

# Overview of the current international debate on reform of investment dispute settlement

Expert meeting: Establishment of a multilateral investment dispute settlement system

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## Outline

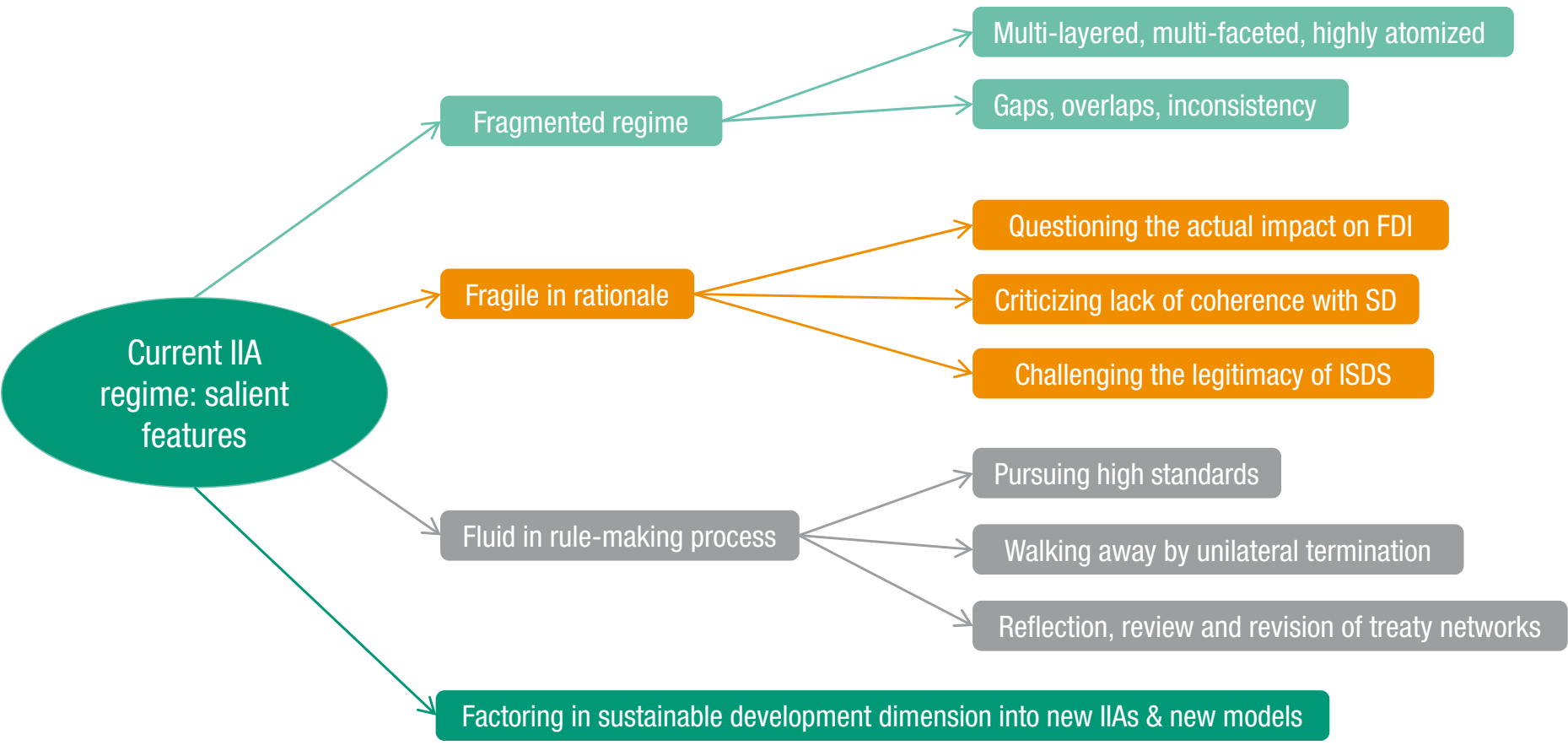
- The international investment regime: salient features
  - International investment agreements (IIAs)
  - Investor-State dispute settlement (ISDS)
- Reforming investment dispute settlement
  - UNCTAD policy options (fixing, adding, replacing)
  - Summary of the debate (pros and cons)
- The bigger picture and the way forward
  - Roadmap for systemic IIA reform
  - Investment Policy Framework for Sustainable Development



