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INVESTMENT POLICY MONITOR

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INVESTMENT LAWS

A WIDESPREAD TOOL FOR THE PROMOTION AND REGULATION OF FOREIGN INVESTMENT

HIGHLIGHTS

- At least 108 countries have an investment law as a core instrument to govern investment. Investment laws are part of the overall policy framework of host countries and not the only instrument to deal with investment.
- Even though investment laws generally share the same objectives, their content and overall approaches differ strongly.
- Most investment laws have investment promotion as their main objective, while only a few also deal with investment facilitation.
- Sustainable development is an explicit goal only in a small minority of them.
- Investment laws tend to show an imbalance between the coverage of investor rights and obligations.
- Investment laws often cover the same issues as investment treaties and more than half of the laws provide access to international arbitration.
- The importance of investment laws calls for a deeper analysis of their content and their consistency with international investment policies.
- There is a need to strengthen the coherence between investment laws and other public policies, such as trade, tax, competition, social and environmental policies.

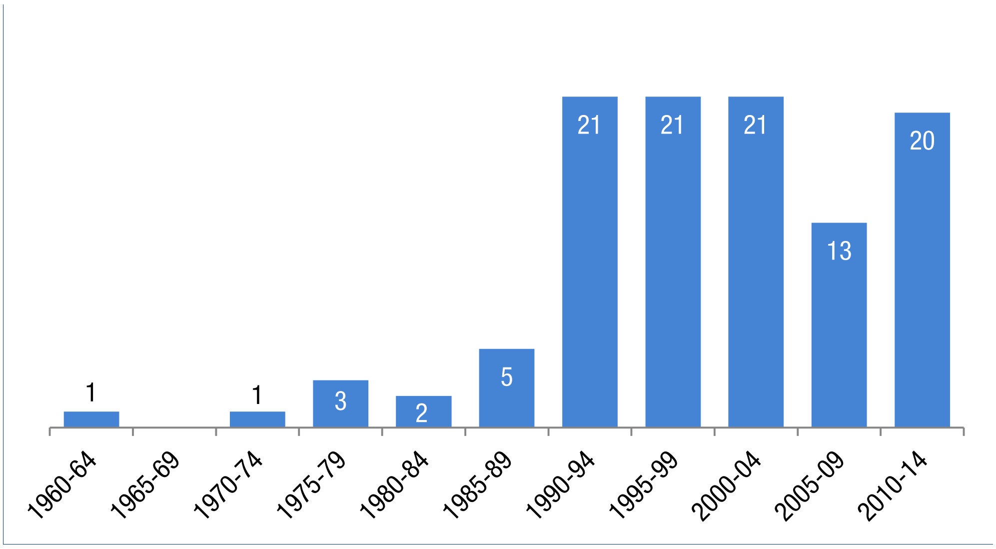
1. Introduction

For many countries investments laws are a core policy tool to promote and regulate investment.[1] Together with international investment agreements (IIAs), they constitute the basic legal framework for cross-border investment in many countries. Often, these laws and IIAs contain similar provisions. Despite their importance, investment laws have so far received relatively little attention in the current discussions about the policy framework for foreign investment and the need for reform.

UNCTAD research finds that at least 108 countries have an investment law.[2] Almost all of them are either a developing country (90) or an economy in transition (16) (figure 1.1).[3] Fifty-eight per cent of the laws (64) apply to both foreign and domestic investors, while the others target foreign investors only (47). Especially countries in Asia have foreign investment laws, while most countries in Africa have adopted general investment laws.

Almost all of the investment laws that are in force were adopted after 1989 (figure 1.2). Especially in the 1990s (after the end of the Cold War period), many countries embraced new investment laws (42).

Figure 1.2 Investment laws currently in force, by period of adoption (Number of laws)



