

# Workshop on Investment Promotion for Egyptian Diplomats

## The international legal framework for investment in Egypt

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Egypt

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## Egypt's BIT coverage of existing FDI stock

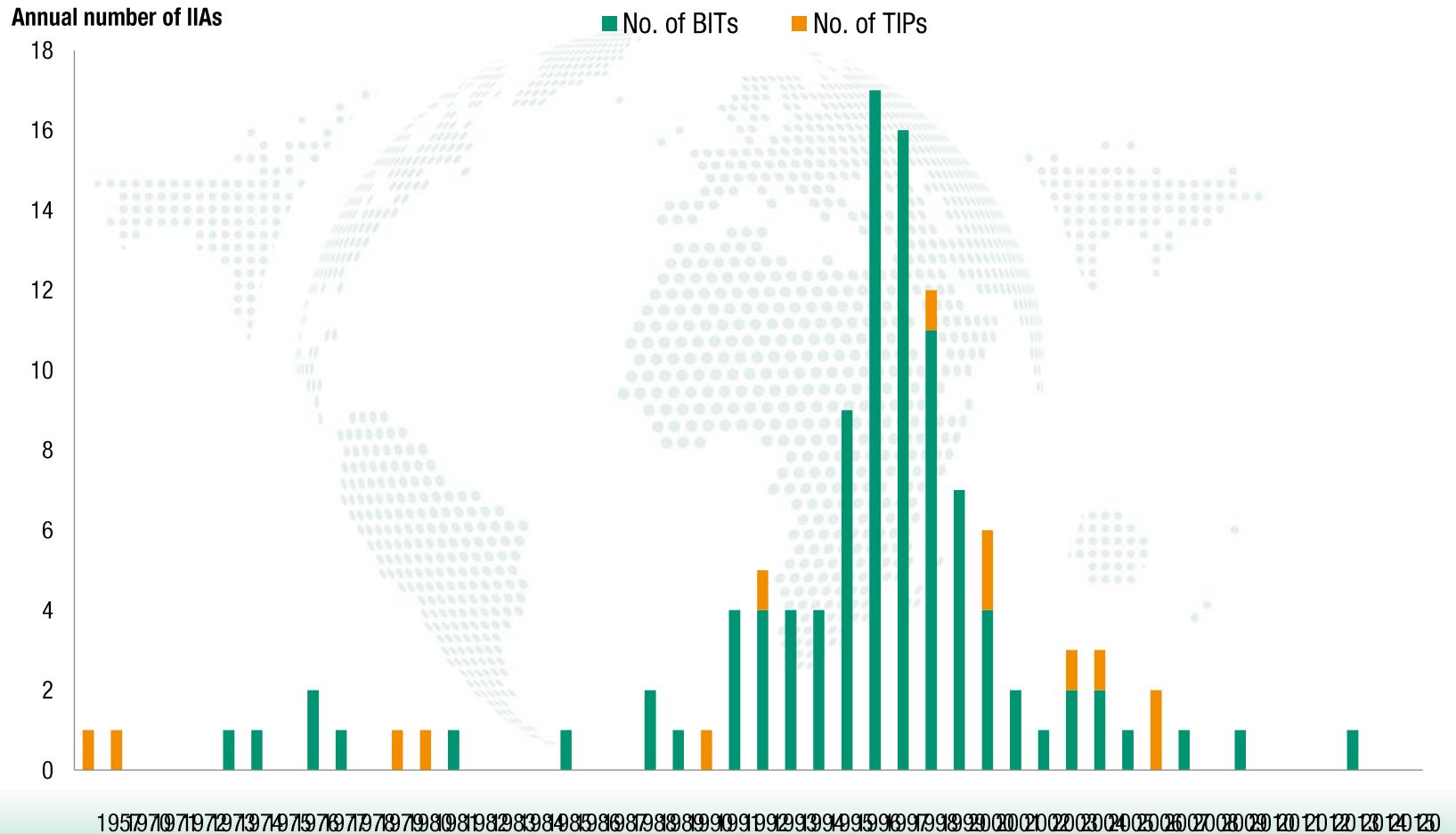
- Egypt has already concluded BITs with its major FDI source countries
  - ➔ More **than 99 per cent** of Egypt's FDI inward stock is covered by a BIT
  - ➔ Only **55 percent** of Egypt's outward stock is covered by a treaty
- Notably, Egypt's large outward FDI stock in Bangladesh and South Africa is not covered by a BIT



# Egypt's network of IIAs

# IIAs signed by Egypt (1957-2016, end of November)

➔ **101 BITs** (of which 73 are in force) and **13 TIPs** (of which 11 are in force)



