

Workshop on Investment Promotion for Egyptian Diplomats

International Investment Policies: Challenges and Implications for Developing Countries

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The International Legal Framework for International Investment

- Absence of a **multilateral agreement on investment** (unlike trade, services, IPR)
- International investment rulemaking lacks **system-wide coordination**
- Countries conclude **investment treaties at the bilateral and regional levels** (bargaining power factors)

The network of IIAs consists of...

- Bilateral investment treaties (**BITs**)
- Free trade agreements/economic partnership agreements with investment provisions (**FTAs/EPAs**)
- Regional integration agreements (**REIOs**) (EU, CARICOM, MERCOSUR, COMESA CIA, SADC investment protocol, Arab investment agreement, ASEAN etc)

Core elements in International Investment Agreements (IIAs)

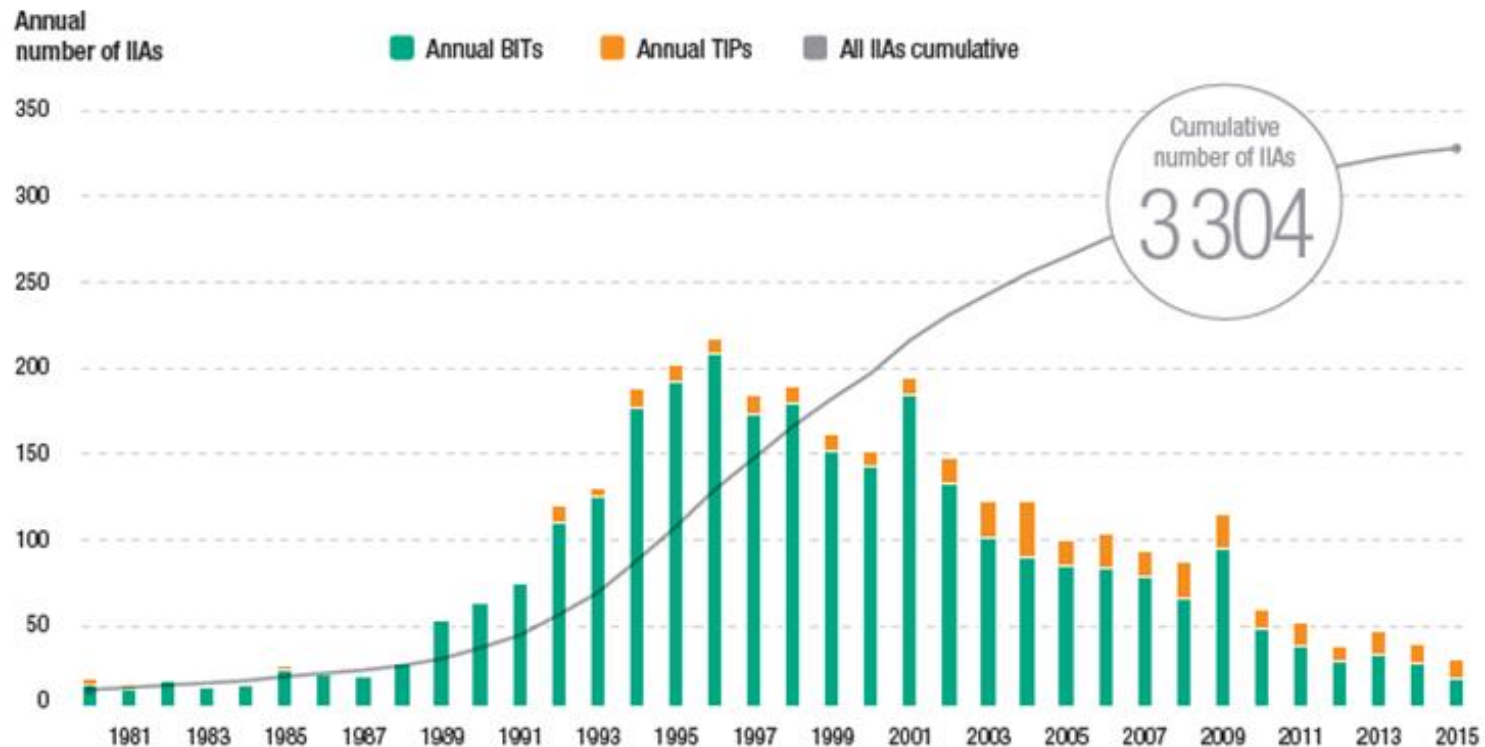
- Preamble
- Definitions (investment/investor)
- Core standards of protection:
 - Principle of fair and equitable treatment
 - Principle of non-discrimination (NT/MFN)
- Expropriation
- Transfer of funds
- Investor-State dispute settlement



Recent Developments: The Numbers

The IIA universe continues to grow: the year 2015 saw the conclusion of 31 new IIAs – 20 bilateral investment treaties (BITs) and 11 treaties with investment provisions (TIPs)

