JUNE 2017 ISSUE 2

IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS

UNITED NATIONS
UNCTAD

PHASE 2 OF IIA REFORM: MODERNIZING THE EXISTING STOCK OF OLD-GENERATION TREATIES

HIGHLIGHTS

- International investment agreement (IIA) reform has made significant progress. Consolidating phase 1 of IIA reform, most new treaties follow UNCTAD's Road Map for IIA Reform (*WIR16*), which sets out five action areas: safeguarding the right to regulate, while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency.

- It is time to move to phase 2 of IIA reform: modernizing the existing stock of old-generation treaties. Old treaties abound: more than 2,500 IIAs in force today (95 per cent of all treaties in force) were concluded before 2010. Old treaties "bite": as of end-2016, virtually all known investor-State dispute settlement (ISDS) cases were based on those treaties. And old treaties perpetuate inconsistencies: their continued existence creates overlaps and fragmentation in treaty relationships and poses interaction challenges.

- UNCTAD presents and analyses the pros and cons of 10 policy options for phase 2 of IIA reform: (1) jointly interpreting treaty provisions; (2) amending treaty provisions; (3) replacing "outdated" treaties; (4) consolidating the IIA network; (5) managing relationships between coexisting treaties; (6) referencing global standards; (7) engaging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 treaties. Countries can adapt and adopt these options to pursue the reforms set out in the Road Map in line with their policy priorities.

- Determining which of these 10 policy options is right for a country in a particular situation requires a careful and facts-based cost-benefit analysis that considers broader challenges; and should ultimately reflect a country's international investment policy direction and national development strategy. Moreover, policymakers have to consider the compound effect of multiple options, which could result in a treaty regime that is largely deprived of its traditional investment protection rationale.

- Comprehensive reform of the IIA regime would benefit from intensified multilateral backstopping. UNCTAD, through its three pillars of work – research and policy analysis, technical assistance and intergovernmental consensus-building – can play a key role, as the United Nations' focal point for international investment and the international forum for high-level and inclusive discussions on today's multilayered and multifaceted IIA regime.

- Recent developments in the international investment regime, a stocktaking of IIA reform and phase 2 of IIA reform are discussed in UNCTAD's World Investment Report 2017 (chapter III).

1. The next phase of IIA reform

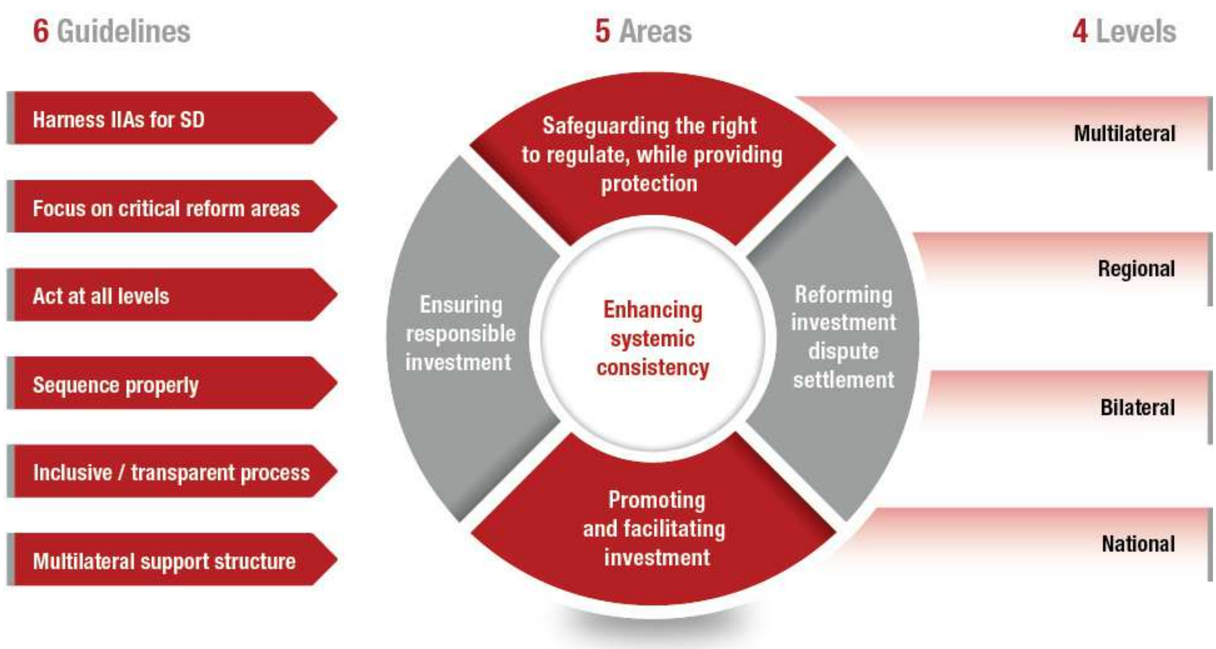
Sustainable development-oriented IIA reform has entered the mainstream of international investment policymaking (*WIR15*, *WIR16*). During the first phase of reform, countries have built consensus on the need for reform, identified reform areas and approaches, reviewed their IIA networks, developed new model treaties and started to negotiate new, more modern IIAs.

Despite significant progress, much remains to be done. First, comprehensive reform requires a two-pronged approach, i.e. not only concluding new treaties but also modernizing the existing ones. Second, reform needs to address the challenge of increasing fragmentation, both within the IIA regime, as well as between the IIA regime and other areas of international policymaking. Ultimately, only coordinated activity at all levels (national, bilateral and regional, as well as multilateral) will deliver an IIA regime in which stability, clarity and predictability serve the objective of all stakeholders: effectively harnessing international investment relations for the pursuit of sustainable development.

In terms of policy content, the five areas of reform identified in UNCTAD's Road Map for IIA Reform (*WIR15, WIR16*) can serve as a basis for reform actions (figure 1). When putting them into practice, countries would typically nuance, clarify or omit traditional treaty elements and add new sustainable development-oriented features. Sustainable development-oriented IIA reform may also include adding new treaty elements that can help make a country's investment climate more attractive, e.g. investment facilitation elements (*WIR17*).

At the same time, it is becoming more common for new IIAs to not only contain reform-oriented elements, but to also impose new, more far-reaching obligations on States. This includes broadening the scope of covered investments or introducing more far-reaching investor protections (e.g. expanding the list of prohibited performance requirements).

Figure 1. UNCTAD's Road Map for IIA Reform



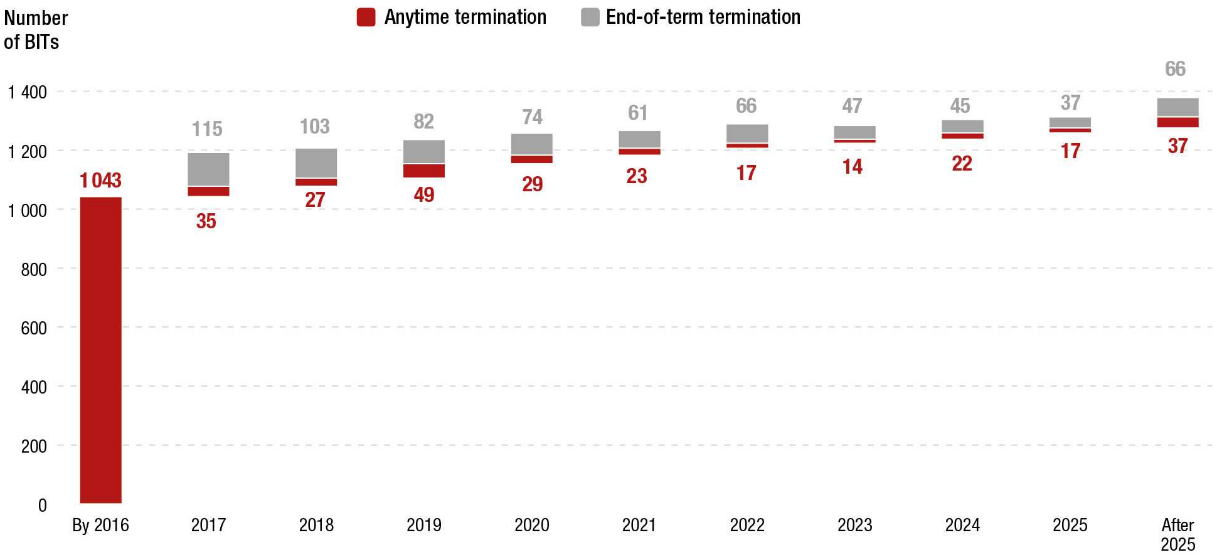
Source: ©UNCTAD, *WIR16*.

