Recent Policy Developments and Key Issues

CHAPTER III

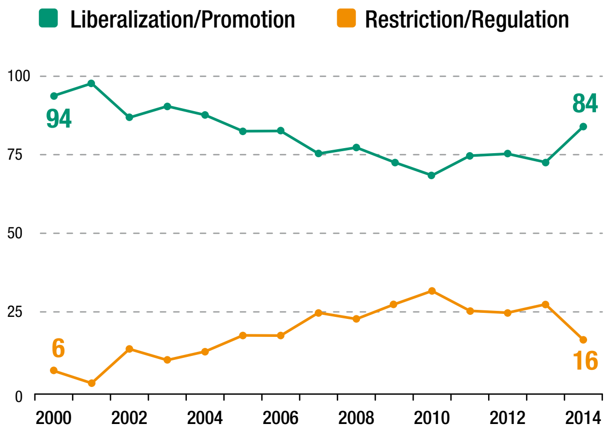
A. NATIONAL INVESTMENT POLICIES

1. Overall trends

Countries' investment policy measures continue to be predominantly directed towards investment liberalization, promotion and facilitation. Measures geared towards investment in sectors important for sustainable development are still relatively few.

In 2014, according to UNCTAD's count, 37 countries and economies adopted 63 policy measures affecting foreign investment. Of these measures, 47 related to liberalization, promotion and facilitation of investment, while 9 introduced new restrictions or regulations on investment (table III.1). The share of liberalization and promotion increased significantly, from 73 per cent in 2013 to 84 per cent in 2014 (figure III.1).[1]

Figure III.1. Changes in national investment policies, 2000–2014 (Per cent)



Source: UNCTAD, Investment Policy Monitor.

a. Investment promotion and facilitation predominant – focus on legal and institutional improvement

A number of countries introduced or amended their investment laws or guidelines to grant new investment incentives or to facilitate investment procedures. *Algeria* reorganized the institutional framework for the mining sector. *Argentina* improved investment conditions for the hydrocarbon industry by amending the Federal Hydrocarbons Law. The *Plurinational State of Bolivia* introduced an investment promotion law (Ley de Promoción de Inversiones) which, inter alia, provides that the State may offer general and specific incentives. *China* introduced new rules on the administration of China's Outward Direct Investment. Henceforth, only outward direct investment in countries or regions and industries identified as "sensitive" require the approval of the Ministry of Commerce (MOFCOM). Outward direct investment in all other countries or regions and industries only need to be registered with MOFCOM. *Cuba* approved a new law on foreign investment offering guarantees and incentives to investors and simplifying investment approval procedures. *Ethiopia* established an Investment Board and Investment Commission. *Kazakhstan* introduced "Rules of Granting Investment Subsidies", describing the procedures in detail. *South Africa* approved guidelines for the new Medium and Heavy Commercial

Table III.1. Changes in national investment policies, 2000–2014 (Number of measures)

Item	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014
Number of countries that introduced changes	46	52	44	60	80	78	71	50	41	47	55	49	54	59	37
Number of regulatory changes	81	97	94	125	164	144	126	79	68	88	121	80	86	87	63
Liberalization/ Promotion	75	85	79	113	142	118	104	58	51	61	80	59	61	61	47
Restriction/ Regulation	5	2	12	12	20	25	22	19	15	23	37	20	20	23	9
Neutral/ Indeterminate[a]	1	10	3	-	2	1	-	2	2	4	4	1	5	3	7

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

Vehicles Automotive Investment Scheme, providing a non-taxable cash grant of various degrees to qualifying investments in productive assets. The *United Arab Emirates* established the Dubai Investment Development Agency, providing a strategic plan and incentives for the attraction of investment. *Uzbekistan* signed a law amending foreign investment regulations. Changes include the introduction of a one-stop shop for foreign businesses, the easing of migration regulations for foreign investors, a guarantee of investors' rights to repatriate funds and a pledge of stable tax legislation and customs tariffs for foreign investors for a decade after a firm is registered. *Viet Nam* revised the Law on Investment which defines in detail the terms "foreign investor" and "foreign invested enterprise", streamlines registration procedures, reduces the mergers and acquisitions (M&A) transaction period and decreases the number of prohibited and conditional business lines. *Viet Nam* also revised the Law on Enterprises which, inter alia, simplifies the procedures for business registration, shortens the time frame to issue an Enterprise Registration Certification, and limits the time frame for capital contribution to 90 days.

Some countries introduced special economic zones (SEZs) or revised polices related to existing SEZs. *Ethiopia* extended various kinds of incentives for investment in industrial development zones and in manufacturing and agriculture. The *Republic of Korea* halved the minimum "foreign investment amount" and "factory construction area ratio" applied to foreign investors in "complex-type foreign investment areas". *Mozambique* approved the Mocuba Special Economic Zone in the Lugela District, which will be used for establishing agro-processing-driven industries in particular. *South Africa* introduced a "Special Economic Zone Act" providing for the designation, promotion, development, operation and management of SEZs.

As regards the general business environment, several countries reformed their tax systems. For instance, the *Russian Federation* amended its tax code, providing more favourable tax treatment in priority territories for social and economic development, and *Saudi Arabia* revised its income tax law, repealing joint tax liabilities of companies on capital gains. In terms of corporate income tax levels, a survey of 32 countries shows that 6 countries announced decreases in headline corporate income tax rates for 2014.

b. FDI liberalization ongoing – most active in Asian emerging economies

Several countries liberalized entry and establishment conditions for foreign investors. In most cases, they relaxed restrictions on foreign ownership limitations or opened up new business activities to foreign investment. As in previous years, countries in Asia were most active, in particular *China, India* and *Indonesia* – the three largest emerging economies in Asia. *India* liberalized foreign investment in railway infrastructure that was hitherto closed to FDI and raised the FDI cap in the defence sector from 26 per cent to 49 per cent. *Indonesia* increased the foreign investment cap in several industries, including for pharmaceuticals to 85 per cent from 75 per cent, for venture capital operations to 85 per cent from 80 per cent and for power plant projects carried out as public-private partnerships to 100 per cent from 95 per cent. *Kuwait* approved new rules permitting foreign banks to open multiple bank branches in the country. *Myanmar* removed 11 items from the prohibited list for foreign investors. These items are related to jade and gemstone prospecting, exploration and production; small- and medium-scale mineral production; and distribution of newspapers, magazines and journals in Burmese and other national ethnic languages.

Australia eased some foreign ownership restrictions on the Australian flag carrier Qantas. *Ethiopia* opened the electricity generation and distribution sector to private investors. *Mexico* established the regulatory framework for the participation of FDI up to 100 per cent in telecommunications and satellite communications, and up to 49 per cent in the broadcasting sector, subject to reciprocity from the country of the ultimate investor.

In 2015, *Canada* amended the Investment Canada Regulations. The amendments change how the value of an acquisition of a Canadian enterprise is assessed for acquisitions or sale by private investors from WTO countries; they gradually raise the threshold that triggers a review under the Investment Canada Act for acquisitions by foreign private investors. *China* revised its "Catalogue for the Guidance of Foreign Investment Industries". It stipulates in which industry sectors foreign investment is "encouraged", "restricted" or "prohibited". Compared with its predecessor, the revised catalogue lifts restrictions on foreign inward investment by reclassifying individual sectors, in particular in the manufacturing sector. *India* raised the ceiling for foreign investment in insurance from 26 per cent to 49 per cent and authorised foreign investment in pension funds up to an ownership ceiling of 49 per cent. FDI up to 26 per cent is allowed in pension funds under the automatic route. Also, FDI in medical devices is now exempt from the rules applicable to the pharmaceutical industry, and 100 per cent FDI is permitted under the automatic route.

