

UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD)

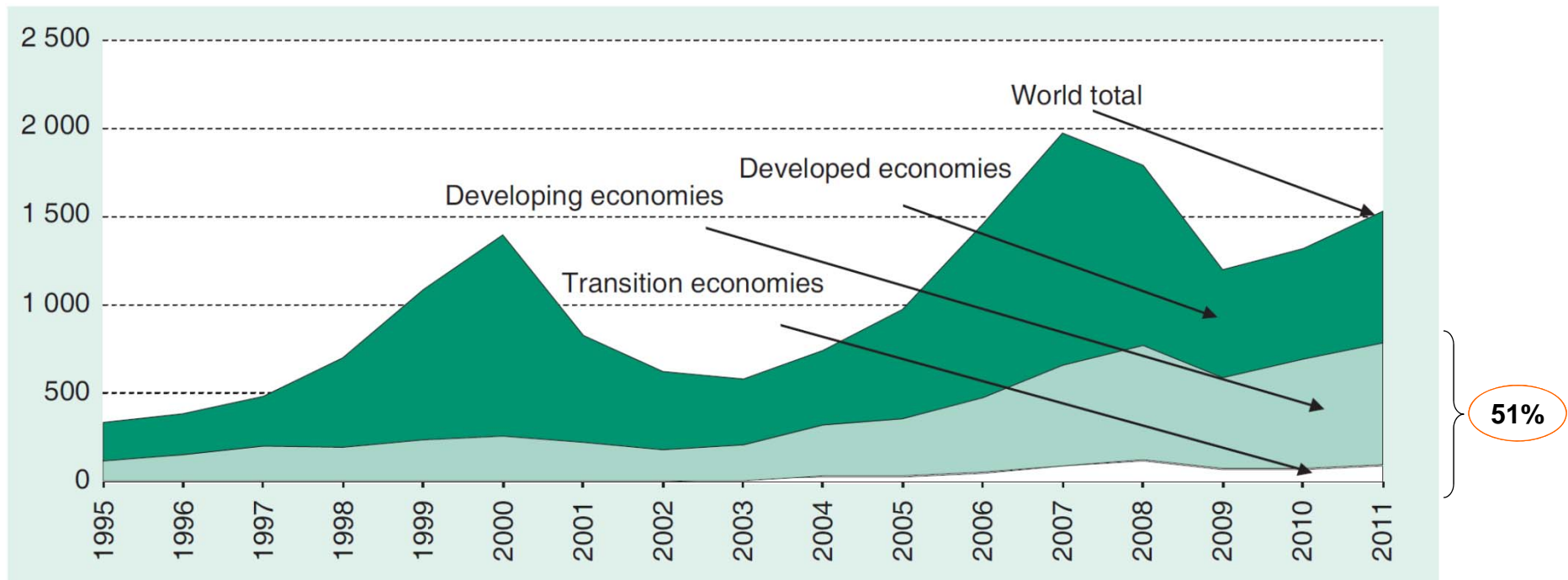
Towards a new generation of investment policies

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FDI inflows up across all major economic groupings

