United Nations TD/B/C.II/MEM.4/14

United Nations Conference on Trade and Development

Distr.: General
31 July 2017

Original: English

Trade and Development Board
Investment, Enterprise and Development Commission
Multi-year Expert Meeting on Investment, Innovation and Entrepreneurship for Productive Capacity-building and Sustainable Development
Fifth session
Geneva, 9–11 October 2017
Item 3 of the provisional agenda
Investment, innovation and entrepreneurship for productive capacity-building and sustainable development

Reform of the international investment agreement regime: Phase 2

Executive summary

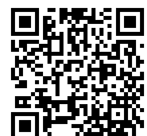
The present note points to the timeliness of a move to phase 2 of reform of the international investment agreement (IIA) regime: modernizing the existing stock of first-generation treaties. As sustainable development-oriented IIA regime reform manifests itself in new, more modern models and treaties (phase 1), policy attention needs to focus on modernizing first-generation treaties (phase 2).

Countries have numerous options for modernizing their first-generation treaties and reducing fragmentation in the IIA regime. This note presents and analyses 10 options and their outcomes and challenges, for countries to adapt and adopt in accordance with their specific reform objectives. Determining which reform option is best 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. Through its research and policy analysis, technical cooperation and intergovernmental consensus-building pillars of work, UNCTAD can play a key role, as the focal point in the United Nations for international investment and the international forum for high-level and inclusive discussions on the current multilayered and multifaceted IIA regime.

GE.17-13056(E)

Please recycle



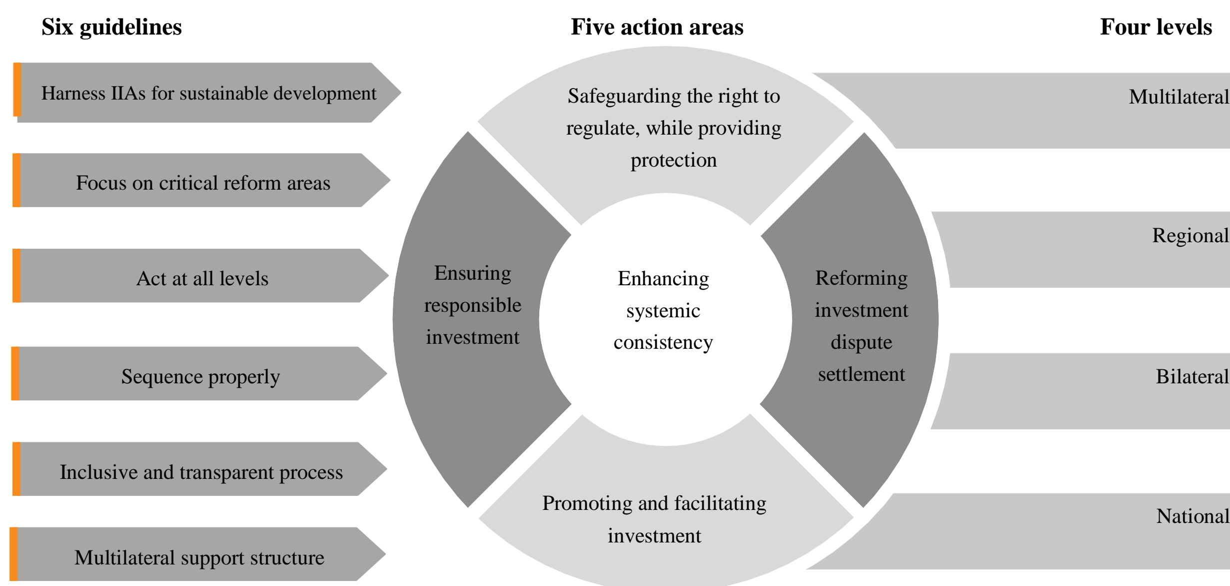
I. Introduction

1. This note builds on policy instruments previously developed by UNCTAD, and addresses international investment policies and sustainable development, in accordance with the topic for the fifth session of the Multi-year Expert Meeting on Investment, Innovation and Entrepreneurship for Productive Capacity-building and Sustainable Development approved by the Trade and Development Board at its thirty-first special session.[1] Specifically, the note builds on progress achieved in sustainable development-oriented IIA regime reform, and presents and analyses the outcomes and challenges of 10 policy options for modernizing the existing stock of treaties.

II. The next phase of reform

2. Sustainable development-oriented IIA regime reform has entered the mainstream of international investment policymaking.[2] In 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 new, more modern IIAs. Most current new IIAs follow the UNCTAD road map for IIA regime reform (see figure), which delineates five action areas,[3] or include clauses set out in the UNCTAD Investment Policy Framework for Sustainable Development (2012; updated in 2015).

UNCTAD road map for reform of the international investment agreement regime



Source: UNCTAD, 2016.

3. Despite significant progress, much remains to be done. Comprehensive reform requires a two-pronged approach, to not only conclude new treaties but also modernize existing treaties. This is pressing for the following three reasons:

[1] TD/B(S-XXXI)/2.

[2] UNCTAD, 2016, *World Investment Report 2016: Investor Nationality – Policy Challenges* (United Nations publication, Sales No. E.16.II.D.4, Geneva); UNCTAD, 2017, *World Investment Report 2017: Investment and the Digital Economy* (United Nations publication, Sales No. E.17.II.D.3, Geneva)..