a. Old treaties abound

More than 2,500 treaties that are in force today were concluded before the year 2010 (95 per cent of all treaties in force) (figure 4, below). Most of these IIAs were negotiated in the 1990s: a time when the IIA universe was light on jurisprudence, but heavy on treaty making (about three new treaties per week). These older treaties typically contained similar, broadly worded definitions and substantive provisions, and few safeguards (*WIR15*).

Today, many IIAs have been in force for longer than their initial periods of operation (most frequently set in the treaties at 10, 15 or 20 years). By the end of 2016, over 1,000 bilateral investment treaties (BITs) had reached a stage where they could be unilaterally terminated by one contracting party immediately; many more are becoming available for such termination in the coming years (figure 2). Moreover, the Vienna Convention on the Law of Treaties (VCLT) allows parties to terminate an agreement by mutual consent at any time (*WIR13*).

Figure 2. BITs in force "up for unilateral termination"

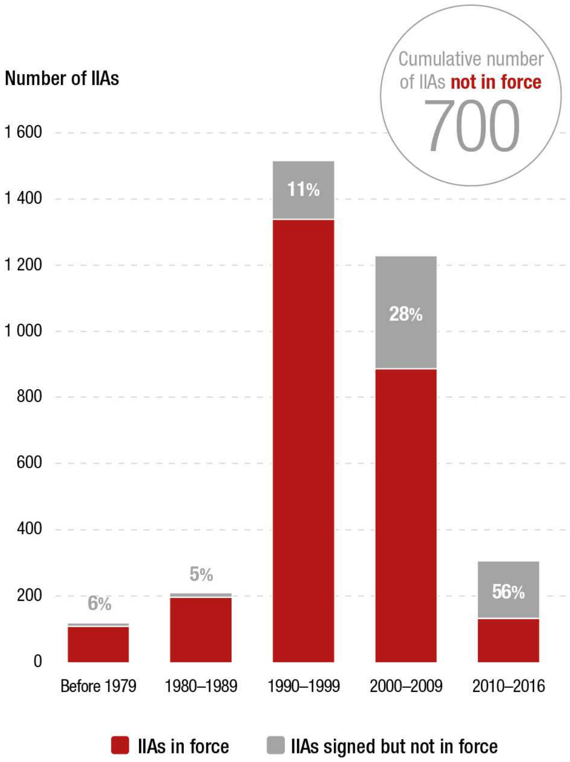


Source: ©UNCTAD.
Note: Data derived from UNCTAD's IIA Navigator and the IIA Mapping Project for 2,009 mapped BITs in force (1,313 BITs provide for automatic renewal for an indefinite period, with "anytime termination", and 696 BITs provide for renewal for a fixed term, with "end-of-term termination").

As agreements reach their expiry date, a treaty partner can opt for automatic prolongation of the treaty or notify its wish to terminate it. After reaching the end of the initial fixed term, many BITs can be unilaterally terminated at any time by giving notice ("anytime termination"), whereas some BITs – if not terminated at the end of the initial term – are extended for subsequent fixed terms and can be unilaterally terminated only at the end of the subsequent term ("end-of-term termination") (*WIR13*, box III.6).

Today's IIA universe is also characterized by a relatively large number of treaties that are not in force. By the end of 2016, there were 700 such treaties, about one fifth of all IIAs. Some are recently concluded treaties that are going through the process of domestic ratification (it takes 2.3 years on average for an IIA to proceed from signature to entry into force). However, the share of treaties dating from the 1990s and the 2000s that are not in force is quite significant, too (figure 3). This provides a window of opportunity for States to consider "abandoning" unratified treaties (see action option 8, below), or renegotiating them in line with sustainable development priorities.

Figure 3. Stock of IIAs and share not in force, by year of signature



Source: ©UNCTAD, IIA Navigator.

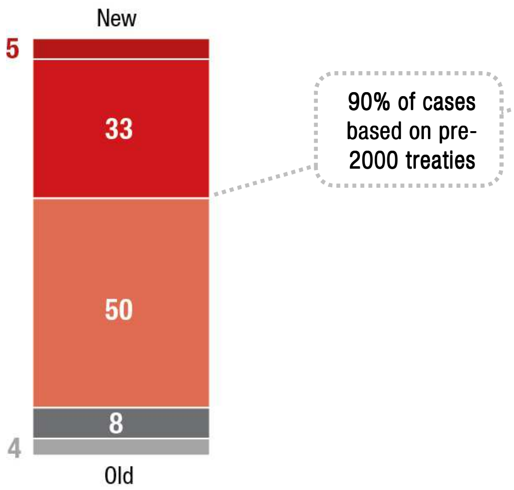
b. Old treaties "bite"

Countries' experience with ISDS cases shows that "old treaties bite". At the end of 2016, virtually all of the known treaty-based ISDS cases had been filed pursuant to treaties concluded before 2010, which typically feature broad and vague formulations and include few exceptions or safeguards. Even though the stock of older treaties that are in force is larger than the number of more recent treaties and those treaties have been in existence for longer, the relative number of cases based on old treaties is still significantly higher (figures 4 and 5).

It is also noteworthy that about 20 per cent of all ISDS cases were brought under two plurilateral agreements from the early 1990s, the Energy Charter Treaty (ECT) and the North American Free Trade Agreement (NAFTA) (though the latter agreement contains several of today's IIA reform features).

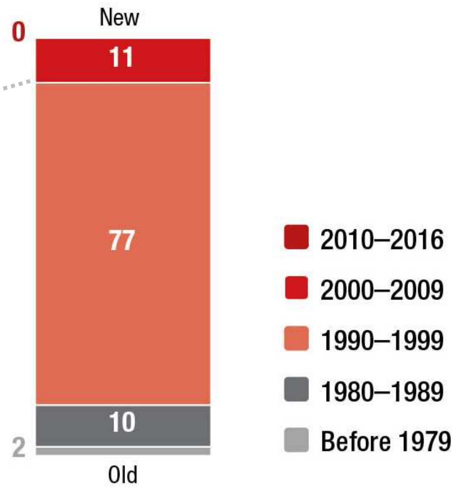
In recent years, many countries (developing and developed countries alike) have experienced first-hand that IIAs are not "harmless" political declarations, but do "bite". Broad and vague formulations of IIA provisions have enabled investors to challenge core domestic policy decisions – for instance, regarding the environment, financial regulation, energy, and public health. They have also generated unanticipated, and at times inconsistent, arbitral interpretations of core IIA obligations, resulting in a lack of predictability as to the kinds of State measures that might violate a specific IIA provision.

Figure 4. Age of IIAs: share of IIAs in force, by year of signature (Per cent)



Source: ©UNCTAD, IIA Navigator.

