CHAPTER III

RECENT POLICY DEVELOPMENTS AND KEY ISSUES

A. NATIONAL INVESTMENT POLICIES

1. Overall trends

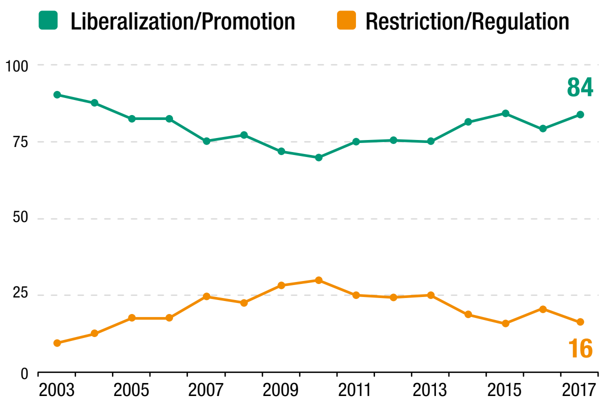
Most countries continued to actively attract FDI in 2017, and the share of investment liberalization or promotion measures increased compared with 2016. However, the overall share of restrictive or regulatory investment policy measures has significantly increased in recent months and some countries have become more critical of foreign takeovers. Also, additional ways and means to strengthen investment screening mechanisms are under discussion, particularly in some developed countries.

In 2017, according to UNCTAD's count, 65 economies adopted 126 policy measures related to foreign investment.[1] These figures constitute the highest number of countries over the past decade, as well as the highest number of policy changes. Of a total of 126 investment policy measures, 93 liberalized, promoted or facilitated investment, while 18 introduced restrictions or regulations. The remaining 15 were of a neutral or indeterminate nature (table III.1). The share of investment liberalization and promotion among all measures climbed to 84 per cent – an increase of five percentage points compared with 2016 (figure III.1). New investment restrictions or regulations for foreign investors were mainly based on considerations of national security, local producers' competitiveness or foreign ownership of land and natural resources.

By region, developing countries in Asia continued to take the lead in adopting investment policy measures. Countries in Africa, the transition economies and Europe also introduced numerous measures (figure III.2).

In contrast to the overall favourable developments for foreign investment in 2017, the share of more

Figure III.1. **Changes in national investment policies, 2003–2017** (Per cent)



Source: UNCTAD, Investment Policy Monitor database.

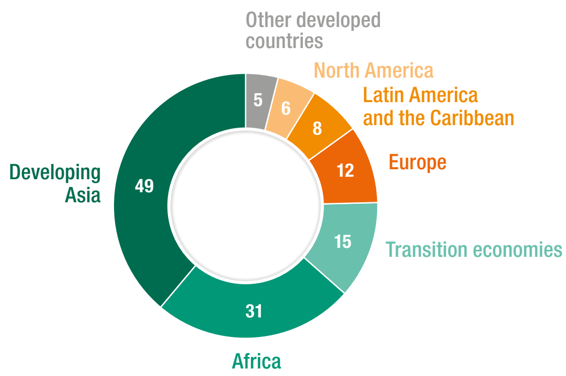
Table III.1. Changes in national investment policies, 2003–2017 (Number of measures)

Item	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017
Number of countries that introduced changes	59	79	77	70	49	40	46	54	51	57	60	41	49	59	65
Number of regulatory changes	**125**	**164**	**144**	**126**	**79**	**68**	**89**	**116**	**86**	**92**	**87**	**74**	**100**	**125**	**126**
Liberalization/promotion	113	142	118	104	58	51	61	77	62	65	63	52	75	84	93
Restriction/regulation	12	20	25	22	19	15	24	33	21	21	21	12	14	22	18
Neutral/indeterminate[a]	-	2	1	-	2	2	4	6	3	6	3	10	11	19	15

Source: UNCTAD, Investment Policy Monitor database.
[a] In some cases, the expected impact of the policy measures on the investment is undetermined.

restrictive or regulatory investment policy measures increased significantly in recent months. From October 2017 to April 2018, about 30 per cent of newly introduced measures were restrictive or regulatory. Some countries are taking a more critical stance towards foreign takeovers, in particular when they relate to national security or the sale of strategic domestic assets. In addition, ways and means to further strengthen investment screening mechanisms are being discussed, particularly in some developed countries (see chapter IV.C.2.d).

Figure III.2. **Regional distribution of national investment policy measures in 2017** (Number of measures)



Source: UNCTAD, Investment Policy Monitor database.

a. Investment liberalization prominent in 2017

Investment liberalization was among the prominent features of policy measures in 2017.[2] About one third of policy measures were related to partial or full investment liberalization in industries such as transport, energy and manufacturing.

(i) Countries in Asia particularly active in investment liberalization

As in previous years, emerging economies in Asia were the most active. *China* revised its foreign investment negative list for 11 free trade zones, lifting investment restrictions in a number of industries. It also issued an updated version of its Investment Industry Guidance Catalogue, which reduced the number of restrictive measures for the entry of foreign investment from 93 to 63 and opened up more activities in services, manufacturing and mining. It also issued a guideline that lists businesses in which outbound investment is encouraged, limited or prohibited. In April 2018, the country announced a timeline for the liberalization of the automobile and financial industries. In January 2018, *India* liberalized rules on inward investment in several industries including single-brand retail trading, airlines and power exchanges.

The *Lao People's Democratic Republic* abolished the minimum registered capital requirements for certain foreign investors. In its newly adopted Companies Act, *Myanmar* allowed foreign investors to hold up to 35 per cent of shares in a domestic company without the company losing its categorization as a "local company". It also permitted foreign companies to engage in trading of fertilizers, seeds, pesticides, hospital equipment and construction materials. Previously, only local companies and joint ventures of local and foreign companies were allowed to do so. *Saudi Arabia* fully liberalized foreign investment in engineering services and associated consultancy services, provided that the investor company is at least 10 years old and operates in at least four countries. *Viet Nam* amended the list of conditional business lines under which domestic and foreign companies must satisfy certain "business conditions" (e.g. technical and staffing requirements). Although 16 business lines were added to the list, 24 – out of a total of 267 – were removed.

Some noteworthy investment liberalization measures have been undertaken in other regions. For example, *Egypt* introduced a new law for the setting up of a natural gas regulatory authority charged with licensing and devising a plan to open the gas market to competition. *Mexico* increased foreign ownership caps for the supply of fuels and lubricants for ships, aircraft and railway equipment, as well as for certain air transport services. The *United Republic of Tanzania* allowed foreign investors to acquire shares in the listed paid-up capital of a telecommunication company. *Zimbabwe* removed the majority-indigenous threshold, except in the diamond and platinum industries. In 2018, *Angola* passed a new investment law abolishing a joint venture requirement for foreign investors and the minimum investment requirement. The law does not apply to investments in oil and mining exploration as well as other activities related to financial institutions governed by specific law.

(ii) Ongoing privatization in several countries

Another important investment policy feature in 2017 was privatization. Several countries undertook full or partial privatizations, benefiting both domestic and foreign investors. For instance, *Brazil* awarded three European groups the rights to operate four airports. The Government of *Côte d'Ivoire* approved the sale of State mining company Sodemi's 30 per cent stake in the Ity gold project. *Greece* signed a concession contract with a German consortium concerning 14 regional airports. In 2018, the country concluded the sale of a 67 per cent stake in Thessaloniki Port to a consortium of investors. *Montenegro* sold the public stake in one of the country's major port operators (Luka Bar) and in a rail cargo firm (Montecargo). *Portugal* signed an agreement with private equity fund Lone Star to sell a 75 per cent stake in State-rescued lender Novo Banco. *Uzbekistan* issued a decree to simplify the procedures and speed up the process of sale of State property, and to eliminate administrative barriers to privatization. *Viet Nam* privatized a 54 per cent stake in its largest brewer (Sabeco). It also issued a decree to facilitate privatization of State-owned enterprises by, for instance, shortening the lock-in period of strategic partners.

b. Ongoing efforts for investment facilitation and promotion

Investment facilitation and promotion continued to be a major element of new investment policy measures in 2017.

(i) Numerous countries simplified administrative procedures

Argentina published a decree with 170 measures aimed at eliminating rules and regulations considered to reduce the country's competitiveness. *Australia* introduced a series of changes to its foreign investment framework by simplifying related regulations and the fee framework. *Azerbaijan* established a single online portal for the issuance of business licenses and permits. *Benin* launched an online platform (iGuide), providing information for domestic and foreign investors on building and developing business plans. *Colombia* modernized its foreign investment registration scheme, in particular by eliminating registration deadlines. The *Dominican Republic* established ProDominicana, an entity tasked with the promotion and facilitation of foreign direct investment (FDI) and exports. *Egypt* promulgated the Industrial Permits Act and its executive regulations, aiming to ease procedures for obtaining licenses for industrial establishments. The country also put into effect a new Investment Law, aiming to promote domestic and foreign investment by offering further incentives, reducing bureaucracy and simplifying administrative processes. *India* abolished its Foreign Investment Promotion Board and issued standard operating procedures for handling FDI proposals, such as the designation of competent authorities and time frames for applications. *Indonesia* replaced the license requirement for establishing a business with a procedure for registering an investment. *Jordan* simplified regulations to stimulate investment and improve the business environment. *Mauritius* introduced the Business Facilitation Act 2017, to eliminate regulatory and administrative bottlenecks to investment. The *Philippines* launched a digital platform called the Philippine Business Data Bank, aiming to shorten the time needed for applying for and renewing permits. *South Africa* launched the "InvestSA One-Stop Shop Initiative" as a focal point of the Government, coordinating and facilitating registration and licensing procedures for all investors.

(ii) Investment incentives remain an important promotion tool

Some countries introduced fiscal and financial incentives to attract foreign investment. The *Republic of Korea* restructured tax incentives for foreign companies engaged in high-tech businesses and extended their benefits. The *Lao People's Democratic Republic* promulgated a new investment promotion law, offering various incentives to attract investment in both promoted industries and hardship areas. *Morocco* enacted a new Finance Law, which provides, inter alia, for corporate income tax exemptions for newly established industrial companies for a certain period. *Nigeria* granted "Pioneer Status" to the creative industry and published a list of 27 new industries that are eligible to enjoy the Pioneer Status incentive. *Thailand* introduced its new Investment Promotion Act to provide more incentives for advanced technology and innovation activities as well as research and development (R&D). *Tunisia* passed a bill on tax incentives, aiming to streamline that system by focusing on the priorities of the next period. The *United States* introduced the Tax Cuts and Jobs Act, which provides a corporate income tax cut and other measures to encourage MNEs to bring overseas funds back home.

(iii) Establishment of new SEZs

Several countries established special economic zones (SEZs) or revised policies related to existing SEZs. For instance, *Bangladesh* approved the construction of four new SEZs. *Congo* introduced two laws implementing the policy of diversification of the Congolese economy and creating SEZs. *Egypt* issued a decree establishing the "Golden Triangle Economic Zone". *Mexico* established three new SEZs in Puerto Chiapas, Coatzacoalcos and Lázaro Cárdenas–La Unión. *Viet Nam* provided some incentives for the Hoa Lac Hi-Tech Park, including preferential tax treatment, land use incentives and favourable conditions for immigration of foreign employees. *Zimbabwe* exempted investors operating in SEZs from paying duty on imported capital equipment, materials and products on the condition that they are used in SEZs. In 2018, *Thailand* enacted the Eastern Economic Corridor (EEC) Act, which provides incentives for investors in the EEC, such as tax grants, the right to land ownership and the issuance of visas.

(iv) Reform of domestic investment dispute resolution system

Meanwhile, a couple of countries reformed their domestic systems of investment dispute resolution. *Fiji* and *Qatar* each enacted new arbitration laws based largely on the Model Law on International Commercial Arbitration of the United Nations Commission on International Trade Law (UNCITRAL). *Saudi Arabia* issued Implementing Regulations of the Arbitration Law, to enhance its business environment.

c. New investment restrictions or regulations mainly reflect concerns about national security and foreign ownership of land and natural resources

(i) Increasing concerns about implications of foreign investment for national security

Some countries introduced new investment restrictions or regulations, mainly reflecting concerns about national security considerations or foreign investment in strategic industries. For instance, *China* restricted certain outward investment by specific State-owned enterprises. *Germany* and *Japan* introduced amendments to their foreign investment review mechanisms, mainly to clarify rules and address shortcomings that were identified in their application. *Italy* extended the Government's so-called "golden powers" to block takeovers in high-tech industries by non-EU companies that may pose a serious threat to essential national interests or present a risk to public order and national security. The *Russian Federation* introduced certain prohibitions for inward investment by offshore companies. It now also requires prior Government approval for foreign investment in certain transactions involving assets of strategic importance for national defence and state security. The *Bolivarian Republic of Venezuela* published the new Constitutional Law on Foreign Productive Investment. Among other changes, it states that foreign investors may not participate directly or indirectly in national political debates. In 2018, *Lithuania* amended a law related to enterprises, mainly seeking to safeguard national security in certain economic sectors or when investing in certain protected zones.

More recently, further changes to investment screening procedures related to national security have been considered or prepared in several developed economies. For example, following an initiative by France, Germany and Italy,[3] the European Commission proposed in September 2017 to establish an EU-wide FDI screening framework, mainly to protect legitimate interests with regard to FDI that raises concerns about security or public order.[4] In October 2017, the Government of the United Kingdom published a Green Paper, "National Security and Infrastructure Investment Review", asking for comments on proposed new structures for reviewing foreign investments.[5] In January 2018, the United States Government stated that it supports the Congress's efforts to pass the "Foreign Investment Risk Review Modernization Act of 2017". The Act would expand the scope of transactions reviewable by the Committee on Foreign Investment in the United States (CFIUS) to more effectively address national security concerns.[6]

(ii) New regulations on access of foreign investors to land and natural resources

Several countries adopted new regulations on ownership of land or natural resources by foreign investors. *Australia* introduced an annual charge on foreign owners of underutilized residential property and increased fees that foreign investors must pay when seeking approval to purchase residential real estate. It also introduced a quantitative restriction on the acquisition of certain real estate assets by foreigners. Territorial subdivisions of *Canada* introduced the Non-Resident Speculation Tax, relating to the acquisition of residential property in areas with overheated housing markets. *New Zealand* tightened screening procedures for foreign acquisitions of sensitive land. *South Africa* introduced a new Mining Charter, which raises the minimum threshold for black ownership of mining companies. The *United Republic of Tanzania* adopted new mining laws, requiring, among other elements, that the Government obtain at least a 16 per cent stake in mining and energy projects.

(iii) Some countries introduced new local content requirements

Several countries imposed local content requirements for investors. For example, *Indonesia* increased the minimum local content requirement for domestically produced 4G smartphones that are sold in the Indonesian market, from 20 per cent to 30 per cent. *Kenya* reinforced the local procurement requirements for existing mineral rights holders. In 2018, the *United Republic of Tanzania* adopted separate "Mining Regulations on Local Content" to promote the use of local expertise, goods and services, businesses and financing in the mining value chain.

2. Merger controls affecting foreign investors

In 2017, several host-country governments raised objections to various foreign takeover attempts, in particular when they involved the sale of critical or strategic domestic assets to foreign investors. Among all cross-border M&As with a value exceeding $100 million, there were at least 10 deals withdrawn for regulatory or political reasons – 3 more than in 2016 (*WIR17*, p. 105). Calculated on the basis of the number of deals, this represents approximately 17 per cent of all cross-border M&As exceeding $100 million in 2017. The approximate gross value of the 10 withdrawn deals was roughly $35.3 billion. Of the 12 M&As that had a value over $50 million and up to $100 million, one was withdrawn for regulatory reasons.

The main industries in which M&As were withdrawn for regulatory or political reasons were high-tech manufacturing (e.g. semiconductors and electronics), financial services, digital mapping services, security services and telecommunication.

As far as the home economies of targeted companies are concerned, the United States ranked first, followed by New Zealand. On the buyer's side, investors from China were predominantly affected.

Of the 11 withdrawn deals in 2017, 3 were terminated in the screening process because of concerns related to national security. All related to attempts by Chinese or German investors to acquire the assets of high-tech firms, including in semiconductor manufacturing.

Five M&As were withdrawn in 2017 because of concerns by competition authorities, and one foreign takeover was aborted for prudential regulatory reasons. With regard to the latter, the planned acquisition was declined by the New Zealand authority, which was not able to determine the ownership structure of the acquiring group.

In addition, one M&A was withdrawn in 2017 for other regulatory reasons and another one because the companies involved did not want to wait longer for host-country approval (table III.2).

In the first four months of 2018, the trend from 2017 continued and even intensified (table III.3). From January to April 2018, seven deals were abandoned, mostly in the United States, which is more than 60 per cent of all the deals withdrawn in 2017.