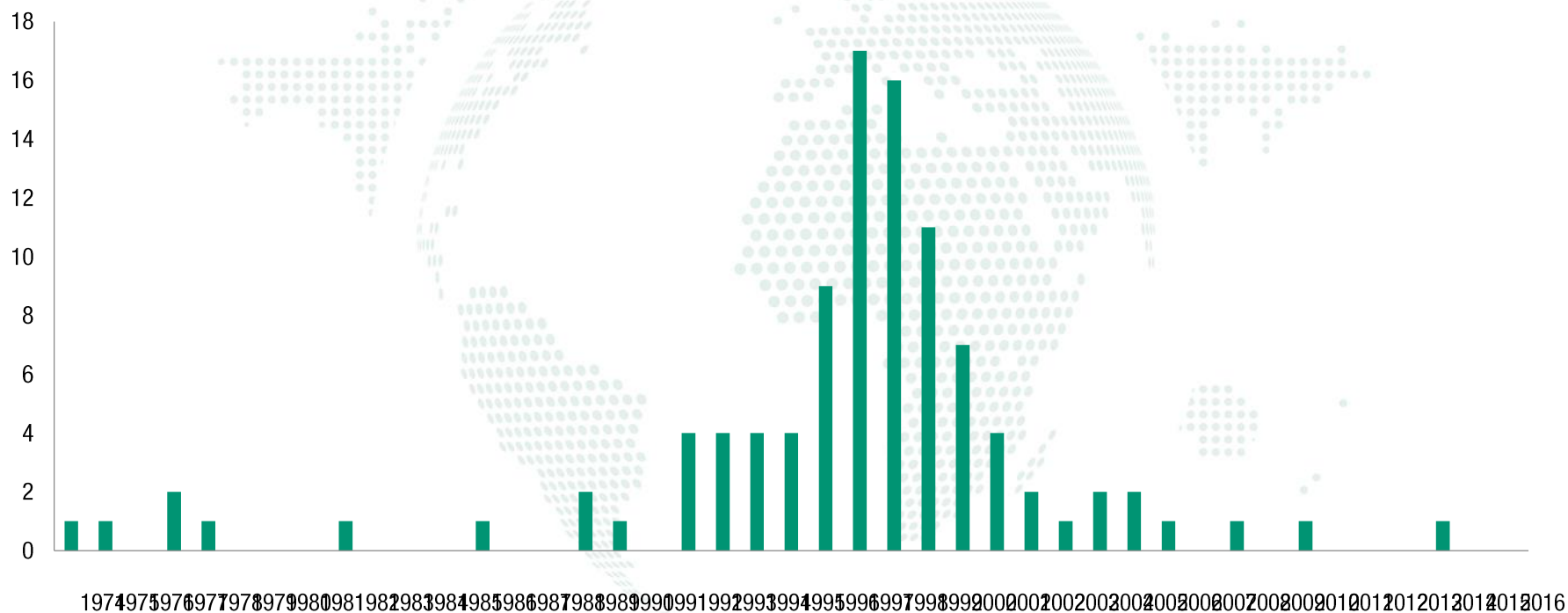
Source: ©UNCTAD, IIA Navigator

# Egypt's Bilateral investment treaties (BITs)

➡ The year 1997 saw the highest number of BITs signed i.e. 17 BITs

➡ Majority of the Egyptian BITs (80 BITs) were signed between 1992 and 2001

Annual BITs concluded by Egypt, 1989-2016 (end of November)

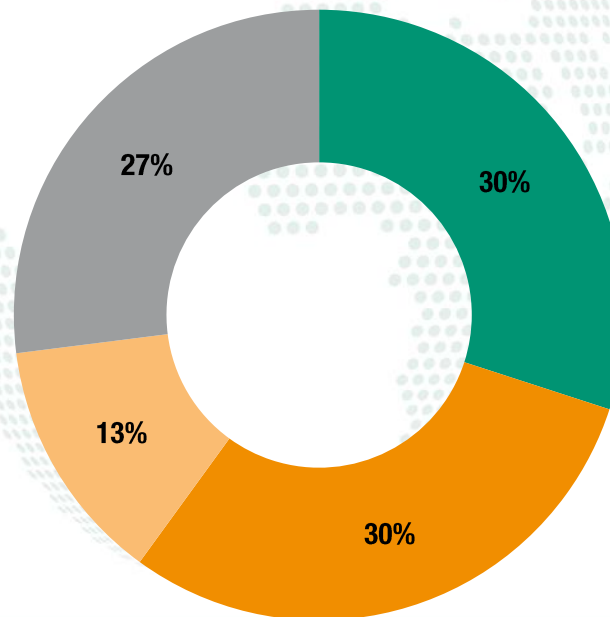


Source: ©UNCTAD, IIA Navigator

# Geographical distribution of BITs concluded by Egypt

- **30%** have been concluded with European countries
- **30%** with Asian countries
- **13%** with other economies in transition
- **27%** were concluded with countries from the Americas and Africa

