Barbados - Italy BIT (1995)	In force	25/10/1995	21/07/1997
8	Barbados - Mauritius BIT (2004)	In force	28/09/2004	18/06/2005
9	Barbados - Switzerland BIT (1995)	In force	29/03/1995	22/12/1995
10	Barbados - United Kingdom BIT (1993)	In force	07/04/1993	07/04/1993
11	Barbados - Venezuela, Bolivarian Republic of BIT (1994)	In force	15/07/1994	31/10/1995
12	Belize - Austria BIT (2001)	In force	17/07/2001	01/02/2002
13	Belize - Cuba BIT (1998)	In force	08/04/1998	16/04/1999
14	Belize - Netherlands BIT (2002)	In force	20/09/2002	01/10/2004
15	Belize - United Kingdom BIT (1982)	In force	30/04/1982	30/04/1982
16	Cabo Verde - Angola BIT (1997)	In force	11/09/1997	15/12/1997
17	Cabo Verde - China BIT (1998)	In force	21/04/1998	01/01/2001
18	Cabo Verde - Cuba BIT (1997)	In force	22/05/1997	08/01/2003
19	Cabo Verde - Germany BIT (1990)	In force	18/01/1990	15/12/1993
20	Cabo Verde - Hungary BIT (2019)	In force	28/03/2019	02/05/2020
21	Cabo Verde - Mauritius BIT (2017)	In force	13/04/2017	07/03/2018
22	Cabo Verde - Netherlands BIT (1991)	In force	11/11/1991	25/11/1992
23	Cabo Verde - Portugal BIT (1990)	In force	26/10/1990	04/10/1991
24	Cabo Verde - Switzerland BIT (1991)	In force	28/10/1991	06/05/1992
25	Comoros - Egypt BIT (1994)	In force	13/11/1994	27/02/2000
26	Comoros-Burkina Faso BIT (2001)	In force	18/05/2001	18/08/2003

27	Cuba - Belarus BIT (2000)	In force	08/06/2000	16/08/2001
28	Cuba - France BIT (1997)	In force	25/04/1997	06/11/1999
29	Cuba - Germany BIT (1996)	In force	30/04/1996	22/11/1998
30	Cuba - Greece BIT (1996)	In force	18/06/1996	18/10/1997
31	Cuba - Guatemala BIT (1999)	In force	20/08/1999	10/08/2002
32	Cuba - Hungary BIT (1999)	In force	22/10/1999	24/11/2003
33	Cuba - Indonesia BIT (1997)	In force	19/09/1997	29/09/1999
34	Cuba - Italy BIT (1993)	In force	07/05/1993	23/08/1995
35	Cuba - Lao People's Democratic Republic BIT (1997)	In force	28/04/1997	10/06/1998
36	Cuba - Lebanon BIT (1995)	In force	14/12/1995	07/01/1999
37	Cuba - Malaysia BIT (1997)	In force	26/09/1997	27/10/1999
38	Cuba - Mexico BIT (2001)	In force	30/05/2001	29/03/2002
39	Cuba - Mongolia BIT (1999)	In force	26/03/1999	18/10/2000
40	Cuba - Netherlands BIT (1999)	In force	02/11/1999	01/11/2001
41	Cuba - Panama BIT (1999)	In force	27/01/1999	11/05/1999
42	Cuba - Paraguay BIT (2000)	In force	21/11/2000	06/12/2002
43	Cuba - Peru BIT (2000)	In force	10/10/2000	25/11/2001
44	Cuba - Portugal BIT (1998)	In force	08/07/1998	18/06/1999
45	Cuba - Romania BIT (1996)	In force	27/01/1996	22/05/1997
46	Cuba - Russian Federation BIT (1993)	In force	07/07/1993	08/07/1996
47	Cuba - Slovakia BIT (1997)	In force	22/03/1997	05/12/1997
48	Cuba - South Africa BIT (1995)	In force	08/12/1995	07/04/1997
49	Cuba - Spain BIT (1994)	In force	27/05/1994	09/06/1995
50	Cuba - Switzerland BIT (1996)	In force	28/06/1996	07/11/1997
51	Cuba - Trinidad and Tobago BIT (1999)	In force	26/05/1999	07/01/2000
52	Cuba - Turkey BIT (1997)	In force	22/12/1997	23/10/1999
53	Cuba - Ukraine BIT (1995)	In force	20/05/1995	04/12/1996
54	Cuba - United Kingdom BIT (1995)	In force	30/01/1995	11/05/1995
55	Cuba - Venezuela, Bolivarian Republic of BIT (1996)	In force	11/12/1996	15/04/2004
56	Cuba - Vietnam BIT (1995)	In force	12/10/1995	01/10/1996
57	Cuba-Argentina BIT (1995)	In force	30/11/1995	01/06/1997
58	Cuba-Austria BIT (2000)	In force	19/05/2000	25/11/2001