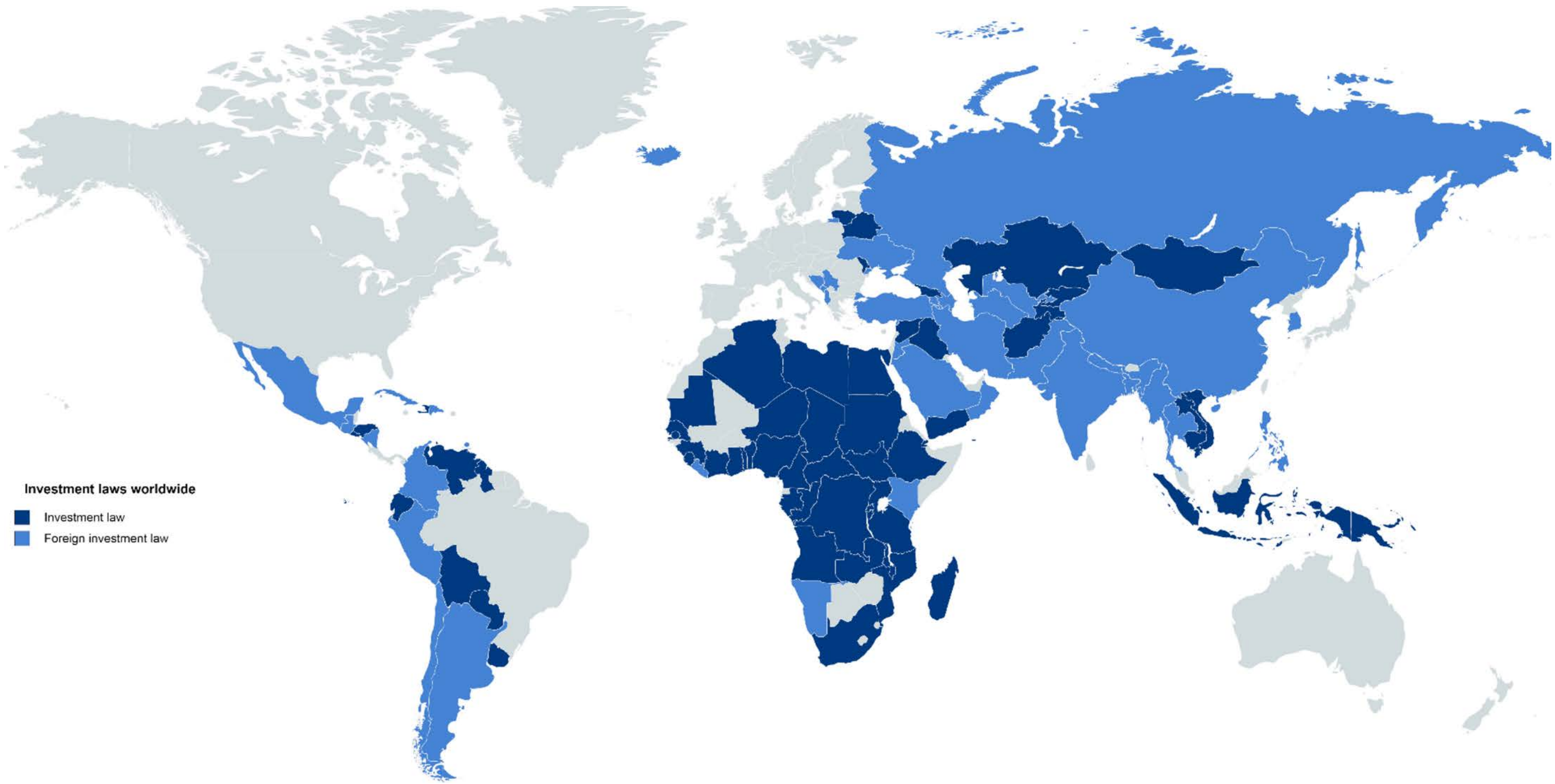
Source: ©UNCTAD

Investment laws are not the only legal instrument that host countries use to deal with investment. Other relevant laws include, for example, laws in the area of taxation, trade, competition, intellectual property, labour, environmental protection, or company laws. Accordingly, a country's investment policy framework cannot be assessed exclusively on the basis of its investment law. For instance, if an investment law does not include specific provisions on investment promotion or contains only rudimentary rules in this area, this does not exclude that the country has investment promotion provisions in other parts of its policy framework.

The following sections will look at key characteristics of selected provisions that can generally be found in investment laws.

[1] This study focuses on those laws that cover (or aim to cover) the basic legal framework for investment and include key investment provisions. It does not include laws that only focus on one or a few specific elements of this framework, such as incentives, access to land or national security.
[2] In total, 111 investment laws were identified for 108 countries, with China and Uzbekistan having more than one investment law (resp. 3 and 2 laws).
[3] Only two developed countries (Iceland and Lithuania) were identified as having general investment laws, although several other developed countries have laws focusing on specific elements of the legal framework for investment (e.g. Australia, Canada, Japan and New Zealand). These issue specific investment laws are not included in this study.

