

Regional Seminar: Facilitating Investment in SDG Projects

Reform of the IIA Regime

10-12 April 2019

Arusha

Ms. Elisabeth Tuerk

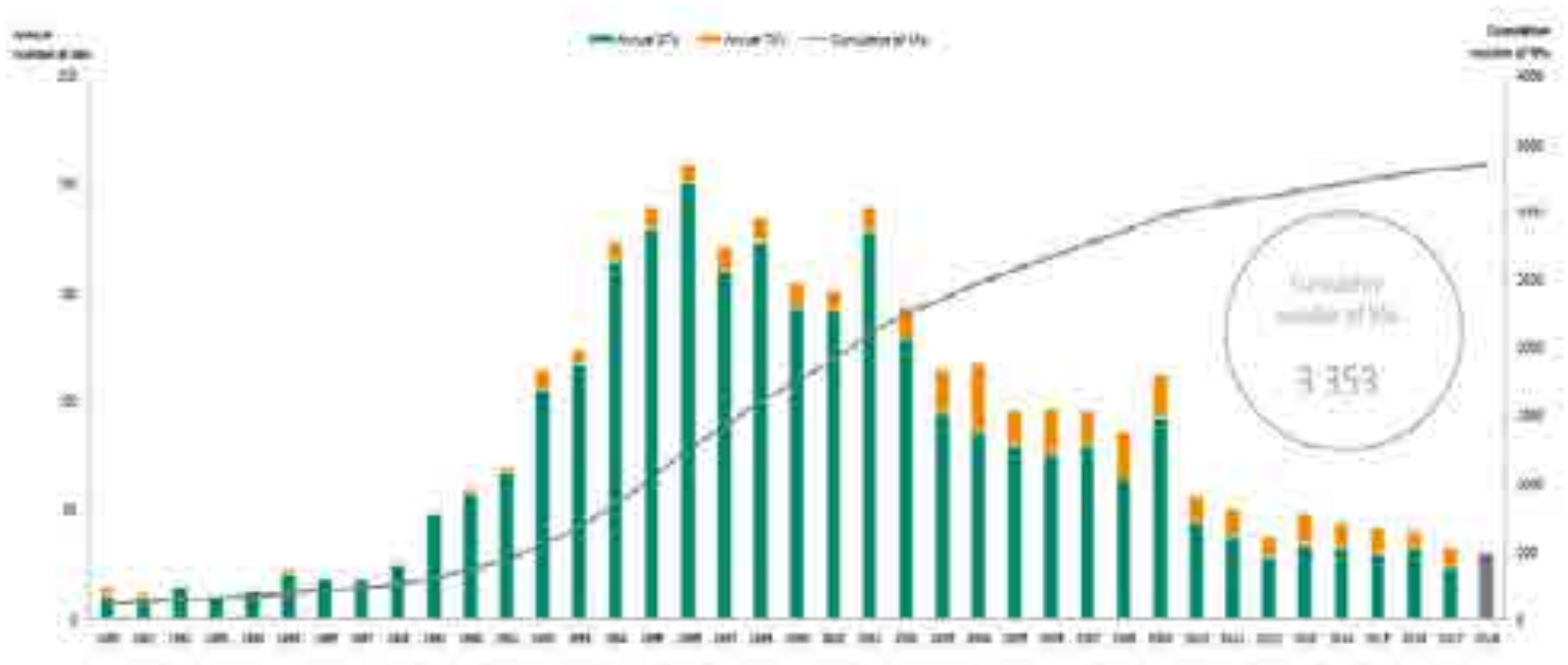
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UNCTAD data on IIAs and ISDS

Countries continue concluding IIAs, albeit at a lower pace and accompanied by an increasing number of terminations

Trends in IIAs signed, 1980 - 2018



Source: ©UNCTAD, WIR18, IIA Navigator.

Note: for 2018, data is preliminary

Taking a strategic approach to IIAs: Summary of pros and cons

Table IV.2.