59	Cuba-Bulgaria BIT (1998)	In force	16/12/1998	24/05/2000
60	Cuba-Chile BIT (1996)	In force	10/01/1996	30/09/2000
61	Cuba-China BIT (1995)	In force	24/04/1995	01/08/1996
62	Dominica - Germany BIT (1984)	In force	01/10/1984	11/05/1986
63	Dominica - United Kingdom BIT (1987)	In force	23/01/1987	23/01/1987
64	Dominican Republic - Finland BIT (2001)	In force	27/11/2001	21/04/2007
65	Dominican Republic - France BIT (1999)	In force	14/01/1999	23/01/2003
66	Dominican Republic - Italy BIT (2006)	In force	12/06/2006	25/11/2009
67	Dominican Republic - Korea, Republic of BIT (2006)	In force	30/06/2006	10/06/2008
68	Dominican Republic - Morocco BIT (2002)	In force	23/05/2002	04/01/2007
69	Dominican Republic - Netherlands BIT (2006)	In force	03/03/2006	01/10/2007
70	Dominican Republic - Panama BIT (2003)	In force	06/02/2003	17/09/2006
71	Dominican Republic - Spain BIT (1995)	In force	16/03/1995	07/10/1996
72	Dominican Republic - Switzerland BIT (2004)	In force	27/08/2004	30/05/2006
73	Dominican Republic - Taiwan Province of China BIT (1999)	In force	05/11/1999	27/11/2001
74	Dominican Republic -Chile BIT (2000)	In force	28/11/2000	08/05/2002
75	Grenada - United Kingdom BIT (1988)	In force	25/02/1988	25/02/1988
76	Grenada - United States of America BIT (1986)	In force	02/05/1986	03/03/1989
77	Guinea-Bissau - Portugal BIT (1991)	In force	24/06/1991	08/04/1996
78	Guyana - Korea, Republic of BIT (2006)	In force	31/07/2006	20/08/2006
79	Guyana - Switzerland BIT (2005)	In force	13/12/2005	02/05/2018
80	Guyana - United Kingdom BIT (1989)	In force	27/10/1989	11/04/1990
81	Guyana-China BIT (2003)	In force	27/03/2003	26/10/2004
82	Guyana-Germany BIT (1989)	In force	06/12/1989	09/03/1994
83	Haiti - France BIT (1984)	In force	23/05/1984	25/03/1985
84	Haiti - Germany BIT (1973)	In force	14/08/1973	01/12/1975
85	Haiti - United Kingdom BIT (1985)	In force	18/03/1985	27/03/1995
86	Jamaica - Argentina BIT (1994)	In force	08/02/1994	01/12/1995
87	Jamaica - Germany BIT (1992)	In force	24/09/1992	29/05/1996
88	Jamaica - Korea, Republic of BIT (2003)	In force	10/06/2003	05/11/2007

