



IIA ISSUES NOTE

INTERNATIONAL INVESTMENT AGREEMENTS



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

H I G H L I G H T S

- International investment agreement (IIA) reform has made significant progress. Consolidating phase 1 of IIA reform, most new treaties follow UNCTAD's Road Map for IIA Reform (*WIR16*), which sets out five action areas: safeguarding the right to regulate, while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency.
- It is time to move to phase 2 of IIA reform: modernizing the existing stock of old-generation treaties. Old treaties abound: more than 2,500 IIAs in force today (95 per cent of all treaties in force) were concluded before 2010. Old treaties "bite": as of end-2016, virtually all known investor-State dispute settlement (ISDS) cases were based on those treaties. And old treaties perpetuate inconsistencies: their continued existence creates overlaps and fragmentation in treaty relationships and poses interaction challenges.
- UNCTAD presents and analyses the pros and cons of 10 policy options for phase 2 of IIA reform: (1) jointly interpreting treaty provisions; (2) amending treaty provisions; (3) replacing "outdated" treaties; (4) consolidating the IIA network; (5) managing relationships between coexisting treaties; (6) referencing global standards; (7) engaging multilaterally; (8) abandoning unratified old treaties; (9) terminating existing old treaties; and (10) withdrawing from multilateral treaties. Countries can adapt and adopt these options to pursue the reforms set out in the Road Map in line with their policy priorities.
- Determining which of these 10 policy options is right for a country in a particular situation requires a careful and facts-based cost-benefit analysis that considers broader challenges; and should ultimately reflect a country's international investment policy direction and national development strategy. Moreover, policymakers have to consider the compound effect of multiple options, which could result in a treaty regime that is largely deprived of its traditional investment protection rationale.
- Comprehensive reform of the IIA regime would benefit from intensified multilateral backstopping. UNCTAD, through its three pillars of work – research and policy analysis, technical assistance and intergovernmental consensus-building – can play a key role, as the United Nations' focal point for international investment and the international forum for high-level and inclusive discussions on today's multilayered and multifaceted IIA regime.
- Recent developments in the international investment regime, a stocktaking of IIA reform and phase 2 of IIA reform are discussed in UNCTAD's World Investment Report 2017 (chapter III).

1. The next phase of IIA reform

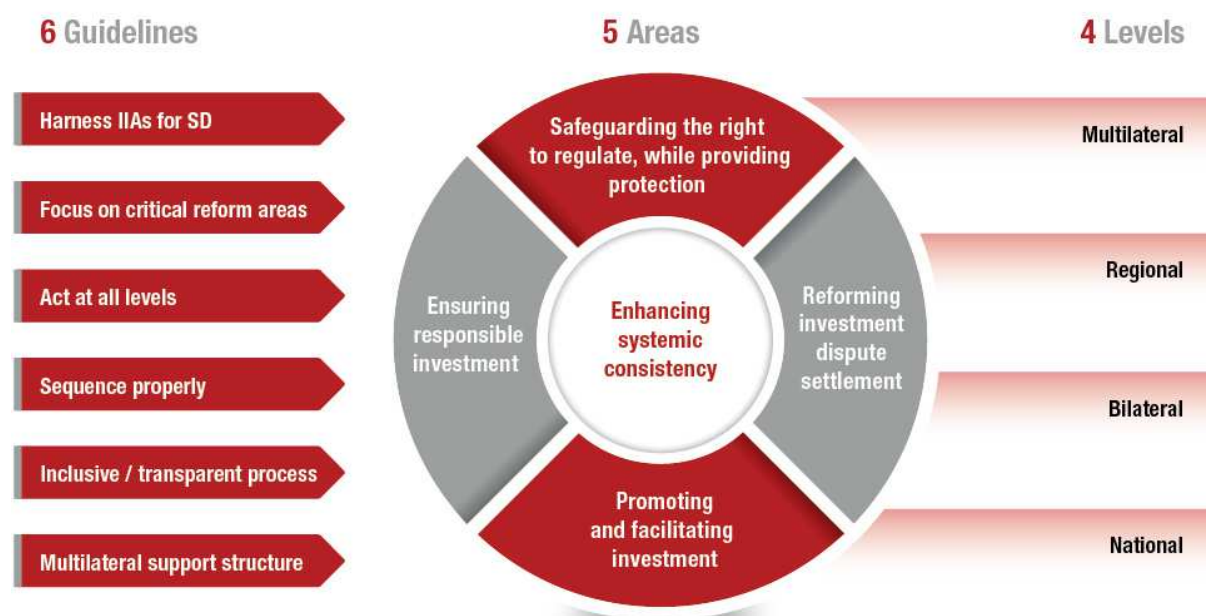
Sustainable development-oriented IIA reform has entered the mainstream of international investment policymaking (*WIR15*, *WIR16*). During the first phase of reform, countries have built consensus on the need for reform, identified reform areas and approaches, reviewed their IIA networks, developed new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

