CHAPTER III

RECENT POLICY DEVELOPMENTS AND KEY ISSUES

INTRODUCTION

Investment policymaking is getting more complex, more divergent and more uncertain. Sustainable development considerations make investment policies more challenging and multifaceted. Policymaking is also becoming more divergent, reflecting the variety of ways in which societies and governments respond to the effects of globalization. This fact, together with more government interventions, has also reduced predictability of investment policies for investors.

Although many countries continue to liberalize and promote foreign investment, the share of such measures among all newly adopted investment policy measures has been declining lately. Moreover, several countries are taking a more critical stance towards foreign takeovers if the targeted companies are strategically important for the host country or if they affect national security. In addition, companies are exposed to political pressure on where to invest and to retention measures, discouraging them from investing abroad.

In international investment policies, investment treaties – including procedures for investment dispute settlement – are going through a reform phase, resulting in the modernization of treaties, with a stronger emphasis on sustainable development considerations, but also in the withdrawal from the regime by some countries. Megaregional agreements are becoming difficult to negotiate and implement.

These developments may represent temporary turbulence in a rapidly changing world as governments adjust their overall approaches to foreign investment. The impact of these developments may be limited, as numerous countries have recently explicitly confirmed their support for a multilateral, rules-based trading system and announced that they are negotiating new investment treaties. Yet, current developments might also be the prelude to more profound policy changes with longer-term implications for global investment governance. A rules-based investment regime that is credible, has broad international support and aims at sustainability and inclusiveness can help reduce uncertainty and improve the stability of investment relations.

A. NATIONAL INVESTMENT POLICIES

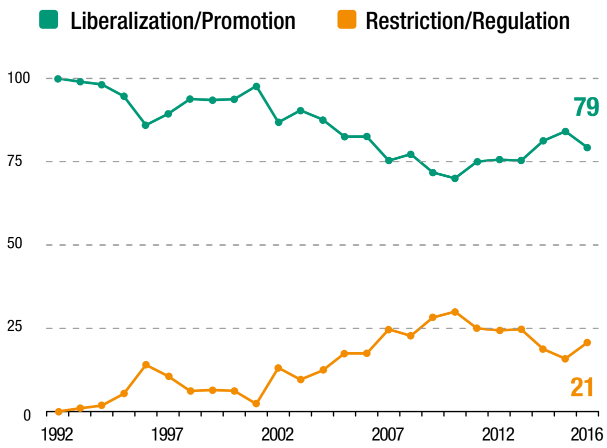
1. Overall trends

Countries remain keen to attract and facilitate FDI, but the share of regulatory or restrictive measures has increased since 2015. They manifest themselves not only in new legislation but also with regard to host countries' approaches to foreign takeovers, trade restrictions that indirectly affect foreign investors and political pressure and retention measures influencing investment decisions.

In 2016, according to UNCTAD's count, 58 countries and economies adopted 124 policy measures affecting foreign investment[1] – an increase of more than 25 per cent over the previous year's figure and the highest number since 2006. Eighty-four of these measures liberalized, promoted or facilitated investment, while 22 introduced new restrictions or regulations on investment (table III.1). The share of investment liberalization and promotion measures among all measures decreased to 79 per cent, considerably lower than during the early stages of UNCTAD's annual reporting in the 1990s, when it stood at more than 90 per cent (figure III.1). In geographic terms, developing countries in Asia took the lead in adopting investment policy measures. Countries in the Commonwealth of Independent States (CIS), Europe and Africa also introduced numerous policy measures (figure III.2).

Beyond investment-related laws and regulations, other policy developments affected foreign investors, some of which have given rise to concerns about an

Figure III.1. **Changes in national investment policies, 1992–2016** (Per cent)



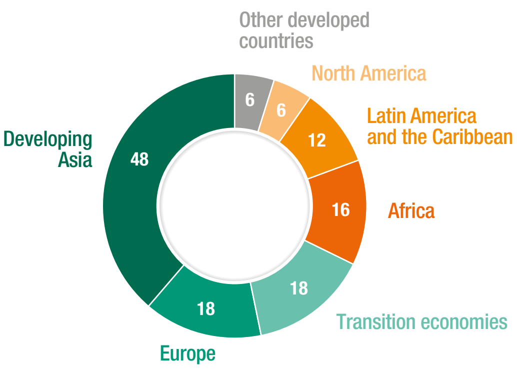
Source: ©UNCTAD, Investment Policy Monitor database.
Note: UNCTAD has been collecting information on changes in national investment policies on an annual basis since 1992. Numbers after 2000 are based on a revised methodology for UNCTAD's Investment Policy Monitor database.

Table III.1. **Changes in national investment policies, 2002–2016** (Number of measures)

Item	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016
Number of countries that introduced changes	43	59	79	77	70	49	40	46	54	51	57	60	41	49	58
Number of regulatory changes	**94**	**125**	**164**	**144**	**126**	**79**	**68**	**89**	**116**	**87**	**92**	**88**	**74**	**99**	**124**
Liberalization/promotion	79	113	142	118	104	58	51	61	77	63	65	64	52	74	84
Restriction/regulation	12	12	20	25	22	19	15	24	33	21	21	21	12	14	22
Neutral/indeterminate[a]	3	-	2	1	-	2	2	4	6	3	6	3	10	11	18

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

Figure III.2. **Regional distribution of national investment policy measures in 2016** (Number of measures)



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increase in restrictive investment policy measures. In particular, there are signs of a more critical attitude towards foreign takeovers that may result in the sale of domestic strategic assets to competitors or lead to significant layoffs of domestic employees. Furthermore, a rise in trade restrictions – as reported by the World Trade Organization (WTO) – may exert a negative effect on investment activities within global value chains. In addition, companies are exposed to political pressure as regards their investment decisions, including investment retention measures discouraging companies from investing abroad. All this qualifies the picture of an overall favourable policy environment for foreign investment.

a. Investment facilitation and promotion predominant

As in previous years, investment facilitation and promotion continued to be a major element of newly adopted investment policy measures. In several cases, such facilitation and promotion measures are included in newly adopted investment laws.

(i) Investment facilitation a prominent feature of policy measures

Cambodia launched an online business registration system as a single window for providing all the services related to registering a business and keeping the business registration up-to-date. *Egypt* established the Supreme Council for Investment, which will overlook the State's investment policies with a view of further improving the investment climate and facilitating investment. Moreover, in 2017, the country's Parliament adopted a revised investment law providing, inter alia, for a one-stop shop and several investment incentives. *India* introduced a new e-form called the "Simplified Proforma for Incorporating Company Electronically (SPICe)" to speed up and streamline the process of corporate establishment. *Kazakhstan* introduced a one-stop shop for the issuance of various permits and licenses. The *Republic of Korea* established the Special Act on Revitalizing Companies, aimed at facilitating voluntary corporate restructuring and mergers and acquisitions (M&As). It also amended the Foreign Investment Promotion Act to simplify FDI registration procedures. *Mexico* relaxed the procedures in the General Corporations Law for opening new small businesses, substantially reducing the time needed for the registration process. *Myanmar* amended its investment law, simplifying investment approval and authorization procedures for both foreign and domestic investors, while reserving some special treatment for local small and medium-sized enterprises (SMEs) on market access, land lease and technical support. The *Philippines* launched "Project Repeal: The Philippine Red Tape Challenge" to clean up regulations by revoking provisions that are no longer necessary or that may be detrimental to the economy. *Saudi Arabia* expedited the licensing procedures for foreign investors by reducing the number of required documents and shortening the review period. *Tajikistan* amended its investment law. It provides, among other things, a "single window" to facilitate investment and more detailed rules on investment protection. *Ukraine* abolished the mandatory State registration of foreign investment.

(ii) New investment incentives to attract foreign investment

Algeria introduced a new investment law offering tax incentives and infrastructure that is needed for investment projects. *Mauritius* introduced various tax incentives for both global and non-global businesses. *Israel* launched a new incentive programme – Innovation Visas – to attract innovative foreign entrepreneurs. *Singapore* amended its Economic Expansion Incentives Act to support "pioneering" activities. *Switzerland* revised its federal tax holiday scheme to improve the attractiveness of specific economic development areas. *Tunisia* enacted a new investment law, which, inter alia, removes profit taxes on major investment projects for 10 years and gives foreign investors more flexibility to transfer funds out of the country. *Turkey* introduced an extensive support package for research and development (R&D) and innovation-related activities. Also, in 2017, the country introduced a regulation offering Turkish citizenship to foreign investors, subject to certain conditions. In 2017, *Italy* tripled the tax credit for businesses engaged in R&D. It also adopted new rules to provide for a "golden visa" for foreign investors, subject to certain conditions. The *Lao People's Democratic Republic* promulgated a new investment promotion law, offering various incentives to attract investment in promoted industries and hardship areas. *Serbia* introduced the "Regulation on Terms and Conditions for Attracting Direct Investments", stipulating, among other points, the criteria, terms and conditions for attracting direct investment and investment of special importance.

(iii) Policies related to special economic zones

Bahrain opened the Investment Gateway Bahrain for business, allowing the purchase of land on Muharraq Island by foreign investors for commercial and light industrial use. *Bangladesh* offered a new package of incentives for investors in special economic zones (SEZs), exempting developers and investors from value-added tax and import duties on items directly linked with the development and construction of SEZs. *Indonesia* transformed the status of Batam from a free trade zone to an SEZ, providing additional benefits, including tax holidays and accelerated amortizations. *Morocco* promulgated a new investment law that centralizes investment promotion activities in the Moroccan Agency for Investment Development and Export, and creates free zones in each of the country's 12 regions. In 2017, *Zimbabwe* introduced various tax incentives for companies within SEZs, on the condition that these incentives be limited to production for export.

(iv) New public-private partnership regimes

Argentina enacted a public-private partnership (PPP) law to establish a legal framework and to attract private investment in key areas such as public infrastructure, housing and innovative technologies. *Romania* adopted a new PPP law, enshrining more flexible terms for determining the technical and economic indicators of a project and providing more options for investment financing. *Ukraine* amended its PPP law to increase the level of legal certainty and protection of investors in such arrangements.