89	Jamaica - Netherlands BIT (1991)	In force	18/04/1991	01/08/1992
90	Jamaica - Spain BIT (2002)	In force	13/03/2002	25/11/2002
91	Jamaica - Switzerland BIT (1990)	In force	11/12/1990	21/11/1991
92	Jamaica - United Kingdom BIT (1987)	In force	20/01/1987	14/05/1987
93	Jamaica - United States of America BIT (1994)	In force	04/02/1994	07/03/1997
94	Jamaica-China BIT (1994)	In force	26/10/1994	01/04/1996
95	Jamaica-France BIT (1993)	In force	25/01/1993	15/09/1994
96	Jamaica-Italy BIT (1993)	In force	29/09/1993	09/11/1995
97	Mauritius - BLEU (Belgium-Luxembourg Economic Union) BIT (2005)	In force	30/11/2005	16/01/2010
98	Mauritius - Burundi BIT (2001)	In force	18/05/2001	22/11/2009
99	Mauritius - Egypt BIT (2014)	In force	25/06/2014	17/10/2014
100	Mauritius - Madagascar BIT (2004)	In force	06/04/2004	29/12/2005
101	Mauritius - Mozambique BIT (1997)	In force	14/02/1997	26/05/2003
102	Mauritius - Portugal BIT (1997)	In force	12/12/1997	03/01/1999
103	Mauritius - Romania BIT (2000)	In force	20/01/2000	20/12/2000
104	Mauritius - Senegal BIT (2002)	In force	14/03/2002	14/10/2009
105	Mauritius - Singapore BIT (2000)	In force	04/03/2000	19/04/2000
106	Mauritius - South Africa BIT (1998)	In force	17/02/1998	23/10/1998
107	Mauritius - Sweden BIT (2004)	In force	23/02/2004	01/06/2005
108	Mauritius - Switzerland BIT (1998)	In force	26/11/1998	21/04/2000
109	Mauritius - Turkey BIT (2013)	In force	07/02/2013	30/05/2016
110	Mauritius - United Arab Emirates BIT (2015)	In force	20/09/2015	28/12/2017
111	Mauritius - United Kingdom BIT (1986)	In force	20/05/1986	13/10/1986
112	Mauritius - United Republic of Tanzania BIT (2009)	In force	04/05/2009	02/03/2013
113	Mauritius-Congo BIT (2010)	In force	20/12/2010	15/12/2013
114	Mauritius-Czech Republic BIT (1999)	In force	05/04/1999	06/05/2000
115	Mauritius-Finland BIT (2007)	In force	12/09/2007	17/10/2008
116	Mauritius-France BIT (1973)	In force	22/03/1973	01/03/1974
117	Mauritius-Germany BIT (1971)	In force	25/05/1971	27/08/1973
118	Mauritius-Indonesia BIT (1997)	In force	05/03/1997	28/03/2000
119	Mauritius-Kuwait BIT (2013)	In force	18/04/2013	24/07/2014

120	Mauritius-Republic of Korea BIT (2007)	In force	18/06/2007	09/05/2008
121	Saint Lucia - Germany BIT (1985)	In force	16/03/1985	22/07/1987
122	Saint Lucia - United Kingdom BIT (1983)	In force	18/01/1983	18/01/1983
123	Saint Vincent and the Grenadines - Taiwan BIT (2009)	In force	17/12/2009	01/02/2010
124	Saint Vincent and the Grenadines-Germany BIT (1986)	In force	25/03/1986	08/01/1989
125	Seychelles-Cyprus BIT (1998)	In force	28/05/1998	19/03/1999
126	Seychelles-France BIT (2007)	In force	29/03/2007	28/12/2014
127	Suriname-The Netherlands BIT (2005)	In force	31/03/2005	01/09/2006
128	Trinidad & Tobago - France BIT (1993)	In force	28/10/1993	16/05/1996
129	Trinidad and Tobago - Spain BIT (1999)	In force	03/07/1999	17/09/2004
130	Trinidad and Tobago - United Kingdom BIT (1993)	In force	23/07/1993	08/10/1993
131	Trinidad and Tobago - United States of America BIT (1994)	In force	26/09/1994	26/12/1996
132	Trinidad and Tobago-Canada BIT (1995)	In force	11/09/1995	08/07/1996
133	Trinidad and Tobago-China BIT (2002)	In force	22/07/2002	07/12/2004
134	Trinidad and Tobago-Germany BIT (2006)	In force	08/09/2006	17/04/2010
135	Trinidad and Tobago-Guatemala BIT (2013)	In force	13/08/2013	23/06/2016
136	Trinidad and Tobago-Mexico BIT (2006)	In force	03/10/2006	16/09/2007
137	Trinidad and Tobago-Republic of Korea BIT (2002)	In force	05/11/2002	27/11/2003
138	Trinidad and Tobago-Switzerland BIT (2010)	In force	26/10/2010	04/07/2012