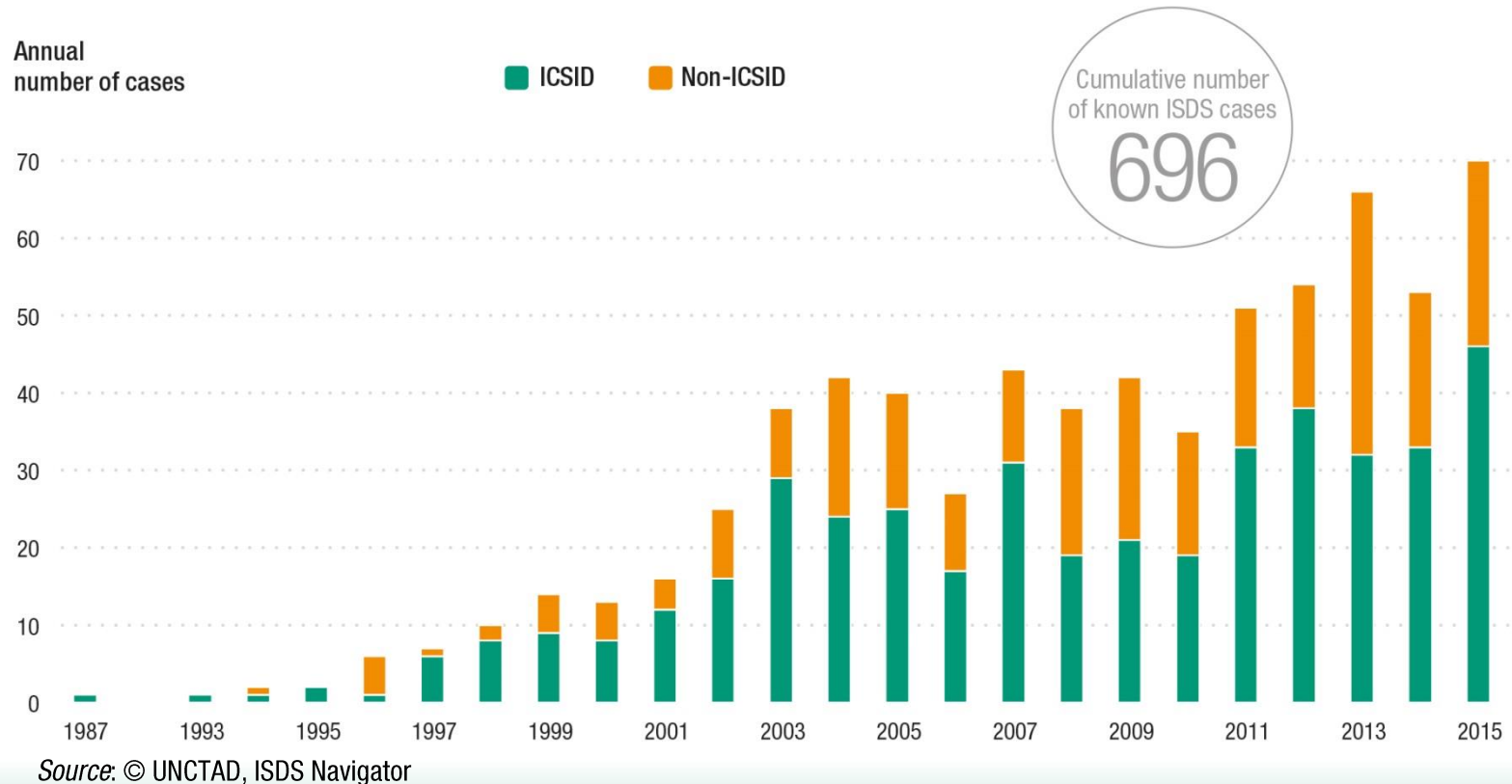
Trends in IIAs signed, 1980-2015



Source: ©UNCTAD, IIA Navigator.

In 2015, investors initiated 70 known investor-State dispute settlement (ISDS) cases: A record high, and with a continued large share of cases filed against developed countries

