

**GENEVA TALKS ON FOREIGN INVESTMENT IN AFRICA
(UNIVERSITIES OF GENEVA AND LAUSANNE)**

7 October 2015

Implications of a Regional Approach to the Regulation of Foreign Investment

Hamed El-Kady, International Investment Policy
Analyst,
Division on Investment



The international setting of international investment rules...(big picture)

- **Absence of a multilateral agreement on investment (unlike trade, services, IPR)**
- **Absence of a global body administering the process**
- **International investment rulemaking lacks system-wide coordination**
- **Countries continue to conclude investment treaties on an individual basis (bargaining power; various models; implications for developing countries)**
- **Perpetuating and accentuating the fragmentation of the IIA network**

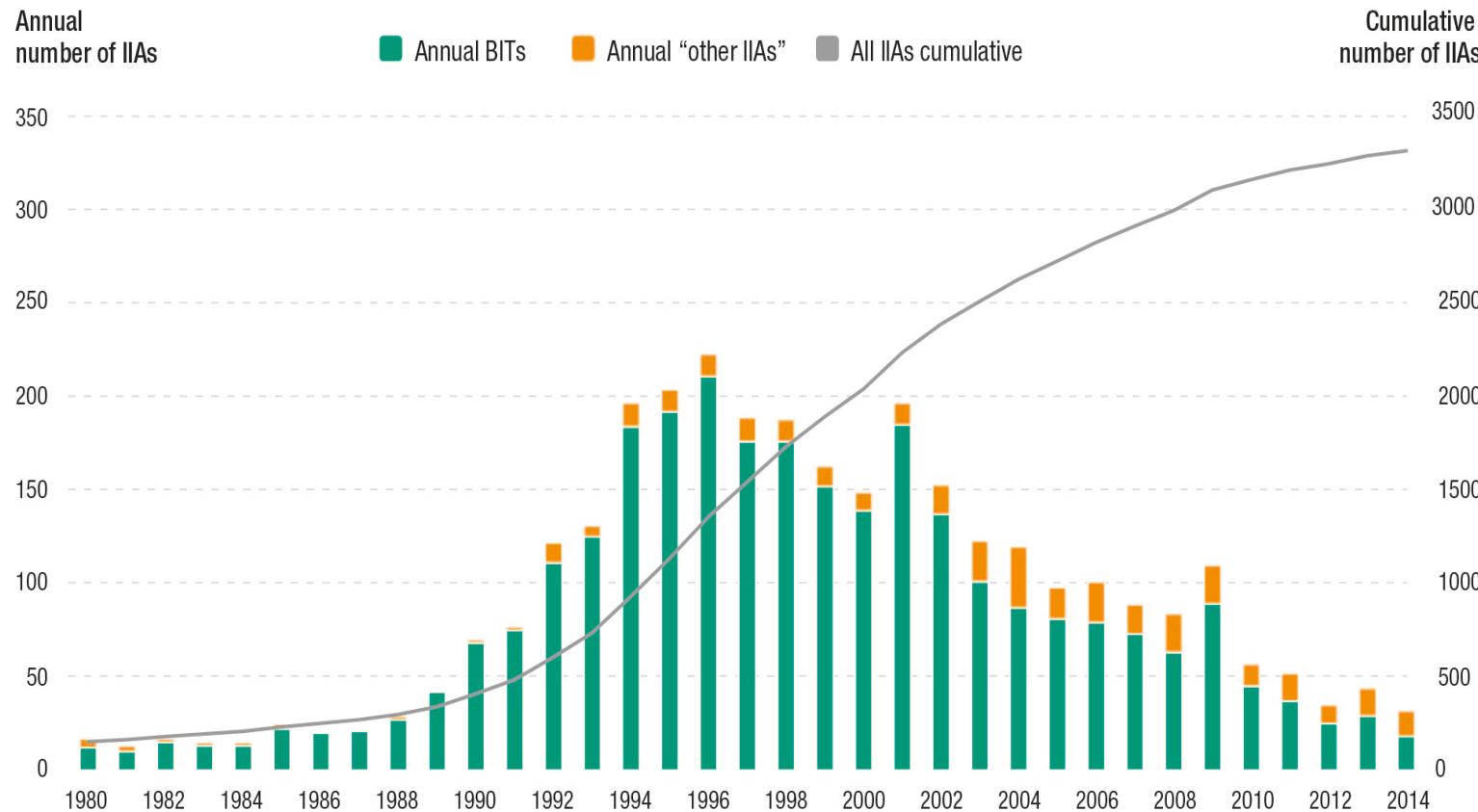
The international investment regime consists of...