Table III.2.	Foreign takeovers withdrawn for regulatory or political reasons in 2017 (Illustrative list)
	For national security reasons
Infineon Technologies AG – Cree Inc, Wolfspeed[a]	On 16 February 2017, Cree Inc (United States) announced that it would terminate its agreement to sell Wolfspeed, which includes its silicon carbide substrate business, to Infineon Technologies AG (Germany). It stated that "Cree and Infineon have been unable to identify alternatives which would address the national security concerns of the Committee on Foreign Investment in the United States (CFIUS), and as a result, the proposed transaction will be terminated."
Canyon Bridge Capital Partners LLC – Lattice Semiconductor Corporation[b]	On 13 September 2017, the president of the United States issued an order prohibiting the acquisition of Lattice Semiconductor Corporation by a Chinese-backed private equity firm. The president followed a recommendation of the CFIUS, which had found that the acquisition by a group of investors, including the State-controlled venture capital fund, would pose a threat to United States national security.
A consortium led by Navinfo Co – HERE International BV[c]	On 26 September 2017, a group of investors led by the digital map provider NavInfo Co (China) abandoned its proposed acquisition of a 10 per cent minority stake in the digital mapping service and software company HERE International BV, following opposition from the CFIUS.
	For competition reasons
Bain Capital Fund IV LP – Resilux NV[d]	On 28 March 2017, Bain Capital Fund IV (United States) withdrew its plans to launch a tender offer to acquire the entire share capital of Resilux NV, a Belgium-based packaging company, in a leveraged buyout transaction because of an antitrust ruling in Germany for the intended combined acquisition.
London Stock Exchange – Deutsche Börse AG[e]	On 29 March 2017, the European Commission vetoed the planned merger between Deutsche Börse AG and the London Stock Exchange Group. The Commission found that by combining the activities of two of the major stock exchange operators, a de facto monopoly in the markets of bonds would have been created and, in addition, the merger would have removed horizontal competition for the trading and clearing of single stock equity derivatives. The value of this deal was estimated to amount to roughly $31 billion.
ZIMEN SP Z O O – Konsalnet Holding SA[f]	ZIMEN SP Z O, a unit of a Chinese security company, withdrew its plans to acquire Konsalnet Holding SA (Poland), a provider of security guard and patrol services, because of concerns about a concentration issue raised by the Polish Competition Authority in April 2017.
Vero Insurance New Zealand Ltd – Tower Ltd[g]	Vero Insurance New Zealand Ltd, ultimately owned by Suncorp Group – an Australian financial company – withdrew its offer to acquire the remaining 80 per cent share in Tower Ltd, a New Zealand–based insurance company. In July 2017, the Commerce Commission of New Zealand declined the merger attempt as it was not satisfied that the merger would not have the effect of substantially lessening competition in the personal insurance market.
Melita Ltd – Vodafone Malta Ltd[h]	On 8 December 2017, Vodafone Group Plc withdrew its plan to combine Vodafone Malta (a wireless telecommunication carrier) with Melita Ltd, aiming to create a fully integrated communications company in Malta. In its media release, Vodafone stated that the parties decided to terminate the transaction as it had become clear that they were unable to satisfy the Maltese Competition Authority's requirements.
	For prudential reasons
TIP-HNA New Zealand Holdings Ltd – UDC Finance Ltd[i]	On 21 December 2017, the Overseas Investment Office (OIO) of New Zealand declined TIP-HNA New Zealand Holdings Ltd's application to acquire 100 per cent of the shares in UDC Finance Ltd (a subsidiary of ANZ Bank). The OIO emphasized that the information provided about ownership and control interests was not sufficient. HNA Group is a Chinese firm from southern China that operates in the aviation business.
	For other regulatory reasons
Dolphin Fund Ltd – FIH Group Plc[j]	In April 2017, Dolphin Fund Ltd – owned by an Argentine investor – withdrew its offer to acquire FIH Group Plc (United Kingdom), which plays an important role in the economy of the Falkland Islands. This followed the Falkland Islands Government's letter to FIH, stating that if the ownership of the company changed it could lose the status that allowed it to acquire land without a license.
	Withdrawn while waiting for host-country approval
Cowen Group Inc – CEFC China Energy Co Ltd[k]	CEFC China Energy Co agreed to acquire a 19.9 per cent minority stake in Cowen Group Inc (United States), an investment bank, in a privately negotiated transaction. However, on 24 November 2017, both parties announced that they had mutually agreed to withdraw from the filing with the CFIUS and not to pursue the deal owing to delays and uncertainty in securing approval from the CFIUS.

Source: UNCTAD based on cross-border M/A database (www.unctad.org-fdistatistics).
[a] https://www.sec.gov/Archives/edgar/data/895419/000089541917000021/ex9918k021617.htm.
[b] https://www.treasury.gov/press-center/press-releases/Pages/sm0157.aspx.
[c] http://www.navinfo.com/news/detail.aspx?id=1217&sort=1.
[d] https://www.resilux.com/downloads/press/RESILUX-20170328-EN-Resilux%20-%20Bain%20Capital.pdf.
[e] http://europa.eu/rapid/press-release_IP-17-789_en.htm.
[f] https://www.uokik.gov.pl/koncentracje.php?news_id=13094&print=1.
[g] http://www.comcom.govt.nz/the-commission/media-centre/media-releases/2017/commission-declines-vero-insurance-clearance-to-acquire-tower-/.
[h] http://www.vodafone.com/content/index/media/vodafone-group-releases/2017/termination-merger-malta-and-melita.html.
[i] https://www.linz.govt.nz/news/2017-12/overseas-investment-office-declines-consent-tip-hna.
[j] http://en.mercopress.com/2017/04/14/falklands-dolphin-fund-desists-from-taking-over-fih-group-at-this-time.
[k] http://www.cowen.com/news/cowen-and-cefc-china-announce-mutual-agreement-to-withdrawal-from-filing-with-the-cfius.

Table III.3. Foreign takeovers withdrawn for regulatory or political reasons in 2018, January–April (Illustrative list)

For national security reasons	
Ant Financial Services Group – MoneyGram International Inc[a]	On 2 January 2018, Ant Financial (China) withdrew its offer to acquire the entire share capital of MoneyGram International Inc (United States), a provider of financial transaction services. According to a statement by MoneyGram, the parties had been advised that CFIUS clearance of the merger would not be forthcoming and both parties agreed to terminate the deal.
BlueFocus International Ltd – Cogint, Inc[b]	On 20 February 2018, Cogint, Inc (United States) a data solutions provider, and BlueFocus International Ltd (Hong Kong, China) agreed to terminate their business combination agreement. Cogint stated that the CFIUS had indicated its unwillingness to approve the transaction.
Unic Capital Management Co Ltd – Xcerra Corporation[c]	On 22 February 2018, Xcerra (United States), a manufacturer of electrical signals measuring and testing instruments, terminated its merger agreement with Unic Capital Management and the China Integrated Circuit Industry Investment Fund. Xcerra stated that after careful review of feedback received from the CFIUS, it considered that approval of this merger would be highly unlikely.
Broadcom Ltd – Qualcomm Inc[d]	On 12 March 2018, the president of the United States prohibited the proposed takeover of chipmaker Qualcomm (United States) by Broadcom (Singapore) for national security reasons. In February 2018, Broadcom had proposed a $117 billion bid for the takeover of Qualcomm.
For prudential reasons	
Consortium led by Chinese investors – Chicago Stock Exchange[e]	On 15 February 2018, the Securities and Exchange Commission (SEC) of the United States rejected a takeover of the Chicago Stock Exchange by a group led by Chinese-based investors. The SEC said in a statement that the review process had raised questions about "whether the proposed ownership structure [would] allow the Commission to exercise sufficient oversight of the Exchange."
For other regulatory reasons	
Aeolus Tyre Co Ltd – Prometeon Tyre Group Srl[f]	Aeolus Tyre Co Ltd (China) withdrew its offer to acquire the remaining 90 per cent stake in Prometeon Tyre Group Srl (Italy), a manufacturer and wholesaler of tires, from other investors in a stock swap transaction. On 4 January 2018, Aeolus released a statement saying that the Chinese authorities had failed to grant approval for the overseas acquisition before the 31 December 2017 deadline. The relevant parties were unable to reach a consensus on an extension, it said, so the deal was terminated.
Withdrawn while waiting for host-country approval	
Warburg Pincus India – Tata Technologies Ltd[g]	In February 2018, Warburg Pincus India, a unit of Warburg Pincus (United States), a private equity firm, withdrew its offer to acquire a 43 per cent stake in Tata Technologies, an engineering service and design arm of India's largest truck maker, Tata Motors. In a media statement, Tata Motors stated that the deal has been mutually terminated "due to delays in securing regulatory approvals as well as due to the recent performance of the company not meeting internal thresholds because of market challenges."

Source: UNCTAD.
[a] https://www.sec.gov/Archives/edgar/data/1273931/000119312518000668/d517771d8k.htm.
[b] https://www.sec.gov/Archives/edgar/data/1460329/000129993318000201/htm_55915.htm.
[c] https://www.sec.gov/Archives/edgar/data/357020/000119312518054209/d533034d8k.htm.
[d] https://www.whitehouse.gov/presidential-actions/presidential-order-regarding-proposed-takeover-qualcomm-incorporated-broadcom-limited.
[e] https://www.sec.gov/rules/sro/chx/2018/34-82727.pdf.
[f] http://static.sse.com.cn/disclosure/listedinfo/announcement/c/2018-01-05/600469_20180105_6.pdf.
[g] https://www.bloombergquint.com/business/2018/02/05/warburg-pincus-calls-off-tata-tech-investment.

B. INTERNATIONAL INVESTMENT POLICIES

1. Recent developments in the international investment regime

a. Trends in the conclusion and negotiation of IIAs

Investment treaty making has reached a turning point. The year 2017 concluded with the lowest number of new international investment agreements (IIAs) since 1983, signalling a period of reflection on, and review of, international investment policies. Moreover, for the first time, the number of effective treaty terminations outpaced the number of new IIA conclusions. In contrast, negotiations for certain megaregional agreements maintained momentum, especially in Africa and Asia.

(i) Developments in the conclusion of IIAs

In 2017, 18 new IIAs were concluded, bringing the total to 3,322 treaties by year-end. The year marks the lowest number of IIAs concluded since 1983, and for the first time, effective treaty terminations exceeded the number of new treaty conclusions.

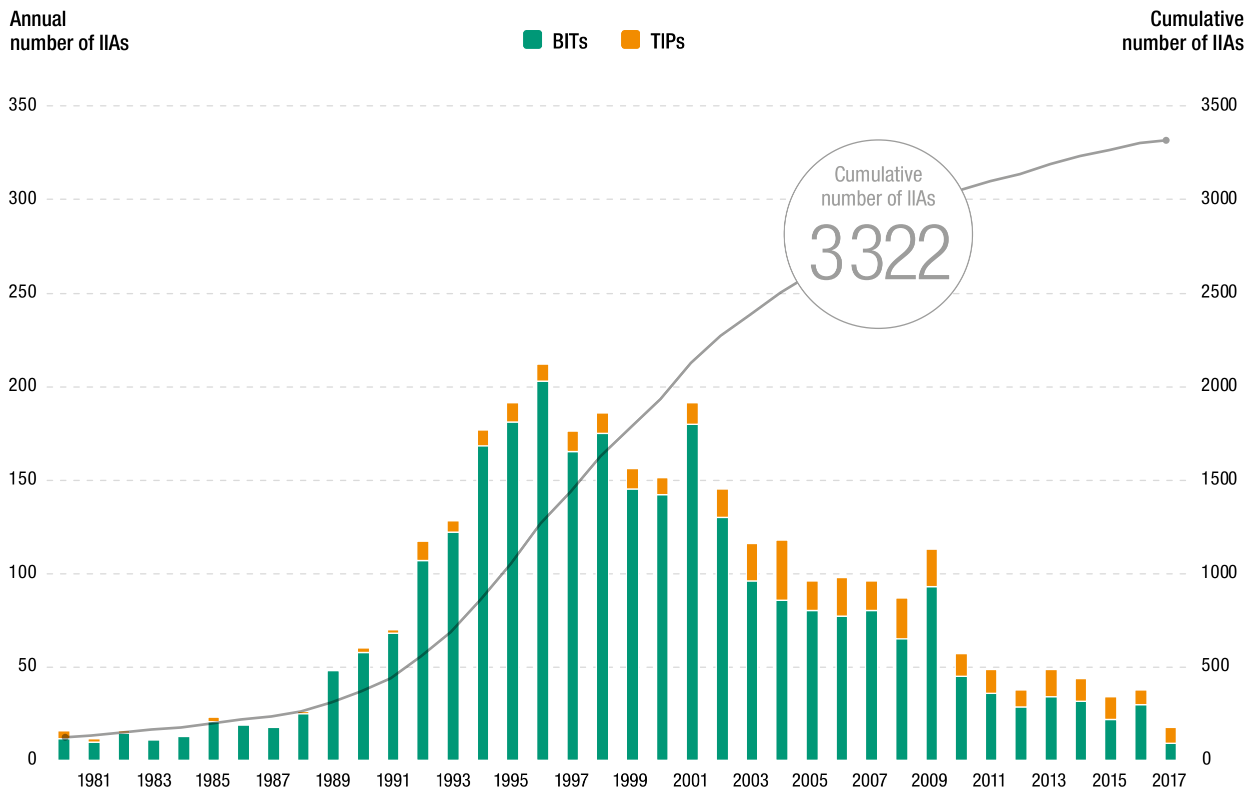
In 2017, countries concluded 18 new IIAs: 9 bilateral investment treaties (BITs) and 9 treaties with investment provisions (TIPs).[7] This brought the size of the IIA universe to 3,322 agreements (2,946 BITs and 376 TIPs), of which 2,638 were in force at year-end (figure III.3). The most active economy was Turkey, concluding four treaties, followed by Hong Kong, China with two. Forty-five economies were parties to one new treaty each. Of the 18 new IIAs, three were regional agreements (the ASEAN–Hong Kong, China Investment Agreement, the Intra-MERCOSUR Investment Facilitation Protocol and the Pacific Agreement on Closer Economic Relations (PACER) Plus Agreement between Australia, New Zealand and 12 Pacific island States).[8] In addition, 15 IIAs entered into force. Between January and March 2018, three additional IIAs were signed.[9]

At the same time, at least 22 terminations entered into effect ("effective termination"). Particularly active in terminating treaties was India with 17. Ecuador sent 16 notices of termination in 2017.[10] Among intra-European Union (EU) BITs, at least two terminations took effect in 2017 (see also *WIR17*, box III.6).[11]

For the first time, the number of effectively terminated IIAs (22) exceeded the number of newly concluded treaties (18) and the number of new treaties entering into force (15). However, the low number of IIAs concluded in 2017 does not necessarily translate into fewer treaty relationships among countries. Unlike BITs, a single regional IIA creates many treaty relationships, depending on the number of contracting parties.[12]

Moreover, effective treaty termination must also be seen in light of survival clauses, according to which treaty application is extended for a further period after termination (some for 5 years, but most commonly for 10, 15 or even 20 years). And the stock of IIAs remains very large, comprising more than 3,300 treaties, most of them belonging to the "first generation" IIAs that are in need of reform.

Figure III.3. Trends in IIAs signed, 1980–2017



Source: UNCTAD, IIA Navigator.
Note: The cumulative number of all signed IIAs, independently of whether they have entered into force, is 3,322. IIAs for which termination has entered into effect are not included.

The nine TIPs concluded in 2017 can be grouped into four categories:

a. Four agreements with obligations commonly found in BITs, including substantive standards of investment protection:
- Argentina–Chile Free Trade Agreement (FTA)
- ASEAN–Hong Kong, China Investment Agreement[13]
- China–Hong Kong, China Investment Agreement[14]
- Pacific Agreement on Closer Economic Relations (PACER) Plus[15]

b. One agreement with investment provisions emphasizing investment promotion and facilitation as well as a number of investment protection provisions – although no investor–State dispute settlement (ISDS) clause:
- Intra-MERCOSUR Investment Facilitation Protocol (2017)

c. One agreement with limited investment provisions (e.g. national treatment (NT) and most favoured nation (MFN) treatment with regard to the right of establishment of companies) or provisions on free movement of capital relating to direct investments:
- Armenia–EU Comprehensive and Enhanced Partnership Agreement

d. Three agreements that establish a process for negotiation or an institutional framework to promote and cooperate on investment but do not contain substantive investment protection provisions:
- Paraguay–United States Trade and Investment Framework Agreement (TIFA)
- Chile–Indonesia Comprehensive Economic Partnership Agreement[16]
- China–Georgia Free Trade Agreement (FTA)

(ii) Developments at the regional level

The year 2017 witnessed maintained momentum in negotiations for megaregional agreements, particularly in Africa and Asia. The EU continued several FTA negotiations, including with Japan. The renegotiations of NAFTA, including the chapter on investment, began. In addition, a number of country groups are developing non-binding guiding principles for investment policy making.

African Continental Free Trade Area (CFTA): The December 2017 African Union (AU) ministerial meeting concluded the first phase of the negotiations on the CFTA, bringing together 55 African economies. Ministers endorsed the Agreement Establishing the CFTA together with the Protocol on Trade in Services and agreed to establish a CFTA Secretariat. Heads of State signed the CFTA in March 2018. The next phase of negotiations will focus on the protocols on competition, intellectual property rights and investment.

African, Caribbean and Pacific (ACP) Group of States – Guiding Principles for ACP Countries Investment Policymaking: The 79 ACP members have developed Guiding Principles jointly with UNCTAD. The Principles are based on UNCTAD's Investment Policy Framework for Sustainable Development (2015 version), reflect ACP countries' specificities and priorities for investment policymaking, and emphasize the special needs and concerns of developing countries, least developed countries (LDCs) and small island developing States (SIDS). The non-binding Principles were approved by the ACP Committee of Ambassadors in June 2017.