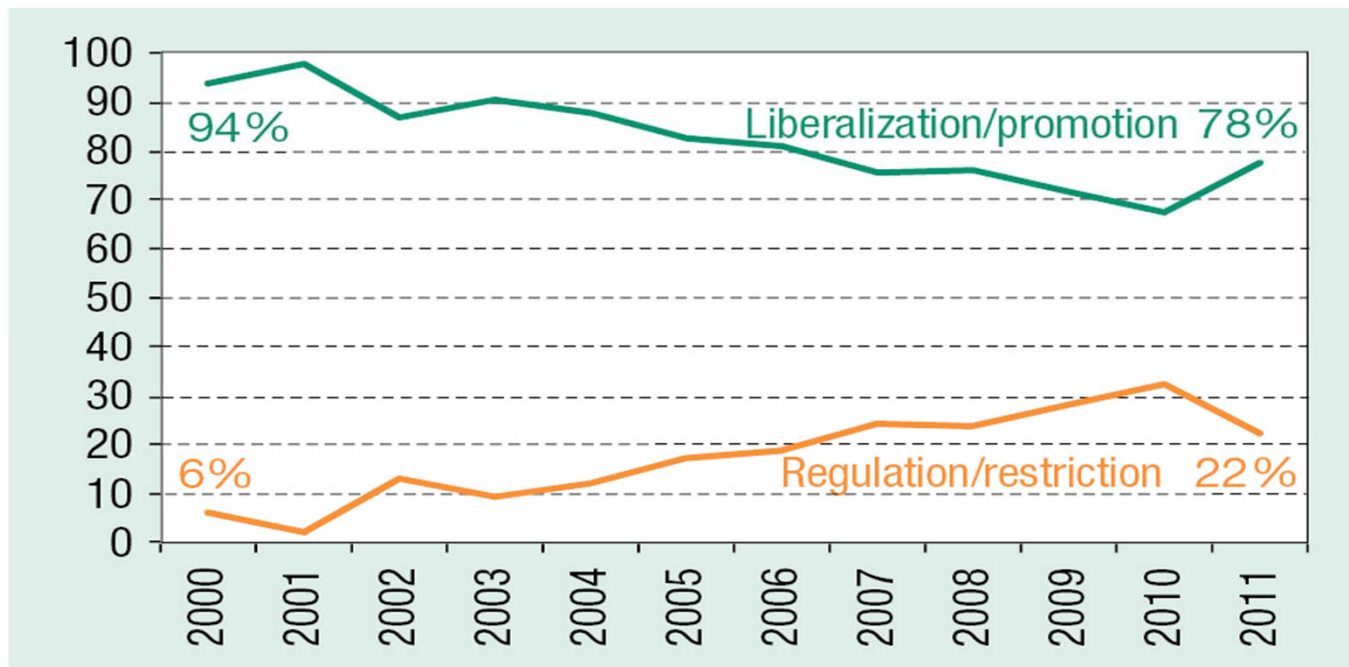
FDI inflows by group of economies, 1990–2011
(Billions of dollars)



National investment policies continued to