



# INTERNATIONAL INVESTMENT AGREEMENTS **REFORM ACCELERATOR**

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## WHAT IS THE INTERNATIONAL INVESTMENT AGREEMENTS REFORM ACCELERATOR?

The IIA Reform Accelerator aims to expedite the modernization of the existing stock of old-generation IIAs. It operationalizes the idea of gradual innovation by focusing on the reform of the substantive provisions of IIAs in selected key areas. The Accelerator focuses on eight IIA provisions that are most in need of reform, and that have seen a clear reform trend in line with the sustainable development goals (SDGs) and towards safeguarding the State's right to regulate in IIAs. For each provision, the IIA Reform Accelerator identifies sustainable development-oriented policy options (building on UNCTAD's Investment Policy Framework for Sustainable Development 2015) and proposes ready-to-use model language that implements these options. The Accelerator further illustrates how these options have been used in recent IIAs and model BITs. Explanatory comments accompany the model formulations to highlight their objective, provide background and explain possibilities for combining various reform options.

The reform-oriented formulations can be directly used at the national, bilateral, regional and multilateral level with a view to: (i) interpreting, (ii) amending or (iii) replacing old-generation treaties. They can also be adapted and contribute to the ongoing collective peer learning by IIA negotiators.

### 1. The need to accelerate the reform of old-generation IIAs

Reform of the existing stock of 2,500 old-generation treaties in force today has not yet taken off on a large scale, while the number of known treaty-based investor-State dispute settlement (ISDS) cases continues to grow. The vast majority of these cases are based on old-generation treaties: all ISDS cases initiated in 2019 and 99 per cent of the total number of known cases – virtually all cases – have been filed pursuant to treaties concluded before 2012,<sup>1</sup> which typically feature broad and vague formulations and include few exceptions or safeguards (*WIR17*). This gives rise to the need to devise policy means that help accelerate the reform of old-generation treaties and thereby reduce the risk of ISDS cases against State measures in pursuit of legitimate public policy objectives. This is a critical complement to the efforts of reforming the ISDS system that are ongoing in ICSID, UNICTRAL and other fora (UNCTAD, 2019).

The importance of reforming the stock of old-generation treaties is further highlighted by the COVID-19 pandemic. IIAs can come into play in relation to the policy responses taken by governments to address the COVID-19 pandemic and its economic fallout as these government measures also affect the operations of foreign investors. IIAs provide legal stability and predictability to foreign investors, and as such impact on contracting parties' regulatory powers to pursue the public interest. This can place constraints on government measures (*WIR15*). State measures to limit the adverse economic impact of the pandemic are manifold and vary from one country to another (UNCTAD, 2020). Although these measures are taken for the protection of the public interest and to

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<sup>1</sup> Old-generation treaties are defined as those concluded between 1959 and 2011, prior to the launch of UNCTAD's Investment Policy Framework for Sustainable Development in 2012 (*WIR12*). Some pre-2012 treaties already contain elements of new-generation treaties. Likewise, some treaties that were negotiated and concluded after 2012 fail to incorporate reform elements.