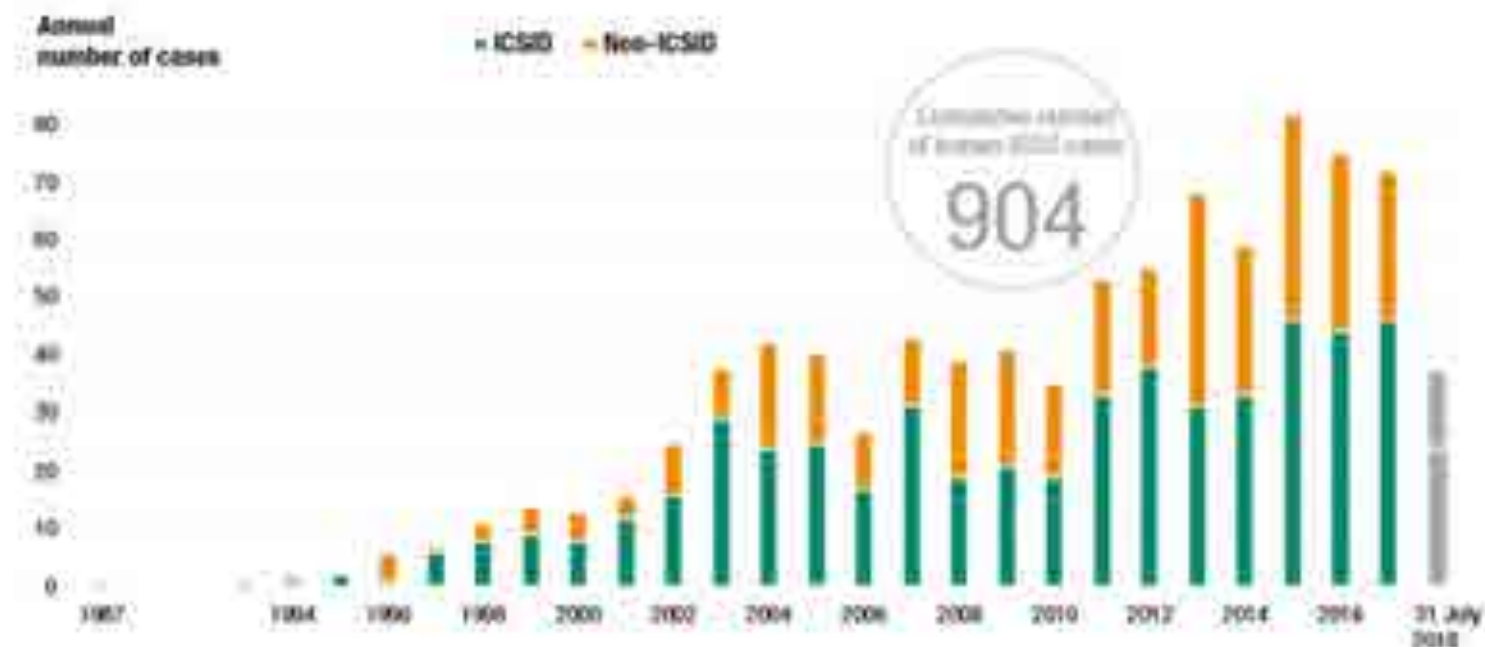
Summary of arguments put forward in favour and against IIAs

Main arguments made in favour of IIAs	Main arguments made against IIAs
IIAs: • Contribute to a favourable investment climate. • Contribute to fostering and expanding economic and political cooperation between contracting parties. • Contribute to the stability and predictability of the policy framework, foster good governance and the rule of law. • Provide protection rights that are independent from host countries' domestic legislation (superiority of international law over national law). • Compared with customary international law, improve legal certainty as protection rights are specified by treaty. • Reduce political risks of investing abroad. • May facilitate the granting of investment guarantees by the home country. • Help to avoid politicization of investment disputes.	IIAs: • Do not guarantee additional investment inflows. • May negatively affect host countries' sovereign right to regulate in the public interest. • Expose host States to ISDS and associated financial risks. • Privilege foreign investors over domestic investors. • Only provide for investor rights, not obligations. • Reflect a negotiated outcome that is influenced by the bargaining power of the negotiating parties. • May result in overlapping and inconsistent IIA obligations of contracting parties. • Are difficult to amend in case of changing circumstances.

Source: UNCTAD.

Investors continue using ISDS

Figure 1. Trends in known treaty-based ISDS cases, 1987–31 July 2018



Source: UNCTAD, ISDS Navigator

Note: Information has been compiled on the basis of public sources, including specialized reporting services. UNCTAD's statistics do not cover investor-State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification processes and may not match case numbers reported in previous years.