(v) Reform of the domestic system of investment dispute resolution

Bahrain introduced two specialized courts for commercial and investment disputes, aiming to ensure that disputes will be resolved quickly and fairly. *Myanmar* promulgated a new arbitration law, providing a comprehensive legal framework for domestic and international arbitration.

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

Numerous countries liberalized entry and establishment conditions for foreign investors.[2]

(i) Financial services a focus of investment liberalization

India permitted 100 per cent FDI in the capital of asset reconstruction companies under the automatic route. It further liberalized the pension and insurance sectors. The *Philippines* allowed 100 per cent foreign ownership in insurance adjustment companies, lending companies, financing companies and investment houses. *Thailand* exempted foreign businesses from license requirements in certain banking and insurance activities.

(ii) Liberalization of extractive industries and land ownership

Argentina eased certain restrictions on the acquisition and leasing of rural lands by foreign individuals and legal entities. *Brazil* lifted the requirements for the national oil company to be the sole operator of all pre-salt oil fields and to hold a minimum of 30 per cent equity in each of these fields, opening the door to greater foreign investment. *Malawi* lifted a ban on oil and gas exploration in Lake Malawi. *Myanmar* introduced the new Condominium Law, permitting foreigners to own up to 40 per cent of a condominium building.

(iii) Increase of foreign ownership ceilings in stock exchanges

India raised the foreign ownership ceiling in Indian stock exchanges, depositories, banking and insurance companies and commodity derivative exchanges from 5 to 15 per cent. *Zimbabwe* expanded foreign ownership limits, allowing foreign investors to own up to 49 per cent of companies listed on the Zimbabwe Stock Exchange.

(iv) Some investment liberalization measures in other sectors

Bahrain amended its Commercial Companies Law, allowing 100 per cent foreign ownership in health and social work, information and communications, mining and quarrying, among others. *Brunei Darussalam* exempted seven business activities – such as retail stores and gas stations – from the requirement for a business license. *China* replaced, to a large extent, the approval requirement for the establishment of and changes in foreign-invested enterprises through a nationwide filing system. *India* amended regulations to further liberalize and rationalize the investment regime for foreign venture capital investors and to encourage foreign investment in start-ups. In June 2016, the country also introduced another comprehensive FDI liberalization strategy, raising sectoral caps in different industries, bringing more activities under the automatic route. *Indonesia* introduced its new "Negative List" for investment, increasing the allowed ceiling for foreign investment in a number of sectors, but also adding some restrictions. *Myanmar* opened trade in construction materials to foreign investors, if they engage in such activities in joint ventures with local firms. *Saudi Arabia* raised the ceiling for foreign investment in wholesale and retail trade from 75 to 100 per cent, if certain conditions are met. *Ukraine* adopted a law that allows State enterprises in the aviation sector to set up joint ventures with foreign partners.

(v) Privatization another important facet of investment policies

Several countries undertook full or partial privatization, benefiting both domestic and foreign investors. For instance, *Finland* privatized a 49.9 per cent stake in its State defense company, Patria Oy. *Greece* finalized the privatization of the Kassiopi site, located on the island of Corfu. Also, the Greek Privatization Fund sold the majority stake in the Piraeus Port Authority to a Chinese investor. The *Republic of Korea* undertook a partial privatization of the State-owned Woori Bank. The *Russian Federation* partially privatized Alrosa (a diamond mining company) and Rosneft (an oil company). *Serbia* signed a contract with a Chinese investor for the sale of the country's only steel mill. *Ukraine* issued a list of more than 130 State entities subject to privatization. It also introduced a law titled "On amendments to some laws of Ukraine to streamline the process of privatization" (see also chapter I).

c. New investment restrictions or regulations affect a variety of sectors with a focus on strategic industries or national security

Approximately one fifth of all newly adopted investment policy measures in 2016 restricted or regulated foreign investment.

(i) New restrictive or regulatory measures in strategic industries

Australia subjected to foreign investment reviews any acquisitions by private foreign investors of certain infrastructure assets from the Commonwealth, a State, a Territory or a local governing body. The country also objected to the 99-year lease of Ausgrid, the New South Wales electricity distribution network, to foreign bidders as contrary to the national interest. *Brazil* reversed a liberalization measure of March 2016 that would have raised the foreign ownership cap in domestic airlines from 20 to 49 per cent and would have repealed the requirement that directors be Brazilian nationals. However, further liberalization of the industry remains under discussion.

(ii) New measures relating to national security

Bulgaria amended the Privatization and Post-Privatization Control Act to include three defence suppliers in the list of State-owned enterprises that are not subject to privatization. *Canada* issued "Guidelines on the National Security Review of Investments" in an effort to provide more clarity to foreign investors.

(iii) Restrictions or regulations based on concerns about local producers' competitiveness

Indonesia imposed a 20 per cent limit on foreign ownership in companies that offer electronic payment services. *Namibia* adopted a new investment law, reserving certain business activities, including retail, for Namibians. The law also allows the Government to reserve specific sectors to certain categories of investors in the interest of national security and in the public interest. *Romania* introduced a law requiring large retailers that have an annual net turnover of more than €2 million or own assets representing that amount to purchase at least 51 per cent of certain foodstuffs from domestic producers.

(iv) Regulations on land ownership by foreign investors

Territorial subdivisions in *Australia* and *Canada* introduced new fees and taxes relating to the acquisition of residential real estate in areas with overheated housing markets. *Poland* adopted new restrictions for the acquisition of agricultural and forest land and for purchasing shares in Polish companies that have agricultural property.

d. Merger controls affect foreign investors

In 2016, governments raised objections against a number of foreign takeovers, in particular when they involved the sale of strategic domestic assets to foreign companies. The approximate gross value of M&As withdrawn for regulatory reasons and having a value exceeding $100 million was roughly $167.9 billion, involving at least seven deals. This represents 15.2 per cent of all M&As (exceeding $100 million) that did not materialize in 2016 (calculated on the basis of the number of deals). However, based on the value of the seven deals, the amount represents 73.9 per cent of all these M&As. Of these deals, one (Allergan-Pfizer) amounted to $160 billion alone.

The main industries in which M&As were withdrawn for regulatory reasons in 2016 are high-tech manufacturing (e.g. pharmaceuticals, semiconductors and electronics) and telecommunication. One case affected the food and beverages sector.

As far as the home economies of targeted companies are concerned, European countries rank first (including, inter alia, France, Germany, Ireland and Sweden). On the buyer's side, investors from China were predominantly affected.

Of seven M&As withdrawn for regulatory reasons, three were terminated because of *national security related concerns in the screening process*. All concern attempts by Chinese investors to acquire the assets of high-tech firms, including semiconductor manufacturing. Two M&As were withdrawn in 2016 because of *concerns by competition or prudential authorities*, and one foreign takeover was aborted for *tax-related reasons*. In addition, one M&A was withdrawn *during the host-country approval process* (table III.2).

In addition to administrative decisions such as those just described, discussions have occurred in some countries about reinforcing the regulatory framework for the screening of foreign takeovers. Recently, Germany, France and Italy have jointly suggested to the European Commission the establishment of additional means to restrict or prohibit investments by non-EU persons in order to ensure a level playing field, including reciprocity in investment relations.[3]

Other countries have clarified or reinforced their regulatory regimes relating to the national security review of foreign investment. The Canadian Government issued guidelines related to its national security review of foreign investment, providing greater clarity to potential investors. Among other steps, it will examine the effects that a projected investment may exert on its national defence capabilities, the security of critical infrastructure and the transfer of sensitive technology out of the country.[4] In addition, China, France and the Russian Federation have introduced or amended national security laws in recent years (*WIR15*, p. 104).

e. Other restrictive policies affect foreign investors

According to the WTO, in the period from mid-October 2015 to mid-October 2016, WTO members introduced 182 new trade-restrictive measures.[5] These restrictions may negatively affect investors, in particular those operating in global supply chains. UNCTAD estimates that approximately 60 per cent of international trade takes place between different units within multinational companies or between multinationals and their global suppliers (*WIR13*, p. 122). Recently, international companies have also been confronted with political pressure on where to invest and with investment retention measures, discouraging them from investing abroad.

f. Concluding remarks

Recent investment policymaking shows a mixed picture. On the one hand, investment liberalization, promotion and facilitation were core features of investment policymaking in 2016. On the other hand, countries have become, in general, more critical of foreign takeovers, in particular if those takeovers affect national security or aim at acquiring strategic assets. Companies are also exposed to political pressures influencing investment

Table III.2. Foreign takeovers withdrawn for regulatory reasons in 2016 (Illustrative list)

