

***ISDS REFORM  
IMPROVEMENTS:  
MAPPING THE WAY  
FORWARD***

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# *AGENDA*

- Introduction: The current system
- Investment protection in IIAs evolution
- Major Concerns regarding ISDS
- Reform Options: Substantive vs. Procedural
- Multilateral ISDS reform agenda
- Concluding Remarks



# *INTRODUCTION*

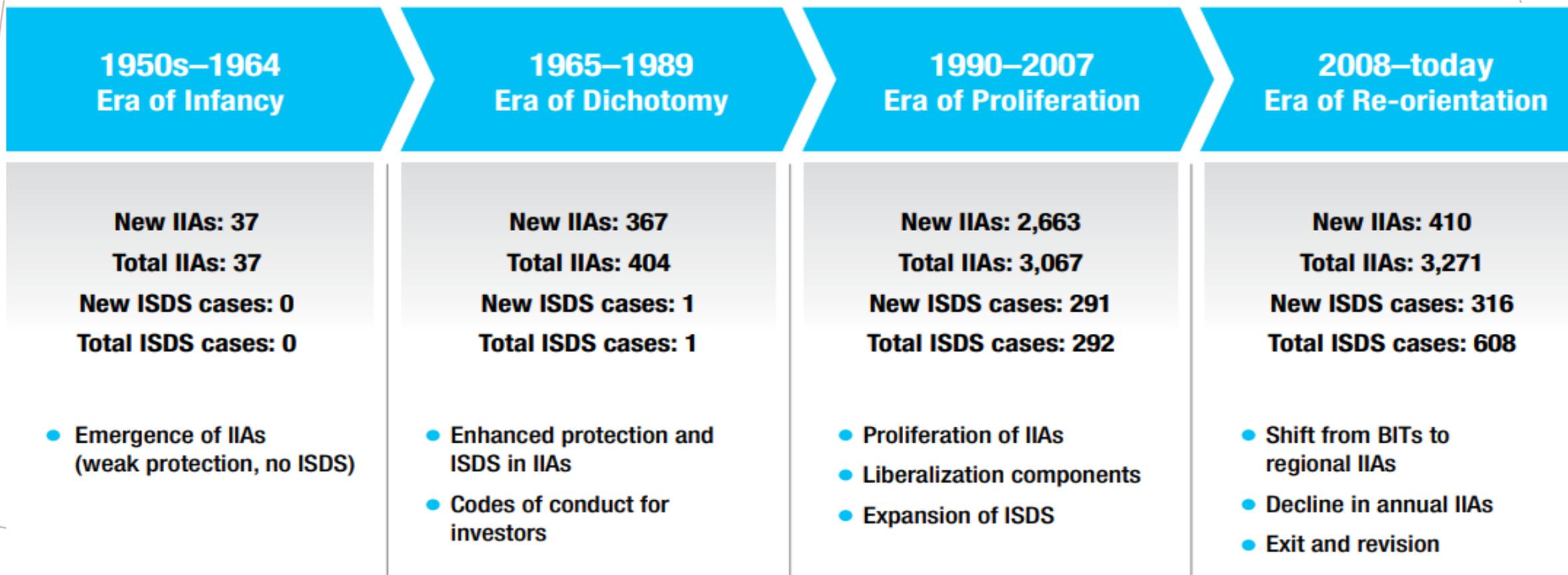
In the past 15 years, the world has witnessed what seems to be an unavoidable legitimacy crisis of investment arbitration.

Since 2017, we have been following the ISDS reform debate under the aegis of the UNCITRAL.