Figure 5. IIAs invoked in known treaty-based ISDS cases, by IIA year of signature (Per cent)



Source: ©UNCTAD, ISDS Navigator.

As a result, there is today a broadly shared view that treaty provisions need to be clearer and more detailed, drafted on the basis of thorough legal analysis of their actual and potential implications, and that the current system of settling investment disputes needs to be reformed (*WIR15*). Recent treaty drafting practice has started to take account of this view for new agreements, and the same lessons should be applied with respect to the stock of existing treaties during the next phase of IIA reform.

c. Old treaties perpetuate inconsistencies

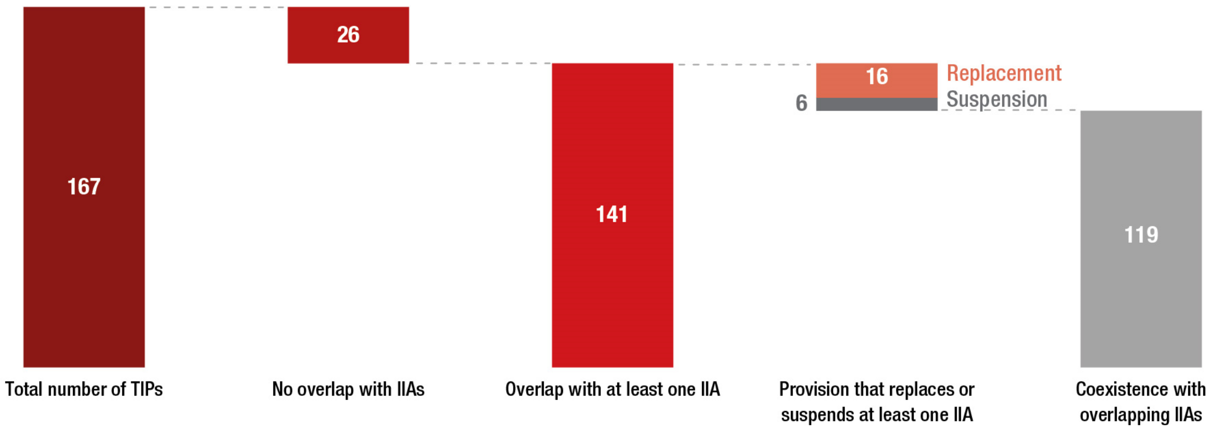
Today's IIA regime is characterized by gaps in treaty relationships (caused by a "patchy" treaty network), overlaps between treaties and divergence or inconsistencies in treaty clauses:

- The existing global treaty network only covers about one fifth of possible country relationships (calculated on the basis of the IIA network as it stood at the end of 2010, *WIR11*, figure III.4).

- Recent treaty making has resulted in increasing treaty overlaps. This is particularly pronounced in the context of megaregionals, but also in the case of FTAs. Among a sample of 167 treaties with investment provisions (TIPs – covering treaties with BIT-type substantive investment provisions and/or pre-establishment provisions), at least 119 overlap with earlier IIAs (concluded between all or some of the parties), which continue to exist in parallel to the new ones (figure 6). Over two-thirds of the sampled TIPs thus potentially exacerbate the IIA regime's fragmentation. Less than one-third either create new, previously uncovered treaty relationships or replace or suspend pre-existing, overlapping IIAs.

- Most new treaties display significant differences to earlier generation models (*WIR17,* chapter III). Sustainable development-oriented clauses that have become part of today's mainstream treaty practice (e.g. clarifications to treaty scope and substantive obligations as well as safeguards) are rarely found in old, first-generation IIAs. New, "reformed" IIAs with reformed treaty clauses thus often co-exist with old, "unreformed" IIAs containing unreformed treaty clauses.

Figure 6. Relationships between IIAs (Number of TIPs)



Source: ©UNCTAD, IIA Navigator.
Note: Based on 167 TIPs with texts available, comprising 127 with BITs-type substantive investment provisions and 40 that are "pre-establishment only" (i.e. that include limited investment provisions, as defined in *WIR16*, box III.3).

To this must be added fragmentation (i.e. lack of coordination) with respect to current reform processes. Multiple, partially overlapping reform efforts are currently occurring – for example, in Africa (box 1) or with respect to initiatives to improve investment dispute settlement. In addition to managing relationships between treaties, there is therefore also a need to coordinate different reform processes. This task includes synchronizing reform efforts at different levels of policymaking (in the case of Africa, at the continental, regional and national levels) or combining them in multilateral contexts.

Box 1. Synchronizing regional IIA reform efforts in Africa

African countries are actively engaged in IIA reform at the regional level through parallel negotiations of, and amendments to, various "new generation" international investment instruments. These include, among others, the Pan-African Investment Code, Phase II of the Tripartite FTA between the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC), the Continental Free Trade Area, the COMESA Common Investment Area and the SADC Finance and Investment Protocol. This is in addition to IIA reform efforts at the national level under way in a number of African countries (e.g. Botswana, Egypt, Nigeria, South Africa).

These initiatives express the determination of African countries to embark on IIA reform in order to make the policy framework for investment in Africa more balanced and more oriented towards sustainable development. However, they risk overlapping with one another, potentially diluting the impact of regional reform efforts and creating a more complex regime instead of harmonizing and consolidating it.

Another challenge relates to the existing intra-African BITs, of which 165 had been signed by the end of 2016 (only 38 are in force). The fate of these first-generation treaties remains uncertain. If the new regional IIAs under negotiation do not entail the replacement of older BITs, the result will be an undesirable multiplication of treaty layers. On the other hand, replacing existing BITs with new regional initiatives would contribute to the consolidation and harmonization of the international investment policy framework in Africa.

It is therefore crucial to synchronize reform efforts at different levels of policymaking (continental, regional and national). This requires coordination and cooperation among African countries and regional economic commissions in order to avoid overlap, policy inconsistencies and fragmentation.

Source: ©UNCTAD.

Finally, there is fragmentation of the international legal governance system for investment more broadly. IIAs interact with other areas of international law, such as environmental, labour, human rights, tax, and trade law (*WIR15*). At times, ISDS cases have highlighted tensions between IIAs and these other areas of international law, as well as public policymaking in these areas (*WIR15*). Policymakers need to consider these linkages and prevent international investment law from evolving further into an even more isolated system with a narrow set of objectives. Many newer IIAs include reference to other international agreements and global standards, but within the overall network they remain rare.

2. Ten options for phase 2 of IIA reform

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 7, table 1). The options are not mutually exclusive and can be used in a complementary manner, especially by countries that have extensive IIA networks.

Figure 7. Overview of phase 2 IIA reform options

Source: ©UNCTAD.

The 10 options differ in several aspects, as they encompass actions that are more technical (e.g. interpreting or amending treaty provisions) or rather 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, replacing, engaging multilaterally) or "exit" from it (e.g. termination without replacement, withdrawing from multilateral treaties). They represent modalities for introducing change to the IIA regime, rather than for designing treaty content.[1]

Determining whether a 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. 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 hard for smaller countries, particularly LDCs, to address the deficiencies of first-generation IIAs.

[1] For the latter, see the UNCTAD Investment Policy Framework for Sustainable Development and the UNCTAD Road Map for IIA Reform (*WIR15*), as well as the stocktaking of reform undertaken in *WIR16*.

Choices must be made for identifying the best possible combination of the 10 policy options.[2] 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 have to 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.

Table 1. 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.
Note: This classification is made for illustration purposes only. The table should not be seen as placing possible reform actions in any order of priority.