For national security reasons	
Fujian Grand Chip Invest Fund -Aixtron SE[a]	The German Ministry of Economy and Energy withdrew its initial certificate of non-objection to the takeover of Aixtron (Germany) by a Chinese company on 24 October 2016. On 2 December 2016, following a recommendation of the Committee on Foreign Investment in the United States (CFIUS), the President of the United States prohibited the acquisition of the United States subsidiary of Aixtron by the same Chinese company on the basis of national security concerns.
Consortium led by Chinese investors - Philips NV[b]	The CFIUS raised concerns about a planned sale by the Dutch electronics group Philips of the majority of its Lumiled (United States) LED lights unit to a consortium headed by Go Scale Capital of China on the basis of an alleged threat to the national security of the country. In January 2016, Phillips announced that it was abandoning the proposed sale.
Xiamen Sanan Integrated Circuit Co Ltd - GCS Holdings[c]	Xiamen Sanan Integrated Circuit announced in March 2016 its intention of acquiring the Taiwan Province of China–based power electronics and chip foundry GCS Holdings Inc, including its California-based subsidiary Global Communication Semiconductors (GCS) LLC. The deal was abandoned on 1 August 2016 because of concerns expressed by the CFIUS.
For competition or prudential reasons	
Visma AS – Fortnox AB[d]	On 14 March 2016, Visma (Norway) announced a recommended tender offer to the shareholders and holders of warrants of Fortnox (Sweden). The Swedish competition authority did not approve the transaction and issued a draft statement of objections to Visma, raising the possibility of initiating a court proceeding to prevent the finalization of the transaction. Consequently, Visma abandoned the acquisition of Fortnox.
Altice NV – SFR Group[e]	In October 2016, France's stock market authority (Autorité des Marchés Financiers) opposed the public exchange offer filed by Netherlands-based Altice for all the remaining shares issued by SFR Group and not currently owned by Altice (equivalent to 22 per cent of all ownership).
For tax-related reasons	
Pfizer - Allergan[f]	On 6 April 2016, Pfizer terminated a $160 billion deal with the Ireland-based pharmaceutical corporation Allergan. Pfizer, a United States-domiciled corporation, attempted to merge with Allergan so as to shift its domicile to Ireland and benefit from lower corporate taxes. However, the United States Treasury elaborated new rules targeting "serial inverters" (companies that have repeatedly changed their domicile in order to gain fiscal benefits). As a consequence of these regulatory changes, the deal turned out to be less economically attractive.
Withdrawn during approval process	
Felda Global Ventures - Zhong Ling Nutril-Oil Holdings Ltd[g]	On 8 April 2016, the agribusiness company Felda Global Ventures (Malaysia) announced the termination of a planned deal to buy a 55 per cent stake in China-based edible oils producer Zhong Ling Nutril-Oil Holdings Ltd. The purchases were subject to several conditions. Among others, they needed the written approvals of Bank Negara and the Finance Ministry. When Felda withdrew its offer, it did not disclose which conditions could not be met.

Source: ©UNCTAD, based on cross-border M&A database (www.unctad.org/fdistatistics).
[a] https://www.nytimes.com/2016/10/25/business/dealbook/germany-china-technology-takeover.html?_r=0, https://www.bloomberg.com/news/articles/2016-12-02/obama-blocks-chinese-takeover-of-aixtron-as-u-s-security-risk.
[b] www.reuters.com/article/us-philips-lumileds-sale-idUSKCN0V02D4.
[c] www.taipeitimes.com/News/biz/archives/2016/08/02/2003652261, www.ledinside.com/news/2016/8/gcs_holdings_sell_to_sanan_opto_blocked_by_us_authorities_to_form_joint_venture.
[d] https://www.visma.com/press-releases/fortnox290616.
[e] https://www.telegeography.com/products/commsupdate/articles/2016/10/05/amf-blocks-altice-sfr-public-exchange-offer.
[f] www.reuters.com/article/us-allergan-m-a-pfizer-idUSKCN0X3188, https://www.theguardian.com/business/2016/apr/06/pfizer-allergan-tax-inversion-deal-merger.
[g] www.thestar.com.my/business/business-news/2016/04/08/fgv-unit-scraps-plan-to-buy-55pc-stake-in-chinas-zhong-ling.

decisions and to retention measures discouraging them from investing abroad. Investors operating in global value chains may also be indirectly affected by an increasing number of trade-restrictive measures.

In light of the critical role of investment as a source of economic growth and job creation, it is important that countries maintain a rules-based, predictable, inclusive and non-discriminatory environment for investment. The non-binding Guiding Principles for Global Investment Policymaking,[6] endorsed by the G20 leaders at the Hangzhou Summit in September 2016, can be useful guidance for this purpose (see also section B).

2. Investment laws and their relation to IIA reform

Together with international investment agreements (IIAs), investment laws constitute the basic legal framework for cross-border investment in many countries. Although 108 countries have adopted a total of 111 investment laws[7] that promote and regulate investment, these laws have received relatively little attention in the international community. This section provides an overview of the main content of investment laws.[8] In light of the ongoing IIA reform, it seeks to raise awareness among policymakers and other stakeholders of potential parallel reform needs in respect of investment laws.

a. Investment laws share the same basic structure, but differ considerably in detail

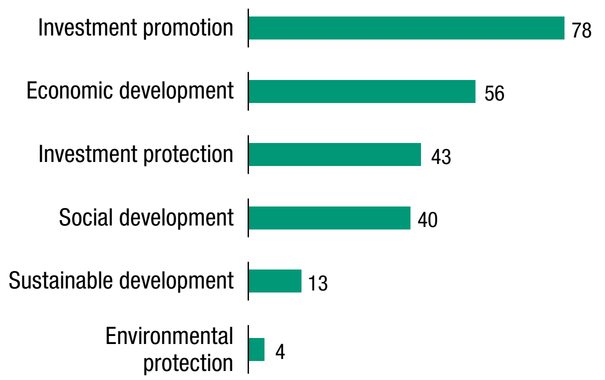
UNCTAD's database on investment laws shows that they have a similar structure and reflect many elements from UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) (UNCTAD, 2015b). Commencing with a preamble or a section on objectives and scope, most investment laws contain provisions on definitions, entry and establishment of investment, treatment and operation, investment promotion and dispute settlement. Despite these basic similarities, investment laws vary significantly in content details.

Fifty-eight per cent (64) of the laws apply to both foreign and domestic investors, whereas the others (47) target foreign investors only. Countries in Asia especially have specific *foreign* investment laws, whereas most countries in Africa have adopted general investment laws. In terms of substance, there is no significant difference between investment laws covering only foreign investors and laws applying to both domestic and foreign investors.

(i) Objectives

A large majority (86) of the investment laws examined explicitly state in their preamble or in a dedicated clause their overall objective. In most cases, the main goal is to promote investments, often in combination with the aim of protecting investors (figure III.3). Many laws also refer to general economic development objectives, such as economic growth, diversification, integration, industrial development or competitiveness, or to social development goals, such as employment, poverty reduction, skill transfer, education or health. Only four laws refer to environmental issues, such as environmental protection, biodiversity including flora and fauna, renewable energy and climate change. Moreover, only 13 of the 111 laws explicitly refer to "sustainable development" in their preamble.

Figure III.3. Objectives of investment laws, by category (Number of laws)



Source: ©UNCTAD.

(ii) Definitions

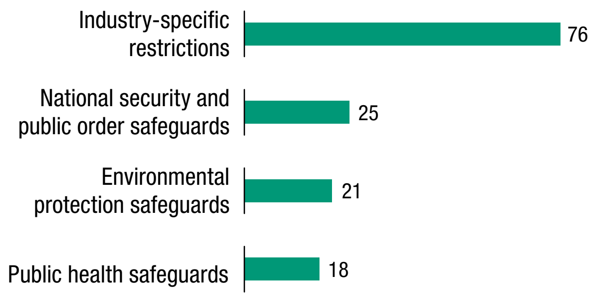
Almost all (98) of the laws include a definition of either investment (66) or foreign investment (59). More than half (60) of these laws apply a broad, asset-based approach, and more than a third (38) follow a limited enterprise-based approach. The phrase "every kind of asset" is frequently used by national investment laws as the formula for introducing a non-exhaustive list of assets qualifying as investments. Several investment laws explicitly specify that investment also includes portfolio investment.

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

(iii) Entry rules

Most investment laws include provisions on the establishment of foreign investment, including sector-specific entry restrictions (figure III.4); however, the specific approach may differ between countries. Most laws use a "negative list" approach (67 of 76 laws with sector-related entry restrictions), either by excluding certain industries from the law's 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 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 defense, 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, as a justification for restricting investment.

Figure III.4. **Entry restrictions in investment laws** (Number of laws)



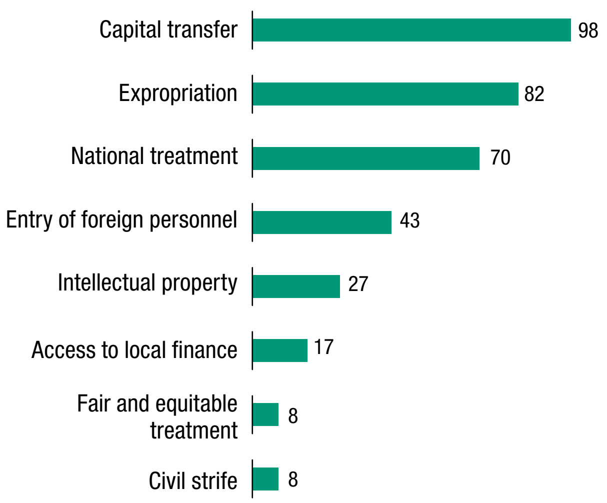
Source: ©UNCTAD.

(iv) Investment protection

The majority of the investment laws cover three key protection rights. These are the right of cross-border capital transfers (98 laws), protection in case of expropriation (82) and the guarantee of national treatment (70). To various degrees, the investment laws also include other protection provisions (figure III.5).

The fact that an investment law does not cover a certain right does not mean that the country does not grant it. For example, in most cases the country's Constitution would also cover the right of non-discrimination or protect property rights, including protection in case of expropriation.

Figure III.5. **Investment protection in investment laws** (Number of laws)

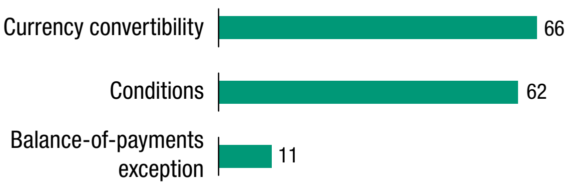


Source: ©UNCTAD.

Capital transfers

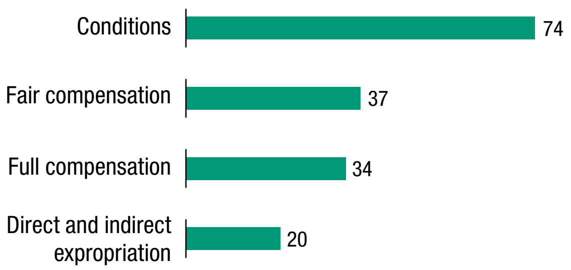
Almost all (98) of the investment laws examined contain provisions on capital transfers in relation to investments, and the text and structure of the provisions are relatively similar. These laws usually provide in very basic terms that investors have the right to transfer abroad – in a freely convertible currency – proceeds resulting from their investment. The majority then set out a non-exhaustive list of examples of protected capital movements. These may include the initial capital and additional amounts to maintain or increase an

Figure III.6. **Capital transfer provisions in investment laws** (Number of laws)



Source: ©UNCTAD.