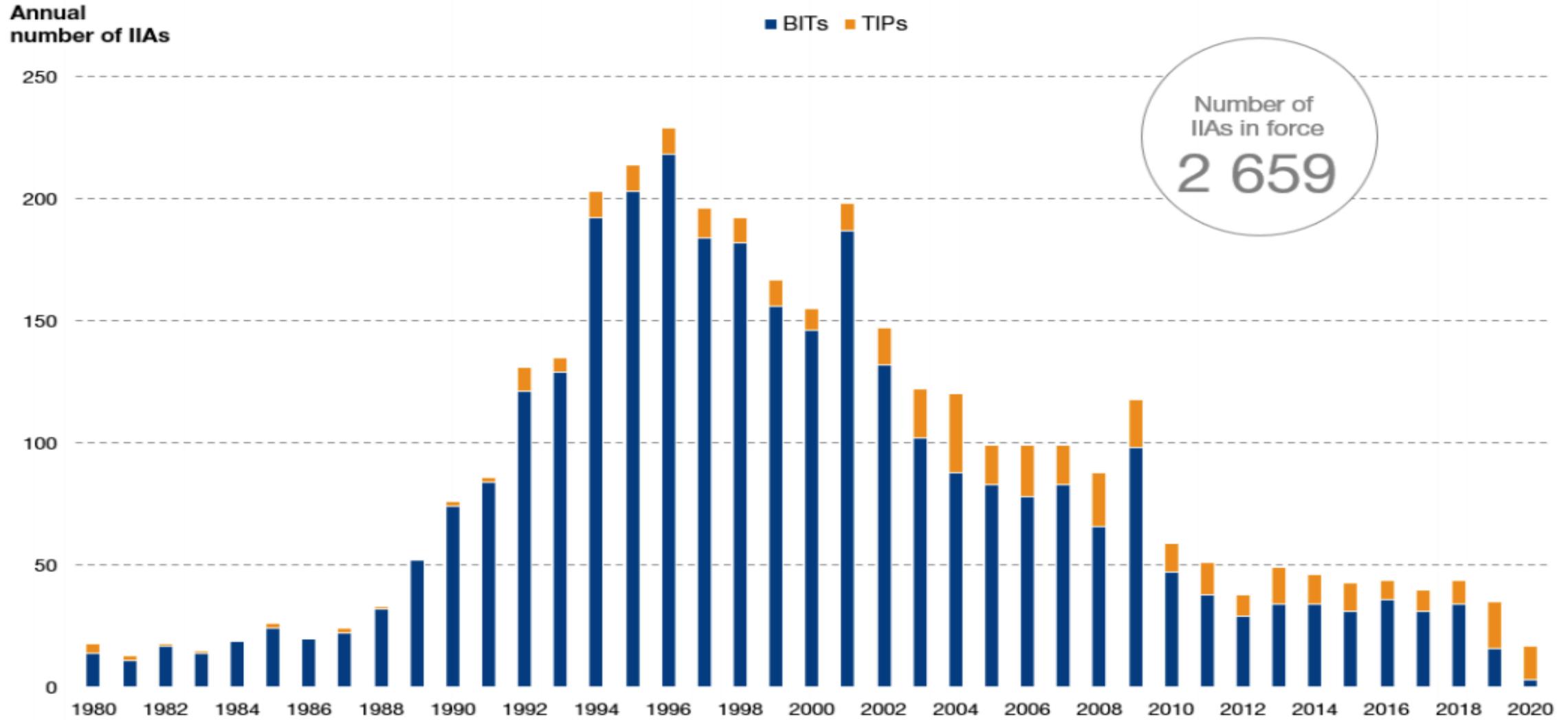


# IIAs OVER TIME

## EVOLUTION OF THE IIA REGIME

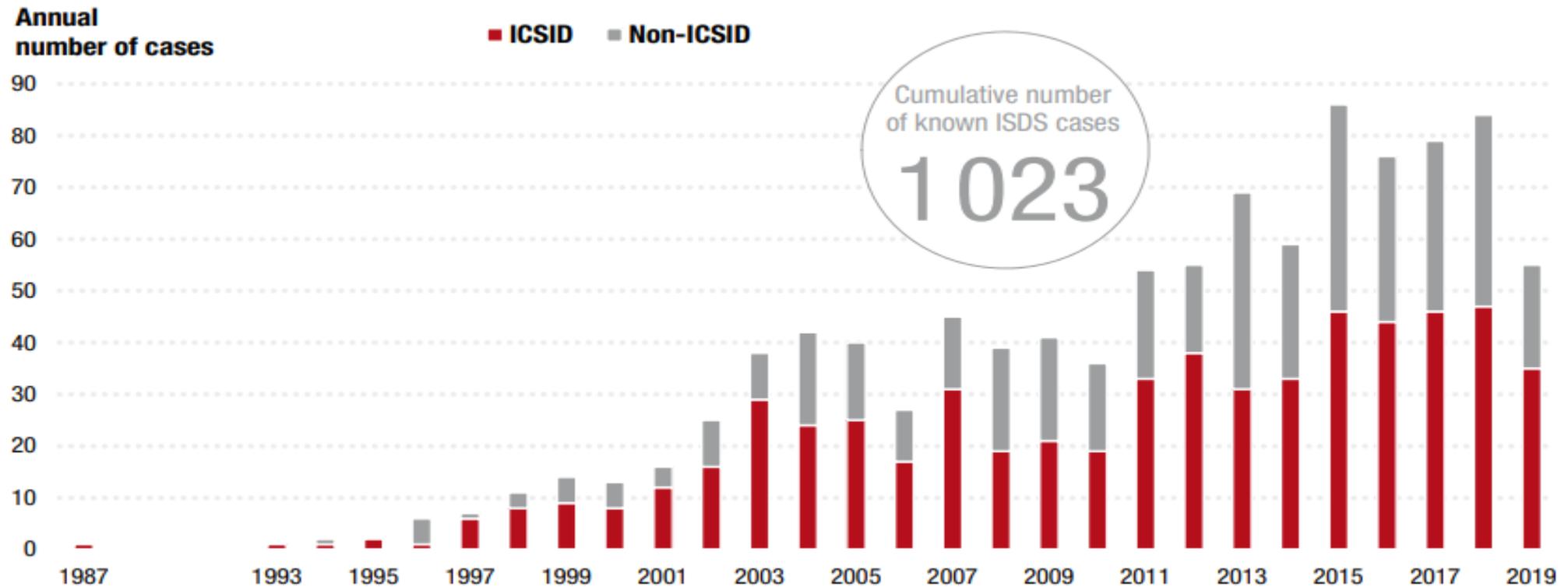


### Figure 2. Trends in IIAs signed, 1980–2020

