High-level IIA Conference UNCTAD, 2017

Opening Plenary

9th October 2017, am

Geneva, Switzerland

Opening Plenary

Keynote speakers

Mr. Abrão Neto, Secretary of Foreign Trade, Ministry of Industry, Foreign Trade and Services, Brazil

H.E. Mr. Hye-min Lee, G20 Sherpa and Ambassador, International Economic Affairs, Ministry of Foreign Affaris, Republic of

Korea

H.E. Mr. Damdinsuren Davaasuren, State Secretary, Ministry of Foreign Affairs, Mongolia

Ms. Yewande Sadiku, Executive Secretary, Nigerian Investment Promotion Commission (NIPC), Nigeria

Mr. Ayedh Al-Otaibi, Deputy Governor, Saudi Arabian General Investment Authority (SAGIA), Saudi Arabia

International Organisations

Ms. Treasure Maphanga, Director of the Department of Trade and Industry, African Union (AU)

Ms. Meg Kinnear, Secretary-General, International Centre for Settlement of Investment Disputes (ICSID) (video message)

Brazil
Secretary of Foreign Trade
Ministry of Industry, Foreign
Trade and Services

Mr. Abrão Neto

Republic of Korea
G20 Sherpa / Ambassador for
International Economic Affairs
Ministry of Foreign Affairs

H.E. Mr. Hye-min Lee

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Mongolia
State Secretary
Ministry of Foreign Affairs

H.E. Mr. Damdinsuren Davaasuren

Nigeria
CEO/Executive Secretary
Nigerian Investment Promotion
Commission

Ms. Yewande Sadiku

Saudi Arabia
Deputy Governor
General Investment Authority
(SAGIA)

Mr. Ayedh Al-Otaibi

African Union

African Union
Director
Department of Trade and
Industry

Ms. Treasure Maphanga

ICSID
INTERNATIONAL CENTRE FOR
SETTLEMENT OF INVESTMENT DISPUTES

ICSID
Secretary-General

Ms. Meg Kinnear

Opening Plenary

Objectives for the discussion

1. Take stock of IIA reform undertaken by your country so far, as well as the lessons learned and best practices.

2. Share your experience with, and plans for, modernizing existing, old-generation treaties.

3. Comment on UNCTAD policy tools, advisory services and inter-governmental meetings in support of sustainable development-oriented IIA reform
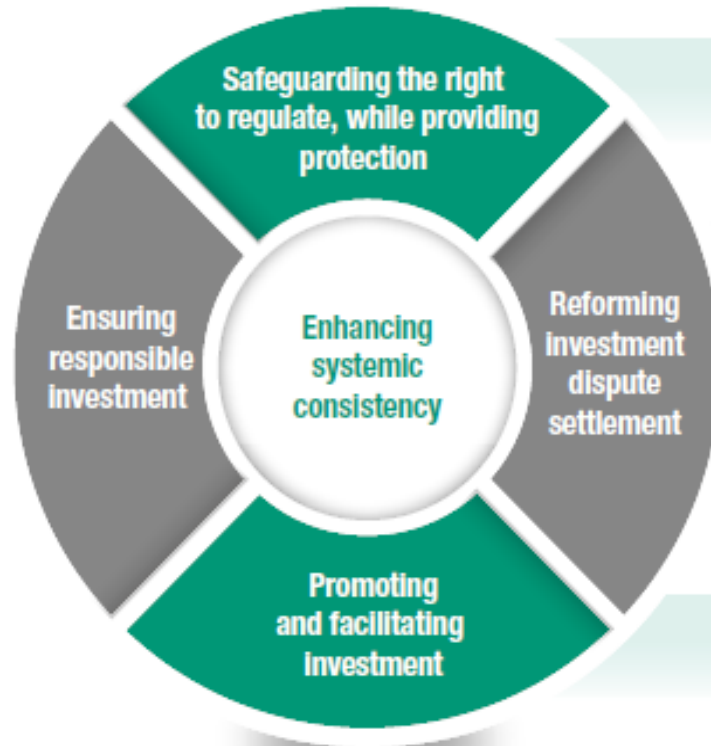
UNITED NATIONS
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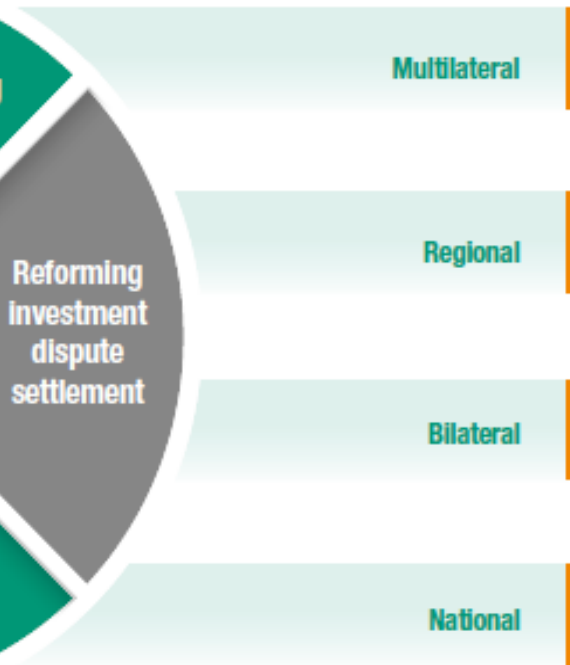# UNCTAD's Policy Tools: UNCTAD's Road Map for IIA Reform (2015)

