



UNCTAD Roadmap for IIA Reform Phase 2

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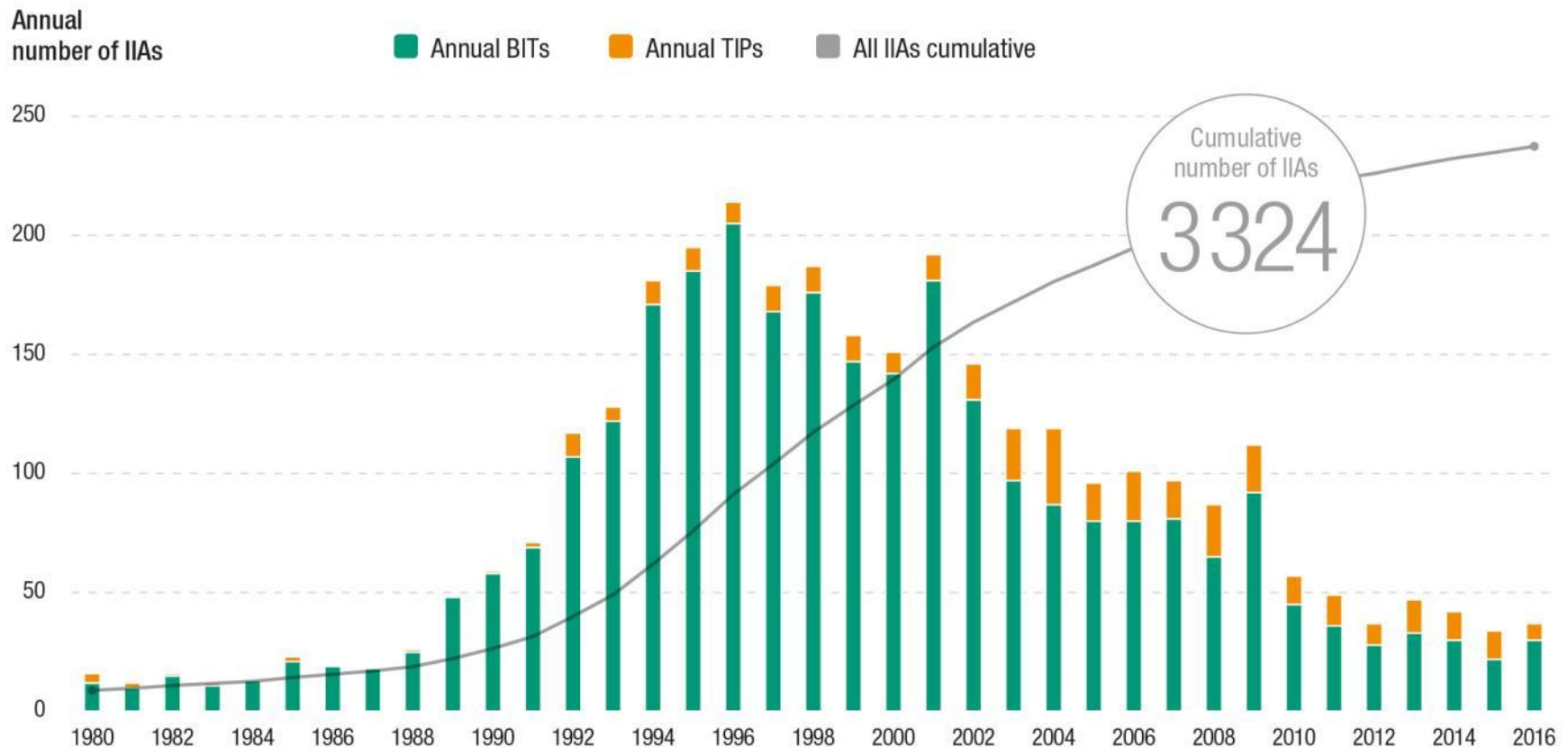
UNCTAD