Known ISDS cases, annual and cumulative, 1987-2015

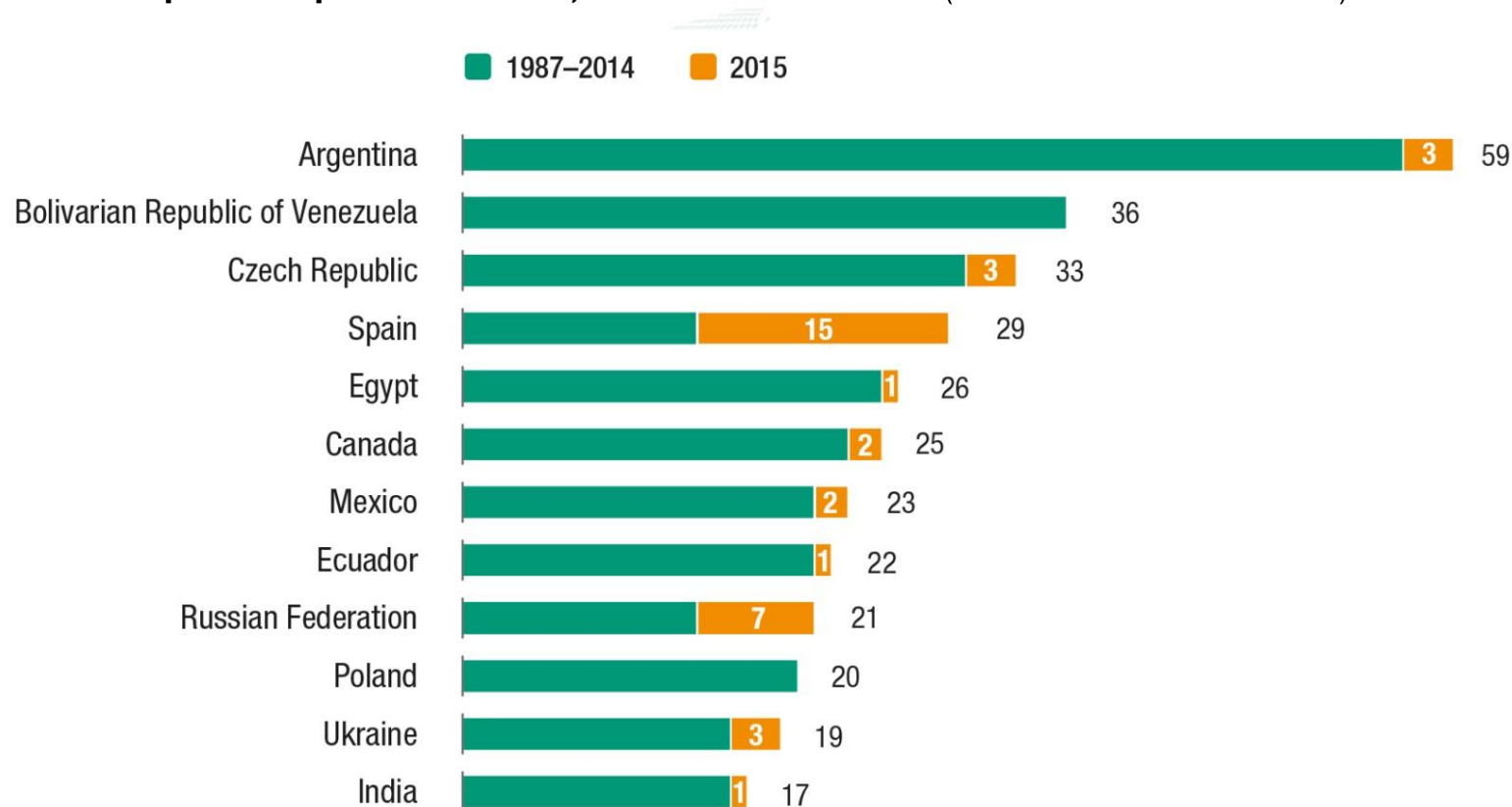


Increase in investor-State disputes

- At least **70 new cases** were initiated in 2015 (record high).
- Total number of known global treaty-based cases reached **696** by 2015.
- Total number of countries that have responded to one or more investment treaty arbitration **increased to 100**.
- Among a broad range of governmental measures challenged in 2014 and 2015, a number of cases **concerned key sustainable development sectors** such as:
 - protection of the environment,
 - infrastructure,
 - supply of electricity, gas and water,
 - port modernization, and
 - renewable energy.

Argentina, Venezuela, and the Czech Republic, have been the most frequent respondent States

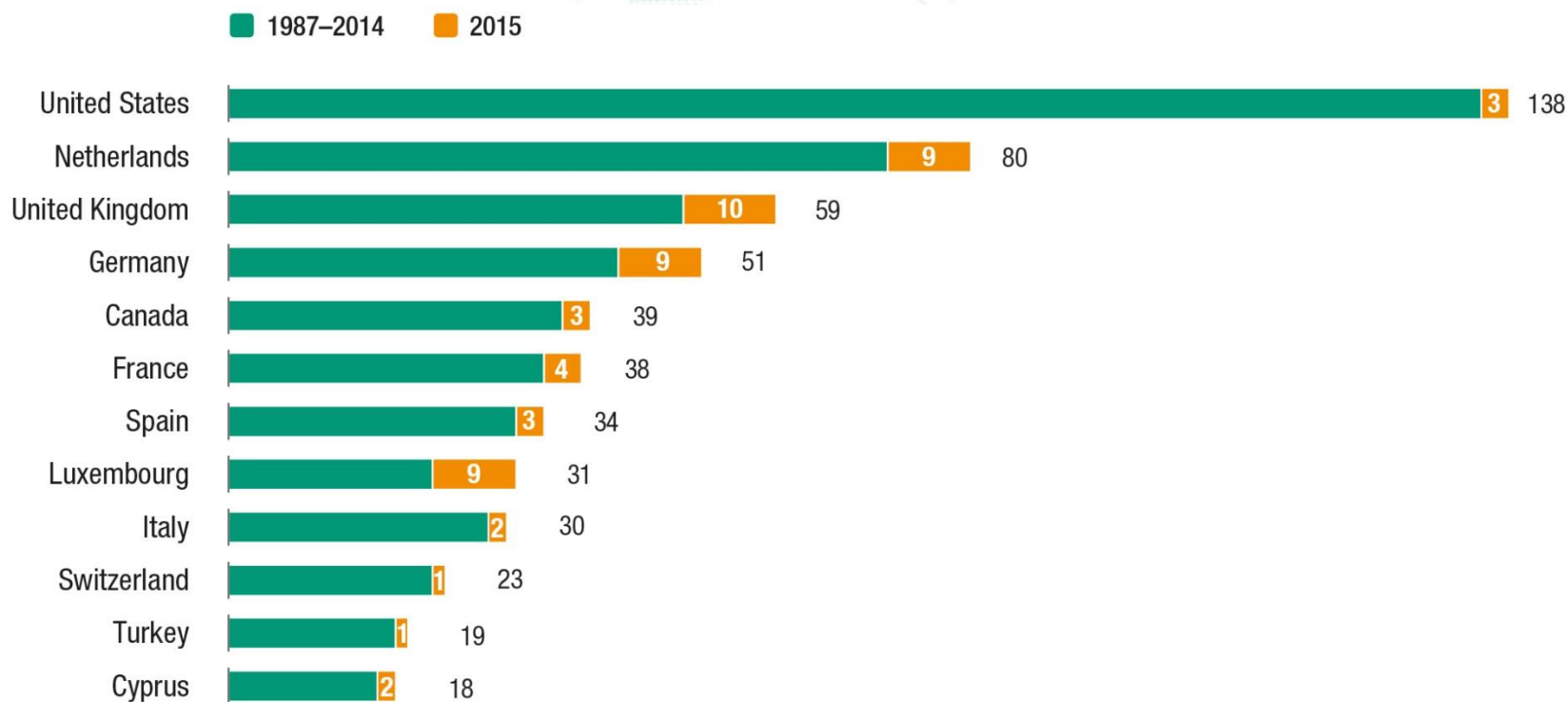
Most frequent respondent States, total as of end 2015 (Number of known cases)



Source: © UNCTAD, ISDS Navigator

The United States, the Netherlands, and the United Kingdom, have been the most frequent home States of investors bringing ISDS claims

Most frequent home States of claimants, total as of end 2015 (Number of known cases)



Source: © UNCTAD, ISDS Navigator

Considerations in ISDS cases

- The amount claimed ranges **from \$8 million to about \$2.5 billion**
- Most of the cases are brought by **investors from developed countries**
- **Developed-country investors** – in particular, those from the United States, Canada and a few EU countries – **have been the main ISDS users**, responsible for over 80 per cent of all claims

Which ISDS cases boosted the numbers in 2015?