Geographical distribution of Egypt's BITs, September 2015



■ Europe ■ Asia ■ Economies in transition ■ Americas and Africa

Source: ©UNCTAD

# 13 TIPs concluded by Egypt (of which 11 are in force)

| Name of TIP                                                                                                                                                                              |
|------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| 1. Investment Agreement for the Common Market for Eastern and Southern Africa (COMESA) Common Investment Area                                                                            |
| 2. FTA between European Free Trade Association (EFTA) and Egypt                                                                                                                          |
| 3. FTA between Egypt and Turkey                                                                                                                                                          |
| 4. Framework Agreement between Mercado Común Sudamericano(MERCOSUR) and the Arab Republic of Egypt                                                                                       |
| 5. Agreement between the COMESA and the United States Concerning the Development of Trade and Investment Relation (TIFA)                                                                 |
| 6. Euro-Mediterranean Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and the Arab Republic of Egypt, of the Other Part |
| 7. Agreement between the Government of the Arab Republic of Egypt and the United States Concerning the Development of Trade and Investment Relations                                     |
| 8. Treaty establishing the COMESA                                                                                                                                                        |
| 9. Treaty Establishing the African Economic Community/African Union                                                                                                                      |
| 10. Agreement on Promotion, Protection and Guarantee of Investments amongst the Member States of the Organization of the Islamic Conference                                              |
| 11. Unified Agreement for the Investment of Arab Capital in the Arab States                                                                                                              |
| 12. Agreement on Investment and Free Movement of Arab Capital among Arab Countries                                                                                                       |
| 13. Agreement on Arab Economic Unity (League of Arab States)                                                                                                                             |

# Multilateral conventions and agreements related to investment

Egypt is also a party to a number of multilateral conventions and agreements relating to investment and investor-State disputes, such as:

- ➡ The New York Convention on the Recognition of Foreign Arbitral Awards (1959)
- ➡ The ICSID Convention (1972)
- ➡ The MIGA Convention (1988)
- ➡ The World Trade Organization (GATS, GATT, TRIPS, TRIMS) (1995)

# Analysis of BIT provisions concluded by Egypt

## A. Definition of investment

- **77% of BITs** concluded by Egypt adopt a broad “asset-based” definition of investment limiting it only to a requirement that an investment must be made in accordance with the host state's laws and regulations.
- **15 Egyptian BITs** include a broad asset-based definition and omit the requirement that an investment must be made in accordance with the host state laws.

# UNCTAD Policy Options

**Option 1:** Require investments to fulfill specific characteristics:

- ❖ The commitment of capital, expectation of profit and assumption of risk.
- ❖ The purpose of establishing lasting economic relations.
- ❖ A duration criteria for the investment.

**Option 2:** Compile an exhaustive list of covered investments and/or exclude specific types of assets from coverage

## B. Most-favored-nation treatment (MFN)

- **85% of the BITs** concluded by Egypt grant MFN at the post-establishment phase.
- **91% of Egyptian BITs** include exceptions to MFN treatment. These exceptions relate to:
  - i. Regional Economic Integration Agreements (REIA)
  - ii. Taxation
  - iii. Procedural issues
- **Only 2 Egyptian BITs** forbid foreign investors from employing dispute settlement mechanisms present in other agreements, by virtue of the MFN obligation in the Egyptian BITs. These are the BITs with Switzerland (2010) and Mauritius (2014).

# UNCTAD Policy options

While an MFN clause may be used to ensure upward harmonisation of IIA treaty standards, it can also result in the unanticipated incorporation of stronger investor rights from IIAs with third countries and complicate conscious treaty-making.

In this line, the following options could be considered:

- Option 1:** Require that investors/investments be “in like circumstances”, to be eligible for MFN treatment, then set out criteria for determining “like circumstances”
- Option 2:** Limit the application of the MFN clause
- Option 3:** Include general carve-outs
- Option 4:** Omit the MFN clause

## C. National treatment (NT)

- **63% of the Egyptian BITs** provide for national treatment (NT) without any clarifications, limitations or carve-outs.
- **Only 4% of the Egyptian BITs** clarify that the NT standard applies only to investments in like circumstances or situations.
- **29% of the Egyptian BITs** under review did not include NT obligations.

# UNCTAD Policy Options

While NT is an important provision in BITs, it is important to note that under some circumstances, and in accordance with its development strategies, Egypt may want to be able to accord preferential treatment to national investors/investments without extending the same benefits to foreign-owned companies.

**Option 1:** Clarify that the NT standard applies only to investors/investments “in like circumstances”

**Option 2:** Allow for carve-outs or country-specific reservations

**Option 3:** Make NT “subject to domestic laws and regulations”

## D. Fair and equitable treatment (FET)

- The obligation to accord FET to foreign investments appears in the great majority of BITs.
- **96% of Egypt's BITs** provide for FET without any qualifiers.
- Through an unqualified promise to treat investors “fairly and equitably”, a country provides maximum protection for investors but also risks posing limits on its policy space, raising its exposure to foreign investors’ claims and resulting financial liabilities.

## UNCTAD Policy Options

There is a great deal of uncertainty concerning the precise meaning of the concept of FET, because the notions of “fairness” and “equity” do not connote a clear set of legal prescriptions in international investment law and allow for a significant degree of subjective judgment.

