

UNCTAD High-level IIAs Conference 2017

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Reforming the International Investment Regime: Phases 1 and 2

Introductory Statement by

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Excellencies,
Distinguished Experts,
Ladies and Gentlemen,

Welcome to the 2017 High-level Conference on International Investment Agreements Regime. Your attendance here today shows that IIA reform is high on your agenda as policymakers and stakeholders. Let me also welcome those who are watching the live webstream of the plenary session this morning.

Over the several past years, a broad consensus has been growing on the need for systematic reform of the global IIA regime. IIA reform is a must, not an option!

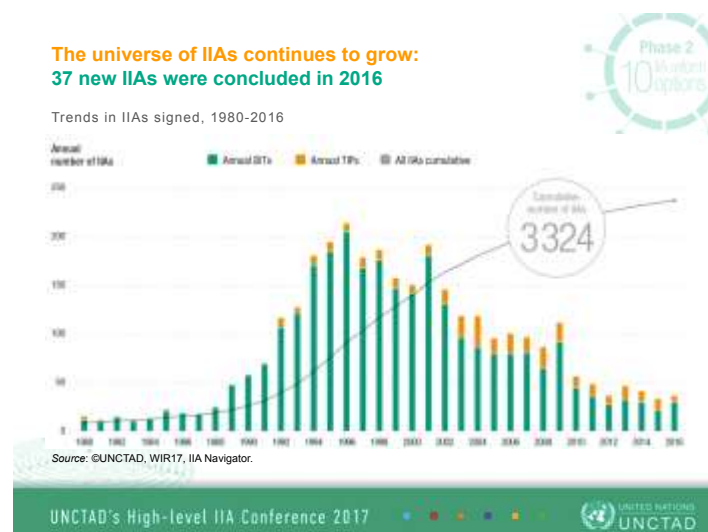
Indeed, many countries have started pursuing various types of reform actions. During its first phase, IIA reform has made remarkable progress. Until recently, IIA reform efforts mostly focused on the content of new treaties under negotiation and the development of new model agreements.

While taking a forward-looking approach, it is also important to review the legacy of the past: the large stock of treaties that are often 20 to 25 years old. Old-generation treaties typically contain generic, broadly-worded definitions and substantive provisions, but few safeguards. Many continue to be in force today and they can still “bite”. Modernizing the existing “old” treaty network is a formidable challenge for the investment-development community.

In my introductory statement for the Conference, I will highlight three aspects:

1. Recent developments in IIAs and ISDS, and the increasing complexity of the Regime
2. Progress in Phase 1 of IIA reform
3. Ten options for Phase 2 of IIA reform

1. Recent developments in IIA and ISDS: growing complexity

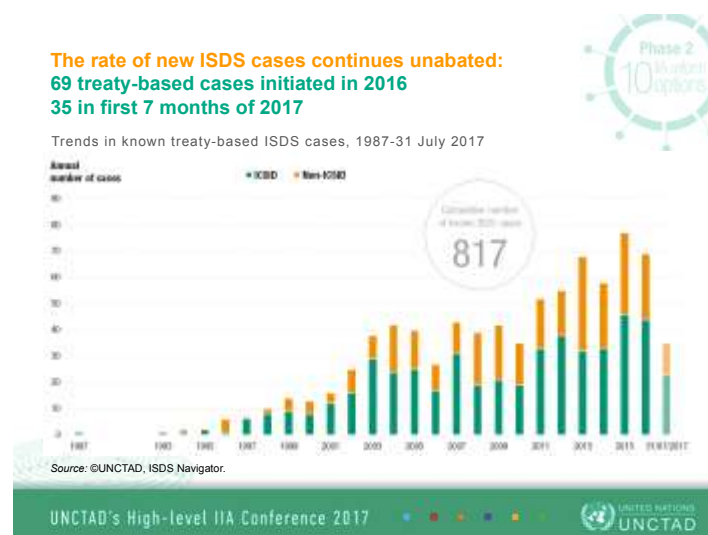


The universe of IIAs continues to grow and increase in complexity. The year 2016 was characterized by contrasting trends. Many countries continued to sign and negotiate new IIAs, usually incorporating reform-oriented provisions; while many other countries recalibrated and re-evaluated their approach to international investment policymaking.