[3] UNCTAD, 2015, *World Investment Report 2015: Reforming International Investment Governance* (United Nations publication, Sales No. E.15.II.D.5, New York and Geneva); UNCTAD, 2016.

(a) First-generation treaties abound. More than 2,500 IIAs (95 per cent of treaties in force) were concluded before 2010. Meanwhile, some 700 treaties have not yet entered into force.

(b) First-generation treaties “bite”. Almost all of the current known investor–State dispute settlement cases are based on treaties concluded before 2010, most of which contain broad and vague formulations.

(c) First-generation treaties perpetuate inconsistencies. Their continued existence creates overlaps and fragmentation in treaty relationships, as well as interaction challenges.

III. Phase 2 of reform: 10 options

4. There are at least 10 policy options available for countries that wish to change existing treaties to bring them into conformity with new policy objectives. The options are not mutually exclusive and can be used in a complementary manner. They differ in several respects, as they encompass actions that are more technical (such as interpreting or amending treaty provisions) or political (such as engaging multilaterally), that focus on procedure (such as amending or replacing treaties) or on substance (such as referencing international standards) and that imply continuous engagement with the IIA regime (such as amending or replacing treaties or engaging multilaterally) or a withdrawal (such as termination without replacement or withdrawal from multilateral treaties). They represent modalities for introducing change to the IIA regime, rather than designing treaty content.

5. The 10 options for reform actions and their outcomes are as follows:[4]

(a) Jointly interpreting treaty provisions. Clarifies the content of a treaty provision and narrows the scope of interpretive discretion of tribunals;

(b) Amending treaty provisions. Modifies an existing treaty’s content by introducing new provisions or altering or removing existing provisions;

(c) Replacing outdated treaties. Substitutes a first-generation treaty with a new treaty;

(d) Consolidating the IIA network. Abrogates two or more first-generation bilateral investment treaties between parties and replaces them with a new, plurilateral IIA;

(e) Managing relationships between coexisting treaties. Establishes rules that determine which of the coexisting IIAs applies in a given situation;

(f) Referencing global standards. Fosters coherence and improves interaction between IIAs and other areas of international law and policymaking;

(g) 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;

(h) Abandoning unratified first-generation treaties. Conveys a country’s intent not to become a party to a concluded but as yet unratified treaty;

(i) Terminating existing first-generation treaties. Releases the parties from their obligations under a treaty;

(j) Withdrawing from multilateral treaties. Releases withdrawing parties from the binding force of an instrument; similar in effect to termination, but leaves the treaty in force among the remaining parties that have not withdrawn.

6. 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 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

[4] This classification is made for illustrative purposes only and should not be seen as placing possible reform actions in any order of priority.

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 among reform efforts at different levels of policymaking. Capacity challenges make it difficult for developing countries, in particular the least developed countries, to address the deficiencies of first-generation IIAs.

7. Choices need to be made in identifying the best possible combination of the 10 policy options. The chosen combination of options should ultimately reflect a country's international investment policy direction, in line with its national development strategy. Moreover, policymakers should consider the compound effect of options. Some combinations of options may result in a treaty regime largely deprived of its traditional investment protection rationale or may result in a complete exit from the IIA regime. Reform efforts, particularly those which are comprehensive, should harness the benefits that can be obtained from the rule of law and respond to investor expectations of predictability, stability and transparency in policymaking.

8. In choosing among reform options, policymakers should consider legal and practical challenges. Among the former, three areas are particularly pronounced, namely the most-favoured nation clause,[5] the survival clause[6] and the management of transitions between outdated and new treaties. Policymakers also need to keep in mind and plan for the many practical and political challenges that might arise.

1. Jointly interpreting treaty provisions

9. IIAs with broadly worded provisions can give rise to unintended and contradictory interpretations in investor–State dispute settlement proceedings. Joint interpretations, aimed at clarifying the meaning of treaty obligations, help reduce uncertainty and enhance predictability for investors, contracting parties and tribunals (table 1).

Table 1
Reform action: Jointly interpreting treaty provisions[a]

Outcomes	*Challenges*
• Allows 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 provides that joint interpretations by 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 treaty parties	• Is limited in its effect as it cannot add 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 instances when a pending dispute involves the application of the provision concerned

Source: UNCTAD.

[a] Clarifies the content of a treaty provision and narrows the scope of interpretive discretion of tribunals.

[5] Most-favoured nation clauses typically prohibit the less favourable treatment of investors from a signatory State, compared with the treatment of similar investors from any third country.

[6] Typically, survival 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 a treaty's termination.

10. Clarifying IIA clauses can help reduce uncertainty arising from the broadly worded provisions of first-generation bilateral investment treaties. Authoritative joint party interpretations offer a degree of much needed clarity for investors, host States and arbitrators alike. This reform tool is potentially the easiest to apply in practice as it allows treaty parties to voice their positions on a specific IIA clause without undertaking a comparatively higher cost-intensive and more time-consuming amendment or renegotiation of the treaty (as 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.[7] However, even in the absence of such a provision, the Vienna Convention on the Law of Treaties obliges arbitrators to take into account, together with the context, "any subsequent agreement between the parties regarding the interpretation of the treaty" (article 31.3(a)).