COMESA Common Investment Agreement (CCIA): The text of the CCIA was revised to strengthen the sustainable development dimension of the agreement and to safeguard the right of host States to regulate investment in their territories. The revised text was submitted to the COMESA Committee on Legal Affairs in September 2017.

Comprehensive and Progressive Agreement for a Trans-Pacific Partnership (CPTPP): Following the United States' withdrawal from the Trans-Pacific Partnership (TPP) agreement in January 2017, in November 2017, the 11 parties[17] to the TPP agreed on the core elements for a CPTPP. Annexes set out TPP treaty provisions that will be maintained in the CPTPP and those that will be suspended. With respect to investment (in Chapter 9), the parties agreed to suspend the application of the provisions related to investment agreement, investment authorization and the selection of arbitrators (in part). The agreement was signed on 8 March 2018, in Chile, and will enter into force after 6 of the 11 signatories ratify the treaty.

Economic Partnership Agreement (EPA) between the EU and Japan: In December 2017, the EU announced that the negotiations between the EU and Japan on the EPA had been finalized. However, for the investment chapter, some aspects remain subject to further negotiation. The EU has tabled during the negotiations its reformed proposal on the Investment Court System.

Free Trade Agreement (FTA) between the EU and Mexico: In April 2018, the EU and Mexico reached an agreement on the modernization of the 1997 Economic Partnership, Political Coordination and Cooperation Agreement between the EU and Mexico, with investment featuring among the chapters. The agreement includes a reference to the establishment of an investment court system (following the court system contained in the recent agreements between the EU and Canada (the Comprehensive Economic and Trade Agreement, or CETA), Singapore and Viet Nam).

North American Free Trade Agreement (NAFTA): The NAFTA parties (Canada, Mexico and the United States) held several rounds of renegotiations of the treaty. Although a handful of chapters have been finalized (e.g. competitiveness, and customs and border facilitation), the investment chapter remained in flux at the time of writing. A number of proposals have been reported in the early part of 2018, including regarding the status of ISDS.[18]

Organisation of Islamic Cooperation (OIC) – Guiding Principles for Investment Policymaking for Member States of the OIC: The 57 OIC countries are developing in cooperation with UNCTAD non-binding Guiding Principles for the OIC countries to use in the development of national and international investment policies. The Principles are based on a joint OIC–UNCTAD proposal containing 10 non-binding investment principles that draw on UNCTAD's Investment Policy Framework for Sustainable Development (*WIR12*, updated 2015), covering areas such as policy coherence, balanced rights and obligations, the right to regulate, openness to investment, investment protection and intra-OIC cooperation. The Principles, which are in line with the OIC Action programme (OIC-2025), were reviewed favourably at a high-level expert meeting organized by the Islamic Centre for Development of Trade and UNCTAD in January 2018.

Regional Comprehensive Economic Partnership (RCEP): Negotiations continued on the RCEP, involving the 10 members of ASEAN[19] plus 6 other countries from the region.[20] At least 20 rounds of negotiations concluded thus far have covered topics such as goods, services, trade remedies, customs clearance, investment, government procurement, competition policy, e-commerce and dispute settlement. RCEP members aim to bring the negotiations to a conclusion in 2018. The investment chapter seeks to create an enabling investment environment in the region based on the following four pillars: investment protection, liberalization, promotion and facilitation.

Tripartite COMESA–EAC–SADC FTA (TFTA): The first phase of negotiations focused on trade in goods. The three regional economic communities (the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC)) adopted annexes on rules of origin, trade remedies and dispute settlement. Negotiations on Phase II have started while a few outstanding issues are being finalized for the market integration pillar. Phase II includes trade in services, intellectual property rights, competition policy and consumer rights, and cross-border investment. For the investment chapter, possible options include a full investment chapter or annex, or a more limited approach focusing on investment cooperation.

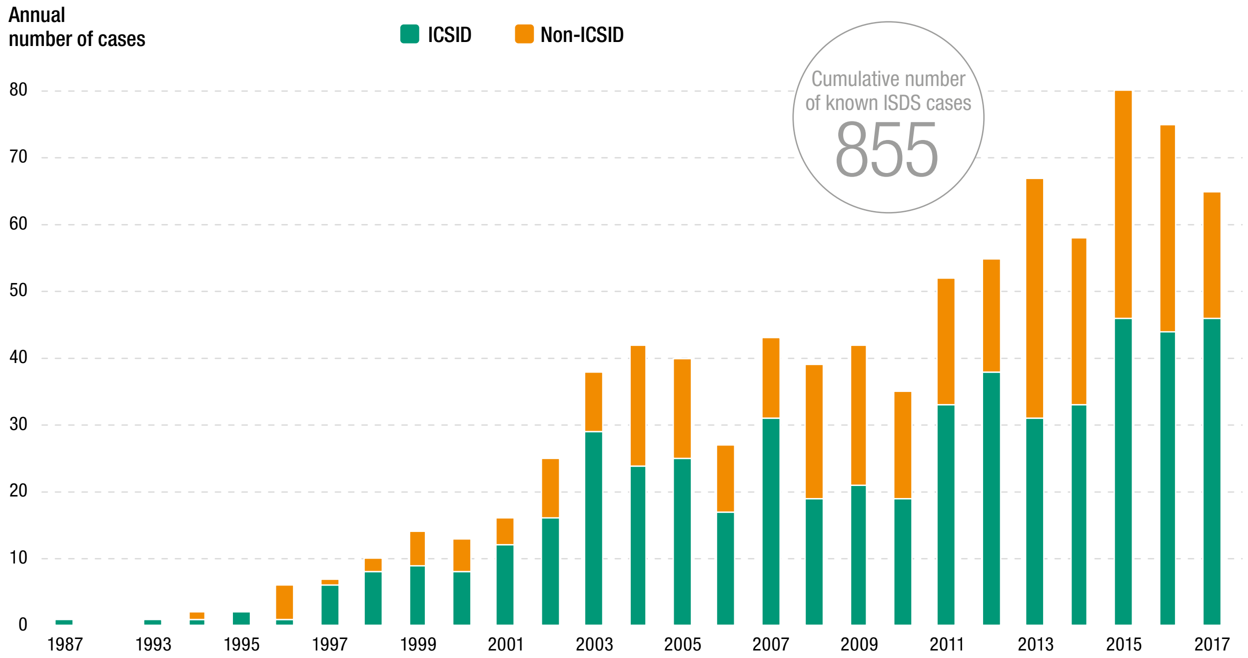
b. Trends in ISDS: new cases and outcomes

The number of new investor–State dispute settlement (ISDS) claims remains high. In 2017, at least 65 new treaty-based ISDS cases were initiated, bringing the total number of known cases to 855. More than half of the arbitral decisions on jurisdictional issues that were rendered in 2017 were decided in favour of the State, whereas those on the merits were mostly decided in favour of the investor.

(i) New cases initiated in 2017

In 2017, investors initiated at least 65 ISDS cases pursuant to IIAs (figure III.4). As of 1 January 2018, the total number of publicly known ISDS claims had reached 855. (On the basis of newly revealed information, the number of known cases for 2016 was adjusted to 75, and for 2015 to 80.) As some arbitrations can be kept fully confidential, the actual number of disputes filed in 2017 and previous years is likely to be higher.

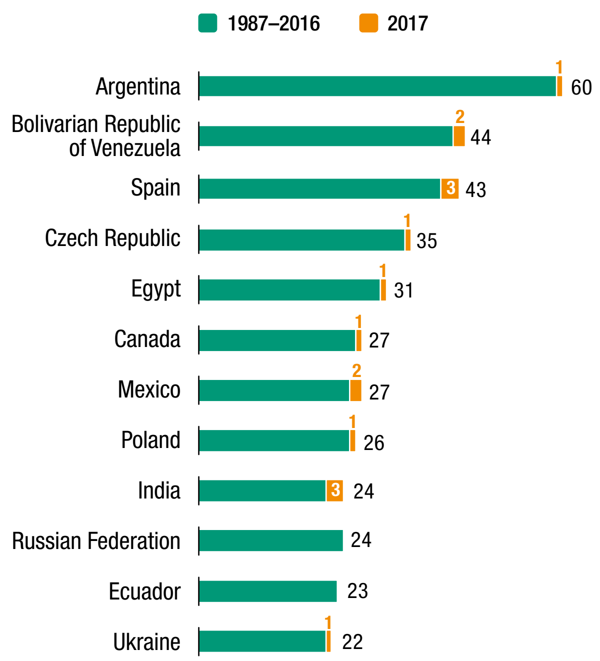
Figure III.4. Trends in known treaty-based ISDS cases, 1987–2017



Source: UNCTAD, ISDS Navigator.

Note: Information has been compiled on the basis of public sources, including specialized reporting services. UNCTAD's statistics do not cover investor–State cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signalled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continuously adjusted as a result of verification processes and may not match case numbers reported in previous years.

Figure III.5. Most frequent respondent States, 1987–2017 (Number of known cases)



Source: UNCTAD, ISDS Navigator.

Respondent States

The new ISDS cases in 2017 were initiated against 48 countries. Croatia was the most frequent respondent with four cases, followed by India and Spain with three cases each (figure III.5). Four economies – Bahrain, Benin, Iraq and Kuwait – faced their first (known) ISDS claims. As in previous years, the majority of new cases were brought against developing countries and transition economies. So far, 113 countries have been respondents to one or more known ISDS claims.

Home States of claimants

Developed-country investors brought most of the 65 known cases in 2017. Investors from the Netherlands and the United States initiated the most cases with eight cases each, followed by investors from the United Kingdom with six (figure III.6). Investors from Turkey were the most active claimants from developing countries, with four cases filed in 2017.

Intra-EU disputes

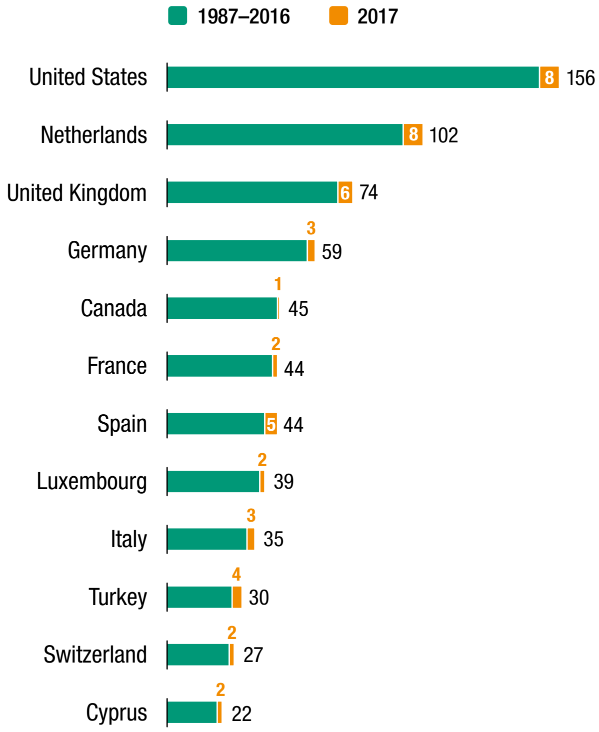
Intra-EU disputes accounted for about one-fifth of all investment arbitrations initiated in 2017, down from one-quarter in the preceding year. The overall number of arbitrations initiated by an investor from one EU member State against another totalled 168 by the end of 2017, i.e. 20 per cent of the total number of cases globally.

A recent judgment of the EU Court of Justice found that the arbitration clause contained in the Netherlands–Slovakia BIT (1991) was incompatible with EU law.[21] This decision may have important implications for intra-EU BITs and future intra-EU disputes.

Applicable investment treaties

About 80 per cent of investment arbitrations in 2017 were brought under BITs. The remaining arbitrations were based on TIPs, or on BITs and TIPs in combination. The majority of the IIAs invoked in 2017 date back to the 1980s and 1990s. The IIAs most frequently invoked in 2017 were the Energy Charter Treaty (with six cases), the Austria–Croatia BIT (three cases) and NAFTA (two cases). Looking at the overall trend, about 20 per cent of all known cases have invoked the Energy Charter Treaty (113 cases) or NAFTA (61 cases).

Figure III.6. **Most frequent home States of claimants, 1987–2017**
(Number of known cases)



Source: UNCTAD, ISDS Navigator.

Economic sectors involved

About 70 per cent of the cases filed in 2017 related to activities in the services sector, including these:

- Financial and insurance services (11 cases)
- Construction (9 cases)
- Supply of electricity, gas, steam and air (7 cases)
- Information and communication (6 cases)
- Transportation and storage (4 cases)

Primary industries and manufacturing each accounted for 15 per cent of new cases. This is broadly in line with the overall distribution of the 855 known ISDS cases filed to date.

Measures challenged

Investors in 2017 most frequently challenged the following types of State conduct:

- Domestic legal proceedings and decisions (at least 7 cases)
- Termination of contracts or concessions, and revocation or non-renewal of licenses (at least 7 cases)
- Placement under administration and other actions allegedly resulting in bankruptcy or liquidation (at least 6 cases)
- Alleged takeover, seizure or nationalization of investments (at least 5 cases)

- Legislation prescribing changes in the currency of loans and mortgages (at least 4 cases)
- Tax-related measures such as allegedly unlawful tax assessments or the denial of tax exemptions (at least 4 cases)
- Legislative reforms in the renewable energy sector (at least 2 cases)

Other conduct that was challenged included alleged harassment by State authorities, unfair or discriminatory treatment, fraudulent misrepresentation and anti-money laundering regulations.

Amounts claimed

Where information regarding the amounts sought by investors has been disclosed (in about one-quarter of the new cases), the amounts claimed range from $15 million (*Arin Capital and Khudyan v. Armenia*) to $1.5 billion (*MAKAE v. Saudi Arabia*).

(ii) ISDS outcomes

Decisions and outcomes in 2017

In 2017, ISDS tribunals rendered at least 62 substantive decisions, 34 of which are in the public domain (at the time of writing). Of these public decisions, more than half of the decisions on jurisdictional issues were decided in favour of the State, whereas those on the merits were mostly decided in favour of the investor. More specifically:

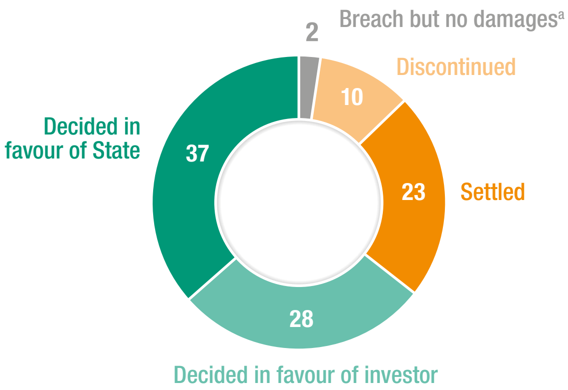
- Thirteen decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with five upholding the tribunal's jurisdiction and eight denying jurisdiction.
- Eighteen decisions on the merits were rendered in 2017, with 12 accepting at least some investor claims and 6 dismissing all of the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the expropriation and the fair and equitable treatment (FET) provisions. In one decision, the tribunal found that the State had breached the IIA but decided that no compensation was due.
- Three publicly known decisions were rendered in ICSID annulment proceedings. ICSID ad hoc committees rejected two applications for annulment and partially annulled one award.

Overall outcomes

By the end of 2017, some 548 ISDS proceedings had been concluded. The relative shares of case outcomes changed only slightly from that in 2016. About one-third of all concluded cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits), and about one-quarter were decided in favour of the investor, with monetary compensation awarded. A quarter of cases were settled; in most cases, the specific terms of settlements remain confidential. In the remaining proceedings, cases were either discontinued or the tribunal found a treaty breach but did not award monetary compensation (figure III.7).

Of the cases that were resolved in favour of the State, about half were dismissed for lack of jurisdiction. Looking at the totality of decisions on the merits (i.e. where a tribunal determined whether the challenged

Figure III.7. Results of concluded cases, 1987–2017 (Per cent)



Source: UNCTAD, ISDS Navigator.
[a] Decided in favour of neither party (liability found but no damages awarded).

measure breached any of the IIA's substantive obligations), about 60 per cent were decided in favour of the investor and 40 per cent in favour of the State (figure III.8).

Overall amounts claimed and awarded

On average, successful claimants were awarded about 40 per cent of the amounts they claimed. In cases decided in favour of the investor, the average amount claimed was $1.3 billion and the median $118 million. The average amount awarded was $504 million and the median $20 million. These amounts do not include interest or legal costs, and some of the awarded sums may have been subject to set-aside or annulment proceedings.

The combined $114 billion claimed and $50 billion awarded in three cases related to the Yukos company (brought by Hulley Enterprises, Veteran Petroleum and Yukos Universal against the Russian Federation) were the highest in the history of investment treaty arbitration. These arbitration awards have been set aside by The Hague District Court; its judgment was appealed and the appeal is currently pending. Excluding these values from the calculations above, the average amount claimed falls to $454 million and the amount awarded to $125 million, i.e. about 28 per cent of the amount claimed.

Appointments of arbitrators

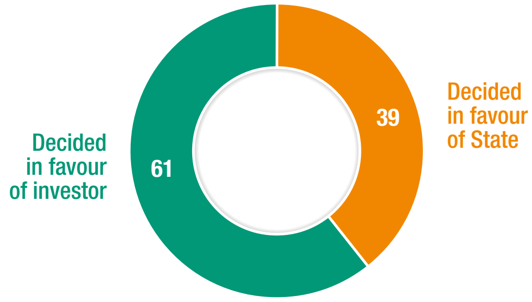
About 500 people have been appointed as arbitrators in known ISDS cases (original proceedings). About half have served on more than one known case. A small number of people have been appointed to more than 30 cases each (figure III.9), with three having received the most appointments. All but one are citizens of European or North American countries. Interesting from a gender perspective is that 11 of the 13 are men, and that the two women are among the three people having received the most appointments.