In 2016, 37 new IIAs were concluded, bringing the total number of treaties to 3,324. At the megaregional level, two IIAs were concluded in 2016: the CETA between Canada–European Union, and the Trans-Pacific Partnership Agreement. Several others remain under.

At the same time, the termination of at least 29 IIAs became effective. Furthermore, one country notified more than 50 countries in its decision to terminate its bilateral investment treaties with them.

There is a lot of movement in IIAs today and a growing basis for consensus on the need for broader reform in international investment policymaking. One manifestation was the adoption by the G20 in 2016 of a set of non-binding Guiding Principles for Global Investment Policymaking. Another example is the Joint ACP-UNCTAD Guiding Principles for Investment Policymaking, which were approved by the ACP earlier this year. Both sets of Principles draw on the Core Principles of UNCTAD's *Investment Policy Framework for Sustainable Development*.



Meanwhile, the rate of treaty-based investor–State dispute settlement (ISDS) cases continues to increase. In 2016, 69 new known treaty-based cases were initiated. During the first seven months of this year, investors initiated at least 35 such cases, bringing the total number to 817. So far, 114 countries have been respondents to one or more known ISDS claims. Looking at the overall trend, virtually all known ISDS cases are based on treaties concluded before 2010. Most are based on IIAs signed in the 1990s or earlier (some 90 per cent).

Our review of ISDS awards and decisions rendered in 2016 shows once again that the wording of specific treaty provisions is a key factor in case outcomes. This underlines the importance of balanced and careful treaty drafting. It calls for the modernizing at the existing stock of old-generation treaties.

2. Phase 1 of IIA reform: Taking stock of progress



IIA reform has already made remarkable progress in Phase 1. Sustainable development-oriented IIA reform has entered the mainstream of international investment policymaking. Most new treaties now follow *UNCTAD's Road Map for IIA Reform* (WIR15, WIR16), which sets out five action areas:

1. safeguarding the right to regulate;
2. reforming the investment dispute settlement mechanism;
3. enhancing investment promotion and facilitation for development;
4. ensuring responsible investment;
5. enhancing systemic coherence.

Investment facilitation has become an area of particular interest to the investment community, and *UNCTAD's Global Action Menu on Investment Facilitation* has obtained strong support from all investment-development stakeholders.

IIA reform: intensifying and yielding concrete results at the national, bilateral, and regional levels

Phase 2 10 Market Options

Treaty provisions Options for IIA Reform	UNCTAD Policy Framework Option	Earlier BITs (1959–2010) (2,432)	Recent BITs (2011–2016) (110)
Preamble Refer to the protection of health and safety, labour rights, environment or sustainable development	1.1.2	8%	56%
Definition of covered investment Expressly exclude portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts	2.1.1	4%	39%
Definition of covered investor Include "denial of benefits" clause	2.2.2	5%	58%
Most-favoured-nation treatment Specify that such treatment is not applicable to other IIAs' ISDS provisions	4.2.2	2%	45%
Fair and equitable treatment Refer to minimum standard of treatment under customary international law	4.3.1	1%	29%
Indirect expropriation Clarify what does and does not constitute an indirect expropriation	4.5.1	5%	42%
Free transfer of funds Include exceptions for balance-of-payments difficulties and/or enforcement of national laws	4.7.2 4.7.3	18%	74%
Public policy exceptions Include general exceptions, e.g. for the protection of human, animal or plant life, or health; or the conservation of exhaustible natural resources	5.1.1	7%	43%

Source: ©UNCTAD, WIR 2017.