11. Several countries have engaged in joint interpretations. In 2001, the Free Trade Commission of the North American Free Trade Agreement adopted notes of interpretation of certain provisions in chapter 11, clarifying article 1105(1) on the minimum standard of treatment. In 2013, through a joint interpretative understanding, Colombia and Singapore clarified several provisions (such as most-favoured nation and fair and equitable treatment) in their bilateral investment treaty (2013). In January 2016, the parties to the Trans-Pacific Partnership issued a drafters' note of interpretation of like circumstances, applicable to the treaty's most-favoured nation and national treatment provisions.

12. Two recent policy developments, different from but related to the traditional understanding of joint interpretations, may be noted. In February 2016, India proposed a joint interpretative statement to 25 countries with which it had IIAs whose initial period of validity had not expired. The statement set out India's proposed interpretation of several provisions in the treaties, including the definitions of investor and investment; the most-favoured nation, fair and equitable treatment, national treatment and expropriation clauses; and investor–State dispute settlement. In October 2016, Canada and the European Union and its member States released a joint interpretative instrument on the Canada–European Union Comprehensive Economic and Trade Agreement (2016) that 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.

13. Also of note is the frequent establishment in recent IIAs of joint bodies with a mandate to issue binding interpretations, such as the Canada–European Union Comprehensive Economic and Trade Agreement (2016) and the Chile–Hong Kong, China (2016) and Morocco–Nigeria (2016) bilateral investment treaties.

2. Amending treaty provisions

14. The expansively formulated obligations common to first-generation IIAs may sometimes be difficult to amend through joint interpretation. By amending treaty provisions, the parties can achieve a higher degree of change, thereby ensuring that the amended treaty reflects their evolving policy preferences (table 2).

Table 2
Reform action: Amending treaty provisions[a]

Outcomes	*Challenges*
• Constitutes broader, more far-reaching tool than interpretation; can introduce new rules rather than merely clarifying meaning of existing rules • Selectively addresses most important issues on which parties' policy positions align	• Typically requires domestic ratification in order to take effect • Only applies prospectively; does not affect pending disputes • Does not lead to overall change in treaty design and philosophy

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

Outcomes	*Challenges*
• Can be easier to agree upon with treaty partners and more efficient to negotiate compared with renegotiation of treaty as a whole	• May lead to difficult negotiations in which agreements on amendments are achieved only through reciprocal concessions with parties demanding other amendments

Source: UNCTAD.

[a] Modifies an existing treaty's contents by introducing new provisions or altering or removing existing provisions.

15. Typically, amendments are limited in number and do not affect the overall design and philosophy of a treaty.[8] If treaty parties are concerned only with certain specific provisions (such as most-favoured nation and fair and equitable treatment), discrete amendments might be preferred to renegotiation of the entire treaty, an exercise that may be time consuming and, depending on the other party or parties, challenging. Applicable amendment procedures depend on the treaty, which is subject to change. For IIAs that do not regulate amendments, the general rules of the Vienna Convention on the Law of Treaties usually apply. However, many newer IIAs include their own provisions on amendment. This is particularly important for plurilateral or multilateral treaties, in which the large number of parties involved adds complexity to the process. IIA amendments are usually formalized through separate agreements (for example protocols or exchanges of letters or notes), which take effect following a procedure similar to the original treaty, that is, after respective domestic ratification procedures have been completed.

16. Comprehensive data on amendments are not yet available. Existing evidence suggests, however, that States have to date used amendments rather sparingly. Exceptions are member States of the European Union in Eastern Europe (Bulgaria, Croatia, Czechia, Estonia, Latvia, Lithuania, Poland, Slovakia, Slovenia and Romania) that have made amendments through protocols before and after accession to the European Union. Of 84 IIAs concluded by these countries that contain protocols, over 60 concern extra-European Union bilateral investment treaties that were amended, among others, to bring their international obligations in line with obligations under European Union law. Some introduce exceptions to most-favoured nation clauses for regional economic integration organizations or include exceptions for national security reasons, such as the protocols in 2007 and 2010, respectively, to the Bulgaria–India (1998) and Czechia–Morocco (2001) bilateral investment treaties. Amendments have also been used by several member States to introduce balance-of-payments exceptions to provisions on the free transfer of funds, such as the protocols in 2009, 2011 and 2013, respectively, to the Czechia–Guatemala (2003), Bulgaria–Israel (1993) and Lithuania–Kuwait (2001) bilateral investment treaties. The latter amendments were also in response to the ruling of the European Court of Justice in 2009 that the transfer of funds provisions in certain member State bilateral investment treaties with third countries breached European Union law.

17. Other countries have used amendments in a more sporadic manner to include adjustments to the investor–State dispute settlement mechanism, for example the exchange of notes in 1997 with regard to the Paraguay–United Kingdom of Great Britain and Northern Ireland bilateral investment treaty (1981) and the protocols in 2000 and 2003, respectively, to the Panama–United States of America (1982) and Germany–Republic of Moldova (1994) bilateral investment treaties. More recent examples include the amendments in May 2016 to the Singapore–Australia (2003) free trade agreement, 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 investor–State dispute settlement for tobacco control measures. These amendments are in the process of ratification.

18. Finally, in August 2016, members of the Southern African Development Community amended annex 1 of the finance and investment protocol of the Community. The amended version omits the provision on fair and equitable treatment and the investor–

[8] Ibid.

