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Recent developments in the international investment regime: Taking stock of phase 2 reform actions

Note by the UNCTAD secretariat

Summary

In the face of new global investment and development challenges, policymakers need to devise public policies that are conducive to sustainable development and strengthen existing investment policy frameworks with this objective in mind. At the international level, sustainable development has entered the mainstream of international investment policymaking. As the reform of international investment agreements (IIAs) has made significant progress, it is time to take stock of IIA reform actions and chart the way forward.

International investment policymaking is in a dynamic phase, with far-reaching implications. This note provides an update on the 10 policy options of UNCTAD for phase 2 of IIA reform, originally launched in *World Investment Report 2017*. Countries can adapt and adopt these options to pursue reforms in line with their policy priorities. The UNCTAD policy options have spurred initial action to modernize old-generation treaties. Increasingly, countries are interpreting, amending, replacing or terminating outdated treaties.

While IIA reform is progressing, much remains to be done. The stock of old-generation treaties is 10 times greater than the number of modern, reform-oriented treaties, and investors continue to resort to old-generation treaties when bringing investor–State dispute settlement cases. IIA reform actions are also creating new challenges. Effectively harnessing international investment relations for the pursuit of sustainable development requires holistic and synchronized reform through an inclusive and transparent process. UNCTAD can play an important facilitating role in this regard.

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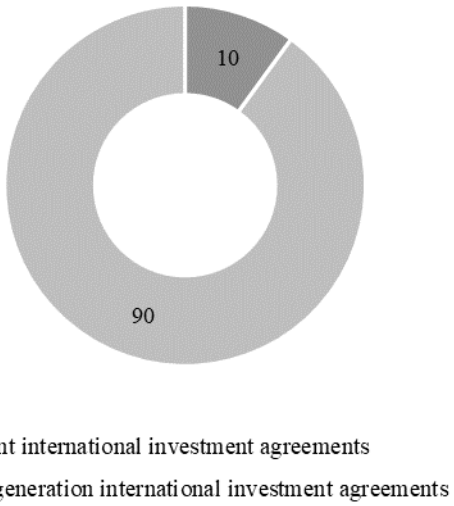
I. Introduction

1. Forward-looking IIA reform is well under way. All treaties concluded in 2018 contain several reforms that are in line with the UNCTAD reform package for the international investment regime (2018) or the UNCTAD Investment Policy Framework for Sustainable Development.[1]

2. Twenty-seven of the 29 IIAs concluded in 2018 for which texts are available contain at least six reform features.[2] Provisions that were considered innovative in pre-2012 IIAs now appear regularly. Modern treaties often include a sustainable development orientation, the preservation of regulatory space and improvements to or omissions of investment dispute settlement. The most frequent area of reform is the preservation of regulatory space. Some recent IIAs or treaty models also contain explicit references to gender equality. Investor–State arbitration is also a central focus of IIA reform. It continues to be controversial, spurring debate in the investment and development community and the public at large. About 75 per cent of IIAs concluded in 2018 contain at least one investor–State dispute settlement reform element, and many contain several.

3. UNCTAD policy tools have also spurred initial action to modernize old-generation treaties. Countries are increasingly interpreting, amending, replacing or terminating outdated treaties. Given that, to date, such reform actions have addressed a relatively small number of IIAs, there is broad scope and urgency to pursue them further. Currently, the stock of old-generation treaties is 10 times greater than the number of modern, reform-oriented treaties (figure 1) and the majority of known investor–State dispute settlement cases have to date been based on old-generation treaties.

Figure 1
Stock of old-generation (1959–2011) and recent (2012–2018) international investment agreements
(Percentage)



Source: UNCTAD, 2019, *World Investment Report 2019: Special Economic Zones* (United Nations publication, Sales No. E.19.II.D.12, Geneva).

[1] See https://unctad.org/en/pages/PublicationWebflyer.aspx?publicationid=1437 and https://investmentpolicy.unctad.org/publications/1190/unctad-s-reform-package-for-the-international-investment-regime-2018-edition-.

[2] In 2018, countries concluded at least 40 IIAs, namely 30 bilateral investment treaties (BITs) and 10 treaties with investment provisions. At the time of writing, texts were available for 29 IIAs.

4. This note provides an update on the 10 options for phase 2 of IIA reform, originally launched in *World Investment Report 2017* and subsequently included in the 2018 reform package for the international investment regime.[3] It reviews the most recent phase 2 reform actions and concludes by identifying four challenges that the international investment community needs to address for reform to become truly successful.

II. Ten options for phase 2 of international investment agreement reform: Challenges and choices

5. Countries have numerous options in modernizing their stock of first-generation treaties and reducing fragmentation of the IIA regime. This note recaps and analyses 10 options and their pros and cons, for countries to adapt and adopt in line with their specific reform objectives. Determining which reform option is right for a country in a particular situation requires a careful and facts-based cost-benefit analysis, while addressing a number of broader challenges.

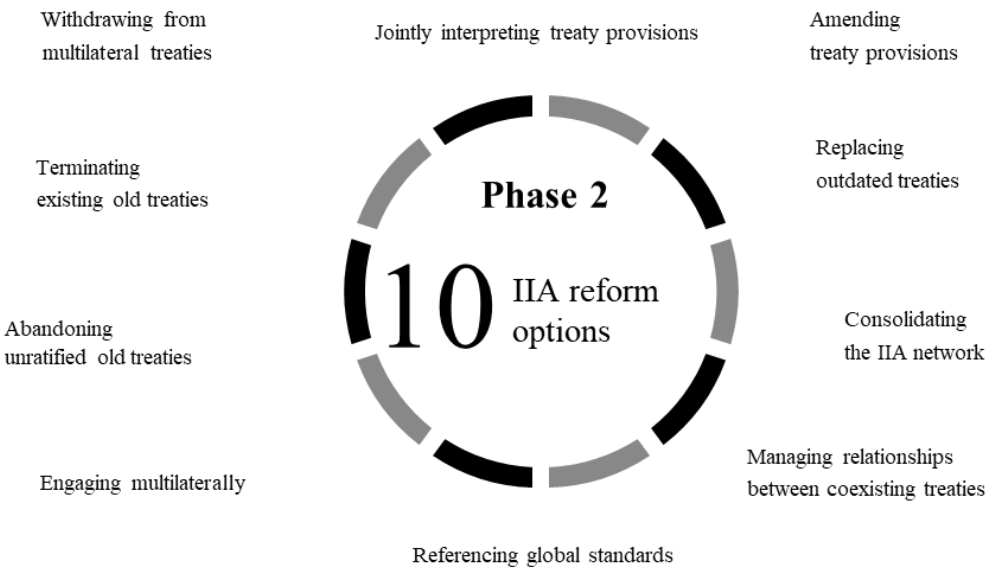
6. There are at least 10 options available for countries that wish to change existing treaties to bring them into conformity with new policy objectives and priorities and to address the challenges arising from the fragmentation of the IIA regime (figure 2). These mechanisms are not mutually exclusive and can be used in a complementary manner, especially by countries that have extensive IIA networks.

