UNCTAD Roadmap for IIA Reform
Phase 2

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The universe of IIAs continues to grow: 37 new IIAs were concluded in 2016

Trends in IIAs signed, 1980-2016

Source: ©UNCTAD, WIR17, IIA Navigator.
The rate of new ISDS cases continues unabated:
69 treaty-based cases initiated in 2016
35 in first 7 months of 2017

Trends in known treaty-based ISDS cases, 1987-31 July 2017

Source: ©UNCTAD, ISDS Navigator.
IIA reform: UNCTAD’s Road Map for IIA Reform (2015)

UNCTAD’s Road Map for IIA Reform

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
- Enhancing systemic consistency
- Reforming investment dispute settlement
- Promoting and facilitating investment
- Ensuring responsible investment

4 Levels
- Multilateral
- Regional
- Bilateral
- National

Source: ©UNCTAD, WIR15 & WIR16.
## IIA reform: intensifying and yielding concrete results at the national, bilateral, and regional levels

<table>
<thead>
<tr>
<th></th>
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</thead>
<tbody>
<tr>
<td><strong>Preamble</strong></td>
<td>1.1.2</td>
<td>8%</td>
<td>56%</td>
</tr>
<tr>
<td>Refer to the protection of health and safety, labour rights, environment or sustainable development</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Definition of covered investment</strong></td>
<td>2.1.1</td>
<td>4%</td>
<td>39%</td>
</tr>
<tr>
<td>Expressly exclude portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Definition of covered investor</strong></td>
<td>2.2.2</td>
<td>5%</td>
<td>58%</td>
</tr>
<tr>
<td>Include “denial of benefits” clause</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Most-favoured-nation treatment</strong></td>
<td>4.2.2</td>
<td>2%</td>
<td>45%</td>
</tr>
<tr>
<td>Specify that such treatment is not applicable to other IIA’s ISDS provisions</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Fair and equitable treatment</strong></td>
<td>4.3.1</td>
<td>1%</td>
<td>29%</td>
</tr>
<tr>
<td>Refer to minimum standard of treatment under customary international law</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Indirect expropriation</strong></td>
<td>4.5.1</td>
<td>5%</td>
<td>42%</td>
</tr>
<tr>
<td>Clarify what does and does not constitute an indirect expropriation</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Free transfer of funds</strong></td>
<td>4.7.2</td>
<td>18%</td>
<td>74%</td>
</tr>
<tr>
<td>Include exceptions for balance-of-payments difficulties and/or enforcement of national laws</td>
<td>4.7.3</td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Public policy exceptions</strong></td>
<td>5.1.1</td>
<td>7%</td>
<td>43%</td>
</tr>
<tr>
<td>Include general exceptions, e.g. for the protection of human, animal or plant life, or health; or the conservation of exhaustible natural resources</td>
<td></td>
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<td></td>
</tr>
</tbody>
</table>

*Source: ©UNCTAD, WIR 2017.*
Almost all ISDS cases are based on old treaties

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

- New: 5
  - 33 (2010–2016)
- Old: 4
  - 8 (1990–1999)
  - 10 (1980–1989)
  - 2 (1979–1979)

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

- New: 11
  - 77 (2010–2016)
- Old: 2
  - 10 (2000–2009)

90% of cases based on pre-2000 treaties

Source: ©UNCTAD, WIR17.
UNCTAD Policy Tools (2017): Phase 2 of IIA Reform

10 options for modernizing old-generation treaties

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

Source: ©UNCTAD, WIR17.
## Overview of reform options: actions and outcomes

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

*Source: ©UNCTAD, WIR17.*
THANK YOU!

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