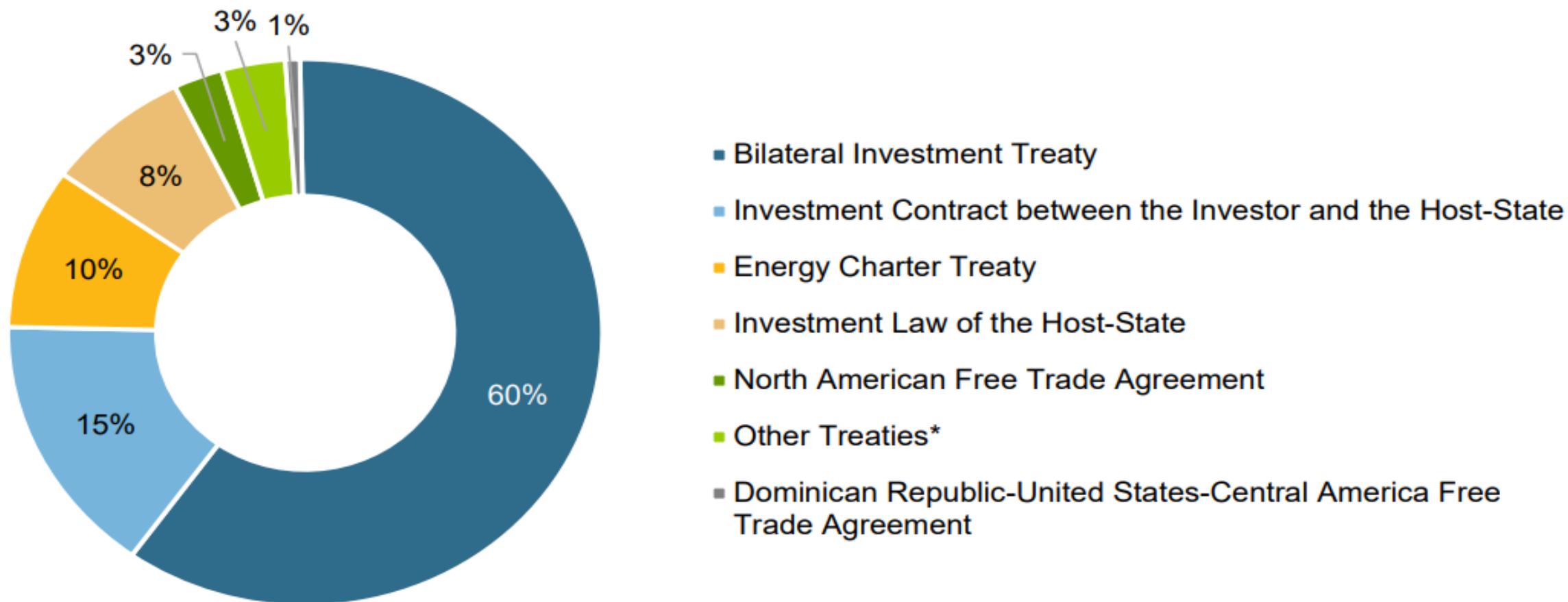


Source: UNCTAD, IIA Navigator.

# TRENDS IN KNOWN TREATY-BASED ISDS



# *BASIS OF CONSENT INVOKED TO ESTABLISH ICSID JURISDICTION*

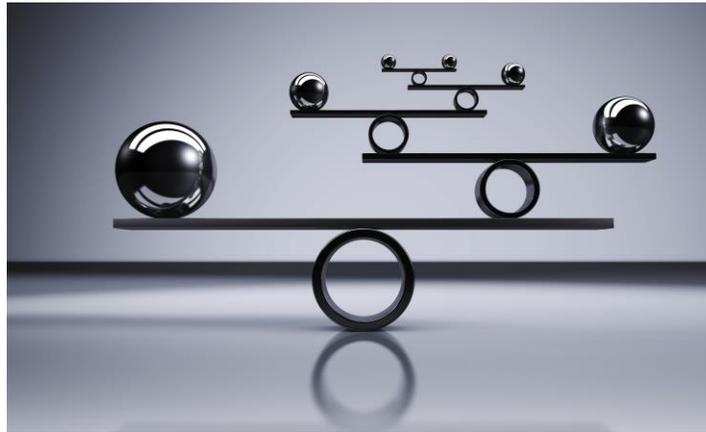


# *MAJOR CONCERNS REGARDING THE ISDS SYSTEM*

Lack of consistency, coherence, predictability, and correctness of arbitral decisions



