

Synergies between IIAs and the National Legal Framework for Investment

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Outline

- **UNCTAD's Reform Package for the International Investment Regime**
 - **Covering 3 phases of sustainable development-oriented IIA reform**
- **Trends in IIAs and ISDS**
 - **Documenting the progress in SD-oriented IIA reform**
- **Phase 3 of IIA Reform**
 - **Going beyond IIAs**



**UNCTAD's Reform Package for the
International Investment Regime**
**Covering 3 Phases of SD-oriented IIA
Reform**

UNCTAD's Reform Package for the International Investment Regime, soon available in consolidated form

- **Phase 1**

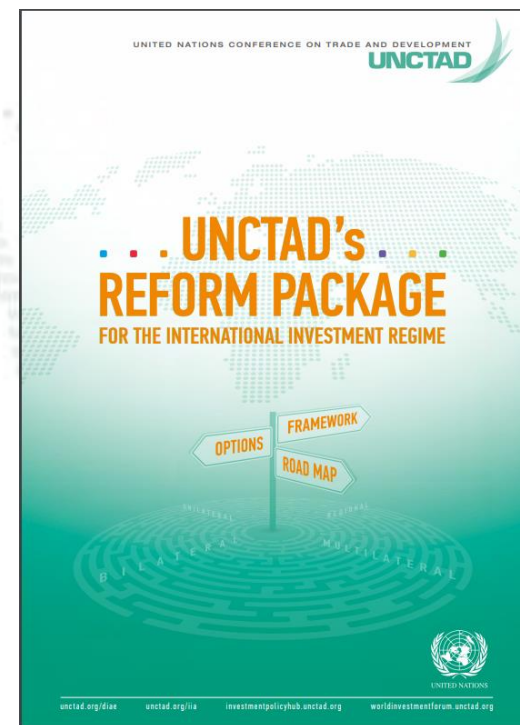
- More than 100 policy options for treaty clauses addressing the five priority areas for sustainable development-oriented treaty making

- **Phase 2**

- 10 reform mechanisms that countries can use to modernize existing old-generation treaties