In addition to liberalizing investment, numerous countries improved business licensing conditions. For instance, *China* amended the Company Law. It applies to Chinese joint ventures with foreign investors. It removes the requirement that the contribution in cash by all shareholders be not less than 30 per cent of the registered capital of the company. *Côte d'Ivoire* adopted a new mining code which extends the permit holding period from 7 years to 10 years, with the possibility of prolonging the period by a further two years. *Mozambique* amended a law that allows the government to issue new gas and oil exploration licenses. *Myanmar* finalized the granting of telecommunications licenses to Telenor Myanmar and Ooredoo. *Rwanda* amended a law providing for a broader variety in the duration of mining licenses. *Viet Nam* permitted wholly foreign-invested enterprises to provide almost all types of logistical services in the country, subject to proper licensing.

Another important feature of investment liberalization in 2014 was privatization. *Cyprus* passed a new law on the privatization of semi-governmental organizations. *Serbia* adopted a Law on Privatization, setting the formal and institutional conditions for the continuation and completion of the restructuring and privatization process. *Turkmenistan* signed into law a bill titled "Denationalization and Privatization of State Property" which outlines the basic principles of denationalization (i.e. the transformation of State firms into joint-stock companies in which the State is a partner) and privatization (i.e. the transfer to private individuals of property rights in State assets in return for payment).

c. Some new investment restrictions or regulations – mainly on national security grounds and for strategic sectors

Some countries introduced new investment restrictions or regulations. They related mainly to national security considerations, strategic sectors and land ownership.

France extended the coverage of the review mechanism for inward foreign investment to six additional activities: (i) energy supply (electricity, gas, hydrocarbons or other sources of energy), (ii) water supply, (iii) transport networks and services, (iv) electronic communications networks and services, (v) operations of buildings and installations for defence reasons and (vi) protection of public health. It applies to safeguarding national interests in public order, public security and national defence. *Italy* established procedures for the exercise of special powers by the government in connection with investments in the defence and national security sector, as part of a security-related investment review mechanism created in 2012. *Indonesia* reduced the foreign ownership ceiling in several industries. For example, onshore oil production facilities which foreign investors could own up to 95 per cent are no longer open to foreign investment and the foreign ownership ceiling for data communications system services was reduced from 95 per cent to 49 per cent. The *Russian Federation* extended coverage of its review mechanism to the transport sector and related services. The review mechanism applies to investments in business entities of strategic importance for national defence and state security. The country also amended the Federal Law on Foreign Investment in Commercial Entities with Strategic Importance for National Defence and National Security; it now covers acquisitions of property classified as fixed production assets in "strategic companies" if the value of these assets exceeds 25 per cent of the total value of the company's assets.

In 2015, *Canada* amended its National Security Review of Investment Regulations to provide the government with the flexibility to extend time periods for the review of investments that could be injurious to national security.

Fiji amended the Land Sales Act to prevent any land within town boundaries from being sold to foreigners for residential purposes. It also requires foreigners who already own undeveloped land to build a house within two years. *Seychelles* discontinued the sale of state land to non-Seychellois.

d. Developments regarding investment for sustainable development

More private investor involvement in sectors and industries related to sustainable development is crucial to achieve the Sustainable Development Goals (SDGs) (*WIR14*). Private investment can play an important role in infrastructure development, health, education and climate change mitigation activities. This section provides a brief overview of recent investment policy developments in these areas, covering the period from 2010 to 2014.

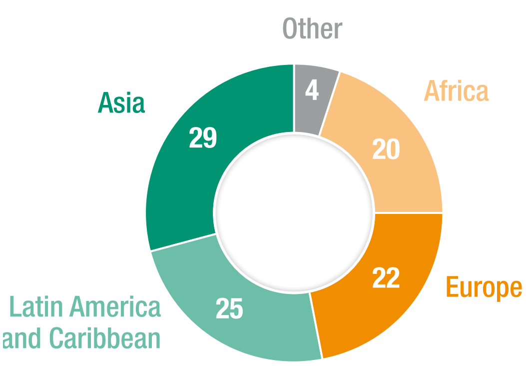
Thirty-two countries undertook 45 investment policy measures in one or several of the above-mentioned sectors or activities between 2010 and 2014. The share of such policy measures among all reported investment policy measures during this period is small – only approximately 8 per cent. Liberalization or promotion measures accounted for about three quarters, i.e. in their majority countries aimed to attract more private investment into SDG sectors.

By region, investment policy measures related to SDG sectors were reported mainly for countries in Asia, followed by countries in Latin America (figure III.2). Interestingly, all reported measures from Asian countries aim at improving entry conditions and facilitating foreign investment. For instance, *India* permitted foreign investment in diverse industries including railways, health and medical services. Another example is *Indonesia*, which liberalized the construction sector, health services and electricity generation.

By sector, investment policy measures related to infrastructure development (including roads, ports, airports, energy generation and distribution, water supply and sanitation) dominated (53 per cent). For example, numerous countries liberalized or facilitated private investment in energy generation and distribution as well as water supply. As shown in figure III.3, investment policies related to education came next (17 per cent). Investment measures related to health services were less prominent. For example, *China* allowed foreign investors to own hospitals in several regions as part of a pilot test, and the *Russian Federation* exempted education and health care services from the corporate profit tax.

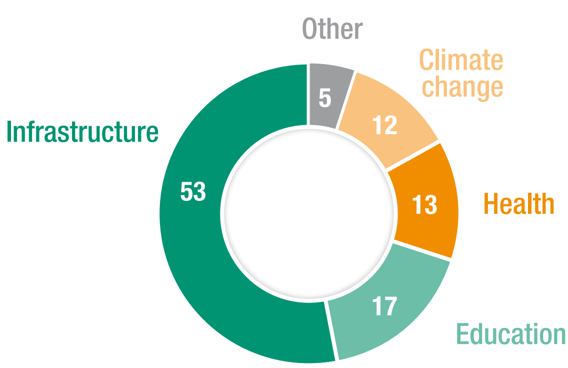
Overall, countries appear to have paid little attention so far to the importance of channelling investment into sectors that are particularly important for sustainable development, and more pro-active policy measures are needed to increase investment flows into these sectors. At the same time, it is important to keep in mind that liberalization and promotion policies related to investment in sectors related to sustainable development do not in themselves guarantee a positive development impact of the investment. It is equally important that host countries have in place a sound regulatory framework that seeks to maximize positive development impacts of investment and to minimize associated risks by safeguarding public interests in these politically sensitive sectors. This implies, in particular, balancing the need for attractive risk-return rates for investors with the need for accessible and affordable services (see *WIR14*).

Figure III.2. SDG-related investment policy measures by region, 2010–2014 (Per cent)



Source: UNCTAD, Investment Policy Monitor.

Figure III.3. SDG-related investment policy measures by sector, 2010–2014 (Per cent)



Source: UNCTAD, Investment Policy Monitor.