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

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

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

Figure 1. UNCTAD's Road Map for IIA Reform



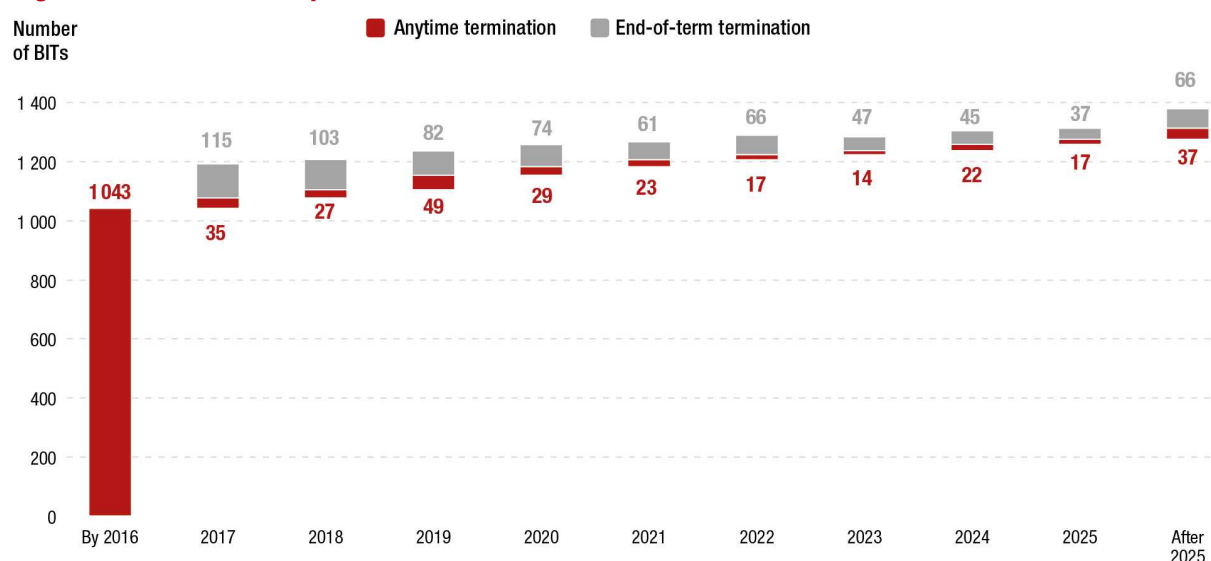
Source: ©UNCTAD, *WIR16*.

a. Old treaties abound

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

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

Figure 2. BITs in force “up for unilateral termination”



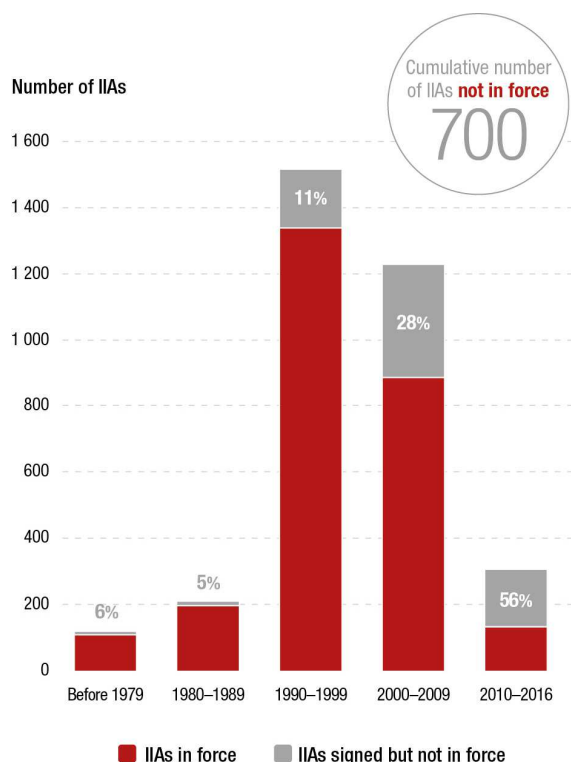
Source: ©UNCTAD.