Out of the 70 known ISDS cases initiated in 2015:

- **20 cases** were filed due to tax-related measures affecting the renewable energy sector in Spain (16 cases), Italy (3 cases), and Bulgaria (1 case)
- **5 cases** were filed against the Russian Federation related to events in Crimea
- **6 countries** faced their first known ISDS treaty-based case including Austria, Cabo Verde, Cameroon, Kenya, Mauritius, and Uganda

Economic sectors involved in ISDS cases in 2015

76% of new cases related to **activities in the services sector**, including:

- Supply of electricity and gas: **23 cases**
- Construction: **7 cases**
- Financial and insurance services: **7 cases**
- Transportation and storage: **7 cases**

14% of new cases related to **primary industries**

10% of new cases related to **investments in manufacturing**

Most frequently challenged measures by investors in 2015

- Legislative reforms in the renewable energy sector (at least 20 cases)
- Alleged direct expropriations of investments (at least 6 cases)
- Alleged discriminatory treatment (at least 6 cases)
- Revocation or denial of licenses or permits (at least 5 cases)

ISDS Cases by Economic Sector

Total as end 2014 (Per Cent)



- Waste collection, treatment and disposal (3 per cent)
- Transportation and storage (3 per cent)
- Manufacture of food products (4 per cent)
- Real estate activities (4 per cent)
- Telecommunications (6 per cent)
- Construction (8 per cent)
- Financial and insurance services (9 per cent)
- Mining, including oil and gas (16 per cent)
- Supply of electricity and gas (19 per cent)
- Other (28 per cent)

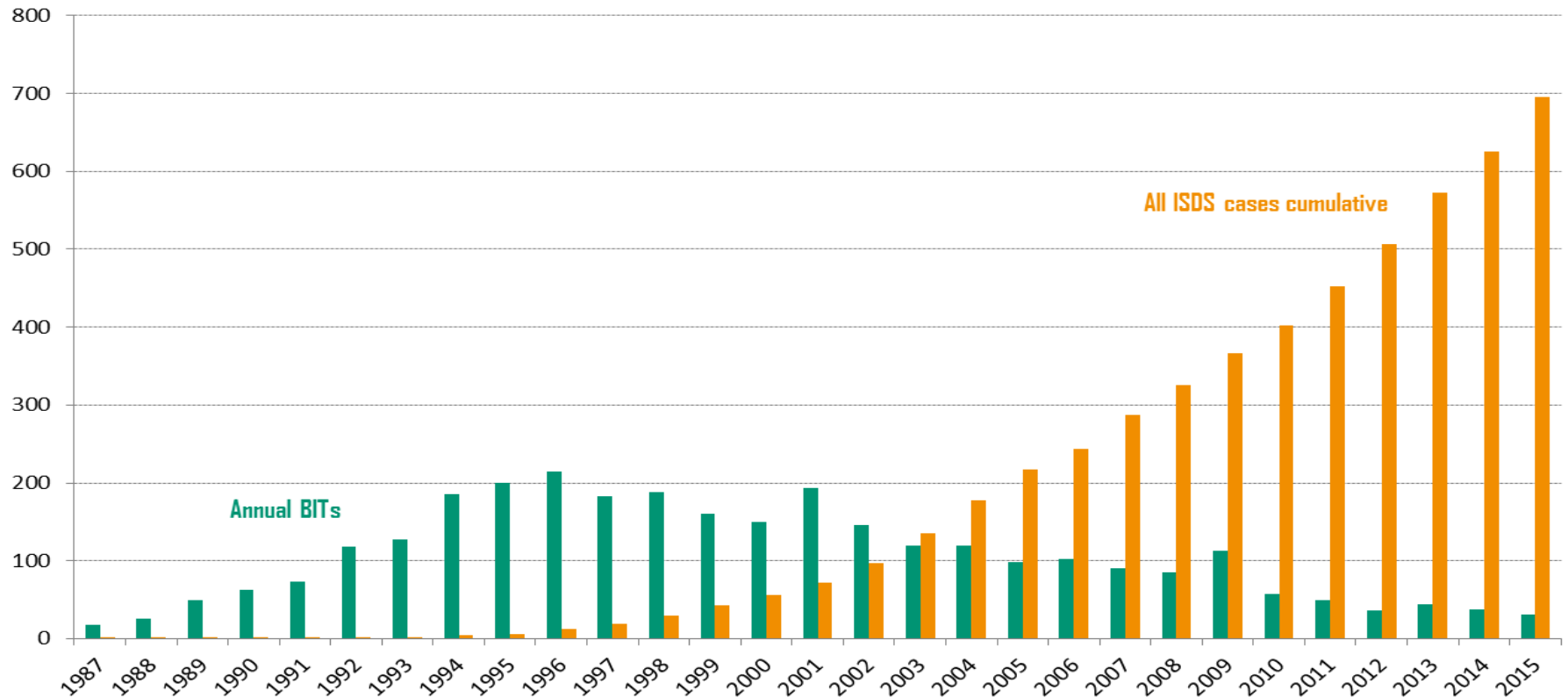
Source: © UNCTAD, ISDS Navigator

Challenges facing Developing countries

- Investment policies often formulated in a vacuum
- Lack of coordination / consultation between ministries on investment policymaking issues (FTAs, BITs, State contracts; inter-ministerial, IPA dialogue)
- Bargaining power and pressure during negotiations (pressure from other party and pressure from within)
- IIAs signed for non-economic reasons
- Manage overlapping and sometimes conflicting approaches between bilateral and regional IIAs



