

Workshop on International Investment Agreements (IIAs) towards Global Sustainability

Bangkok, 26 June 2015

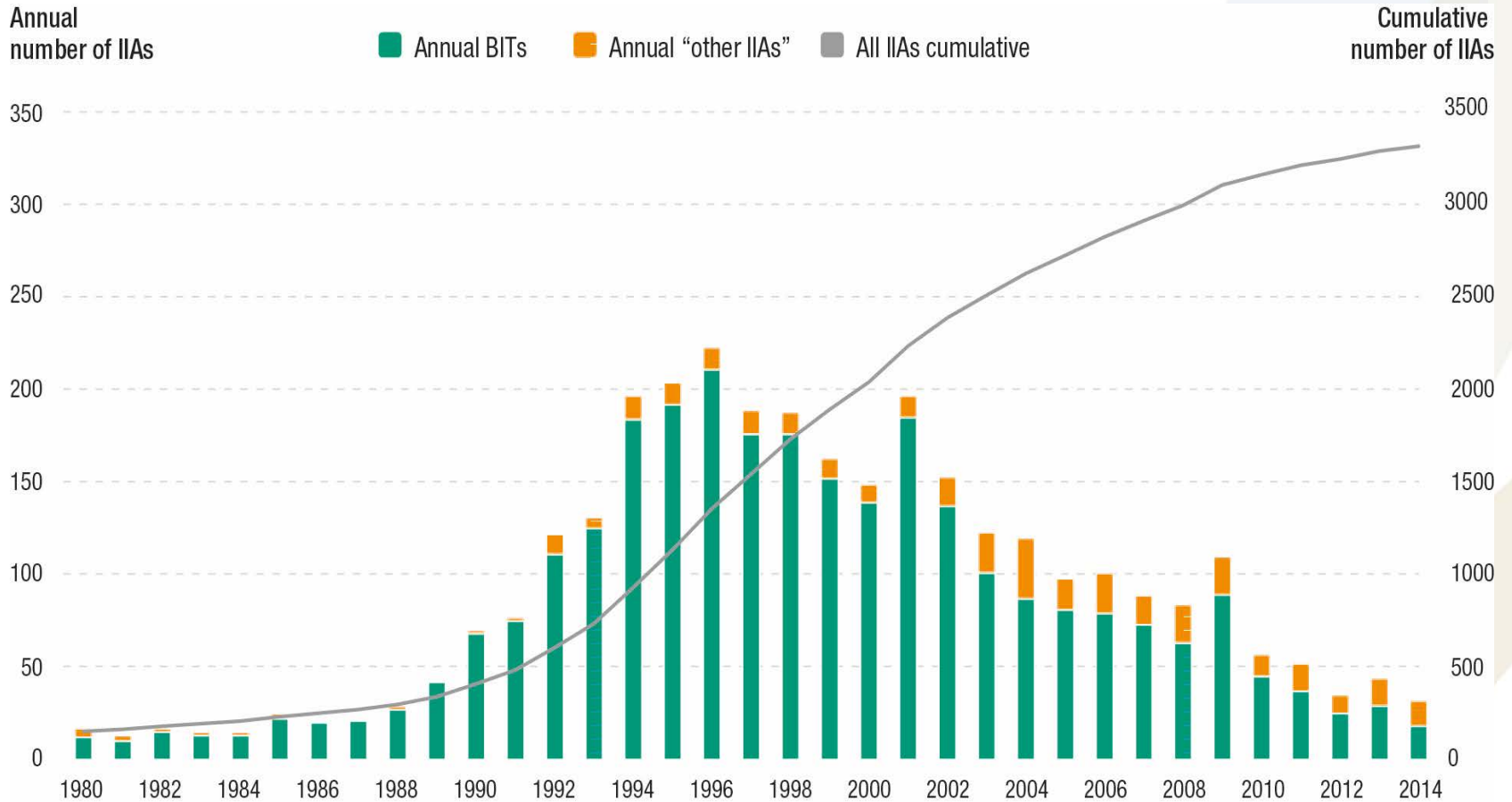
Trends and challenges in international investment policies