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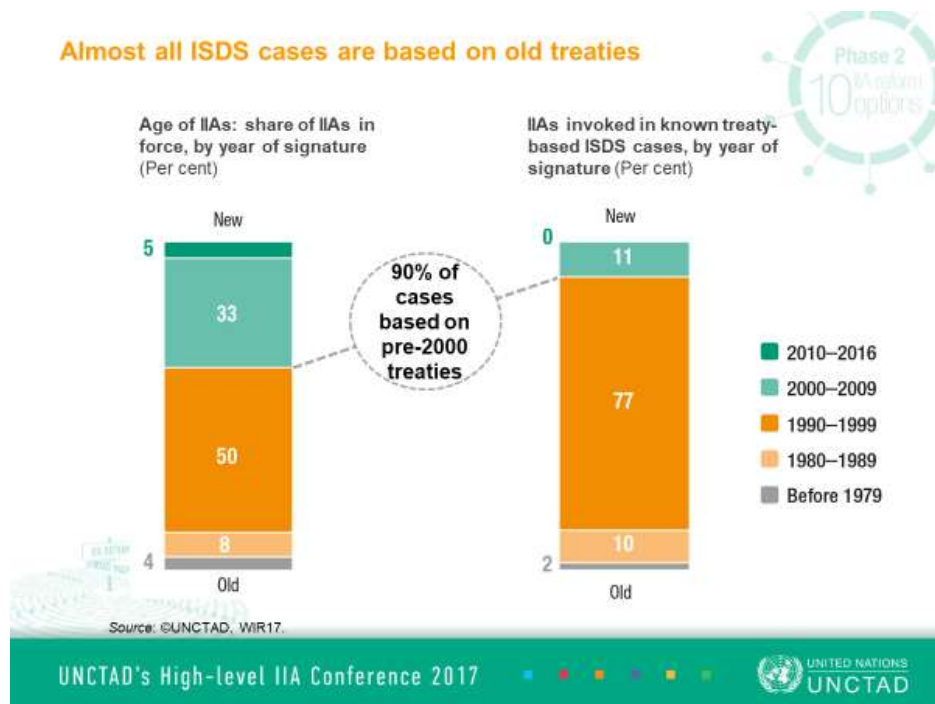
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Most of today's new IIAs include sustainable development-oriented reform elements. Evidence of IIA reform is particularly pronounced when treaties are compared over time. Recent BITs are more likely to contain treaty clauses that preserve the right to regulate, while maintaining protection of foreign investors.

Several provisions that were considered to be “innovative” in IIAs concluded around 2010, now appear almost regularly. Almost all the recently concluded IIAs contain at least one or two reform features.

At the same time, some of the IIAs concluded in 2016 contain unique, innovative features rarely encountered in earlier IIAs. In addition, some new treaties also impose new, far-reaching obligations on States. This includes broadening the scope of covered investments or introducing far-reaching investor protections (e.g. expanding the list of prohibited performance requirements).

3. Phase 2 of IIA reform: UNCTAD’s 10 Options



During the first phase of reform, countries built consensus on the need for reform, identified reform areas and approaches, reviewed their IIA networks, developed new model treaties and started to negotiate more modern treaties.

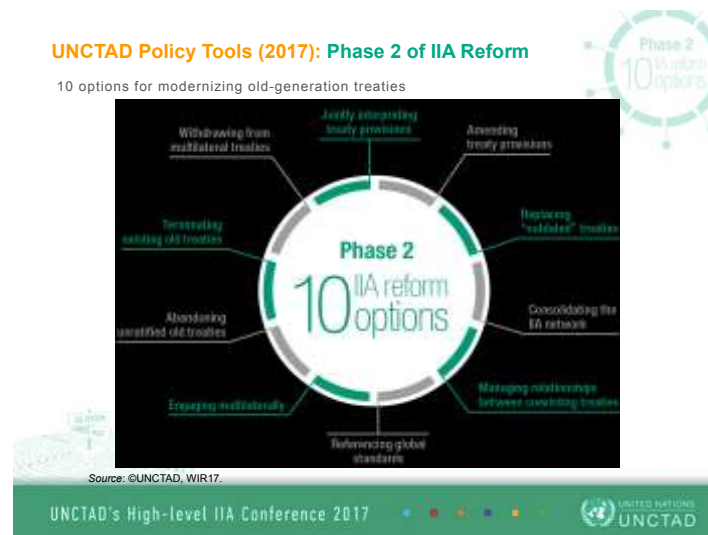
It now is time to move to Phase 2 of IIA reform: modernizing the existing stock of old generation treaties. Why is phase 2 of IIA reform needed? The *World Investment Report 2017* identified at least three reasons:

1. Old treaties are many: more than 2,500 IIAs were concluded before 2010. They account for 95 per cent of all treaties in force today
2. Old treaties “bite”: almost all of today’s known ISDS cases are based on those old treaties.
3. Old treaties cause inconsistencies: their continued existence creates overlaps and fragmentation in treaty relationships and poses interaction challenges.