Decline in IIAs, rise in ISDS



Source: © UNCTAD, IIA and ISDS Navigator

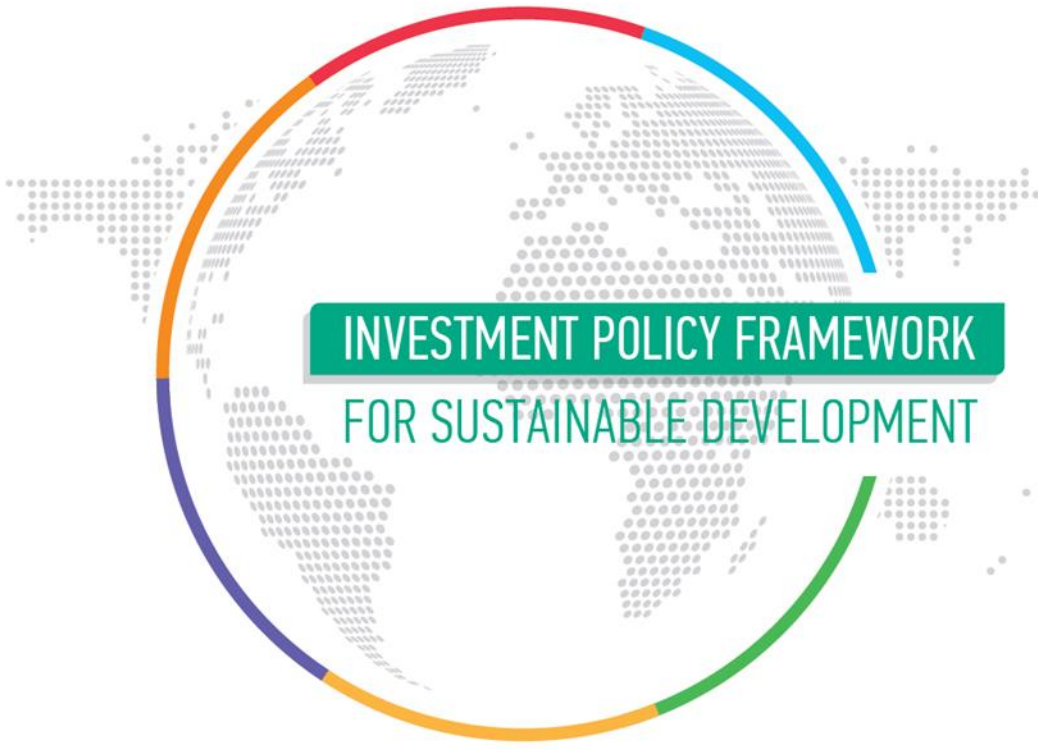


IIA Reform: **Taking Stock and Charting the Way Forward**

UNCTAD Roadmap for IIA Reform (WIR 2015)

- There is a pressing need for systematic reform of the global IIA regime
- Need for reform is evident from the heated public debate and parliamentary hearing processes in many countries and regions
- The question is not whether or not to reform, but about the *what*, *how* and *extent* of such reform
- World Investment Report 2015 (WIR15) offers an action menu for such reform





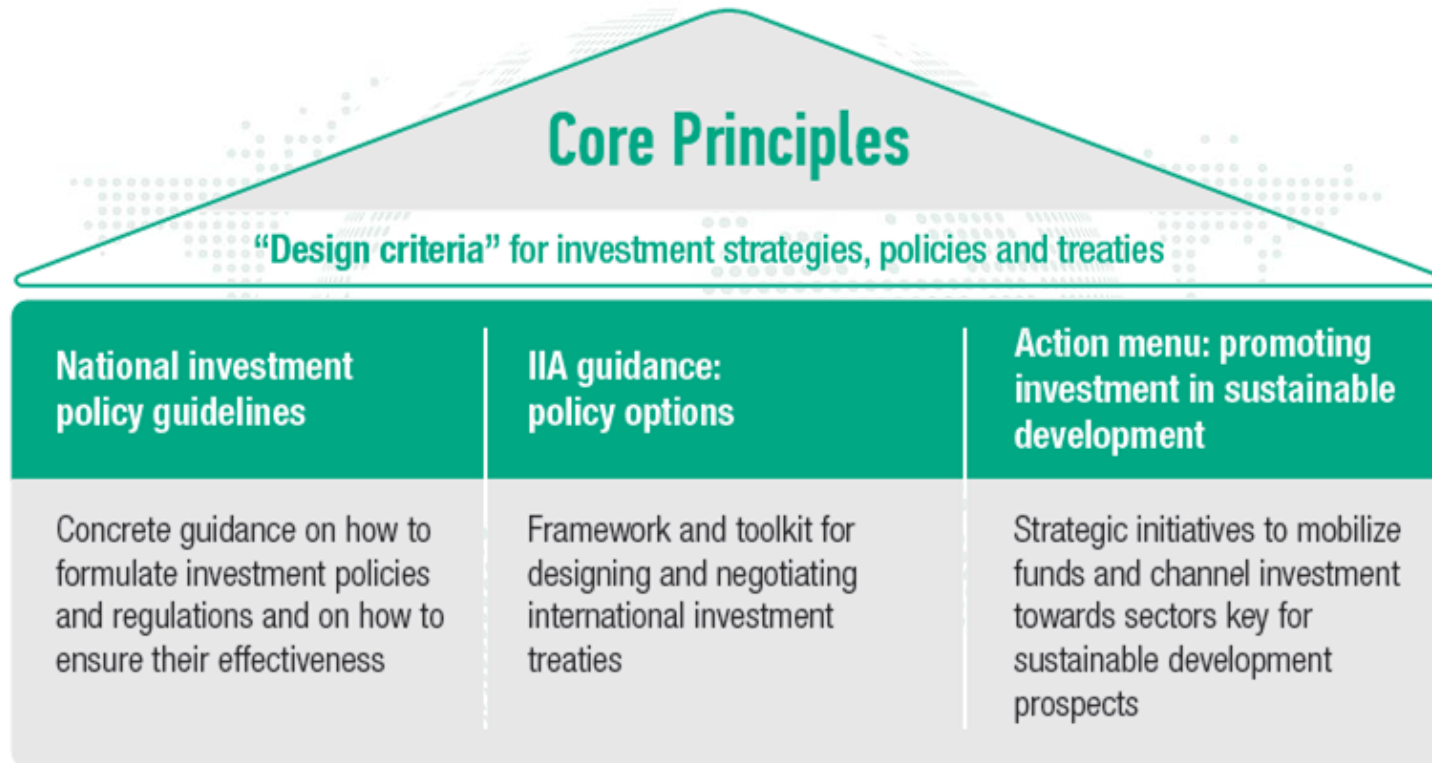
INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT

- NEW GENERATION INVESTMENT POLICIES
- PRINCIPLES FOR INVESTMENT POLICYMAKING
- NATIONAL INVESTMENT POLICY GUIDANCE
- GUIDANCE FOR INVESTMENT TREATIES
- ACTION MENU FOR INVESTMENT IN SDGs
- THE WAY FORWARD

http://investmentpolicyhub.unctad.org/Upload/Documents/POLICY_FRAMEWORK%2025_JAN_2016.pdf

UNCTAD's Policy Framework and Road Map for IIA Reform are shaping reform objectives and approaches

UNCTAD Investment Policy Framework 2015



Source: ©UNCTAD, IPFSD 2015

Evidence of reform at the national level: Numerous countries are reviewing their IIA network and/or developing a new treaty model. Frequently, their actions are based on UNCTAD's policy guidance

IIA Reform – actions and outcomes at the national level, selected examples:

Brazil has developed a new BIT model focusing on investment promotion and facilitation. It has used it in its most recent Cooperation and Facilitation Investment Agreements (CIFAs).