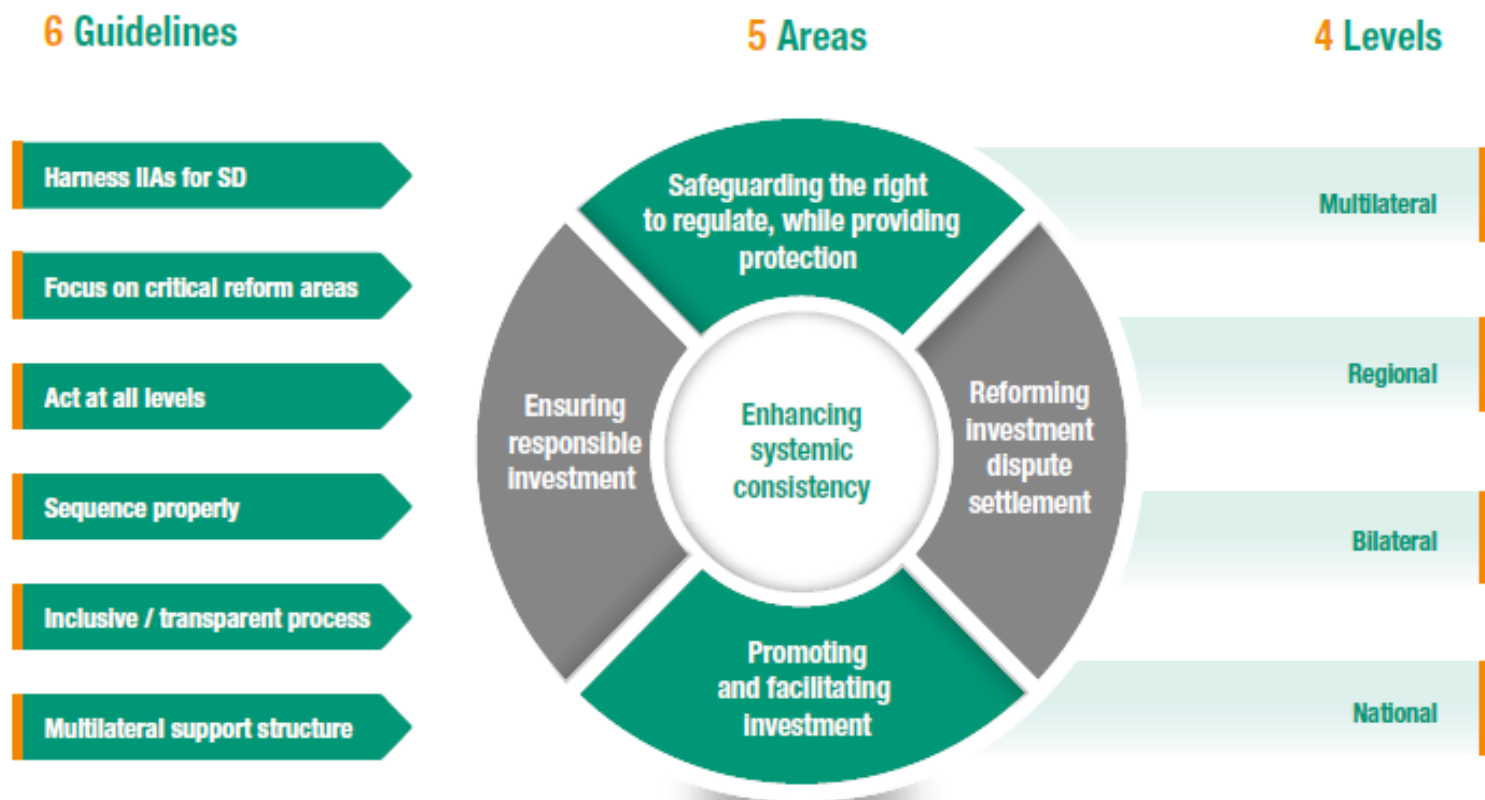
- **Phase 3**

- Policy guidance for 3 prongs of action towards ensuring overall investment policy coherence for sustainable development



Phase 1

UNCTAD's Road Map for IIA Reform (2015)



Source: © UNCTAD, WIR16.

Phase 2

UNCTAD's 10 Options for modernizing the existing stock of old-generation IIAs (2017)



Source: © UNCTAD, WIR18.

Phase 3

Enhancing overall investment policy coherence and synergies (2018)

3 dimensions

1. Ensuring internal consistency within the country's IIA network
2. Maximizing synergies between IIAs and the national legal framework for domestic and foreign investment
3. Managing the interaction between IIAs and other bodies of international law that also touch upon investment