Strategic approach to ISDS: Summary of pros and cons

Table IV.5	Summary of arguments put forward in favour and against ISDS
Main arguments made in favour of ISDS	Main arguments made against ISDS
ISDS: • Provides an additional avenue of legal redress to covered foreign investors and enforces the substantive treaty obligations. • Allows foreign investors to avoid national courts of the host State if they have little trust in their independence, efficiency or competence. • Avoids recourse to diplomatic protection (investors do not need to convince their home State to bring claims or to exercise diplomatic protection). • Ensures adjudication of claims by a qualified and neutral tribunal. • Removes any State immunity obstacles that may complicate domestic legal claims in some States. • May be faster than domestic court procedures in some countries. • Allows recognition and enforcement of arbitral awards in many jurisdictions (under the ICSID Convention or the New York Convention).	ISDS: • Grants foreign investors greater rights than those of domestic investors, creating unequal competitive conditions. • Exposes host States to legal and financial risks, without bringing any additional benefits, and can lead to "regulatory chill". • Lacks sufficient legitimacy (is modelled on private commercial arbitration, lacks transparency, raises concerns about arbitrators' independence and impartiality). • Fails to ensure consistency between decisions adopted by different tribunals on identical or similar issues. • Does not allow for correcting erroneous decisions. • Creates incentives for "nationality planning" by investors from third countries (or from the host State itself) in order to gain access to ISDS. • Is very expensive for users. • Holds little additional value in the presence of well-established and well-functioning domestic legal systems.

Source: ©UNCTAD, World Investment Report 2015.



UNCTAD's work on sustainable development-oriented IIA reform

SUSTAINABLE DEVELOPMENT GOALS



UNCTAD's Reform Package for the Int. Investment Regime, Launched at the 2018 World Investment Forum

- **Phase 1**

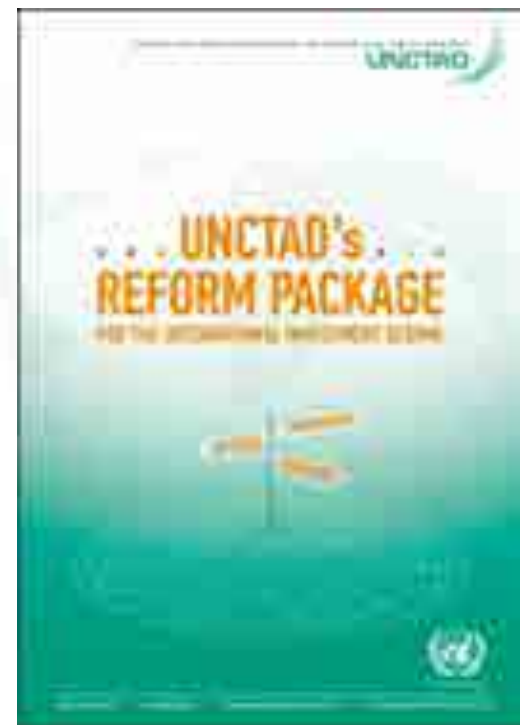
- More than 100 policy options for treaty clauses addressing the five priority areas for sustainable development-oriented treaty making