Egypt's updated model BIT is awaiting release after a comprehensive review that involved all concerned stakeholders. The update aims to balance investment protection and the State's right to regulate and includes provisions on combating corruption, SDG consideration, investors' responsibilities and a refined ISDS mechanism.

South Africa has adopted a new Promotion and Protection of Investment Act, and is currently reshaping its investment policy in accordance with its objectives of sustainable development.

India approved a new model BIT which includes a chapter on investor obligations and an ISDS mechanism that provides, among others, for exhaustion of local remedies and for strict timeframes prior to submitting a dispute to arbitration.

Evidence of reform at the national level: Most of the recently adopted model treaties include some sustainable development-friendly clauses

Reform-oriented provisions in selected model IIAs

Selected aspects of IIAs

- 1 References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble
- 2 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)
- 3 Circumscribed fair and equitable treatment (equated to the minimum standard of treatment of aliens under customary international law and/or clarification with a list of State obligations)
- 4 Clarification of what does and does not constitute an indirect expropriation
- 5 Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws

- 6 Omission of the so-called "umbrella" clause
- 7 General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources
- 8 Explicit recognition that parties should not relax health, safety or environmental standards to attract investment
- 9 Promotion of Corporate and Social Responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble
- 10 Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, no ISDS mechanism)
- 11 Specific proactive provisions on investment promotion and/or facilitation

	1	2	3	4	5	6	7	8	9	10	11
Austria Model BIT (2008)	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes	Yes	No
Azerbaijan Model BIT (2016)	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes	No
Brazil Model CFIA (2015)	Yes	Yes	Not applicable	Not applicable	Yes	Yes	No	Yes	Yes	Yes	Yes
Canada Model BIT (2014)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Egypt draft Model BIT (2015)	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
India Model BIT (2015)	Yes	Yes	Not applicable	Yes	Yes	Yes	No	Yes	Yes	Yes	No
Serbia Model BIT (2014)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Slovakia draft Model BIT (2016)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Turkey draft Model BIT (2016)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	No
United States Model BIT (2012)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No

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

Yes No Not applicable

Source: © UNCTAD, WIR16

Evidence of reform at the regional level (Africa)

IIA Reform – actions and outcomes also occurs at the regional level, Africa taking the lead, but careful...

There are various "**new generation**" international investment agreements (IIAs) being negotiated or amended simultaneously among African countries and REIOs:

These include among others,

- the Pan African Investment Code (PAIC);
- the COMESA-EAC SADC Tripartite FTA;
- the Continental Free Trade Area (CFTA);
- the COMESA Common Investment Area (CCIA);
- the SADC Investment protocol;
- the EAC model IIA.

Risk: overlap and contradict one another. Fragmentation of IIA reform efforts in Africa. Lead to the emergence of a new "spaghetti bowl" of IIAs in Africa.

Charting the Way Forward:

Phase 2 of IIA Reform –Tackling the existing stock

Despite significant progress, much remains to be done:

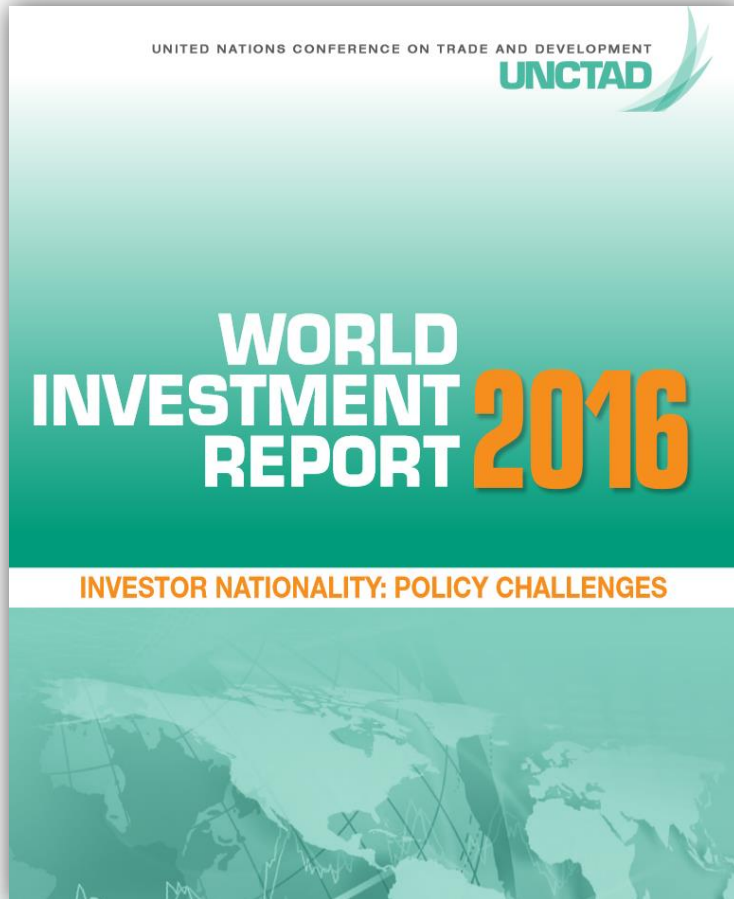
- Dealing with the existing stock of treaties remains a key challenge
- Reform has to address the challenge of increasing fragmentation
- Only coordinated activity at all levels (national, bilateral, regional, multilateral) can deliver an IIA regime that can harness international investment relations for the pursuit of sustainable development

The second phase of IIA reform will require countries to intensify collaboration and coordination between treaty partners to address the systemic risks and incoherence of the large body of old treaties

UNCTAD stands ready to provide the necessary backstopping in this regard:

- **UNCTAD's Road Map for IIA Reform and its Action Menu on Investment** offers key guidance for reform
- **UNCTAD's 2016 World Investment Forum (WIF)** offers the opportunity to discuss how to carry IIA reform to the next level