be favourable to foreign investors

National investment policy changes, 2000 – 2011

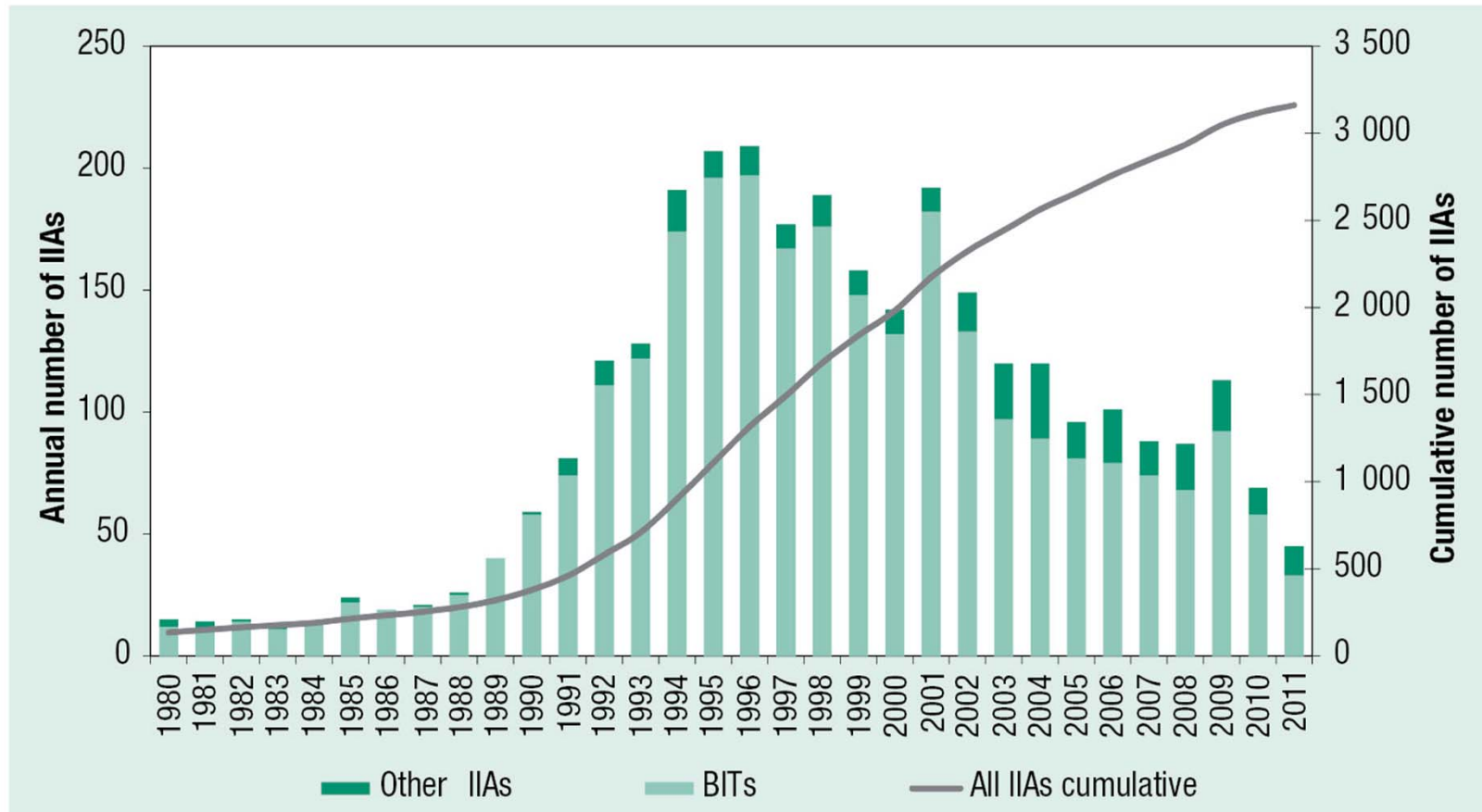
(Per cent of measures)