Lack of Impartiality, Independence and Diversity of Arbitrators



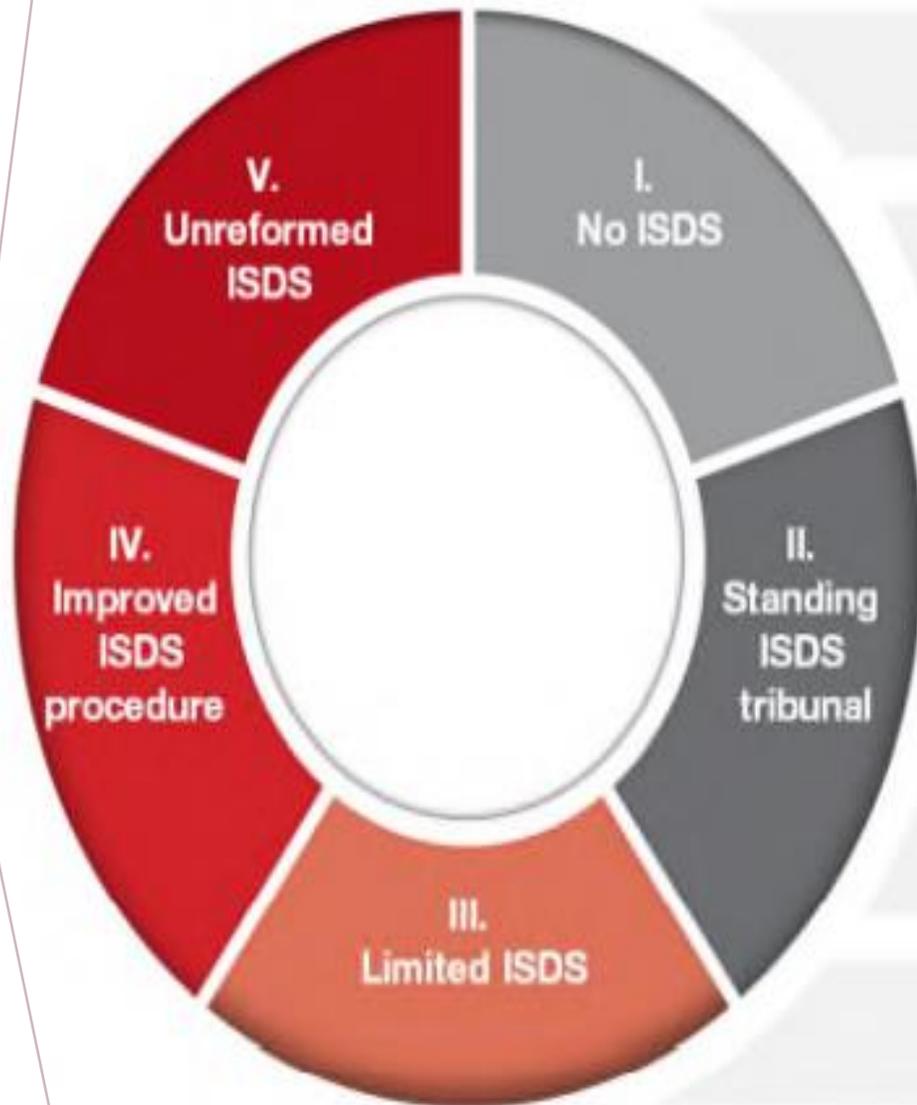
The cost and duration of ISDS cases





*REFORM OPTIONS:  
Substantive vs  
Procedural*

## Principal approaches



## Treaty examples

- |      |  |
|------|--|
| I.   | <ul style="list-style-type: none"> <li>• Brazil–Ethiopia BIT • Brazil–Guyana BIT • Brazil–Suriname BIT</li> <li>• CPTPP (five bilateral opt-outs) • USMCA (Canada–Mexico, Canada–United States)</li> </ul>   |
| II.  | <ul style="list-style-type: none"> <li>• EU–Singapore IPA</li> </ul>   |
| III. | <ul style="list-style-type: none"> <li>• Argentina–Japan BIT • Argentina–United Arab Emirates BIT • Armenia–Japan BIT</li> <li>• Australia–Peru FTA • Belarus–India BIT • Central America–Republic of Korea FTA</li> <li>• CPTPP (except for five bilateral opt-outs) • EU–Singapore IPA</li> <li>• Japan–United Arab Emirates BIT • Kazakhstan–Singapore BIT</li> <li>• Singapore–Sri Lanka FTA • USMCA (Mexico–United States)</li> </ul> |
| IV.  | <ul style="list-style-type: none"> <li>• Argentina–Japan BIT • Argentina–United Arab Emirates BIT • Armenia–Japan BIT</li> <li>• Australia–Peru FTA • Belarus–India BIT • Central America–Republic of Korea FTA</li> <li>• CPTPP (except for five bilateral opt-outs) • EU–Singapore IPA</li> <li>• Japan–United Arab Emirates BIT • Singapore–Sri Lanka FTA</li> <li>• USMCA (Mexico–United States)</li> </ul>                            |
| V.   | <ul style="list-style-type: none"> <li>• Kazakhstan–United Arab Emirates BIT</li> <li>• Mali–Turkey BIT</li> <li>• Mali–United Arab Emirates BIT</li> </ul>  |

## *LOOKING AHEAD: ACCELERATION OF IIA REFORM*

<b>Public Policy exceptions</b>	Public health as a legitimate objective under the treaty. Measures shall be temporary and proportionate.
<b>National security exceptions</b>	Self-judging essential security exception clause for public health and serious economic clauses
<b>Force Majeure; Distress and Necessity</b>	Limitation/Exclusion of liability for events outside of states control (ILC Articles of Responsibility of States for Internationally Wrongful Acts)
<b>Transfer of Funds</b>	Exceptions to the free transfer clause in case of economic crisis related to health or environmental emergencies
<b>FET, Expropriation</b>	Clarification of standards for avoiding undue constraints on State's prerogative to regulate in the public interest
<b>ISDS systemic reform</b>	Exclusion of certain policy areas from the ISDS scope; improvement of ISDS procedures; replacing ad-hoc ISDS