B. INTERNATIONAL INVESTMENT POLICIES

1. Trends in the conclusion of IIAs

The expansion of the IIA universe continues, with intensified efforts at the regional level.

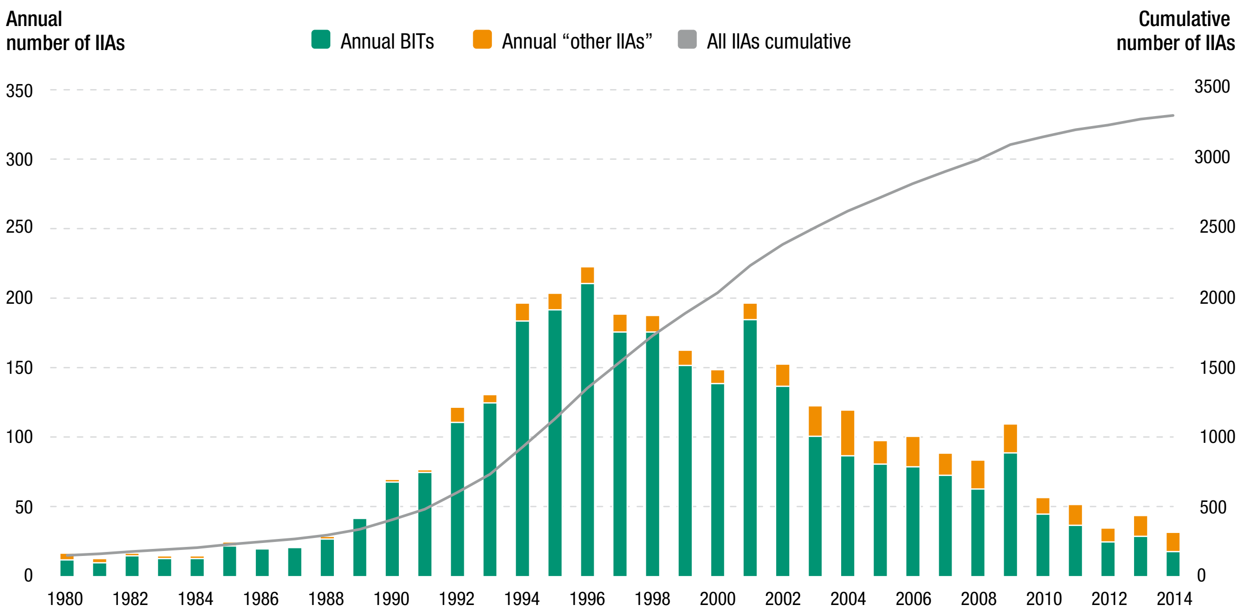
a. Overall trends

The conclusion in 2014 of 31 international investment agreements (IIAs) – 18 bilateral investment treaties (BITs) and 13 "other IIAs"[2] - brought the total number of IIAs to 3,271 (2,926 BITs and 345 "other IIAs") by year-end (figure III.4). Between January and April 2015, five more treaties (of which three were BITs) were added. Most active in concluding IIAs in 2014 were Canada with seven and Colombia, Côte d'Ivoire and the European Union (EU) with three each. Overall, the annual number of "other IIAs" has remained stable over the past few years, while the annual number of BITs continues to decline (see annex).

"Other IIAs" signed between January 2014 and April 2015 can be grouped into the three broad categories identified in *WIR12*:

- *Eight agreements with BIT-equivalent provisions*. The Australia–Japan EPA, the Australia–Republic of Korea FTA, the Canada–Republic of Korea FTA, the Japan–Mongolia EPA, the Mexico-Panama FTA, the Additional Protocol to the Framework Agreement of the Pacific Alliance (between Chile, Colombia, Mexico and Peru), the Treaty on the Eurasian Economic Union (between Armenia, Belarus, Kazakhstan and the Russian Federation) and the Agreement on Investment under the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and India fall in the category of IIAs that contain obligations commonly found in BITs, including substantive standards of investment protection and investor-State dispute settlement (ISDS). It should be noted that the Australia–Japan EPA does not provide for ISDS.
- *Five agreements with limited investment provisions*. The EU–Georgia Association Agreement, the EU–Moldova Association Agreement and the

Figure III.4. Trends in IIAs signed, 1980–2014



Source: UNCTAD, IIA database.

EU–Ukraine Association Agreement fall in the category of agreements that provide limited investment-related provisions (e.g. national treatment with respect to commercial presence or free movement of capital relating to direct investments). Also, the Cooperation and Facilitation Investment Agreements (CFIAs) signed by Brazil with Angola and Mozambique in 2015 (based on Brazil's new model – see below) belong to this category, as they emphasize investment promotion and facilitation while containing also a number of investment protection provisions – although no ISDS clause.

- *Two agreements with investment cooperation provisions and/or a future negotiating mandate*. The ECOWAS–United States Trade and Investment Framework Agreement (TIFA), and the Malaysia–Turkey FTA contain general provisions on cooperation in investment matters and/or a mandate for future negotiations on investment.

In 2014, 84 double taxation treaties (DTTs) were concluded. These treaties govern the fiscal treatment of cross-border investment operations between host and home States. The network of DTTs and BITs grew together, and there are now over 3,000 DTTs in force worldwide.[3] In fact, two thirds of BIT relationships are also covered by a DTT (and half of DTT relationships are also covered by a BIT). Where two countries have both BITs and DTTs, in a quarter of cases they were signed in the same year, and in more than a third of cases within two years. DTTs have a separate settlement mechanism for disputes between investors and both home and host States (the mutual agreement procedure or MAP), which is generally considered weaker than the dispute settlement system for BITs. In some tax-related disputes, investors have resorted to BITs (e.g. *Vodafone v. India*).

b. IIA-related developments in 2014–2015

Several other developments beyond treaty-making left their mark on the IIA universe:

- Negotiations on megaregional agreements continued, involving close to 90 countries (*WIR14*). The ninth negotiating round of the TTIP took place in New York (20–24 April 2015). For the TPP negotiations, a series of meetings of chief negotiators and trade ministers took place pursuant to the 19th round of negotiations that was held in Brunei (22–30 August 2013). The most recent TPP officials' meeting took place in Maryland, United States, from 23 to 26 April 2015. With regard to RCEP, the seventh round of negotiations took place in Thailand in February 2015, with investment discussions focusing on the approach to the scheduling of commitments. Concerning PACER, Fiji accepted the May 2014 Pacific Islands Forum Leaders' invitation to participate in the PACER Plus negotiations. The tenth inter-sessional negotiating meeting took place in Port Vila, Vanuatu (5–7 May 2015); parties intend to conclude the negotiations by July 2016. The third meeting of the COMESA–EAC–SADC Tripartite Technical Committee on movement of business persons was held in Mauritius (3–6 November 2014). The second phase of the Tripartite negotiations, scheduled for the second half of 2015, will focus on investment, trade in services, intellectual property rights, competition policy and consumer protection. The trilateral FTA is expected to be launched during the Third Tripartite Summit to be held in Egypt in June 2015.
- In January 2015, Italy gave official notice to the Energy Charter Treaty of its intent to withdraw from the treaty (the withdrawal will take effect in January 2016, but the treaty will apply for another 20 years to investments made before or at the day of withdrawal).
- In October 2014, African independent legal experts met in Djibouti to discuss and review the draft Pan African Investment Code (PAIC). This follows the 2008 African Union (AU) Commission mandate to "develop a comprehensive investment code for Africa with a view to promoting private sector participation".
- At the 26th session of the UN Human Rights Council, held in Geneva 9–27 June 2014, a resolution drafted by Ecuador and South Africa and signed by Bolivia, Cuba and the Bolivarian Republic of Venezuela – and supported by 20 countries[4] – called for the Council "to establish an open-ended intergovernmental working group with the mandate to elaborate an international legally binding instrument on Transnational Corporations and Other Business Enterprises with respect to human rights". The Human Rights

Council adopted the resolution (by majority) on 26 June 2014 and decided that the working group should hold its first session in 2015.