International investment policies see a shift from the bilateral to the regional level

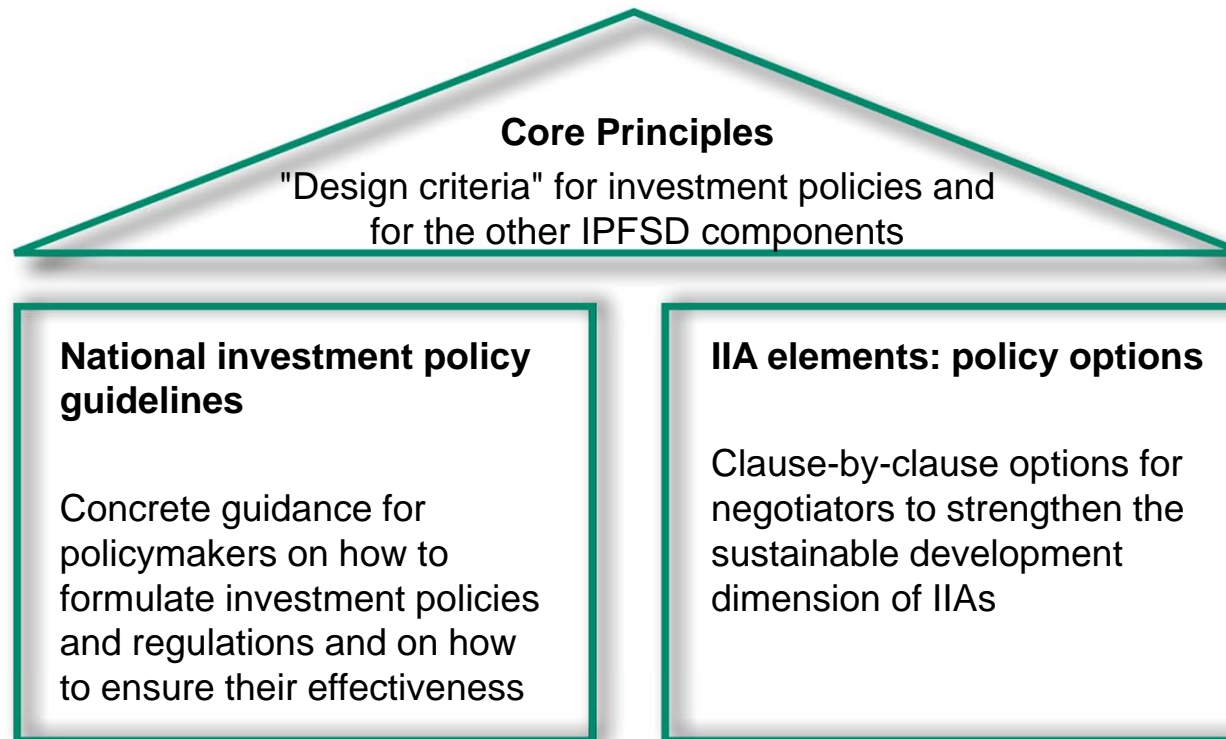
Trends of BITs and “other IIAs”, 1980 – 2011