- **Bilateral investment treaties (BITs)**
- **Free trade agreements / economic partnership agreements with investment provisions (FTAs/EPAs)**
- **Regional integration agreements (EU, ECOWAS, CARICOM, SADC, MERCOSUR, COMESA, Arab investment agreement, ASEAN)**

Core Elements in international investment agreements (IIAs)

- **Preamble**
- **Definitions (investment/investor)**
- **Admission and establishment**
- **Core standards of protection:**
 - **Principle of fair and equitable treatment**
 - **Principle of non-discrimination (NT/MFN)**
 - **Expropriation**
 - **Transfer of funds**
- **Dispute settlement**

The number of newly signed IIAs continues to decline

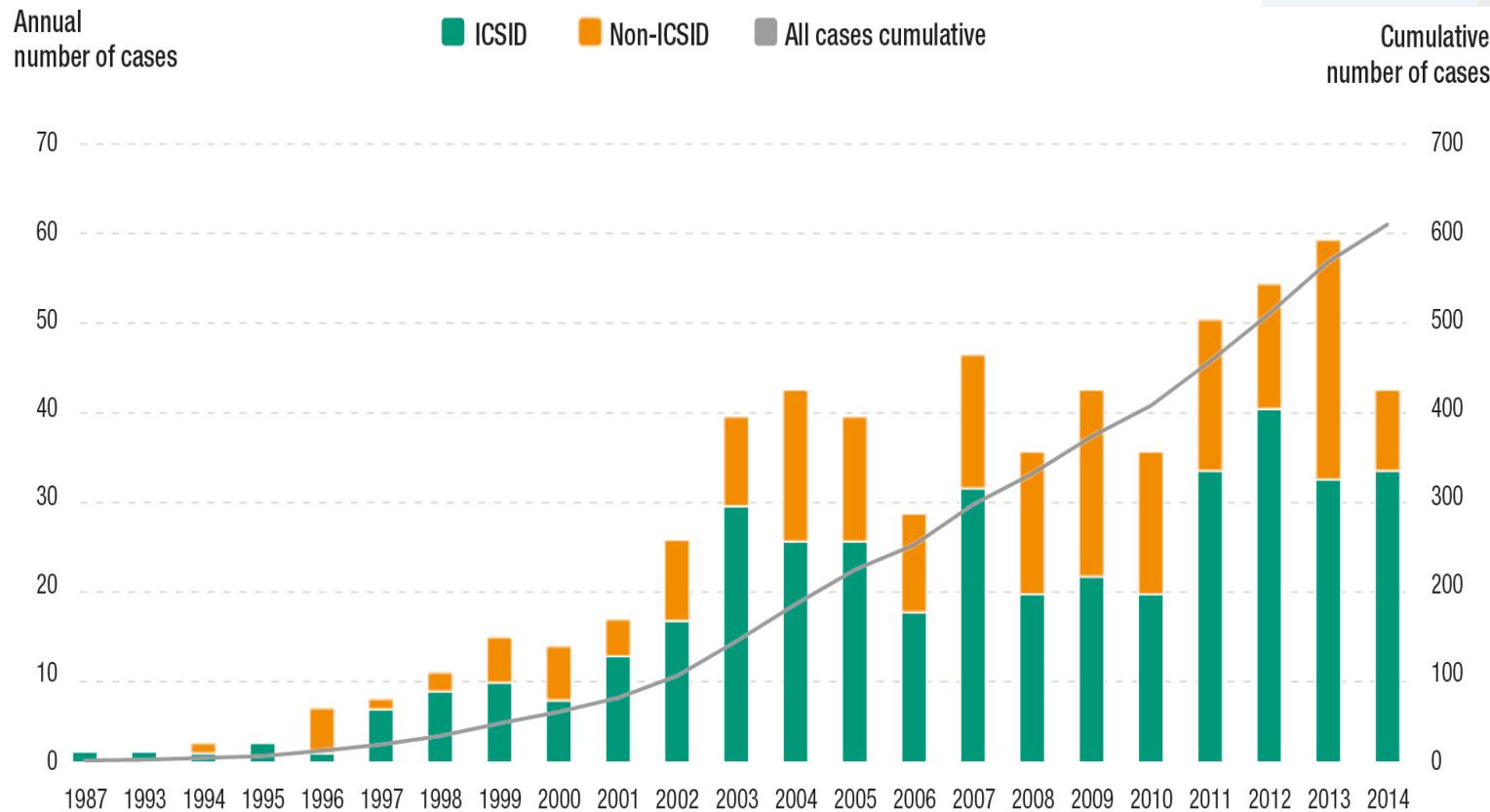


The increase in IIAs has been paralleled by an increase in investor-State disputes

- At least 42 new cases were initiated in 2014
- The total number of known treaty-based cases reached 608 by 2014 and the total number of countries that have responded to one or more investment treaty arbitration increased to 99.
- Among a broad range of governmental measures challenged in 2014, a number of cases concerned key sustainable development sectors such as protection of the environment, infrastructure, the supply of electricity, gas and water, port modernization, and the renewable energy.