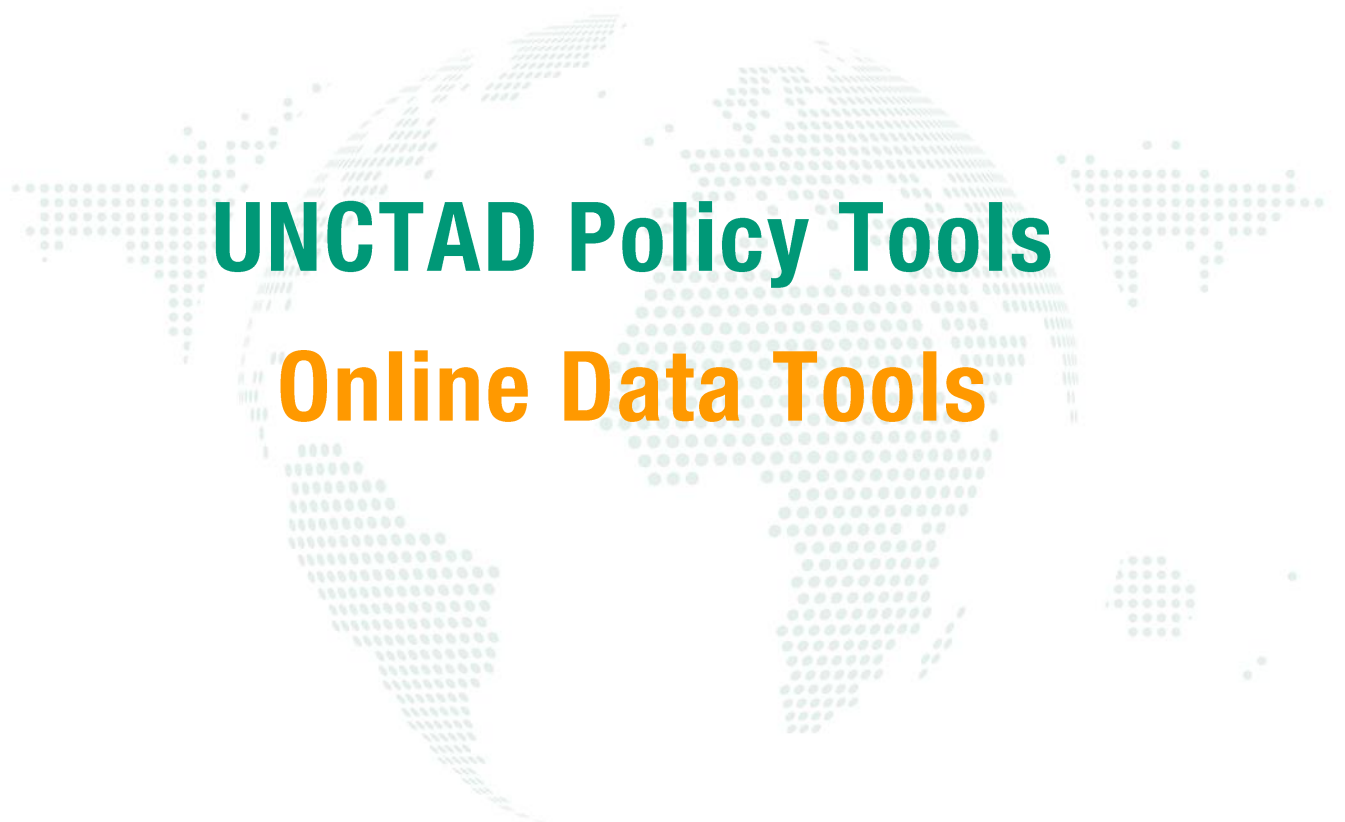
UNCTAD's Publications: Analyzing the latest investment trends and providing guidance and options for reform



The World Investment Report

- UNCTAD's flagship publication
- Each year's Report covers the latest trends in foreign direct investment around the world and analyses in-depth one selected topic related to foreign direct investment and development

http://unctad.org/en/PublicationsLibrary/wir2016_en.pdf



UNCTAD Policy Tools

Online Data Tools

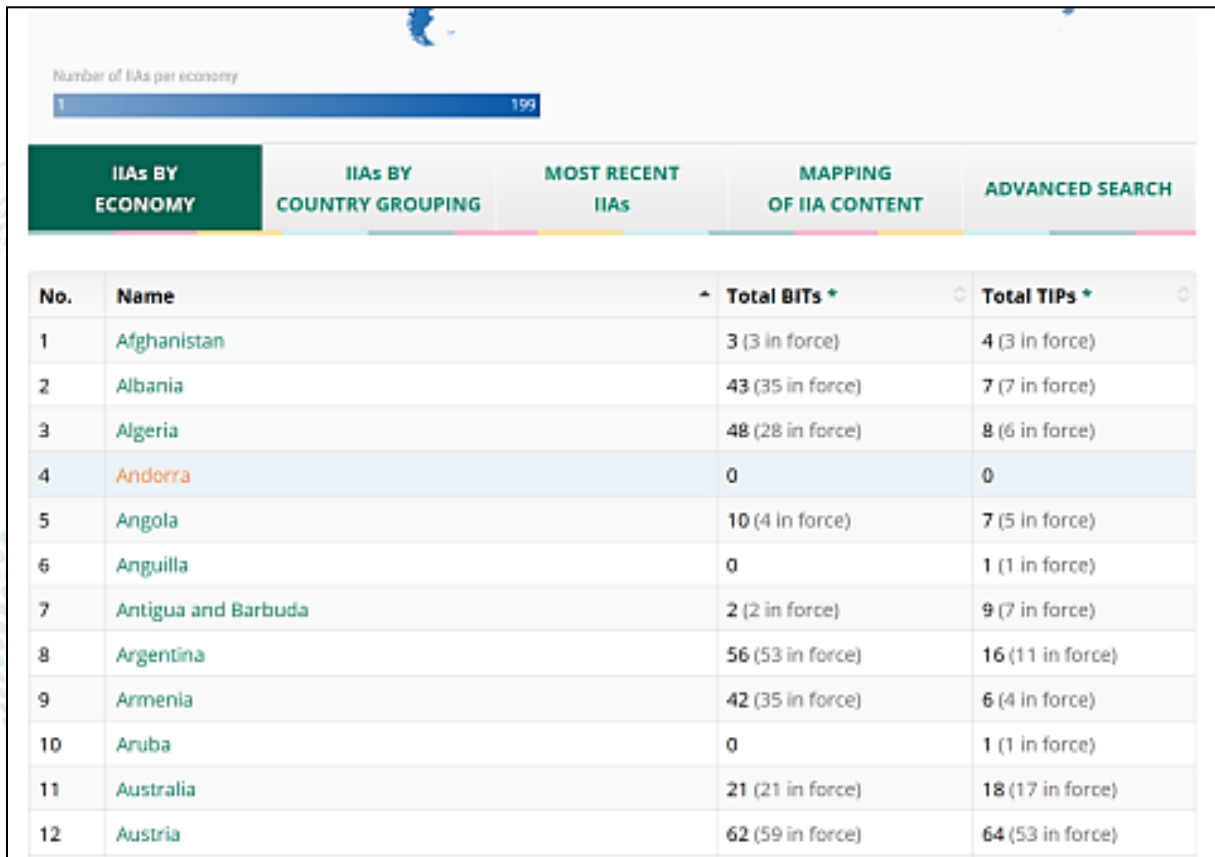
INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT

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

The IIA Navigator

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

- 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



The screenshot displays the 'IIAs BY ECONOMY' tab of the IIA Navigator. At the top, a bar chart shows the '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 includes data for 12 countries, with Andorra highlighted in blue.

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)

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

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

- 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

The screenshot shows the 'IIA Mapping Project' web application. At the top, there are navigation tabs: 'IIAs BY ECONOMY', 'IIAs BY COUNTRY GROUPING', 'MOST RECENT IIAs', 'MAPPING OF IIA CONTENT' (which is highlighted in green), and 'ADVANCED SEARCH'. Below the tabs, the title 'IIA Mapping Project' is displayed next to a 'Contact us' button. A descriptive paragraph states: '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, a link to 'Mapping Project Description & Methodology' is provided. A note indicates: 'This page allows browsing through the project results to date (the page is regularly updated as the new results come in)'. The main content area features a search bar with 'Select mapped treaty elements' and 'Filter by country, type, status, year'. A sidebar on the left lists treaty elements: Preamble, Scope and Definitions, Standards of Treatment, Other Clauses, Exceptions, and State-State Dispute Settlement. The main table displays a list of treaties with columns for No., Short title, Date of signature, Status, Text, and View mapping. The table shows 4 out of 1406 mapped treaties.

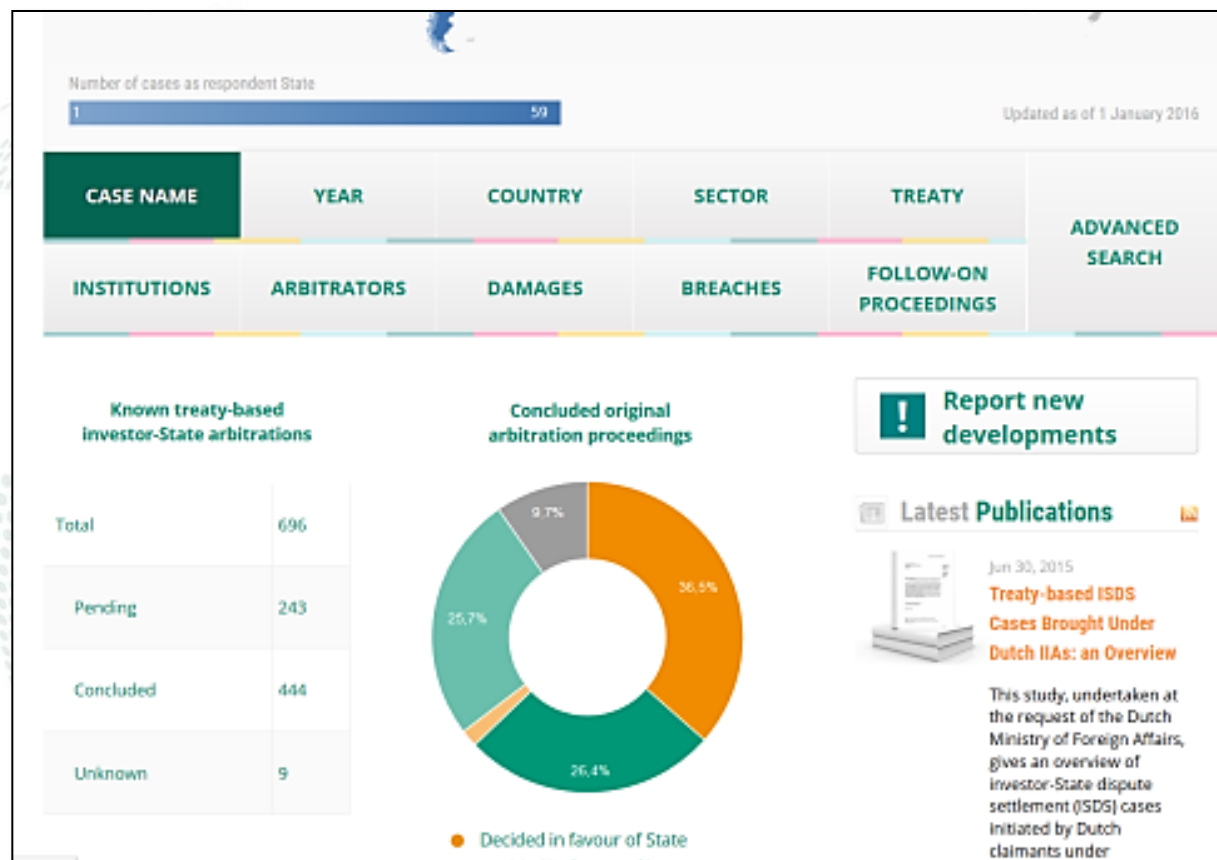
No.	Short title	Date of signature	Status	Text	View mapping
1	Afghanistan - Germany BIT (2005)	20/04/2005	In force	Full text: en	
2	Afghanistan - Turkey BIT (2004)	10/07/2004	In force	Full text: en	
3	Albania - Azerbaijan BIT (2012)	09/02/2012	Signed (not in force)	Full text: en	
4	Albania - Bosnia and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

The ISDS Navigator

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

- 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



THANK YOU!

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