State dispute settlement mechanism, refines the definitions of investor and investment, introduces exceptions to the expropriation provision and clarifies the national treatment provision and investor responsibilities, as well as the right of host countries to regulate investment. These amendments are in the process of ratification.

3. Replacing outdated treaties

19. Treaty replacements offer an opportunity to undertake a comprehensive revision of a treaty instead of selectively amending individual clauses (table 3). This reform action replaces outdated IIAs by substituting them with new agreements. New IIAs can be concluded by the same treaty partners (for example when a bilateral investment treaty is replaced with a new treaty) or by a larger group of countries (for example when several bilateral investment treaties are replaced by a plurilateral treaty (see option 4)). Approaching a treaty afresh enables the parties to achieve a higher degree of change with regard to selective amendments and to be more rigorous and conceptual in designing an IIA that reflects their contemporary shared vision.

Table 3
Reform action: Replacing outdated treaties[a]

Outcome	*Challenges*
• Allows for holistic approach to reform through comprehensive revision of treaty in line with parties' evolving policy objectives • Allows for revision of treaty's philosophy and overall design, and inclusion of new policy issues • Can be done at any time during lifetime of treaty	• Requires participation of treaty partner(s) with similar views • Can be cost and time-intensive, as it involves negotiation of treaty from the start • Does not guarantee inclusion of reform-oriented elements (depends on negotiated outcome) • Requires effective transition between former and new treaty regime

Source: UNCTAD.

[a] Substitutes a first-generation treaty with a new treaty.

20. For replacement to be effective, countries need to be mindful of termination provisions in the earlier IIA, including how to ensure an effective transition from the former to the new treaty regime and how to deal with any survival clauses.

21. To date, about 130 bilateral investment treaties have been replaced, mostly by other such treaties or by bilateral treaties with investment provisions. 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 bilateral investment treaty that will replace that of 1995.

22. Of a sample of 167 treaties with investment provisions, only 16 (10 per cent) replaced at least one bilateral investment treaty with which they overlapped.[9] For example, Peru replaced three bilateral investment treaties with subsequent free trade agreements that it concluded with the same partners, namely Chile (2006), Singapore (2008) and the Republic of Korea (2010). All three agreements include an investment chapter, expressly provide for termination of the prior bilateral investment treaty upon the entry into force of the free trade agreement and establish transition rules.

23. Alternatively, in rare instances, some States suspend bilateral investment treaties or parts thereof for the time that a new IIA is in force, such as the Morocco–United States (2004) and Canada–Panama (2010) free trade agreements and the Republic of Korea–European Free Trade Association investment agreement (2005). This is not replacement as

[9] UNCTAD, 2017, figure III.23.

such, but rather a conditional replacement that leaves open the possibility that the bilateral investment treaty may be revived if the new IIA is terminated.

4. Consolidating the international investment agreement network

24. Abrogating multiple bilateral investment treaties and replacing them with a new, plurilateral IIA helps to modernize treaty content and reduce fragmentation in the IIA network at the same time (table 4). 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 treaty. From a reform perspective, this is an appealing option as it has the dual positive effect of modernizing treaty content and reducing fragmentation in the IIA network, by establishing uniform treaty rules for more than two countries.

Table 4
Reform action: Consolidating the international investment agreement network[a]

Outcomes	*Challenges*
• Allows for holistic approach to IIA modernization through comprehensive revision of treaty • Reduces fragmentation in IIA network by decreasing number of existing treaties • May be more cost-effective and time-efficient than pursuing multiple bilateral negotiations	• Requires participation of numerous treaty partners • Does not guarantee inclusion of reform-oriented elements (depends on negotiated outcome) • May be more difficult to achieve outcomes in plurilateral negotiations than bilateral negotiations

Source: UNCTAD.

[a] Abrogates two or more first-generation bilateral investment treaties between parties and replaces them with a new, plurilateral IIA.

25. For example, when the European Union signs an IIA with a third country, the new treaty replaces all bilateral investment treaties previously concluded with that country by individual member States of the European Union. The Canada–European Union Comprehensive Economic and Trade Agreement (2016), for example, is scheduled to replace eight prior bilateral investment treaties between Canada and individual member States (article 30.8). Similar provisions are included in the recently negotiated Singapore–European Union (12 pre-existing treaties to be replaced) and Viet Nam–European Union (22 pre-existing treaties to be replaced) free trade agreements.

26. Another example is the free trade agreement between Mexico and certain States in Central America (Costa Rica, El Salvador, Guatemala, Honduras and Nicaragua; 2011), which replaced three earlier free trade agreements between Mexico and Costa Rica (1994), Nicaragua (1997) and El Salvador, Guatemala and Honduras (2000).

27. However, most other plurilateral IIAs have missed the opportunity to consolidate and, instead, have led to the parallel application of outdated and new treaties. This adds complexity and inconsistency to an already highly complex system.[10] 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 context of the Trans-Pacific Partnership, Australia separately agreed to terminate its bilateral investment treaties with Mexico, Peru and Viet Nam upon entry into force of the Partnership. Other parties have, to date, decided to maintain their pre-existing IIAs (the number of IIAs with investment commitments between parties to the Partnership that overlap with the Partnership exceeds 20). In some ongoing plurilateral negotiations, the issue is still under discussion. For example, in Africa, the tripartite free trade agreement between the Common Market for Eastern and Southern

[10] UNCTAD, 2014, *World Investment Report 2014: Investing in the SDGs [Sustainable Development Goals] – An Action Plan* (United Nations publication, Sales No. E.14.II.D.1, New York and Geneva).