Figure 1.1 Overview of investment laws worldwide



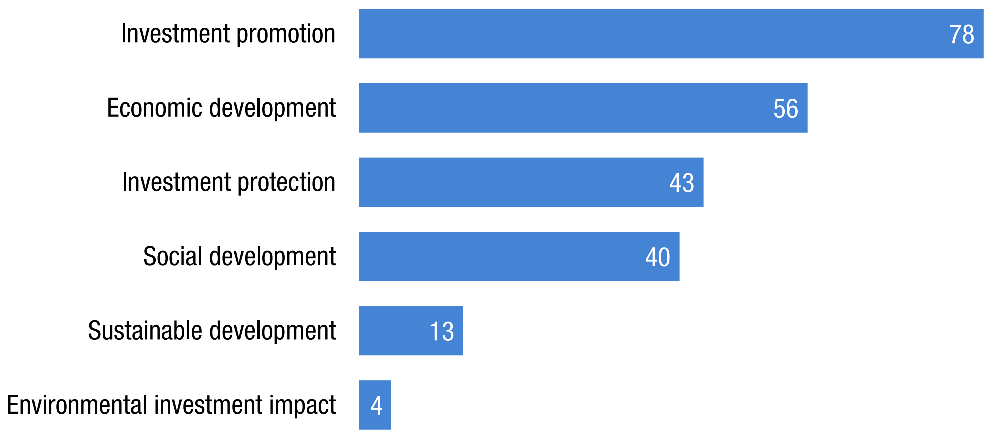
Source: ©UNCTAD

Note: the boundaries shown on this map do not imply official endorsement or acceptance by the United Nations

2. Objectives

A large majority of the examined investment laws explicitly state in their preamble or a dedicated clause the objective of the law (86). In most cases, the main objective is to attract investments, often in combination with the aim to protect investors (figure 2.1). Many laws also refer to general economic development objectives, such as economic growth, diversification, integration, industrial development, competitiveness, or to social development objectives, such as employment, poverty reduction, skill transfer, education, or health. Only four laws refer to environmental impacts, such as protection of environment, plant life, animal life, biodiversity, renewable energy, climate change. Moreover, only 13 of the 111 laws explicitly refer to the concept of “sustainable development” in their preamble.

Figure 2.1 Objectives mentioned in investment laws, by category (Number of laws)



Source: ©UNCTAD

3. Definitions and Scope

a. Definitions

Definition of "investment"

Almost all of the examined investment laws (98) include either a definition of "investment” (66) or "foreign investment" (59). More than half of the laws (60) apply a broad asset-based approach and 38 a limited enterprise-based approach. The term “every kind of asset” is frequently used by national investment laws as the leading formula to introduce a non-exhaustive list of assets qualifying as investment. Examples of "investment" mentioned in the laws generally include property rights, shares of companies or other kinds of interest in companies, claims to money, intellectual property rights, business concessions under public law (including natural resources exploration and exploitation), and all other income out of investment (in particular profit, interest, capital gains, dividends, royalties). Several investment laws explicitly specify that investment also includes portfolio investment.[4]

Definition of "investor"

Most laws (87) include a definition of "investor" or "foreign investor", which, in general, includes both natural and legal persons.[5] In the great majority of laws, natural persons include both domestic citizens and foreigners and may also cover those with permanent residence outside the host country. Legal persons are qualified as investors if they are registered or incorporated in the host country. Legal entities registered in the home country, but with a certain level of foreign participation, are sometimes qualified as foreign investors.

[4] Contrary to certain international investment agreements (IIAs), national laws do not define the scope of "investment" by specifying that investment means every asset which has certain characteristics such as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk.
[5] Some countries exclude juridical persons from the definition of domestic investors, e.g. Afghanistan, Cuba and Ethiopia.

b. Scope of the law

Temporal scope

More than half of the investment laws (68) include a clause that determines how far back the law applies to investments made before the entry into force of the law. The scope of the law is the widest if its application is extended to all investments regardless of the time of their establishment. Alternatively, the law may exclude pre-existing investments from its scope. Often this exclusion itself is limited in time, giving already established investors a fixed period after which they will also have to fulfil new requirements of the law. Some laws provide pre-established investors with the option to voluntarily respect the new law.