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

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

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

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



Source: ©UNCTAD, IIA Navigator.

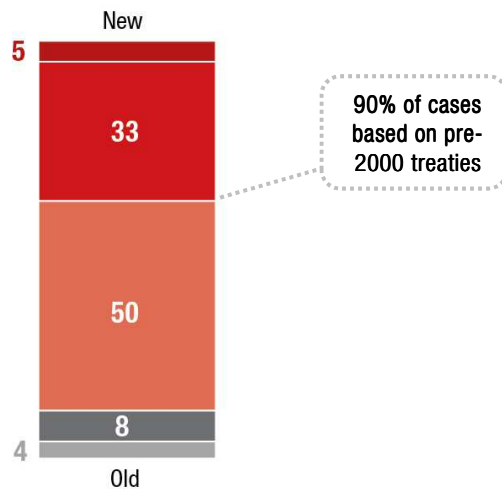
b. Old treaties “bite”

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

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

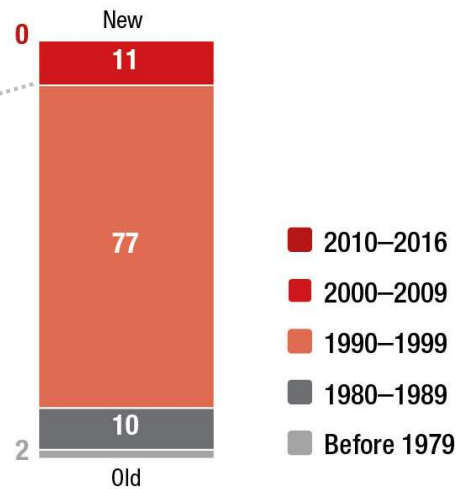
In recent years, many countries (developing and developed countries alike) have experienced first-hand that IIAs are not “harmless” political declarations, but do “bite”. Broad and vague formulations of IIA provisions have enabled investors to challenge core domestic policy decisions – for instance,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

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



Source: ©UNCTAD, IIA Navigator.

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



Source: ©UNCTAD, ISDS Navigator.

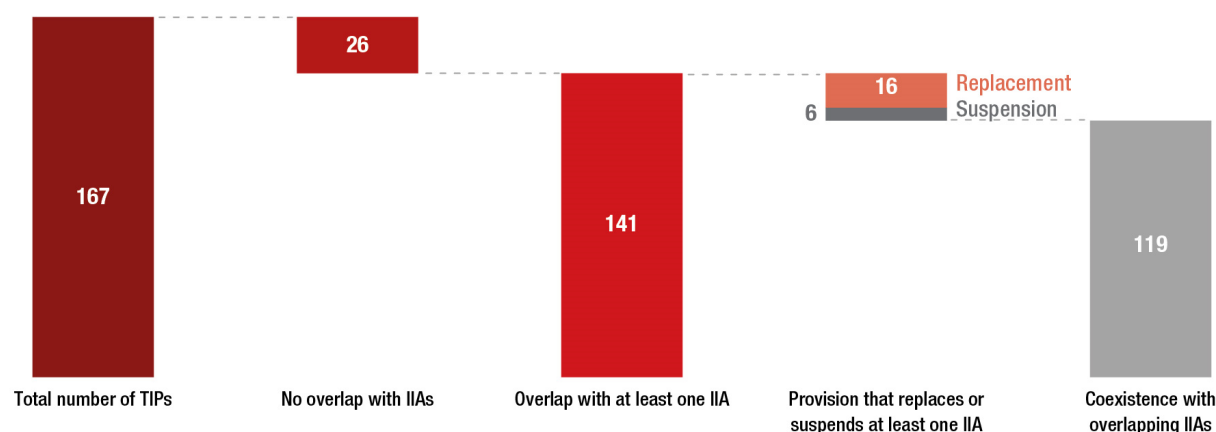
As a result, there is today a broadly shared view that treaty provisions need to be clearer and more detailed, drafted on the basis of thorough legal analysis of their actual and potential implications, and that the current system of settling investment disputes needs to be reformed (*WIR15*). Recent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