# *SYSTEMIC REFORMS OPTIONS*

UNCITRAL, WORKING GROUP III ON ISDS  
REFORM



# *MAIN REFORMS PROPOSALS*

## Multilateral Investment Court



## Appellate Mechanism



# *SCOPE AND STANDARD OF REVIEW OF AN APPEAL MECHANISM*

## Errors of Law



## Errors of Fact



## ICSID / New York Convention





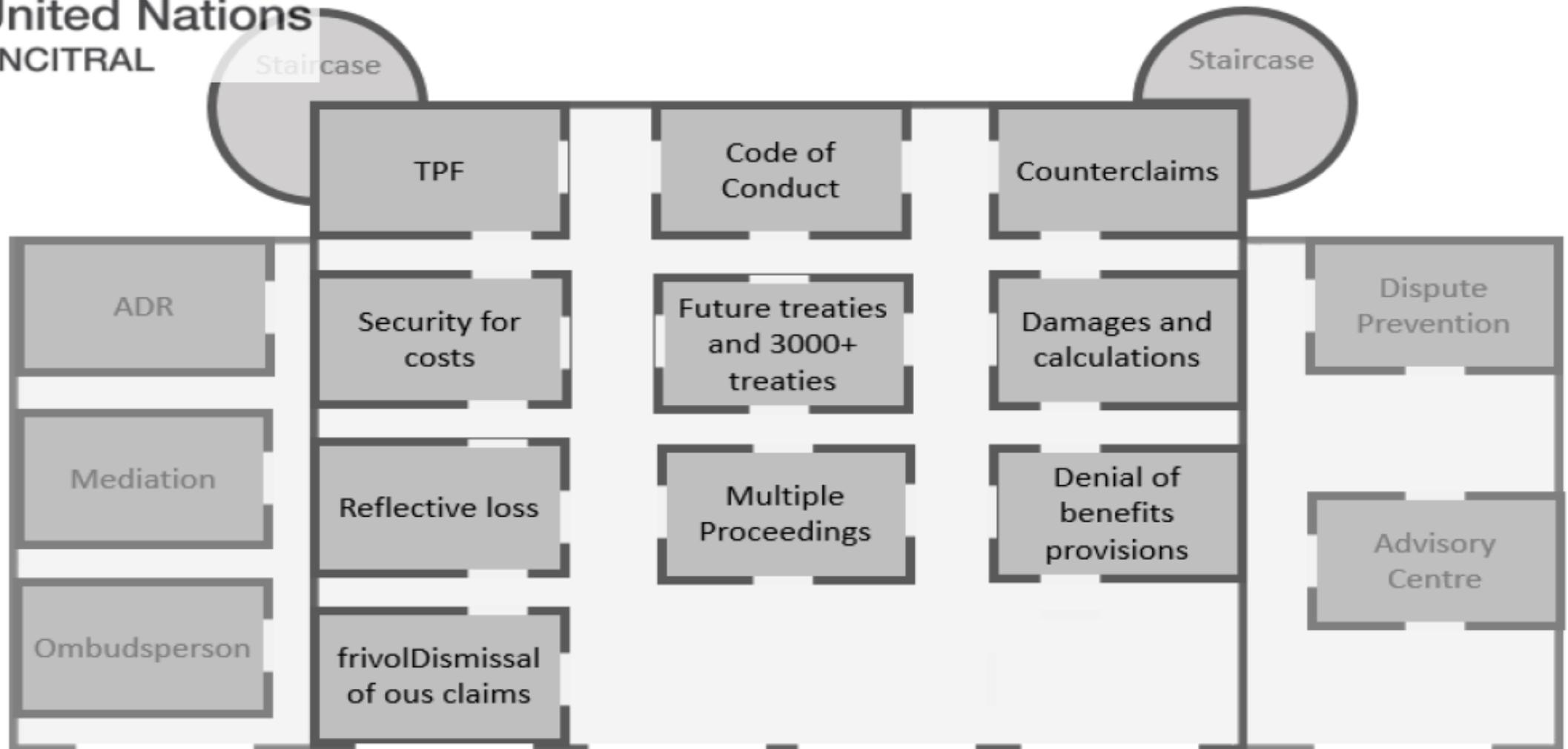
- Consensus – International Investment Law
- Application to previous IIAs
- Ensuring compatibility with the current system