- In May 2014, Ecuador, the Dominican Republic and the Bolivarian Republic of Venezuela presented a proposal to establish a Southern Observatory for investment assistance. The observatory's envisaged activities include to report periodically on the state of international investment disputes; identify procedures to monitor the action of international arbitration tribunals in investment; analyse and propose mechanisms to reform such arbitration proceedings; and promote the creation of mechanisms for coordination and mutual consultation between the judicial systems of Latin American countries to ensure the validity of national decisions on disputes between States and MNEs.

c. Countries and regions search for IIA reform

An increasing number of countries are reviewing their model IIAs in line with recent developments in international investment law. At least 50 countries or regions are currently revising or have recently revised their model IIAs. This trend is not limited to a specific group of countries or regions but includes at least 12 African countries, 10 countries from Europe and North America, 8 Latin American countries, 7 Asian countries and 6 economies in transition. In addition, at least 4 regional organizations have reviewed or are reviewing their models. Three new approaches (by Brazil, India and Indonesia) were revealed at the UNCTAD expert meeting on the Transformation of the IIA Regime, held in February 2015.[5] In May 2015, the European Commission published a concept paper on "Investment in TTIP and beyond – the path for reform", the German Federal Ministry for Economic Affairs and Energy published a suggestion for a model investment protection treaty for developed countries, and Norway put forward a new draft model BIT for public consultation.

- Brazil's model CFIA has been developed on the basis of extensive domestic consultations, including with the private sector, and the experience of other countries and international organizations.[6] The model's objectives of promoting cooperation between the parties and facilitating and encouraging mutual investments are pursued through three main features: (i) the improvement of institutional governance, with the establishment of Focal Points and of a Joint Committee; (ii) the identification of ongoing agendas for investment cooperation and facilitation; and (iii) the creation of mechanisms for risk mitigation and dispute prevention. Focal Points (ombudsmen) act as intermediaries between investors and host States in order to solve problems related to investments and suggest improvements in the business environment. As such, they also act to prevent disputes and facilitate their resolution. The Joint Committee, made up of government representatives from both parties, shares information on investment opportunities in the two contracting parties, monitors the implementation of the agreement and solves possible disagreements in an amicable manner. The private sector can participate in Joint Committee hearings and ad hoc working groups. The CFIA also focuses on specific thematic agendas as a way of encouraging and promoting a business-friendly environment. This includes cooperation on business visas, corporate social responsibility (CSR), transfer of funds and transparency of procedures. In addition to these new features, the model includes substantive provisions dealing with expropriation, national treatment (subject to the applicable law) and most-favoured-nation (MFN) treatment, compensation for losses, and transparency. The model also includes a compulsory mechanism for dispute prevention prior to the establishment of a State-State arbitration procedure.

- The European Commission proposed new approaches to key IIA provisions related to the right to regulate and ISDS in its concept paper on "Investment in TTIP and beyond – the path for reform", launched in May 2015 (European Commission, 2015). The paper recognizes the achievements of the concluded negotiations with Canada and Singapore and addresses issues that could be further explored, as a result of the TTIP public consultations. Four areas are identified for such further improvement: (i) the protection of the right to regulate, (ii) the establishment and functioning of arbitral tribunals, (iii) the review of ISDS decisions by an appellate body, and (iv) the relationship between domestic judicial systems and ISDS. Concretely, some of the notable suggestions concern the host State's right to regulate in the public interest; the paper suggests the inclusion of a treaty article expressly recognizing the right of States to take measures in pursuance of legitimate public policy objectives according to the level of protection they deem appropriate. For ISDS, the Commission's paper elaborates on arbitrator selection and qualifications, third-party submissions, and the establishment of a permanent bilateral appeals mechanism. The latter would review awards with respect to errors of law and manifest errors in the assessment of facts. The concept paper advances the idea that it could be modelled in good part on the basis of the WTO Appellate Body's institutional set-up. Finally, the proposal envisions the eventual creation of a permanent court and its possible multilateralization (European Commission, 2015).

- The German Federal Ministry for Economic Affairs and Energy made public in May 2015 a memorandum ("Gutachten") on a model BIT for developed countries with a functioning legal system (BMWi, 2015). The model agreement addresses reform issues that arose during the TTIP consultation process. It intends to safeguard the State's right to regulate through public policy exceptions and provide options for conferring on foreign investors rights no greater than those enjoyed by domestic investors. For this reason, the model agreement circumscribes and clarifies the content of the fair and equitable treatment (FET) and of the expropriation standard with greater precision than the CETA draft. Notably, the model suggests the introduction of a new investment protection mechanism: a bilateral tribunal or court would be created for each specific treaty (e.g. EU-US Permanent Investment Tribunal) with judges pre-selected by the parties to the agreement and individual cases being assigned to the judges by abstract rules. The parties to the dispute would not have any influence on the composition of the panel of judges. This first instance would have exclusive jurisdiction to hear investment disputes arising under the agreement. The proposed tribunal mechanism is complimented by a standing appellate body. This appellate body would as a second instance "undertake comprehensive scrutiny of the law and restricted scrutiny of the facts" in respect of the awards rendered by the first instance. Submission of a claim by an investor is subject to the exhaustion of domestic remedies, unless such remedies are unavailable or manifestly ineffective. An alternative suggestion conditions initiation of proceedings to the investor's waiver of any rights to start proceedings under national courts or tribunals.

- India made available its new draft model BIT for public comments, although the review process is not yet complete.[7] The new model includes several innovative provisions: a detailed clarification of what is meant by "real and substantial business operations" under the definition of the term "enterprise"; a careful definition of the scope of the treaty; a national treatment provision applicable to investments in "like circumstances"; a new approach to the equitable treatment that lists State obligations, including a prohibition on the denial of justice, the duty to afford due process and the requirement to refrain from manifestly abusive treatment involving continuous, unjustified and outrageous coercion or harassment (without explicitly including a FET clause); a test for determining whether indirect expropriation occurred; and a free transfer of funds clause, subject to a detailed list of exceptions. It does not include an MFN clause. The model also includes provisions on investor obligations. It further contains a detailed investor-State dispute mechanism that provides for, among other matters, strict time frames for the submission of a dispute to arbitration, the selection of arbitrators and the prevention of conflict of interest. The model stipulates that investors must first submit their claim before the relevant domestic courts or administrative bodies for the purpose of pursuing domestic remedies, where available. If after exhausting all judicial and administrative remedies no resolution has been satisfactory to the investor within three years, the investor may commence a proceeding under the ISDS article by transmitting a notice of dispute to the respondent party.