A two-pronged approach is needed, not only for formulating new treaties, but also to modernize the existing ones.

UNCTAD Policy Tools (2017): Phase 2 of IIA Reform

10 options for modernizing old-generation treaties



Countries have numerous options to modernize their stock of first-generation treaties and reduce systemic fragmentation in the IIA regime. The *World Investment Report 2017* presents and analyses ten policy options for phase 2 of IIA reform. The ten options are:

- (1) jointly interpreting treaty provisions; (2) amending treaty provisions; (3) replacing “outdated” treaties; (4) consolidating the IIA network; (5) managing relationships between coexisting treaties; (6) referencing global standards; (7) engaging multilaterally; (8) abandoning unratified old treaties; (9) terminating existing old treaties; and (10) withdrawing from multilateral mechanisms.

Overview of reform options: actions and outcomes

Action option	Outcome
1. Jointly interpreting treaty provisions	Clarifies the content of a treaty provision and narrows the scope of interpretive discretion of tribunals
2. Amending treaty provisions	Modifies an existing treaty's content by introducing new provisions or altering or removing existing ones
3. Replacing “outdated” treaties	Substitutes an old treaty with a new one
4. Consolidating the IIA network	Abrogates two or more old IIAs between parties and replaces them with a new, plurilateral IIA
5. Managing relationships between coexisting treaties	Establishes rules that determine which of the coexisting IIAs applies in a given situation
6. Referencing global standards	Fosters coherence and improves the interaction between IIAs and other areas of international law and policymaking
7. Engaging multilaterally	Establishes a common understanding or new rules among a multitude of countries, coupled with a mechanism that brings about change “in one go”
8. Abandoning unratified old treaties	Conveys a country's intent to not become a party to a concluded but as yet unratified treaty
9. Terminating existing old treaties	Releases the parties from their obligations under a treaty
10. Withdrawing from multilateral treaties	Similar in effect to termination, but leaves the treaty in force among the remaining parties who have not withdrawn

Source: ©UNCTAD, WIR17.

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Importantly, our report presents the full set of policy options - with their pros and cons - and against the backdrop of a series of broader, strategic considerations. With this, we aim to help policymakers make informed choices about the best option – or combination of options – for their countries.

Determining whether a reform option is “right” for a country in a specific situation, requires a careful and facts-based cost-benefit analysis, while coping with a number of broader challenges. Addressing the deficiencies of old-generation IIAs will be particularly hard for smaller countries and LDCs. Comprehensive reform would therefore benefit from intensified multilateral backstopping. UNCTAD, through its three pillars of work – research and policy analysis, technical assistance and multilateral consensus-building – has been playing a key role, as the United Nations’ focal point for international investment and the international forum for high-level and inclusive dialogue on international investment issues.

Concluding remarks

We hope that during the plenary and break-out sessions, everyone will have an opportunity to share his or her views on the pertinent issues that are on the IIA reform agenda – to consider all options, their pros and cons and lessons learned.

We look forward to hearing from more than 200 chief treaty negotiators and government experts, representatives of intergovernmental organizations and business, civil society and academia.

The discussions and outcomes of this meeting will feed into the UNCTAD IIA Conference 2018 at the next World Investment Forum in Geneva. They will also enrich the analysis and policy options of the forthcoming document *Modernizing International Investment Regime: UNCTAD’s Reform Package*.

It is my sincere hope that each of you will take new insights about IIA reform back home. Together, we will make IIA regime work for sustainable investment.