Figure III.7. **Expropriation provisions in investment laws** (Number of laws)



Source: ©UNCTAD.

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; and compensation for expropriation.

Almost two thirds (62) of the laws subject capital transfers to certain conditions. Many laws limit the scope of the transfer right by permitting transactions only when investors have honoured their tax obligations in the host country. They may also stipulate that transfers are not permitted when there is a risk that creditors' rights would be jeopardized or when ensuring the satisfaction of judgements 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 III.6).

Expropriation

Eighty-two of the investment laws protect investors in cases of expropriation. Most of these laws (74) describe the conditions for a lawful expropriation and provide guidelines on the amount of compensation. The conditions under which an expropriation is lawful have been standardized to the point that laws authorize expropriations for the public benefit, without discrimination, against compensation and under due process of law (figure III.7).

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 explicitly 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 speak 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.

National treatment

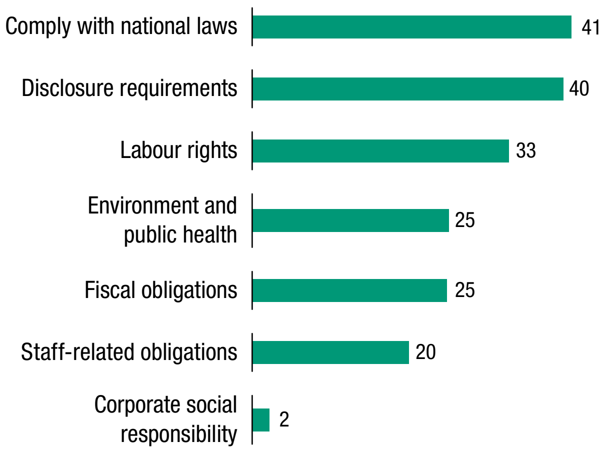
Nearly two thirds (70) of the investment laws include a provision on non-discriminatory treatment between domestic and foreign investors. In some cases, investors can claim national treatment only in "like circumstances" or under the condition of reciprocity.

In addition, the majority of investment laws with a national treatment provision (43) include exceptions to it. These exceptions, which are often drafted in a vague manner, 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.

(v) Investor obligations

More than two thirds (77) of all investment laws examined explicitly refer to certain obligations of investors. The most commonly stated, fundamental obligation is that investors must comply with the host country's laws and regulations (figure III.8). Often, duties that are more specific complement this general obligation. The most common one is the requirement to provide accurate and timely accounting information of operations (corporate disclosure). Thirty-three laws pay particular attention to respect for labour rights and standards, such as those pertaining to social security, minimum wages and trade union rights.

Figure III.8. **Investor obligations in investment laws** (Number of laws)



Source: ©UNCTAD.

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. An explanation may be that most countries have specific environmental and health regulations in addition to the general investment laws.

Some investment laws either 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 in the hiring process. Only two laws mention that investors should respect international principles and instruments on corporate social responsibility, without providing any details.

(vi) Investment promotion and facilitation

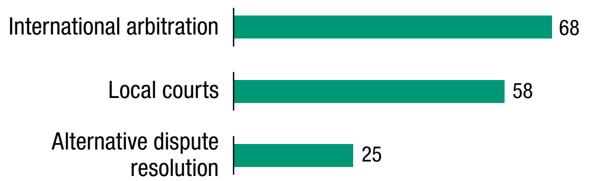
Most (74) of the investment laws examined include provisions on investment incentives. Forty-six of the investment laws include provisions related to investment promotion agencies (IPAs) and describe their tasks, such as building the country's reputation and confidence in its investment climate or identifying and promoting investment opportunities.

Investment facilitation provisions are also included in a number of investment laws. In addition to clauses on transparency (15 laws) and entry and sojourn (43), provisions refer to a one-stop shop (25), which is often set up as part of the country's IPA. The tasks of these one-stop shops usually relate to facilitating investment by providing information, issuing enterprise or concession certificates, or issuing notifications in relation to the investment. One investment law established an ombudsman for facilitating the settling of grievances of foreign investors.

(vii) Investor–State dispute settlement

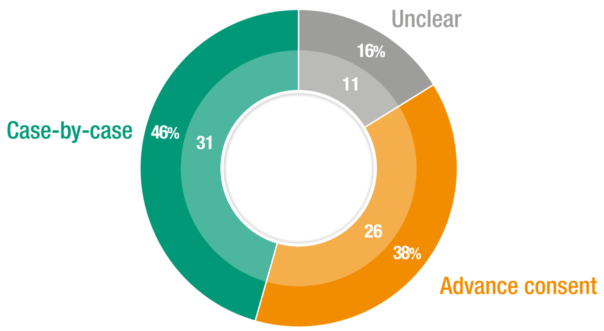
Investment laws often include investor–State dispute settlement (ISDS) provisions. In total, 85 of the laws examined include an ISDS provision. International arbitration is the ISDS mechanism to which investment laws most often refer, followed by recourse to domestic courts and alternative dispute resolution mechanisms such as conciliation or mediation (figure III.9).

Figure III.9. Investor–State dispute resolution mechanisms in investment laws (Number of laws)



Source: ©UNCTAD.

Figure III.10. Type of consent to international arbitration (Number of laws and per cent)



Source: ©UNCTAD.

The three different ISDS mechanisms often apply in combination. Thirteen laws provide investors with all three dispute settlement options, while a small majority of the 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 investors must not bring the same case in another forum once they have initiated proceedings. Ten laws stipulate that domestic courts shall settle the disputes.

Among the laws offering investors recourse to international arbitration, almost half of them reserve the host country's consent to arbitration on a case-by-case basis (figure III.10). Other investment laws, mostly in Africa, contain advance consent for international arbitration in case of investment disputes. Some laws do not provide sufficient clarity to be able to determine whether they provide for case-by-case or advance consent.

b. Investment laws and IIA reform

Investment laws and IIAs are separate but closely related policy tools for dealing with foreign investment. In each, policymakers need to decide how to treat foreign investment, how to balance investor rights and obligations, how to incorporate sustainable development considerations and how to deal with the interaction between the two instruments. On all these issues, investment laws and IIAs can be a mutual source of inspiration, as IIA negotiators may learn from policy approaches taken in investment laws and vice versa.

Investment laws and IIAs have many commonalities in respect of their main building blocks (preamble, definitions, provisions on entry and treatment of investment, investment promotion and dispute settlement). At the same time, they show considerable diversity in respect of the inclusion of specific law or treaty provisions, and the drafting of details. Another difference between investment laws and IIAs is that the laws are usually only one element within a host country's domestic policy framework for investment, whereas IIAs tend to be the exclusive or principal international instrument in this area.

IIA reform may call for parallel reform steps in corresponding clauses in investment laws. If similar or identical provisions in investment laws do not mirror IIA reform, undesirable incongruities between the two legal instruments can result and can risk rendering the IIA reform ineffective. In addition, host countries would be well advised to look beyond investment laws and assess whether IIA reform may require parallel modernization steps in other parts of their investment-related policy framework.

B. INTERNATIONAL INVESTMENT POLICIES

1. Recent developments in the international investment regime

a. Trends in treaty making

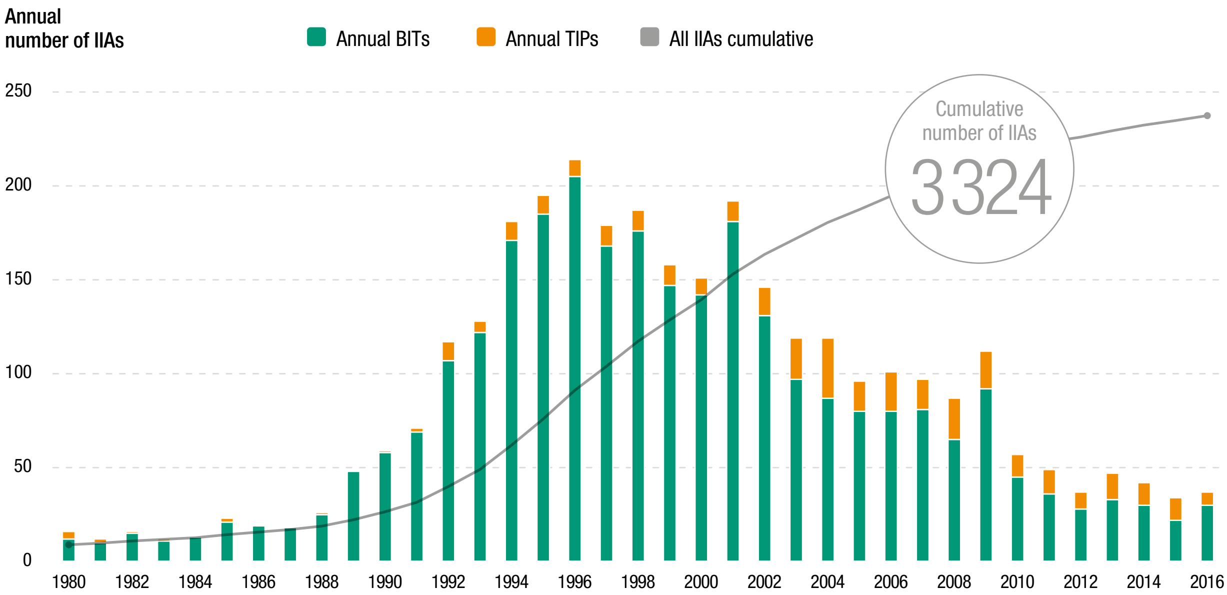
The past year was characterized by contrasting trends. As countries continued to sign and negotiate new IIAs, usually incorporating reform-oriented provisions, a number of other countries recalibrated and re-evaluated their approach to international investment policymaking.