Stabilization clause

Stabilization clauses protect investors against future changes in laws and regulations that would negatively affect their business. Twenty-seven of the examined investment laws include such a provision; almost half of them are in transition economies. The subject and scope of the stabilization clauses in the laws varies. Some guarantee stability with respect to all types of legislative changes, while others focus on specific issues, such as modifications to fiscal and custom duties. A few laws explicitly state that legislative changes will not have a retroactive effect; some guarantee the stability of investor rights for a specific time period (e.g. Mauritania for 20 years). Others declare that investors shall benefit from the "acquired rights" of the national law as long as the investment remains active (e.g. Côte d'Ivoire). These assurances contrast with the more restrictive approach of other laws where the State guarantees that future legislative changes which may negatively affect investors' situation will only apply after a certain time. Finally, several laws only guarantee the stability of investment contracts, licences and agreements which were concluded by the State, notwithstanding any future legislative changes.

Relationship with international investment agreements

Commitments under international investment agreements (IIAs) usually have superiority over regulations in national investment laws. One third of the investment laws (37) explicitly acknowledge that existing international investment instruments, such as IIAs, take precedence over the content of national investment laws and that investors will be entitled to the more favourable treatment provided by these international treaties. The clause is especially common in economies in transition.

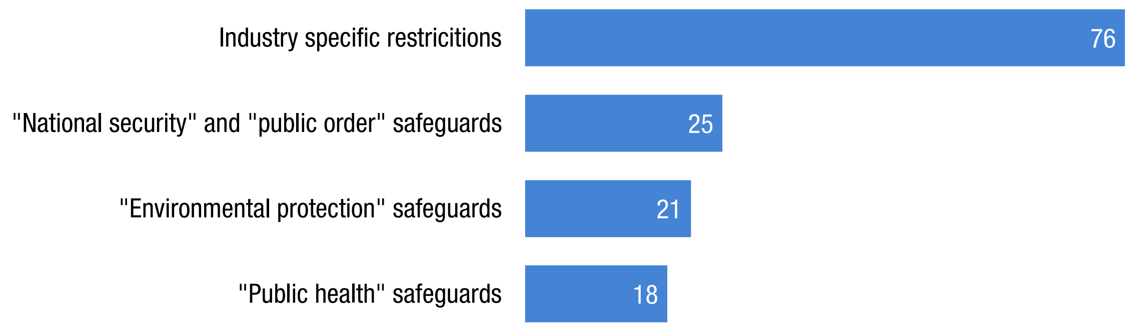
4. Entry and establishment

a. Entry

Entry restrictions

Most investment laws include sector-specific entry restrictions (figure 4.1). The approach, however, may differ. Most laws use a "negative list" approach (67 out of 76 laws with sector-related entry restrictions), either by excluding certain industries from its scope or by specifying the restrictions in the law itself. Nine laws, mainly in Africa, include a "positive list" of industries in which foreign investment is permitted, by default excluding any other industry. Some laws explicitly specify that the restricted sectors are reserved for nationals only or refer to the fact that industry-specific laws and regulations may include (foreign) investment restrictions. Most restricted sectors relate to strategic industries, such as defence, extractive industries and energy. A number of laws also include references to one or more general safeguards, such as the protection of "national security", "public order", "environmental protection", or "public health". These criteria can be particularly relevant in host countries' registration and screening procedures for foreign investment; however, none of the surveyed laws defines them in more detail.

Figure 4.1 Entry restrictions in investment laws (Number of laws)



Source: ©UNCTAD

Minimum capital requirements

Investment laws may require investors to bring in a certain minimum of the capital from outside the country. General minimum capital requirements applying to all investors are used in 18 African and Asian investment laws. The amount of minimum capital requirements varies from $ 0.1 million to $ 1.5 million.

Access to land or real estate

Countries may prohibit or restrict foreign ownership in real estate, effectively restricting investments. Just over a third of surveyed investment laws (42) address this issue. Where access to real estate is mentioned, the guarantee of full ownership is slightly more frequent than limited access to real estate for foreigners (i.e. rent, lease or use only). In addition, national laws are evenly divided between those that qualify the type of land to which access is granted and those that do not provide any details. Only five laws explicitly refer to agricultural land.