(Number of treaties)



UNCTAD's Investment Policy Framework for Sustainable Development helps policymakers address these challenges

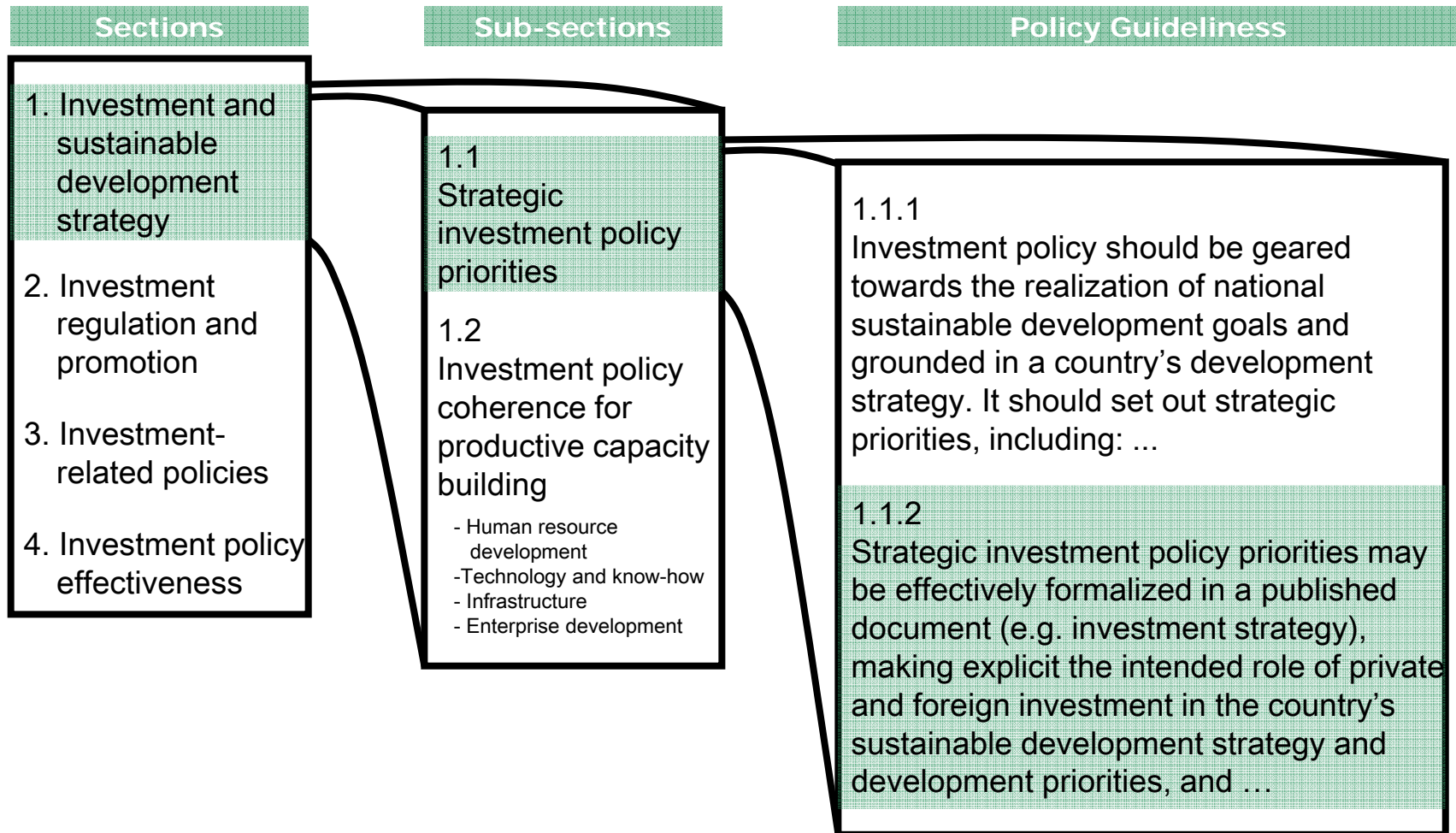
Structure and components of the IPFSD



Core principles for investment policymaking

- ① **Investment for sustainable development** •...overarching objective of investment policymaking ...
- ② **Policy coherence** •...grounded in a country's overall development strategy ... coherent and synergetic ...
- ③ **Public governance and institutions** •...involving all stakeholders ... standards of public governance ... predictable, efficient and transparent procedures for investors
- ④ **Dynamic policymaking** •...regular reviews for effectiveness and relevance ...
- ⑤ **Balanced rights and obligations** •...setting out rights and obligations of States and investors in the interest of development
- ⑥ **Right to regulate** •...in the interest of the public good and to minimize potential negative effects
- ⑦ **Openness to investment** •...in line with development strategy ... open, stable and predictable entry conditions ...
- ⑧ **Investment protection and treatment** •...adequate protection to established investors ... non-discriminatory
- ⑨ **Investment promotion and facilitation** •...aligned with sustainable development goals ... minimize risk of harmful competition for investment
- ⑩ **Corporate governance and responsibility** •...promote adoption of and compliance with best international practices of CSR ...
- ⑪ **International cooperation** •...address shared investment-for-development challenges ... avoid investment protectionism

National investment policy guidelines: how it works



Access to land

- 3.6.1 More than the nature of land titles (full ownership, long-term lease, land-use rights or other), predictability and security are paramount for investors. Governments should aim to ease access to land titles, adequately register and protect them, and guarantee stability. Developing and properly administering a national cadastre system can be an effective tool to encourage investment.
- 3.6.2 Full ownership of land or tradable land titles can help companies secure financing for investment, as land can be used as collateral. Transferable titles should be encouraged where specific country circumstances do not prevent this option.
- 3.6.3 Foreign ownership or user titles over agricultural land is particularly sensitive in most countries, in particular those with large rural populations and where food security is an issue. Governments should pay particular care in putting in place and enforcing regulations to protect the long-term national interest and not compromise it for short-term gains by special interest groups. Adherence to the UNCTAD, FAO, IFAD, and World Bank Principles for Responsible Agricultural Investment should be encouraged.
- 3.6.4 The development of industrial, technology or services parks as public-private partnerships has worked well in a number of countries and can be an effective tool to facilitate access to fully-serviced land by (foreign) investors.

Sustainable development features of the IPFSD's national investment policy guidelines

1 Integrating investment policy in development strategy

- Section on **strategic investment priorities** and investment policy coherence for **productive capacity building**, including sub-sections on investment and: Human resource development, Infrastructure (including section on PPPs), Technology, Enterprise development
- Attention to investment policy options for the **protection of sensitive industries**
- Sections on other policy areas geared towards overall sustainable development objectives to ensure **coherence** with investment policy