7. The 10 options differ in several respects, as they encompass actions that are more technical (e.g. interpreting or amending treaty provisions) or political (e.g. engaging multilaterally), focus on procedure (e.g. amending or replacing treaties) or also on substance (e.g. referencing international standards) or imply continuous engagement with the IIA regime (e.g. amending or replacing treaties or engaging multilaterally) or exit from it (e.g. terminating without replacement or withdrawing from multilateral mechanisms). They represent modalities for introducing change to the IIA regime (the "how" of reform), although they need to be seen and considered in combination with treaty content design (the "what" of reform, or phase 1 of IIA reform).

8. In making a determination of whether a reform mechanism is right for a country in a particular situation, a careful and facts-based cost-benefit analysis, which addresses a number of broader challenges, is needed. Strategic challenges include producing a holistic and balanced result, rather than overshooting on reform and depriving the IIA regime of its purpose of protecting and promoting investment. Systemic challenges arise from gaps, overlaps and fragmentation that create coherence and consistency problems. Coordination challenges require prioritizing reform actions, finding the right treaty partners to implement them and ensuring coherence between reform efforts at different levels of policymaking. Capacity challenges make it difficult for smaller countries, in particular the least developed countries, to address the deficiencies of first-generation IIAs.

[3] UNCTAD, 2017, *World Investment Report 2017: Investment and the Digital Economy* (United Nations publication, Sales No. E.17.II.D.3, Geneva).

Figure 2
Ten options for modernizing the existing stock of old-generation international investment agreements



Source: UNCTAD, 2017.

9. Choices must be made in identifying the best possible combination of the 10 policy options. For example, treaty termination is frequently combined with replacement or consolidation. The chosen combination of options should ultimately reflect a country's international investment policy direction in line with its national development strategy. Moreover, when implementing IIA reform, policymakers should consider the compound effect of options. Some combinations of reform options may result in a treaty regime that is largely deprived of its traditional investment protection rationale or may result in a complete exit from the IIA regime. Reform efforts, particularly comprehensive ones, should harness the benefits that can be obtained from the rule of law and respond to investors' expectations of predictability, stability and transparency in policymaking.

10. When choosing among reform mechanisms, policymakers should also consider the attendant challenges, both legal and practical. Among the legal challenges, three stand out as particularly pronounced: the most-favoured nation clause, the survival clause and the management of transitions between old and new treaties. Each of these challenges may be particularly relevant for certain specific reform options, as follows:

- Most-favoured nation clauses aim to prevent nationality-based discrimination. They typically prohibit the less favourable treatment of investors from a signatory State when compared with the treatment of like investors from any third country. Many tribunals have interpreted broadly worded most-favoured nation provisions as allowing the importation of more favourable provisions from IIAs signed by a host State with third countries. This has led to some controversy and subsequently more careful treaty drafting that limits the scope of application of the most-favoured nation provision. The inclusion of a broadly worded most-favoured nation clause in a new treaty can undermine reform efforts, as it allows investors to cherry pick the most advantageous clauses from a host State's unreformed treaties with third countries. For existing IIAs, challenges related to the most-favoured nation clause arise in particular with regard to four reform options: joint interpretation, amendment, replacement and management of treaty relationships.
- Survival clauses included in most BITs are designed to extend treaty application for a further period after termination (some for 5 years, but most frequently for 10, 15 or even 20 years). Depending on how they are formulated, survival clauses either apply only to unilateral termination or potentially also to joint treaty termination (including termination owing to replacement by a new treaty). Allowing an old-generation (unreformed) treaty to apply for a long time after termination would

undermine reform efforts, particularly if doing so results in parallel application with a new treaty. Survival clauses may therefore need to be neutralized in old treaties that are jointly terminated or replaced (including through consolidation). Challenges related to survival clauses are particularly pronounced with regard to reform options that terminate, replace or consolidate.

- Transition clauses delineate a treaty's scope of temporal application by clarifying in which situations, and for how long after a treaty's termination, an investor may invoke the old IIA to bring an investor–State dispute settlement case. If included in the new treaty, such clauses help ensure a smooth transition from the old to the new by limiting situations in which both treaties apply concurrently (or by clarifying that upon the new treaty's entry into force, the old treaty is phased out). Transition clauses effectively modify the operation of the survival clause in the outgoing treaty; they are particularly relevant with regard to reform options that replace old treaties, including through consolidation.

11. In addition to legal challenges, policymakers also need to keep in mind and plan for the many practical and political challenges that might arise, as outlined in the following chapter.

III. Ten options for phase 2 of international investment agreement reform: Overview and stocktaking

1. Jointly interpreting treaty provisions

12. IIAs with broadly worded provisions can give rise to unintended and contradictory interpretations in investor–State dispute settlement proceedings. Joint interpretations, aimed at clarifying the meaning of treaty obligations, help reduce uncertainty and enhance predictability for investors, contracting parties and tribunals.