(i) Developments in the conclusion and termination of IIAs

The universe of IIAs continues to grow amid greater complexity. In 2016, 37 new IIAs were concluded, bringing the total to 3,324 treaties by year-end (with an additional 4 treaties concluded in early 2017). Over that time, terminations of at least 19 IIAs became effective. All these actions reflect governments' broader re-adjustment of their international investment policy engagement.

In 2016, countries concluded 37 new IIAs: 30 bilateral investment treaties (BITs) and 7 treaties with investment provisions (TIPs).[9] In addition, 26 IIAs entered into force. This brought the size of the IIA universe to 3,324 agreements (2,957 BITs and 367 TIPs) by year-end (figure III.11). The most active country was Turkey, concluding seven treaties, followed by Canada, Morocco and the United Arab Emirates, with four treaties each, and the Islamic Republic of Iran and Nigeria with three treaties each. Between January and March 2017, four additional IIAs were signed.

Figure III.11. Trends in IIAs signed, 1980–2016



Source: ©UNCTAD, IIA Navigator.

At the megaregional level, two IIAs were concluded in 2016 (the Canada–European Union (EU) Comprehensive Economic and Trade Agreement (CETA), and the Trans-Pacific Partnership Agreement (TPP)). Several others remain at various stages of negotiation. These include negotiations for the African Continental Free Trade Area (CFTA), the Regional Comprehensive Economic Partnership (RCEP), the Trade in Services Agreement (TISA) and the Transatlantic Trade and Investment Partnership (TTIP).

At the same time, the international investment policy regime is facing mounting challenges from the recalibration and re-evaluation of such policymaking in some countries.

By way of illustration:

- Between 1 January 2016 and 1 April 2017, terminations became effective for at least 19 IIAs, with more scheduled to take effect later the year. Countries particularly active in terminating treaties were Indonesia (with 11) and India (with 7). Of the 19 terminated IIAs, 16 were unilaterally denounced, 1 was terminated by consent (the 1995 Argentina–Indonesia BIT), and 2 were replaced by a new treaty (the Japan–Mongolia BIT and the European Communities–Ukraine Cooperation Agreement).[10]
- Some countries are re-evaluating their networks of treaties (*WIR16*). Most recently, for example, in the United States, a Presidential Executive Order, issued in April 2017, tasks the Secretary of Commerce and the United States Trade Representative (in consultation with other government agencies) to conduct performance reviews of, inter alia, all bilateral, plurilateral and multilateral investment agreements to which the United States is a party. [11]
- Megaregional agreements with substantive investment rules are under scrutiny in several countries. For example, in January 2017, the United States informed the TPP parties that it was formally withdrawing from the agreement and expressed its intention to review the North American Free Trade Agreement (NAFTA).[12]
- Ratification processes are becoming more intricate, particularly for megaregional agreements. In the EU context, for example, questions of competency have arisen with respect to recently concluded IIAs with Canada, Singapore and Viet Nam (i.e. whether these agreements fall under the exclusive competence of the EU for purposes of ratification or instead require ratification by all member States according to each State's constitutional requirements).

The seven TIPs concluded in 2016 can be grouped into three categories, as identified in *WIR16*:

1. Three agreements with obligations commonly found in BITs, including substantive standards of investment protection and, frequently, ISDS:
    - Canada–EU CETA
    - Brazil–Peru Economic and Trade Expansion Agreement (ETEA)[13]
    - Trans–Pacific Partnership Agreement (TPP)
2. Three agreements with limited investment provisions (e.g. market access, national treatment (NT) and most favoured nation (MFN) with respect to commercial presence, "not-lowering standards" clauses or provisions on free movement of capital relating to direct investments):
    - European Free Trade Association (EFTA) States–Georgia Free Trade Agreement (FTA)[14]
    - EU–Southern African Development Community (SADC) Economic Partnership Agreement (EPA)[15]
    - Chile–Uruguay FTA[16]
3. One agreement establishing an institutional framework between the parties to promote and cooperate on investment:
    - Paraguay–United States Trade and Investment Framework Agreement (TIFA)

(ii) Developments at the regional level

Countries are actively engaged in international investment policymaking at the regional level, with current efforts including both the negotiation of new treaties as well as the reform and modernization of existing ones. Such developments occur with regard to regional groupings; the continental level (particularly in Africa); and plurilateral agreements covering different regions or continents.

- **North American Free Trade Agreement (NAFTA):** The United States expressed to its partners its intention to review NAFTA. In February 2017, the Mexican Government announced that it is beginning a consultation with the country's Senate and private sector before talks begin with the United States to review the agreement.
- **Regional Comprehensive Economic Partnership (RCEP):** Several rounds of negotiations took place throughout 2016 on the proposed RCEP.[17] Thus far, two chapters (the chapter on SMEs and the one on economic and technical cooperation) were concluded. In 2017, RCEP negotiations made progress on goods, services and investment, as well as intellectual property, electronic commerce, and legal and institutional issues.
- **Mercado Común del Sur (Mercosur):** The Member States of Mercosur signed a Protocol for the Cooperation and the Facilitation of Investment within Mercosur (April 2017). The protocol lists the characteristics an investment must have in order to be covered; circumscribes the scope of NT and MFN; and provides for protection against expropriation (without making a reference to indirect expropriation). The protocol includes specific investment facilitation provisions; emphasizes investors' obligations and social responsibility; and includes a provision creating a focal point or ombudsman in each party, charged with questions concerning investment development, promotion and cooperation. The protocol does not contain either a fair and equitable treatment (FET) clause or an ISDS clause.
- **Southern African Development Community (SADC):** The SADC Member States amended Annex 1 of the SADC Finance and Investment Protocol (August 2016). The amended version omits the FET provision and the ISDS mechanism, refines the definition of investment and investors, introduces exceptions to the expropriation provision for public policy measures, clarifies the NT provision (with reference to "like circumstances") and includes detailed provisions on investor responsibility and the right of host countries to regulate investment for the public interest. These amendments are in the process of ratification.
- **Continental Free Trade Agreement (CFTA):** The purpose of the CFTA is to create a free trade area among the member States of the African Union (AU), which is expected to cover investment. Following the launching of negotiations for a CFTA by the AU summit (June 2015), negotiations are planned for two phases: the first, expected to be concluded by end-2017, covering trade in goods and trade in services; the second will deal with the issues of investment, intellectual property rights, and competition policy.
- **COMESA–EAC–SADC Tripartite Free Trade Area (TFTA):** The TFTA was launched in June 2015 and will come into force once ratification is attained in two thirds of the 26 member States of the Common Market for Eastern and Southern Africa (COMESA), the SADC and the East African Community (EAC). Negotiations on investment are scheduled to take place in the second phase of the negotiations, together with trade in services, competition policy and intellectual property rights.
- **Pan African Investment Code (PAIC):** Developed during 2016, the PAIC is envisaged as a guiding instrument for AU member States as they embark on negotiations of IIAs, including the investment chapter for the CFTA. The PAIC includes sustainable development elements aimed at protecting legitimate public welfare objectives (e.g. public health, safety and the environment) and clarifications and refinements to the

definitions of investment, NT, and MFN. The Code also includes innovative language on investors' obligations relating to corporate social responsibility (CSR), combating bribery and compliance by investors with business ethics and human rights. The PAIC refers to UNCTAD's Investment Policy Framework for Sustainable Development in its preamble.

- **African, Caribbean and Pacific Group of States (ACP) Guiding Principles for Investment Policymaking:** ACP countries are developing Guiding Principles for Investment Policymaking for ACP States to use in the development of national and international investment policies that are balanced, predictable and sustainable development-friendly. Based on a Joint ACP-UNCTAD Proposal, the draft 10 non-binding investment principles cover areas such as policy coherence, balanced rights and obligations, right to regulate, openness to investment, investment protection and regional and international cooperation. The Principles also recognize the different levels of economic development of ACP States and emphasize the special needs and concerns of developing countries and least developed countries (LDCs).
- **Asia-Pacific Economic Cooperation (APEC) Lima Declaration:** The APEC Economic Leaders' Meeting (November 2016) adopted the Lima Declaration under the APEC 2016 theme of "Quality Growth and Human Development", which focuses on addressing challenges and opportunities for free trade and investment in the current global context and encourages members to work further towards the target of the Bogor Goals to promote regional economic integration.
- **Transatlantic Trade and Investment Partnership (TTIP):** Following four rounds of negotiations during 2016 on the TTIP, in January 2017, the EU and the United States published a joint progress assessment. Investment protection (including with respect to dispute resolution mechanisms) is among the areas identified where further work is needed.
- **Africa–EU Principles on Investment:** Work is ongoing to identify interest in and possible content of a set of non-binding key principles on investment between the EU and African countries.[18] Discussions took place during the 2016 World Investment Forum in Nairobi, Kenya, and the December 2016 Joint Africa-European Commission Trade Ministerial in Brussels, Belgium, among others.
- **Trade in Services Agreement (TISA):** The TISA is being negotiated by 23 members of the WTO.[19] Several rounds of negotiations took place in 2016, with progress made on key issues, such as domestic regulation, transparency in legislative processes, financial services, institutional arrangements and dispute settlement. Differences persist among the negotiating parties (e.g. regarding market access in certain services sectors and on certain aspects of dispute settlement). No updated workplan has been submitted regarding the possible end-date of the TISA negotiations.[20]