- **Phase 2**

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

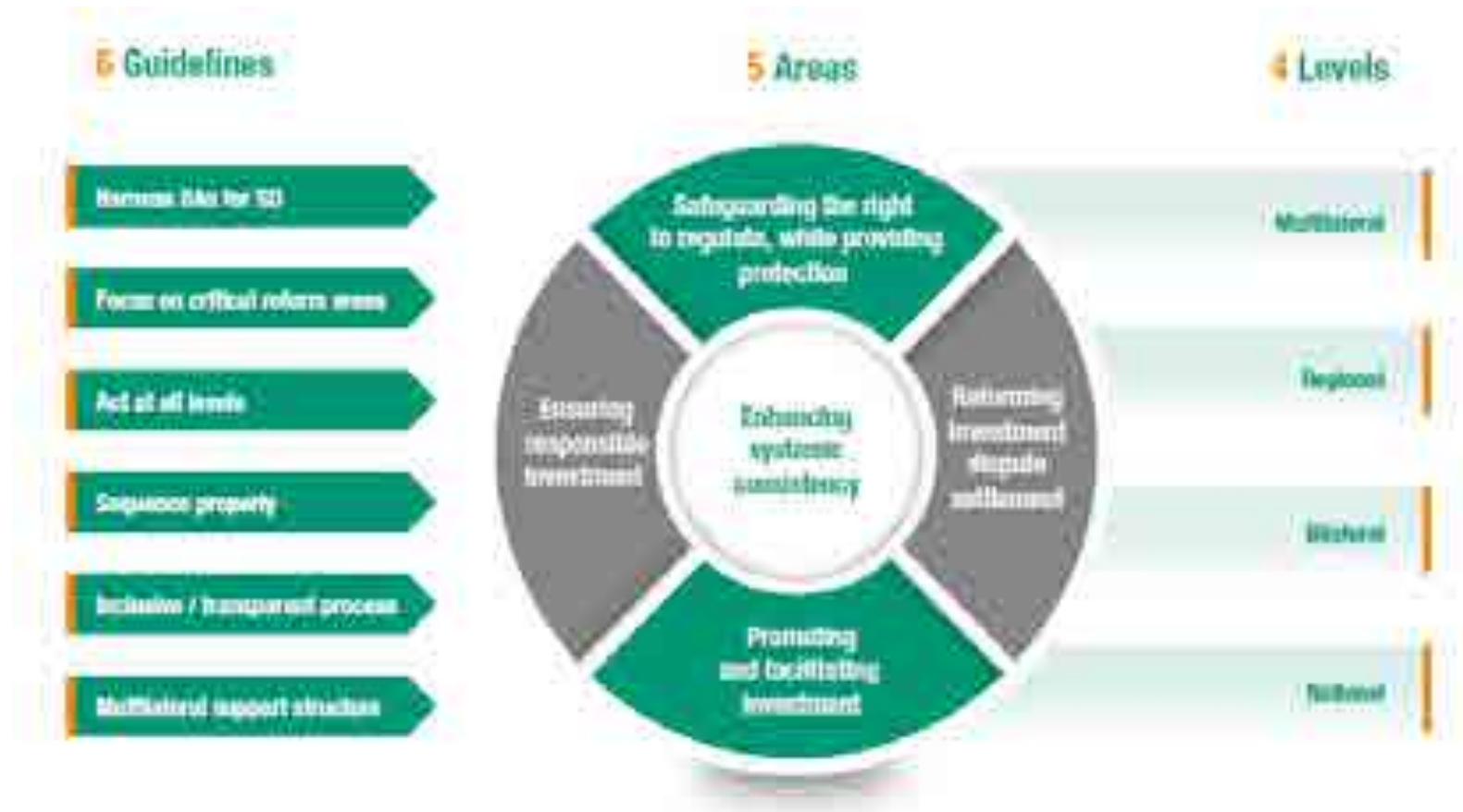
- **Phase 3**

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



Phase 1

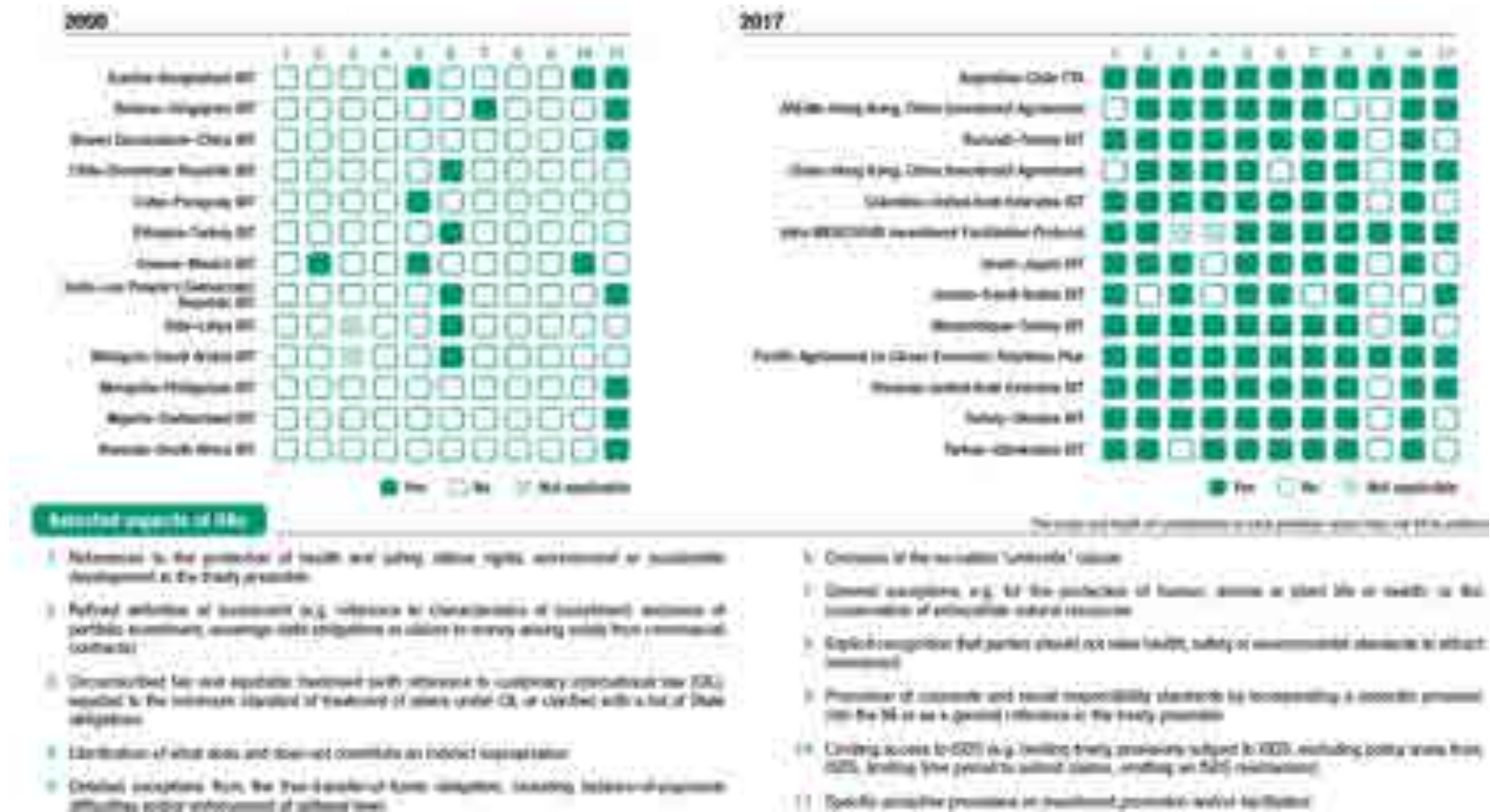
UNCTAD's Road Map for IIA Reform (2015)