# The international investment regime: salient features

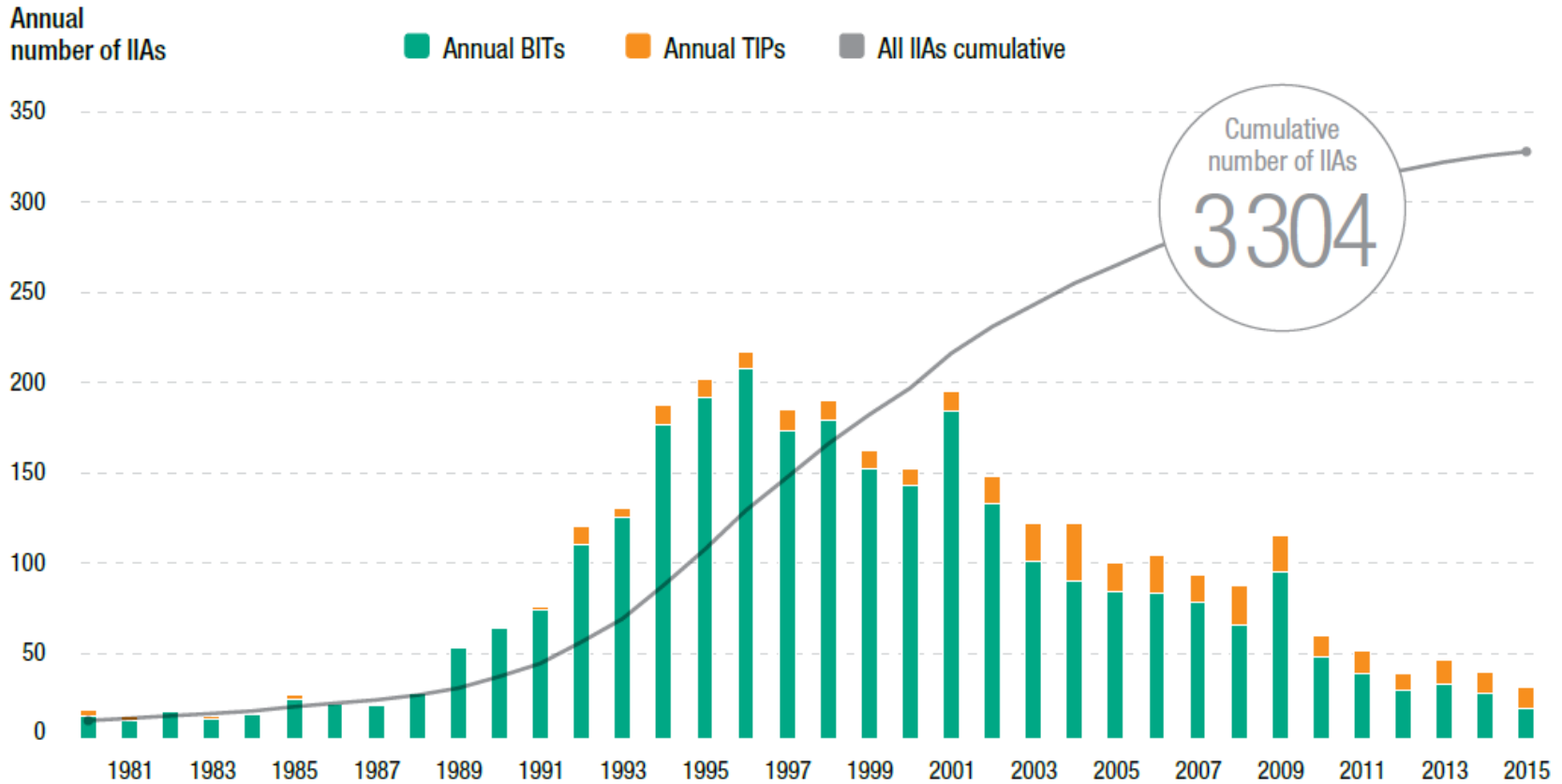


# The current IIA regime: salient features



# The IIA universe continues to grow: 31 new IIAs in 2015 (20 BITs & 11 TIPs)

## Trends in IIAs signed, 1980-2015

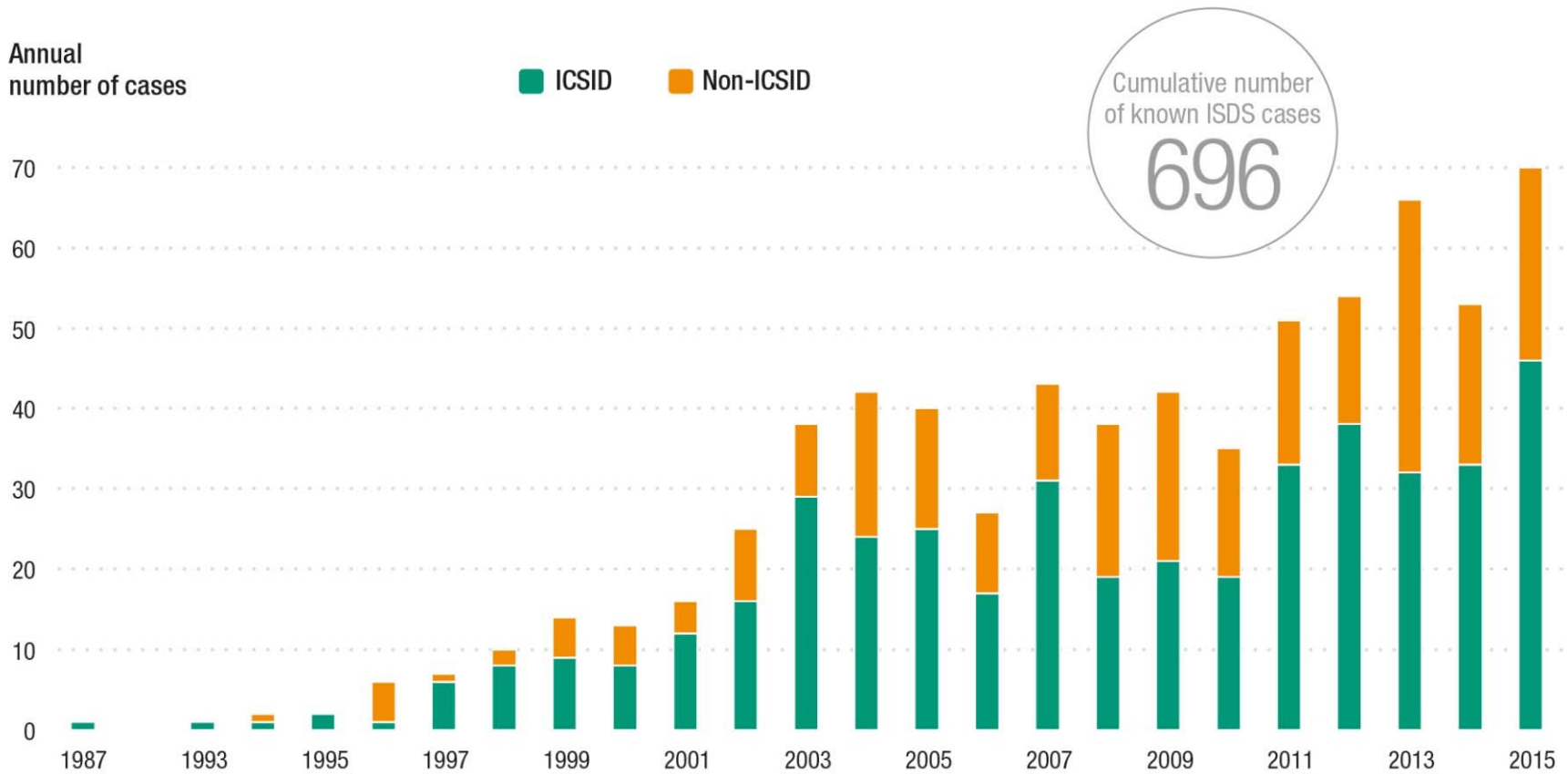


Source: ©UNCTAD, IIA Navigator.



# In 2015, investors initiated a record high of 70 known ISDS cases

## Known ISDS cases, annual and cumulative, 1987-2015



Source: ©UNCTAD, ISDS Navigator.



# Reforming investment dispute settlement



# Options for reforming investment dispute settlement

Table IV.6.