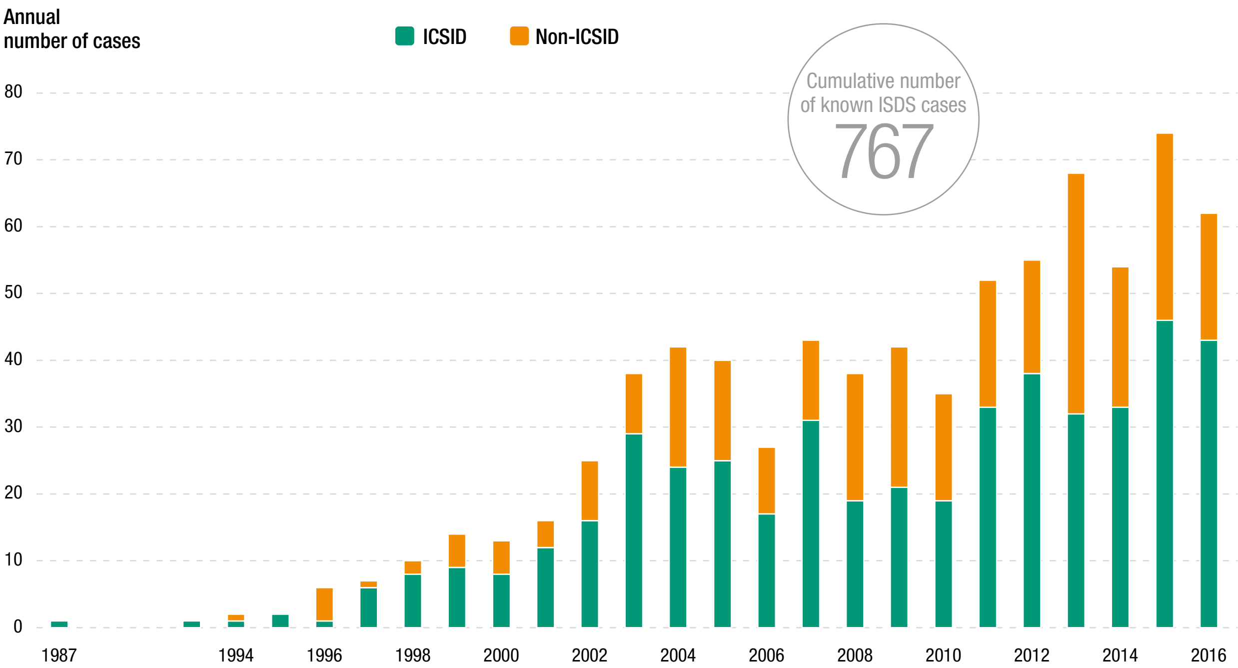
b. Trends in investor–State dispute settlement

The rate of new treaty-based ISDS cases continued unabated. In 2016, 62 new cases were initiated, bringing the total number of known cases to 767. Investors won 60 per cent of all cases decided on the merits.

(i) New cases initiated in 2016

In 2016, investors initiated 62 known ISDS cases pursuant to IIAs (figure III.12). This number is lower than the 74 initiated in the preceding year, but higher than the 10-year average of 49 cases per year (2006–2015). As of 1 January 2017, the total number of publicly known ISDS claims had reached 767. So far, 109 countries have been respondents to one or more known ISDS claims. As arbitrations can be kept confidential under certain circumstances,

Figure III.12. | **Trends in known treaty-based ISDS cases, 1987–2016**



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

the actual number of disputes filed for this and previous years is likely to be higher.

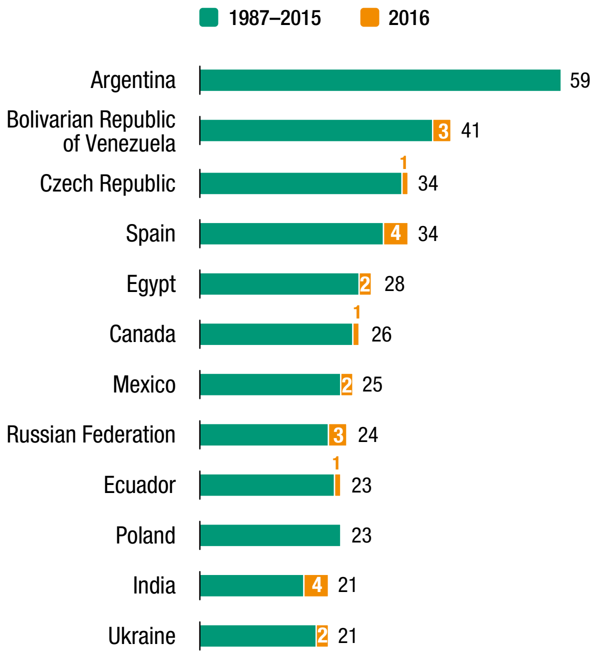
Respondent States

The new ISDS cases in 2016 were commenced against 41 countries. With four cases each, Colombia, India and Spain were the most frequent respondents (figure III.13). The cases against Colombia are the first known in the country's history. At 29 per cent, the relative share of cases against developed countries was lower than in 2015 (45 per cent).

Home States of claimants

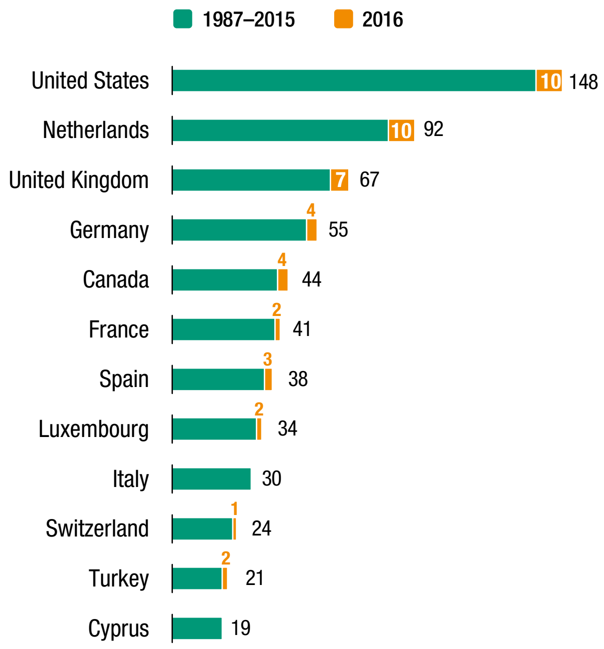
Developed-country investors brought most of the 62 known cases in 2016. Investors from the Netherlands and the United States initiated the most cases with 10 each, followed by investors from the United Kingdom with 7 (figure III.14). Investors from the Russian Federation, Turkey, Ukraine and the United Arab Emirates were the most active claimants from developing countries and transition economies, with two cases each filed in 2016.

Figure III.13. | **Most frequent respondent States, 1987–2016** (Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

Figure III.14. **Most frequent home States of claimants, 1987–2016**
(Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

Intra-EU disputes

Intra-EU disputes accounted for about one quarter of investment arbitrations initiated in 2016, down from one third in the three preceding years. The overall number of known intra-EU investment arbitrations initiated by an investor from one EU member State against another member State totalled 147 by the end of 2016, i.e. approximately 19 per cent of all known cases globally.

Applicable investment treaties

About two thirds of investment arbitrations in 2016 were brought under BITs, most of them dating back to the 1980s and 1990s. The remaining arbitrations were based on TIPs. The IIAs most frequently invoked in 2016 were the Energy Charter Treaty (with 10 cases), NAFTA and the Russian Federation–Ukraine BIT (3 cases each). Looking at the overall trend, virtually all of today's known ISDS cases are based on treaties concluded before the year 2010; about 20 per cent of all known cases invoked the Energy Charter Treaty (99 cases) or NAFTA (59 cases).

Economic sectors involved

About 60 per cent of the cases filed in 2016 related to activities in the services sector, including the following:

- Supply of electricity and gas (11 cases)
- Construction (6 cases)
- Information and communication (6 cases)
- Financial and insurance services (4 cases)
- Real estate (3 cases)
- Transportation and storage; and arts, entertainment and recreation (2 cases each)
- Accommodation and food service, and administrative and support service (1 case each)

Primary industries accounted for 24 per cent of new cases, and manufacturing for the remaining 16 per cent. This is broadly in line with the overall distribution of the 767 known ISDS cases filed to date.

Measures challenged

Investors in 2016 most frequently challenged the following types of State conduct:

- Alleged direct expropriations of investments (at least 7 cases)
- Legislative reforms in the renewable energy sector (at least 6 cases)
- Tax-related measures such as allegedly unlawful tax assessments or the denial of tax exemptions (at least 5 cases)
- Termination, non-renewal or alleged interference with contracts or concessions (at least 5 cases)
- Revocation or denial of licenses or permits (at least 5 cases)

Other measures that were challenged included the designation of national heritage sites, environmental conservation zones, indigenous protected areas and national parks; and money laundering and anti–corruption investigations.

Amounts claimed

The amounts claimed ranged from $10 million (*Grot and others v. Moldova* and *Görkem Insaat v. Turkmenistan*) to $16.5 billion (*Cosigo Resources and others v. Colombia*). Information regarding the amounts sought by investors has been reported for about half of the new cases.

(ii) ISDS outcomes

Decisions and outcomes in 2016

In 2016, ISDS tribunals rendered at least 57 substantive decisions in investor–State disputes, 41 of which are in the public domain (at the time of writing). Of these public decisions, half of the decisions on jurisdictional issues were decided in favour of the State, whereas those on the merits were mostly decided in favour of the investor.

More specifically:

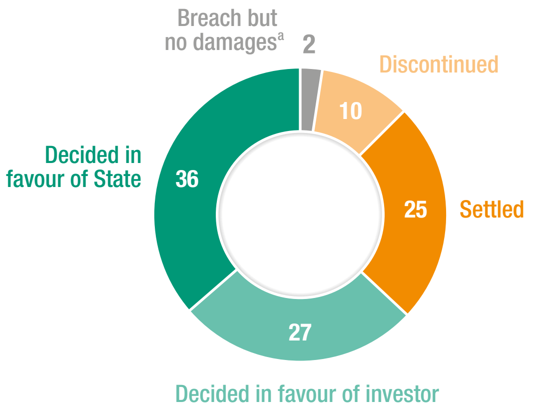
- Twelve decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with six upholding the tribunal's jurisdiction and six denying jurisdiction over the investors' claims.
- Twenty decisions on the merits were rendered in 2016, with 14 accepting at least some investor claims and 6 dismissing all the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the FET provision and the expropriation provision. In two decisions, tribunals found that the State breached the IIA but decided that no compensation was due.
- One decision in a resubmitted ICSID case confirmed the breaches found by the original tribunal but held that no monetary compensation was due.
- Eight publicly known decisions were rendered in ICSID annulment proceedings. ICSID ad hoc committees rejected six applications for annulment and partially annulled two awards.