Source: © UNCTAD, WIR16.

IIA reform is happening (Phase 1)

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



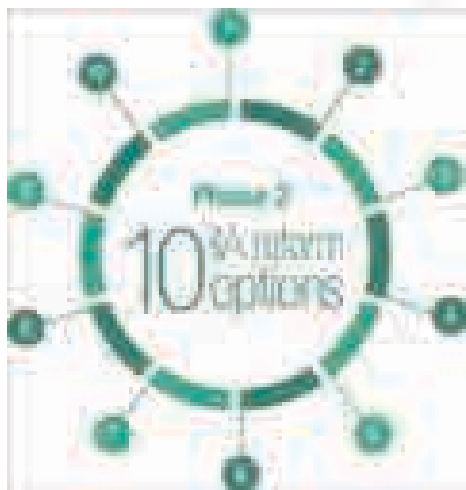
Source: ©UNCTAD, WIR18.

UNCTAD Roadmap for IIA Reform (2015): Reforming Investment Dispute Settlement

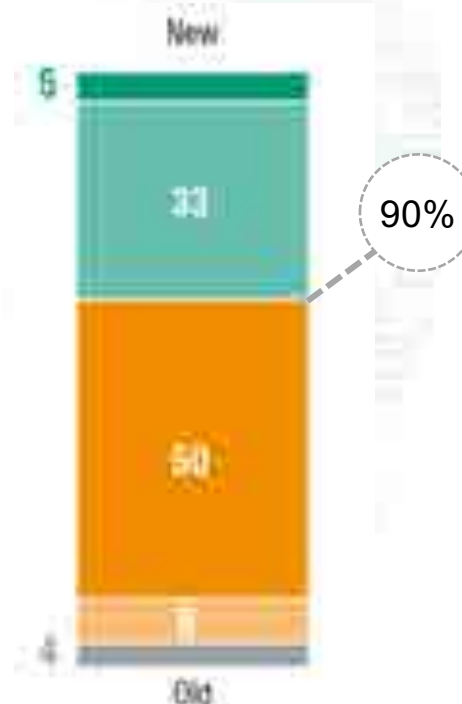
Reforming existing investor-State arbitration		Replacing existing investor-State arbitration
Fixing existing ISDS mechanisms	Adding new elements to existing ISDS mechanisms	
1. Improving the arbitral process, e.g. by making it more transparent and streamlined, discouraging submission of unfounded claims, addressing ongoing concerns about arbitrator appointments and potential conflicts. 2. Limiting investors' access, e.g. by reducing the subject-matter scope, circumscribing the range of arbitrable claims, setting time limits, and preventing abuse by "mailbox" companies 3. Using filters for channelling sensitive cases to State-State dispute settlement 4. Introducing local litigation requirements as a precondition for ISDS	1. Building in effective alternative dispute resolution 2. Introducing an appeals facility (whether bilateral, regional or multilateral)	1. Creating a standing international investment court 2. Replacing ISDS by State-State dispute settlement 3. Replacing ISDS by domestic dispute resolution