2. Taking stock of IIA reform

a. The new generation of IIAs: features and developments (Phase 1)

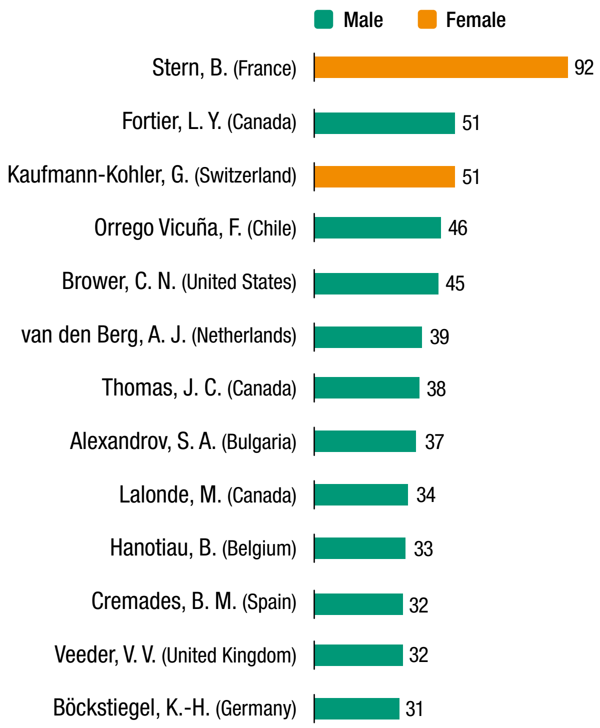
IIA reform is well under way across all regions. Most of today's new IIAs include sustainable development-oriented reform elements. Highlights of modern

Figure III.8. **Results of decisions on the merits, 1987–2017** (Per cent)



Source: UNCTAD, ISDS Navigator.
Note: Excluding cases (i) dismissed by tribunals for lack of jurisdiction, (ii) settled, (iii) discontinued for reasons other than settlement (or for unknown reasons) and (iv) decided in favour of neither party (liability found but no damages awarded).

Figure III.9. **Most frequently appointed ICSID arbitrators, 1987–2017** (Number of appointments)



Source: UNCTAD, ISDS Navigator.
Note: Information on nationality and gender compiled on the basis of ICSID's database of arbitrators, conciliators and ad hoc Committee members.

treaty making include a sustainable development orientation, preservation of regulatory space and improvements to or omissions of ISDS.

Since 2012, over 150 countries have undertaken at least one action in the pursuit of sustainable development-oriented IIAs as set out in UNCTAD's Reform Package for the International Investment Regime (including either Phase 1 or Phase 2 reform actions, discussed below). For example, they have reviewed their treaty networks or revised treaty models.

Most of today's new IIAs follow UNCTAD's Road Map (*WIR15*), which sets out five action areas (safeguarding the right to regulate, while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency) or include clauses that were set out in UNCTAD's Investment Policy Framework for Sustainable Development (*WIR12*, updated in 2015). In addition, some IIAs concluded in 2017 contain innovative features that have rarely been encountered in earlier IIAs.

Today's reform-oriented treaty making is in striking contrast to treaty making at the turn of the millennium. A comparison between the 13 IIAs concluded in 2017 for which texts are available (eight BITs and five TIPs) and a sample of 13 IIAs concluded in 2000 shows remarkable differences (table III.4). Clearly, reform-oriented clauses are becoming more common in modern treaties. All IIAs concluded in 2017 contain at least six reform features, and some provisions that were considered innovative in pre-2010 IIAs now appear regularly.

Highlights of modern treaty making include a sustainable development orientation, preservation of regulatory space and improvements to or omissions of investment dispute settlement.

Sustainable development orientation. In contrast to the IIAs signed in 2000, the 2017 IIAs include a larger number of provisions explicitly referring to sustainable development issues (including by preserving the right to regulate for sustainable development-oriented policy objectives). Of the 13 agreements concluded in 2017, 12 have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources. All but one also explicitly recognize that the parties should not relax health, safety or environmental standards to attract investment; and 11 refer to the protection of health and safety, labour rights, the environment or sustainable development in their preambles.

Preservation of regulatory space. Recent treaties frequently differ from old-generation treaties in other elements that aim more broadly at preserving regulatory space and/or at minimizing exposure to investment arbitration. These elements include clauses that (i) limit the treaty scope (e.g. by excluding certain types of assets from the definition of investment) (12 IIAs); (ii) clarify obligations (e.g. by including more detailed clauses on FET (11 IIAs) and/or indirect expropriation (10 IIAs)); and (iii) contain exceptions to transfer-of-funds obligations and/or carve-outs for prudential measures (all 13 IIAs). Notably, all but one of the treaties reviewed omit the so-called umbrella clause (thus also reducing access to ISDS). Interestingly, already in 2000, 5 of the 13 treaties did not include umbrella clauses.

Investment dispute settlement. Modern IIAs carefully regulate ISDS (e.g. by specifying treaty provisions that are subject to ISDS, excluding certain policy areas from ISDS, setting out a special mechanism for taxation and prudential measures, and/or restricting the allotted time period within which claims can be submitted) (eight IIAs). In addition, four IIAs omit ISDS-type international arbitration (or note that parties agree to discuss ISDS in the future).

With the current momentum of ISDS reform, important questions of policy coherence arise. Taking the examples of Canada and Mexico, in their respective arrangements with the EU, they have committed to a multilateral initiative for an investment court, replacing

Table III.4. Reform-oriented provisions in IIAs concluded in 2000 and in 2017

2000

	1	2	3	4	5	6	7	8	9	10	11
Austria–Bangladesh BIT	No	No	No	No	Yes	No	No	No	No	Yes	Yes
Belarus–Singapore BIT	No	No	No	No	No	No	Yes	No	No	No	Yes
Brunei Darussalam–China BIT	No	No	No	No	No	No	No	No	No	No	Yes
Chile–Dominican Republic BIT	No	No	No	No	No	Yes	No	No	No	No	No
Cuba–Paraguay BIT	No	No	No	No	Yes	No	No	No	No	No	No
Ethiopia–Turkey BIT	No	No	No	No	No	Yes	No	No	No	No	No
Greece–Mexico BIT	No	Yes	No	No	Yes	No	No	No	No	Yes	No
India–Lao People's Democratic Republic BIT	No	No	No	No	No	Yes	No	No	No	No	Yes
Italy–Libya BIT	No	No	Not applicable	No	No	Yes	No	No	No	No	No
Malaysia–Saudi Arabia BIT	No	No	Not applicable	No	No	Yes	No	No	No	No	No
Mongolia–Philippines BIT	No	No	No	No	No	No	No	No	No	No	Yes
Nigeria–Switzerland BIT	No	No	No	No	No	No	No	No	No	No	Yes
Rwanda–South Africa BIT	No	No	No	No	No	No	No	No	No	No	Yes

Yes No Not applicable

2017

	1	2	3	4	5	6	7	8	9	10	11
Argentina–Chile FTA	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
ASEAN–Hong-Kong, China Investment Agreement	No	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	Yes
Burundi–Turkey BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No
China–Hong Kong, China Investment Agreement	No	Yes	Yes	Yes	Yes	No	Yes	Yes	No	Yes	Yes
Colombia–United Arab Emirates BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No
Intra-MERCOSUR Investment Facilitation Protocol	Yes	Yes	Not applicable	Not applicable	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Israel–Japan BIT	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes	No	Yes	No
Jordan–Saudi Arabia BIT	Yes	No	Yes	No	Yes	Yes	No	Yes	No	No	Yes
Mozambique–Turkey BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No
Pacific Agreement on Closer Economic Relations Plus	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Rwanda–United Arab Emirates BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes
Turkey–Ukraine BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No
Turkey–Uzbekistan BIT	Yes	Yes	No	Yes	Yes	Yes	Yes	Yes	No	Yes	No

Yes No Not applicable

Selected aspects of IIAs

The scope and depth of commitments in each provision varies from one IIA to another.

1 References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble

2 Refined definition of investment (e.g. reference to characteristics of investment; exclusion of portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts)

3 Circumscribed fair and equitable treatment (with reference to customary international law (CIL), equated to the minimum standard of treatment of aliens under CIL or clarified with a list of State obligations

4 Clarification of what does and does not constitute an indirect expropriation

5 Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws

6 Omission of the so-called “umbrella” clause

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

8 Explicit recognition that parties should not relax health, safety or environmental standards to attract investment

9 Promotion of corporate and social responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble

10 Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, omitting an ISDS mechanism)

11 Specific proactive provisions on investment promotion and/or facilitation

Source: UNCTAD.

Note: BITs listed for 2000 are a sample of IIAs signed in that year. IIAs listed for 2017 are those concluded in that year for which texts are available; this list does not include “framework agreements” that lack substantive investment provisions. Available IIA texts can be accessed at UNCTAD's IIA Navigator at http://investmentpolicyhub.unctad.org/IIA.

the traditional ISDS system. By contrast, in the recently concluded CPTPP, Canada and Mexico have agreed to maintain a more traditional ISDS mechanism. And finally, in NAFTA renegotiations, the parties have considered a number of proposals since the start of 2018, among them removing ISDS, including an opt-out provision and providing for binding arbitration for Canada and Mexico only.

In addition to the reform-oriented elements presented in table III.4, some of the IIAs concluded in 2017 contain innovative features that have rarely been encountered in earlier IIAs:

- *Conditioning treaty coverage on investors' contribution to sustainable development.* Requiring that a covered investment contribute to the host State's economy or sustainable development (e.g. Burundi–Turkey BIT, Mozambique–Turkey BIT, Turkey–Ukraine BIT)
- *Reducing the role of investor expectations in FET.* Specifying that the mere act of taking, or the failure to take, an action that may be inconsistent with an investor's expectations does not constitute a breach of FET, even if it results in loss or damage to the investment (e.g. China–Hong Kong, China Investment Agreement)
- *Fostering responsible investment.* Including a "best efforts" obligation for investors to respect the human rights of the people involved in investment activities and to promote the building of local capacity and the development of human capital (e.g. Intra-MERCOSUR Agreement)
- *Building capacity for investment facilitation.* Requiring the home State to assist host States in the promotion and facilitation of investment through capacity-building, insurance programmes or technology transfer (e.g. China–Hong Kong, China Investment Agreement; ASEAN–Hong Kong, China Agreement; PACER Plus)
- *Facilitating counterclaims by the respondent party against the claimant investor.* Establishing a mechanism for obtaining investor's consent for counterclaims (e.g. Colombia–United Arab Emirates BIT)

It must be noted that these innovative features do not necessarily translate into a reduced level of investment protection, as most of the IIAs signed in 2017 maintain substantive investment protection standards.

b. Modernizing the existing stock of old-generation treaties (Phase 2)

Countries are engaging in modernizing the existing stock of old-generation treaties. Initial reform actions correspond to UNCTAD's 10 Options for Phase 2 of IIA Reform (WIR17). In particular, in the past year, countries have been engaging in multilateral reform discussions, including with regard to ISDS, and a small but growing number of countries are issuing interpretations or replacing their old-generation agreements.

This stocktaking of Phase 2 reform actions (table III.5) focuses on progress made in 2017 and during the first months of 2018 (and, where relevant, 2016) (figure III.10).

Jointly interpreting treaty provisions. Countries have not only developed – and sometimes adopted – joint interpretative statements for existing IIAs, but also strengthened the basis for binding interpretation in recently concluded treaties.

- In early 2016, India proposed a Joint Interpretative Statement to approximately 25 countries with which it has IIAs for which the initial period of validity had not expired.
- In October 2017, Bangladesh and India signed the Joint Interpretative Notes for the Bangladesh–India BIT (2009). The Notes add clarity to a number of BIT provisions, including the definitions of investment and investor, the exclusion of taxation measures, FET, NT and MFN, expropriation, essential security and ISDS.

Table III.5. Overview of reform options: actions and outcomes

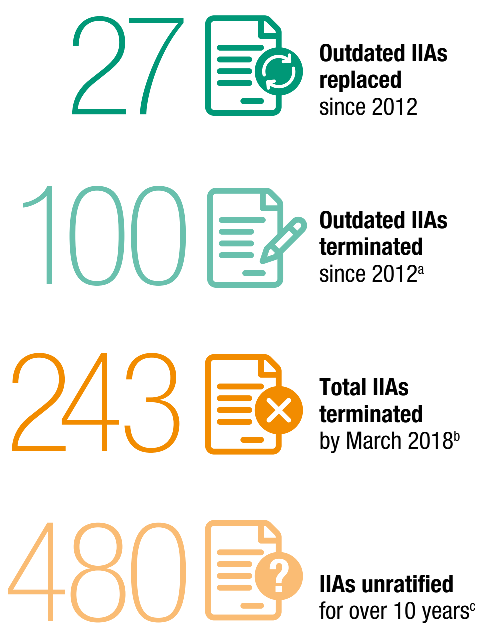
Action option	Outcome
1. Jointly interpreting treaty provisions	Clarifies the content of a treaty provision and narrows the scope of interpretive discretion of tribunals
2. Amending treaty provisions	Modifies an existing treaty's content by introducing new provisions or altering or removing existing 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.
Note: This classification is made for illustration purposes only. The table should not be seen as placing possible reform actions in any order of priority.

- In October 2016, the EU, its member States and Canada agreed to a Joint Interpretative Instrument on the CETA that sets out the parties' agreement on a number of provisions that have been the subject of public debate and concern (such as the right to regulate and compensation).
- In October 2017, Colombia and France signed a Joint Interpretative Declaration for the Colombia–France BIT (2014) which clarified that the reference to "obligations that arise from international law" means treaties ratified by both parties and should not be interpreted as a legal stability clause or as allowing claims based upon mere breach of contract.
- In October 2017, the Joint Commission of the FTA between Canada and Colombia (2008) adopted a Joint Interpretative Declaration, which reaffirms the parties' right to regulate and clarifies the provisions on "like circumstances", full protection and security, and minimum standard of treatment.
- Several recent IIAs establish joint bodies with a mandate to issue binding interpretations of treaty provisions (e.g. Rwanda–United Arab Emirates BIT (2017); Australia–Peru FTA (2018); Republic of Korea–Republics of Central America FTA (2018)).

Amending treaty provisions. Although amendments were used relatively sparingly in the bilateral context, protocols or exchanges of letters or notes were used in important regional IIAs.

Figure III.10. Selected Phase 2 reform actions: facts and figures



[a] These are IIAs for which termination has entered into effect (2012–2018). They include expired treaties, treaties replaced by new ones, terminations by consent and unilaterally denounced treaties.
[b] These are all IIAs for which termination has entered into effect. They include expired treaties, treaties replaced by new ones, terminations by consent and unilaterally denounced treaties.
[c] This includes IIAs concluded through December 2008.

- In March 2018, the remaining 11 parties to the CPTPP agreed to an amended text in select areas while retaining the core elements. With respect to investment (in Chapter 9), the parties agreed to suspend the application of the provisions related to investment agreement, investment authorization and the selection of arbitrators (in part).
- Canada and Chile have updated the investment chapter in their FTA at least three times, the most recent being in 2017, when they added “new and progressive elements” to the chapter (e.g. clarifying existing obligations, reaffirming the States’ right to regulate, including a provision on corporate social responsibility (CSR), improving the ISDS mechanism and adding a “rendezvous clause”, enjoining the parties to adopt a permanent multilateral tribunal, should such a tribunal be established in the future).

Replacing “outdated” treaties. Since 2012, at least 27 outdated IIAs have been replaced by newer, more modern, treaties.[22]

- In 2017, at least 3 of the 13 IIAs signed replaced older-generation BITs (Argentina–Chile FTA (2017) replaced Argentina–Chile BIT (1991); Turkey–Ukraine BIT (2017) replaced Turkey–Ukraine BIT (1996); Turkey–Uzbekistan BIT (2017) replaced Turkey–Uzbekistan BIT (1992)).
- Since 2016, Turkey has replaced eight outdated treaties (with Belarus, Georgia, Jordan, Moldova, Serbia, Tunisia, Ukraine and Uzbekistan). Among the reforms implemented are more detailed definitions of investment, more precisely formulated general treatment standards (e.g. FET, NT and MFN treatment), new general exceptions and balance-of-payments exceptions, a denial of benefits clause and refinements to ISDS (i.e. exemptions from the scope of ISDS and time limitations for the referral of disputes to ISDS).
- In recent years, Australia has replaced several of its first-generation BITs with investment chapters upon the conclusion of comprehensive FTAs with BIT partner countries (e.g. Australia–Chile (1996)). Australia continues reviewing and renegotiating those BITs that are not captured by current FTA negotiations.
- In March 2018, Ecuador presented its new model treaty, which will be the basis for future negotiations, including with the countries’ prior treaty partners. Among the model’s most prominent features are a mechanism aimed at the prevention of disputes, exceptions to avoid possible conflicts between the disciplines and the pursuit of legitimate policy objectives by the States, and an appellate stage.

Consolidating the IIA network. Although consolidation is a prominent feature in the EU’s nascent treaty practice, it is less common – or yet to be decided on – in other regional or megaregional agreements.