When choosing among reform options, policymakers should also consider the attendant challenges, both legal and practical. Among the legal challenges, three stand out as being particularly pronounced: the most-favoured nation (MFN) 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:

- *MFN clauses* aim to prevent nationality-based discrimination.[3] Many tribunals have interpreted broadly worded MFN provisions as allowing the importation of more favourable provisions from IIAs signed by the 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 MFN provision. The inclusion of a broadly worded MFN clause in a new treaty can undermine reform efforts, as it might allow investors to cherry-pick the most advantageous clauses from a host State's "unreformed" treaties with third countries. For existing IIAs, MFN-related challenges arise in particular for four reform options: joint interpretation, amendment, replacement and management of treaty relationships.

[2] For example, treaty termination is frequently combined with replacement or consolidation.
[3] MFN clauses typically prohibit less favourable treatment of investors from a signatory State when compared with treatment of "like" investors from any third country.

- *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).[4] Depending on how they are formulated, survival clauses apply either 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. Thus, survival clauses may need to be "neutralized" in old treaties that are being jointly terminated or replaced (including through consolidation). Challenges related to survival clauses are particularly pronounced with respect 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 ISDS 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 for reform options that replace old treaties, including through consolidation.

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 subsections.

a. Jointly interpreting treaty provisions

Table 2.	**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.

Clarifying IIA clauses can help reduce uncertainty arising from (broadly worded) provisions of first-generation BITs (*UNCTAD, 2011*). Authoritative joint party interpretations therefore offer a degree of much-needed clarity for investors, host States and arbitrators alike. This reform tool is potentially the easiest in 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 (interpretative statements do not require ratification). 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 VCLT obliges arbitrators to take into account, together with the context, "[a]ny subsequent agreement between the parties regarding the interpretation of the treaty" (Article 31.3(a)).

Several countries have engaged in joint interpretations. In 2001, the NAFTA Free Trade Commission adopted "Notes of Interpretation of Certain Chapter 11 Provisions", clarifying e.g. NAFTA Article 1105(1) on the minimum

[4] Typically, such clauses cover governmental measures adopted both before and after the date of termination (for the duration of the survival period), but apply only to investments made before the treaty's termination.

standard of treatment. In 2013, through a joint interpretative understanding, Colombia and Singapore clarified several provisions (such as fair and equitable treatment (FET) and MFN) of their BIT (also signed in 2013). In January 2016, the parties to the Trans-Pacific Partnership TPP issued the “Drafters’ Note on Interpretation of ‘In Like Circumstances’”, which is applicable to the treaty’s national treatment (NT) and MFN provisions.

Two recent policy developments, different from but related to the traditional understanding of “joint interpretations”, also merit consideration: In February 2016, India proposed a “Joint Interpretative Statement” to 25 countries with which it has IIAs whose initial period of validity had not expired. The statement sets out India’s proposed interpretation of several provisions in those treaties, including the definitions of “investor” and “investment”; the MFN, NT, FET and expropriation clauses; and the ISDS provisions. In October 2016, the EU, its member States and Canada released a “Joint Interpretative Instrument” on the Comprehensive Economic and Trade Agreement (CETA). It sets out the parties’ agreement on a number of provisions that have been the subject of public debate and concern (such as the right to regulate and compensation).

Of note also is the frequent establishment in recent IIAs of joint bodies with a mandate to issue binding interpretations (e.g. Canada–EU CETA (2016); Morocco–Nigeria BIT (2016); Chile–Hong Kong, China BIT (2016)).

b. Amending treaty provisions

Table 3. 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 clarify 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.

Typically, amendments are limited in number and do not affect the overall design and philosophy of a treaty (*WIR13*). Where treaty parties are concerned only with certain specific provisions (e.g. MFN, FET), 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.

Applicable amendment procedures depend on the treaty that is subject to change. For IIAs that do not regulate amendments, the general rules of the VCLT will usually apply. However, many newer IIAs include their own provisions on amendment. This is particularly important for pluri- 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 the original treaty, i.e. after respective domestic ratification procedures are completed.

Comprehensive data on amendments are not yet available. Existing evidence suggests, however, that States have thus far used amendments rather sparingly.[5] Exceptions are the EU member States from Eastern Europe (Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovak Republic, Slovenia and Romania), which have made amendments by using protocols before and after accession to the EU. Of a sample of 84 IIAs concluded by these countries that contain protocols, over 60 concern extra-EU BITs that were amended, among others, to bring their international obligations in line with their obligations under EU law. Some introduce

[5] Gordon, K., and J. Pohl (2015). “Investment Treaties over Time – Treaty Practice and Interpretation in a Changing World”. *OECD Working Papers on International Investment*, 2015/02, Organization for Economic Cooperation and Development, Paris; Broude T., Y. Haftel, and A. Thompson (2016). “Legitimation Through Renegotiation: Do States Seek More Regulatory Space in Their BITs?” *Hebrew University of Jerusalem Legal Research Paper*, 17-1, Hebrew University of Jerusalem.

exceptions to MFN clauses for regional economic integration organizations or include exceptions for national security reasons (e.g. Protocol (2007) to the Bulgaria–India BIT (1998) or the Protocol (2010) to the Czech Republic–Morocco BIT (2001)). Amendments have also been used by several EU member States to introduce balance-of-payments exceptions to provisions on the free transfer of funds (e.g. Protocol (2013) to the Kuwait–Lithuania BIT (2001), Protocol (2011) to the Bulgaria–Israel BIT (1993) or Protocol (2009) to the Czech Republic–Guatemala BIT (2003)). These latter amendments have also been made in reaction to the ruling of the European Court of Justice in 2009 that the transfer of funds provisions in certain EU member States' BITs with third countries breached EU law.[6]

Other countries have used amendments in a more sporadic manner to include adjustments to the ISDS mechanism (e.g. the Exchange of Notes (1997) to the Paraguay–United Kingdom BIT (1981), the Protocol (2000) to the Panama–United States BIT (1982), the Protocol (2003) to the Germany–Moldova BIT (1994)). More recent examples include the May 2016 amendments to the Singapore–Australia FTA (2003) agreed by the parties upon their third review of the treaty. The revised investment chapter includes numerous changes to definitions and substantive obligations, and adds exceptions to dispute settlement (including a carve-out from ISDS for tobacco control measures). These amendments are in the process of ratification.

Finally, in August 2016, members of the SADC amended Annex 1 of the SADC Finance and Investment Protocol. The amended version omits the FET provision and the ISDS mechanism, refines the definition of investment and investor, introduces exceptions to the expropriation provision and clarifies the NT provision and investor responsibilities as well as the right of host countries to regulate investment. These amendments are in the process of ratification.

c. Replacing "outdated" treaties

Table 4. 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 the new treaties

Source: ©UNCTAD.

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.

For replacement to be effective, countries need to be mindful of termination provisions in the earlier IIA, including how to ensure effective transition from the old to the new treaty regime (box 2) and how to deal with any survival clause (box 3).

To date, about 130 BITs have been replaced, mostly by other BITs or bilateral TIPs. Countries that have been active in this respect over the past 20 years include Germany, followed by China, Egypt, Romania and Morocco. Replacement treaties do not always incorporate elements of sustainable development-oriented reform. Current replacement examples include the ongoing renegotiation talks between Mexico and Switzerland on a treaty that will replace their BIT of 1995.

[6] See European Court of Justice (ECJ), Commission v Austria, C-205/06, Judgement (3 March 2009); ECJ, Commission v Sweden, C-249/06, Judgement (3 March 2009); ECJ, Commission v Finland, C-118/07, Judgement (19 November 2009).

Of the 167 TIPs sampled, only 16 treaties – or 10 per cent – replaced at least one BIT they overlapped with (figure 6). For example, Peru replaced three of its old BITs with subsequent FTAs that it concluded with the same partners, namely Chile (2006), Singapore (2008) and the Republic of Korea (2010). All three FTAs include an investment chapter, expressly provide for the termination of the prior BIT upon the FTA's entry into force and establish transition rules.