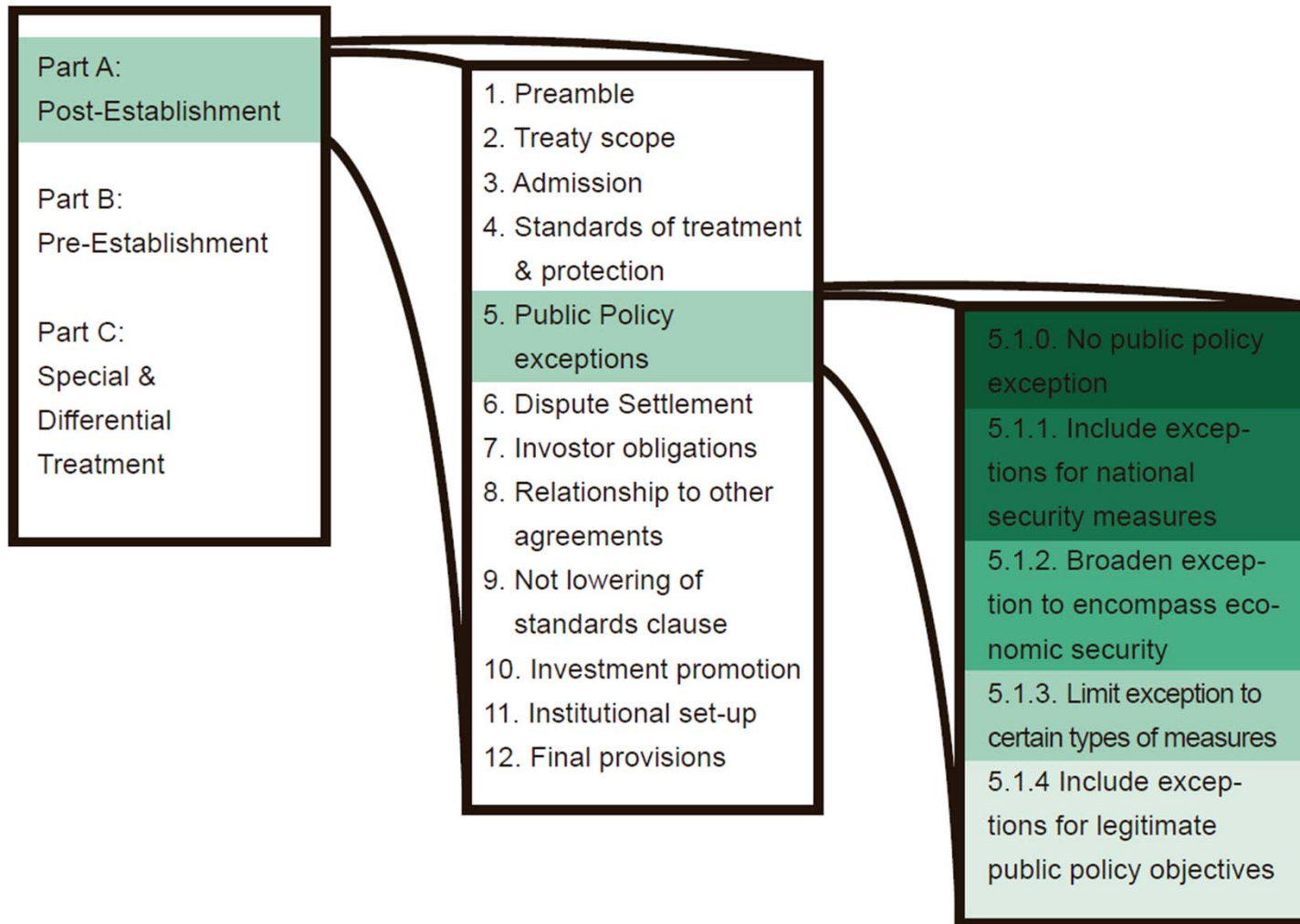
2 Incorporating sustainable development objectives in investment policy

- Specific guidelines for the design of investment-specific policies and regulations, including not only establishment and operations, treatment and protection of investments, and investment promotion and facilitation, but also **investor responsibilities**
- Guidance on the encouragement of responsible investment and on guaranteeing compliance with **international core standards**
- Guidance on investment promotion and use of **incentives in the interest of inclusive and sustainable development**
- Specific guidelines aimed at **minimizing potential negative effects of investment**, such as tax avoidance, anti-competitive behaviour, core labour standards, environmental impact
- A sub-section on access to land, incorporating the **Principles for Responsible Agricultural Investment** (PRAI)

3 Ensuring investment policy relevance and effectiveness

- Section on investment policy effectiveness, including guidance on **public governance and institutional capacity-building**
- Guidance on the **measurement of policy effectiveness**, with reference to quantitative investment impact indicators and UNCTAD tools (FDI Attraction and Contribution Indices)