*It is therefore crucial to reduce this uncertainty and to preserve the right of host states to regulate by qualifying or clarifying the FET clause.*

**Option 1:** Add reference to MST/CIL

**Option 2:** Specify what the FET standard includes

**Option 3:** Clarify through an exhaustive list of FET obligations

**Option 4:** Omit FET clause

## E. Expropriation

- All of Egypt's BITs under review cover direct and indirect expropriation and provide that an expropriation must comply with/respect four conditions: public purpose, non-discrimination, due process and payment of compensation.
- Indirect expropriation refers to regulatory takings, creeping expropriation and acts “tantamount to” or “equivalent to” expropriation.
- An expropriation provision protects foreign investments against dispossession or confiscation of their property by the host country without compensation.

## UNCTAD Policy Options

As most BITs also prohibit indirect expropriation (i.e. apply to regulatory takings), and as some arbitral tribunals have tended to interpret this broadly (i.e. including legitimate regulatory measures in the pursuit of the public interest), **the expropriation clause has the potential to pose undue constraints on a State's regulatory capacity.**

To avoid this, Egypt could :

- clarify the notion of indirect expropriation, and
- introduce criteria to distinguish between indirect expropriation and legitimate regulation that does not require compensation.

**Option 1:** Establish criteria for indirect expropriation

**Option 2:** Define what does not constitute indirect expropriation

**Option 3:** Omit reference to indirect expropriation

## F. Free transfer of funds

- All of Egypt's BITs include a free transfer of funds provision.
- Only 16% of the Egyptian BITs include exceptions related to the free transfer of funds provision.
- These exceptions concern balance of payments difficulties such as in the BITs with Iceland (2008) and Mauritius (2003) or other specific exception (e.g. to protect creditors) such as in the BIT with Australia (2001).

## UNCTAD Policy Options

An unqualified transfer-of-funds provision significantly reduces a host country's ability to deal with sudden and massive outflows or inflows of capital, balance-of-payments (BoP) difficulties and other macroeconomic problems.

Egypt may wish to maintain its ability to deal with sudden and massive outflows or inflows of capital by the inclusion of specific exceptions, as is foreseen in its draft model BIT of 2014.

Various options exist:

**Option 1:** Include an exception for serious balance-of-payments difficulties or other financial and economic crises

**Option 2:** Provide an exhaustive list of the types of funds that are freely transferable

**Option 3:** Subject the free transfer obligation to investors' compliance with certain key laws that aim at the protection of third parties (e.g. creditors) and prevention of illegal activities

## G. Public policy exceptions

- **Only 8% of the Egyptian BITs** include general public policy exceptions related to public health, the environment and public order.
- public policy exceptions reduce States' exposure to claims arising from any conflict that may occur between the interests of a foreign investor and the promotion and protection of legitimate public-interest objectives.

# UNCTAD Policy Options

The draft Egyptian model BIT of 2014 foresees the protection of measures considered appropriate to protect national security; public order and morals; conserve human life and health; natural resources; and cultural diversity.

Accordingly, the following options are available :

**Option 1:** Decide on public policy objectives to which the exception applies

**Option 2:** Provide guidance for interpretation of exceptions

## H. Investor-state dispute settlement (ISDS)

- 94% of the Egyptian BITs include an investor-State dispute settlement (ISDS) mechanism.
- As the number of ISDS cases against Egypt increased in the last few years, questions have arisen with regard to the effectiveness and the development implications of ISDS.

# UNCTAD Policy Options

ISDS grants foreign investors greater rights than those of domestic investors, creating unequal competitive conditions.

It can also expose host States to legal and financial risks and can lead to “regulatory chill”.

The ISDS system also lacks sufficient legitimacy and fails to ensure consistency between decisions adopted by different tribunals on identical or similar issues.

Finally, ISDS cases are very expensive and often take several years to resolve. A number of policy options are thus available to deal with these problems:

**Option 1:** Limit investors resort to international arbitration

**Option 2:** Limit States’ exposure to ISDS

**Option 3:** Promote the use of alternative dispute resolution (ADR)

**Option 4:** Introduce an appeals facility

**Option 5:** Set up a standing international investment court

**Option 6:** Envisage only State-State dispute settlement

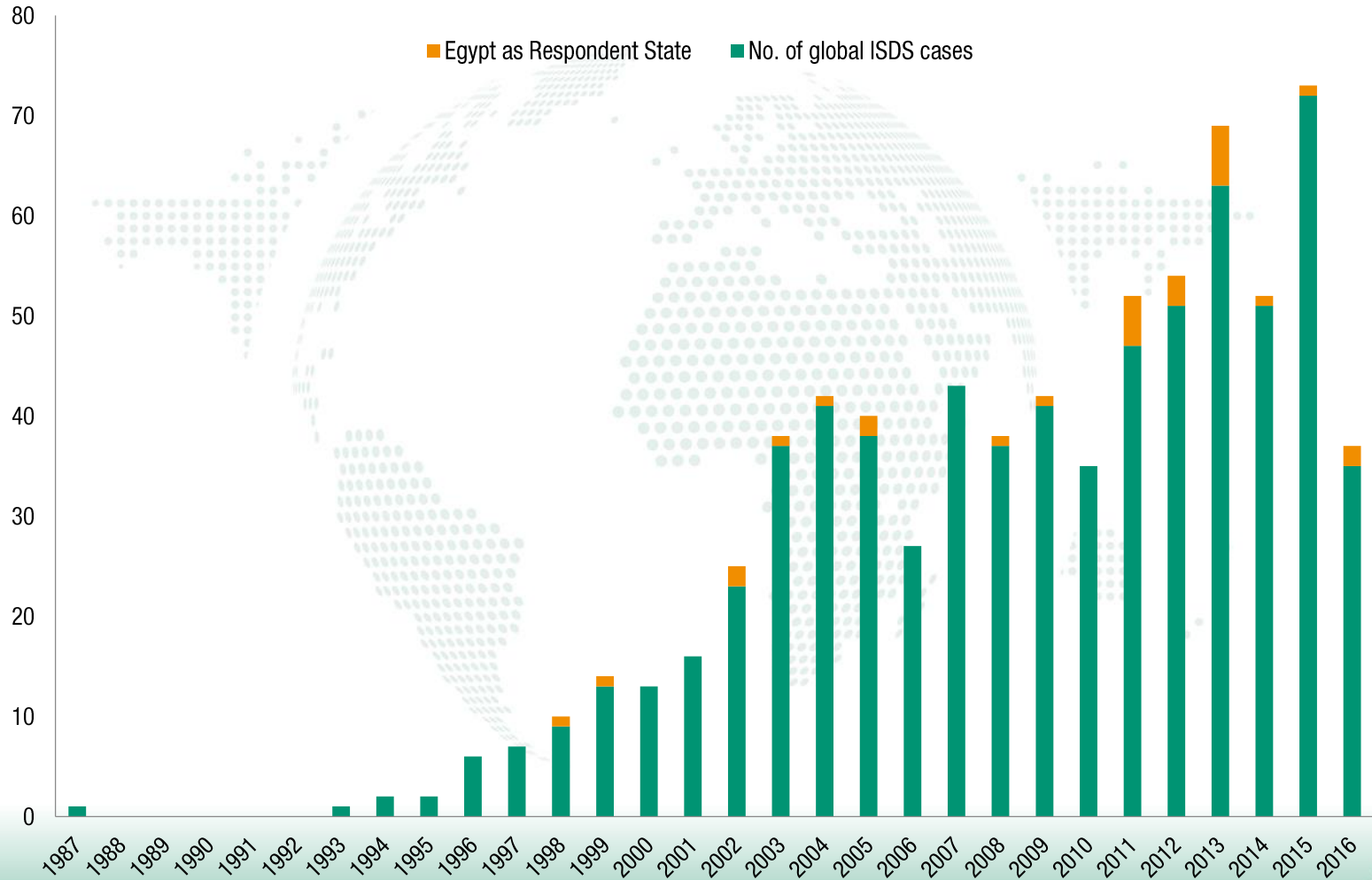


# ISDS Trends in Egypt

INVESTMENT POLICY FRAMEWORK FOR SUSTAINABLE DEVELOPMENT