Alternatively, in rare instances some States suspend old BITs (or parts thereof) for the time that the new IIA is in force (e.g. Canada–Panama FTA (2010), Morocco–United States FTA (2004), European Free Trade Association (EFTA)–Republic of Korea Investment Agreement (2005)). This is not replacement per se, but rather a "conditional replacement", which leaves open the possibility that the old BIT may be revived if the new IIA is terminated.

Box 2. Transition clauses

To ensure a smooth transition from the old to the new regime and prevent situations in which both apply concurrently, it is important to delineate clearly the respective treaties' scope of temporal application, e.g. by means of transition clauses. Such clauses clarify in which situations and for how long after an old IIA's termination an investor may invoke the old IIA to bring an ISDS case. Often such periods are limited to three years. Transition clauses typically modify the operation of survival clauses in the outgoing IIA (box 3). They also ensure that investors do not fall between the cracks but remain protected throughout the transition from the old to the new IIA regime.

Anecdotal evidence suggests that only a minority of replacement IIAs contain transition clauses and that 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, the EU, the Republic of Korea, Mexico, Panama, Peru, Singapore and Viet Nam. Examples of transition clauses can be found in the Peru–Singapore FTA (2008) (Article 10.20), Australia–Chile FTA (2008) (Annex 10-E), Canada–EU CETA (2016) (Article 30.8) and other treaties.

Source: ©UNCTAD.

d. Consolidating the IIA network

Table 5. Reform action: Consolidating the IIA 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 • Reduces fragmentation of the IIA network by decreasing the number of existing treaties • May be more cost-effective and time-efficient than pursuing multiple bilateral negotiations	• Requires the participation of numerous treaty partners • Does not guarantee inclusion of reform-oriented elements (depends on the negotiated outcome) • May be more difficult to achieve outcomes in plurilateral negotiations than in bilateral ones

Source: ©UNCTAD.

Consolidation is a form of replacement (see option 3). It means abrogating several pre-existing treaties and replacing them with a single new, modern and sustainable development-oriented one. 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).

For the EU, for example, whenever it signs an IIA with a third country, this new treaty replaces all BITs previously concluded with that country by individual EU member States. The Canada–EU CETA (2016), for example, is scheduled to replace eight prior BITs between Canada and EU member States (Article 30.8). Similar provisions are included in the EU's recently negotiated FTAs with Singapore (12 pre-existing BITs to be replaced) and Viet Nam (22 pre-existing BITs to be replaced).

Another example is the Mexico–Central America FTA concluded in 2011 (Costa Rica, El Salvador, Guatemala, Honduras, Mexico and Nicaragua), which replaced three earlier FTAs that were in place between Mexico and the other participating countries (i.e. Costa Rica–Mexico FTA (1994), Mexico–Nicaragua FTA (1997) and El Salvador–Guatemala–Honduras–Mexico FTA (2000)).

However, most other plurilateral IIAs have missed the opportunity for consolidation and, instead, have led to parallel application of the new and old treaties (figure 6). This adds complexity and inconsistency to an already highly complex system (WIR14). Some of these IIAs employ conflict clauses to manage overlapping treaty relationships (see option 5). Others adopt a default approach of parallelism but grant flexibility to the parties to decide between themselves. For example, in the TPP context, Australia separately agreed to terminate its BITs with Mexico, Peru and Viet Nam upon the entry into force of the TPP. Other TPP parties have thus far decided to keep their pre-existing IIAs in place (the number of IIAs with investment commitments between TPP parties that overlap with the TPP exceeds 20). In some ongoing plurilateral negotiations, the issue is still up for debate. For example, in Africa, the COMESA–EAC–SADC Tripartite FTA has the potential to replace more than 100 existing BITs between the participating States (box 1).

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 (option 3).

e. Managing relationships between coexisting treaties

Table 6. 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 dependent on the formulation used in the conflict clause

Source: ©UNCTAD.

Instead of opting for replacement, some treaty parties decide that their old and new treaties should exist in parallel. This often appears to be the case when the new treaty is plurilateral (e.g. a regional FTA with an investment chapter), and the old, underlying treaties are bilateral. For instance, of the sample of 167 TIPs, more than two thirds (119) coexist with prior, overlapping IIAs (figure 6). 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 parallel application of coexisting IIAs between the same parties. However, States may have their reasons to opt for coexisting IIAs.

To mitigate potentially adverse consequences arising from this situation, States can include clauses that clarify the relationship between the coexisting IIAs.[7] For example, a conflict clause may specify which of the treaties prevails in case of conflict or inconsistency. Only about 35 treaties, or roughly one third of the 119 TIPs that overlap with coexisting IIAs, contain a clause explicitly allocating priority to either the existing or the new IIA.

Conflict clauses may be a useful tool for IIA reform if they prioritize new, more modern IIAs. For instance, of the 35 TIPs examined that contain conflict clauses, more than half (20) prioritize the newer IIA in cases of inconsistency. Examples include the Colombia–Republic of Korea FTA (2013) (Article 1.2(2)), the Mexico–Peru FTA (2011) (Article 1.3(2)) and the Panama–Taiwan Province of China FTA (2003) (Article 1.03(2)).

[7] If the new overlapping treaty does not include a relationship clause of any kind, the relationship between the coexisting treaties will be guided by the VCLT, notably its Articles 30 and 59 (as applicable).

However, States often also opt to include clauses that give explicit priority to the earlier (often less reform-oriented) treaty (e.g. the Australia–Malaysia FTA (2012) (Article 21.2(2)) or the China–Japan–Republic of Korea Trilateral Investment Agreement (2012) (Article 25)).

In fact, 15 of the above-mentioned 35 TIPs give priority to the earlier treaty. States sometimes also include clauses that yield priority to the treaty that is more favourable to investors (e.g. side letters to the TPP signed by New Zealand with Australia, Brunei Darussalam, Chile, Malaysia, Singapore and Viet Nam) or that do not provide full clarity but leave open the question about the status of the pre-existing IIA (e.g. China–Republic of Korea FTA (2015) (Article 1.3)). These types of relationship clauses do little to promote IIA reform.

The challenge of managing relationships is also relevant for IIAs with distinct (but overlapping) coverage and for different chapters within an IIA. As rules on services and investment typically interact and overlap to some extent (e.g. Article I.2 of the General Agreement on Trade in Services, covering the so-called Mode 3 of services supply), it may be necessary to regulate this interaction. States have several options at hand. First, they may opt for overlapping coverage and use conflict clauses, providing that in case of inconsistency between the investment chapter and other chapters of an FTA, the other chapters prevail (e.g. Australia–United States FTA (2004) (Article 11.2)). Another option is to cover investment in services by both the services and investment chapters, but exclude certain investment protection obligations (typically NT and MFN) from the application to services investment (e.g. EFTA–Singapore FTA (2002) (Article 38(2) and (3)). States may also include a "Services-Investment" linkage clause in the services chapter that specifies which investment obligations apply mutatis mutandis to measures affecting the supply of services (e.g. India–Singapore Comprehensive Economic Cooperation Agreement (2005) (Article 7.24)). Or they may carefully delineate the scope of application, regulating the interaction in either the services or the investment chapter (e.g. excluding Mode 3 of services supply from the scope of the services chapter, Article 10.1 TPP (2016)).

f. Referencing global standards

Table 7. 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 IIAs' traditional 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 future development of the respective instruments

Source: ©UNCTAD.