6 Guidelines

- Harness IIAs for SD
- Focus on critical reform areas
- Act at all levels
- Sequence properly
- Inclusive / transparent process
- Multilateral support structure

5 Areas

- Safeguarding the right to regulate, while providing protection
- Reforming investment dispute settlement
- Promoting and facilitating investment
- Ensuring responsible investment
- Enhancing systemic consistency

4 Levels

- Multilateral
- Regional
- Bilateral
- National

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UNCTAD Policy Tools: Phase 2 of IIA Reform: 10 options for modernizing old-generation treaties (2017)

Phase 2
10 IIA reform options

- Jointly interpreting treaty provisions
- Amending treaty provisions
- Withdrawing from multilateral treaties
- Replacing "outdated" treaties
- Terminating existing old treaties
- Consolidating the IIA network
- Abandoning unratified old treaties
- Managing relationships between coexisting treaties
- Engaging multilaterally
- Referencing global standards

Source: © UNCTAD, *WIR17*.

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Break-out session 1:
Harnessing investment for the
SDGs – the IIA dimension

9 October 2017, pm

Geneva, Switzerland

Harnessing investment for the SDGs – the IIA dimension

Questions for consideration

1. What are lessons learned in harnessing IIAs for mobilizing investment into the SDGs?

2. What are the roles of national policies, including with respect to PPPs in this regard?

3. What are key policy challenges and options from an IIA perspective?

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High-level IIA Conference UNCTAD, 2017

Break-out session 2:
Clarifying and modifying treaty content

9 October 2017, pm

Geneva, Switzerland

UNCTAD's High-level IIA Conference 2017

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UNCTAD Policy Tools: Phase 2 of IIA Reform: 10 options for modernizing old-generation treaties (2017)

Jointly interpreting treaty provisions

Withdrawing from multilateral treaties

Amending treaty provisions

Terminating existing old treaties

Replacing "outdated" treaties

Phase 2
10 IIA reform options

Abandoning unratified old treaties

Consolidating the IIA network

Engaging multilaterally

Managing relationships between coexisting treaties

Referencing global standards

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UNCTAD's High-level IIA Conference 2017

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Clarifying and modifying treaty content

Questions for consideration

1. Which of these reform options have you undertaken, are you considering undertaking or have you been asked to undertake?

2. What are the pros and cons of each of them?

3. What are lessons learned?

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Overview of reform options: actions and outcomes

Action option	Outcome
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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
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Source: © UNCTAD, *WIR17*.
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.

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 limited in its effect as it cannot attach an entirely new meaning to the provision being interpreted
• Is particularly effective if the treaty expressly provides that joint interpretations by the parties (or their joint bodies) are binding on tribunals	• Can raise doubts about its true legal nature (may not always be easy to distinguish between a joint interpretation and an amendment)
• Becomes relevant from the moment of adoption, including for pending disputes	• Can leave tribunals with a margin of discretion
• Has authoritative power as it originates from the treaty parties	• 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, *WIR17*.