13. Authoritative joint interpretations can help reduce uncertainty and enhance predictability for investors, contracting parties and tribunals (table 1). This reform tool is the easiest with regard to its practical application as it allows treaty parties to voice their positions on a specific IIA clause without undertaking a comparatively higher cost and more time-consuming amendment or renegotiation of the treaty. By stating explicitly in the treaty that joint interpretation is binding on the tribunal, the parties can remove any doubt regarding its legal effect. However, even in the absence of such a provision, the Vienna Convention on the Law of Treaties obliges arbitrators to take into account, together with the context, "any subsequent agreement between the parties regarding the interpretation of the treaty" (article 31.3 (a)).

14. In 2018, Colombia and India signed a joint interpretative declaration with regard to their 2009 BIT. The declaration refines key clauses in the 2009 treaty to reflect sustainable development objectives, to strengthen the right of the parties to regulate in the public interest and to clarify the provisions on fair and equitable treatment, expropriation, national treatment, most-favoured nation treatment and investor–State dispute settlement.

15. In 2017, Bangladesh and India signed a similar joint declaration with regard to their 2009 BIT. In addition, in 2017, Colombia and France signed a joint interpretative declaration with regard to their 2014 BIT. The latter clarifies that article 16 on other dispositions should not be read as a stabilization clause and that a violation of a State contract between an investor and a party does not constitute a treaty violation.

16. Several recent IIAs and models also establish joint bodies with a mandate to issue binding interpretations of treaty provisions (e.g. Australia–Peru free trade agreement, 2018; Belarus–India BIT, 2018; Central America–Republic of Korea free trade agreement, 2018; Comprehensive and Progressive Trans-Pacific Partnership, 2018; European Union–Singapore investment protection agreement, 2018; European Union–Viet Nam investment protection agreement, 2019; Republic of Korea–United States of America free trade agreement (2007), 2018 amendments; United States–Mexico–Canada Agreement, 2018; and Netherlands model BIT, 2018).

Table 1
Reform action: Jointly interpreting treaty provisions

Clarifies the content of a treaty provision and narrows the scope of interpretive discretion of tribunals	
Outcomes (pros)	*Challenges (cons)*
• Allows the parties to clarify one or several specific provisions without amending or renegotiating the treaty (no ratification required; less cost and time-intensive) • Is particularly effective if the treaty expressly provides that joint interpretations by the parties (or their joint bodies) are binding on tribunals • Becomes relevant from the moment of adoption, including for pending disputes • Has authoritative power as it originates from the treaty parties	• Is limited in its effect as it cannot attach an entirely new meaning to the provision being interpreted • Can raise doubts about its true legal nature (may not always be easy to distinguish between a joint interpretation and an amendment) • Can leave tribunals with a margin of discretion • Might be difficult to establish as genuine if either party has consistently acted in a way that does not comport with the interpretation • May be difficult to negotiate in cases when a pending dispute involves the application of the provision concerned

Source: UNCTAD, 2017.

2. Amending treaty provisions

17. It may be difficult to fix expansively formulated obligations commonly found in older IIAs through joint interpretations. By amending treaty provisions, the parties can achieve a higher degree of change and thereby ensure that the amended treaty reflects their evolving policy preferences.

18. Typically, amendments are limited in number and do not affect the overall design and philosophy of a treaty.[4] Where treaty parties are concerned only with certain specific provisions (e.g. most-favoured nation or fair and equitable treatment), discrete amendments might be preferred to the renegotiation of the whole treaty, an exercise that could be time-consuming and, depending on the other party (or parties), challenging (table 2).

19. Applicable amendment procedures depend on the treaty that is subject to change. For IIAs that do not regulate amendments, the general rules of the Vienna Convention on the Law of Treaties usually apply. However, many newer IIAs include their own provisions on amendment. This is particularly important for plurilateral or multilateral treaties, in which the large number of parties involved adds complexity to the process. IIA amendments are usually formalized through separate agreements (e.g. protocols or exchanges of letters or notes), which take effect following a procedure similar to that of the original treaty, i.e. after respective domestic ratification procedures have been completed.

20. In 2018, amendments were used in both bilateral and regional contexts. In megaregional IIAs, parties used protocols and exchanges of side letters or notes. The 11 parties to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership agreed to retain core elements of the Trans-Pacific Partnership text with amendments in selected areas. With regard to investment (chapter 9), the parties agreed to suspend the application of the provisions related to investor–State contracts and investment authorizations.

21. In September 2018, the Republic of Korea and the United States signed an amendment to their free trade agreement (2007). The amendment includes clarifications on the meaning of minimum standard of treatment and excludes investor–State dispute settlement procedures from the scope of the most-favoured nation clause. It also tasks the joint committee with considering improvements to the investor–State dispute settlement

[4] UNCTAD, 2013, *World Investment Report 2013: Global Value Chains – Investment and Trade for Development* (United Nations publication, Sales No. E.13.II.D.5, New York and Geneva).

provision that meet both countries' objectives (e.g. ways to resolve disputes and eliminate frivolous claims).

22. In 2019, the Energy Charter Conference approved the timeline for discussion on modernization of the Energy Charter Treaty and agreed on a set of topics to be reviewed as part of the discussion, including the right to regulate, sustainable development, corporate social responsibility, fair and equitable treatment and indirect expropriation.[5] The modernization process will identify possible policy options for each of the topics listed. The members of the subgroup of the conference will commence negotiations to modernize the treaty in accordance with the proposed topics and the identified policy options.

Table 2
Reform action: Amending treaty provisions

Modifies an existing treaty's content by introducing new provisions or altering or removing existing ones	
Outcomes (pros)	*Challenges (cons)*
• Constitutes a broader, more far-reaching tool than interpretation; can introduce new rules rather than merely clarifying the meaning of existing ones • Selectively addresses the most important issues on which the parties' policy positions align • Can be easier to agree upon with the treaty partner and more efficient to negotiate compared with a renegotiation of the treaty as a whole	• Typically requires domestic ratification in order to take effect • Only applies prospectively, i.e. does not affect pending disputes • Does not lead to overall change in treaty design and philosophy • May lead to horse trading, in which desired amendments are achieved only through a quid pro quo with parties demanding other amendments

Source: UNCTAD, 2017.

3. Replacing outdated treaties

23. Treaty replacements offer an opportunity to undertake a comprehensive revision of a treaty instead of selectively amending individual clauses.