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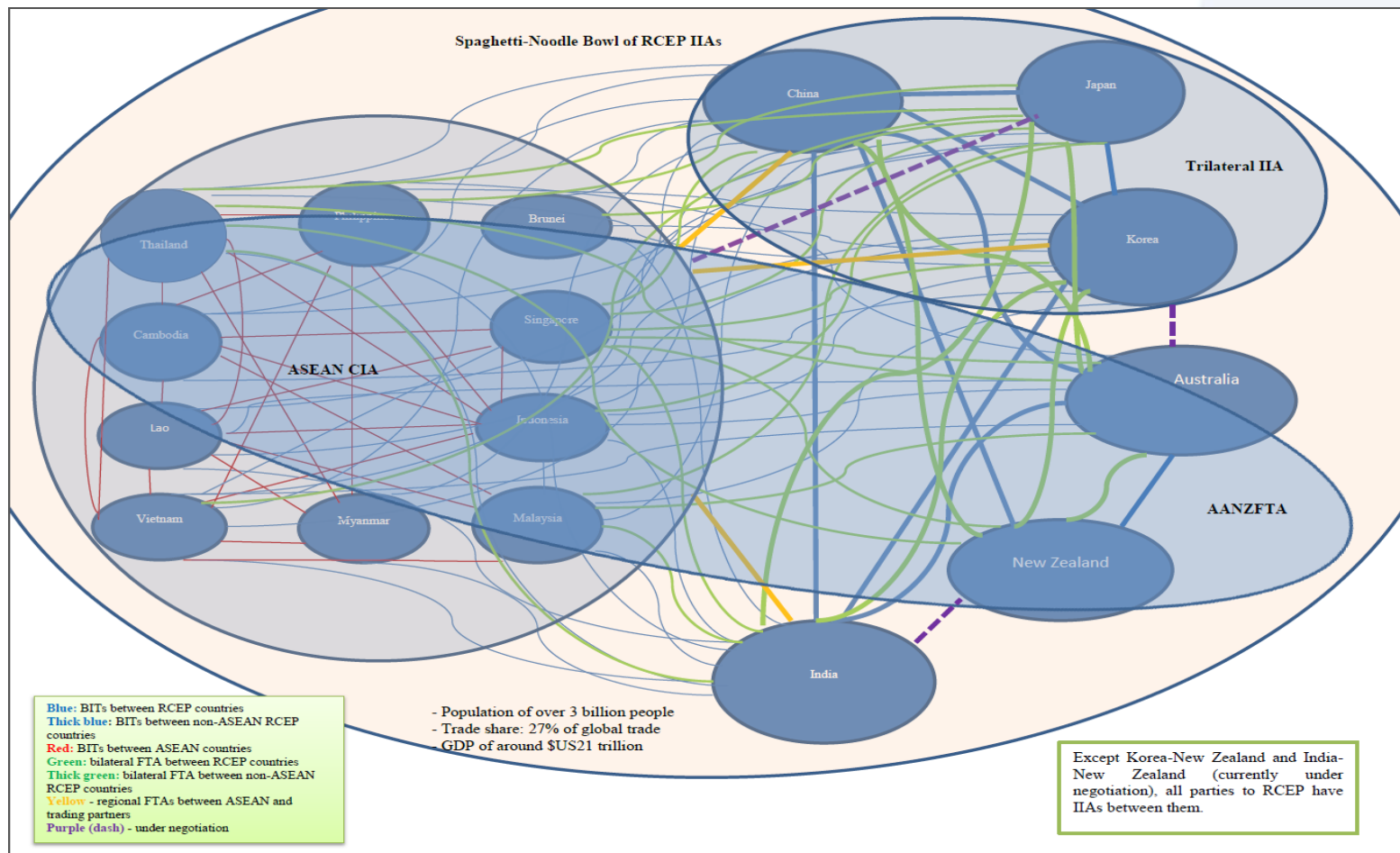
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Trends in IIAs signed, 1980–2014



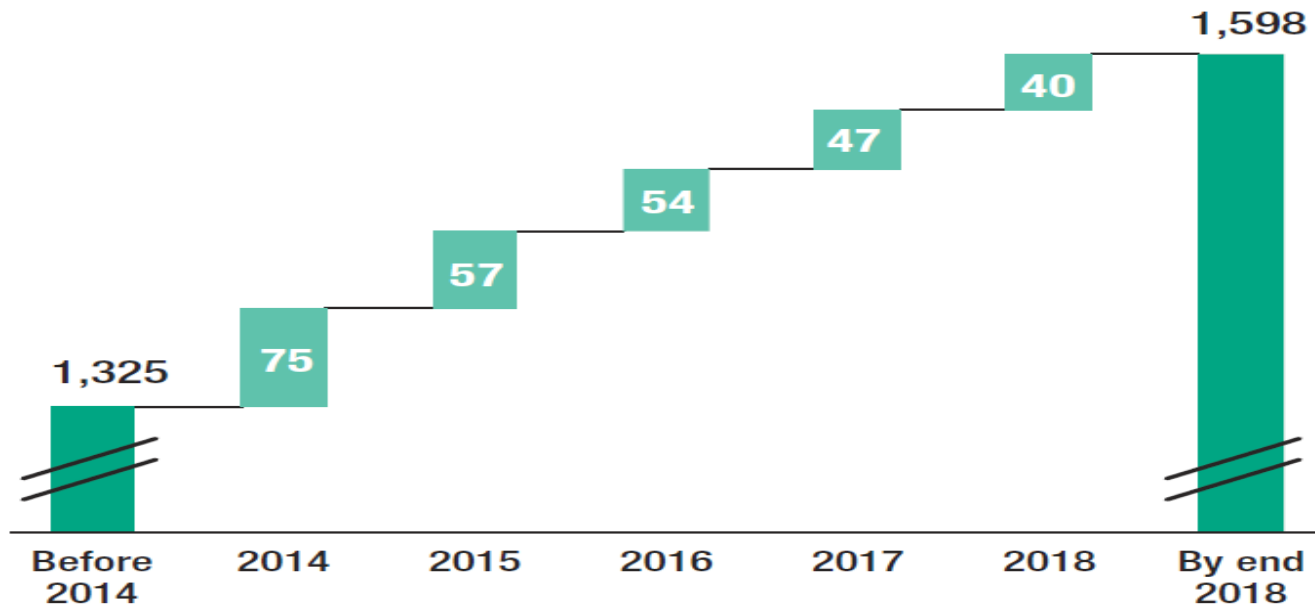
Spaghetti bowl of IIAs (RCEP countries)