b. Establishment procedures

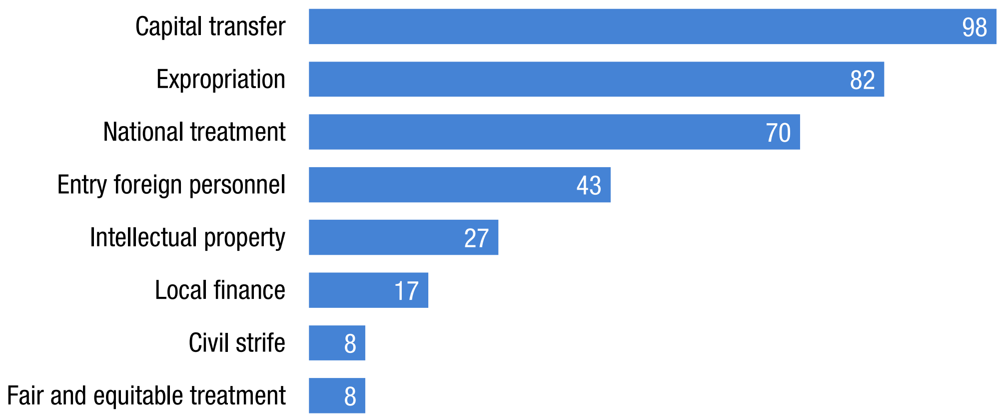
Basically all surveyed countries have set up specific agencies and procedures for the administration of investments. Of the surveyed investment laws, 86 include a reference to a registration or authorization authority or process for investors, although the degree of details may differ. Less than half of the laws (43) mention the general obligation to obtain an authorization from local authorities, while half (55) contain a specific requirement for foreign investors to register or seek approval from government authorities prior to their entry into the country. Finally, about half of the laws (52) include details on the specific procedures or conditions for an investor to register or obtain an authorization. These generally include requirements such as the presentation of technical certificates, financial guarantees and statements, description of the investment project, or constituent documents of a company. Just over half of the laws include a reference to an authority responsible for the registration or authorization, but do not explain the procedure or conditions.

5. Treatment and operation

a. Investor rights and guarantees

Three key rights and guarantees are covered by the majority of the surveyed investment laws. These are 1) the guarantee of national treatment or non-discrimination, 2) protection in case of expropriation, and 3) the right of cross-border capital transfer (figure 5.1). However, the fact that a certain right or guarantee is not covered in an investment law does not mean that the country does not offer it. For example, in most cases the constitution would (also) cover non-discrimination, right of property and protection in case of expropriation. Capital transfer and access to local finance are often codified in specific capital control legislation and entry of personnel in the labour law.

Figure 5.1 Investor rights and guarantees in investment laws (Number of laws)



Source: ©UNCTAD

National treatment

Two thirds (70) of the investment laws include a provision on non-discriminatory treatment between domestic and foreign investors. The guarantee of national treatment is, however, rarely full and unqualified. In some cases, national treatment is granted to investors in "like circumstances", or it is subject to reciprocity. In addition, the majority of investment laws with a national treatment provision (43) include exceptions to it. These exceptions are often drafted in a vague manner and stipulate that national treatment is subject to "special laws or international agreements", or exclude, through negative lists, certain economic sectors or activities or other specific matters (e.g. access to real estate, import of goods) from the scope of national treatment.

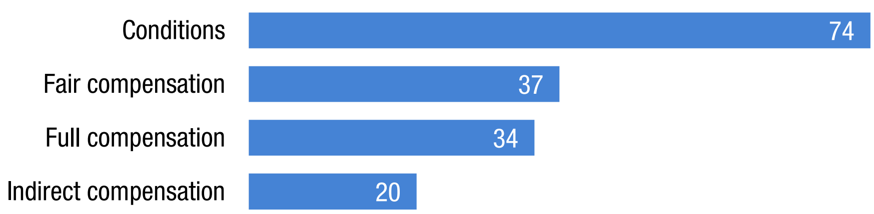
Expropriation

Protection of investments in case of expropriation is found in 82 of the investment laws (figure 5.2). Most of these laws describe the conditions for a lawful expropriation and provide guidelines for the amount of compensation. The conditions under which the expropriation is lawful have been standardized to a large extent to the point that laws authorize expropriations for the public benefit, without discrimination, against compensation and under due process of law.

Investment laws are about equally divided between those that grant prompt, adequate and effective compensation ("full") and those that introduce some flexibility (e.g. appropriate, just or equitable) in the calculation of compensation ("fair"). "Fair" compensation is particularly common in African laws.