Source: UNCTAD's IIA Navigator Database

Annex B: List of TIPS reviewed

No.	Short title	Parties	Type of agreement	Status	Date of signature	Date of entry into force
1	Arab Investment Agreement (1980)	League of Arab States;	Treaties with Investment Provisions	In force	26/11/1980	07/09/1981
2	Arab League Investment Agreement (1970)	League of Arab States;	Treaties with Investment Provisions	In force	29/08/1970	29/08/1970
3	AU Treaty (1991)	AU (African Union);	Treaties with Investment Provisions	In force	03/06/1991	12/05/1994
4	CAFTA - DR (2004)	Costa Rica; Dominican Republic; El Salvador; Guatemala; Honduras; Nicaragua; United States of America;	Treaties with Investment Provisions	In force	05/08/2004	01/03/2006

5	CARICOM - Costa Rica FTA (2004)	CARICOM (Caribbean Community); Costa Rica;	Treaties with Investment Provisions	In force	09/03/2004	15/11/2005
6	CARICOM - Cuba Cooperation Agreement (2000)	CARICOM (Caribbean Community); Cuba;	Treaties with Investment Provisions	In force	05/07/2000	01/01/2001
7	CARICOM - Dominican Republic FTA (1998)	CARICOM (Caribbean Community); Dominican Republic;	Treaties with Investment Provisions	In force	22/08/1998	05/02/2002
8	CARICOM - United States TIFA (2013)	CARICOM (Caribbean Community); United States of America;	Treaties with Investment Provisions	In force	28/05/2013	28/05/2013

9	CARICOM - Venezuela FTA (1992)	CARICOM (Caribbean Community); Venezuela, Bolivarian Republic of;	Treaties with Investment Provisions	In force	13/10/1992	01/01/1993
10	CARICOM Revised Treaty of Chaguaramas 2001)	CARICOM (Caribbean Community);	Treaties with Investment Provisions	In force	07/05/2001	04/02/2002
11	CARIFORUM - EU EPA (2008)	CARICOM (Caribbean Community); Dominican Republic; EU (European Union);	Treaties with Investment Provisions	In force	15/10/2008	01/01/2009

12	CARIFORUM States - United Kingdom EPA (2019)	Antigua and Barbuda; Bahamas; Barbados; Belize; Dominica; Dominican Republic; Grenada; Guyana; Haiti; Jamaica; Saint Lucia; Saint Vincent and the Grenadines; Suriname; Trinidad and Tobago; United Kingdom;	Treaties with Investment Provisions	Signed	22/03/2019	Provisionally applied since January 1, 2021
13	China - Mauritius FTA (2019)	China; Mauritius;	Treaties with Investment Provisions	In force	17/10/2019	01/01/2021

14	COMESA - US TIFA (2001)	COMESA (Common Market for Eastern and Southern Africa); United States of America;	Treaties with Investment Provisions	In force	29/10/2001	29/10/2001
15	COMESA Investment Agreement (2007)	COMESA (Common Market for Eastern and Southern Africa);	Treaties with Investment Provisions	Signed	23/05/2007	
16	COMESA Treaty (1993)	COMESA (Common Market for Eastern and Southern Africa);	Treaties with Investment Provisions	In force	05/11/1993	08/12/1994
17	Dominican Republic - Central America FTA (1998)	CACM (Central American Common Market); Dominican Republic;	Treaties with Investment Provisions	In force	16/04/1998	03/10/2001