# Known global ISDS cases ➡ 739 (end of November 2016)

Annual number of cases

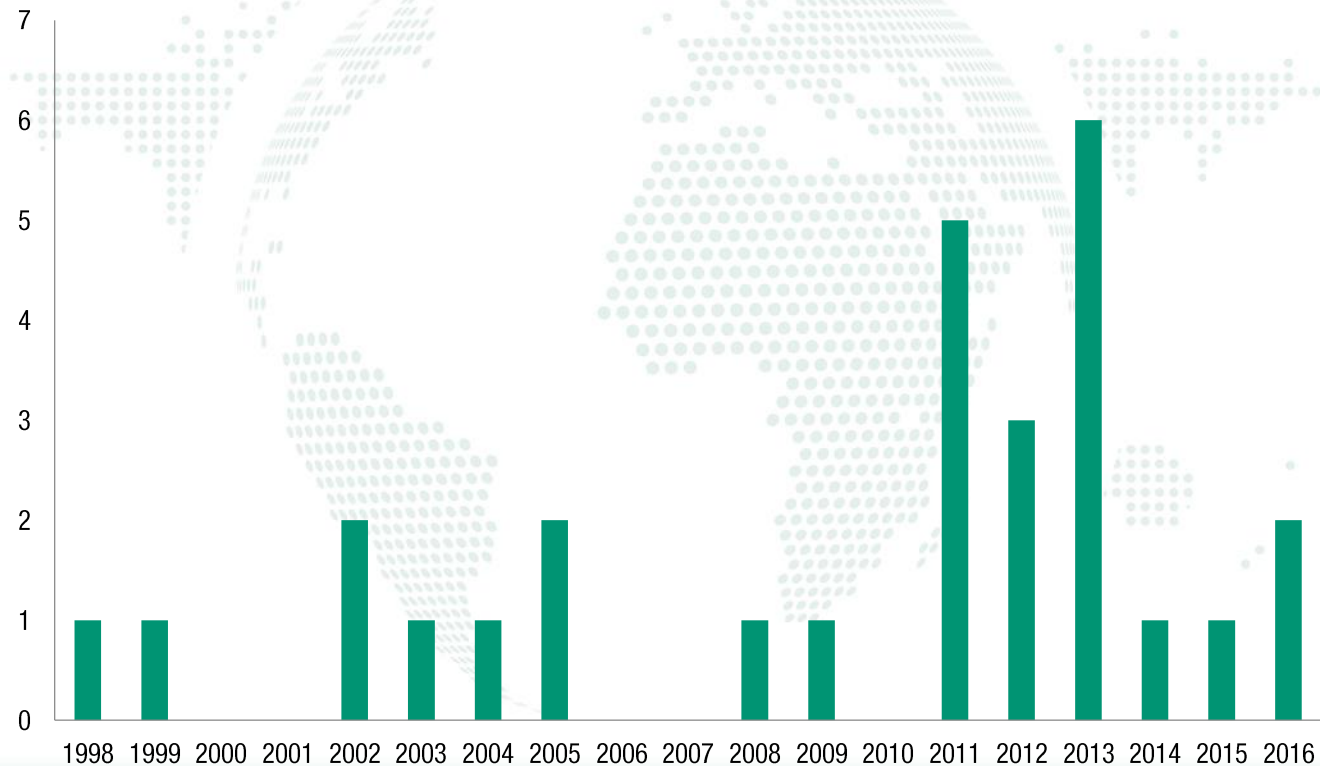


Source: ©UNCTAD, ISDS Navigator

# Egypt has been a Respondent State in **28** ISDS cases

➔ The year 2013 saw the highest no. of ISDS cases initiated against Egypt

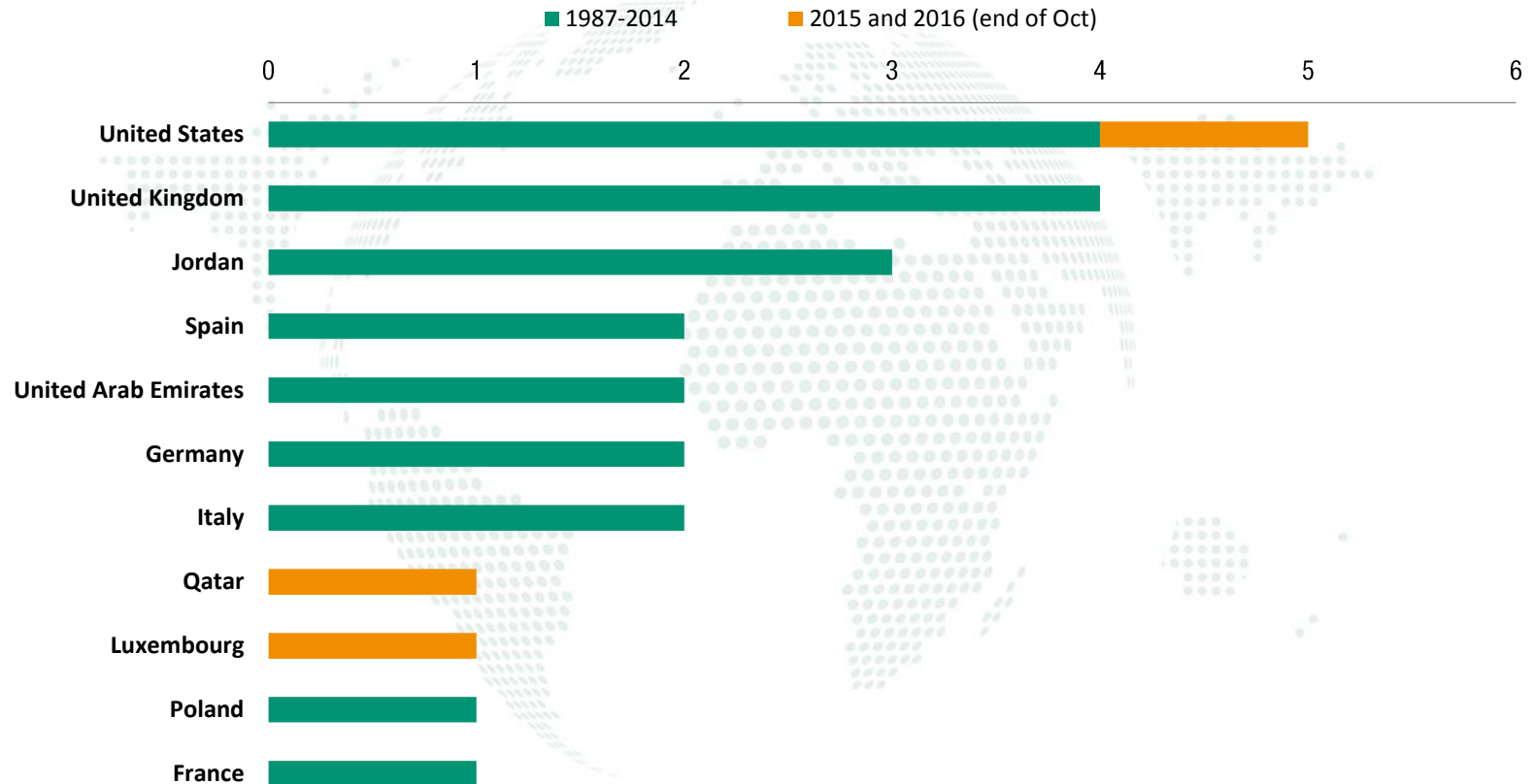
**Annual no. of ISDS cases involving Egypt as Respondent State**