- In March 2018, in conjunction with its signing of the CPTPP, Australia is terminating the underlying BITs it had with Mexico, Peru and Viet Nam.[23]
- Negotiations have concluded for investment chapters in the FTA between the EU and Mexico but continue for investment chapters in the FTAs between the EU and Chile, and the EU and Tunisia and for an investment agreement with China. These agreements are expected to replace all prior BITs concluded with the respective countries by individual EU member States.

Managing relationships between coexisting treaties. Managing treaty relationships is crucial when pursuing policy coherence, an issue taken up in the updated version of UNCTAD’s Reform Package for the International Investment Regime (UNCTAD, forthcoming).

Referencing global standards. Some recent IIAs have included provisions aimed at ensuring more responsible and regulated investment activities through reference to global standards:

- At least 13 recent IIAs refer to CSR standards in a general manner, typically to “internationally recognized standards” in areas such as labour, environment, human rights, anti-corruption and the like (e.g. Intra–MERCOSUR Investment Facilitation Protocol (2017); PACER Plus (2017)).

- At least 6 recent IIAs are more specific, referring to global standards such as the Sustainable Development Goals (SDGs) (e.g. Morocco–Nigeria BIT (2016)); the UN Charter, Universal Declaration of Human Rights and/or International Labour Organization instruments (e.g. EFTA–Georgia FTA (2016); CETA (2016); Armenia–EU Comprehensive and Enhanced Partnership Agreement (2017)); or the Organization for Economic Co-operation and Development (OECD) MNE Guidelines and OECD Principles of Corporate Governance (e.g. CETA (2016); Argentina–Chile FTA (2017)).

Engaging multilaterally. Multilateral developments on international investment issues have gained momentum in 2017, with some of them having a clear IIA reform dimension.

Most clearly related to IIA reform are multilateral discussions on improving ISDS:

- In January 2017, ICSID commenced a public consultation regarding amendments to its arbitration rules. The goal is to modernize and simplify the rules, with a particular focus on reducing the time and cost of ICSID arbitration. Topics under consideration include the appointment and disqualification of arbitrators, third-party funding, consolidation of cases, and transparency and non-disputing party participation.
- In July 2017, during UNCITRAL's 50th annual session, the Commission asked its Working Group III to identify concerns regarding ISDS, to consider whether reform was desirable and, if so, to develop any relevant solutions. At sessions in November 2017 and April 2018, the Working Group completed a review of issues in relation to procedural aspects of ISDS, including the arbitral process, overall consistency and coherence of its outcomes, and issues relating to decision-makers in ISDS proceedings.
- In October 2017, the Mauritius Convention on Transparency in Treaty-based Investor–State Arbitration, also known as the Mauritius Convention on Transparency, entered into force.[24] According to the Convention, the UNCITRAL transparency rules will become part of treaty-based investor–State disputes involving countries that have ratified it. The Mauritius Convention effectively modifies a number of first-generation IIAs (of those countries that have ratified the Convention), thus rendering it a collective IIA reform action.

And one process potentially goes beyond dispute settlement:

- Work on the potential modernization of the Energy Charter Treaty is under way, with discussions set to take place in 2018, involving member States, observers and the industry. The process takes into consideration all the provisions of the ECT, not just the investment protection standards. It is expected that a list of topics for the potential negotiation on modernization will be decided upon by late 2018.

Following the issuance of the 2016 "G20 Guiding Principles for Global Investment Policymaking", some other country groups embarked on designing their own sets of principles, typically informed by those set out in UNCTAD's Investment Policy Framework for Sustainable Development. The formulation of the guiding principles is an important and efficient means to build consensus on the core issues related to international investment policymaking.

- In June 2017, the Joint ACP–UNCTAD Guiding Principles for Investment Policymaking, covering 79 countries, were approved by the ACP Committee of Ambassadors meeting.
- In January 2018, the Guiding Principles for Investment Policymaking for OIC countries, developed in cooperation with UNCTAD and covering 57 OIC countries, were examined at a high-level expert meeting.

Two additional work streams address specific reform areas as set out in the UNCTAD Road Map:

- *Facilitating investment*. In December, 70 WTO members issued a Joint Ministerial Statement on Investment Facilitation for Development on the margins of the WTO's Eleventh Ministerial Conference. Many of the key elements of these proposals for an Investment Facilitation Agreement built on UNCTAD's Global Action Menu for Investment Facilitation.[25] These elements included transparency, efficiency in procedures, national focal points, technical assistance, investor principles and standards.
- *Ensuring responsible investment*. Initiated in 2014 by the Human Rights Council, work towards an international instrument to regulate the activities of transnational corporations and other business enterprises continued. The third meeting of the open-ended intergovernmental working group on transnational corporations and other business enterprises with respect to human rights focused its discussions on the content, scope and nature of a future agreement.
- *Multilateral platform for IIA reform*. Benefiting from UNCTAD's comprehensive platform for multilateral engagement, more than 300 experts, including high-level IIA negotiators, representatives from intergovernmental organizations, civil society, academia and the private sector convened in Geneva during 9–11 October 2017, for UNCTAD's Annual High-level IIA Conference. Attendees discussed UNCTAD's Reform Package for the International Investment Regime, and exchanged experiences and good practices.

Abandoning unratified old treaties. Although explicit abandonment actions have not been taken, several countries seem to have – de facto – abandoned unratified treaties or put their BIT negotiations on hold:

- More than 480 IIAs that were concluded over 10 years ago have not entered into force, suggesting that the parties to these IIAs have decided to not pursue their ratification. Moreover, as stated in UNCTAD's October 2017 High-level IIA Conference, in 2008, Ecuador interrupted the ratification of treaties that had been signed but not ratified (with Costa Rica and with the Russian Federation) and, in 2017, Pakistan announced that it had halted certain BIT ratification processes.
- Several countries have also issued moratoriums on the conclusion of new BITs (e.g. Botswana, in 2013, citing implementation challenges; Namibia, in 2014, halting any future BIT negotiations until a new investment policy is implemented; Montenegro, in 2016, linking the moratorium to the development of a new model; Pakistan, in 2017, pending the design, in close cooperation with UNCTAD, of a new legal framework for future BITs and a road map for the existing ones). In addition, as of 2003, Chile stopped negotiating BITs, instead negotiating investment-related provisions as part of FTAs.
- Several countries that previously had actively negotiated BITs have not concluded any new BITs for the past five years (among them, Malaysia, Namibia and the Philippines).

Terminating existing old treaties. Countries have continued the trend of terminating old treaties, with several new terminations coming into effect in 2017.

- At least 22 terminations entered into effect in 2017, including 17 for India. Ecuador sent 16 notices of termination.
- At least two intra-EU BITs were terminated in 2017 (Denmark's BITs with Estonia (1991) and Romania (1994)).
- Since 2012, at least 100 IIAs have been effectively terminated, either by consent or unilaterally.

Withdrawing from multilateral treaties. No example could be found for this reform option during this reporting period (see *WIR17*), suggesting that withdrawal from multilateral treaties is not currently a preferred reform path.

c. Lessons learned and way forward

Countries have different but related motivations to engage in Phase 2 reform actions, and they face a number of challenges in tackling their outdated IIAs effectively. Through its evidence-based policy analysis and advisory work, together with its intergovernmental consensus-building function, UNCTAD can help countries overcome challenges related to Phase 2 of IIA reform.

Phase 1 of IIA reform has seen steady progress and significant achievements, and Phase 2 is gaining significant momentum, as a small but growing number of countries have begun to directly tackle their outdated BITs. In addition, an increasing number of countries are actively considering the best policy options for initiating Phase 2 of IIA reform. The more than 3,000 first-generation treaties in existence today (representing some 90 per cent of the IIA universe) present further opportunities for Phase 2 reform actions.

A better understanding of the motivations and challenges related to Phase 2 of IIA reform can help strengthen current reform efforts. With a view to providing the best possible backstopping functions, UNCTAD has conducted a survey of negotiators, relating to motivations, challenges and early results of Phase 2. Some of the results are discussed here.

Countries have different but related motivations to start engaging in Phase 2 reform actions. Motivations relate predominantly to minimizing the risk of the State's exposure to ISDS claims as well as wishing to enhance the sustainable development dimension of IIAs and ensure the State's right to regulate.

When aiming to tackle their outdated IIAs effectively, countries face a number of challenges. These include opposition from treaty partners to reforming existing IIAs, insufficient or unavailable capacity (e.g. human resources, legal, financial), and challenges related to internal procedures and coordination processes for building consensus and political will on the need to reform (e.g. interministerial coordination challenges, identification of priority treaties to be reformed, assurance of coherence between reform efforts at different levels of policymaking).

Initial lessons learned can already be identified for engaging in Phase 2 of IIA reform. They relate overwhelmingly to the importance of developing a national IIA reform strategy in light of national development objectives, conducting an IIA review to identify inconsistencies and setting up interministerial working groups.

From the survey responses, one can distil potential reasons for the relatively slow progress associated with Phase 2 of reform:

- Reforming the existing stock of IIAs requires, for the most part, the agreement of more than one country (with the exception of unilateral terminations).
- Countries have a preference for adopting a more gradual approach (BIT by BIT reform) instead of reforming national IIA networks in a wholesale manner.
- Some policymakers may have the perception that Phase 2 IIA reform will reduce a country's attractiveness to foreign investors.
- There is lack of awareness at the domestic level of the importance of Phase 2 IIA reform.

Policymakers and IIA negotiators should carefully consider the pros and cons of maintaining the existing stock of outdated IIAs and formulate a comprehensive IIA policy in line with their country's national development strategy. Through its evidence-based policy analysis and advisory work, together with its intergovernmental consensus-building function, which create opportunities for sharing experiences and lessons learned, UNCTAD can help countries move forward on this endeavour. At the same time, consideration should also be given to maximizing synergies between IIAs and national legal frameworks for investment, and managing the interaction between investment and other bodies of law. These topics are addressed in the next section, Phase 3 of IIA Reform.

C. PHASE 3 OF IIA REFORM

1. Improving investment policy coherence and synergies

After improving the approach to new treaties and modernizing existing treaties, the last step in the reform process (Phase 3) is to ensure coherence with national investment policies and with other bodies of international law. Striving for coherence does not necessarily imply legal uniformity – inconsistencies and divergence may be intended – but different policy areas and legal instruments should work in synergy.

Sustainable development has entered the mainstream of investment policymaking, particularly at the international level. As part of the first phase of IIA reform, countries have built consensus on the need for reform, identified reform areas and approaches, reviewed their IIA networks, developed new model treaties and started to negotiate new, more modern IIAs. The majority of reform-oriented actions follow UNCTAD's Reform Package for the International Investment Regime. In this context, an increasing number of countries have also embarked on the second phase of IIA reform, shifting policy attention towards comprehensively modernizing the stock of outdated, first-generation treaties (*WIR17*, pp. 130–145). With Phase 1 consolidating and Phase 2 under way, the time has come to consider Phase 3 of reform: enhancing investment policy coherence and synergies holistically across two dimensions:

- First, maximizing synergies between IIAs and the national legal framework for domestic and foreign investment
- Second, managing the interaction between IIAs and other bodies of international law that also touch upon investment

For each dimension, policy interaction manifests itself in different ways, gives rise to different challenges and requires different solutions in line with countries' specific national development priorities. This report takes stock of the status quo, outlines potential challenges and offers policy responses.

Two issues merit particular consideration:

- First, policy coherence does not necessarily require uniform legal language. Rather, mutually supportive policies allow countries the flexibility to decide, on a case-by-case basis and in line with their national development strategies (guided by the UNCTAD Policy Framework's core principles), where on the scale between consistency and divergence individual policy interactions should be placed. Factors influencing this choice include strategic considerations, evolution over time and capacity.
- Second, achieving a satisfactory level of investment policy coherence is not instantaneous. For example, a country's shift towards sustainable development-oriented investment policymaking will almost always produce a temporary phase of inconsistency. Such temporary inconsistency should not discourage investment policy reform. Instead, it should create momentum and foster more rapid and dynamic reform.

Working towards maximizing synergies from policy interactions in a regime consisting of thousands of investment treaties, national laws regulating domestic and foreign investment, and other bodies of international law affecting investment is a significant challenge for all countries, and for developing countries and LDCs in particular. This challenge calls for responses through a combination of individual, bilateral, regional and multilateral reform steps. Such steps should reflect on evidence-based policy analysis and, for many countries, may require backstopping through technical assistance and advisory services. UNCTAD can offer comprehensive support through its three pillars of (i) research and policy analysis, (ii) capacity-building and advisory services, and (iii) intergovernmental consensus building.

2. Maximizing synergies between the IIA regime and the national legal framework for investment

Countries' investment policy regimes typically have both a national and an international dimension. Although these dimensions often diverge intentionally, they nevertheless should interact in a way that maximizes synergies, including from a sustainable development perspective. Shaping such interaction requires a solid understanding of the different objectives, functions and natures of the legal instruments involved. Strengthening cooperation between national and international investment policymakers, improving interaction and ensuring cross-fertilization between the two regimes (including by identifying lessons learned that can be transferred from one policy regime to the other) are crucial tasks for countries striving to create a mutually supporting, sustainable development-oriented investment policy regime.

a. Similarities and differences between IIAs and the national legal framework for investment

When assessing the best possible approaches to fostering synergies between national and international policy dimensions, it is important to recognize key structural and contextual differences. These relate to (i) the context and nature of the two policy regimes, (ii) their overall purpose and scope, (iii) their process of development and (iv) their evolution (table III.6).

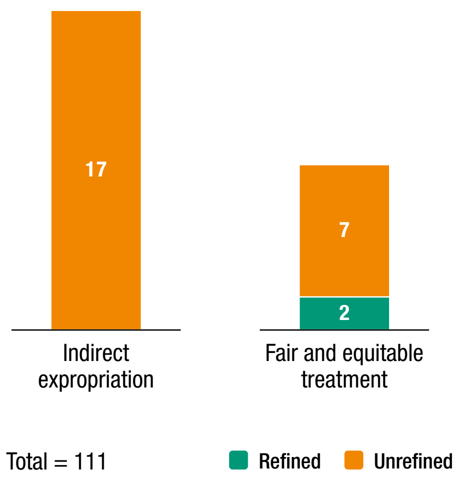
IIAs are considered the primary international instrument governing foreign investment, and they operate in a relatively well-defined universe. National legal frameworks for investment consist of a multitude of investment-related laws. Among them, national investment laws are an important element. They are complex and vary from country to country. Although they display significant divergences in their scope and content,

Table III.6. IIAs and national legal and policy frameworks for investment: structural and contextual differences

Differences	IIAs	National legal framework
Context and nature	• Consist of BITs and TIPs, considered the primary international instruments governing foreign investment	• Consists of a broad system of investment-related laws, regulations and policies • May include a national investment law as an important element of the investment policy framework
Purpose and scope	• Offer (substantive and procedural) protections to foreign investors of a particular home country, which may go beyond what is available at the domestic level	• Covers foreign investors from any country; may also cover domestic investors • May offer protection, but can also include other elements, such as promotion, facilitation, admission, liberalization or regulation
Process of development	• Adopted as a result of a negotiation process at the international level, which typically involves bargaining power	• Adopted relatively autonomously by a country and dependent on internal political and legislative processes
SDG-oriented evolution over time	• Subject to global debate on sustainable development-oriented IIA reform • Exhibits reform approaches to IIAs by many States (based on UNCTAD Reform Package)	• Some elements (e.g. environmental laws) at the core of SDG-oriented policy reform • Other elements (e.g. national investment laws) less exposed to SDG discourse

Source: UNCTAD.

Figure III.11. Selected provisions in national investment laws



Note: "Refined" clauses are those that contain features reflected in table III.4.

some features are relatively consistent among them (box III.1), and some contain provisions similar to those of IIAs (*WIR17*; UNCTAD, 2016; UNCTAD Investment Law Navigator).

Yet, to the extent that investment laws have typical IIA clauses, these clauses frequently lack the refinements and clarifications that are characteristic of modern IIA drafting. For example, in investment laws, none of the 17 clauses on indirect expropriation and only 2 of the 9 FET clauses are "refined" (figure III.11). For IIAs, these kinds of refinements have become standard features of modern treaty drafting (*WIR17*). Regarding investment dispute settlement, whereas it is typically addressed in IIAs through ISDS, providing advance consent to international arbitration (95 per cent of IIAs), 66 of the 111 national investment laws (59 per cent) refer to international arbitration as a means for settling investor–State disputes; and of those, only 24 laws provide for advance consent to international arbitration (see box III.1).

Divergence between the two types of instruments is not necessarily undesirable. Importantly, the absence of some IIA-type protection clauses in national laws can be in line with what the national legal framework for investment aims to achieve (e.g. investment promotion or facilitation).

Against this investment policy landscape, the issue that arises is how to best foster synergies between the national legal framework for investment and the IIA regime.

Box III.1. A primer on national investment laws

For many developing and transition countries, the investment law is at the core of the domestic regulatory framework for foreign investment. UNCTAD's Investment Laws Navigator shows that at least 109 countries have such a law. Almost all of these are either a developing country (91) or an economy in transition (13), while in developed countries key FDI provisions can be found in various other laws. Of the investment laws, 64 per cent (71 laws) apply to both foreign and domestic investors, whereas the others target foreign investors only (40). Countries in Asia are more likely to have foreign investment laws, whereas most countries in Africa have adopted investment laws that cover both foreign and domestic investors. Most all of the investment laws that are in force were adopted after 1989. Especially in the 1990s (after the end of the Cold War period), many countries (39) embraced new investment laws.