Africa, East African Community and Southern African Development Community has the potential to replace more than 100 existing bilateral investment treaties between the participating States.

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

5. Managing relationships between coexisting treaties

29. If countries choose to maintain both first-generation and new treaties in parallel, IIA regime reform objectives can be achieved only if, in the event of conflict or inconsistency, the new, more modern IIA prevails (table 5).

Table 5
Reform action: Managing relationships between coexisting treaties[a]

Outcomes	*Challenges*
• Ensures that countries are not subject to simultaneously applicable obligations found in overlapping treaties	• Does not terminate earlier treaty
• May aid reform efforts by ensuring that more recent treaty prevails	• Only mitigates adverse consequences arising from coexistence; does not advance effective and comprehensive IIA regime reform
• While keeping earlier treaty in force (creating parallelism), clarifies new treaty's relationship with earlier treaty	• Impact depends on formulation used in conflict clause

Source: UNCTAD.

[a] Establishes rules that determine which of the coexisting IIAs applies in a given situation.

30. Instead of opting for replacement, some treaty parties decide that first-generation and new treaties should exist in parallel. This often occurs when the new treaty is plurilateral, for example a regional free trade agreement with an investment chapter, and the existing, underlying treaties are bilateral. For example, of 167 treaties with investment provisions, more than two thirds (119) coexist with prior, overlapping IIAs.[11] Generally, such parallelism adds complexity to the system and is not conducive to IIA regime reform. For the purpose of effective and comprehensive reform, a better approach would be to avoid the parallel application of coexisting IIAs between the same parties. However, States may have specific reasons for maintaining coexisting IIAs.

31. To mitigate potentially adverse consequences arising from such a situation, States may include clauses that clarify the relationship between coexisting IIAs.[12] For example, a conflict clause may specify which of the treaties prevails in the event of a conflict or inconsistency. Of the above-mentioned 119 treaties with investment provisions that coexist with overlapping IIAs, only about 35 (or roughly one third) contain a clause explicitly allocating priority to either the existing or the new IIA.

32. Conflict clauses may be a useful tool for IIA regime reform if they prioritize new, more modern IIAs. For instance, of the 35 treaties with investment provisions that contain conflict clauses, more than half (20) prioritize the newer IIA in the event of inconsistency. Examples include the Panama–Taiwan Province of China (2003; article 1.03(2)), Mexico–Peru (2011; article 1.3(2)) and Colombia–Republic of Korea (2013; article 1.2(2)) free trade agreements.

33. However, States often also elect to include clauses that give explicit priority to the earlier (often less reform-oriented) treaty, such as in the Australia–Malaysia free trade

[11] UNCTAD, 2017, figure III.23.

[12] If a new overlapping treaty does not include a relationship clause of any kind, the relationship between coexisting treaties is guided by the Vienna Convention on the Law of Treaties, notably articles 30 and 59, as applicable.

agreement (2012; article 21.2(2)) and the China–Japan–Republic of Korea trilateral investment agreement (2012; article 25). Of the above-mentioned 35 treaties with investment provisions, 15 give priority to the earlier treaty.

34. States sometimes also include clauses that yield priority to the treaty that is more favourable to investors (such as side letters to the Trans-Pacific Partnership, 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 of the status of the pre-existing IIA (such as in the China–Republic of Korea free trade agreement (2015; article 1.3)). These types of relationship clauses do little to promote IIA regime reform.

35. 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 (for example article I.2 of the General Agreement on Trade in Services, covering mode 3 of the supply of services), it may be necessary to regulate interactions. States have several options. They may opt for overlapping coverage and use conflict clauses, providing that in the event of inconsistency between the investment chapter and other chapters of a free trade agreement, the other chapters prevail, such as in the United States–Australia free trade agreement (2004; article 11.2). Another option is to cover investment in services in both the investment and services chapters, but exclude certain investment protection obligations (typically most-favoured nation and national treatment provisions) from application to services investment, such as in the Singapore–European Free Trade Association free trade agreement (2002; articles 38(2) and 38(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, such as in the India–Singapore comprehensive economic cooperation agreement (2005; article 7.24). They may also delineate the scope of application, regulating the interaction in either the services or the investment chapter, such as in article 10.1 of the Trans-Pacific Partnership, which excludes mode 3 from the scope of the services chapter.

6. Referencing global standards

36. In their IIA regime reform efforts, countries may refer to multilaterally recognized standards and instruments. Such instruments reflect broad consensus on relevant issues and referencing them can help overcome fragmentation between IIAs and other bodies of international law and policymaking (table 6).

Table 6
Reform action: Referencing global standards[a]

Outcomes	*Challenges*
• Can help shape spirit of a treaty (such as objective and purpose) and influence its interpretation by arbitral tribunals • Can inform modernization of existing treaties and creation of new treaties • Can reconnect different groups of international rules • Cost-effective and time-efficient (countries can make use of existing instruments that parties have previously agreed to)	• Depending on global standard at issue, can be seen as overloading IIA regime with issues not central to traditional objective of IIAs of protecting foreign investment • Does not necessarily create legal clarity or restrict interpretive discretion of arbitral tribunals • Does not give treaty parties control over future development of respective instruments

Source: UNCTAD.