Stock of older IIAs that reach termination

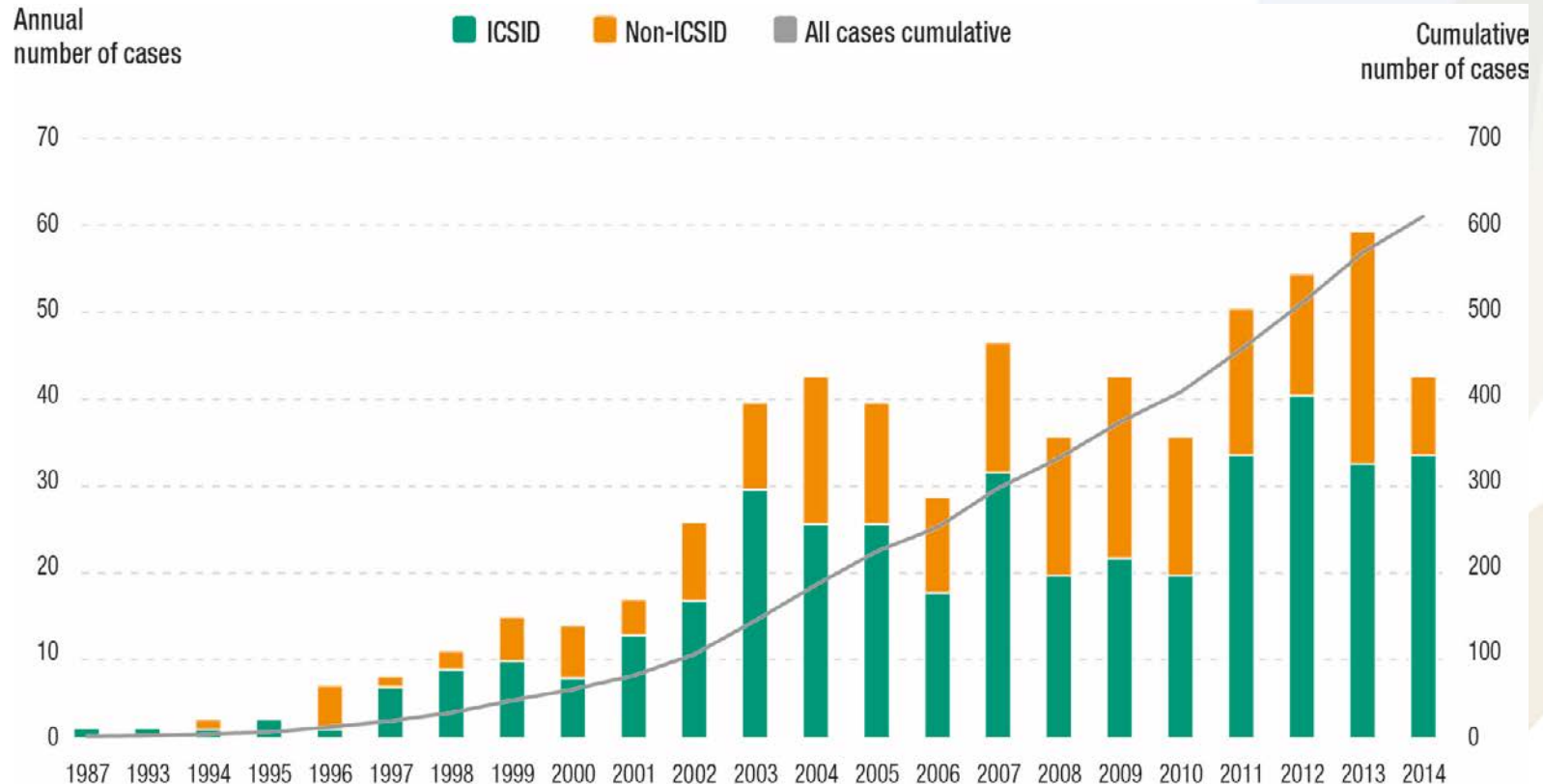
Figure IV.10.