The main objective of investment laws is to promote (foreign) investment by regulating access to the domestic market; stipulating investor rights and guarantees; clarifying access to dispute settlement; setting up institutions, including investment promotion agencies and one-stop-shops; and providing incentives schemes. However, although most investment laws share the same objective and basic structure, they differ considerably in terms of content and quality of key FDI provisions (*WIR17*). Their specific content may also depend on their differing functions (Bonnitcha).

In addition, national investment laws operate within a complex web of domestic laws, regulations and policies that relate to investment (e.g. competition, labour, social, taxation, trade, finance, intellectual property, health, environmental, culture). Investment-related issues are typically also enshrined in countries' company laws, and – sometimes – in countries' constitutions. Accordingly, to the extent a country has an investment law, this law must be assessed in the context of the country's larger policy framework.

Source: UNCTAD Investment Laws Navigator.
Note: Data limited to laws that cover (or aim to cover) the basic legal framework for investment and include key FDI provisions (total is 111). Not included are laws that focus on only one specific element of this framework, such as incentives, access to land or national security.

b. Challenges arising from the interaction between IIAs and the national legal framework for investment

Although national and international investment policymaking is structurally distinct in the ways outlined above, there are instances where the two dimensions interact. Such interaction gives rise to at least three specific challenges:

- Policymakers in charge of national and international investment policies might be operating in silos and create outcomes that are not mutually supportive or, worse, conflicting.
- Incoherence (e.g. between a clearly defined FET clause in one or several IIAs and a broad FET clause in an investment law) may have the effect of rendering IIA reform ineffective. Similarly, broadly drafted provisions in "old" IIAs risk cancelling out reform efforts in new, more modern investment laws.
- Incoherence between investment laws and IIAs may also create ISDS-related risks when national laws include advance consent to international arbitration as the means for the settlement of investor–State disputes, which could result in parallel proceedings (box III.2).

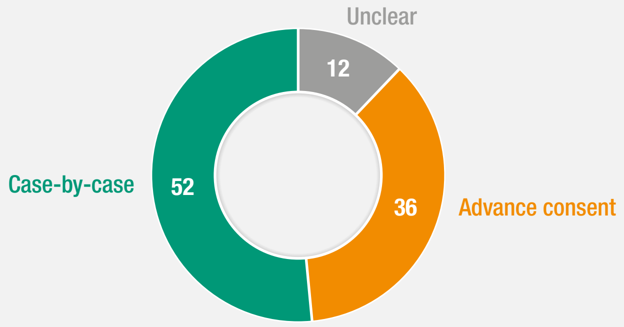
Box III.2. ISDS: facts, figures and risks

Although treaty-based ISDS has come to the forefront of today's international investment policy debate, the inclusion of ISDS in national investment laws and the resulting ISDS cases have thus far triggered less controversy. In fact, the number of ISDS cases brought on the basis of national investment laws is relatively low.

By the numbers: ISDS clauses in different legal instruments

- ISDS is typical for IIAs: 95 per cent have ISDS clauses
- ISDS is less common but still present in national investment laws: 59 per cent have ISDS clauses (only 24 out of 66 laws provide advance consent; see above)
  - Laws in Africa are most likely to include ISDS: 77 per cent
  - Laws in transition economies are also likely to include ISDS: 70 per cent
- When including ISDS, national investment laws take a more cautious approach, often using so-called case-by-case consent. Such clauses offer the possibility of ISDS but require an additional act of consent by the host State government before an ISDS arbitration can go forward.
  - National investment laws that allow for ISDS on a case-by-case basis: 52 per cent
  - BITs that provide for case-by-case consent: 4 (total), most of which were concluded in the 1970s (Sweden–Yugoslavia BIT (1978), Sweden–Malaysia BIT (1979), Egypt–Sweden BIT (1978) and Sri Lanka–Switzerland BIT (1981); see also the Pan African Investment Code (2015)).

Box figure III.1.1. Types of consent to international arbitration in national investment laws (Per cent, total = 66)



Source: UNCTAD, Investment Laws Navigator.

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Box III.2. ISDS: facts, figures and risks (Continued)

By the numbers: ICSID-registered cases based on different legal instruments[a]

- ICSID cases brought based on national investment laws only: 26 cases
- ICSID cases brought based on both national investment laws and IIAs: 35 cases
  - Total: 61 cases brought on the basis of an investment law
- Certain States have been subjected to higher numbers of ICSID cases based on their national laws.

Box table III.2.1. ICSID-registered cases based on national laws

Country	Based on national law	Total IIA-based ICSID cases
Venezuela (Bolivarian Republic of)	12	39
Uzbekistan	6	6
Guinea	5	0
Kazakhstan	5	11
Albania	4	6
Egypt	3	28
El Salvador	3	3
Kyrgyzstan	3	3
Congo, Dem. Rep. of	2	4
Tunisia	2	1

Other states that have been subjected to at least one ICSID case based on a national investment law include Cameroon, Côte d'Ivoire, Gabon, Georgia, Jordan, Madagascar, Mauritania, Montenegro, Mozambique, Niger, Nigeria, Papua New Guinea, Senegal, South Sudan, Tanzania, Timor-Leste and Yemen.

Possible risks of advance ISDS consent in both IIAs and national investment laws

Advance ISDS consent in both IIAs and national investment laws can increase countries' exposure to ISDS, prolong proceedings and impose higher costs on the defending States, with the potential for contradictory awards.

- *Increased exposure*: e.g. in *Caratube v. Kazakhstan*, after the original IIA claim had been dismissed on jurisdictional grounds, the investor renewed its claim based on the same IIA and, in addition, brought a claim based on the national investment law; the investor was ultimately awarded $39 million in damages[b]
- *Prolonged proceedings*: e.g. in *Champion Holding Company et al. v. Egypt*, investors brought a subsequent claim based on both the national law and the IIA after treaty-based claims were dismissed (case still pending)[c]
- *Higher costs*: e.g. in *Pac Rim Cayman v. El Salvador*, an arbitral tribunal dismissed the treaty-based claim in the jurisdictional phase but allowed the national law-based claim to go forward; proceedings drew out for an additional four years and generated significant legal and arbitration costs[d]

Source: UNCTAD.
[a] Based on 640 cases registered under ICSID Arbitration or Additional Facility Rules as of January 2018, pending or concluded.
[b] *Caratube International Oil Company LLP and Devincci Salah Hourani v. Republic of Kazakhstan* (ICSID Case No. ARB/13/13).
[c] *Champion Holding Company et al. v. Arab Republic of Egypt* (ICSID Case No. ARB/16/2).
[d] *Pac Rim Cayman Ltd v. Republic of El Salvador* (ICSID Case No. ARB/09/12); see also *ABCI Investments N.V. v. Republic of Tunisia* (ICSID Case No. ARB/04/12).

c. Policy options

Maximizing sustainable development benefits requires maximizing synergies between IIAs and the national legal framework for investment. There are several entry points for countries to address the challenges (table III.7).

(i) Strengthening cooperation between policymakers

There is a risk that investment policymaking occurs in silos, and that instruments are formulated in a vacuum, without sufficient coordination between the authorities in charge of IIAs and those in charge of domestic investment rules. Lack of interaction may also

Table III.7.	IIAs and the national legal framework for investment: entry points for maximizing synergies
Strengthening cooperation between policymakers	• Improve coordination between institutions charged with national and international investment policymaking • Encourage consultation between the various stakeholders in the investment regime
Improving interaction between the two regimes	• Establish clear principles for inter-operation of the different elements of the regimes • Condition IIA protections on investors' compliance with domestic law, provided that such laws are in line with international commitments • Use divergence to pursue strategic policy objectives
Ensuring cross-fertilization between the two regimes	• Determine where the national legal framework for investment can benefit from elements found in modern IIAs • Determine where IIA negotiators can consider features common to national investment policymaking

Source: UNCTAD.

occur between ministries in charge of investment and those in charge of related policies (see discussion below). These challenges occur in all countries but can be particularly pronounced in small, developing countries that have insufficient human resources and institutional or administrative capacities. Strengthening cooperation between the authorities in charge of the various dimensions of a country's investment policy framework is crucial for ensuring a coherent approach that reflects the country's overall strategy on investment for development. One option for doing so is the establishment of special agencies or interministerial task forces with a specific mandate to coordinate investment policy-related work (including the negotiation of IIAs) of different ministries and other government units. In addition, stakeholder consultations can help maximize synergies.

(ii) Improving interaction between regimes

Well-managed legal interaction between different investment policy instruments, based on a clear understanding of the different functions and objectives of the two regimes and the way they relate to each other, can help minimize challenges arising from diverging or conflicting clauses. Both IIAs and national investment laws sometimes contain elements that address the interaction between the two bodies of law:

- *Establishing the precedence of one regime over the other in the event of conflict*. Technical provisions, such as "relationship management" clauses, can help guide the legal interaction between intersecting and overlapping instruments, and establish clear precedence. More than 30 per cent of national investment laws (34) contain such "relationship management" clauses. Of these 34 laws, 16 explicitly acknowledge that the IIA takes precedence over national laws. Others include more vague formulations, such as providing that rights guaranteed under the investment law are "without prejudice to" rights derived from international instruments. Clear drafting can help provide legal guidance to government actors, investors and tribunals (in the event of dispute) on how these regimes should interact.[26]
- *Conditioning IIA protections on investor compliance with domestic law*. To benefit from the protection of the agreement, more than 60 per cent of IIAs require that an investment must be made in accordance with domestic law. This can include safeguards and requirements related to corporate disclosure and to social, environmental or public health protections. This approach can help improve coherence between the two regimes with respect to certain, albeit limited, aspects and can also promote responsible investor behaviour. This is particularly so if compliance with domestic laws is also extended post-entry (e.g. to the operations or post-operations stage; UNCTAD, 2015, option 7.1.1), provided that such laws are in line with international commitments.

- *Using divergence to pursue strategic policy objectives*. Although the management of policy interaction would typically strive for consistency, conscious and temporary divergence between the national and international investment policy regimes can also foster the achievement of strategic goals. For example, the international regime could drive change at the national level, as sometimes seen in the context of pre-establishment agreements (*WIR04*).[27] At the same time, changes in countries' domestic policy priorities (and subsequently national laws and policies) can also spur change in a country's approach to international investment policymaking.

(iii) Ensuring cross-fertilization between the two regimes

Cross-fertilization between domestic investment rules and IIAs can ensure that lessons learned in one realm of policymaking benefit the other. Facilitating cross-fertilization not only requires intensified cooperation between policymakers (as noted above), but also the careful identification of potentially transferable lessons learned. It is important to note that lessons learned cannot be transferred mechanically. Instead, careful attention must be given to the key structural and contextual differences between the different regimes.

For example, the fact that a country has a widely liberalized investment regime at the domestic level does not automatically translate into the need to inscribe this level of openness into IIAs. Instead, countries may wish to preserve regulatory space as regards the entry conditions for foreign investment. Similarly, the fact that a country has started to carefully circumscribe key protection clauses, e.g. FET, in IIAs does not mean that such a clause should automatically be "exported" into national laws. Instead, countries may wish to refrain from having FET clauses in national investment laws at all.

Considering these dynamics is of particular importance in light of today's imperative of sustainable development-oriented IIA reform. There is a concern that, under certain conditions (where a national investment law includes advanced consent to international arbitration as a means for the settlement of investor–State disputes as well as traditional investment protection clauses), unreformed national investment laws may render sustainable development-oriented IIA reform more challenging. Similarly, unreformed IIAs can dilute the relevance of and even cancel out more modern investment-related laws that contain sustainable development features.

IIA policymakers may wish to consider reflecting the following national law approaches in investment treaties:

- *Investment facilitation*: Investment laws generally include a range of investment facilitation provisions (UNCTAD, 2016). In addition to the provisions found in some IIAs (e.g. clauses on transparency and on entry and sojourn of foreign personnel), many investment laws also contain references to the facilitation services of investment promotion agencies and one-stop shops.
- *Investor obligations*: About two-thirds of investment laws make explicit reference to investor obligations. Beyond the commonly stated obligation to comply with host-country laws, investment laws often also include one or more specific requirements, such as corporate disclosure, respect for labour rights and standards (e.g. those pertaining to social security, minimum wages and trade union rights) and respect for environmental and public health legislation. In addition, some laws specify that investors must honour fiscal obligations or refer to obligations regarding hiring, training and skill transfer for local staff.
- *Settlement of investment disputes*: More than half of the investment laws analysed here include provisions for international arbitration for the settlement of investment disputes, frequently on a case-by-case consent basis (box III.2). Many laws also include clauses on recourse to local courts and alternative dispute resolution (64 and 21 laws,

respectively). For current reform efforts to improve international investment dispute settlement, policymakers may wish to consider whether lessons can be learned from the national level.

National investment policymakers may wish to consider reflecting the following IIA approaches in domestic law:

- *Refinements*: To the extent that national investment laws have typical IIA clauses (e.g. on FET, expropriation or transfer of funds), these clauses frequently do not have the refinements and clarifications that are typical of modern IIA drafting (for IIAs, see *WIR16*, *WIR17*).
- *Sustainable development orientation*: Only a small number of national investment laws refer – in their preamble or another dedicated clause on the objectives of the law – to sustainable development (or environmental or human health protection). It should be noted, however, that sustainable development-related concepts may be found in other national laws and policies. For IIAs, in turn, a focus on sustainable development-oriented reform has become standard (*WIR16*, *WIR17*).

In maximizing synergies between the international and national investment policy dimensions, it is important to remain flexible. Divergences between IIAs and national investment laws are often desirable and, in fact, may be intentional. While recognizing the need for different approaches to the legal framework for investment at the national and international levels, policymakers should strive for a more synergetic approach to the formulation of IIAs and the national legal framework for investment in order to produce an investment regime that is in line with a country's broader national development strategy and with sustainable development imperatives.

3. Managing the interaction between IIAs and other bodies of international law affecting investment

The fragmentation of international law has led to different systems that each pursue their own objectives, with each system often being developed and decided on in isolation. In line with today's SDG imperative, IIA reform should take into account the interaction between IIAs and other bodies of international law affecting investment. IIA reform can help avoid conflict and maximize synergies, notably through clearer treaty drafting, exceptions in IIAs and guidance on interpretation of IIA provisions.

a. Examples of interaction between IIAs and other bodies of international law affecting investment

The investment policy regime does not exist in a vacuum; it interacts with other areas of economic law and policy (e.g. competition, finance, intellectual property, development,[28] taxation and trade), as well as with areas of law and policy that are typically considered "non-economic" (e.g. culture, environment, health, labour, social or gender-related issues; land rights; national security issues).[29]

Different areas of international law diverge from each other in important ways. For example:

- *Type of regime*: Some international regimes, such as IIAs and double taxation treaties (DTTs), comprise mostly bilateral agreements, while others, such as human rights, trade and environment, are largely multilateral. Also, some areas of law are governed by enforceable legal instruments while others promulgate "soft law" norms, such as guidelines.

- *Type of dispute settlement*: At the international level, the IIA and trade regimes stand out as two regimes containing litigation-type dispute settlement, as opposed to dispute prevention or other types of mechanisms (multilateral environmental agreements, DTTs' mutual agreement procedures, etc.). Both IIAs and some international human rights conventions allow private parties (companies and individuals), as opposed to States, to bring direct international claims.[30]
- *Type of protection and content*: Some regimes govern the relationships between States and private parties (IIAs, human rights), while others seek to regulate or shape States' policies with a view to achieving certain global objectives, such as environmental protection, financial stability or preservation of cultural heritage.

These differences result in a multitude of types of interrelationships between these legal regimes, as well as interactions in policy practices. Moreover, by its very nature, economic activity (such as investment or trade) will affect both the environment and the social conditions for the public and laborers.

b. Challenges resulting from the interaction between IIAs and other bodies of international law affecting investment

The various ways in which the IIA regime interacts with other bodies of international law give rise to several distinct, but often interrelated, challenges (table III.8). These challenges can be placed in three broad categories: reduction of regulatory space, administrative complexity and uncertainty about dispute settlement.

The reduction of regulatory space manifests itself in several interrelated ways. Most prominent in the public debate is the risk that IIAs can constrain policymakers in the pursuit of important public policy objectives in a manner that was not anticipated. Such constraints could have a chilling effect on future, non-investment related national or international law-making (van Harten; Bonnitcha et al.). For example, in the wake of the (ultimately unsuccessful) tobacco-related disputes brought against Australia and Uruguay, several developing countries claimed an inability to enact strong tobacco control laws given the threats that multinational tobacco companies might bring international investment claims.

Second, there are administrative difficulties inherent in managing an international legal regime consisting of many different policy areas layered on top of an already intricate domestic policy framework. For States in which different ministries negotiate and implement international agreements across subject matters, these issue areas can and do conflict.

Table III.8. IIAs and other bodies of international law and policies: policy challenges

Reduction of regulatory space	• Unexpected chilling effect on future, non-investment-related law-making • Exposure to ISDS
Administrative complexity (for States and investors)	• For States: difficulty in managing distinct but overlapping policy areas and international obligations • For investors: investment decisions taken in light of fragmented web of international (and national) laws
Dispute settlement	• Risk of isolated treaty interpretation • Litigation of one issue in multiple fora • In case of ISDS competence, uncertainty about interpretation

Source: UNCTAD.