Overall outcomes

By the end of 2016, some 495 ISDS proceedings had been concluded. The relative shares of case outcomes changed only slightly from those of 2015. About one third of concluded cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits), and about one quarter were decided in favour of the investor, with monetary compensation awarded. A quarter of cases were settled; in most, the specific terms of settlements remain confidential (figure III.15). In the remaining proceedings, either cases were discontinued or the tribunal found a treaty breach but did not award monetary compensation.

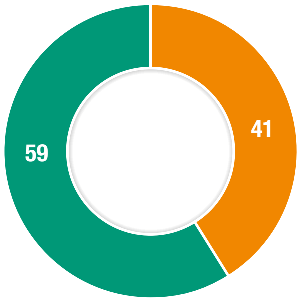
Of the cases that ended in favour of the State, about half were dismissed for lack of jurisdiction. Looking at the totality of decisions on the merits (i.e. where a tribunal determined whether the challenged measure breached any of the IIA's substantive obligations), about 60 per cent were decided in favour of the investor and 40 per cent in favour of the State (figure III.16).

Figure III.15. **Results of concluded cases, 1987–2016** (Per cent)



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

Figure III.16. Results of decisions on the merits, 1987–2016 (Per cent)



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

Average amounts claimed and awarded

On average, successful claimants were awarded about 40 per cent of the amounts they claimed. In cases decided in favour of the investor, the average amount claimed was $1.4 billion and the median $100 million. The average amount awarded was $545 million and the median $20 million. (The quoted amounts do not include interest or legal costs).

c. G20 Guiding Principles for Global Investment Policymaking

The G20 countries adopted the Guiding Principles for Global Investment Policymaking. Drawing on UNCTAD's Investment Policy Framework for Sustainable Development, the G20 Principles constitute the first time that multilateral consensus on investment matters has been reached between a varied group of developed, developing and transition economies, representing over two thirds of global outward FDI.

The non-binding Guiding Principles were agreed during the G20 Ministerial Meeting, which took place in July 2016 in Shanghai, China, and were endorsed by G20 leaders at the Hangzhou Summit in September 2016 (box III.1).

Box III.1. G20 Guiding Principles for Global Investment Policymaking

With the objective of (i) fostering an open, transparent and conducive global policy environment for investment, (ii) promoting coherence in national and international investment policymaking, and (iii) promoting inclusive economic growth and sustainable development, G20 members hereby propose the following non-binding principles to provide general guidance for investment policymaking.

I. Recognizing the critical role of investment as an engine of economic growth in the global economy, Governments should avoid protectionism in relation to cross-border investment.

II. Investment policies should establish open, non-discriminatory, transparent and predictable conditions for investment.

III. Investment policies should provide legal certainty and strong protection to investors and investments, tangible and intangible, including access to effective mechanisms for the prevention and settlement of disputes, as well as to enforcement procedures. Dispute settlement procedures should be fair, open and transparent, with appropriate safeguards to prevent abuse.

IV. Regulation relating to investment should be developed in a transparent manner with the opportunity for all stakeholders to participate, and embedded in an institutional framework based on the rule of law.

V. Investment policies and other policies that impact on investment should be coherent at both the national and international levels and aimed at fostering investment, consistent with the objectives of sustainable development and inclusive growth.

VI. Governments reaffirm the right to regulate investment for legitimate public policy purposes.

VII. Policies for investment promotion should, to maximize economic benefit, be effective and efficient, aimed at attracting and retaining investment, and matched by facilitation efforts that promote transparency and are conducive for investors to establish, conduct and expand their businesses.

VIII. Investment policies should promote and facilitate the observance by investors of international best practices and applicable instruments of responsible business conduct and corporate governance.

IX. The international community should continue to cooperate and engage in dialogue with a view to maintaining an open and conducive policy environment for investment, and to address shared investment policy challenges.

These principles interact with each other and should be considered together. They can serve as a reference for national and international investment policymaking, in accordance with respective international commitments, and taking into account national, and broader, sustainable development objectives and priorities.

Source: G20.

The G20 Principles have the following main features:

- **New generation:** The Guiding Principles contain key new generation investment policy elements, such as sustainable development and inclusive growth, the right to regulate for public policy purposes and guidelines on responsible business practice. It is noteworthy that the first draft considered by the Trade and Investment Working Group of the G20 drew on the Core Principles of UNCTAD's Investment Policy Framework for Sustainable Development.
- **Global statement:** The Guiding Principles are a statement of the G20's collective position on the four key building blocks of investment policy and treaty making: establishment, protection and treatment, promotion and facilitation, and dispute settlement.
- **Improving coherence:** A key driver for the Guiding Principles was the desire to strengthen policy coherence between national and international policies, and consistency between investment policies and other policy areas, as well as sustainable development objectives.
- **Delicate balance:** The Guiding Principles try to strike a delicate balance between the rights and obligations of firms and States, between liberalization and regulation, and between the strategic interests of host and home countries.
- **Non-binding instrument:** The Guiding Principles are non-binding. They are meant to serve as a guiding instrument for reviewing and formulating national investment policies and strategies. They are also meant to serve as an important reference for drafting and negotiating international investment treaties.

2. Taking stock of IIA reform

IIA reform has made significant progress. Sustainable development-oriented IIA reform has entered the mainstream of international investment policymaking and consolidated phase 1 of IIA reform. Most new treaties follow UNCTAD's Road Map for IIA Reform, which sets out five areas of reform.

a. New-generation IIAs – features and developments

Most of today's new IIAs include sustainable development-oriented reform elements that preserve the right to regulate, while maintaining investor protection, foster responsible investment and improve investment dispute settlement.

Most of today's new IIAs follow UNCTAD's Road Map for IIA Reform (*WIR15*, *WIR16*), which sets out five action areas – (i) safeguarding the right to regulate, while providing protection; (ii) reforming investment dispute settlement; (iii) promoting and facilitating investment; (iv) ensuring responsible investment; and (v) enhancing systemic consistency – or include clauses that were set out in UNCTAD's Investment Policy Framework for Sustainable Development.

A review of 18 IIAs concluded in 2016 for which texts are available (15 BITs and three TIPs) shows that most of them include provisions safeguarding the right to regulate for sustainable development objectives (table III.3). Of these 18 agreements, 9 have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources. Another 11 explicitly recognize that the parties should not relax health, safety or environmental standards to attract investment; and 12 refer to the protection of health and safety, labour rights, the environment or sustainable development in their preambles. The inclusion of safeguards for the right to regulate does not necessarily translate into a reduced level of investment protection, as most of the IIAs signed in 2016 maintain substantive investment protection standards.

A number of other treaty elements found in 2016 IIAs aim more broadly at preserving regulatory space and/or at minimizing exposure to investment arbitration. These elements include clauses that (i) limit the treaty scope (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 carve-outs for prudential measures; and (iv) carefully regulate ISDS (for example, by specifying treaty provisions that are subject to ISDS, excluding certain policy areas from ISDS, setting out a special mechanism for taxation and prudential measures, and/or restricting the allotted time period within which claims can be submitted). Notably, 13 of the treaties reviewed limit access to ISDS; and 16 omit the so-called umbrella clause (thus also reducing access to ISDS), which continues a trend noted in *WIR14*, *WIR15* and *WIR16*.

Evidence of IIA reform is particularly pronounced when treaties are compared over time. Table III.4 shows the prevalence of modern treaty clauses in recent BITs, focusing on those that are particularly relevant for preserving the right to regulate while maintaining protection of foreign investors.

As tables III.3 and III.4 show, reform-oriented clauses are becoming more common in treaties. In fact, some provisions that were considered as "innovative" in IIAs concluded through 2010, now appear almost regularly. And almost all the recently concluded IIAs contain at least one or two reform features. At the same time, some countries appear to be holding back from applying modern treaty drafting practices, and substantial differences in the IIAs concluded by a country at about the same time raise concerns about growing inconsistencies in and fragmentation of the IIA regime.

In addition to the reform-oriented elements presented in tables III.3 and III.4, some of the IIAs concluded in 2016 contain unique, innovative features that have rarely been encountered in earlier IIAs. For example:

- Focusing the definition of covered investment
  - Requiring that a covered investment contribute to the host State's economy or sustainable development (e.g. Islamic Republic of Iran–Slovak Republic BIT; Morocco–Nigeria BIT)
- Clarifying and focusing non-discrimination clauses
  - Specifying that an assessment of like circumstances should include consideration of whether the relevant treatment distinguishes between investors and/or investments on the basis of legitimate public welfare objectives (e.g. Chile–Hong Kong (China) BIT, Brazil–Peru ETEA)
  - Adding NT- and/or MFN-specific reservations for social services provided by the State in the public interest (e.g. social welfare, public education, public training, health and child care services) or for treatment granted to socially and economically disadvantaged minorities and ethnic groups (e.g. Brazil–Peru ETEA)
  - Adding NT- and/or MFN-specific exceptions for measures implemented in pursuit of a legitimate public purpose such as the protection of health, safety and the environment; for internationally and domestically recognized labour rights; or for the elimination of bribery and corruption (e.g. Islamic Republic of Iran–Slovak Republic BIT)
- Further clarifying FET
  - Specifying that the mere act of taking, or the failure to take, an action that may be inconsistent with an investor's expectations does not constitute a breach of FET, even if it results in loss or damage to the investment (e.g. Chile–Hong Kong (China) BIT, Canada–EU CETA, and the 2016 amendments to the Australia–Singapore FTA)