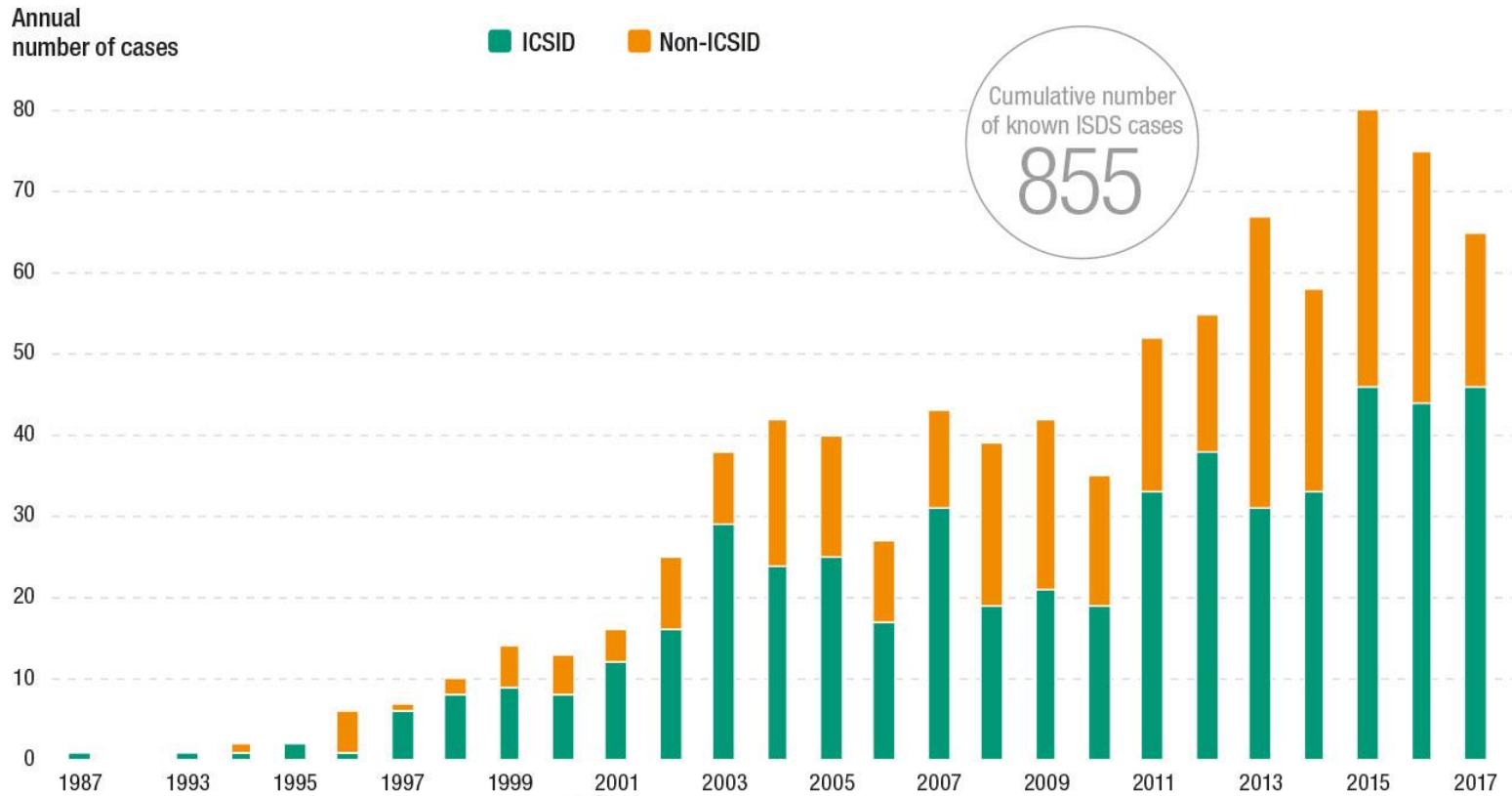


Trends in IIAs and ISDS

Documenting Progress in SD-oriented IIA Reform

The rate of new treaty-based ISDS cases continues unabated

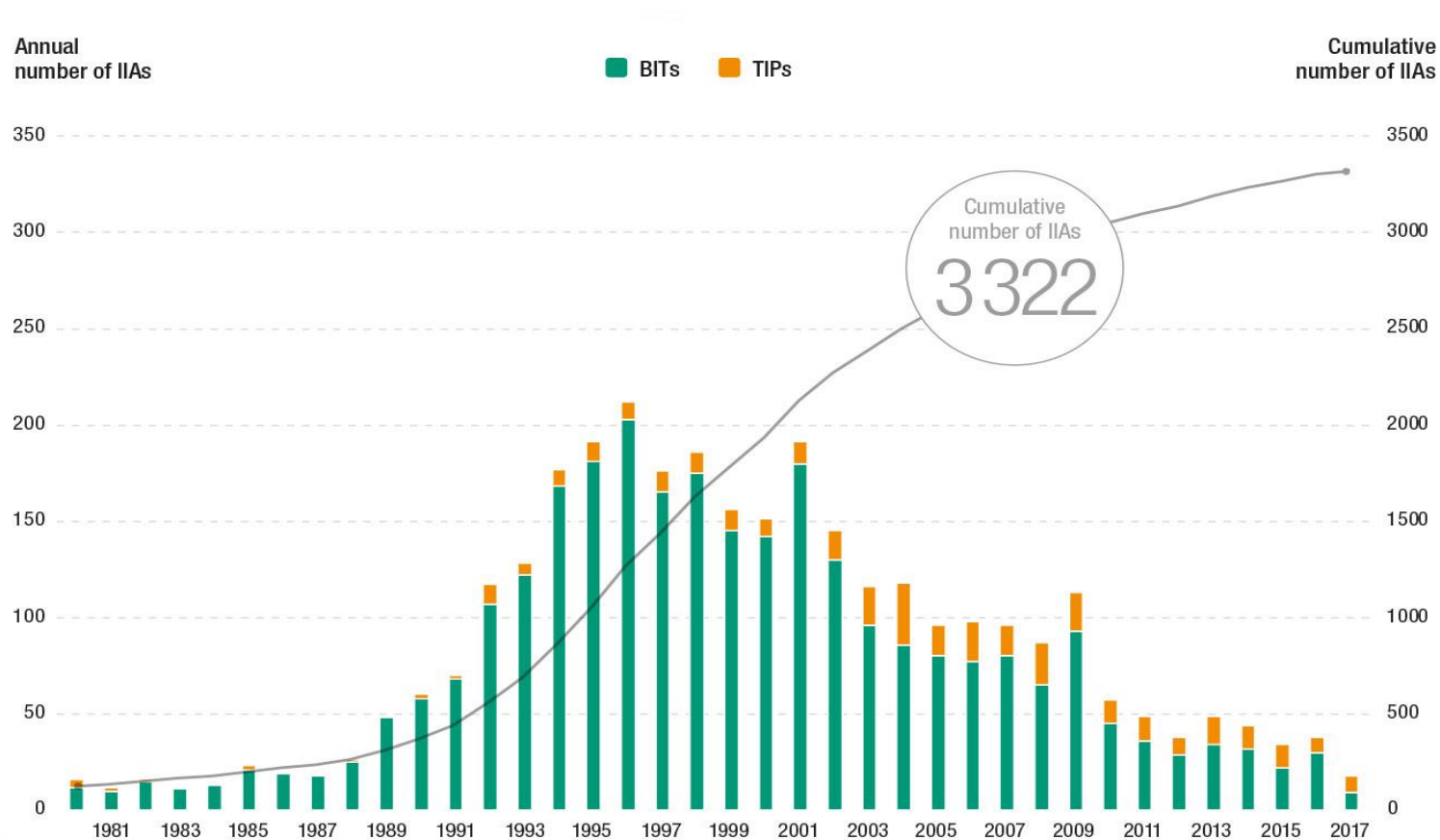
Trends in known treaty-based ISDS cases, 1987-2017



Source: ©UNCTAD, WIR18, ISDS Navigator.