[a] Fosters coherence and improves interaction between IIAs and other areas of international law and policymaking.

37. 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. In September 2015,

the global community adopted the Sustainable Development Goals, and several of the 169 targets note the important role of investment in achieving the Goals (for example targets 7.a and 10.b) or are relevant to investment policy (for example targets 1.b, 17.14, 17.15 and 17.16). Similarly, in the outcome document of the third International Conference on Financing for Development, the Addis Ababa Action Agenda, member States noted the following (paragraph 91): "The 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."

38. The UNCTAD Investment Policy Framework for Sustainable Development, a non-binding framework developed in 2012, aims to make investment work for sustainable development and inclusive growth. The framework was updated in 2015and re-launched at the third International Conference on Financing for Development. It has since served as a point of reference for policymakers in more than 130 countries.

39. In addition, there are numerous voluntary and regulatory initiatives to promote corporate social responsibility standards and guidelines that foster sustainable development, such as the United Nations Global Compact and International Organization for Standardization standard 26000 on social responsibility. Such instruments are a unique and rapidly evolving dimension of soft law. They typically focus on the operations of multinational enterprises and, as such, have increasingly shaped the global investment policy landscape over the last decades.[13]

40. Although some uncertainty remains about the role and weight that international arbitration tribunals might give to such instruments, policymakers have certain options for harnessing such global standards for IIA regime reform. For example, they may take the following actions:

(a) Introduce global standards and instruments in their new IIAs, such as by means of cross-referencing, as already done in a small but growing number of agreements. Such clauses would, at a minimum, serve to highlight the importance of sustainability in investor–State relations. They could also attune investors to their sustainable development-related responsibilities and operate as a source of interpretative guidance for investor–State dispute settlement tribunals;

(b) Adopt a joint statement, recalling national commitments to certain enumerated global standards and instruments and noting that the investment policy relations among participating countries are to be understood in the light of these commitments. The effects would be similar to those of cross-referencing but would apply not only to new treaties but to pre-existing treaties as well. The larger the group of participating countries (and, possibly, the longer the list of global standards), the stronger or more far-reaching the effect would be;

(c) Incorporate, at a broader level, global sustainability issues into discussions on global economic governance and the international regulatory architecture for investment.

41. Overall, cross-referencing can play an important role in reducing fragmentation, and isolation, among 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 to existing treaties as well.

42. For instance, several recent IIAs reference corporate social responsibility standards in a general manner, typically referring to internationally recognized standards in areas such as human rights, labour, the environment, anti-corruption and others, such as the Burkina Faso–Canada bilateral investment treaty (2015) and the Colombia–Panama free trade agreement (2013). Other recent IIAs are more specific, referring to global standards such as the Sustainable Development Goals (such as the Morocco–Nigeria bilateral investment treaty (2016)); the Charter of the United Nations, Universal Declaration of Human Rights

[13] UNCTAD, 2013.

and/or International Labour Organization instruments (such as the Georgia–European Free Trade Association free trade agreement (2016) and the Canada–European Union Comprehensive Economic and Trade Agreement (2016)); or the multinational enterprises guidelines and the principles of corporate governance of the Organization for Economic Cooperation and Development (such as the Canada–European Union Comprehensive Economic and Trade Agreement (2016) and the Bosnia and Herzegovina–European Free Trade Association free trade agreement (2013)).

43. A recent example of standard setting in a plurilateral context is the guiding principles for global investment policymaking agreed on by the Group of 20 in July 2016 and endorsed in September 2016. While an example of standard setting in 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".

7. Engaging multilaterally

44. Multilateral engagement is the most impactful but also most difficult avenue for IIA regime reform. In drawing inspiration from current or past multilateral processes, attention should be given to their differences in terms of intensity, depth and character of engagement (table 7). 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 the current IIA regime. However, multilateral reform action is challenging, in particular, in determining how to pursue it.[14]

Table 7
Reform action: Engaging multilaterally[a]

Outcomes	*Challenges*
• Among reform options, is best suited for addressing policy issues of global relevance (such as sustainable development) or systemic issues (such as most-favoured nation clauses) • If successful, is 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 piecemeal reform actions of individual countries	• Is the most challenging reform path as consensus among many countries is hard to achieve • Can lead to situation in which countries with less bargaining power or latecomers find themselves in role of rule-takers • Is more likely to result, at least currently, in non-binding instruments or instruments with a narrow substantive scope (such as individual aspects of investor–State dispute settlement); therefore has limited overall impact on IIA regime

Source: UNCTAD.

[a] Establishes a common understanding or new rules among a multitude of countries, coupled with a mechanism that brings about change all at once.

45. Recently, there have been a number of policy developments at the multilateral or plurilateral level that can inspire future multilateral IIA regime reform efforts. Inspiration may be found in both the way the new rules have been developed and the processes or tools employed to extend these rules to existing treaties. In this regard, multilateral rulemaking processes in areas other than IIAs, such as the base erosion and profit shifting project of the Organization for Economic Cooperation and Development, may also be instructive.