The universe of IIAs continues to grow: 37 new IIAs were concluded in 2016



Trends in IIAs signed, 1980-2016

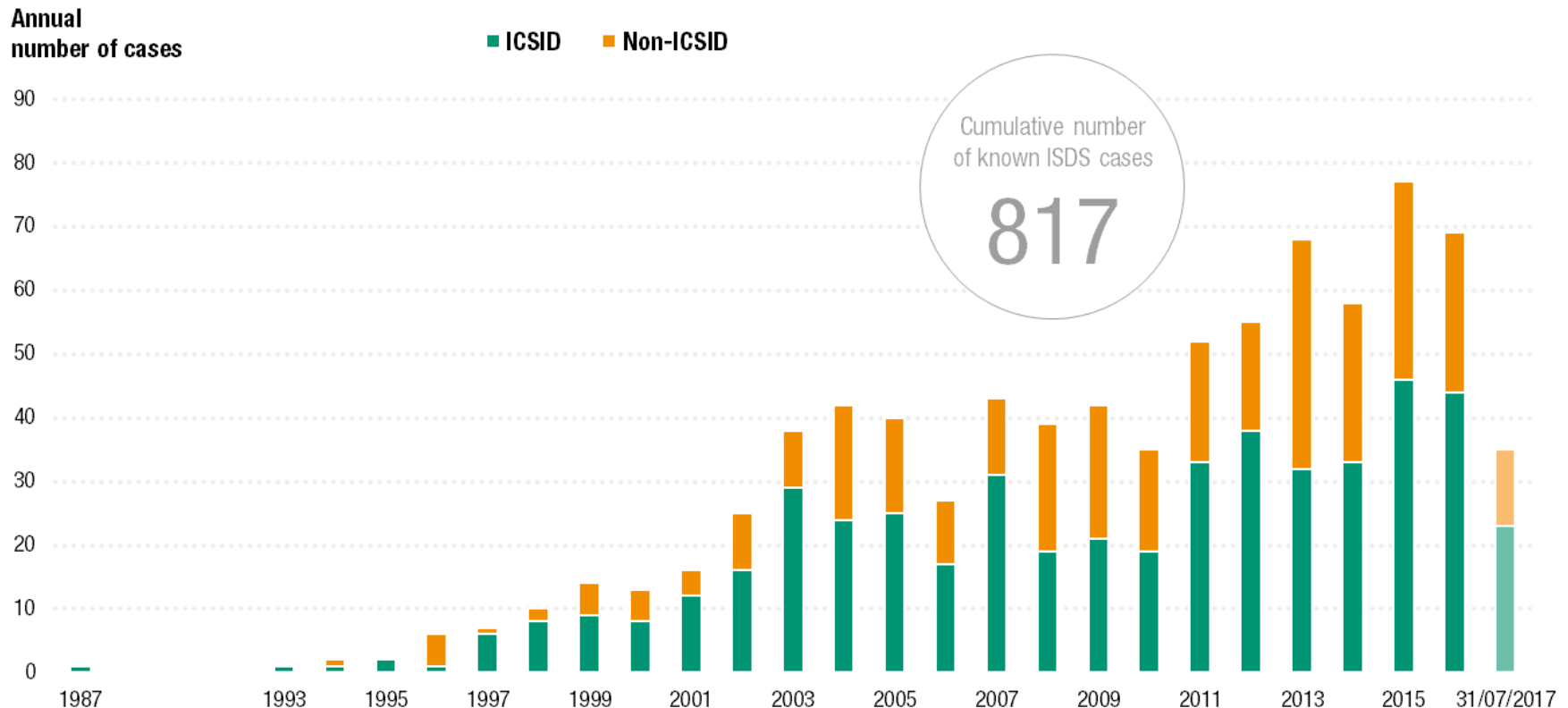


Source: ©UNCTAD, WIR17, IIA Navigator.

The rate of new ISDS cases continues unabated: 69 treaty-based cases initiated in 2016 35 in first 7 months of 2017



Trends in known treaty-based ISDS cases, 1987-31 July 2017



Source: ©UNCTAD, ISDS Navigator.

IIA reform: UNCTAD's Road Map for IIA Reform (2015)