Sets of options for 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	
<ol style="list-style-type: none"> <li><b>1. Improving the arbitral process</b>, e.g. by making it more transparent and streamlined, discouraging submission of unfounded claims, addressing ongoing concerns about arbitrator appointments and potential conflicts.</li> <li><b>2. Limiting investors' access</b>, e.g. by reducing the subject-matter scope, circumscribing the range of arbitrable claims, setting time limits, and preventing abuse by "mailbox" companies</li> <li><b>3. Using filters for channelling sensitive cases</b> to State-State dispute settlement</li> <li><b>4. Introducing local litigation requirements</b> as a precondition for ISDS</li> </ol>	<ol style="list-style-type: none"> <li><b>1. Building in effective alternative dispute resolution</b></li> <li><b>2. Introducing an appeals facility</b> (whether bilateral, regional or multilateral)</li> </ol>	<ol style="list-style-type: none"> <li><b>1. Creating a standing international investment court</b></li> <li><b>2. Replacing ISDS by State-State dispute settlement</b></li> <li><b>3. Replacing ISDS by domestic dispute resolution</b></li> </ol>



Source: ©UNCTAD, World Investment Report 2015.



# ISDS is at the core of the reform debate: 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

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).

### Main arguments made against ISDS

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.

## Evidence of ISDS reform: more recent BITs compared to earlier ones

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

Source: ©UNCTAD.

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



# Domestic investment dispute resolution: summary of pros and cons

## Summary of arguments put forward in favour and against domestic investment dispute resolution

### Main arguments made in favour

- Puts foreign investors on an equal footing with domestic investors.
- Helps establish a level playing field among foreign investors (e.g. for SMEs).
- Usually includes a right to appeal first-instance decisions in national jurisdictions; well-suited to interpret and apply the domestic laws of the host State.
- Reflects that reliance on ISDS is less important in countries with a sound legal systems, good governance and local courts' expertise.
- Brings into focus domestic reforms aimed at fostering sound and well-working legal and judicial institutions in host States.
- Addresses concerns about sovereignty and inconsistency with countries' constitutions.

### Main arguments made against

- There are concerns that some host States cannot guarantee an efficient and well-functioning domestic court system.
- Local courts may lack independence and be subject to political control and abuse by the State, including delaying tactics.
- Would be particularly challenging in governance weak countries, where local court decisions could be difficult to enforce.
- In some jurisdictions, exhaustion of local remedies may span a long period of time, owing to the high workload of local tribunals.
- Local courts may not have the legal competence to apply international law – many jurisdictions do not allow for the direct applicability of IIAs.



Source: ©UNCTAD, based on World Investment Report 2015.

## State-State arbitration: summary of pros and cons

Table IV.7.

### Summary of arguments put forward in favour and against State-State arbitration

Main arguments made in favour of State-State dispute settlement	Main arguments made against State-State dispute settlement
<ul style="list-style-type: none"><li>• Could avoid broader legitimacy concerns that have been raised in respect of ISDS.</li><li>• Could help to filter out frivolous claims.</li><li>• Only States can bring claims under international law as they are the principal subjects of the system.</li><li>• May help to avoid controversial legal issues related to challenges to public policies.</li><li>• States would not make certain types of legal arguments that could be used against them in the future.</li><li>• Does away with the privileges that ISDS bestows on foreign investors.</li></ul>	<ul style="list-style-type: none"><li>• Could politicize investment disputes-commercial dispute would become a matter of State-State diplomatic confrontation.</li><li>• Investor interests could become a bargaining chip in international relationships.</li><li>• May be more cumbersome and lengthy for investors due to bureaucracy in either or both disputing States.</li><li>• May disadvantage SMEs vis-à-vis larger companies.</li><li>• Raises challenges for States in terms of costs of proceedings and legal remedies.</li><li>• Has implications for States in terms of administrative and institutional resources.</li></ul>

Source: ©UNCTAD, World Investment Report 2015.



## A multilateral investment dispute settlement system

Can help pursue key reform objectives, including:

- Legitimacy
- Consistency and predictability in the interpretation
- Independence and impartiality of adjudicators
- Contribution to consolidation of ISDS procedures

The initiative needs to clarify a number of issues regarding e.g.

- Scope of application and institutional set-up
- Flexibilities to allow the system to expand
- Coordination between first instance and appeal mechanism
- Appointment of adjudicators and their qualifications and credentials
- Enforcement of decisions/awards
- Costs of the system
- Possible special assistance for developing countries

These questions are skillfully summarized and proposed for a technical debate in the background note to today's meeting.