In 2017 for the first time more treaty terminations than new conclusions

Trends in IIAs signed, 1987 - 2017

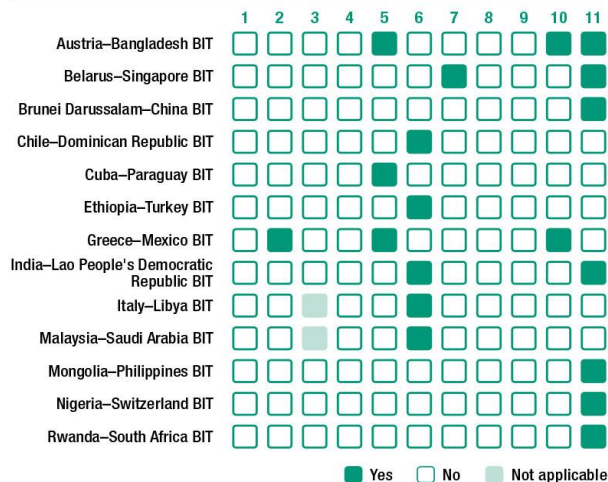


Source: ©UNCTAD, WIR18, IIA Navigator.

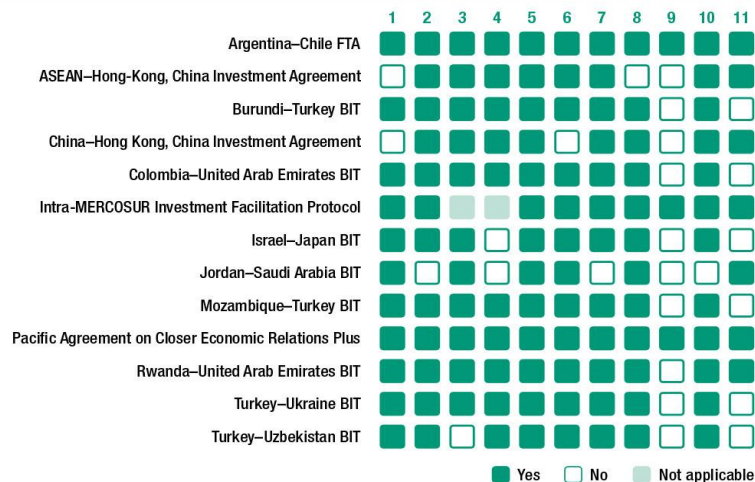
IIA reform is happening (Phase 1)

Reform-oriented provisions in IIAs concluded in 2000 compared to 2017

2000



2017



The scope and depth of commitments in each provision varies from one IIA to another.

Selected aspects of IIAs

- References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble
- Refined definition of investment (e.g. reference to characteristics of investment; exclusion of portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts)
- Circumscribed fair and equitable treatment (with reference to customary international law (CIL), equated to the minimum standard of treatment of aliens under CIL or clarified with a list of State obligations)
- Clarification of what does and does not constitute an indirect expropriation
- Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws

- Omission of the so-called “umbrella” clause
- General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources
- Explicit recognition that parties should not relax health, safety or environmental standards to attract investment
- Promotion of corporate and social responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble
- Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, omitting an ISDS mechanism)
- Specific proactive provisions on investment promotion and/or facilitation

Source: ©UNCTAD, WIR18.

IIA reform is happening, also in dispute settlement clauses (Phase 1)

BITs signed between 1959-2011 compared to 2012-2015

Treaty provisions Selected ISDS options	Earlier BITs (1959– 2011) (1,873)	Recent BITs (2012–2015) (53)
Limiting treaty provisions subject to ISDS or excluding policy areas from ISDS	8%	34%
Limiting time period to submit claims	5%	45%
No ISDS mechanism	4%	11%

Source: ©UNCTAD.

Note: Data derived from UNCTAD's IIA Mapping Project.

IIA reform is happening (Phase 2)

Figure III.10. Selected Phase 2 reform actions: facts and figures

27  Outdated IIAs replaced since 2012

100  Outdated IIAs terminated since 2012^a

243  Total IIAs terminated by March 2018^b

480  IIAs unratified for over 10 years^c

UNCTAD's High-level Annual IIA Conference, 9-11 October 2017

More than 300 experts, including high-level IIA negotiators, representatives from intergovernmental organizations, civil society, academia and the private sector convened in Geneva, Palais des Nations.



Source: ©UNCTAD, WIR18.



Phase 3 of IIA Reform

Going beyond IIAs

Improving investment policy coherence and synergies

Phase 3 of IIA Reform aims at enhancing investment policy coherence and synergies, a challenge that is also identified as the fifth priority area for IIA reform:

3 dimensions of IIA reform

Dimension 1: Ensuring internal consistency within the country's IIA network

Dimension 2: Maximizing synergies between IIAs and the national legal framework for domestic and foreign investment

Dimension 3: Managing the interaction between IIAs and other bodies of international law that also touch upon investment

Two issues to consider

Policy coherence does not necessarily require uniform legal language

- Rather, mutually supportive policies allow countries the flexibility to decide where on the scale between consistency and divergence individual policy interactions should be placed

Achieving a satisfactory level of investment policy coherence is not instantaneous

- A country's shift towards sustainable development-oriented investment policymaking will almost always produce a temporary phase of inconsistency