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 (table 8). In September 2015, for example, the global community adopted the 17 Sustainable Development Goals (SDGs), and several of the 169 targets note the important role of investment for achieving these global objectives (e.g. Goal 7 target 7.a or Goal 10 target 10.b), or are related to investment policy (e.g. Goal 1 target 1.b, Goal 17 targets 17.14, 17.15, 17.16). Similarly, in the 2015 Addis Ababa Action Agenda, the outcome document of the Third UN Conference on Financing for Development (FfD), member States noted (in paragraph 91) that "[t]he goal of protecting and encouraging investment should not affect our ability to pursue public policy objectives. We will endeavour to craft trade and investment agreements with appropriate safeguards so as not to constrain domestic policies and regulation in the public interest."

Noteworthy is also UNCTAD's Investment Policy Framework for Sustainable Development, a non-binding framework that aims at making investment work for sustainable development and inclusive growth. Developed in 2012, and re-launched in updated form at the 2015 FfD Conference, the UNCTAD Policy Framework has since served as a point of reference for policymakers in more than 130 countries.

To this must be added numerous voluntary and regulatory initiatives to promote corporate social responsibility (CSR) standards and guidelines that foster sustainable development (e.g. ISO 26000 "Social responsibility", the UN Global Compact). Such instruments are a unique and rapidly evolving dimension of "soft law". They typically focus on the operations of multinational enterprises (MNEs) and, as such, have increasingly shaped the global investment policy landscape over the last decades (*WIR13*).

Table 8. Selected examples of global standards with investment relevance

Common reference	Full title	Area of focus
UNFCCC	United Nations Framework Convention on Climate Change, 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994), including the 1997 Kyoto Protocol (entered in force 16 February 2005) and 2016 Paris Agreement (entered in force 4 November 2016)	Climate change
SDGs	Transforming our world: the 2030 Agenda for Sustainable Development, GA Res 70/1, UN GAOR, 70th sess, UN Doc A/RES/70/1 (25 September 2015)	Sustainable development
FfD/AAAA	Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), GA Res 69/313, UN GAOR, 69th sess, 99th plen mtg, UN Doc A/RES/69/313 (27 July 2015)	Sustainable development
UNCTAD Policy Framework	Investment Policy Framework for Sustainable Development, UN Doc UNCTAD/DIAE/PCB/2015/5 (2015 rev.)	Sustainable development
UN Guiding Principles on Business and Human Rights	Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, HRC, UN GAOR, 17th sess, UN Doc A/HRC/17/31, annex I (21 March 2011); see also HRC Res 17/4, UN GAOR, 17th sess, 33rd mtg, UN Doc A/HRC/RES/17/4 (6 July 2011)	Human rights
UN Anti-Corruption Convention	The United Nations Convention against Corruption, GA Res 58/4, UN GAOR, 58th sess, 51st plen mtg, UN Doc A/RES/58/4 (31 October 2003, entered into force 14 December 2005)	Anti-corruption
ILO Tripartite MNE Declaration	Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (November 1977), and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions	Labour rights
Universal Declaration of Human Rights	Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948)	Human rights
UN Charter	Charter of the United Nations, 1 UNTS XVI (24 October 1945)	International peace, security and development

Source: ©UNCTAD.

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. 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 ISDS 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 light of these commitments. The effects would be similar to those of cross-referencing but would apply not only to new, but also to pre-existing treaties. The larger the group of participating countries (and, possibly, the longer the list of global standards), the stronger or the 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.

Overall, cross-referencing can play an important role in reducing fragmentation – and isolation – of different bodies of law and policymaking and can strengthen linkages between IIAs and international sustainability standards. All of this would help shape global policy understanding, as it applies not only to future investment policymaking, but also to existing treaties.

For instance, several recent IIAs reference CSR standards in a general manner, typically referring to "internationally recognized standards" in areas such as labour, environment, human rights, anti-corruption and the like (e.g. Burkina Faso–Canada BIT (2015); Colombia–Panama FTA (2013)). Meanwhile, other recent IIAs are more specific, referring to global standards such as the SDGs (e.g. Morocco–Nigeria BIT (2016)); the UN Charter, Universal Declaration of Human Rights and/or International Labour Organization instruments (e.g. EFTA–Georgia FTA (2016); CETA (2016)); or the Organization for Economic Cooperation and Development (OECD) MNE Guidelines and OECD Principles of Corporate Governance (e.g. CETA (2016); Bosnia and Herzegovina–EFTA FTA (2013)).

A recent example of standard setting in a plurilateral context are the G20 Guiding Principles for Global Investment Policymaking, agreed on by the G20 in July 2016 during the group's Shanghai Ministerial Meeting and endorsed in September 2016 at the Hangzhou Summit (*WIR17*). Being an example of standard setting themselves, the Guiding Principles also reference global standards, notably in Principle VIII which states that "investment policies should promote and facilitate the observance by investors of international best practices and applicable instruments of responsible business conduct and corporate governance".

g. Engaging multilaterally

Table 9. 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. MFN 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 hard 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 ISDS); therefore has a limited overall impact on the IIA universe

Source: ©UNCTAD.

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. That said, multilateral reform action is challenging – in particular, how to pursue it (*WIR15*, *WIR16*).

The recent past has seen a number of policy developments at the multilateral (or plurilateral) level that can inspire future multilateral IIA reform efforts. Inspiration can be found in both the way the "new rules" were developed and the processes or "tools" employed to extend the new rules to existing treaties. In this regard, multilateral rulemaking processes in areas other than IIAs (e.g. the OECD-based base erosion and profit shifting (BEPS) project) may also be instructive.

When considering to what extent lessons can be learned from these initiatives, attention needs to be given to the characteristics of various multilateral processes. Differences may exist regarding, inter alia, the scope and breadth of content covered, the number of countries involved (during rule creation and for later rule application), its legal nature (both of the actual rules and the mechanism used to foster broader application) and the extent to which such processes are institutionalized or hosted by an intergovernmental organization.

For example, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention) fosters greater application of the UNCITRAL Transparency Rules to IIAs concluded prior to 1 April 2014. The Mauritius Convention effectively modifies a number of first-generation IIAs (of those countries that have ratified the Convention), which turns it into a collective IIA reform action.[8] Future IIA reform actions could draw upon (i) the process of multilateral negotiations that led to the UNCITRAL Rules and the Mauritius Convention and (ii) the Mauritius Convention's opt-in mechanism, which modifies certain aspects of pre-existing IIAs (*WIR17*).

Beyond the investment regime, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the BEPS Multilateral Instrument) fosters States' implementation of the tax treaty related measures of the Final BEPS Package, potentially amending over 3,000 bilateral tax treaties concluded thus far. The BEPS Multilateral Instrument deals with a number of issues of concern (e.g. hybrid mismatch arrangements, treaty abuse, streamlining dispute resolution) and creates change in a flexible, à la carte way. For example, the BEPS Multilateral Instrument will apply only to the 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 give the possibility of taking on additional commitments.[9] Future IIA reform actions could draw upon (i) the multilateral stakeholder process that led to the adoption of the Final BEPS Package; and (ii) the treaty's architecture, which is similar to (but more complex than) the Mauritius Convention, allowing for unilateral declarations, and selective reservations to or amendments of pre-existing tax treaties.

Current discussions on the establishment of a multilateral investment court and/or appellate mechanism (*WIR17*) could result in an instrument that ultimately changes ISDS provisions included in earlier treaties. The opt-in technique of the Mauritius Convention as a potential model for reform is also explored in the ongoing process involving UNCITRAL and the Geneva Center for International Dispute Settlement that examines the establishment of a permanent investment tribunal or an appellate mechanism.