24. This reform action replaces outdated IIAs by substituting them with new ones. New IIAs can be concluded by the same treaty partners (e.g. when one BIT is replaced by a new BIT) or by a larger group of countries (e.g. when several BITs are replaced by a plurilateral treaty (see option 4)). Approaching the treaty afresh enables the parties to achieve a higher degree of change (vis-à-vis selective amendments) and to be more rigorous and conceptual in designing an IIA that reflects their contemporary shared vision (table 3).

25. An increasing number of recently concluded IIAs are replacing old-generation treaties, typically substituting a new treaty for an old one. Of the 30 BITs signed in 2018, four replaced older BITs between two countries (e.g. the Belarus–Turkey BIT replaced their 1995 BIT; the Kyrgyzstan–Turkey BIT replaced their 1992 BIT; the Lithuania–Turkey BIT replaced their 1994 BIT; and the Serbia–Turkey BIT replaced their 2001 BIT).

26. Three treaties with investment provisions concluded in 2018 replaced one treaty each or are set to do so. The Singapore–Sri Lanka free trade agreement replaced one BIT (1980) and the Australia–Peru free trade agreement (2018) foresees the replacement of one BIT (1995), unless replaced upon the entry into force of the Comprehensive and Progressive Agreement for Trans-Pacific Partnership for the two countries. Once in force, the United States–Mexico–Canada Agreement (2018) will replace the North American Free Trade Agreement (1992). Three other treaties with investment provisions have replaced several agreements at once (see option 4).

27. The effective transition from an old to a new treaty can be ensured through transition clauses. Three recent treaties with investment provisions establish a transition period of

[5] See http://trade.ec.europa.eu/doclib/press/index.cfm?id=2017.

three years after the entry into force of the new agreement (namely, the Australia–Peru free trade agreement (2018), the Singapore–Sri Lanka free trade agreement (2018) and the United States–Mexico–Canada Agreement (2018)).[6] Transition clauses are a relatively new phenomenon and their prevalence is growing in recent regional and plurilateral IIAs. Treaty partners that are known to have used transition provisions at least once include Australia, Canada, Chile, Mexico, Panama, Peru, the Republic of Korea, Singapore, Viet Nam and the European Union.

Table 3
Reform action: Replacing outdated treaties

Substitutes an old treaty with a new one	
Outcomes (pros)	*Challenges (cons)*
• Allows for a holistic approach to reform through a comprehensive revision of the treaty in line with the contracting parties' evolving policy objectives • Allows for the revision of the treaty's philosophy and overall design and the inclusion of new policy issues • Can be done at any time during the lifetime of the treaty	• Requires participation of a treaty partner or partners with similar views • Can be cost and time-intensive, as it involves the negotiation of the treaty from scratch • Does not guarantee inclusion of reform-oriented elements (depends on the negotiated outcome) • Requires effective transition between the old and new treaties

Source: UNCTAD, 2017.

4. Consolidating the international investment agreement network

28. A growing number of regional IIAs include specific clauses providing for the replacement of treaties between the parties. Abrogating two or more old treaties through the creation of a single new one can help to modernize treaty content and avoid fragmentation of the IIA network.

29. Consolidation is a form of replacement (see option 3). It means abrogating several pre-existing treaties and replacing them with one single new, modern and sustainable development-oriented treaty. From an IIA reform perspective, this is an appealing option as it has the dual positive effect of modernizing treaty content and reducing fragmentation of the IIA network, i.e. establishing uniform treaty rules for more than two countries (table 4).

30. As with replacement generally, when opting for consolidation, countries need to be mindful of termination provisions in the outgoing IIAs and ensure an effective transition from the old to the new treaty regime (see option 3).

31. Among the treaties with investment provisions concluded in 2018, three replaced more than one older BIT. Replacements were recorded in specific clauses in the text of the new IIAs or in letters providing for termination and replacement. For example, the European Union–Singapore free trade agreement (2018) will replace 12 older BITs between the European Union member States and Singapore. The Central America–Republic of Korea free trade agreement (2018) will replace five BITs.

32. In the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, some parties provide for the replacement of pre-existing BITs (e.g. Australia–Viet Nam BIT, 1991; Australia–Peru BIT, 1995; and Australia–Mexico BIT, 2005) under terms set out in relevant side letters.

[6] Anecdotal evidence suggests that only a minority of replacement IIAs contain transition clauses but that their prevalence is growing in recent regional and plurilateral IIAs. Examples of transition clauses can be found in annex 10-E of the Australia–Chile free trade agreement (2008), article 30.8 of the Canada–European Union Comprehensive Economic and Trade Agreement (2016), article 10.20 of the Peru–Singapore free trade agreement (2008) and in other treaties. Other treaty partners that are known to have used transition provisions at least once include Mexico, Panama, the Republic of Korea and Viet Nam.

33. The investment protocol of the African Continental Free Trade Area, scheduled to be negotiated as part of phase 2 of the continental integration process, could potentially replace over 170 intra-African BITs.

Table 4
Reform action: Consolidating the international investment agreement network

Abrogates two or more old BITs between parties and replaces them with a new, plurilateral IIA	
Outcomes (pros)	*Challenges (cons)*
• Allows for a holistic approach to IIA modernization through a comprehensive revision of the treaty	• Requires the participation of numerous treaty partners
• Reduces fragmentation of the IIA network by decreasing the number of existing treaties	• Does not guarantee inclusion of reform-oriented elements (depends on the negotiated outcome)
• May be more cost-effective and time-efficient than pursuing multiple bilateral negotiations	• May be more difficult to achieve outcomes in plurilateral negotiations than in bilateral ones

Source: UNCTAD, 2017.

5. Managing relationships between coexisting treaties

34. Where countries opt to maintain both old and new treaties in parallel, IIA reform objectives will be achieved only if, in the event of conflict or inconsistency, the new, more modern IIA prevails.