- Indonesia has embarked on reforming its IIA policy on several fronts. The country has initiated the termination of its BITs, while developing a new model BIT for (re)negotiation. The new model BIT will consider the exclusion of portfolio investment from the definition of investment and will add a contribution to economic development requirement in its definition clauses. National treatment will be subject to exceptions related to special treatment in favour of domestic small and medium enterprises and investments and measures affecting natural resources. The new model will also clarify in greater detail the scope of the FET standard and will provide a list of State obligations including a prohibition against denial of justice in criminal, civil or administrative proceedings and assurance of police protection from any physical harm. Finally, investor-State arbitration will be subject to host country consent. An investor may submit a case to international arbitration if the host country provides a specific consent letter.

- Norway developed a new draft model BIT and opened a public consultation in May 2015.[8] The draft model circumscribes indirect expropriation, which may be found "[i]n rare circumstances", by offering a list of elements that need to be taken into account in order to determine whether such an expropriation has taken place, e.g. the economic impact and duration of the measure and whether it interferes with "reasonable, investment-backed expectations" of investors. It contains exceptions relating to essential security interests, cultural policy, prudential regulation and taxation. The draft model BIT also establishes a joint committee that is tasked, among other things, with supervising the implementation of the agreement, attempting to resolve disputes regarding the interpretation of the agreement, working to remove barriers to investment, amending the agreement when necessary, and potentially adopting codes of conduct for arbitrators.

These new approaches converge in their attempt to modernize IIAs and further improve their sustainable development dimension. UNCTAD's Investment Policy Framework, which represents a new generation of investment policies, has been widely used as a main reference in the above processes.

At the same time, countries continued to terminate their BITs. South Africa terminated its BITs with Austria, Denmark and Germany, and discussions are ongoing with regard to new impending terminations of BITs. Indonesia discontinued 18 of its 64 BITs.[9] Both countries are in the process of formulating a new strategy for international investment policies. Botswana and Namibia are currently reconsidering their approaches to BITs.

2. Content of new IIAs

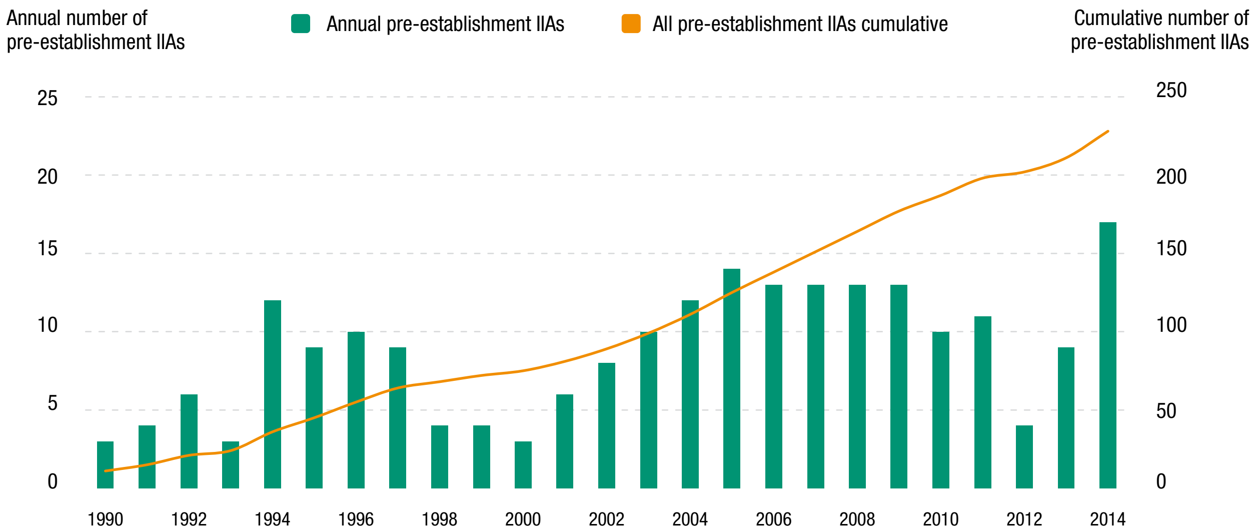
A small but growing number of IIAs include pre-establishment commitments; new treaties include provisions safeguarding the right to regulate for sustainable development objectives.

a. Pre-establishment IIAs are on the rise

In recent years, an increasing number of IIAs has included pre-establishment commitments, extending national treatment and MFN obligations to the "establishment, acquisition and expansion" of investments. By the end of 2014, pre-establishment IIAs totalled 228 (125 "other IIAs" and 103 BITs) (figure III.5), most of which involved developed economies, in particular the United States, Canada, Finland, Japan, and the EU (figure III.6). Taken together, these economies are party to 70 per cent of all pre-establishment IIAs signed worldwide. Also, a few developing countries in Asia and Latin America have also been actively concluding pre-establishment IIAs; they include Chile, Costa Rica, the Republic of Korea, Peru and Singapore.

Pre-establishment commitments in these IIAs use either a positive or a negative list approach. In addition, some treaties include a "market access" clause which prohibits certain non-discriminatory practices that can inhibit the right of establishment. The positive list approach offers selective liberalization by drawing up a list of industries in which investors enjoy pre-establishment rights, i.e. listing the industries or sectors where liberalization commitments are undertaken. The negative list approach offers liberalization across the board with the exception of those industries and sectors that are specifically listed, i.e. for which no liberalization commitments are made. In treaty practice to date, the negative list approach has been prevalent under both approaches, treaty obligations that are given a pre-establishment dimension (i.e. that apply to "establishment, acquisition and expansion" of investments) usually include national treatment, MFN

Figure III.5. Trends in pre-establishment IIAs signed, 1990–2014



Source: UNCTAD, IIA database.

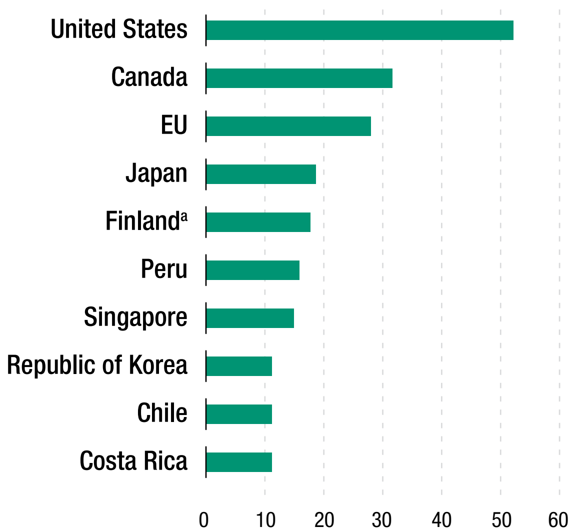
treatment, prohibition of performance requirements, and prohibition of nationality requirements for senior management and board members.

Countries frequently lodge reservations to these obligations to preserve (maintain) existing non-conforming measures ("standstill") and/or to retain the right to adopt new non-conforming measures in the future. Reservations are particularly important when making commitments on a negative list basis because of its "list or lose" nature. They can take the form of sectoral reservations (for economic sectors, industries or activities); government-level reservations (for non-conforming measures adopted by a certain level of government, e.g. provincial or municipal); policy area reservations (e.g. for land rights, privatization, subsidies and other specific policy areas); and government procedure reservations (e.g. for screening and approval procedures for certain foreign investments).