Yet another example are the G20 Guiding Principles on Global Investment Policymaking, adopted with the backstopping of UNCTAD (*WIR17*). Although non-binding, the principles are meant to serve as an important reference for negotiating IIAs and modernizing existing ones. They could effectively be the touchstone for global reform of the existing IIA regime and for the formulation of a new generation of IIAs, more appropriately aligned with 21st century concerns and priorities. Inspiration may be found in suggestions that (i) the principles may not only give guidance to treaty drafting but, by stating the G20 members' shared understanding of today's investment policymaking priorities, may also offer guidance for the interpretation of existing IIAs; and (ii) they may lay the basis for their broader application to countries other than members of the G20.

Finally, multi-stakeholder platforms and processes such as UNCTAD's World Investment Forum, the international forum for high-level and inclusive discussions on today's existing multi-layered and multifaceted IIA regime, and the FfD, mandating UNCTAD to continue consultations with member States on IIAs, are useful as a platform for the expert research, analysis, backstopping and exchange on how to carry reform further.

[8] For the status of the Convention, see the UNCITRAL website at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

[9] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (adopted 24 November 2016).

h. Abandoning unratified old treaties

Table 10. Reform action: Abandoning unratified old treaties

Conveys a country's intent not to 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 the country's investment climate • Could disturb relations with other treaty parties • May not affect existing cases arising from provisional application • May not affect future ISDS claims (during the survival clause period) if a country accepted provisional application pending ratification

Source: ©UNCTAD.

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 (VCLT Article 18). Formally "abandoning" a treaty ("abandonment" being used as a colloquial and legally neutral term) would make certain that a country has released itself from that obligation. This is usually a straightforward process because the treaty is not in force.

To date, few countries are known to have undertaken this reform action, though not all cases may have received public attention. Brazil abandoned 14 BITs signed in the 1990s after some of them were rejected by its Congress, as certain provisions were deemed unconstitutional. In 2008, Ecuador "denounced" two unratified BITs (with Honduras and Nicaragua). Most recently, in January 2017, the United States publicly stated its intention not to become a party to the TPP.[10]

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 (box 3). Provisional application is more common in plurilateral IIAs (e.g. the ECT (1994); Canada–EU CETA (2016)[11]) as ratification by multiple parties is likely to be a protracted process. For example, in 2009, the Russian Federation issued a notice to terminate the provisional application of the ECT (the treaty contains a separate 20-year survival clause for signatories terminating provisional application).

i. Terminating existing old treaties

Table 11. Reform action: Terminating existing old treaties

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

Source: ©UNCTAD.

[10] United States, The White House, "Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement", 23 January 2017.
[11] Note that only some provisions of the investment chapter will be provisionally applied. See Council of the European Union, 10974/16 (5 October 2016).

Terminating a treaty releases the parties from the obligation to further perform according to it (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 the 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. 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. For the sake of clarity, countries may consider neutralizing the survival clause when terminating a treaty jointly (box 3).

Box 3. Survival clauses

Survival clauses, included in most BITs, are designed to extend a BIT's application for an additional period (some for 5 years, but most commonly for 10, 15 or 20 years) after treaty termination. 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.

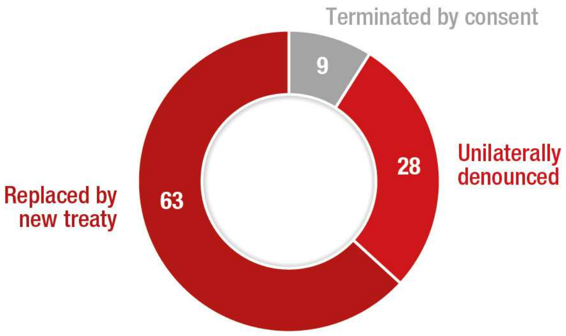
To date, two known ISDS cases have been filed pursuant to BITs that had been jointly terminated (without replacement by a new treaty) by the contracting parties: *Marco Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25), filed in 2012 under the Italy–Romania BIT (1990), jointly terminated on 14 March 2010; and *Impresa Grassetto SpA, in liquidation v. Republic of Slovenia* (ICSID Case No. ARB/13/10), filed in 2013 under the Italy–Slovenia BIT (2000), jointly terminated on 10 June 2009. In both cases, the tribunals have issued their jurisdictional decisions, but their texts were not public at the time of writing. Available evidence suggests that both proceedings are going forward, i.e. that the tribunals dismissed any jurisdictional objections raised. It is unknown, however, whether the respondent States in these two cases raised an objection based on the purported inapplicability of the survival clause.

Given the lack of certainty on the matter, when jointly terminating an IIA countries are well advised to clarify their intention with regard to the survival clause, either by explicitly amending and/or suppressing it (neutralization), or explicitly confirming that they wish for the survival clause to apply. For instance, 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 the Czech Republic and several other EU member States.

Source: ©UNCTAD.

Of 212 BITs terminated as of March 2017, 19 treaties (9 per cent) were jointly terminated, without any replacement or consolidation; another 59 (28 per cent) were unilaterally terminated, while 134 (63 per cent) were replaced by a new treaty (figure 8). This suggests that countries are often receptive to termination, but generally when it is part of the process of concluding a new IIA. Noteworthy is also the process of termination of intra-EU BITs (box 4).

Figure 8. Terminated BITs, by type of termination as of March 2017 (Per cent)



Source: ©UNCTAD, IIA Navigator.
Note: Based on 212 terminated BITs (excluding expired BITs).

Over the past decade, several countries have terminated their BITs (unilaterally or jointly); examples include the Plurinational State of Bolivia (10), Ecuador (10), and Indonesia (at least 20). The Argentina–Indonesia BIT (1995) provides an instance in which the parties have agreed to terminate the treaty while at the same time extinguishing the survival clause. South Africa has terminated 9 BITs, as part of the country's broader move to reshape its investment policy in accordance with its objectives of sustainable development and inclusive economic growth; this also includes the adoption of the Promotion and Protection of Investment Act (*WIR16*), the formulation of a new Model BIT, and engagement at the regional and continental levels, as well as in multilateral dialogues (*WIR17*). In 2016, India sent notices of termination to more than 50 treaty partners with whom the initial treaty term had expired, following the adoption of its new model BIT at the end of 2015, with the intention to renegotiate a new treaty based on the revised model BIT (India has already started to renegotiate with various countries). Most recently, in May 2017, Ecuador's National Assembly has also approved the termination of 16 BITs (subsequent steps need to be taken to finalize the domestic termination process).

Box 4. Termination of intra-EU BITs

Almost 200 BITs are in force among EU member States. The European Commission's position is that these intra-EU BITs need to be terminated because they are incompatible with EU law. In the Commission's view, they overlap and conflict with the EU single market rules, thereby discriminating against investors from other EU member States and interfering with the EU court's exclusive competence to ensure full effect of EU law (e.g. through the substantive protection they provide and due to ISDS). In 2015, the Commission initiated infringement proceedings against five member States for failing to terminate their intra-EU BITs (i.e. the Austria–Czech and Slovak Federal Republic BIT (1990), the Netherlands–Czech and Slovak Federal Republic BIT (1991) and the Sweden–Romania BIT (2002)), followed by a so-called reasoned opinion to these member States issued in September 2016, formally requesting them to terminate the BITs under investigation. In parallel, the Commission has also initiated separate "EU Pilot" proceedings against 21 other member States. With the latter, the Commission seeks to achieve compliance without having to resort to formal infringement proceedings. The Commission has urged the member States not only to terminate their intra-EU BITs, but also to make sure that all the "legal effects" of those BITs are likewise terminated.