Dimension 2 (of the 3rd Phase) of IIA Reform

IIAs and national legal policy frameworks for investment: structural and contextual differences

Differences	IIAs	National legal framework
Context and nature	<ul style="list-style-type: none"> Consist of BITs and TIPs, considered the primary international instruments governing foreign investment 	<ul style="list-style-type: none"> Consists of a broad system of investment-related laws, regulations and policies May include a national investment law as an important element of the investment policy framework
Purpose and scope	<ul style="list-style-type: none"> Offer (substantive and procedural) protections to foreign investors of a particular home country, which may go beyond what is available at the domestic level 	<ul style="list-style-type: none"> Covers foreign investors from any country; may also cover domestic investors May offer protection, but can also include other elements, such as promotion, facilitation, admission, liberalization or regulation
Process of development	<ul style="list-style-type: none"> Adopted as a result of a negotiation process at the international level, which typically involves bargaining power 	<ul style="list-style-type: none"> Adopted relatively autonomously by a country and dependent on internal political and legislative processes
SDG-oriented evolution over time	<ul style="list-style-type: none"> Subject to global debate on sustainable development-oriented IIA reform Exhibits reform approaches to IIAs by many States (based on UNCTAD Reform Package) 	<ul style="list-style-type: none"> Some elements (e.g. environmental laws) at the core of SDG-oriented policy reform Other elements (e.g. national investment laws) less exposed to SDG discourse

Source: ©UNCTAD, WIR18.

Dimension 2 (of the 3rd Phase) of IIA Reform

Challenges arising from the interaction between IIAs and the national legal framework for investment

- Policymakers in charge of national and international investment policies might be operating in silos and **create outcomes that are not mutually supportive or conflicting**
- **Incoherence** (e.g. between a clearly defined FET clause in one or several IIAs and a broad FET clause in an investment law) may have the **effect of rendering IIA reform ineffective**. Similarly, broadly drafted provisions in “old” IIAs risk cancelling out reform efforts in new, more modern investment laws
- **Incoherence** between investment laws and IIAs may also create **ISDS-related risks** when national laws include advance consent to international arbitration as the means for the settlement of investor–State disputes, which could result in **parallel proceedings**