In addition, some treaties include "safety valves" that allow parties to modify their reservation schedules after the treaty enters into force (subject to certain conditions). Furthermore, treaties sometimes exclude pre-establishment matters from the scope of ISDS so that any disputes on these issues are subject to State-State dispute resolution only.

The rise of pre-establishment IIAs is gradually moving policies related to the establishment of foreign investment from the realm of the domestic regulatory framework of host countries to the international level. From the host-country perspective, pre-establishment commitments may improve the country's

Figure III.6. Top signatories of pre-establishment IIAs
(Number of agreements)



Source: UNCTAD, IIA database.
[a] Excluding EU pre-establishment IIAs.

attractiveness as an investment destination, while from the home-country perspective, they help to "lock in" the existing level of openness, make the regulatory environment more transparent and, in some instances, open new investment opportunities. At the same time, making pre-establishment commitments requires a sophisticated domestic regulatory regime as well as sufficient institutional capacity to conduct a thorough audit of existing domestic policies and to consider possible future regulatory needs.

b. Provisions safeguarding the right to regulate for sustainable development objectives continue to be included

A review of 18 IIAs concluded in 2014 for which texts are available (11 BITs and 7 "other IIAs") shows that most of the treaties include provisions safeguarding the right to regulate for sustainable development objectives, such as those identified in UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) (table III.2). Of these agreements, 14 have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources. Another 14 treaties contain a clause that explicitly recognizes that the parties should not relax health, safety or environmental standards in order to attract investment. Twelve treaties refer to the protection of health and safety, labour rights, the environment or sustainable development in their preambles.

These sustainable development features are supplemented by treaty elements that aim more broadly at preserving regulatory space for public policies of host countries and/or at minimizing exposure to investment arbitration. These elements include clauses that (i) limit treaty scope (for example, by excluding certain types of assets from the definition of investment); (ii) clarify obligations (for example, by including more detailed clauses on FET and/or indirect expropriation); (iii) contain exceptions to transfer-of-funds obligations or carveouts for prudential measures; and (iv) carefully regulate ISDS (for example, by limiting 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). Notably, all but one of the treaties concluded in 2014 that were reviewed omit the so-called umbrella clause.

The inclusion of provisions safeguarding the right to regulate for sustainable development objectives does not translate to a reduced level of investment protection. Most of the IIAs signed in 2014 also included high investment protection standards.

3. Investment dispute settlement

There were fewer new ISDS cases, with a continued high share of cases against developed States.

a. Latest trends in ISDS

In 2014, investors initiated 42 known ISDS cases pursuant to IIAs (UNCTAD, 2015). This is lower than the record high numbers of new claims in 2013 (59 cases) and 2012 (54 cases) and closer to the annual averages observed in the period between 2003 and 2011. As most IIAs allow for fully confidential arbitration, the actual number is likely to be higher.

Last year's developments brought the overall number of known ISDS claims to 608 (figure III.7). Ninety-nine governments around the world have been respondents to one or more known ISDS claims.

- *Respondent States*. The relative share of cases against developed States is on the rise. In 2014, 40 per cent of all cases were brought against developed countries. In total, 32 countries faced new claims last year. The most frequent respondent was Spain (5 cases), followed by Costa Rica, the Czech Republic, India, Romania, Ukraine and the Bolivarian Republic of Venezuela (2 cases each). Three countries – Italy, Mozambique and Sudan – faced their first (known) ISDS claims in history. Overall, Argentina, the Bolivarian Republic of Venezuela and the Czech Republic have faced the most cases to date (figure III.8).
- *Home country of investor*. Of the 42 known new cases in 2014, 35 were brought by investors from developed countries and 5 were brought by investors from developing countries. In two cases the nationality of the claimants is unknown. The most frequent home States were the Netherlands (with 7 cases brought by Dutch investors), followed by the United Kingdom and the United States (5 each), France (4), Canada (3) and Belgium, Cyprus and Spain (2 each). This corresponds to the historical trend in

Table III.2. Selected aspects of IIAs signed in 2014

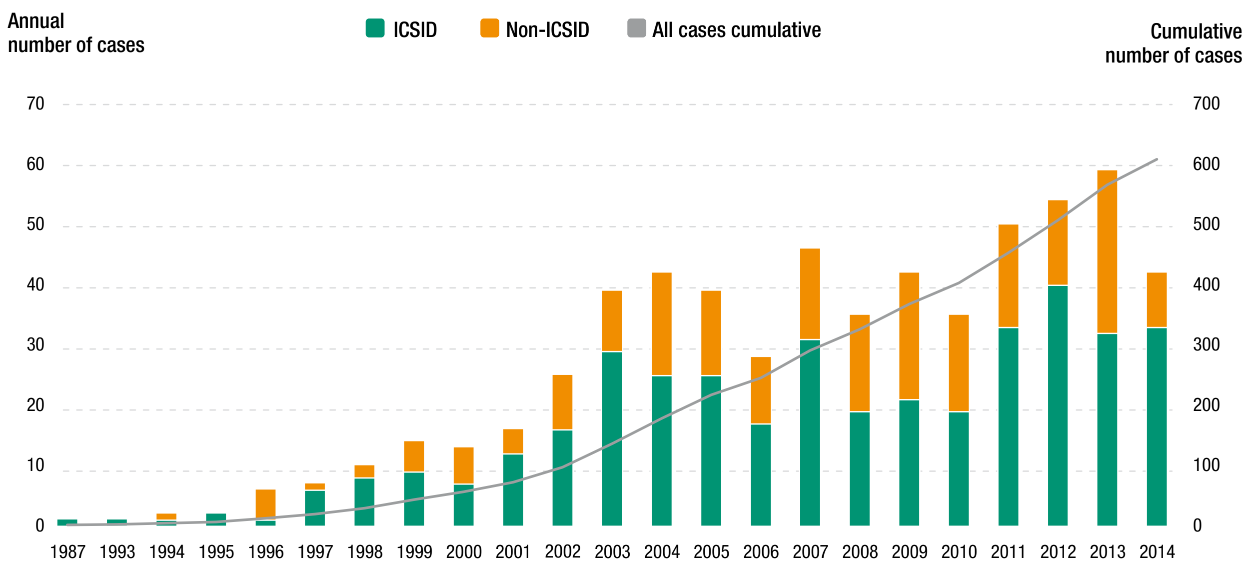
	Policy Objectives																						
Selected aspects of IIAs	Sustainable development enhancing features	Focus on investments conducive to development	Preserve the right to regulate in the public interest	Avoid overexposure to litigation	Stimulate responsible business practices	Mexico–Panama FTA	Israel–Myanmar BIT	Treaty on Eurasian Economic Union	Japan–Kazakhstan BIT	Egypt–Mauritius BIT	Colombia–Turkey BIT	Colombia–France BIT	Canada–Serbia BIT	Canada–Senegal BIT	Canada–Nigeria BIT	Canada–Mali BIT	Canada–Republic of Korea FTA	Canada–Côte d'Ivoire BIT	Canada–Cameroon BIT	Australia–Republic of Korea FTA	Australia–Japan EPA	ASEAN–India Investment Agreement	Additional Protocol to the Framework Agreement of the Pacific Alliance
References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble	X	X	X		X				X	X	X		X	X	X	X	X	X	X	X			X
Refined definition of investment (reference to characteristics of investment; exclusion of portfolio investment, sovereign debt obligations or claims of money arising solely from commercial contracts)		X		X		X	X			X	X	X	X	X	X	X	X	X	X	X	X	X	X
A carve-out for prudential measures in the financial services sector			X	X		X			X		X	X	X	X	X	X	X	X	X	X	X	X	X
Fair and equitable treatment equated to the minimum standard of treatment of aliens under customary international law			X	X		X				X	X		X	X	X	X	X	X	X	X	X	X	X
Clarification of what does and does not constitute an indirect expropriation			X	X		X					X	X	X	X	X	X	X	X	X	X	X	X	X
Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws			X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X	X
Omission of the so-called “umbrella” clause				X		X	X	X		X	X	X	X	X	X	X	X	X	X	X	X	X	X
General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources	X		X	X		X				X	X		X	X	X	X	X	X	X	X	X	X	X
Explicit recognition that parties should not relax health, safety or environmental standards to attract investment	X	X			X	X		X	X		X	X	X	X	X	X	X	X	X	X			X
Promotion of Corporate and Social Responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble	X											X	X	X	X	X	X	X	X				X
Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, no ISDS mechanism)			X	X		X			X	X	X	X	X	X	X	X	X	X	X	X	X	X	X