The IIA elements table: how it works



An excerpt from the IPFSD framework

4.3 Fair and equitable treatment (FET)

... protects foreign investors/ investments against, e.g. denial of justice, arbitrary and abusive treatment

- 4.3.0 Give an unqualified commitment to treat foreign investors/investments “fairly and equitably”.
- 4.3.1 Qualify the FET standard by reference to:
 - minimum standard of treatment of aliens under customary international law (MST/CIL)
 - international law or principles of international law.
- 4.3.2 Include an exhaustive list of State obligations under FET, e.g. obligation not to
 - deny justice in judicial or administrative proceedings
 - treat investors in a manifestly arbitrary manner
 - flagrantly violate due process
 - engage in manifestly abusive treatment involving continuous, unjustified coercion or harassment
 - infringe investors’ legitimate expectations based on investment-inducing representations or measures.
- 4.3.3 Clarify (with a view to giving interpretative guidance to arbitral tribunals) that:
 - the FET clause does not preclude States from adopting good faith regulatory or other measures that pursue legitimate policy objectives
 - the investor’s conduct (including the observance of universally recognized standards, see section 7) is relevant in determining whether the FET standard has been breached
 - the country’s level of development is relevant in determining whether the FET standard has been breached
 - a breach of another provision of the IIA or of another international agreement cannot establish a claim for breach of the clause.
- 4.3.4 Omit FET clause.

IPFSD policy options – some examples

- Carefully craft **scope** and definitions clause.
- Structure **FET** as an exhaustive list of State obligations.
- Distinguish legitimate regulations from **regulatory takings**.
- Make full protection and security commensurate with a country's **level of development**.
- Limit the scope of the **transfer of funds** clause.
- Include **exceptions** to protect human rights, health, labor standards, and the environment.
- Consider **no ISDS**, or last resort ISDS jurisdiction.
- Create an **institutional setup** that makes the IIA adaptable to changing development contexts.

Policy options to operationalize sustainable development objectives in IIAs

Options

Adjust existing/common provisions through clauses that safeguard policy space and limit State liability.

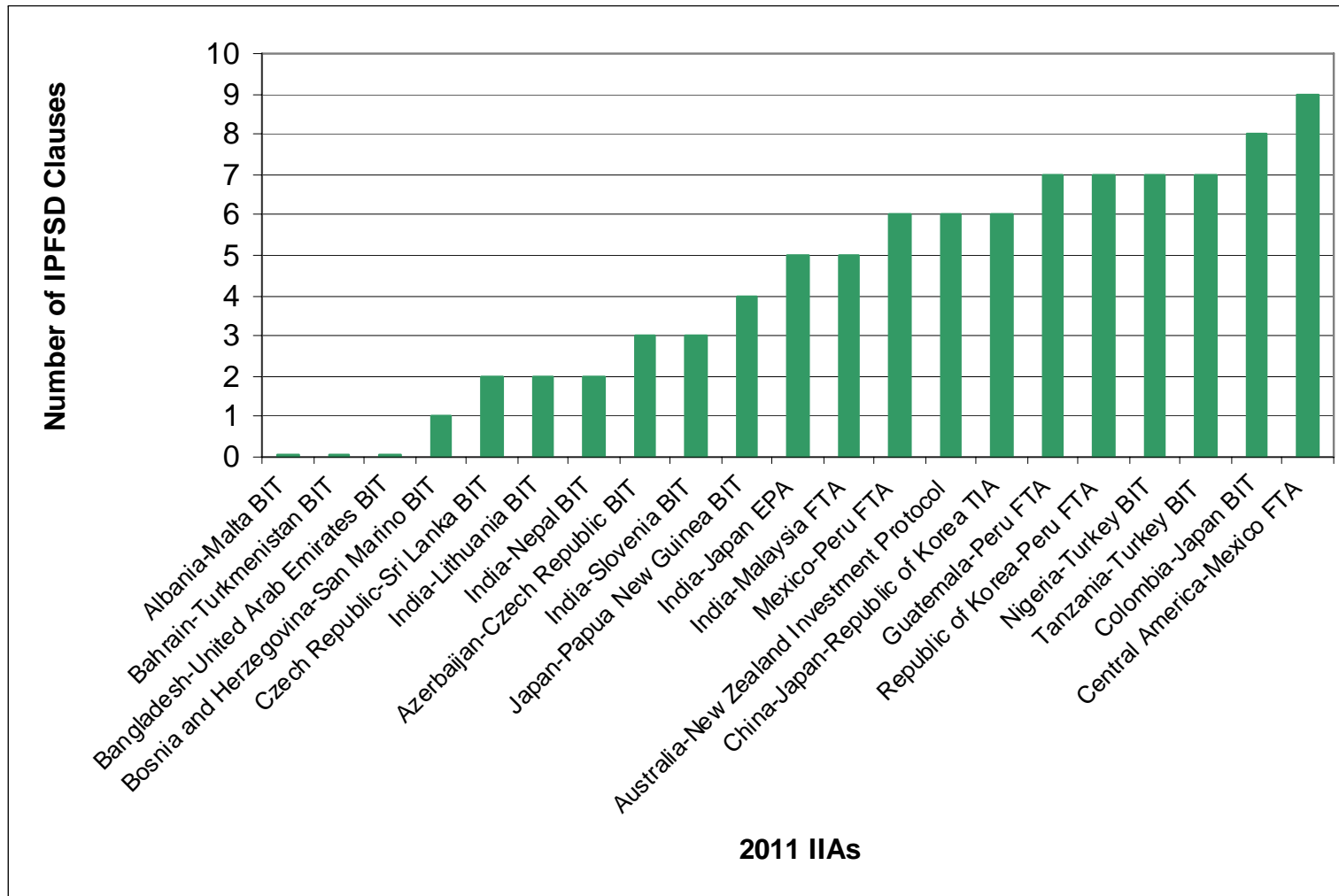
Add new provisions that balance investor rights and responsibilities, promote responsible investment, and strengthen home-country support