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	• Typically requires domestic ratification in order to take effect
• Selectively addresses the most important issues on which the parties' policy positions align	• Only applies prospectively, i.e. does not affect pending disputes
• 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	• 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

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High-level IIA Conference UNCTAD, 2017

Break-out session 3: Consolidating the IIA network

10 October 2017, am

Geneva, Switzerland

Phase 2
10 IIA reform options

UNCTAD Policy Tools: Phase 2 of IIA Reform: 10 options for modernizing old-generation treaties (2017)

Phase 2

10 IIA reform options

- Jointly interpreting treaty provisions
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- Managing relationships between coexisting treaties
- Referencing global standards
- Engaging multilaterally
- Abandoning unratified old treaties
- Terminating existing old treaties
- Withdrawing from multilateral treaties

Source: © UNCTAD, *WIR17*.

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Consolidating the IIA network

Questions for consideration

1. Which of these reform options have you undertaken, are you considering undertaking, or have you been asked to undertake?

2. What are the pros and cons of each of them?

3. What are lessons learned?

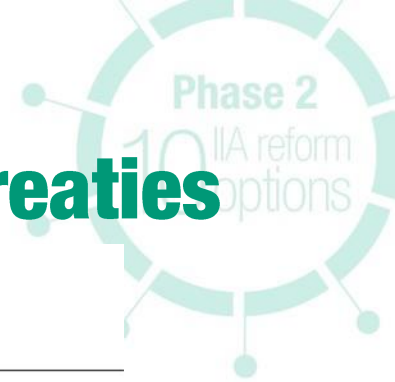# Overview of reform options: actions and outcomes

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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	• Requires participation of a treaty partner or partners with similar views
• Allows for the revision of the treaty's philosophy and overall design and the inclusion of new policy issues	• Can be cost- and time-intensive, as it involves the negotiation of the treaty from scratch
• Can be done at any time during the lifetime of the treaty	• Does not guarantee inclusion of reform-oriented elements (depends on the negotiated outcome)
	• Requires effective transition between the old and the new treaties

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Phase 2
10 IIA reform options

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

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Reform action: Managing relationship between co-existing 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	• Does not terminate the earlier treaty
• May aid reform efforts by ensuring that the more recent treaty prevails	• Only mitigates the adverse consequences arising from coexistence; does not advance effective and comprehensive IIA reform
• While keeping the earlier treaty "alive" (i.e. creating parallelism), clarifies the new treaty's relationship with the earlier one	• Impact dependent on the formulation used in the conflict clause

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Break-out session 4:
The implications of disengaging

10 October 2017, am

Geneva, Switzerland

UNCTAD Policy Tools: Phase 2 of IIA Reform: 10 options for modernizing old-generation treaties (2017)

Withdrawing from multilateral treaties

Jointly interpreting treaty provisions

Amending treaty provisions

Terminating existing old treaties

Replacing "outdated" treaties

Phase 2

10 IIA reform options

Abandoning unratified old treaties

Consolidating the IIA network

Engaging multilaterally

Managing relationships between coexisting treaties

Referencing global standards

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The implications of disengaging

Questions for consideration

1. Which of these reform options have you undertaken, are you considering undertaking, or have you been asked to undertake?

2. What are the pros and cons of each of them?

3. What are lessons learned?

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Overview of reform options: actions and outcomes

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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	• Could be perceived as negatively affecting the country's investment climate
• Is procedurally simple, requiring only a notice to the 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 ISDS claims (during the survival clause period) if a country accepted provisional application pending ratification

Source: © UNCTAD, *WIR17*.