Source: UNCTAD.
Note: Based on IIAs concluded in 2014 for which the text was available; does not include “framework agreements”, which do not include substantive investment provisions.

which developed-country investors – in particular, those from the United States, Canada and a few EU countries – have been the main ISDS users, responsible for over 80 per cent of all claims (figure III.9).

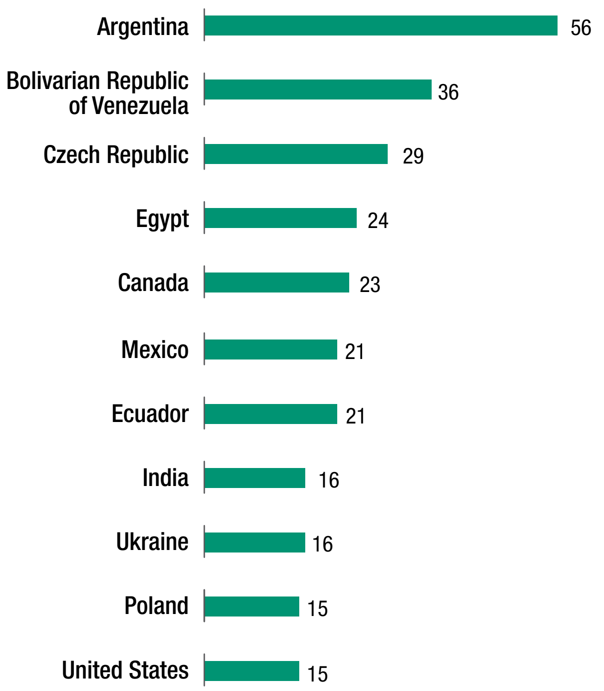
- *Intra-EU disputes*. A quarter of all known new disputes (11) are intra-EU cases, which is lower than the year before (in 2013, 42 per cent of all new claims were intra-EU cases). Half of them were brought pursuant to the Energy Charter Treaty, and the rest on the basis of intra-EU BITs. The year's developments brought the overall number of intra-EU investment arbitrations to 99, i.e. approximately 16 per cent of all cases globally.
- *Arbitral forums and rules*. Of the 42 new known disputes, 33 were filed with the International Centre for Settlement of Investment Disputes (ICSID) (three of them under the ICSID Additional Facility Rules), 6 under the arbitration rules of UNCITRAL, 2 under the arbitration rules of the Stockholm Chamber of Commerce (SCC) and 1 under those of the International Chamber of Commerce. These numbers are roughly in line with overall historical statistics.
- *Applicable investment treaties*. The majority of new cases (30) were brought under BITs. Ten cases were filed pursuant to the provisions of the Energy Charter Treaty (twice in conjunction with a BIT), two cases under the Central America–Dominican Republic–United States Free Trade Agreement (CAFTA), one case under the North American Free Trade Agreement (NAFTA) and one case under the Canada-Peru FTA. Looking at historical statistics, the Energy Charter Treaty has now surpassed the NAFTA as the IIA invoked most frequently (60 and 53 cases, respectively). Among BITs, the Argentina–United States BIT remains the agreement most frequently used (20 disputes).
- *Economic sectors involved.* About 61 per cent of cases filed in 2014 relate to the services sector. Primary industries account for 28 per cent of new cases, while the remaining 11 per cent arose out of investments in manufacturing.
- *Affected sustainable development sectors.* A number of ISDS claims concerned key sustainable development sectors such as infrastructure and climate-change mitigation, including, in particular,

Figure III.7. Known ISDS cases, annual and cumulative, 1987–2014



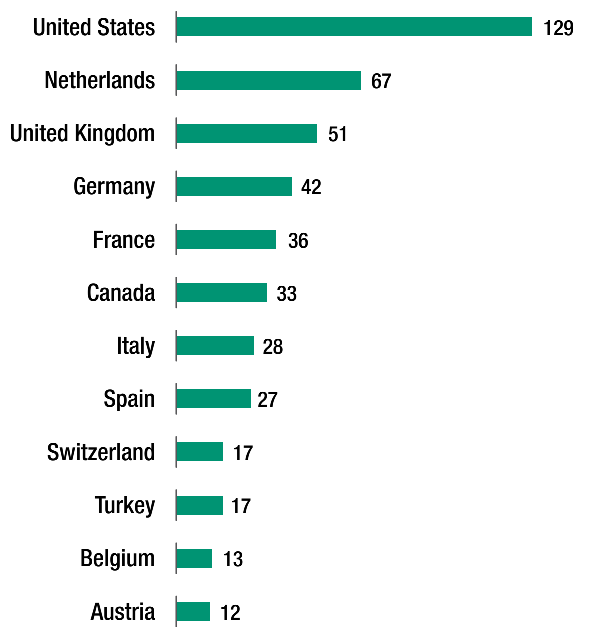
Source: UNCTAD, ISDS database.
Note: Information about 2014 claims has been compiled on the basis of public sources, including specialized reporting services. This part does not cover cases that are based exclusively on investment contracts (State contracts) or national investment laws, or cases in which a party has signaled 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 and may not exactly match case numbers reported in previous years.

Figure III.8. **Most frequent respondent States, total as of end 2014**
(Number of known cases)



Source: UNCTAD, ISDS database.

Figure III.9. **Most frequent home States of claimants, total as of end 2014**
(Number of known cases)



Source: UNCTAD, ISDS database.

the supply of electricity, gas and water, port modernization, and the regulation of renewable energy producers. A number of cases involved measures taken by governments on environmental grounds.