- The amount claimed ranges from \$8 million to about \$2.5 billion.
- Of the new 42 known new cases in 2014, 35 were brought by investors from developed countries
- Developed-country investors – in particular, those from the United States, Canada and a few EU countries – have been the main ISDS users, responsible for over 80 per cent of all claims.
- 45 cases against African countries – \$ 35 billion sought from investors

Known investment treaty arbitrations (cumulative and newly instituted cases)



Challenging legitimate Government measures

some examples...

- Veolia vs Egypt (monthly minimum wage increase from \$56 to \$99). – Social
- Piero Foresti vs South Africa (Black Economic Empowerment Act). – Social
- Vattenfall vs Germany (new environmental standards). – Environmental
- Phillip Morris vs Australia (protection of public health). – Health

Unsustainable bilateralism, unsustainable complexity, unsustainable system,

- Limitations on policy space to regulate FDI
- Exposure to ISDS
- Increased risk of incoherence between BITs, regional agreements and national investment laws
- Developing countries caught in asymmetrical bargaining relations
- Investment treaty takers, not makers

Can regional cooperation on investment help address some of these challenges ?

Can regionalism help address some of the problems of the regime ?

It will **NOT** help if:

- Regional agreements do not entail the replacement of older BITs
- Regional agreements do not include provisions preserving the right to regulate and addressing sustainable and inclusive growth
- Countries negotiate regional agreements in a vacuum (no consultations between ministries before negotiations)

Can regionalism help address some of the problems of the regime ?

It will help if:

- Regional agreements effectively replaces BITs between the parties
- Regional agreements incorporate provisions reflecting sustainable development objectives, responsible investor behaviour
- Regional agreements take into account the different levels of economic development of parties
- Regional agreements include innovative provisions/standards reflecting the interests of African countries
- If they are operational and not merely dormant agreements

Why is regionalism an important building block ?

- Regional investment agreements have the potential to supersede a substantial number of older BITs
- Regional cooperation brings an opportunity to move away from the investment protection-oriented model to a model that addresses emerging social, economic, environmental and developmental challenges
- Regional investment agreements can build on and foster economic integration in Africa
- Regional cooperation on investment can build consensus among countries on core elements of investment protection and sustainable development.
- This may, in turn, spur a more constructive dialogue on international investment policy, representing a crucial step towards multilateralism

Relationship between regional agreements and BITs in Africa

Regional Agreement	Affected BITs	Relationship *	relevant article
COMESA Common Investment Area	24	Parallel	Article 32
COMESA-EAC-SADC Tripartite FTA	47	Under negotiations	Under negotiations
Inter-Arab Investment Agreement (2014)	96	Silent	N.A.
ECOWAS Energy Protocol	14	Parallel	Article 16
SADC Protocol on Finance and Investment	16	Silent	N.A.

* Parallel: Nothing in the Agreement affects the rights and obligations of a Party under any bilateral investment agreement.
Silent: No provisions on relationship with bilateral agreements.

UNCTAD's Roadmap for IIA Reform

The [2015 World Investment Report](#) provides a Roadmap for IIA Reform and presents policy options for meeting the challenges related to IIA reform:

- Safeguarding the right to regulate in the public interest - Options include clarifying or circumscribing provisions and/or inserting exclusions
- Reforming investment dispute settlement to address the legitimacy crisis of the current system
- Promoting and facilitating investment by effectively expanding this dimension in IIAs
- Ensuring responsible investment to maximize the positive impact of foreign investment and minimize its potential negative effects. Options include establishing provisions on investor responsibilities, such as clauses on compliance with domestic laws and on corporate social responsibility
- The 2015 World Investment Report details these and many more policy options, offering pros and cons for each of them, together with treaty examples. In so doing, it allows policy makers to pick and choose those reform options and tools that are best suited to their particular policy objectives.

UNCTAD

PROSPERITY FOR ALL

www.unctad.org