Less than one-fifth (20) of the investment laws cover both direct and indirect expropriation. About half of these laws refer to indirect expropriation by using terms such as "measures having effect equivalent to/tantamount to expropriation", while the other half speaks of "direct and indirect measures of expropriation". However, no investment law actually defines indirect expropriation by articulating, for example, the difference between indirect expropriation and non-compensable regulation taken for the public interest.

Figure 5.2 Expropriation provisions in investment laws (Number of laws)



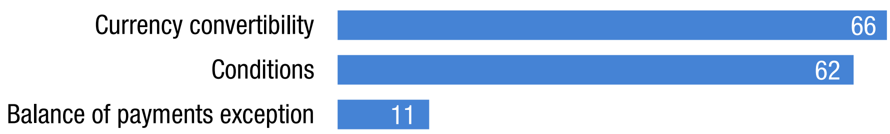
Source: ©UNCTAD

Capital transfer

Provisions on capital transfers in relation to investments are found in almost all examined national laws (98), and the text and structure of the provisions are fairly similar. Laws usually provide in very basic terms that investors have the right to transfer abroad in freely convertible currency proceeds resulting from their investment. The majority of investment laws then set out a non-exhaustive list of examples of capital movements that can be transferred. These may include the initial capital and additional amounts to maintain or increase an investment, returns such as profits, interests, dividends, capital gains, royalties or fees, proceeds obtained from the total or partial sale or disposal of an investment, funds in repayment of loans, earnings and other remuneration of personnel, as well as compensation from expropriation.

Almost two-thirds of investment laws (62) subject capital transfers to certain conditions (figure 5.3). Many laws limit the scope of transfer provisions by clarifying that transactions are allowed only when investors have honoured their tax obligations in the host country. They may also stipulate that transfers will not be permitted in cases where creditors' rights will risk to be jeopardized or when ensuring the satisfaction of judgments or the recovery of proceeds of crime would be impeded. Finally, a small proportion of investment laws explicitly reserve the right to restrict capital transfers in cases of serious balance-of-payments difficulties or exceptional financial and economic difficulties for the State.

Figure 5.3 Capital transfer provisions in investment laws (Number of laws)

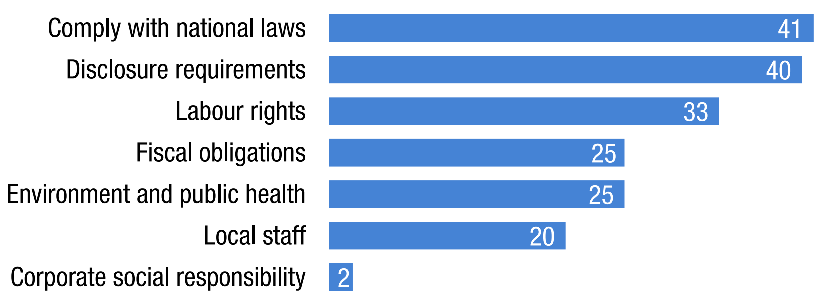


Source: ©UNCTAD

b. Investor obligations

About two-thirds (77) of all surveyed investment laws make explicit reference to certain obligations of investors. The most commonly stated (and fundamental) obligation is that investors must comply with the host country's laws and regulations (figure 5.4). Often, this general obligation is complemented by more specific obligations. The most common one is the requirement to provide accurate and timely accounting information of their operations (corporate disclosure). Thirty-three laws give particular attention to the respect of labour rights and standards, such as those pertaining to social security, minimum wages and trade union rights. In the 25 laws dealing with environmental and health issues, obligations remain very general and lack any specifics as to the concrete legal acts or sectors involved. Some laws explicitly specify that investors should honour their fiscal obligations or refer to obligations regarding local staff, such as training and skill transfer, or an obligation to give preference to local personnel when hiring. Only two laws mention that investors should respect international principles and instruments on corporate social responsibility, without providing any further details as to what specific instruments the laws refer.

Figure 5.4 Investor obligations in investment laws (Number of laws)



Source: ©UNCTAD

6. Investment promotion and facilitation

Investment promotion and facilitation work hand in hand. However, they are two different types of activities. One is about promoting a location as an investment destination (and is therefore often country specific and competitive in nature), while the other is about making it easier for investors to establish or expand their investments, as well as to conduct their day-to-day business in host countries. While both are important tools to attract and retain investments, most laws include provisions on their promotion regime, while only a few address investment facilitation.

a. Investment promotion agencies

About half of the investment laws (46) include provisions related to investment promotion agencies (IPAs). In most cases, especially among African laws, the investment promotion agency is established by the investment law itself. Other laws refer to an already existing investment promotion agency or specify instead that such an institution would be set up in the future.