46. In considering the extent to which lessons can be learned from such initiatives, attention should 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 in later rule application), the legal

[14] UNCTAD, 2015; UNCTAD, 2016.

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.

47. For example, the United Nations Convention on Transparency in Treaty-based Investor–State Arbitration (Mauritius Convention on Transparency) fosters greater application of the United Nations Commission on International Trade Law transparency rules to IIAs concluded prior to 1 April 2014. The Convention effectively modifies a number of first-generation IIAs of those countries that have ratified the Convention, which turns it into a collective IIA regime reform action. Future IIA regime reform actions could draw upon the process of multilateral negotiations that led to the Arbitration Rules of the United Nations Commission on International Trade Law and to the Mauritius Convention on Transparency; and on the opt-in mechanism of the Convention, which modifies certain aspects of pre-existing IIAs.

48. Beyond the investment regime, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (Multilateral Instrument) fosters State implementation of the tax treaty-related measures of the base erosion and profit shifting package, potentially amending over 3,000 bilateral tax treaties concluded to date. The Multilateral Instrument deals with a number of issues of concern (such as hybrid mismatch arrangements, treaty abuse and streamlining of dispute resolution) and creates change in a flexible, optional way. For example, it will apply only to tax treaties specifically designated by the parties to the Convention, and 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 make it possible to take on additional commitments. Future IIA regime reform actions could draw upon the multilateral stakeholder process that led to the adoption of the base erosion and profit shifting package; and on the treaty's architecture, which is similar to but more complex than the Mauritius Convention on Transparency, allowing for unilateral declarations and selective reservations to, or amendments of, pre-existing tax treaties.

49. Current discussions on the establishment of a multilateral investment court and/or appellate mechanism could result in an instrument that ultimately changes investor–State dispute settlement provisions included in earlier treaties. The opt-in mechanism of the Mauritius Convention on Transparency as a potential model for reform is also explored in an ongoing process involving the United Nations Commission on International Trade Law and the International Centre for Settlement of Investment Disputes that examines the establishment of a permanent investment tribunal or appellate mechanism.

50. A further example is the guiding principles for global investment policymaking of the Group of 20, adopted with backstopping by UNCTAD. Although non-binding, the principles are meant to serve as an important reference in negotiating IIAs and modernizing existing agreements. 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 twenty-first century concerns and priorities. Inspiration may be found in the suggestions that the principles may not only offer guidance on treaty drafting but, by stating the shared understanding of the Group of 20 of current investment policymaking priorities, may also offer guidance on the interpretation of existing IIAs; and that they may form the basis for their broader application to countries other than the Group of 20.

51. Finally, multistakeholder platforms and processes such as the UNCTAD World Investment Forum, an international forum for high-level and inclusive discussions on the current multilayered and multifaceted IIA regime, and the third International Conference on Financing for Development of the United Nations, which requested UNCTAD to continue consultations with member States on IIAs, are useful for expert research, analysis, backstopping and exchanges on how to carry reform further.

8. Abandoning unratified first-generation treaties

52. A relatively large number of bilateral investment treaties, many of them first-generation treaties, have not yet entered into force. A country can formally indicate its decision not to be bound by them as a means to help streamline its IIA network and promote the negotiation of new, more modern treaties (table 8).

Table 8
Reform action: Abandoning unratified first-generation treaties[a]

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

Source: UNCTAD.

[a] Conveys a country's intent not to become a party to a concluded but as yet unratified treaty.

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

54. To date, it appears that few countries have undertaken this reform action, although not all instances may have received public attention. Brazil abandoned 14 bilateral investment treaties signed in the 1990s after some were rejected by its congress, as certain provisions were deemed unconstitutional. In 2008, Ecuador filed denunciations of two unratified bilateral investment treaties with Honduras and Nicaragua. Most recently, in January 2017, the United States stated its intention to withdraw from the Trans-Pacific Partnership.[15]

55. However, under certain treaties, countries agree to provisional application, which means that the treaty or part thereof is applied after its signature but before its entry into force. Relinquishing a provisionally applied treaty is usually more complicated, as it is similar to terminating a treaty that has entered into force. Typically, IIAs stipulate a process that a country must follow in order to terminate provisional application; this may also trigger the operation of a survival clause. As ratification by multiple parties is likely to be a protracted process, provisional application is more common in plurilateral IIAs, such as the Energy Charter Treaty (1994) and the Canada–European Union Comprehensive Economic and Trade Agreement (2016), of which only parts of the investment chapter will be provisionally applied. For example, in 2009, the Russian Federation issued a notice to terminate the provisional application of the Energy Charter Treaty. The treaty contains a separate 20-year survival clause for signatories terminating provisional application.

9. Terminating existing first-generation treaties

56. Terminating outdated bilateral investment treaties, whether unilaterally or jointly, is a straightforward yet not always instantaneous way to release the parties from their obligations (table 9). 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 treaty (see options 3 and 4). A treaty can be terminated unilaterally when the treaty permits, or by mutual consent at any time. Rules for unilateral treaty termination are often set out in a bilateral investment treaty itself. Typically, such a treaty sets out an initial period of operation of 10–20 years, which must expire before a party may unilaterally

[15] United States of America, Office of the Press Secretary, 2017, Presidential memorandum regarding withdrawal of the United States from the Trans-Pacific Partnership negotiations and agreement, 23 January.

terminate the treaty. Unilateral termination triggers any survival clauses existing in the treaty, which will prolong the treaty's operation for a set time after it has been terminated. For the purposes of clarity, countries may consider neutralizing the survival clause when terminating a treaty jointly.