# The bigger picture and the way forward



## The way forward

Current efforts to establish a multilateral investment dispute settlement system are a valuable step with regard to institutional and procedural aspects

Additional considerations:

- **Holistic:** looking at IIAs in their entirety
  - not losing sight of substantive treaty content, while exploring new ways for dispute settlement
- **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

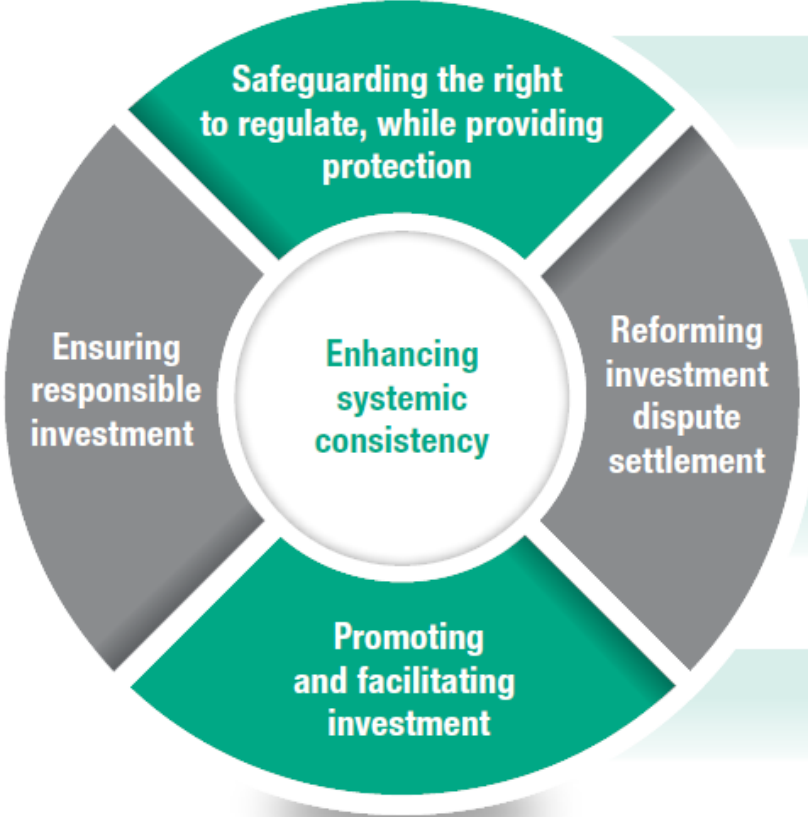


# UNCTAD's Road Map for IIA Reform

## 6 Guidelines

- Harness IIAs for SD
- Focus on critical reform areas
- Act at all levels
- Sequence properly
- Inclusive / transparent process
- Multilateral support structure

## 5 Areas



## 4 Levels

- Multilateral
- Regional
- Bilateral
- National



Source: ©UNCTAD, World Investment Report 2016.



# UNCTAD's Investment Policy Framework for Sustainable Development

## Core Principles

“Design criteria” for investment strategies, policies and treaties

National investment policy guidelines	IIA guidance: policy options	Action Menu: promoting investment in sustainable development	Global Action Menu for Investment Facilitation
Concrete guidance on how to formulate investment policies and ensure their effectiveness	Framework and toolkit for designing and negotiating international investment treaties	Strategic initiatives to mobilize funds and channel investment towards sectors key for sustainable development	10 Action Lines for policymakers to adapt and adopt for facilitating investment and benefitting from it



## Concluding remarks: there is a pressing need for systemic reform of the IIA regime

- The need for systemic reform is evident. The question is not whether or not to reform, but about the *what, how and extent* of such reform.
- This has been reflected as consensus at the 3<sup>rd</sup> UN Financing for Development Conference, UNCTAD's Ministerial Conference and the UN General Assembly. UNCTAD is mandated to be the United Nations' focal point for IIAs.
- About 100 countries have used UNCTAD's Policy Framework and Road Map to review their IIA networks and about 60 have used them to design treaty clauses.
- Comprehensive reform requires a two-pronged approach: formulating new treaties and modernizing existing ones.



# THANK YOU!

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