Dimension 2: Example 1

Selected provisions in national investment laws

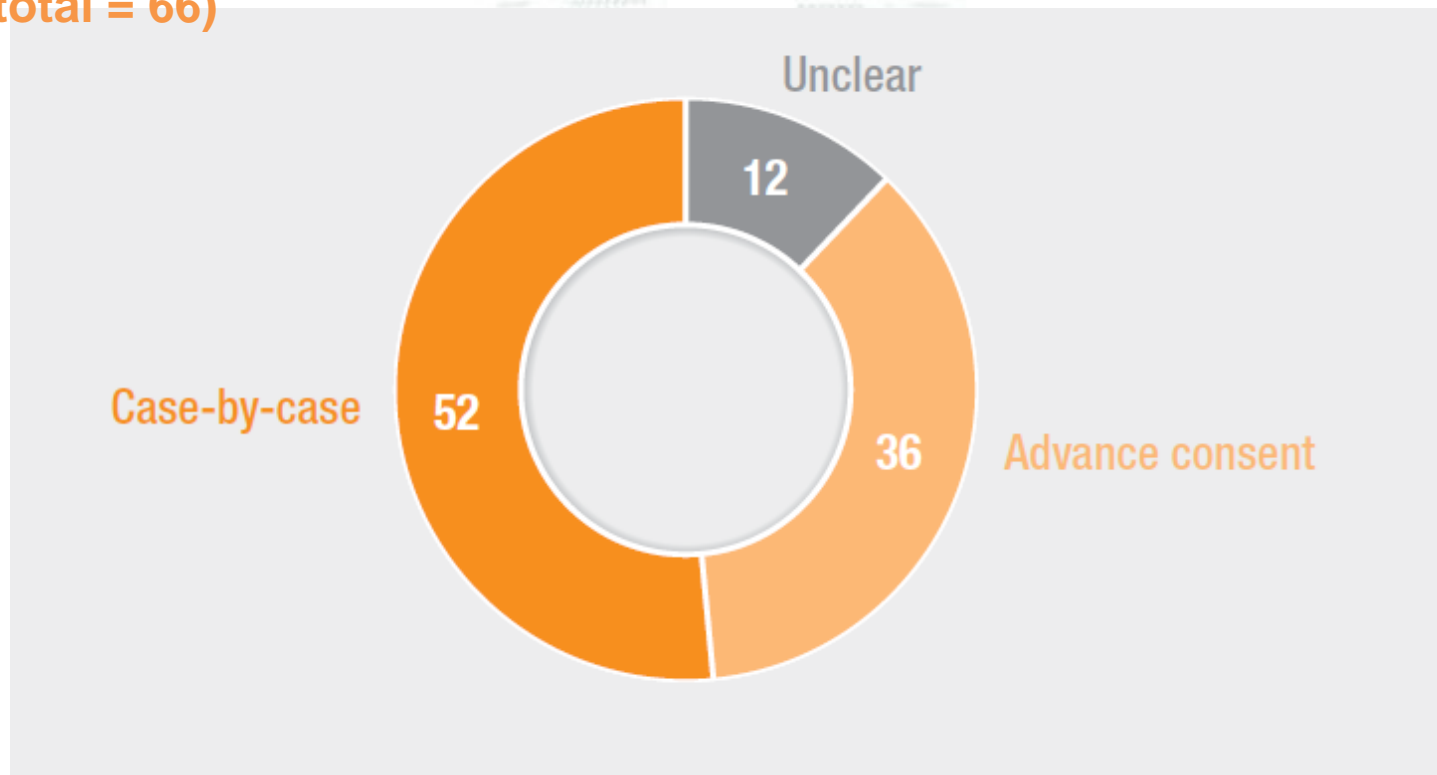


Source: ©UNCTAD, WIR18.

Dimension 2: Example 2

ISDS: facts, figures and risks

Types of consent to international arbitration in national investment laws (Per cent, total = 66)



Source: ©UNCTAD, WIR18.

Dimension 2: Example 3

ISDS: facts, figures and risks (continued)

ICSID-registered cases based on national laws

Country	Based on national law	Total IIA-based ICSID cases
Venezuela (Bolivarian Republic of)	12	39
Uzbekistan	6	6
Guinea	5	0
Kazakhstan	5	11
Albania	4	6
Egypt	3	28
El Salvador	3	3
Kyrgyzstan	3	3
Congo, Dem. Rep. of	2	4
Tunisia	2	1

Source: ©UNCTAD, WIR18.

Dimension 2 - Policy options

IIAs and the national legal framework for investment: entry points for maximizing synergies

Strengthening cooperation between policymakers

- Improve coordination between institutions charged with national and international investment policymaking
- Encourage consultation between the various stakeholders in the investment regime

Improving interaction between the two regimes

- Establish clear principles for inter-operation of the different elements of the regimes
- Condition IIA protections on investors' compliance with domestic law, provided that such laws are in line with international commitments
- Use divergence to pursue strategic policy objectives

Ensuring cross-fertilization between the two regimes

- Determine where the national legal framework for investment can benefit from elements found in modern IIAs
 - Determine where IIA negotiators can consider features common to national investment policymaking
-

Source: ©UNCTAD, WIR18.



What's Next?

The way forward for IIA reform

Holistic: looking at IIAs in their entirety

- IIA reform should be comprehensive: procedural aspects, but also substantive standards of protection
- Reform should extend not only to future, but also to existing treaties, and beyond IIAs

Inclusive: ensuring an inclusive and transparent process

- Addressing the "development challenge" (rule-takers) and involving other stakeholders

Sustainable: not losing sight of the bigger picture

- Shaping the process so that it effectively pursues the overarching objective of sustainable development

The way forward for IIA reform (Continued)

Sustainable: not losing sight of the bigger picture

- Reform of international policymaking is not enough - domestic **capacity-building** is also required
- UNCTAD stands ready to assist with **technical assistance** and capacity-building, **policy tools** and **consensus building**

UNCTAD policy tools are covering

- Three “phases” of reform
- Applied across UNCTAD’s three pillars of activities

UNCTAD High-level IIA Conference at the World Investment Forum 2018

Phase 3 of IIA Reform

24 October 2018, Palais des Nations, Geneva



WORLD INVESTMENT REPORT 2018

INVESTMENT AND NEW INDUSTRIAL POLICIES

INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT



THANK YOU!

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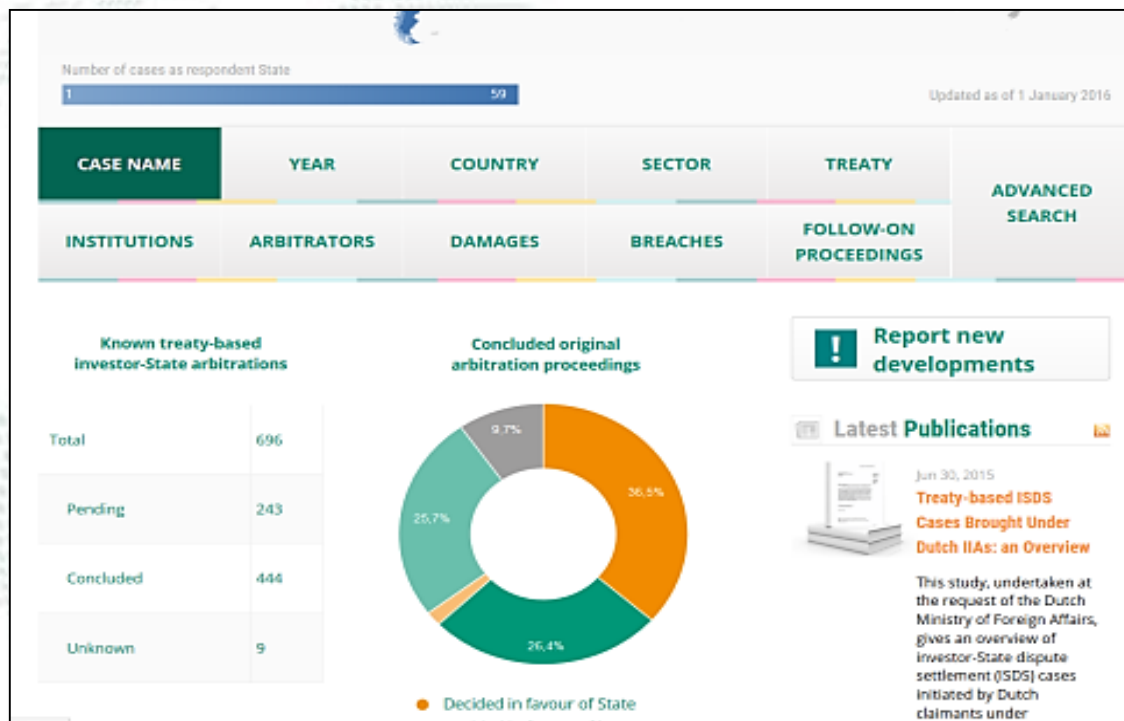
<http://unctad-worldinvestmentforum.org>