Source: ©UNCTAD, ISDS Navigator

# United States, United Kingdom and Jordan were the top 3 home State of claimants in ISDS cases against Egypt

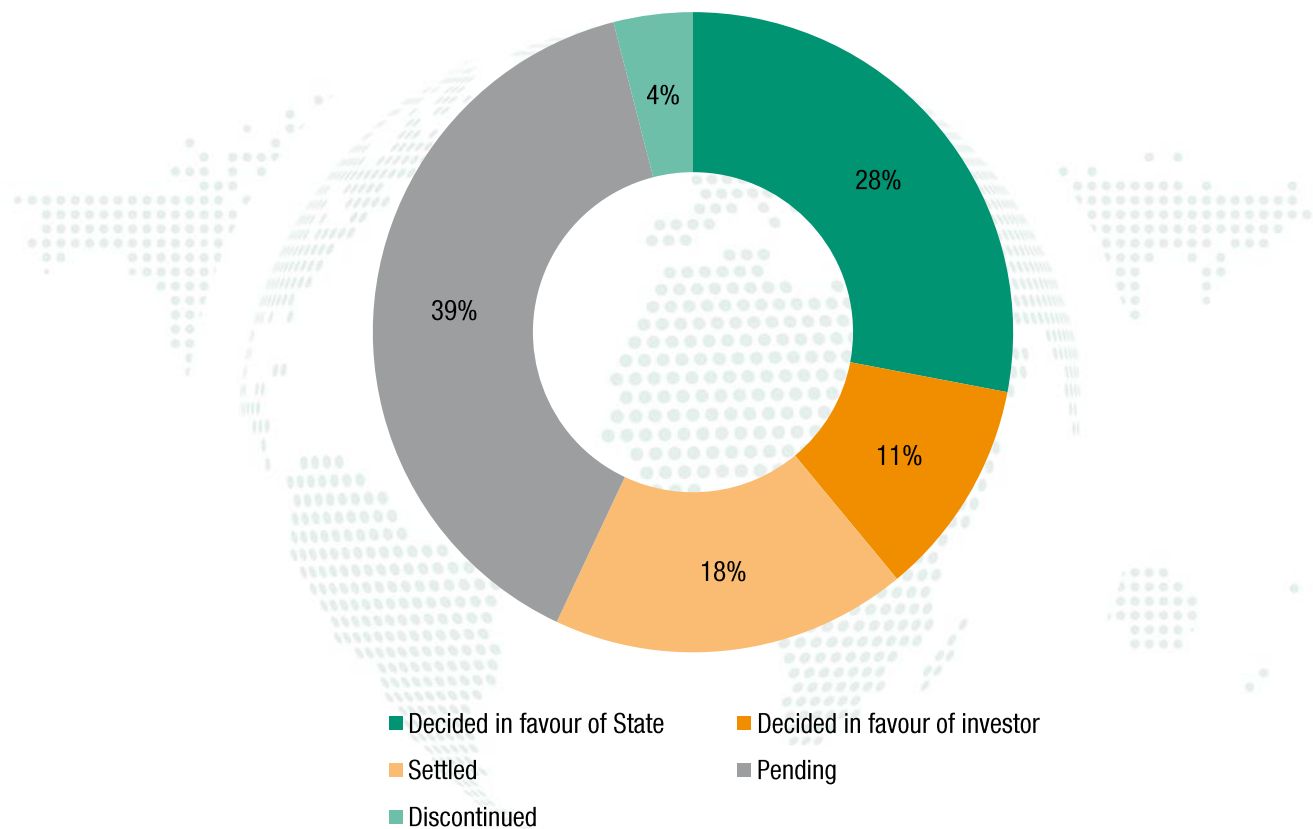
Top 10 home State of Claimants against Egypt