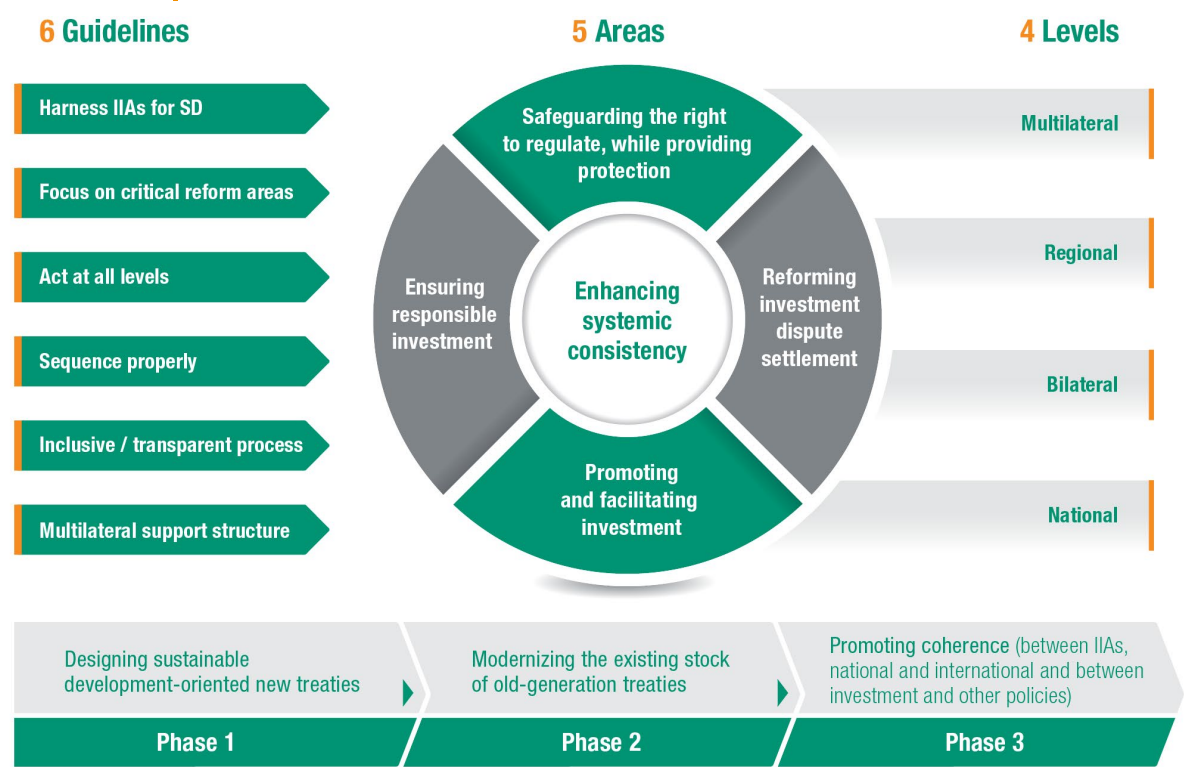
mitigate the negative impact of the pandemic on the economy, some of them could, depending on the way they are implemented, expose governments to arbitration proceedings initiated by foreign investors under IIAs. This is especially true for those IIAs that lack the necessary exceptions and refinements to safeguard policy space.

IIAs were not designed to undermine the legitimate regulatory function of the State, especially in emergency situations. However, they were concluded, for the most part, during a different era with less consideration for today’s global challenges relating to public health, the environment and sustainable development goals more broadly. IIAs concluded 20 to 60 years ago do not reflect today’s global challenges. Arbitral tribunals have adopted expansive interpretations of the broad provisions found in those IIAs. At times, this reduces the capacity of host States to regulate in the public interest. Reform of the existing stock of IIAs allows States to better respond to challenges in areas such as public health, economic stability and the environment. Balanced treaty reform, as advocated by UNCTAD, reduces the risk of expensive and lengthy ISDS proceedings that challenge *legitimate* government measures. At the same time, it preserves the protective value of IIAs. Although reforming existing IIAs is a continuous process that requires sustained efforts, it is important to act now by including this issue in the list of priorities of the post-COVID-19 crisis policy agenda.

So far, countries have implemented treaty reform of their existing stock of old IIAs almost exclusively on a treaty-by-treaty basis. Developed, developing and transition economies alike face numerous challenges in addressing their stock of old-generation treaties. At UNCTAD’s Annual IIA Conferences and regional seminars, treaty negotiators and policymakers regularly provide insights on IIA reform progress and potential impediments to reform, highlighting the lack of strong internal capacities, unclear policy positions on IIAs and ISDS reform, lack of buy-in at the highest levels and failure to identify matching partners for reform processes, among others.

In 2018, UNCTAD introduced its Road Map for IIA Reform, covering in a single package, all key aspects across IIA Reform (UNCTAD, 2018; figure 1). It recommended to focus on three phases: Moving to a new generation of IIAs (“Phase 1”), modernizing the existing stock of IIAs (“Phase 2”) and improving investment policy coherence and synergies (“Phase 3”). In line with this approach and focusing on expediting the modernization of the existing stock of IIAs, UNCTAD now introduces the “IIA Reform Accelerator”.

Figure 1. UNCTAD’s Road Map for IIA Reform



Source: UNCTAD, 2018.



## 2. Objective and design criteria of the IIA Reform Accelerator

### Objective: a tool for coordination and consensus-building

The IIA Reform Accelerator is meant to help countries overcome the current challenges in IIA reform by suggesting concrete options to reform central IIA provisions. In doing so, the Accelerator provides a tool for coordination, focused discussion and consensus-building on joint reform actions between multiple countries. It aims to help level the playing field for policymakers and treaty negotiators by making the latest “IIA reform knowledge” and recent treaty practice more readily accessible. The IIA Reform Accelerator can be used with respect to multiple reform options, three of which are highlighted below. This is meant to result in a greater level of coherence in reform approaches adopted by individual countries.