35. Instead of opting for replacement, some treaty parties decide that their old and new treaties should exist in parallel (table 5). This is often the case when the new treaty is plurilateral (e.g. a regional free trade agreement with an investment chapter) and the old underlying treaties are bilateral. Generally, such parallelism adds complexity to the system and is not conducive to IIA reform. For the purpose of effective and comprehensive IIA reform, the better approach would be to avoid the parallel application of coexisting IIAs between the same parties. However, States may have reasons to opt for coexisting IIAs.

36. In some recent treaties with investment provisions, countries continue to be bound by overlapping pre-existing treaties. With regard to the Comprehensive and Progressive Agreement for Trans-Pacific Partnership, a total of 37 earlier IIAs remain in force and coexist with the Agreement. For example, Australia and Singapore have an overlapping free trade agreement (2003). Japan and Viet Nam have two older treaties in force (Japan–Viet Nam BIT, 2003; and Japan–Viet Nam Economic Partnership Agreement, 2008), with the BIT incorporated into the Economic Partnership Agreement.

37. At least 12 BITs signed in 2018 have parallel treaty relationships. For example, the Azerbaijan–Turkmenistan BIT (2018) and the Belarus–Turkey BIT (2018) overlap with the Energy Charter Treaty (1994) for the sector in question. The Indonesia–Singapore BIT (2018) coexists with the Association of Southeast Asian Nations (ASEAN) Comprehensive Investment Agreement (2009). The Kazakhstan–United Arab Emirates BIT (2018) and the Mauritania–Turkey BIT (2018), among others, overlap with the Organization of Islamic Cooperation Investment Agreement (1981).

38. The parties to the Australia–Indonesia Comprehensive Economic Partnership Agreement remain bound by the Australia–Indonesia BIT (1992) and the ASEAN–Australia–New Zealand free trade agreement (2009). The Australia–Indonesia Comprehensive Economic Partnership Agreement includes a relationship clause that provides for consultations between the parties where a party considers that there is an inconsistency between agreements, with a view to reaching a mutually satisfactory solution.

39. To mitigate potentially adverse consequences arising from this situation, States can include clauses that clarify the relationship between the coexisting IIAs. For example, a conflict clause may specify which of the treaties prevails in the event of of conflict or inconsistency. The relationship clause included in the Australia–Peru free trade agreement (2018) provides that the parties should consult with each other in case of inconsistency between agreements.

Table 5
Reform action: Managing relationships between coexisting treaties

Establishes rules that determine which of the coexisting IIAs applies in a given situation	
Outcomes (pros)	*Challenges (cons)*
• Ensures that countries are not subject to simultaneously applicable obligations found in overlapping treaties • May aid reform efforts by ensuring that the more recent treaty prevails • While keeping the earlier treaty alive (i.e. creating parallelism), clarifies the new treaty's relationship with the earlier one	• Does not terminate the earlier treaty • Only mitigates the adverse consequences arising from coexistence; does not advance effective and comprehensive IIA reform • Impact depends on the formulation used in the conflict clause

Source: UNCTAD, 2017.

6. Referencing global standards

40. In their IIA reform efforts, countries can refer to multilaterally recognized standards and instruments. Such instruments reflect broad consensus on relevant issues and referencing them can help overcome the fragmentation between IIAs and other bodies of international law and policymaking.

41. IIAs are currently the most prominent tools that deal with foreign investment (at bilateral, regional, plurilateral and multilateral levels). However, international policymaking has also resulted in numerous other standards and instruments that may or may not be binding and, directly or indirectly, concern international investment.

42. Examples of the numerous voluntary and regulatory initiatives to promote corporate social responsibility standards and guidelines that foster sustainable development are the International Organization for Standardization standard 26000 on social responsibility and the United Nations Global Compact. Such instruments are a unique and rapidly evolving dimension of soft law. They typically focus on the operations of multinational enterprises and, as such, have increasingly shaped the global investment policy landscape over the last decades.

43. Although some uncertainty remains about the role and weight that international arbitration tribunals would give to such instruments, policymakers have certain options for harnessing these global standards for IIA reform, by referencing them in IIAs (table 6). For example, they can take the following actions:

- Introduce (e.g. by means of cross-referencing) global standards and instruments in their new IIAs, as a small but growing number of agreements already do. Such clauses would, at a minimum, serve to flag the importance of sustainability in investor–State relations. They could also attune investors to their sustainable development-related responsibilities and operate as a source of interpretative guidance for investor–State dispute settlement tribunals.
- Adopt a joint statement, recalling their countries' commitments to certain enumerated global standards and instruments and noting that the investment (policy) relations among the participating countries are to be understood in the light of these commitments. The effects would be similar to those of cross-referencing but would apply not only to new treaties, but also to pre-existing ones. The larger the group of participating countries (and, possibly, the longer the list of global standards), the stronger or more far-reaching the effect would be.
- Incorporate, at a broader level, global sustainability issues into discussions on global economic governance and the international regulatory architecture for investment.

44. Reference to global standards, with a view to ensuring more responsible and regulated investment activities, has become an increasingly prominent treaty feature. Of the 29 treaties signed in 2018 for which texts are available, at least 18 refer to the achievement

of sustainable development objectives. At least four refer to one or more specific global standards related to the promotion of sustainable development. The Charter of the United Nations and the Universal Declaration of Human Rights are both mentioned three times. The United Nations Global Compact, obligations linked to membership in the International Labour Organization and the guidelines for multinational enterprises of the Organization for Economic Cooperation and Development are all mentioned in two treaties.

45. Most significantly, the European Free Trade Association–Indonesia Economic Partnership Agreement (2018) specifically refers to the 2030 Agenda for Sustainable Development (the second treaty to do so, after the Canada–European Union Comprehensive Economic and Trade Agreement (2016)). European Free Trade Association treaties refer to the greatest number of global standards (up to seven standards in the European Free Trade Association–Indonesia Economic Partnership Agreement (2018), followed by four in the European Free Trade Association–Ecuador Economic Partnership Agreement (2018)).