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)	• Could be perceived as worsening the investment climate in the terminating country or countries
• Sends a strong signal to reform-oriented domestic stakeholders and critics of the IIA regime	• Could result in investors of one party no longer being protected in the other party's territory
• Can promote sustainable development-oriented reform, if part of a coordinated, joint replacement strategy	• Might not be instantaneous if a survival clause is triggered (i.e. ISDS exposure remains for the duration of the survival clause period)

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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)	• Could be perceived as negatively affecting the country's investment climate and/or could put the country into an "outsider" position
• May reduce annual expenditures (e.g. if the treaty requires annual contributions)	• Deprives the country of further cooperation with other treaty partners and the opportunity to have a word in the evolution of the agreement
• Can be a second-best solution for countries that would prefer to reform the existing treaty, but cannot do so alone	• 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

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UNCTAD Policy Tools: Phase 2 of IIA Reform: 10 options for modernizing old-generation treaties (2017)

Jointly interpreting treaty provisions

Withdrawing from multilateral treaties

Amending treaty provisions

Terminating existing old treaties

Replacing "outdated" treaties

Phase 2

10 IIA reform options

Abandoning unratified old treaties

Consolidating the IIA network

Engaging multilaterally

Managing relationships between coexisting treaties

Referencing global standards

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Towards a global reform effort designing principles

Questions for consideration

1. Have you undertaken, are you considering undertaking, or have you been asked to engage in the design of principles?

2. What are the pros and cons of each of this reform option?

3. What are lessons learned - what is the way forward?

Overview of reform options: actions and outcomes

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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

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High-level IIA Conference UNCTAD, 2017

Break-out session 6:
Towards a global reform effort – improving dispute settlement

10 October 2017, pm

Geneva, Switzerland

Phase 2
10 IIA reform options

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UNCTAD Policy Tools: Phase 2 of IIA Reform: 10 options for modernizing old-generation treaties (2017)

Withdrawing from multilateral treaties

Jointly interpreting treaty provisions

Amending treaty provisions

Terminating existing old treaties

Replacing "outdated" treaties

Phase 2
10 IIA reform options

Abandoning unratified old treaties

Consolidating the IIA network

Engaging multilaterally

Managing relationships between coexisting treaties

Referencing global standards

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Towards a global reform effort
Improving dispute settlement

Questions for consideration

1. Have you undertaken, are you considering undertaking, or have you been asked to engage multilaterally for the improvement of dispute settlement?

2. What are the pros and cons of each of this reform option?

3. What are lessons learned - what is the way forward?

Overview of reform options: actions and outcomes

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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)	• Is the most challenging reform path as consensus among many countries is hard to achieve
• 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 lead to a situation in which countries with small bargaining power or latecomers find themselves in the role of "rule-takers"
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Source: © UNCTAD, *WIR17*.

High-level IIA Conference UNCTAD, 2017

**Break-out session 7:
Towards a global reform effort –
referencing global standards**

10 October 2017, pm

Geneva, Switzerland

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UNCTAD Policy Tools: Phase 2 of IIA Reform: 10 options for modernizing old-generation treaties (2017)

Phase 2
10 IIA reform options

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- Consolidating the IIA network
- Engaging multilaterally
- Managing relationships between coexisting treaties
- Referencing global standards

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Towards a global reform effort
Referencing global standards

Questions for consideration

1. Have you undertaken, are you considering undertaking, or have you been asked to reference global standards in IIAs?

2. What are the pros and cons of each of this reform option?

3. What are lessons learned - what is the way forward?

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Phase 2
10 IIA reform options

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Global Standards

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

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High-level IIA Conference UNCTAD, 2017

Closing Plenary

11 October 2017, am

Geneva, Switzerland

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Report back

Break-out sessions:

1. Harnessing investment for the SDGs – the IIA dimension

2. Clarifying and modifying treaty content

3. Consolidating the IIA network

4. The implications of disengaging

5. Towards a global reform effort – designing principles

6. Towards a global reform effort – improving dispute settlement

7. Towards a global reform effort – referencing global standards

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UNCTAD Policy Tools: Phase 2 of IIA Reform: 10 options for modernizing old-generation treaties (2017)

Jointly interpreting treaty provisions

Withdrawing from multilateral treaties

Amending treaty provisions

Terminating existing old treaties

Replacing "outdated" treaties

Phase 2
10 IIA reform options

Abandoning unratified old treaties

Consolidating the IIA network

Engaging multilaterally

Managing relationships between coexisting treaties

Referencing global standards

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Closing Plenary

Questions for consideration

1. What are the strategic and systemic challenges in addressing the existing stock of treaties?

2. What are the practical challenges in addressing the existing stock of treaties?

3. What are the possible solutions to address the challenges presented?