Commonly stated responsibilities of IPAs include reputation and confidence-building in the country's investment climate; identifying and promoting investment opportunities; simplifying registration procedures; specifying the norms, standards, and procedures for the implementation of investment activities; establishing and coordinating a one-stop shop for investment (see below); providing advice, information, and data to investors; helping to solve problems and give consultation on any difficulties faced by investors in making their investment; facilitating the allocation of land or other assets needed by investors; establishing secure and free investment areas; encouraging investors by providing them with loans and financial facilities.

b. Investment promotion

In order to encourage (foreign) investment, many countries offer fiscal or financial incentives or engage in other investment promotion activities.[6] Most of the reviewed investment laws (74) include provisions on investment incentives. Most investment incentives covered in the surveyed investment laws (57 out of 74 laws with incentives provisions) include various fiscal benefits for investors who fulfil certain conditions, such as a minimum of invested capital or job creation requirements. Some laws limit the entitlement to incentives to a specific period of time, while for others this is not specified. African investment laws are most detailed in depicting investment incentives and typically include a description of the different investment incentives regimes available to investors. In contrast, most countries in Asia and economies in transition refer to investment incentives that are regulated in other legislative acts.

c. Investment facilitation[7]

One-stop shops

Less than a quarter (25) of the surveyed laws include a reference to a one-stop shop. In some cases, the one-stop shop is part of the investment promotion agencies, in others a separate government entity will act as a one-stop shop for investors. The tasks of one-stop shops are rarely specified, but usually relate to facilitating investors by providing information; issuing enterprise or concession registration certificates; and issuing notifications in relation to the investment.

Dispute prevention

Investment dispute prevention and resolution methods are largely absent from national investment laws. Only one law provides for the establishment of an ombudsman for the purpose of facilitating the settling of grievances of foreign investors. While 32 countries include provisions for consultations and negotiations between the disputing parties in their investment laws, these amicable resolution efforts are not linked to independent institutional support (ombudsman, mediation centre, etc.). Instead, such consultations are merely a prerequisite for investors to initiate arbitration proceedings.

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[6] The current study is limited to incentives as an instrument for investment promotion, future research may also include other areas such as image and confidence building, investment generation (identifying and promoting investment opportunities), or special economic zones.

[7] The current study is limited to one-stop shops, dispute prevention and government transparency as some of the key tools of investment facilitation, future research may also include other investment facilitation areas.

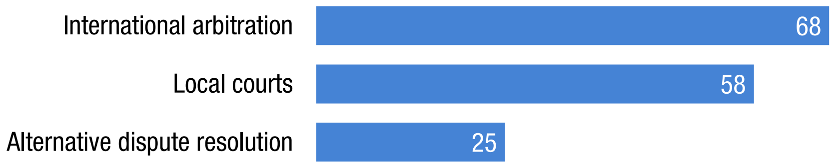
Government transparency

The national investment laws of 15 countries stipulate that governments will make publicly available all laws and regulations pertaining to investment. In addition, 6 jurisdictions further specify that national administrative bodies must collaborate with investors and provide them with information relevant for their investments. One country specifies that a public authority, intending to develop new investment policy must organize public consultations before carrying out such policy.

7. Investor–State dispute settlement

Investment laws often include investor–State dispute settlement (ISDS) provisions. In total, 85 of the surveyed investment laws include an explicit ISDS provision. International arbitration is the ISDS mechanism which is most often used in investment laws, followed by recourse to local courts and alternative dispute resolution mechanisms such as conciliation or mediation procedures (figure 7.1).

Figure 7.1 Investor–State dispute resolution mechanisms in investment laws (Number of laws)

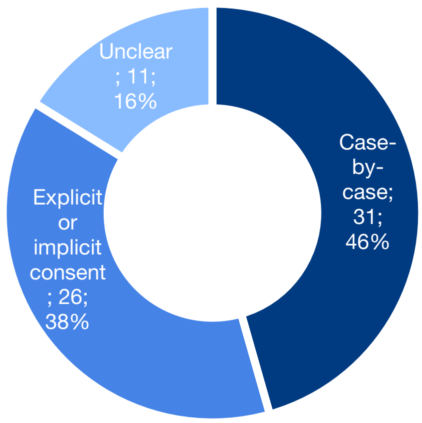


Source: ©UNCTAD
Note: Investor-State dispute resolution mechanisms are not mutually exclusive.