Small and resource-constrained countries may find this situation particularly difficult to navigate. These challenges also result in more uncertainty for States that are trying to determine which measures could constitute an IIA violation. Administrative complexity also arises for investors, for example, in the determination of which operational rules apply and/or prevail for their investment at any given point in time or place.

Third, dispute settlement poses three distinct challenges: the risk of isolated treaty interpretation, litigation in multiple fora and uncertainty about ISDS tribunals' approach to another body of law.

The risk of isolated treaty interpretation arises from the special nature of international law. Treaties can be interpreted in a fragmented way (International Law Commission Study Group). Legal scholars have analysed the intensity with which international legal regimes engage and reference other areas of law. Interestingly, ISDS tribunals interact more with other bodies of law, than, for example, dispute settlement processes under the WTO (Charlotin). Moreover, in ISDS there is convergence around certain public international law norms, as interpreted by the International Court of Justice (ICJ). This is reflected in the frequency with which ICJ jurisprudence is cited in ISDS. For example, ISDS tribunals have cited as many as 184 ICJ decisions in numerous awards, decisions or orders.[31]

Litigation in multiple fora could also arise. Bringing the same facts, claims or arguments before multiple fora (e.g. ISDS and WTO dispute settlement; ISDS and European Court of Justice) risks conflicting or confusing judgments. Thus far, litigation has been brought in multiple fora in both the economic realm (e.g. investment and trade) and the non-economic realm (e.g. investment and human rights).

Uncertainty about ISDS tribunals' approach to another body of international law, particularly in light of the multitude of scenarios which may require arbitrators to consider such rules. Such scenarios include the State alleging that a measure is either permitted or required by another norm of international law; the claimant arguing that the State's violation of a non-investment rule entails a breach of the IIA; and the State arguing that the claimant has breached an obligation and therefore may not make a claim under the IIA. For example:

- In *S.D. Myers v. Canada*,[32] to justify the imposition of an export ban for a certain chemical, Canada referred to its international obligations under the Basel Convention and the Transboundary Agreement between Canada and the United States.[33] The tribunal examined the environmental instruments invoked; it concluded that the true reason for the export ban was protectionist rather than environmental.
- In *UPS v. Canada*,[34] the claimant asserted that certain provisions of NAFTA's Chapter 15 (addressing competition policy, monopolies and State enterprises) could be used as a basis for claiming damages in ISDS. The tribunal held that its jurisdiction was limited to failures to abide by the terms of the investment chapter (Chapter 11) but nevertheless found that conduct in violation of a party's obligation under NAFTA as a whole (including Chapter 15) could also constitute a violation of Chapter 11.[35]
- In *Urbaser v. Argentina*,[36] Argentina lodged a counterclaim, invoking several international instruments[37] and alleging that the investor's failure to invest in service expansion compromised the human right to water. Pointing to developments in CSR and the United Nations Guiding Principles on Business and Human Rights, the tribunal stated that it could no longer be said "that companies operating internationally are immune from becoming subjects of international law".

Also of relevance is a recent judgment by the European Court of Justice, which held that the arbitration provisions of the Netherlands–Slovakia BIT were incompatible with EU law.[38]

c. Policy options

In order to foster sustainable development-oriented policy coherence, IIA reform must take into account the interaction between IIAs and other bodies of international law. Addressing this relationship in IIA reform can help avoid conflicts and provide arbitral tribunals with guidance on how to interpret such interaction (see also UNCTAD Reform Package for the International Investment Regime).

One way of managing some of the above-mentioned risks is through clearer drafting in IIAs.[39]

- *Including exceptions for other areas of policymaking*. A first option is clearer and more sustainable development-oriented exceptions clauses or carve-outs for other areas of policymaking (e.g. temporary safeguards in the event of serious balance-of-payments difficulties; clauses for prudential measures; environmental, cultural or national security exceptions).[40]
- *Cross-referencing*. A second option is to manage the interaction of policy regimes, as some treaties have begun to do. For example, some of the more than 300 BITs that include balance-of-payments exceptions specify that the exceptional measures to derogate from the free transfer provision must be consistent with the Articles of Agreement of the International Monetary Fund (e.g. Cambodia–Japan BIT, Article 19 (2007); Colombia–Turkey, Article 9 (2015); Japan–Kenya, Article 17 (2016)). Interestingly, the WTO GATS specifies that, in consultations related to restrictions to safeguard the balance of payments, all findings of statistical and other facts presented by the Fund shall be accepted, and conclusions shall be based on the assessment by the Fund.
- *Guiding interpretation*. A third option is clauses that can guide ISDS tribunals in their interpretation of key treaty terms (in terms of both jurisdictional and merits questions). References to other bodies of law or the SDGs in IIAs, e.g. through preamble language, can also guide tribunals that are grappling with overlapping legal regimes in the resolution of a dispute.

UNCTAD's Reform Package for the International Investment Regime (2017) can help States identify the key areas of policy incoherence between its IIAs and other non-investment laws and policies, and consider solutions.

4. Dynamics of policymaking: flexibility and policy space

Striving for coherence does not necessarily imply legal uniformity – inconsistencies and divergence may be intended – but different policy areas and legal instruments should work in synergy.

A country's strategic considerations may result in policy divergences that are intentional. For example, as mentioned above, a country may wish to conclude IIAs that give greater (pre-)establishment rights than its national legal framework for investment. This greater level of openness in IIAs can be used – intentionally – to drive change at the national level (e.g. IIA-induced liberalization; *WIR04*). Similarly, a country may choose to stop short of enshrining the country's actual level of openness, as set out in the national legal framework for investment, in IIAs. In that case, the differences can also be intentional, with the goal of giving the country policy space to explore opening new sectors to foreign investment and, if need be, reintroducing limitations on investment in those sectors in the future (*WIR15*; UNCTAD, 2015).

Similarly, country policies may evolve. Indeed, policy shifts are a regular feature at both the national and international levels of policymaking. For example, new factors may emerge on the domestic policy scene, including a new government in power, economic or financial crises, social pressures or environmental degradation. Similarly, a country's shift towards sustainable development-oriented investment policymaking will almost always produce a temporary phase of inconsistency. Such temporary inconsistency should not discourage investment policy reform. Instead, it should create momentum and foster more rapid and dynamic reform. At the same time, countries must embrace flexibility in adjustment periods and time lags, which are nearly always present in governmental shifts or promulgation of new policies.

Lastly, policy divergence may result from differential levels of development, which translates into different policy needs and objectives, as well as different capacity to implement policies. Policy interaction should be tailored to the particular conditions prevailing in a country and to the realities of the economic asymmetries between countries. Finding the proper balance between flexibility and consistency, i.e. a coherent balance that leaves sufficient space for individual countries to pursue their needs, is crucial for countries in the pursuit of their national policy strategy on investment for sustainable development.

The need for flexibility in the pursuit of policy coherence and in the management of policy interaction also flows from UNCTAD's Core Principles for Investment Policymaking, as set out in UNCTAD's Investment Policy Framework for Sustainable Development. Principles such as policy coherence (noting that investment policy should be integrated in an overarching development strategy) and dynamic policymaking (recognizing that national and international investment policies need flexibility to adapt to changing circumstances) are key ideas to embrace when embarking on Phase 3 reform actions.

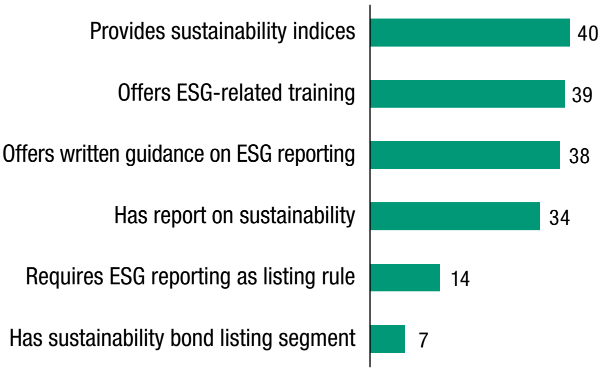
In addressing the interactions between national and international policy regimes, as well as between investment and other policies, policymakers should also bear in mind the complexity and incoherence of the IIA regime itself. The global IIA regime, consisting of more than 3,300 treaties concluded over more than 60 years, displays gaps, overlaps and inconsistencies, including with respect to sustainable development elements. At the country level, an incoherent IIA network can expose the host State to undesirable effects. Most prominently, it increases vulnerability in ISDS because of treaty shopping by investors and the possibility of importation of treaty elements from old-generation IIAs into modern, sustainable development-oriented treaties (for analysis and policy options, see updated version of UNCTAD's Reform Package for the International Investment Regime).

In sum, in considering next steps for investment policy reform, countries should be guided by the objectives of fostering coherence, maximizing synergies and improving interaction between various instruments that govern investment. However, investment policy consistency should not be pursued for its own sake, but rather in a way that is coherent and mutually supportive for investment as a driver of sustainable development.

D. CAPITAL MARKETS AND SUSTAINABILITY

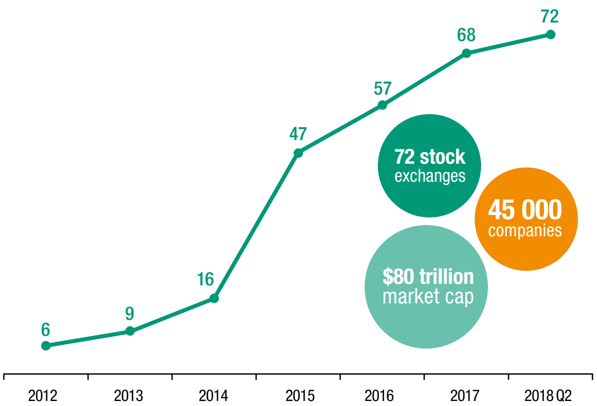
Capital market policies and instruments designed to promote investment in sustainable businesses and support the achievement of the SDGs are an increasingly important feature of the investment landscape. Key actors in promoting new policies, tools and instruments are stock exchanges, institutional investors (including both asset owners and asset managers) and security market regulators. The sustainability practices of stock exchanges can be a useful benchmark for monitoring innovation in sustainable finance, given stock exchanges' position at the intersection of portfolio investors, listed companies and capital market authorities.

Figure III.12. **Overview of sustainability mechanisms used by stock exchanges** (Number of exchanges)



Source: UNCTAD, SSE initiative database.

Figure III.13. **SSE initiative members, 2012–2018 Q2** (Number of stock exchanges)



Source: UNCTAD, SSE initiative database.

1. Stock exchanges' ESG activities

An examination of stock exchange-related instruments around the world focusing on environmental, social and governance (ESG) factors indicates that 54 exchanges have in place at least one mechanism for promoting corporate ESG practices (figure III.12). Many exchanges provide sustainability indices or some form of guidance or training to listed companies regarding ESG factors.

a. Sustainable Stock Exchanges initiative

The United Nations Sustainable Stock Exchanges (SSE) initiative,[41] which has now grown to include most of the stock exchanges in the world (figure III.13), provides an indicator of the growing attention that exchanges are giving to sustainability in their markets. Launched in 2009, the SSE is a UN Partnership Programme administered by UNCTAD, UN Global Compact, UN Environment and Principles for Responsible Investment. Through the SSE's multi-stakeholder platform, exchanges engage in consensus- and capacity-building activities with portfolio investors, listed companies, capital market regulators and policymakers.

As of Q2 2018, public commitments to advancing sustainability in their markets have been made by 72 partner exchanges from five continents, listing over 45,000 companies and representing a market capitalization of more than $80 trillion. This includes 9 of the 10 largest exchanges in the world, as well as a number of small exchanges from developing countries.

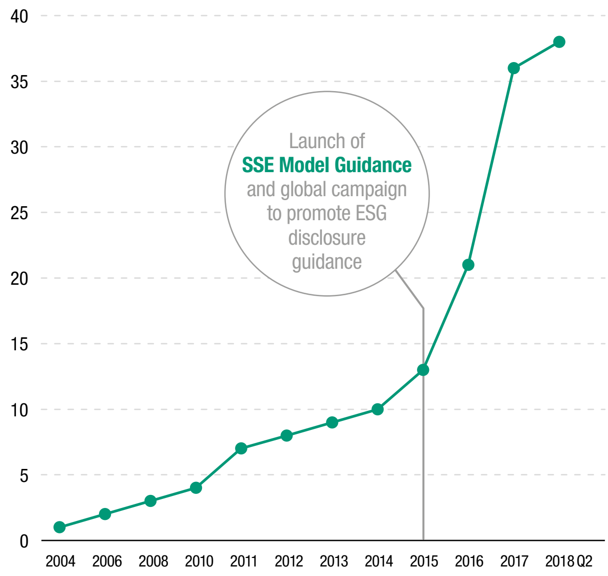
b. Guidance and listing requirements on ESG disclosure

Exchanges continue to play an important role in helping markets navigate emerging ESG disclosure and management demands. By the end of Q1 2018 the number of stock exchanges providing formal guidance to issuers on reporting ESG information had reached 38. Only 13 did so in 2015, when the UN SSE launched its global campaign and model guidance to encourage exchanges to provide guidance on sustainability reporting and the World Federation of Exchanges introduced its guidance on the topic (figure III.14).

In addition to voluntary guidance, ESG information is increasingly incorporated into the listing rules on exchanges, either by the exchanges themselves or by securities regulators (depending on the jurisdiction and the respective authorities of each institution). As of the end of Q1 2018, 14 stock exchanges require ESG disclosure, up from 12 exchanges a year ago. As ESG issues are incorporated into the listing rules of more exchanges, and as the market for ESG-themed investment products grows (see following subsection), securities market regulators are taking a greater interest in this area. The Growth and Emerging Markets committee of the International Organization of Securities Commissions (IOSCO), for example, undertook a survey of its members in early 2018 to further inform discussions at IOSCO about the role of securities regulators in ESG issues. In addition, the SSE initiative in early 2018 convened a securities regulators advisory group to study practices in this area and facilitate the exchange of experiences between countries.

As mandatory ESG reporting is still a relatively new sustainability mechanism, the creation of listing requirements is often combined with other activities to assist with adoption and implementation. For example, to help listed companies comply with ESG disclosure requirements in Singapore, in 2017 the Singapore Exchange organized 23 capacity-building workshops to train company staff in the production of sustainability reports.

Figure III.14. **Global trend in stock exchange ESG disclosure guidance, 2004–2018 Q2**
(Number of stock exchanges with guidance)



Source: UNCTAD, SSE initiative database.

c. ESG training activities

Stock exchanges serve as more than a marketplace for issuers and investors, they also play a strong capacity-building role in helping issuers and investors to better understand new standards, products, services and practices. Within this role stock exchanges also provide training related to ESG practices; indeed, the provision of training is one of the most common activities stock exchanges take to promote ESG practices. Exchange training activities include the development of printed educational materials, workshops, larger conferences and mentorship programmes. To take one example, Norway's stock exchange, the Oslo Bors, has made ESG training mandatory for board members of listed companies as well as for management and board members of companies that have applied to list on the market. The exchange provides this training as well as the continuing courses for listed company management and advisers.

2. Green finance and ESG indices

Promoting green products and "greening" the mainstream financial markets are critical ways that stock exchanges and other capital market stakeholders can contribute to meeting global goals to combat climate change. To help stock exchanges start or enhance their work on green finance, the SSE released a guidance document at the UN Climate Summit (COP23) in November 2017, providing an action plan.[42] Developed by a multi-stakeholder advisory group of more than 70 experts from more than 60 institutions across 28 countries (as well as 6 international organizations), this document synthesizes efforts already being undertaken, identifies specific items of relevance for stock exchanges and highlights key areas of impact. It includes a Green Finance Diagnostic Checklist, which enables exchanges to benchmark their current activities in support of green capital markets (table III.9).

A significant feature of green finance is the continuing rapid growth of the market for green bonds, which provide investment for a diverse range of environmentally themed projects.[43] Although green bond listings represent only about 0.2 per cent of the overall bond market, the number and value of such listings have increased exponentially, with triple-digit year-on-year growth rates over the past five years (figure III.15). The absolute value of the green bond market exceeded $163 billion at the end of 2017. Just under half of all green bonds are listed on stock exchanges, with seven exchanges in the SSE database offering a specific category for sustainability bond listings. In addition to listing such bonds, stock exchanges are playing an important role in promoting standards for assurance and guidance for issuing such bonds, while opening new channels of finance for climate mitigation and adaptation projects.