Table 9
Reform action: Terminating existing first-generation treaties[a]

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

Source: UNCTAD.

[a] Releases the parties from their obligations under a treaty.

57. Of 212 bilateral investment treaties terminated as at March 2017, 19 (9 per cent) were jointly terminated, without any replacement or consolidation, 59 (28 per cent) were unilaterally terminated and 134 (63 per cent) were replaced by a new treaty. This suggests that countries are often receptive to termination, but generally only when it is part of the process of concluding a new IIA. Also of note is the process of termination of intra-European Union bilateral investment treaties.

58. In the past decade, several countries have unilaterally or jointly terminated a number of bilateral investment treaties, such as the Plurinational State of Bolivia (10), Ecuador (10) and Indonesia (at least 20). For example, with regard to the Argentina–Indonesia bilateral investment treaty (1995), the parties agreed to terminate the treaty while at the same time neutralizing the survival clause. South Africa has terminated nine bilateral investment treaties as part of its broader move to reshape its investment policy in accordance with its sustainable development and inclusive economic growth objectives; this also includes the adoption of the Protection of Investment Act, the formulation of a new model bilateral investment treaty and engagement at the regional and continental levels, as well as in multilateral dialogues.[16] India revised its earlier model bilateral investment treaty and adopted a new model at the end of 2015. Consequently, in 2016, India sent notices of termination to more than 50 treaty partners with whom initial treaty terms had expired, with the intention of renegotiating a new treaty based on the revised model. India has already started to renegotiate with various countries. Most recently, in May 2017, the National Assembly of Ecuador approved the termination of 16 bilateral investment treaties and the President signed the decrees that formally terminated the treaties.

10. Withdrawing from multilateral treaties

59. Unilateral withdrawal from an investment-related multilateral treaty can help reduce a country's exposure to investor claims, but may also create challenges for future multilateral cooperation on investment (table 10). 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 forum such as the Union of South American Nations.

[16] UNCTAD, 2016; UNCTAD, 2017.

Table 10
Reform action: Withdrawing from multilateral treaties[a]

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

Source: UNCTAD.

[a] Releases withdrawing parties from the binding force of an instrument.

60. To date, two countries have withdrawn from the Energy Charter Treaty, a treaty with over 50 signatories that has been used more frequently than any other IIA to bring investor–State dispute settlement cases. In 2009, the Russian Federation submitted its notice to terminate provisional application and declare its intention not to become a party to the Treaty. In 2014, Italy filed a notice of denunciation of the Treaty, which took effect on 1 January 2016. In contrast to the Russian Federation, Italy had ratified the Treaty and was a full-fledged party. The Treaty contains two separate 20-year survival clauses, for signatories that applied the treaty on a provisional basis and for full-fledged parties. In addition, the International Centre for Settlement of Investment Disputes Convention has to date been terminated by three countries, namely the Plurinational State of Bolivia in 2007, Ecuador in 2009 and the Bolivarian Republic of Venezuela in 2012. Multiple treaty-based investor claims had been filed against each of these States at the International Centre for Settlement of Investment Disputes, with high financial stakes.

IV. Conclusions

61. Sustainable development-oriented IIA regime reform has entered the mainstream of international investment policymaking. The second phase of reform builds on progress achieved in the past, and focuses on what can be done to modernize the high number of first-generation treaties.

62. This note identifies and discusses 10 reform actions that may be pursued to bring about this second phase of IIA regime reform. It addresses national experiences with these options, their respective outcomes and challenges and lessons learned. The 10 reform actions represent modalities for introducing change to the IIA regime rather than designing treaty content (see UNCTAD Investment Policy Framework for Sustainable Development and road map for IIA regime reform, as well as the stocktaking of reform in UNCTAD (2016)).

63. Although many countries have begun to pursue one or more of the 10 options, there remains much scope for further reform, as detailed in UNCTAD (2017). Countries therefore have ample opportunity to consider each option, its outcomes and challenges and its lessons learned, to adapt them as necessary and adopt those in accordance with their individual objectives for IIA regime reform.

64. In doing so, policymakers face numerous challenges, including strategic and systemic challenges, as well as those related to capacity and coordination. Successful

reform also requires strong internal structures for preparing and carrying out actions, with solid processes and decision-making and implementation capacities, such as sustained internal coordination among State bodies, awareness raising and capacity-building. This is particularly difficult for developing countries and the least developed countries, which face challenges in terms of bargaining power and negotiation and implementation capacities, as well as greater vulnerability to reform risks.

65. All of these challenges call for a coordinated approach to IIA regime reform, supported by multilateral backstopping. Through its research and policy analysis, technical cooperation and intergovernmental consensus-building pillars of work, UNCTAD can play a key role in this regard. In particular, the role of UNCTAD as the focal point in the United Nations for international investment and the international forum for high-level and inclusive discussions on the current multilayered and multifaceted IIA regime, as reconfirmed in its mandates from the Nairobi Maafikiano[17] 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.

[17] TD/519/Add.2.