Table 6
Reform action: Referencing global standards

Fosters coherence and improves the interaction between IIAs and other areas of law and policymaking	
Outcomes (pros)	*Challenges (cons)*
• Can help shape the spirit (e.g. object and purpose) of the treaty and influence its interpretation by arbitral tribunals • Can inform the modernization of existing treaties and the creation of new ones • Can reconnect the different universes of international rules • Cost-effective and time-efficient (countries can make use of existing instruments that the parties have previously agreed to)	• Depending on the global standard at issue, can be seen as overloading the IIA regime with issues that are not central to the traditional IIA objective of protecting foreign investment • Does not necessarily create legal clarity or restrict the interpretive discretion of arbitral tribunals • Does not give treaty parties control over the future development of the respective instruments

Source: UNCTAD, 2017.

7. Engaging multilaterally

46. Multilateral engagement is potentially the most impactful but also most difficult avenue for reforming pre-existing IIAs. When drawing inspiration from current or past multilateral processes, attention should be given to their differences in terms of intensity, depth and character of engagement.

47. If successful, a global multilateral reform effort would be the most efficient way to address the inconsistencies, overlaps and development challenges that characterize the thousands of treaties that make up today's IIA regime. However, multilateral reform action is challenging, in particular, with regard to how to pursue it (table 7).

48. There have been a number of policy developments at the multilateral (or plurilateral) level in the recent past that can inspire future multilateral IIA reform efforts. Inspiration can be found in both the way the new rules have been developed and the processes or tools employed to extend the new rules to existing treaties.

49. Recent examples of multilateral developments in investment policymaking in 2018 include discussions taking place under the Energy Charter and, for example, at the International Centre for Settlement of Investment Disputes, the Organization for Economic Cooperation and Development, the World Trade Organization, the United Nations Commission on International Trade Law and the United Nations Working Group on Business and Human Rights. However, the current undertakings may be unlikely to generate big picture results for the sustainable development-oriented modernization of old-generation investment treaties.

50. Beyond the investment regime, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting, developed in the context of an Organization for Economic Cooperation and Development and Group of 20 project on base erosion and profit shifting, offers important lessons learned for phase 2 reform actions (box).

Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting: Lessons for phase 2 reform actions

Future IIA reform actions could draw upon the multilateral stakeholder process that led to the adoption of the final base erosion and profit shifting package and upon the treaty's architecture, which is similar to, but more complex than, the Mauritius Convention on Transparency in treaty-based investor–State arbitration.

The base erosion and profit shifting package aims to update international tax rules and lessen the opportunity for tax avoidance by multinational enterprises and deals with a number of issues of concern (e.g. hybrid mismatch arrangements, treaty abuse and streamlining dispute resolution). The aim of the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting is to swiftly implement the tax treaty measures of the final package.

The Convention fosters States' implementation of the tax treaty-related measures and the potential amendment of over 3,000 bilateral tax treaties concluded to date. It creates change in a flexible, à la carte way, allowing for unilateral declarations and selective reservations to or amendments of pre-existing tax treaties. For example, the Convention will apply only to those tax treaties specifically designated by the parties to the Convention and it uses opt-out mechanisms that allow parties to exclude or modify the legal effects of certain provisions. Choices between alternative provisions and opt-in mechanisms allow for the possibility of taking on additional commitments.

The negotiations for the Convention were concluded by over 100 jurisdictions in November 2016. Upon the signature of the Convention by Albania and Morocco in May and June 2019, respectively, the Convention covered 89 jurisdictions. The Convention became effective on 1 January 2019 and currently applies to 51 tax treaties concluded among the 28 jurisdictions that have ratified the Convention as at 25 June 2019. As at July 2019, there are 131 members of the inclusive framework on base erosion and profit shifting from all continents and all levels of development.

Source: UNCTAD, based on Organization for Economic Cooperation and Development, 2019, Information brochure, available at https://www.oecd.org/tax/treaties/multilateral-convention-to-implement-tax-treaty-related-measures-to-prevent-beps.htm; and https://www.oecd.org/tax/beps/morocco-signs-landmark-agreement-to-strengthen-its-tax-treaties.htm.

51. Finally, multi-stakeholder platforms and processes such as the World Investment Forum held at UNCTAD – the international forum for high-level and inclusive discussions on today's existing multilayered and multifaceted IIA regime – and the Forum on Financing for Development, mandating UNCTAD to continue consultations with member States on IIAs, are useful in allowing for expert research, analysis, backstopping and exchanges on how to carry reform further.

Table 7
Reform action: Engaging multilaterally

Establishes a common understanding or new rules between a multitude of countries, coupled with a mechanism that brings about change in one go	
Outcomes (pros)	*Challenges (cons)*
• Among reform options, is best suited for dealing with policy issues of global relevance (e.g. sustainable development) or systemic issues (e.g. most-favoured nation clause) • If successful, is the most efficient type of reform action as it brings about change in one go for a multitude of countries or treaty relationships • Can help avoid further fragmentation arising from individual countries' piecemeal reform actions	• Is the most challenging reform path as consensus among many countries is difficult to achieve • Can lead to a situation in which countries with small bargaining power or latecomers find themselves in the role of rule-takers • Is more likely to result, at least at the current stage, in non-binding instruments or instruments with a narrow substantive scope (e.g. individual aspects of investor–State dispute settlement); therefore, has a limited overall impact on the IIA universe

Source: UNCTAD, 2017.

8. Abandoning unratified old treaties

52. A relatively large number of BITs, many of them old, have not yet entered into force. A country can formally indicate its decision to not be bound by them as a means to help clean up its IIA network and promote the negotiation of new, more modern treaties.

53. A country can decide to not be bound by old-generation treaties that have not yet entered into force. Under international law, countries are "obliged to refrain from acts which would defeat the object and purpose of a treaty" they have signed, even before the said treaty enters into force (article 18 of the Vienna Convention on the Law of Treaties). Formally abandoning a treaty ("abandonment" is used as a colloquial and legally neutral term) would ensure that a country has released itself from that obligation. This is usually a straightforward process because the treaty is not in force.

54. Although explicit actions to abandon unratified treaties have been rare, notable examples include the termination by India of several BITs that had been signed but had not yet entered into force (e.g. BITs with Ethiopia (2007), Ghana (2002), Nepal (2011) and Slovenia (2011)). Close to 480 IIAs were signed more than 10 years ago and have not yet entered into force. This may signal that States have abandoned efforts to ratify them (table 8).