Some member States have already terminated all their intra-EU BITs (e.g. Ireland, Italy), and termination efforts are currently under way or being considered in several others (e.g. the Czech Republic, Romania, the Slovak Republic). Certain member States have sought to propose compromise solutions going forward and to retain aspects of the status quo, notably ISDS. For example, in April 2016, Austria, Finland, France, Germany and the Netherlands presented to the Trade Policy Committee of the EU Council a "non-paper" suggesting such a compromise, which envisages the conclusion of an agreement among all EU member States in order to coordinate the phasing out of existing intra-EU BITs, to codify existing investor rights under EU law, and to provide protection to EU investors further to the termination of these BITs, including a binding and enforceable settlement mechanism for investment disputes as a last resort to mediation and domestic litigation. The proposal also refers to the parallel elimination of survival clauses in the respective intra-EU BITs.

Source: ©UNCTAD.

j. Withdrawing from multilateral treaties

Table 12. 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 fora) • 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 the country's investment climate and/or could put the country into an "outsider" position • Deprives the country of further cooperation with other treaty partners and the opportunity to have a word in the evolution of the agreement • Applies prospectively only • Since most IIAs provide consent to multiple fora for ISDS, may not eliminate the risk of ISDS claims entirely • Could narrow protection for nationals investing abroad

Source: ©UNCTAD.

Unilateral withdrawal from an investment-related multilateral treaty releases the withdrawing party from the instrument's obligations and – depending on the treaty at issue – can help minimize a country's exposure to investor claims. 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 dispute settlement forum – for instance, a regional one (e.g. UNASUR[12]).

So far, two countries have withdrawn from the ECT, a treaty with over 50 signatories that has been used more frequently than any other IIA to bring ISDS cases. In 2009, the Russian Federation submitted its notice to terminate provisional application and declare its intention not to become party to the ECT. In 2014, Italy filed a notice of denunciation of the ECT, which took effect on 1 January 2016 (unlike the Russian Federation, Italy had ratified the ECT and was a fully-fledged party to it). The ECT contains two separate 20-year survival clauses: for signatories that applied the treaty on a provisional basis and for fully fledged parties. The ICSID Convention has to date been terminated by three countries – the Plurinational State of Bolivia in 2007, Ecuador in 2009 and the Bolivarian Republic of Venezuela in 2012. All three had had multiple treaty-based investor claims filed against them at ICSID, with high financial stakes.

3. Concluding remarks

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. Comprehensive regime reform would benefit from intensified multilateral backstopping. UNCTAD, through its three pillars of work – research and policy analysis, technical assistance and intergovernmental consensus building – can play a key role, as the United Nations' focal point for international investment and the international forum for high-level and inclusive discussions on today's existing multi-layered and multifaceted IIA regime.

Sustainable development-oriented IIA reform has entered the mainstream of international investment policymaking (*WIR15*, *WIR16*). The second phase of IIA reform builds on progress achieved in the past, by focusing on what can be done to modernize the large stock of first-generation treaties and to reduce fragmentation of the global IIA network.

This note has identified and discussed 10 reform actions that can be pursued to bring about such sustainable development-oriented IIA reform. It has taken stock of countries' experiences with these options, their respective pros and cons, and lessons learned along the way.

[12] UNASUR's members include Argentina, the Plurinational State of Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and the Bolivarian Republic of Venezuela. Mexico and Panama hold observer status.

The 10 reform actions represent modalities for introducing change to the IIA regime rather than designing treaty content (for the latter, see the UNCTAD Investment Policy Framework for Sustainable Development and the UNCTAD Road Map for IIA Reform, as well as the stocktaking of reform in *WIR16*). When striving to make IIAs work for sustainable development, policymakers may also wish to consider complementary policy actions, including actions with respect to the implementation of treaties or the prevention and management of investment disputes.

Although many countries have already begun to pursue one or more of the 10 options identified here, this note also shows that there remains much scope for further reform. Countries therefore have ample opportunity to consider each option, its pros and cons and its lessons learned, in order to adapt them as necessary and adopt those that are in line with their individual objectives for IIA regime reform.

In so doing, policymakers face a number of challenges, including strategic and systemic ones, as well as those relating to capacity and coordination. At the strategic level, countries need to determine the right extent of reform, on the basis of a comprehensive and facts-based cost-benefit analysis in light of their offensive and defensive interests. Importantly, this means ensuring that reform produces holistic results (covering all five areas of reform and all four levels of policymaking; see *WIR15* and *WIR17*), but without depriving the IIA regime of its fundamental purpose of protecting and promoting investment. When examining different reform options, policymakers need to consider the need for balance between preserving those elements of the current investment policy regime that work well and improving those parts on which action is required to make it work better for sustainable development. Similarly, policymakers need to avoid unintended consequences of reform. Ultimately, the regime must be reoriented so that it becomes balanced, predictable and conducive to sustainable development.

In terms of systemic challenges, policymakers need to address the challenges that arise from gaps, overlaps and fragmentation that create coherence and consistency problems. This includes improving the coherence of the IIA regime consisting of thousands of agreements that differ in content and type, consolidating and streamlining the IIA network, and managing the interaction between IIAs and other bodies of international law. Cross-cutting systemic challenges that policymakers should keep in mind also arise from the operation of MFN provisions, and survival and transition clauses.

A third set of challenges relates to coordination. These challenges include finding treaty partners with similar reform objectives and prioritizing individual reform actions and options, considering their importance and feasibility, as well as their suitability in light of long- and short-term IIA reform objectives and overall development strategies. Coordination also benefits from communicating reform to affected stakeholders – within and outside the country. Treaty partners, the international community and foreign investors (both established and prospective) need to receive a clear message that a country's reform endeavours will not result in a less attractive business environment or encourage protectionism.

Coordination challenges also include ensuring coherence between reform efforts at different levels of policymaking. Coordination challenges include prioritizing reform actions, finding the right treaty partners to implement them and ensuring coherence between reform efforts at different levels of policymaking, including the national and international levels (*WIR17*). Only coordinated activity at all levels (national, bilateral and regional, as well as multilateral) will deliver an IIA regime in which stability, clarity and predictability serve the objectives of all stakeholders: effectively harnessing international investment relations for the pursuit of sustainable development. In the absence of such a coordinated approach, the risk is that IIA reform efforts could become fragmented and incoherent. Reform needs to be pursued with a common agenda and vision in mind.

A final set of challenges relate to capacity. Successful reform requires strong internal structures for preparing and carrying out actions, with solid processes and decision-making and implementation capacities (e.g. sustained internal coordination among State organs, awareness raising and capacity-building). This is particularly difficult for developing countries and LDCs, which face challenges in terms of bargaining power, negotiating and implementing capacities, and greater vulnerability to reform risks.

In practice, these challenges make it very difficult for LDCs and smaller developing countries to be effective in altering their existing IIA networks and addressing the drawbacks of existing first-generation IIAs. For such countries it is particularly important to benefit from opportunities to build the capacity of IIA negotiators, to ensure that knowledge of IIA issues is preserved in institutional memory and does not disappear due to turnover of officials, as well as to ensure some continuity in the staff engaged in IIA reform in order to maintain a coherent and cohesive IIA reform approach over time.

All these challenges call for a coordinated approach to IIA reform, supported by multilateral backstopping. UNCTAD, through its three pillars of work – research and policy analysis, technical assistance and intergovernmental consensus building – can play a key role in this regard. In particular, UNCTAD's role as the United Nations' focal point for international investment and the international forum for high-level and inclusive discussions on today's multilayered and multifaceted IIA regime, as reconfirmed in its mandates from the Nairobi Maafikiano and the Addis Ababa Action Agenda, can help bring coordination and coherence to reform efforts. Ultimately, the higher the degree of coordination at various levels of policymaking (national, bilateral and regional, as well as multilateral), the higher the chances of creating a less fragmented and more balanced, stable and predictable IIA regime that effectively pursues sustainable development objectives.

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