*BENEFITS OF CONCLUDING  
A MULTILATERAL  
CONVENTION ON ISDS  
REFORM*

# MULTILATERAL ISDS REFORM AGENDA



United Nations  
UNCITRAL



# *CODE OF CONDUCT*

- Independence and Impartiality
- Limit on Multiple Roles
- Duty of Diligence
- Communications with a Party
- Confidentiality
- Fees and Expenses
- Disclosure Obligations
- Enforcement





# *ADVISORY CENTRE ON INTERNATIONAL INVESTMENT LAW*

## Potential Role of the Advisory Centre on Dispute prevention



**Explaining how mediation works**



**Unbiased assessment/  
evaluating the feasibility  
of mediation**



**Curating a list/roster  
of mediators**

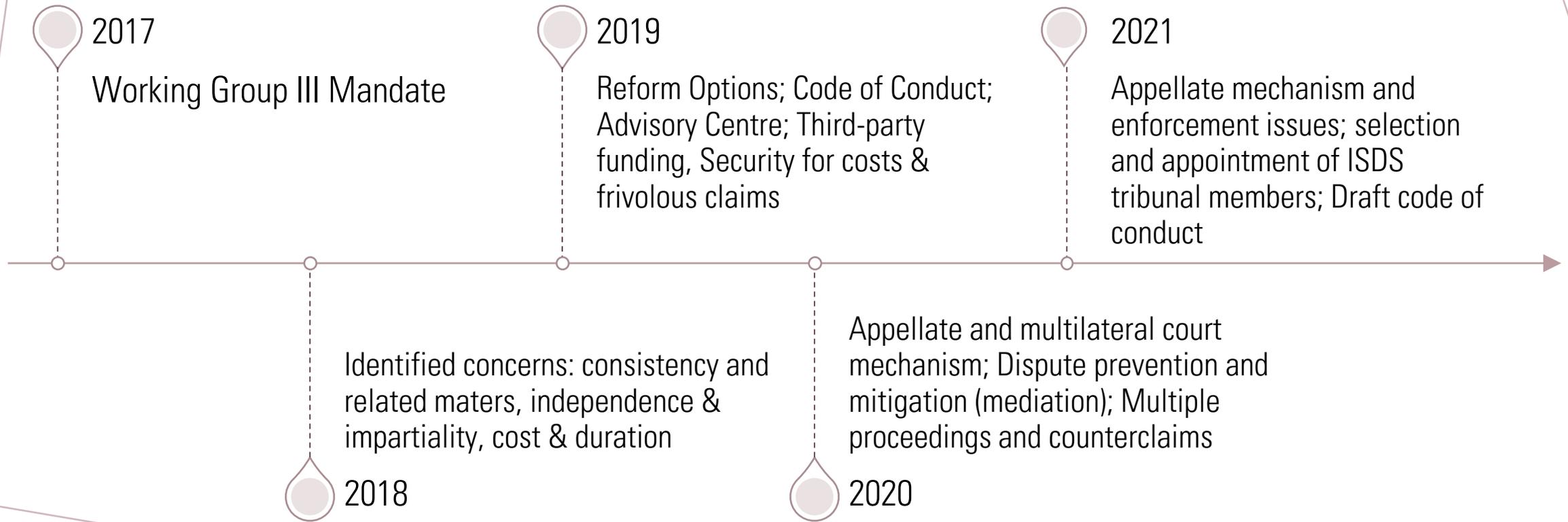


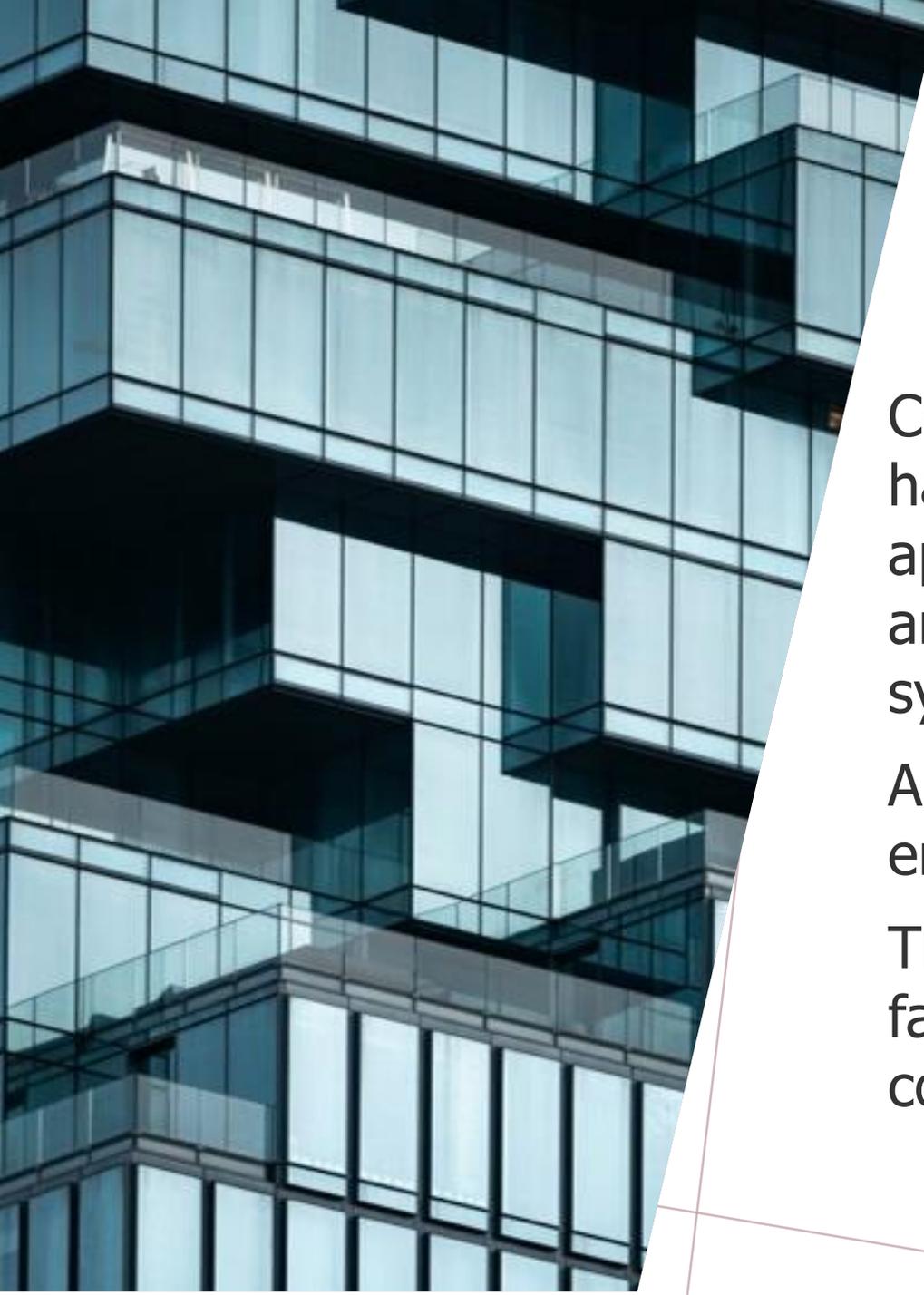
**Providing a platform to  
exchange best practices**



**Administering mediation, including  
drafting settlement agreements**

# GOING FORWARD



A photograph of a modern glass skyscraper with a grid-like facade, partially obscured by a white geometric shape on the right side of the slide.

# *CONCLUDING REMARKS*

Concluding a multilateral convention on ISDS has several benefits such as achieving the application of the agreement to previous IIAs and ensuring the compatibility with the current system.

Any ISDS reform should be flexible enough to encompass different approaches.

The introduction of an appeal system should favour a balance between the finality and the correctness of arbitral awards.

*THANK YOU!*

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