UNCTAD's online databases: Helping researchers and policymakers in keeping informed of the developments in an ever-growing universe of ISDS cases

The ISDS Navigator

- A comprehensive and regularly updated collection of treaty-based international arbitrations between investors and States
- Contains essential information about each ISDS case
- Offers user-friendly tools to search and filter the data

<http://investmentpolicyhub.unctad.org/ISDS>

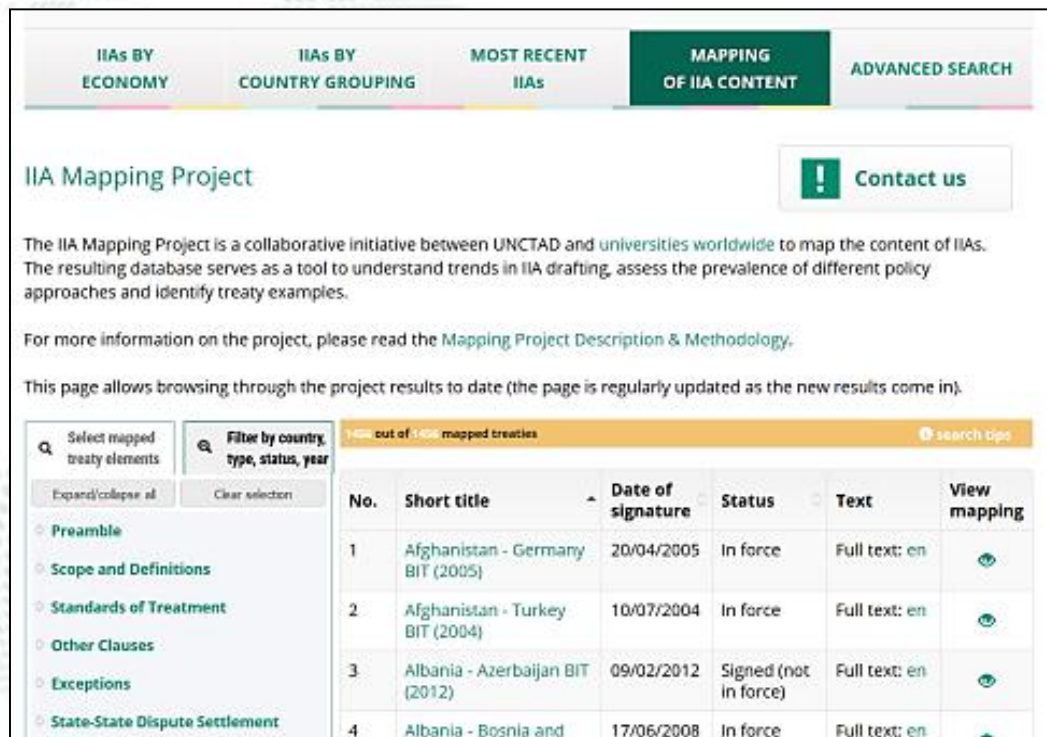


UNCTAD's online databases: Helping researchers and policymakers in keeping informed of the developments in an ever-evolving IIA regime (cont'd)

The IIA Mapping Project

- A collaborative initiative between UNCTAD and universities worldwide to map the content of IIAs
- Over 1.900 IIAs have been mapped to-date, for over 100 features each
- Serves as a tool to understand trends in IIA drafting, assess the prevalence of different policy approaches and identify treaty examples

<http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu>



The screenshot shows the UNCTAD IIA Mapping Project website. At the top, there are navigation tabs: 'IIAs BY ECONOMY', 'IIAs BY COUNTRY GROUPING', 'MOST RECENT IIAs', 'MAPPING OF IIA CONTENT' (which is highlighted), and 'ADVANCED SEARCH'. Below the tabs, there is a 'Contact us' button with an exclamation mark icon. The main content area features the title 'IIA Mapping Project' and a brief description: 'The IIA Mapping Project is a collaborative initiative between UNCTAD and universities worldwide to map the content of IIAs. The resulting database serves as a tool to understand trends in IIA drafting, assess the prevalence of different policy approaches and identify treaty examples.' Below this, there is a link to 'Mapping Project Description & Methodology' and a note that the page is regularly updated. A table displays a list of mapped treaties with the following columns: No., Short title, Date of signature, Status, Text, and View mapping. The table shows 4 out of 1,900 mapped treaties.