The three different ISDS mechanisms are often used in combination. Thirteen laws provide investors with all of the above dispute settlement possibilities, while the majority of laws with a dispute settlement provision (44) explicitly offer investors only access to international arbitration and local courts. Only three laws regulate the relationship between local courts and international arbitral tribunals, all of them clarify that the investor must not bring the same case in another forum once he has initiated proceedings. Ten laws stipulate that disputes can only be settled in domestic courts.

Among the laws which offer investors recourse to international arbitration, the majority reserve the host country's consent to arbitration on a case-by-case basis (figure 7.2). Other laws, mostly in Africa, contain explicit or implicit consent for international arbitration in case of investment disputes. Some laws do not provide sufficient clarity to be able to determine whether it provides for case-by-case or explicit or implicit consent.

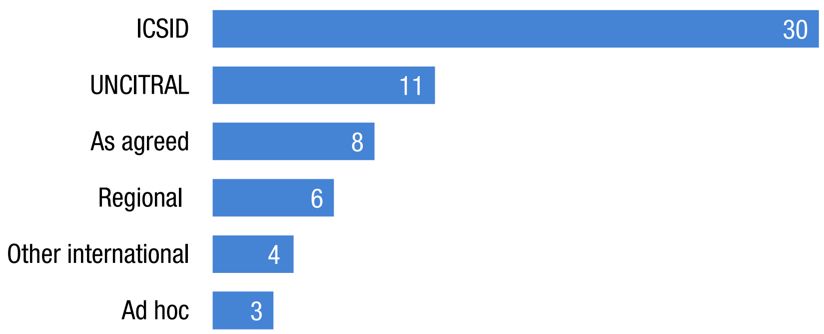
Figure 7.2 Type of consent to international arbitration



Source: ©UNCTAD

Of the laws that allow investors the use of international investment arbitration, most (30) refer to the ICSID procedural rules, while UNCITRAL rules are less mentioned (figure 7.3). Only a few laws refer to other international (e.g. ICC) or regional (e.g. OHADA, CRCICA) arbitration rules, or establish an ad-hoc arbitration procedure which does not already exist in international or regional instruments. Finally, some laws leave the decision on procedural rules completely to the disputing parties. One third of the laws that include ISDS provisions refer to more than one set of arbitration rules.

Figure 7.3 Investment arbitration rules (Number of laws)



Source: ©UNCTAD

8. Policy implications

Investment laws have so far received relatively little attention in current discussions about the policy framework for investment. However, in more than 100 countries these laws are a core instrument for governing investment. It is therefore important to have a closer look at the content of these laws, what commonalities they have and to what extent they differ. There is a need to strengthen the coherence between investment laws and other public policies, such as trade, tax, competition, social and environmental policies. Furthermore, as the content of the investment laws considerably overlaps with IIAs, it is equally important to explore as to what extent these two legal instruments adopt consistent approaches.

While the above findings can only provide a first overview, a preliminary conclusion is that most investment laws seem to lag behind in the latest developments in investment policymaking.[8] Most of them give relatively little attention to sustainable development, do not contain many investor obligations, and remain silent as regards corporate social responsibility. They also do not deal much with investment facilitation.

All this shows that many investment laws do not yet reflect the ongoing IIA reform debate in their investment protection provisions. There is therefore a risk of an increasing incongruity between national and international investment policies. One example is access to international investment arbitration. Whereas new IIAs tend to limit such access and to refine arbitration procedures, such reform efforts are largely absent in investment laws.

Nonetheless, investment laws and IIAs closely interact. Foreign investors can claim protection under both instruments. With regard to the entry of investment, IIAs can partially lock in domestic liberalisation and sometimes even drive it; vice versa, some IIAs include a "ratchet clause" to lock in unilateral liberalisation at the national level.

All this calls for a closer look at the content of investment laws and their relationship to other investment-related policies and IIAs. To encourage and facilitate a policy discussion, UNCTAD will – as a first step – make its database on domestic investment laws publicly available on its online Investment Policy Hub.[9]

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[8] See for instance UNCTAD's Investment Policy Framework for Sustainable Development (2nd ed., 2015).
[9] The launch of the database is foreseen for early 2017 on the Investment Policy Hub: http://investmentpolicyhub.unctad.org.

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