55. However, in certain treaties, countries agree to provisional application, which means that the treaty (or part of it) is applied after its signature but before its entry into force. Relinquishing a provisionally applied treaty is usually more complicated, as it comes close to terminating a treaty that has entered into force. Typically, the IIA will stipulate a process that a country must follow in order to terminate provisional application; this may also trigger the operation of a survival clause.

Table 8
Reform action: Abandoning unratified old treaties

Conveys a country's intent to not become a party to a concluded but as yet unratified treaty	
Outcomes (pros)	*Challenges (cons)*
• Can help clean up a country's IIA network • Is procedurally simple, requiring only a notice to the other parties • Can send a reform message to other treaty parties and the public	• Could be perceived as negatively affecting a country's investment climate • Could disturb relations with other treaty parties • May not affect existing cases arising from provisional application • May not affect future investor–State dispute settlement claims (during the survival clause period) if a country accepted provisional application pending ratification

Source: UNCTAD, 2017.

9. Terminating existing old treaties

56. Terminating outdated BITs, whether unilaterally or jointly, is a straightforward (although not always instantaneous) way to release the parties from their obligations.

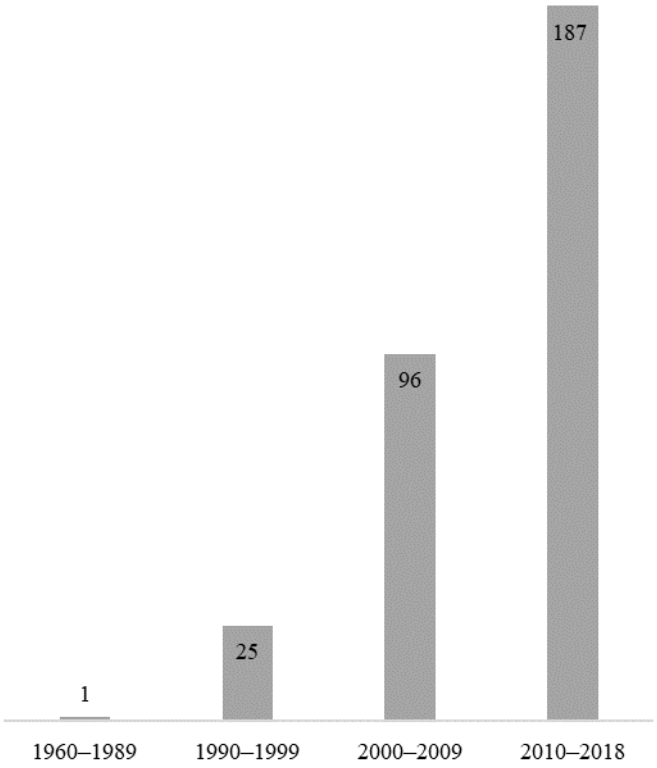
57. Terminating a treaty releases the parties from the obligation to further perform according to it (table 9). This differs from a treaty's termination due to its replacement by a new one (see options 3 and 4). A treaty can be terminated unilaterally (when the treaty permits) or by mutual consent (at any time). Rules for unilateral treaty termination are often set out in a BIT itself. Typically, BITs set out an initial period of operation of between 10 and 20 years, which must expire before a party may unilaterally terminate the treaty.

58. Unilateral termination will trigger the survival clause (if existing in the treaty), which will prolong the treaty's operation for a set time after it has been terminated. Survival clauses apply to investments made prior to the date of termination but cover governmental measures adopted both before and after the date of termination (for the duration of the survival period). There are two main types of survival clauses. Some are formulated to apply to unilateral treaty termination only (type 1); others do not make it clear whether they are limited to cases of unilateral termination or also apply to joint termination by the parties (type 2). Unilateral treaty terminations will invariably trigger the survival clause. In joint terminations, the situation is less clear; the survival clause may or may not be triggered, depending on its formulation (type 1 or 2) and whether it has been neutralized by the treaty parties at the time of termination.

59. For the sake of clarity, countries may consider neutralizing the survival clause when terminating a treaty jointly. The survival clause was neutralized by the parties' express agreement in the context of the joint termination of the Argentina–Indonesia BIT (1995), as well as the joint termination of several BITs between Czechia and several other member States of the European Union.

60. Overall, IIA terminations are on the rise. Between 2010 and 2018 alone, 187 IIA terminations took effect (figure 3), of which 128 were the result of unilateral terminations. At least 24 terminations entered into effect in 2018 and at least 10 in the first half of 2019.

Figure 3
Effective international investment agreement terminations
(Number of agreements by selected period)



Source: UNCTAD, 2019.
Note: This figure includes treaties that were unilaterally denounced, terminated by consent, replaced by a new treaty and expired automatically.

61. At least two intra-European Union BIT terminations took effect in 2017 and six more at the beginning of 2019. A number of termination notifications were sent in 2017 and 2018 (e.g. by Poland), which have yet to enter into effect.

62. The number of treaty terminations is expected to increase in the years to come, as follows:

- The planned termination of intra-European Union BITs, which concerns some 190 treaties in force between member States of the European Union, will outpace previous termination actions. In a declaration in January 2019, 22 member States of the European Union announced their intention to terminate all BITs concluded between them by 6 December 2019. In separate declarations, the six remaining member States reaffirmed, in essence, the statement on intra-European Union BITs.
- Once several recently signed regional, plurilateral or megaregional treaties (e.g. the European Union–Singapore Investment Protection Agreement) enter into force, they will effectively replace older BITs, i.e. these BITs will be terminated.

63. Terminating IIAs does not necessarily mean that a country envisages fully disengaging from the system. Terminations can form part of a country's overall approach to recalibrating its international investment policymaking, accompanied by the development of a revised treaty model and the start of new IIA negotiations. Two countries, namely India and Indonesia, that recently terminated a large number of their IIAs, many of them on a unilateral basis, concluded new BITs in 2018 (e.g. Belarus–India BIT and Indonesia–Singapore BIT).