c. Old treaties perpetuate inconsistencies

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

- The existing global treaty network only covers about one fifth of possible country relationships (calculated on the basis of the IIA network as it stood at the end of 2010, *WIR11*, figure III.4).
- Recent treaty making has resulted in increasing treaty overlaps. This is particularly pronounced in the context of megaregionals, but also in the case of FTAs. Among a sample of 167 treaties with investment provisions (TIPs – covering treaties with BIT-type substantive investment provisions and/or pre-establishment provisions), at least 119 overlap with earlier IIAs (concluded between all or some of the parties), which continue to exist in parallel to the new ones (figure 6). Over two-thirds of the sampled TIPs thus potentially exacerbate the IIA regime's fragmentation. Less than one-third either create new, previously uncovered treaty relationships or replace or suspend pre-existing, overlapping IIAs.
- Most new treaties display significant differences to earlier generation models (*WIR17*, chapter III). Sustainable development-oriented clauses that have become part of today's mainstream treaty practice (e.g. clarifications to treaty scope and substantive obligations as well as safeguards) are rarely found in old, first-generation IIAs. New, “reformed” IIAs with reformed treaty clauses thus often co-exist with old, “unreformed” IIAs containing unreformed treaty clauses.

Figure 6. Relationships between IIAs (Number of TIPs)



Source: ©UNCTAD, IIA Navigator.

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

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

Box 1. Synchronizing regional IIA reform efforts in Africa

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

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

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

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

Source: ©UNCTAD.

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

2. Ten options for phase 2 of IIA reform

There are at least 10 options available for countries that wish to change existing treaties to bring them into conformity with new policy objectives and priorities and to address the challenges arising from the fragmentation of the IIA regime (figure 7, table 1). The options are not mutually exclusive and can be used in a complementary manner, especially by countries that have extensive IIA networks.

Figure 7. Overview of phase 2 IIA reform options



Source: ©UNCTAD.

The 10 options differ in several aspects, as they encompass actions that are more technical (e.g. interpreting or amending treaty provisions) or rather political (e.g. engaging multilaterally), focus on procedure (e.g. amending or replacing treaties) or also on substance (e.g. referencing international standards), or imply continuous engagement with the IIA regime (e.g. amending, replacing, engaging multilaterally) or “exit” from it (e.g. termination without replacement, withdrawing from multilateral treaties). They represent modalities for introducing change to the IIA regime, rather than for designing treaty content.¹

Determining whether a reform option is “right” for a country in a particular situation requires a careful and facts-based cost-benefit analysis, while addressing a number of broader challenges. Strategic challenges include producing a holistic and “balanced” result, rather than “overshooting” on reform and depriving the IIA regime of its purpose of protecting and promoting investment. Systemic challenges arise from gaps, overlaps and fragmentation that create coherence and consistency problems. Coordination challenges require prioritizing reform actions, finding the right treaty partners to implement them and ensuring coherence between reform efforts at different levels of policymaking. Capacity challenges make it hard for smaller countries, particularly LDCs, to address the deficiencies of first-generation IIAs.

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

Choices must be made for identifying the best possible combination of the 10 policy options.² The chosen combination of options should ultimately reflect a country's international investment policy direction in line with its national development strategy. Moreover, when implementing IIA reform, policymakers have to consider the compound effect of options.

Some combinations of reform options may result in a treaty regime that is largely deprived of its traditional investment protection rationale or may result in a complete exit from the IIA regime. Reform efforts, particularly comprehensive ones, should harness the benefits that can be obtained from the rule of law and respond to investors' expectations of predictability, stability and transparency in policymaking.

Table 1. Overview of reform options: actions and outcomes

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

Source: ©UNCTAD.

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

When choosing among reform options, policymakers should also consider the attendant challenges, both legal and practical. Among the legal challenges, three stand out as being particularly pronounced: the most-favoured nation (MFN) clause, the survival clause and the management of transitions between old and new treaties. Each

预览已结束，完整报告链接和二维码如下：

https://www.yunbaogao.cn/report/index/report?reportId=5_6783