Source: ©UNCTAD, ISDS Navigator

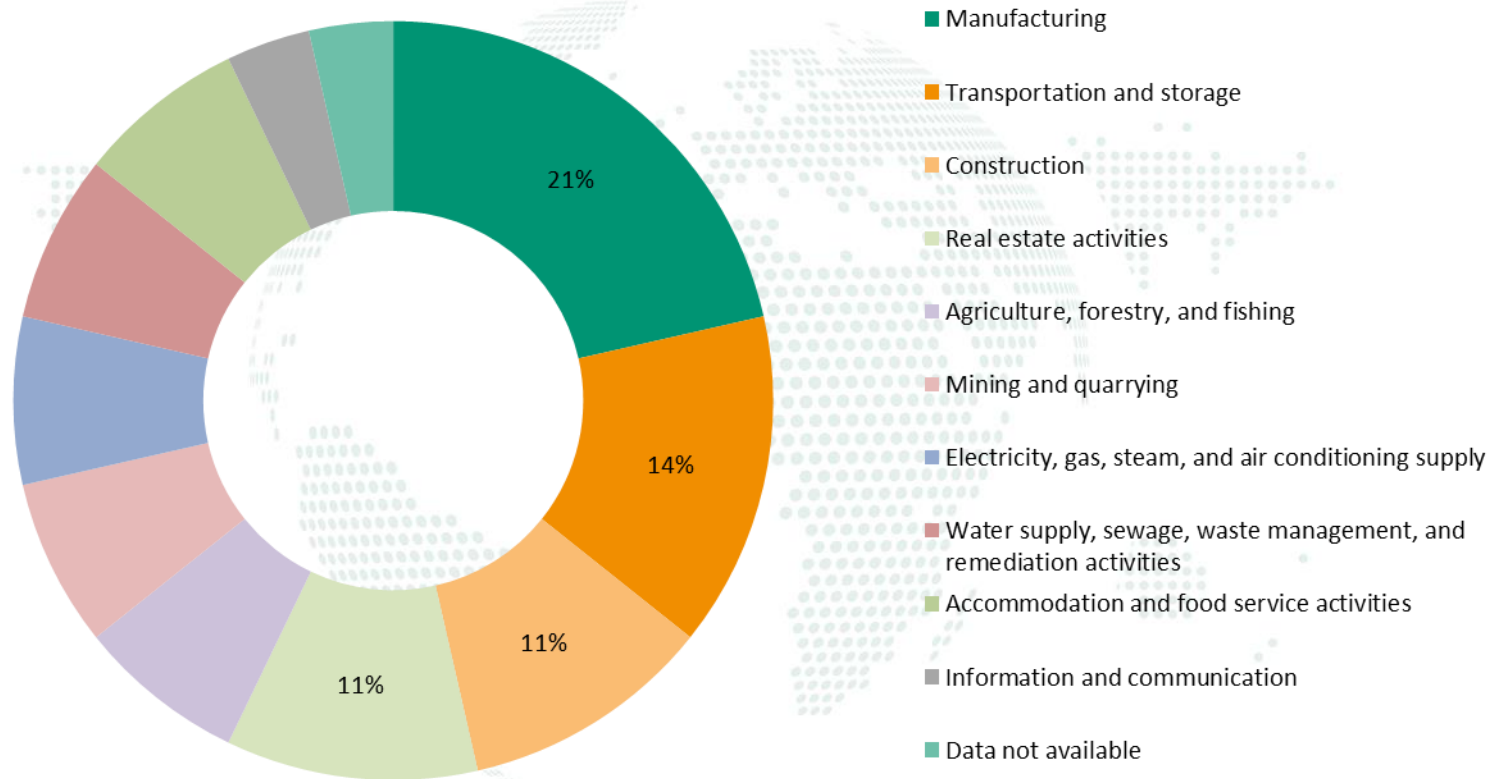
# Status of ISDS cases involving Egypt

Status of ISDS cases, end of November 2016



Source: ©UNCTAD, ISDS Navigator

# Industry sectors involved in ISDS cases against Egypt



Source: ©UNCTAD, ISDS Navigator

## Concluding remarks

- The lifespan of the current Egyptian BIT network provides an opportunity to effectively reform it with a view to addressing inconsistencies and overlaps and to strengthen its development dimension.
- Egypt may wish to initiate the first step for reforming its BITs network in a gradual and comprehensive manner. In doing so, Egypt may wish to assess the impact of these agreements, and identify concrete reform needs.
- Putting these findings into the context of the country's socioeconomic and political realities (as stipulated in its national development strategy and by today's SDG imperative) will enable policymakers to draw lessons learned and to identify concrete reform needs.

## IIA reform needs to be part of a broader agenda.

- Approaching treaty partners about changing the terms of the agreements requires careful planning and assessment of the impact on the broader aspects of the partnership.
- Here, broader strategic considerations of economic, social and political nature may come into play, which need to be carefully vetted against the investment interests.
- **UNCTAD stands ready to continue its technical assistance work with the Government of Egypt on the reform of its IIA regime.**

# THANK YOU!

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