Cumulative number of BITs that can be terminated or renegotiated at any time



Source: WIR13.

Known ISDS cases (annual and cumulative) 1987–2014



Lessons learned

| Lesson 1 | IIAs “bite” |
|----------|---|
| Lesson 2 | IIAs have limitations as an investment promotion and facilitation tool, but also underused potential |
| Lesson 3 | IIAs have wider implications for policy and systemic coherence, and capacity-building |

Key reform challenges

Reform objectives

Reform areas

1. Safeguarding the right to regulate

Circumscribed (clearly defined) IIA standards of protection

- Fair and equitable treatment
- Indirect expropriation
- MFN

"Safety valves"; e.g. exceptions for

- Public policies
- National security
- Balance-of-payments crises

2. Reforming investment dispute settlement

Clauses that

- Fix the existing ISDS mechanism by improving transparency, limiting investors' access, enhancing the contracting parties' control and introducing local litigation requirements
- Add new elements to the existing ISDS mechanism (e.g. building in effective alternative methods of dispute resolution, introducing an appeals facility)
- Replace the existing ISDS mechanism (e.g. by creating a standing international investment court, reliance on State-State dispute settlement and/or reliance on domestic dispute resolution)

3. Promoting and facilitating investment

Clauses that

- Strengthen promotion measures (inward and outward)
- Target promotion measures to sustainable development
- Foster cooperation in this regard

4. Ensuring responsible investment

Clauses that

- Prevent the lowering of environmental or social standards
- Ensure compliance with domestic laws
- Strengthen corporate social responsibility (CSR) and foster cooperation in this regard

5. Enhancing systemic consistency

Clauses and mechanisms that manage interaction between

- IIAs and other bodies of international law
- IIAs and domestic investment and other policies
- Different IIAs within a country's network

Key reform challenges

1. Safeguarding the right to regulate

Circumscribed (clearly defined) IIA standards of protection

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“Safety valves”; e.g. exceptions for

- Public policies
 - National security
 - Balance-of-payments crises
-

Key reform challenges

2. 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 | |
| 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. | 1. Building in effective alternative dispute resolution | 1. Creating a standing international investment court |
| 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 | 2. Introducing an appeals facility (whether bilateral, regional or multilateral) | 2. Replacing ISDS by State-State dispute settlement |
| 3. Using filters for channelling sensitive cases to State-State dispute settlement | | 3. Replacing ISDS by domestic dispute resolution |
| 4. Introducing local litigation requirements as a precondition for ISDS | | |

Source: UNCTAD.

Key reform challenges

3. Promoting and facilitating investment

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Key reform challenges

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Key reform challenges

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The transformation of the IIA regime requires collective vision and action

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- Transformation is a “must”
 - Sustainable development is the objective
 - Debate has moved from “to reform or not to reform” to “*how*” to reform

Guidelines for IIA reform

Table IV.8.

Guidelines for IIA reform

Description

| | |
|--|---|
| 1. Harness IIAs for sustainable development | The ultimate objective of IIA reform is to ensure that the IIA regime is better geared towards sustainable development objectives while protecting and promoting investment. |
| 2. Focus on critical reform areas | The key areas for reform are (i) safeguarding the right to regulate for public interest, (ii) reforming investment dispute settlement, (iii) strengthening the investment promotion and facilitation function of IIAs, (iv) ensuring investor responsibility, and (v) enhancing systemic coherence. |
| 3. Act at all levels | The reform process should follow a multilevel approach and take place at the national, bilateral, regional, and multilateral levels, with appropriate and mutually supportive action at each level. |
| 4. Sequence properly for concrete solutions | At each level, the reform process should follow a gradual, step-by-step approach, with appropriately sequenced and timed actions based on identifying the facts and problems, formulating a strategic plan, and working towards concrete outcomes that embody the reform effort. |
| 5. Ensure an inclusive and transparent reform process | The reform process should be transparent and inclusive, allowing all stakeholders to voice their opinion and to propose contributions. |
| 6. Strengthen the multilateral supportive structure | The reform process should be supported by universal and inclusive structures that help coordinate reform actions at different levels by offering backstopping, including through policy analysis, technical cooperation, and a platform for exchange of experiences and consensus-building. |

Source: UNCTAD.

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