The experience of the green bond market is also leading to innovations with other sustainability-themed bonds, such as "water bonds" (a subcategory of green bonds used to finance clean and sustainable water supplies) and "gender bonds" (a new subcategory that includes, for example, the Women's Livelihood Bond, listed on the Singapore Exchange in August 2017, and QBE Insurance's Gender Equality Bond, launched in Australia in 2017). Growing investor demand for sustainability-themed bonds has led the International Capital Market Association to issue new guidelines – "The Social Bond Principles" – in

Table III.9. SSE Green Finance Diagnostic Checklist

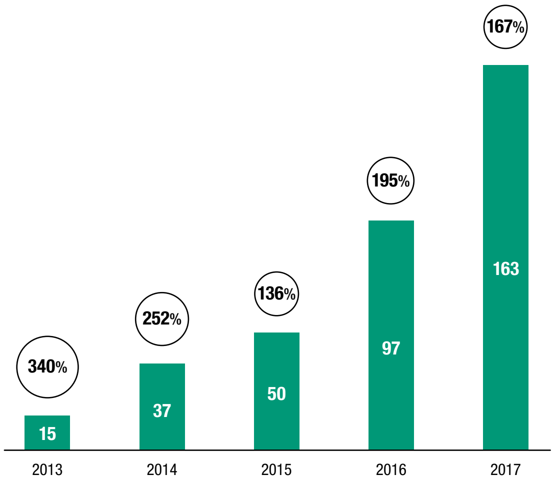
Action plan area		Action point
Promote green products and services	1.1	**Product offerings and partnerships**: Has your exchange developed and offered green products or services for your market or partnered with another financial services institution to do so?
	1.2	**Visibility**: Does your stock exchange make green products easy to find through dedicated platforms or listing labels?
	1.3	**Green terminology**: Does your exchange provide guidance to its market on green terminology?
Greening financial markets	2.1	**Market education**: Does your exchange educate issuers and investors on the importance of incorporating environmental issues into investment practices?
	2.2	**Standards**: Has your exchange incorporated environmental disclosure standards into its listing rules?
	2.3	**Benchmarking**: Does your exchange make benchmarks available for your market in the form of green indices or environmental rating systems?
Strengthen environmental disclosure	3.1	**Written guidance**: Does your exchange provide written guidance on environmental disclosure?
	3.2	**Training**: Is your exchange providing training for capital market participants on environmental disclosure and/or integration?
	3.3	**Leading by example**: Does your exchange produce a report on its own environmental policies, practices and impacts?
Grow green dialogue	4.1	**Green financial centres**: Does your exchange have an action plan or roadmap to grow green finance in your market?
	4.2	**Standards and policy dialogues**: Does your exchange stimulate policy dialogue on green standards?
	4.3	**Investor–issuer dialogue**: Does your exchange facilitate a dialogue between issuers and investors on green finance?

Source: SSE (2017).

2018. In another indication, the International Finance Corporation has merged its Banking on Women programme into a broader social bond programme in an effort to expand the investor base.

Environmental issues are also increasingly affecting equity markets, with portfolio investors beginning to incorporate climate risk and other environmental risks and opportunities into their analyses and asset allocations. For example, global efforts to combat climate change, in line with the outcomes of the UN Paris Agreement and the SDGs, have some major asset owners concerned about the medium- to long-term viability of fossil fuel companies. This is leading some portfolio investors to exclude such companies from their portfolios. This investor behaviour is giving rise to a new class of environmentally themed equity indices, and the performance of these indices against their conventional benchmarks gives an indication of the growing materiality of sustainability issues (figure III.16).

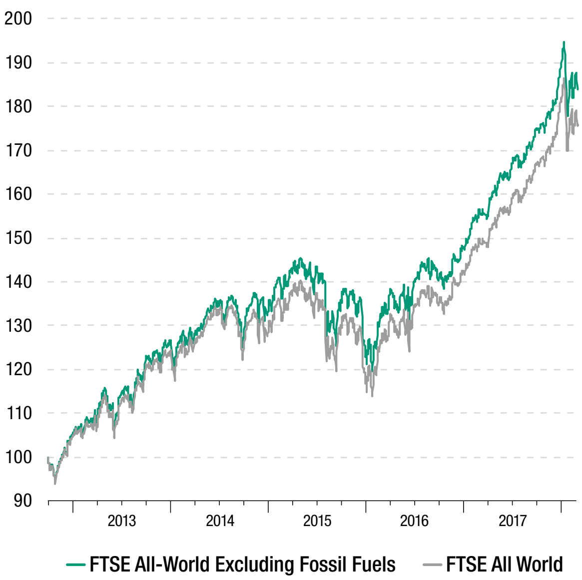
Figure III.15. Total green bond issuance, 2013–2017 (Billions of dollars and per cent)

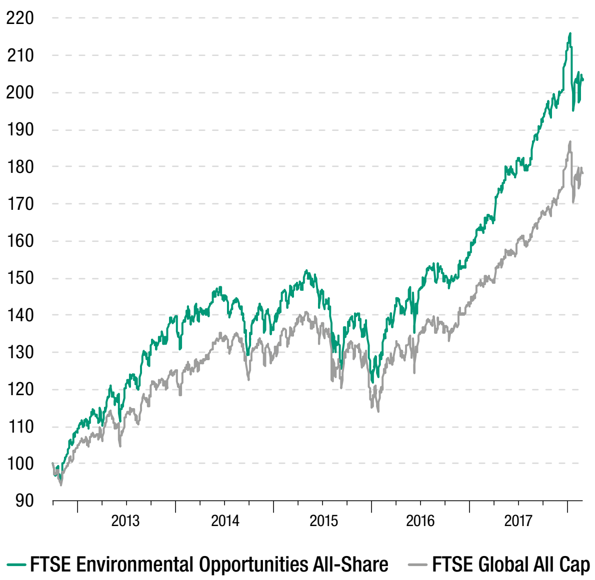


Source: UN Environment and Bloomberg.

Fossil fuels, gender equality, renewable energy, human rights and water management are just a few of the diverse and rapidly growing themes addressed by ESG indices. ESG indices remain the most popular sustainability instrument among stock exchanges, with 40 of the 87 exchanges in the SSE database providing them. Exchanges are not the only entities creating such indices; there are over a hundred ESG-themed indices worldwide, created by specialist companies such as FTSE-Russell, Standard & Poor's, Dow Jones, Stoxx, Thomson Reuters and MSCI. These indices are often licensed to large asset managers that create specific products, such as exchange-traded funds that are used by both institutional and retail investors. ESG indices are assisting asset managers who seek

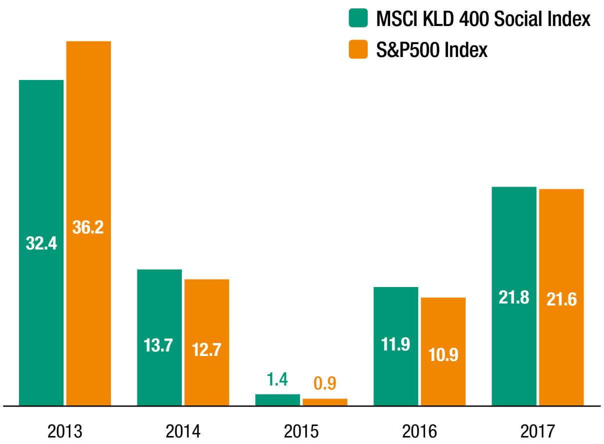
Figure III.16. Green equity indices' performance versus their conventional benchmarks, 2012 Q3–2017 Q3 and 2018 Q1 (100 = 10/2012)





Source: FTSE-Russell.

Figure III.17. **ESG index versus traditional broad market index, United States market, calendar year returns, 2013–2017**
(Per cent)



Source: MSCI and Standard & Poor's.

to incorporate material sustainability issues into their asset allocation strategies. ESG indices are also encouraging greater voluntary transparency among listed companies. Some of the earliest ESG indices are now over a decade old, providing a significant record for comparing their performance with more conventional market indices. The MSCI KLD 400 Social Index, for example, has outperformed its main benchmark, the S&P500, in four of the past five years (figure III.17).

3. Gender equality

Gender equality, the fifth SDG, is increasingly being addressed by capital markets. Gender equality in business operations and value chains is seen by companies and asset managers alike as an important metric for business success, often associated with the ability to attract better talent, higher productivity, more customers and higher revenues. The 2018 International Women's Day, on March 8, marked the fourth annual "Ring the Bell for Gender Equality" event, launched by the SSE and celebrated with partners including UN Women, the International Finance Corporation, Women in ETFs and the World Federation of Exchanges. This annual awareness-raising event saw 65 stock exchanges host a bell-ringing ceremony to highlight the pivotal role that the private sector can play in advancing gender equality.

Exchanges can play several roles. They can encourage reporting from listed companies on metrics related to gender equality: diversity objectives and how they are achieved; policies that support equality in the workplace; and diversity metrics, including the percentage of women across all levels of the organization, pay gap and turnover rates by gender, and actions taken to promote gender equality and women's human rights across the supply chain. Exchanges can also play a leading role in promoting training for listed companies on gender issues.

For example, in 2017 Peru's stock exchange, the Bolsa de Valores Lima (BVL), developed a workshop called "Breaking the Glass Ceiling" for executives of companies listed on the BVL. It provided training on the implementation of policies aimed at closing the gender gap. The BVL has also launched a free, confidential platform called Allied Group Ranking Par that enables companies to measure gender equality, with the goal that companies listed on the BVL can measure their relative performance on this issue and implement improvements in their organizations.

Some capital market stakeholders are also introducing new financial products designed to support the empowerment of women and gender equality in corporate leadership. Noted above were two gender-themed bonds. On the equity side, there are also gender-themed products such as the Bloomberg Gender Equality Index, which measures gender equality across internal company statistics, employee policies, external community support and engagement, and gender-conscious product offerings for more than 100 companies from 10 industries headquartered in 24 markets. In another example, the FTSE Women on Boards Leadership Index Series includes companies based on the strength of the gender diversity of their leadership at the board level and how well they manage broader impacts on society.

Capital markets play a critical role in the overall investment chain that is financing MNEs and their international activities. Market innovations related to sustainable development continue to attract interest from portfolio investors, and the positive track record of sustainability-themed products is reinforcing asset managers' views that ESG issues are material to long-term investment performance. As these sustainable investment trends take root and expand, they can have a stronger influence on the relationship between listed MNEs and their shareholders, and in turn the operational policies and practices of MNEs relative to sustainable development.

NOTES

[1] The sources for these investment measures can be found at UNCTAD's Investment Policy Hub (http://investmentpolicyhub.unctad.org).

[2] Some of these measures were also of a promoting nature.

[3] For details, see https://www.bmwi.de/Redaktion/DE/Downloads/S-T/schreiben-de-fr-it-an-malmstroem.pdf?__blob=publicationFile&v=5.

[4] European Commission, "Proposal for a regulation of the European Parliament and of the Council establishing a framework for screening of foreign direct investments into the European Union", 13 September 2017, http://www.europarl.europa.eu/RegData/docs_autres_institutions/commission_europeenne/com/2017/0487/COM_COM(2017)0487_EN.pdf.

[5] United Kingdom, Department for Business, Energy and Industrial Strategy, "National Security and Infrastructure Investment Review (Green Paper)", 17 October 2017, https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/652505/2017_10_16_NSII_Green_Paper_final.pdf.

[6] United States, The White House, "Statement by the Press Secretary Supporting the Foreign Investment Risk Review Modernization Act", 24 January 2018, https://www.whitehouse.gov/briefings-statements/statement-press-secretary-supporting-foreign-investment-risk-review-modernization-act.

[7] For the list of IIAs signed and entered into force in 2017, see UNCTAD's IIA Navigator, http://investmentpolicyhub.unctad.org/IIA.

[8] Cook Islands, Kiribati, Marshall Islands, Federated States of Micronesia, Nauru, Niue, Palau, Samoa, Solomon Islands, Tonga, Tuvalu, Vanuatu.

[9] The Australia–Peru Free Trade Agreement (FTA), the Comprehensive and Progressive Agreement for a Trans-Pacific Partnership Agreement (CPTPP) and the FTA between the Republic of Korea and the Republics of Central America. In addition, in March 2018, a number of side agreements to the CPTPP were signed related to ISDS. For example, ISDS is excluded between New Zealand and Peru, and a respondent host State must provide specific consent for an investor claim to proceed to arbitration (side agreements between Brunei Darussalam and New Zealand, and between Malaysia and Viet Nam).

[10] Terminations not effective as of April 2018.

[11] The BITs of Denmark with Estonia (1991) and with Romania (1994).

[12] For example, the Intra-MERCOSUR Investment Facilitation Protocol (2017) creates six IIA relationships between the four contracting parties, and the CPTPP (2018) creates 55.

[13] The treaty contains a placeholder for an ISDS clause (Article 21); the parties agreed to conclude the discussions on ISDS within one year from the date of the agreement's entry into force.

[14] The agreement includes an ISDS clause that does not provide for international arbitration as an option.

[15] The agreement does not include an ISDS clause.

[16] The text of the agreement is not publicly available. The parties agreed that in the future the scope of the agreement will be expanded to include trade in services and investment protection.

[17] Australia, Brunei, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore and Viet Nam.

[18] Academic and policy discussions about dispute settlement in NAFTA raise the question of whether lessons can be learned from the 1994 Labour Side Agreement, which under certain conditions provides for the establishment of an arbitral panel to consider the matter where the alleged persistent pattern of failure by the party complained against to effectively enforce its occupational safety and health, child labour or minimum wage technical labour standards is (a) trade-related and (b) covered by mutually recognized labour laws.

[19] Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand and Viet Nam.

[20] Australia, China, India, Japan, the Republic of Korea and New Zealand.

[21] *Slovak Republic v. Achmea B.V.* (Case C-284/16), Judgment, 6 March 2018.

[22] See e.g. CETA (2016), which will replace eight BITs between Canada and EU member States (Article 30.8), while the EU–Singapore FTA and the EU–Viet Nam FTA will replace 12 and 22 BITs respectively.

[23] Note that thus far other CPTPP parties have not taken steps to terminate their pre-existing IIAs.

[24] As of April 2018, the Convention has been signed by Australia, Belgium, Benin, the Plurinational State of Bolivia, Cameroon, Canada, the Congo, Finland, France, Gabon, The Gambia, Germany, Iraq, Italy, Luxembourg, Madagascar, Mauritius, the Netherlands, Sweden, Switzerland, Syria, the United Kingdom and the United States.

[25] In June 2016, UNCTAD launched its Global Action Menu for Investment Facilitation. Its more than 40 action items for countries to adapt and adopt are intended to fill a systemic gap in national and international investment policymaking. Since its launching, the Global Action Menu has received strong support from all investment development stakeholders, including at several high-level intergovernmental meetings.

[26] Although the Vienna Convention on the Law of Treaties provides that a State may not invoke its national law as justification for its failure to perform an international treaty (Art. 27), the legal status of a specific treaty (IIA) within a national legal regime may depend on whether that regime is monist or dualist.

[27] In such circumstances, a country's IIA negotiators would intentionally agree to internationally committing the country to a degree of openness that is more far-reaching than what is prescribed in terms of entry and establishment at the national level. At times combined with a phase-in schedule, such (temporary) divergence could translate into national-level policy action (e.g. domestic reforms such as liberalization; see WIR04, "IIA-driven policy interaction").

[28] Some FTAs include chapters on development, which could provide a means for State parties to assist other members with respect to the implementation of their treaty commitments, including commitments under investment chapters.

[29] The distinction between economic and non-economic areas of policymaking may be blurring. Many recent environmental treaties may also be considered economic in nature, e.g. the United Nations Framework Convention on Climate Change (UNFCCC).

[30] Nonetheless, in contrast to human right treaties, IIAs do not require claimants to exhaust local remedies before submitting claims to an international tribunal.

[31] A few ICJ or PCIJ cases are cited with regularity in ISDS decisions, e.g. Case concerning Elettronica Sicula S.p.A. (ELSI) (United States/Italy), Judgment (20 July 1989), Case concerning the Barcelona Traction, Light and Power Company, Ltd. (Belgium/Spain), Judgment (5 February 1970), and Case concerning the Factory at Chorzów (Claim for Indemnity) (Merits) (Germany/Poland), Judgment (13 September 1928).

[32] UNCITRAL, Partial Award, 13 November 2000.

[33] Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, signed on 22 March 1989. The Basel Convention is a multilateral environmental agreement, to which Canada is a party, but the United States, the home country of the investor, is not.

[34] ICSID Case No. UNCT/02/1, Award on Jurisdiction, 22 November 2002; Award, 24 May 2007.

[35] Interestingly, in Al Tamimi v. Oman, the State successfully defended against the investor claims, in part, on the basis of non-investment chapters and provisions of the Oman–United States FTA (2006) related to environmental protection. Adel A Hamadi Al Tamimi v. Sultanate of Oman (ICSID Case No. ARB/11/33), Award, 3 November 2015.

[36] ICSID Case No. ARB/07/26, Award, 8 December 2016.

[37] Argentina invoked the Universal Declaration of Human Rights of 1948; the International Covenant on Economic, Social and Cultural Rights of 1966; the ILO Tripartite Declaration of Principles concerning Multinational Enterprises (as amended in 2006); and UN General Assembly Resolution 64/292 of 2010.

[38] Slovak Republic v. Achmea B.V. (Case C-284/16), Judgment, 6 March 2018.

[39] To this is added refining IIA clauses that deal with substantive and procedural protections, as suggested in the UNCTAD Investment Policy Framework for sustainable Development and the UNCTAD Reform Package for the International Investment Regime, and as implemented in recent treaties (see section III.B).

[40] This should be done with caution, however, as there is a risk that such clauses could be interpreted narrowly, thus circumscribing the State's regulatory space in a way that was not intended. See Bear Creek Mining v. Peru (ICSID Case No. ARB/14/2), Award, 30 November 2017, paragraph 473.

[41] For more information, visit www.SSEinitiative.org.

[42] SSE (2017), "How Stock Exchanges Can Grow Green Finance".

[43] Green bonds finance projects in the following sectors: renewable energy, energy efficiency, low-carbon transport, sustainable water, waste and pollution management, climate adaptation, and agriculture and forestry.