The IIA Reform Accelerator responds to the need for change of substantive aspects of the IIA regime. It fills a vacuum by complementing other ongoing efforts, including those aimed at reforming the investment dispute settlement system.

### Design criteria: the IIA Accelerator’s scope and guiding elements

UNCTAD’s IIA Reform Accelerator is underpinned by five elements, guiding and enabling change in the IIA regime:

- (1) An orientation towards sustainable development;
- (2) Principles and options developed in UNCTAD’s longstanding IIA reform policy tools;
- (3) Flexibility to “adapt and adopt” in line with countries’ specific needs (as concerns the options, depth, sequence, pace, and partners for reform);
- (4) Collective peer-learning;
- (5) Capacity-building.

The Accelerator builds on the Investment Policy Framework for Sustainable Development (UNCTAD, 2015) and the Reform Package for the International Investment Regime (UNCTAD, 2018). It reflects UNCTAD’s extensive experience in providing technical assistance and capacity-building to its member States on substantive and procedural questions arising under their IIAs. The IIA Reform Accelerator combines incremental IIA reform with a multilateral holistic approach based on UNCTAD’s experience and expertise. This includes multilateral coordination and cooperation where useful and desired.

As a first step, UNCTAD’s IIA Reform Accelerator focuses on eight key IIA provisions (treaty scope and substance):

- (1) Definition of investment
- (2) Definition of investor
- (3) National treatment (NT)
- (4) Most-favoured-nation (MFN) treatment
- (5) Fair and equitable treatment (FET)
- (6) Full protection and security (FPS)
- (7) Indirect expropriation
- (8) Public policy exceptions

The provisions included in the IIA Accelerator have been chosen based on insights from UNCTAD’s Annual IIA Conferences, capacity-building activities and policy research. The substantive provisions identified here include those that are most frequently invoked in ISDS claims, including to challenge genuine public interest measures such as those for the protection of public health or the environment. Further, provisions have been included that have a significant impact on sustainable development or affect the host State’s ability to regulate in the interest of sustainable development. These eight provisions should, therefore, be prioritized as being most in need of reform. The Accelerator focuses on the post-establishment phase as old-generation BITs rarely cover the pre-establishment stage.

IIA reform is a much wider endeavour than the eight clauses this version of the Accelerator covers. The IIA Reform Accelerator is intended as a starting point and a living document that will be regularly updated and further developed, including through the addition of further treaty provisions. Other treaty provisions, which are not addressed here – such as umbrella clauses or transfer of funds provisions – play an important role in

rebalancing the IIA regime (*WIR15*) as do new, emerging IIA clauses such as those relating to investor obligations and responsibilities or investment promotion and facilitation (*WIR19*). These provisions will be covered in a subsequent version of the IIA Reform Accelerator. The Accelerator does not cover mechanisms for settling investment disputes included in old-generation IIAs, the reform of which is currently discussed in other fora, including UNCITRAL and ICSID.

For each of the eight provisions, the Accelerator offers a menu of sustainable development-friendly options. These options have been identified based on UNCTAD's Investment Policy Framework for Sustainable Development, recent treaty practice (as demonstrated by the tables of reform-oriented provisions in IIAs concluded in recent years, see Ch. III of *WIR19*, *WIR18*, *WIR17*, etc.), and lessons learned from UNCTAD's extensive technical assistance and capacity-building experience in developing countries.

For each option, the Accelerator offers ready-to-use model language that implements the reform approach. This language is based on a sample of treaties and model BITs that serve to illustrate the use of the respective reform option and have informed the model language. Factors such as geographical representation of treaty parties and their development status have been taken into account in selecting the sample. The reform options and model formulations are accompanied by explanatory comments and annotations that highlight their objective and the interplay between different options.

As the illustrative language of reform-oriented formulations is based on actual provisions used in recent treaties and model treaties, it aims to show the results of peer learning by countries' IIA negotiators beyond individual negotiation outcomes and sets the stage for accelerated reform of old-generation treaties. The Accelerator translates UNCTAD's Investment Policy Framework reform options into practical treaty language that can be adopted and/or adapted by IIA negotiators. Usage of the Accelerator will add to the ongoing collective peer learning process, including by further finetuning provisions and adding other key provisions to its core.

The initial outline of the IIA Reform Accelerator benefited from peer reviews by experts and stakeholders from the investment and development community.