The Need for Phase 2 of IIA Reform

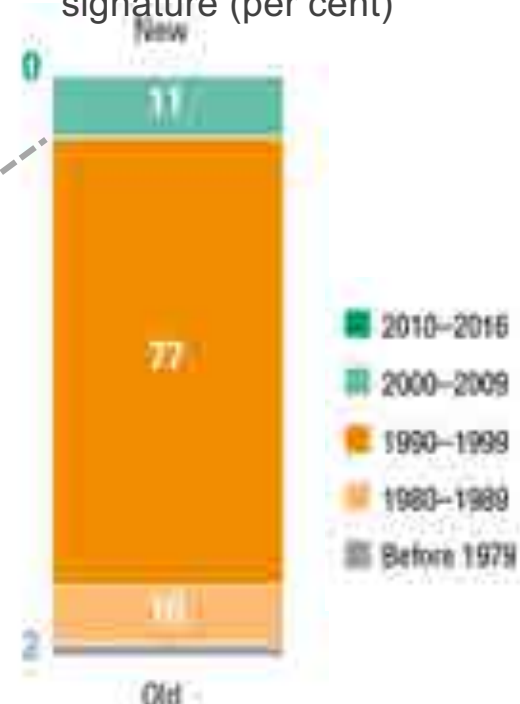
- Old treaties abound
- **Old treaties "bite"**
- Old treaties perpetuate inconsistencies



Age of IIAs: share of IIAs in force, by year of signature (per cent)



IIAs invoked in known treaty-based ISDS cases, by year of signature (per cent)



Source: ©UNCTAD, WIR17, IIA NavigatorSource: ©UNCTAD, WIR17, ISDS Navigator.

Phase 2

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



Source: © UNCTAD, WIR18.

Phase 2

The IIA regime is facing an increasing number of terminations



- **2017**
 - 55 effective terminations (53 unilateral, 2 by consent)
 - India 50
- **2018**
 - 24 effective terminations (20 unilateral, 4 replaced by new treaty)
 - Ecuador 12
 - India 5

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

The way forward: IIA reform should be

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

UNCTAD policy tools include

- Policy Framework on SD
- Reform Package on SD Refo
- Global Action Menu on IF

UNCTAD policy tools are

- 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

More than 300 experts, including high-level IIA negotiators, representatives from intergovernmental organizations, civil society, academia and the private sector convened at the High-Level IIA Conference 2018.

One of the outcomes included the launching of the updated version of UNCTAD's Reform Package for the International Investment Regime.



THANK YOU!



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 displays the IIA Mapping Project web application. At the top, there are navigation tabs: 'Filter by: Country', 'Filter by: Date', 'Filter by: Type', and 'Filter by: Status'. Below these, the 'IIA Mapping Project' title is followed by a brief description of the project's collaborative nature and purpose. A 'Contact us' button is visible. The main content area features a table of mapped IIAs. The table has columns for 'No.', 'Short title', 'Date of signature', 'Status', 'Text', and 'View mapping'. The first four rows of the table are as follows:

No.	Short title	Date of signature	Status	Text	View mapping
1	Agreement between the Government of the United Kingdom and the Government of the United States of America on the subject of the exchange of consular officers	20/04/2000	In force	Full text in	
2	Agreement between the Government of the United Kingdom and the Government of the United States of America on the subject of the exchange of consular officers	10/01/2000	In force	Full text in	
3	Agreement between the Government of the United Kingdom and the Government of the United States of America on the subject of the exchange of consular officers	09/02/2000	Signature in force	Full text in	
4	Agreement between the Government of the United Kingdom and the Government of the United States of America on the subject of the exchange of consular officers	11/06/2000	In force	Full text in	

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 IIA Navigator web application. At the top, there are navigation tabs for "ALL IIA", "ECONOMY", and "POLICY". Below these, a sidebar contains a list of filter categories such as "Type", "Geography", "Status", and "Full Text". The main area displays a list of investment treaties, each represented by a colored bar and a title. The interface is clean and modern, with a focus on providing easy access to a large database of international investment agreements.

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