64. Moreover, terminations do not always instantaneously release the parties from their treaty obligations. They may trigger the operation of a survival clause, typically included in IIAs, unless it is neutralized by the treaty parties at the time of termination.

Table 9
Reform action: Terminating existing old treaties

Releases the parties from their obligations under the treaty	
Outcomes (pros)	*Challenges (cons)*
• Can be a unilateral or joint termination (without replacement by a new treaty)	• Could be perceived as worsening the investment climate in the terminating country or countries
• Sends a strong signal to reform-oriented domestic stakeholders and critics of the IIA regime	• Could result in investors of one party no longer being protected in the other party's territory
• Can promote sustainable development-oriented reform, if part of a coordinated joint replacement strategy	• Might not be instantaneous if a survival clause is triggered (i.e. investor–State dispute settlement exposure remains for the duration of the survival clause period)

Source: UNCTAD, 2017.

10. Withdrawing from multilateral treaties

65. Unilateral withdrawal from an investment-related multilateral mechanism (e.g. the Convention on the Settlement of Investment Disputes between States and Nationals of Other States) can help reduce a country's exposure to investor claims but may also create challenges for future multilateral cooperation on investment.

66. A unilateral withdrawal from an investment-related multilateral mechanism releases the withdrawing party from the instrument's obligations and, depending on the instrument at issue, can help minimize a country's exposure to investor claims (table 10). Unilateral withdrawal can also signal the country's apparent loss of faith in the system and a desire to exit from it, rather than reform it. It can show a preference for an alternative forum.

67. To date, two countries have withdrawn from the Energy Charter Treaty. In 2009, the Russian Federation submitted its notice to terminate provisional application and declare its intention to not become a party to the Treaty. In 2014, Italy filed a notice of denunciation of the Treaty, which took effect on 1 January 2016 (in contrast to the Russian Federation, Italy had ratified the Treaty and was a fully-fledged party to it). The Treaty contains two separate 20-year survival clauses for signatories that applied the Treaty on a provisional basis and for fully-fledged parties.

68. The Convention on the Settlement of Investment Disputes between States and Nationals of Other States has been terminated by three countries to date, namely the Plurinational State of Bolivia in 2007, Ecuador in 2009 and the Bolivarian Republic of Venezuela in 2012. Each country had had multiple treaty-based investor claims filed against the country at the International Centre for Settlement of Investment Disputes, with high financial stakes.

69. More recently, there have been no new examples with regard to this reform option, suggesting that withdrawal from multilateral investment treaties is currently not a preferred reform path.

Table 10
Reform action: Withdrawing from multilateral treaties

Releases the withdrawing parties from the instrument's binding force	
Outcomes (pros)	*Challenges (cons)*
• Can help narrow a country's exposure to (future) investor claims (subject to the denounced treaty's survival clause and without prejudice to investor claims under other IIAs or before other international forums) • May reduce annual expenditures (e.g. if the treaty requires annual contributions) • Can be a second-best solution for countries that would prefer to reform the existing treaty, but cannot do so alone	• Could be perceived as negatively affecting a country's investment climate and/or could put the country into an outsider position • Deprives a country of further cooperation with other treaty partners and the opportunity to have a say in the evolution of the agreement • Applies prospectively only • Since most IIAs provide consent to multiple forums for investor–State dispute settlement, may not eliminate the risk of investor–State dispute settlement claims entirely • Could narrow protection for nationals investing abroad

Source: UNCTAD, 2017.

IV. Conclusions

70. Sustainable development-oriented reform has made its way into today's investment policymaking. Reform actions have taken place at all levels (national, bilateral, regional and multilateral). They cover all five areas of reform set out in the UNCTAD reform package for the international investment regime (2018) and, increasingly, they implement the 10 options for phase 2 of IIA reform.

71. However, much remains to be done. For reform to be truly successful, the international investment community needs to meet four challenges.

72. First, modernizing old-generation treaties remains a priority. Despite ongoing reform efforts, the stock of treaties belonging to the old generation of IIAs that do not include reform-oriented features still accounts for over 3,000 IIAs (10 times as many as the number of modern IIAs concluded since 2012). This illustrates the magnitude of the task of reforming the bulk of the IIA regime to make it more balanced, manageable and sustainable development friendly.

73. Second, reform needs to be holistic. Although reform efforts converge in their objective to make the IIA regime more sustainable development oriented, they are implemented only intermittently by countries and they focus on specific aspects of the regime that are often addressed in isolation. The reform of investment dispute settlement for example, a recent focus of worldwide attention, is not synchronized with the reform of the substantive rules embodied in IIAs. However, reorienting the investment policy regime towards sustainable development requires reforming both the rules on dispute settlement and treaties' substantive rules.

74. Third, some reform clauses have yet to be tested. It is too early to assess the effectiveness of some of the innovative language introduced in IIAs in achieving their objectives of safeguarding countries' right to regulate. Many of the new refinements in IIAs have yet to be tested in investment disputes and doubts remain about how arbitrators may interpret them in investor–State dispute settlement proceedings. This applies to both new clauses that are widely used in treaties and those that have been used relatively rarely to date.

75. Fourth, reform efforts must be inclusive and not be limited by capacity constraints. Successful reform requires a transparent and inclusive process. Governments and international forums need to ensure the availability of possibilities for meaningful stakeholder engagement and build the skills and experience of negotiators and policymakers. Bilateral or regional technical assistance programmes can follow up on the

capacity-building needs identified by Governments. Sharing of experiences and best practices on IIA reform can foster peer-to-peer learning on sustainable development-oriented reform options.

76. As the focal point in the United Nations for the integrated treatment of trade and development and interrelated issues in the areas of finance, technology, investment and sustainable development, UNCTAD backstops ongoing policymaking processes in the pursuit of sustainable development-oriented IIA reform. It supports such reform through its three pillars of work, namely the development of policy tools based on research and policy analysis; technical assistance, including capacity-building and advisory services; and intergovernmental consensus-building. The eleventh session of the Commission on Investment, Enterprise and Development may wish to take stock of reform efforts to date, identify lessons learned and chart the way forward.