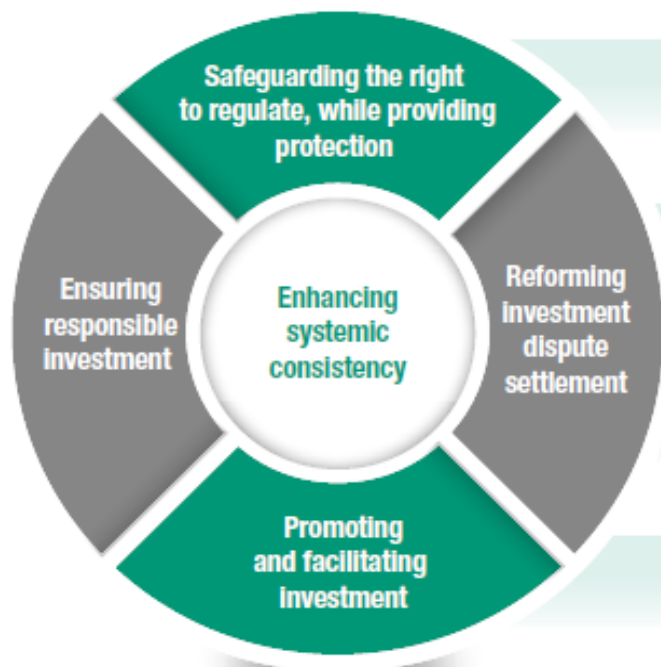


UNCTAD's Road Map for IIA Reform

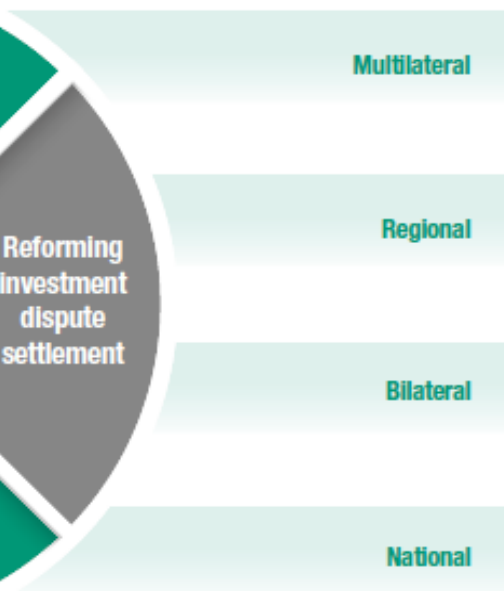
6 Guidelines



5 Areas



4 Levels



Source: ©UNCTAD, WIR15 & WIR16.

IIA reform: intensifying and yielding concrete results at the national, bilateral, and regional levels



Treaty provisions Options for IIA Reform

Preamble

Refer to the protection of health and safety, labour rights, environment or sustainable development

Definition of covered investment

Expressly exclude portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts

Definition of covered investor

Include “denial of benefits” clause

Most-favoured-nation treatment

Specify that such treatment is not applicable to other IIAs’ ISDS provisions

Fair and equitable treatment

Refer to minimum standard of treatment under customary international law

Indirect expropriation

Clarify what does and does not constitute an indirect expropriation

Free transfer of funds

Include exceptions for balance-of-payments difficulties and/or enforcement of national laws

Public policy exceptions

Include general exceptions, e.g. for the protection of human, animal or plant life, or health; or the conservation of exhaustible natural resources

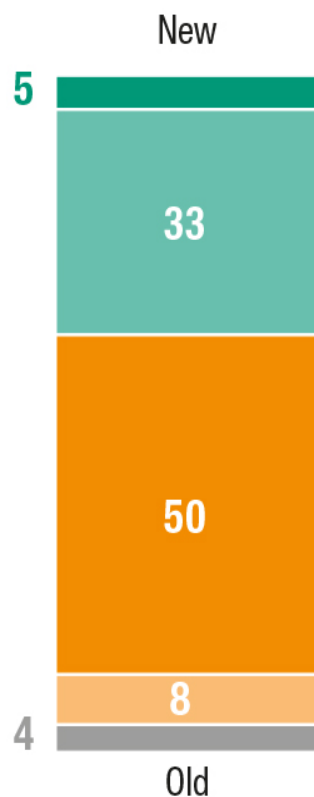
UNCTAD Policy Framework Option	Earlier BITs (1959–2010) (2,432)	Recent BITs (2011–2016) (110)
1.1.2	8%	56%
2.1.1	4%	39%
2.2.2	5%	58%
4.2.2	2%	45%
4.3.1	1%	29%
4.5.1	5%	42%
4.7.2	18%	74%
4.7.3		
5.1.1	7%	43%

Source: ©UNCTAD, WIR 2017.

Almost all ISDS cases are based on old treaties



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)



90% of cases based on pre-2000 treaties

- 2010–2016
- 2000–2009
- 1990–1999
- 1980–1989
- Before 1979

Source: ©UNCTAD, WIR17.

UNCTAD Policy Tools (2017): Phase 2 of IIA Reform

10 options for modernizing old-generation treaties



Source: ©UNCTAD, WIR17.

Overview of reform options: actions and outcomes

Phase 2

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, WIR17.



THANK YOU!

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