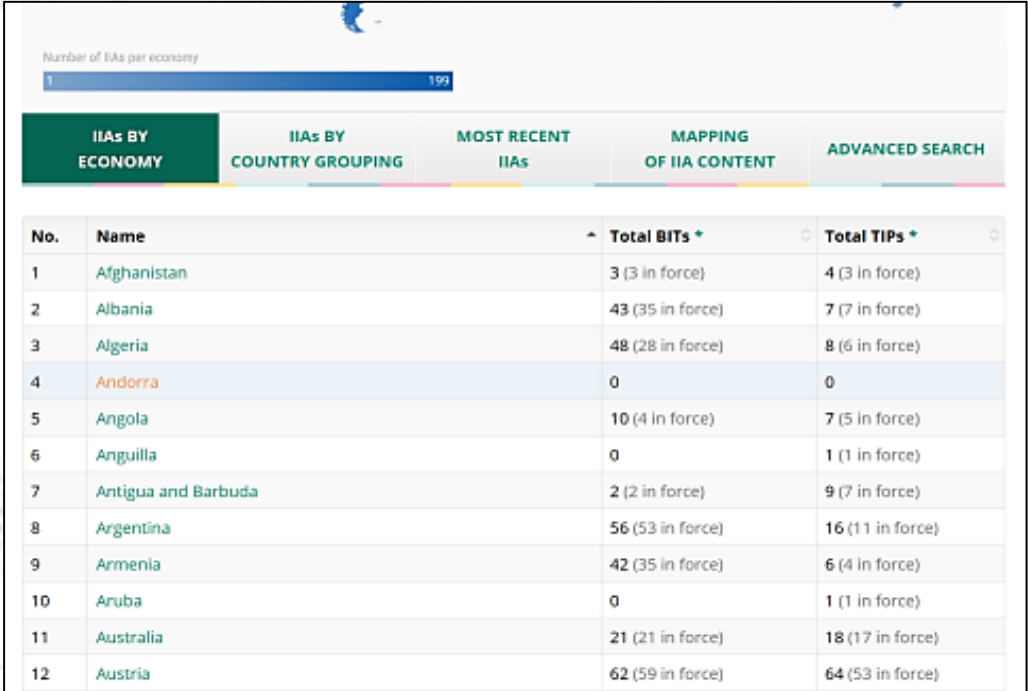
No.	Short title	Date of signature	Status	Text	View mapping
1	Afghanistan - Germany BIT (2005)	20/04/2005	In force	Full text: en	
2	Afghanistan - Turkey BIT (2004)	10/07/2004	In force	Full text: en	
3	Albania - Azerbaijan BIT (2012)	09/02/2012	Signed (not in force)	Full text: en	
4	Albania - Bosnia and	17/06/2008	In force	Full text: en	

UNCTAD's online databases: Helping researchers and policymakers in keeping informed of the developments in an ever-evolving IIA regime

The IIA Navigator

- The world's most comprehensive free IIA database, with over 3.300 investment treaties and model agreements
- Allows for advanced searches of IIAs by type, geography, status and full text
- Provides analysis on the latest policy developments

<http://investmentpolicyhub.unctad.org/IIA>



The screenshot shows the 'IIAs BY ECONOMY' section of the IIA Navigator. At the top, a bar chart indicates 'Number of IIAs per economy' with a value of 199. Below the chart are navigation tabs: 'IIAs BY ECONOMY' (selected), 'IIAs BY COUNTRY GROUPING', 'MOST RECENT IIAs', 'MAPPING OF IIA CONTENT', and 'ADVANCED SEARCH'. The main table lists countries with columns for 'No.', 'Name', 'Total BITs', and 'Total TIPs'. The table data is as follows:

No.	Name	Total BITs	Total TIPs
1	Afghanistan	3 (3 in force)	4 (3 in force)
2	Albania	43 (35 in force)	7 (7 in force)
3	Algeria	48 (28 in force)	8 (6 in force)
4	Andorra	0	0
5	Angola	10 (4 in force)	7 (5 in force)
6	Anguilla	0	1 (1 in force)
7	Antigua and Barbuda	2 (2 in force)	9 (7 in force)
8	Argentina	56 (53 in force)	16 (11 in force)
9	Armenia	42 (35 in force)	6 (4 in force)
10	Aruba	0	1 (1 in force)
11	Australia	21 (21 in force)	18 (17 in force)
12	Austria	62 (59 in force)	64 (53 in force)