Introduce special and differential treatment to calibrate the level of obligations to the country's level of development

Mechanisms

- Hortatory language
- Clarifications
- Qualifications/limitations
- Reservations/carve outs
- Exclusions from coverage/exceptions
- Omissions
- Investor obligations and responsibilities
- Institutional set-up for SD impact
- Home country measures to promote responsible investment
- Lower levels of obligations
- Development-focused exceptions from obligations/commitments
- Best endeavor commitments
- Asymmetric implementation timetables

IPFSD-inspired clauses in 2011 IIAs



IPFSD: a reference point, common language, and platform for discussion with investment stakeholders

The screenshot displays the UNCTAD Investment Policy Hub website. At the top left is the UNCTAD logo, which includes the United Nations emblem and the text 'UNCTAD' and 'INVESTMENT POLICY HUB'. To the right of the logo, the text reads 'UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT' and 'DIVISION ON INVESTMENT AND ENTERPRISE'. Below this is a navigation bar with links for 'Home', 'Discussion forum', 'Core Principles', 'National Policy Guidelines', and 'Policy options for IIAs'. The main content area is titled 'Core Principles for Investment Policymaking' and features a search bar, an 'Account login' section with fields for 'Username:' and 'Password:' and a 'Submit' button, and an 'Events calendar' link. The main article is titled '1. Investment for sustainable development' and includes the text: 'The overarching objective of investment policymaking is to promote investment for inclusive growth and sustainable development.' It also shows a post by Stephen Young from the University of Glasgow, dated 14 June 2012, with the title 'Focus of the IPFSD (Stephen Young)'. The post content begins with: 'Focus of the IPFSD. The notion of 'sustainable development' is central to the IPFSD, and its definition needs to be clarified and extended. For example, p5 notes that sustainable development issues include environmental, social and poverty alleviation – as well as investor responsibility in these areas; p5/6 comments on 'a desire to pursue sustainable development through responsible investment'; and p6 states that sustainable investment implies the promotion of specific types of investment e.g. 'green investments' and 'low carbon investment' (see also the definition on p11). Aside from clarifying the definition, I wonder if the notion of sustainable development is given sufficient attention in the National

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