### 3. Operationalizing the IIA Reform Accelerator

Operationalizing the IIA Reform Accelerator could take different forms. Three potential options for bilateral and multilateral engagement are outlined below. The Accelerator can be the basis for joint interpretation, amendment, or replacement of old treaties. The Accelerator leaves it to countries to choose which form to use when updating their old-generation agreements. It can help foster a certain degree of coherence in IIA reform by enhancing a common understanding of the main challenges and concerns of specific IIA provisions. In reforming their treaty network, countries may also decide to rely on other reform tools and mechanisms, beyond those proposed here. This decision should be based on the specific circumstances and strategic considerations of each country.

UNCTAD's expertise and convening power on IIA issues could guide and support country-driven substantive reform of the IIA regime. UNCTAD could also act as a repository for related information, statements and notifications by countries when they use the IIA Reform Accelerator in their treaty reform efforts.

#### Ensuring coherence when using the IIA Reform Accelerator

Processes using Accelerator reform options should consider broader coherence issues. This includes the need to ensure coherence within the treaty in question (e.g. the interaction between different provisions and reform options), coherence in the overall IIA reform effort of a country, and coherence between reform efforts for international and national investment policies. Ensuring coherence will help to avoid unintended consequences.

With respect to coherence within the treaty in question, it is important to bear in mind that treaty obligations may arise from the interplay of provisions. The extent to which a State's right to regulate in the public interest is restricted may be directly affected by treaty provisions relating to the scope of the IIA or definitions of concepts such as "investment" and "investor". General exceptions or denial of benefits clauses are equally important in this respect as they may provide a counterweight to otherwise broad treaty coverage. Similarly, substantive provisions interact. For example, a restrictive approach to indirect expropriation may be undermined by an overly broad fair and equitable treatment (FET) clause.

Interactions also occur between different reform options for each treaty provision proposed by the Accelerator. Some reform options can be used on their own, others can or should be combined, or are mutually exclusive. For example, States could specify in a stand-alone fashion that full protection and security (FPS) refers only to “physical” or police protection. An enterprise-based definition of investment should be used together with a list of excluded assets. Reducing the FET clause to a political commitment cannot be combined with a clarification of the FET standard.

Secondly, coherence in the overall reform efforts can help reduce opportunities for treaty shopping and mitigate the risk that reform achievements in new or amended treaties are undermined by recourse to unreformed ones (UNCTAD, 2018). However, this does not mean that reform processes – often gradual or incremental – should be deferred in the absence of a coherent solution to all existing treaties. The need for reform generally outweighs the desirability of a coherent but unreformed treaty network. UNCTAD’s 10 Policy Tools for Phase 2 of IIA Reform (WIR17; UNCTAD, 2018) address the challenges countries face when managing their treaty networks, such as overlapping commitments with the same treaty partners and the lack of coherence in treaties signed with different partners.

Thirdly, coherence between the international and national policy reform efforts is important to maximize potential synergies between a country’s IIA network and the national legal framework for investment (WIR17). This does not necessarily require uniform language and divergence between the two levels can be in line with what each framework aims to achieve. However, incoherence can arise, for example, between clearly defined protection provisions in one or several IIAs and broad clauses in a national investment law. Similarly, broadly drafted provisions in “old” IIAs risk cancelling out reform efforts in new, more modern investment laws (WIR18).

It is important that policymakers in charge of national and international investment policies do not operate in silos and instead create outcomes that are mutually supportive. With respect to Phase 3 of IIA Reform (“improving investment policy coherence and synergies”), UNCTAD recommends (i) strengthening the cooperation between policymakers, (ii) improving the interaction between the national and international investment regimes, and (iii) ensuring cross-fertilization between the two regimes so that lessons learned in one realm of policymaking benefit the other (WIR 2018). UNCTAD will soon launch its Practitioner’s Guide to Drafting Investment Laws. This Guide supports the adoption of sustainable development-oriented national investment laws that are in line with countries’ policy preferences and create synergies with reform efforts relating to their IIA networks.

## How the Accelerator can expedite IIA Reform

### Choosing a reform action: interpretation, amendment or replacement

Various options arise for the Accelerator’s use: as the basis for joint interpretation, amendment, or replacement of old treaty provisions. This engagement could focus on one or several of the substantive provisions. As such, the Accelerator can be used with flexibility when sequencing and pacing treaty modernization. However, clarification of key provisions is only one way of addressing the challenges arising out of old-generation IIAs. Countries may choose to pursue other policy tools, each with their pros and cons (e.g. terminating old treaties, WIR17).

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