- *Measures challenged*. The two types of State conduct most frequently challenged by investors in 2014 were (i) cancellations or alleged violations of contracts or concessions (at least nine cases), and (ii) revocation or denial of licenses or permits (at least six cases). Other challenged measures included legislative reforms in the renewable energy sector, alleged discrimination against foreign investors relative to domestic ones, alleged direct expropriations of investments, alleged failure on the part of the host State to enforce its own legislation and alleged failure to protect investments, as well as measures related to taxation, regulation of exports, bankruptcy proceedings and water tariff regulation. Information about a number of cases is lacking. Some of the new cases concern public policies, including environmental issues, anti–money laundering and taxation.
- *Amounts claimed.* Information regarding the amounts sought by investors is scant. For cases where this information has been reported, the amount claimed ranges from $8 million to about $2.5 billion.

b. ISDS outcomes

In 2014, ISDS tribunals rendered at least 43 decisions in investor-State disputes, 34 of which are in the public domain (at the time of writing). Of these public decisions, 11 principally addressed jurisdictional issues, with 6 decisions upholding the tribunal's jurisdiction (at least in part) and 5 decisions rejecting jurisdiction. Fifteen decisions on the merits were rendered in 2014, with 10 accepting – at least in part – the claims of the investors, and 5 dismissing all of the claims. The other 8 public decisions relate to annulments and preliminary objections.

Of the 10 decisions finding the State liable, 6 found a violation of the FET provision and 7 a violation of the expropriation provision. At least 8 decisions rendered in 2014 awarded compensation to the investor, including a combined award of approximately $50 billion in 3 closely related cases, the highest known award – by far – in the history of investment arbitration. Five decisions on applications for annulment were issued in 2014 by ICSID *ad hoc* committees, all of them rejecting the application for annulment.

Ten cases were reportedly settled in 2014, and another five proceedings discontinued for unknown reasons.

By the end of 2014, the overall number of concluded cases had reached 405. Out of these, 36 per cent (144 cases) were decided in favour of the State (all claims dismissed either on jurisdictional grounds or on the merits), and 27 per cent (111 cases) ended in favour of the investor (monetary compensation awarded). Approximately 26 per cent of cases (105) were settled and 9 per cent of claims (37) discontinued for reasons other than settlement (or for unknown reasons). In the remaining 2 per cent (8 cases), a treaty breach was found but no monetary compensation was awarded to the investor (figure III.10).

Out of the 144 decisions that ended in favour of the State, almost half (71 cases) were dismissed by tribunals for lack of jurisdiction.[10]

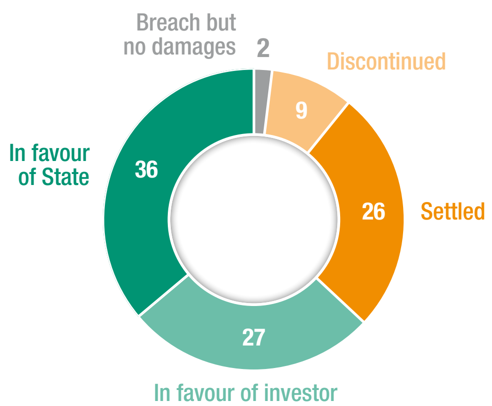
Looking at the decisions on the merits only, 60 per cent were decided in favour of the investor, and 40 per cent in favour of the State (figure III.11).

c. Other developments in ISDS

In 2014 and early 2015, a number of multilateral developments related to ISDS took place:

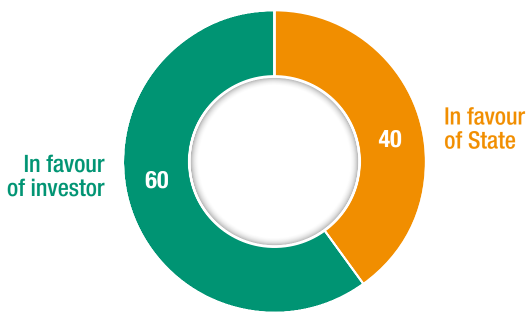
- *The UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration came into effect on 1 April 2014*. The UNCITRAL Transparency Rules provide for open oral hearings in ISDS cases as well as the publication of key documents, including notices of arbitration, pleadings, transcripts, and all decisions and awards issued by the tribunal (subject to certain safeguards, including protection of confidential information). By default (in the absence of further action), the Rules apply only to UNCITRAL arbitrations brought under IIAs concluded after 1 April 2014, and thus exclude the pre-existing IIAs from their coverage.
- *The United Nations General Assembly adopted the Convention on Transparency in Treaty-based Investor-State Arbitration on 10 December 2014*. The aim of the Convention is to give those States (as well as regional economic integration organizations) that wish to make the UNCITRAL Transparency Rules applicable to their existing

Figure III.10. Results of concluded cases, total as of end 2014
(Per cent)



Source: UNCTAD, ISDS database.

Figure III.11. Results of decisions on the merits, total as of end 2014
(Per cent)



Source: UNCTAD, ISDS database.
Note: Excluding cases (1) dismissed by tribunals for lack of jurisdiction, (2) settled, (3) discontinued for reasons other than settlement (or for unknown reasons), and (4) in which a treaty breach was found but no monetary compensation was awarded to the investor.

IIAs a mechanism to do so. Specifically, and in the absence of reservations by the signatories, the Transparency Rules will apply to disputes where (i) both the respondent State and the home State of the claimant investor are parties to the Convention; and (ii) only the respondent State is party to the Convention but the claimant investor agrees to the application of the Rules. A signing ceremony was held on 17 March 2015 in Port Louis, Mauritius, opening the convention for signature, and by mid-May 2014, 11 countries had signed.[11]

- *On April 18, 2015, the Republic of San Marino deposited its Instrument of Ratification of the ICSID Convention with the World Bank*. San Marino signed the ICSID Convention on 11 April 2014. The ratification marks the last step in the membership process for San Marino to become an ICSID Contracting State.

Notes

1 For more information about these investment policy measures, please visit UNCTAD's Investment Policy Hub at http://investmentpolicyhub.unctad.org. Percentage figures exclude "neutral" measures.

2 "Other IIAs" refers to economic agreements other than BITs that include investment-related provisions, e.g. investment chapters in economic partnership agreements (EPAs) and free trade agreements (FTAs), regional economic integration agreements and framework agreements on economic cooperation.

3 Based on International Bureau of Fiscal Documentation (IBFD) database. www.ibfd.org.

4 Algeria, Benin, Burkina Faso, China, the Congo, Côte d'Ivoire, Cuba, Ethiopia, India, Indonesia, Kazakhstan, Kenya, Morocco, Namibia, Pakistan, the Philippines, the Russian Federation, South Africa, the Bolivarian Republic of Venezuela and Viet Nam.

5 http://unctad-worldinvestmentforum.org/followup-events/media-center/.

6 Brazil signed 14 BITs in the 1990s; however none of these treaties entered into force.

7 The new draft Indian model BIT is available at https://mygov.in/group-issue/draft-indian-model-bilateral-investment-treaty-text/.

8 See https://www.regjeringen.no/nb/dokumenter/horing---modell-for-investeringsavtaler/id2411615/.

9 Between January 2014 and May 2015, Indonesia sent notices of termination to Bulgaria, Cambodia, China, Egypt, France, Hungary, India, Italy, Kyrgyzstan, the Lao People's Democratic Republic, Malaysia, the Netherlands, Romania, Singapore, Slovakia, Spain, Turkey and Viet Nam.

10 These are cases in which a tribunal found, for example, that the asset/transaction did not constitute a "covered investment", that the claimant was not a "covered investor", that the dispute arose before the treaty entered into force or fell outside the scope of the ISDS clause, that the investor had failed to comply with certain IIA-imposed conditions (e.g. the mandatory local litigation requirement) or other reasons for dismissal.

11 Canada, Finland, France, Germany, Italy, Mauritius, Sweden, Switzerland, the Syrian Arab Republic, the United Kingdom and the United States.

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