18	Eastern and Southern Africa States - EU Interim EPA (2009)	Comoros; EU (European Union); Madagascar; Mauritius; Seychelles; Zimbabwe;	Treaties with Investment Provisions	Signed	29/08/2009	
19	ECOWAS - US TIFA (2014)	ECOWAS (Economic Community of West African States); United States of America;	Treaties with Investment Provisions	Signed	05/08/2014	
20	ECOWAS Common Investment Code (ECOWIC) (2019)	ECOWAS (Economic Community of West African States);	Treaties with Investment Provisions	In force	22/12/2019	22/12/2019
21	ECOWAS Energy Protocol (2003)	ECOWAS (Economic Community of West African States);	Treaties with Investment Provisions	Signed	31/01/2003	

22	ECOWAS Protocol on Movement of Persons and Establishment (1979)	ECOWAS (Economic Community of West African States);	Treaties with Investment Provisions	In force	29/05/1979	08/04/1980
23	ECOWAS Supplementary Act on Investments (2008)	ECOWAS (Economic Community of West African States);	Treaties with Investment Provisions	In force	19/12/2008	19/01/2009
24	ECOWAS Supplementary Act on Investments (2008)	ECOWAS (Economic Community of West African States);	Treaties with Investment Provisions	In force	19/12/2008	19/01/2009
25	ECOWAS Treaty (1975)	ECOWAS (Economic Community of West African States);	Treaties with Investment Provisions	Terminated	28/05/1975	20/06/1975
26	ESA - United Kingdom EPA (2019)	Mauritius; Seychelles; United Kingdom; Zimbabwe;	Treaties with Investment Provisions	In force	31/01/2019	01/01/2021

27	LAIA Treaty (1980)	LAIA (Latin American Integration Association);	Treaties with Investment Provisions	In force	12/08/1980	18/03/1981
28	Mauritius - India CECPA (2021)	India; Mauritius;	Treaties with Investment Provisions	In force	22/02/2021	01/04/2021
29	Mauritius - US TIFA (2006)	Mauritius; United States of America;	Treaties with Investment Provisions	In force	18/09/2006	18/09/2006
30	OIC Investment Agreement (1981)	OIC (Organisation of Islamic Cooperation);	Treaties with Investment Provisions	In force	05/06/1981	01/02/1988
31	Revised ECOWAS Treaty (1993)	ECOWAS (Economic Community of West African States);	Treaties with Investment Provisions	In force	24/07/1993	23/08/1995
32	SADC Investment Protocol (2006)	SADC (Southern African Development Community);	Treaties with Investment Provisions	In force	18/08/2006	16/04/2010

33	SADC Treaty (1992)	SADC (Southern African Development Community);	Treaties with Investment Provisions	In force	17/08/1992	30/09/1993
34	US - WAEMU TIFA (2002)	United States of America; WAEMU (West African Economic and Monetary Union);	Treaties with Investment Provisions	In force	24/04/2002	24/04/2002
35	WAEMU Treaty (1994)	WAEMU (West African Economic and Monetary Union);	Treaties with Investment Provisions	In force	10/01/1994	01/08/1994

Source: Compiled from UNCTAD's IIA Navigator

Annex C: Investor Claims as Respondent State and Home State of Claimant

Country	Respondent State	Home State of Claimant
Antigua & Barbuda	0	0
Bahamas*	0	2
Barbados	1	7
Belize	3	0
Cabo Verde	1	0
Comoros	0	0
Cuba	1	0
Dominica	0	0
Dominican Republic	11	2
Grenada	2	0
Guinea-Bissau	0	0
Guyana	1	0
Haiti	0	0
Jamaica	0	1
Mauritius	4	14
Sao Tome e Principe	0	0
Seychelles	0	2
St. Kitts & Nevis	0	0
St. Lucia	0	0
St. Vincent & the Grenadines	0	0
Suriname	0	0
Trinidad & Tobago	1	0

Source: Compiled from UNCTAD's Dispute Settlement Navigator

*Mobil Cerro Negro Holding, Ltd., Mobil Cerro Negro, Ltd., Mobil Corporation, and others v. Bolivarian Republic of Venezuela (ICSID Case No. ARB/07/27) was brought under the Netherlands-Venezuela BIT and Perenco Ecuador Limited v. Republic of Ecuador (Petroecuador) (ICSID Case No. ARB/08/6) was brought under the Ecuador-France BIT.