Table III.3. Reform-oriented provisions in IIAs concluded in 2016

	1	2	3	4	5	6	7	8	9	10	11
Argentina–Qatar BIT	Yes	Yes	No	No	Yes	Yes	No	No	Yes	No	Yes
Austria–Kyrgyzstan BIT	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes	Yes	No
Brazil–Peru ETEA	Yes	Yes	Not applicable	Not applicable	Yes	Yes	No	Yes	Yes	Yes	Yes
Canada–EU CETA	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Canada–Hong Kong, China BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No
Canada–Mongolia BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Chile–Hong Kong, China Investment Agreement	No	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes
Islamic Republic of Iran–Japan BIT	No	No	Yes	No	Yes	No	Yes	No	No	No	No
Islamic Republic of Iran–Slovak Republic BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Japan–Kenya BIT	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No	Yes	No
Mexico–United Arab Emirates BIT	No	Yes	Yes	No	Yes	Yes	No	No	No	Yes	No
Morocco–Nigeria BIT	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes	Yes
Morocco–Russian Federation BIT	No	No	Not applicable	No	No	Yes	No	No	No	No	No
Morocco–Rwanda BIT	No	Yes	Not applicable	No	Yes	Yes	No	No	No	No	No
Nigeria–Singapore BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Nigeria–United Arab Emirates BIT	No	Yes	No	No	Yes	Yes	No	No	No	No	No
Rwanda–Turkey BIT	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	No
TPP	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes

Yes No Not applicable

Selected aspects of IIAs

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

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

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

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

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

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

6 Omission of the so-called "umbrella" clause

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

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

9 Promotion of Corporate and Social Responsibility standards by incorporating a separate provision into the IIA or as a general reference in the treaty preamble

10 Limiting access to ISDS (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from ISDS, limiting time period to submit claims, no ISDS mechanism)

11 Specific proactive provisions on investment promotion

Source: ©UNCTAD.
Note: Based on 18 IIAs concluded in 2016 for which texts are available; does not include "framework agreements" that lack substantive investment provisions. IIA texts are available at UNCTAD's IIA Navigator at http://investmentpolicyhub.unctad.org/IIA.

Table III.4.	Reform-oriented elements in IIAs – comparison of "old" and "new" BITs		
Treaty provisions Options for IIA Reform	**UNCTAD Policy Framework Option**	**Earlier BITs** (1959–2010) (2,432)	**Recent BITs** (2011–2016) (110)
Preamble Refer to the protection of health and safety, labour rights, environment or sustainable development	1.1.2	8%	56%
Definition of covered investment Expressly exclude portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts	2.1.1	4%	39%
Definition of covered investor Include "denial of benefits" clause	2.2.2	5%	58%
Most-favoured-nation treatment Specify that such treatment is not applicable to other IIAs' ISDS provisions	4.2.2	2%	45%
Fair and equitable treatment Refer to minimum standard of treatment under customary international law	4.3.1	1%	29%
Indirect expropriation Clarify what does and does not constitute an indirect expropriation	4.5.1	5%	42%
Free transfer of funds Include exceptions for balance-of-payments difficulties and/or enforcement of national laws	4.7.2 4.7.3	18%	74%
Public policy exceptions Include general exceptions, e.g. for the protection of human, animal or plant life, or health; or the conservation of exhaustible natural resources	5.1.1	7%	43%

Source: ©UNCTAD.
Note: The numbering refers to "Policy Options for IIAs: Part A. Post-Establishment", in the 2015 version of UNCTAD's Investment Policy Framework for Sustainable Development. Data derived from UNCTAD's IIA Mapping Project. The Mapping Project is an UNCTAD-led collaboration of more than 45 universities around the globe. Over 2,500 IIAs have been mapped to date, for over 100 features each. The Mapping Project's results are available at http://investmentpolicyhub.unctad.org/IIA/mappedContent#iiaInnerMenu. Although every effort has been made to ensure accuracy, UNCTAD assumes no responsibility for eventual errors or omissions in the mapping data.

- Fostering responsible investment
  - Requiring investors to comply with environmental assessment screening procedures prior to establishment of the investment and to conduct social impact assessments of potential investments (e.g. Morocco–Nigeria BIT)
  - Requiring investors to maintain an environmental management system and meet international certification standards, and investments in resource exploitation and high-risk industrial enterprises to maintain an ISO 14001 or equivalent standard (e.g. Morocco–Nigeria BIT)
  - Setting out consequences for investors' failure to comply with investor obligations: e.g. subjecting them to civil actions before the courts of their home State in case of acts leading to significant damage, personal injuries or loss of life in the host State (e.g. Morocco–Nigeria BIT)
  - Requiring investors to refrain from offering bribes to public officials and entitling States to deny substantive protection to investments established or operating by way of illicit means, corruption, or other form of illegality (e.g. Morocco–Nigeria BIT and Brazil–Peru ETEA)
  - Encouraging investors to contribute to economic, social and environmental development; to stimulate local capacity-building; to promote human capital formation and employment; and to develop and implement self-regulatory practices and effective management systems (e.g. Brazil–Peru ETEA)
- Building capacity for investment facilitation
  - Requiring the home State to assist the host State in the promotion and facilitation of investment through capacity-building, insurance programmes or technology transfer (e.g. Morocco–Nigeria BIT)

- Refining investment dispute settlement
  - Tasking tribunals to dismiss ISDS claims of investors where they or the investment have violated host State laws (e.g. those related to fraud, tax evasion, corruption) or where the investment was made through fraudulent misrepresentation, concealment, corruption, or conduct amounting to an abuse of process (e.g. Islamic Republic of Iran–Slovak Republic BIT)
  - Including a reference allowing for the incorporation of a multilateral investment tribunal and an appellate mechanism for the resolution of investment disputes (e.g. Canada–EU CETA)
- Strengthening public-private partnerships
  - Requiring the parties to discuss initiatives to strengthen public-private partnerships (e.g. Morocco–Nigeria BIT)
- Introducing gender-related considerations
  - Preserving the right to regulate for gender-specific policies; setting out specific gender-related cooperation activities (e.g. sharing of experiences in policy design, conducting seminars and joint research); identifying specific areas of cooperation (e.g. financial inclusion, skill-building and leadership for women); and establishing an institutional framework (i.e. a Gender Committee); all of which with a view to eliminating all forms of discrimination and promoting equal rights, equal treatment and equal opportunities for men and women, for the purposes of achieving sustainable development and inclusive economic growth (Chile-Uruguay FTA).[21]

In addition to these innovative sustainable development-oriented elements, some new treaties also impose new, more far-reaching obligations on States. This includes broadening the scope of covered investments or introducing more far-reaching investor protections (e.g. expanding the list of prohibited performance requirements).

b. Reforming investment dispute settlement – recent developments

Reforming dispute settlement is high on the agenda, with concrete steps undertaken, including at the multilateral level.

(i) A multilateral mechanism for settling investment disputes

After first exploratory talks in the margins of the UNCTAD World Investment Forum (Nairobi, July 2016) and the OECD Investment Treaty Dialogue (Paris, October 2016), Canada and the European Commission co-hosted two days of exploratory discussions with third countries on the establishment of a multilateral investment court in Geneva (in December 2016). A "non-paper" outlined possible features of a future multilateral investment dispute mechanism and identified discussion points. Shortly after, the European Commission launched a public consultation on a multilateral reform of investment dispute settlement, which was open until mid-March 2017. In addition, a ministerial-level breakfast discussion on the multilateral investment court initiative was co-hosted by the European Trade Commissioner and the Minister of International Trade of Canada in January 2017 on the sidelines of the World Economic Forum in Davos, Switzerland.

(ii) United Nations Commission on International Trade Law (UNCITRAL)

In early July 2016, UNCITRAL considered a report by the Geneva Center for International Dispute Settlement (CIDS), which suggested a road map for the possible reform of ISDS, including the potential of using the opt-in mechanism of the Mauritius Convention as a model for reform. The Commission requested that the UNCITRAL Secretariat review how the research project might be carried forward, if approved as a topic at the July 2017 Commission session. In that context, a number of consultations took place, e.g. through a questionnaire that was sent out to all governments as well as expert group meetings, such as a government expert meeting hosted by the Swiss Government in Geneva (in March 2017).

(iii) Union of South American Nations (UNASUR)

UNASUR[22] consultations and national experts' meetings are discussing the constituting agreement of the region's investment dispute resolution centre. In November 2016, national experts from UNASUR held a meeting in Caracas, Bolivarian Republic of Venezuela, to carry forward the consultations.

(iv) International Centre for Settlement of Investment Disputes (ICSID)

ICSID started work to update and modernize its rules and regulations in October 2016 by asking its member States for preliminary suggestions on topics or themes for possible amendments. In January 2017, the ICSID Secretariat sent an additional invitation to all other interested stakeholders to file suggestions for amendments of the ICSID rules by the end of March 2017. Having collected and processed the comments received, the ICSID Secretariat announced that potential areas for amendments include arbitrator-related issues (appointment, code of conduct, challenge procedure), third-party funding, consolidation of cases, means of communication, preliminary objections proceedings, time frames, allocation of costs and some others. The last amendments to the ICSID rules, which came into effect in 2006, were adopted after a two-year period of consultations with member States and other stakeholders.

c. Facilitating investment – recent developments

Investment facilitation has become an area of increased interest in IIA making, and UNCTAD's Investment Facilitation Action Menu has obtained strong support from all investment-development stakeholders.

Facilitating investment is crucial for achieving the SDGs. Despite its fundamental importance for growth and development, national and international investment policies to date have paid relatively little attention to investment facilitation. In June 2016, UNCTAD launched its Global Action Menu for Investment Facilitation (box III.2). Its more than 40 action items are intended to fill a systemic gap in national and international investment policymaking, and to spur debate on concerted global action on investment facilitation, with a view to mobilizing investment for sustainable development. Since its launching the Global Action Menu has obtained strong support from all investment and development stakeholders including at several high-level intergovernmental meetings.

To date, in the clear majority of existing IIAs, concrete investment facilitation provisions are either absent or weak (noting, however, that the precise extent of an IIA's facilitation dimension is hard to document because of the diversity of issues it comprises). Two types of clauses constitute an exception in this respect:

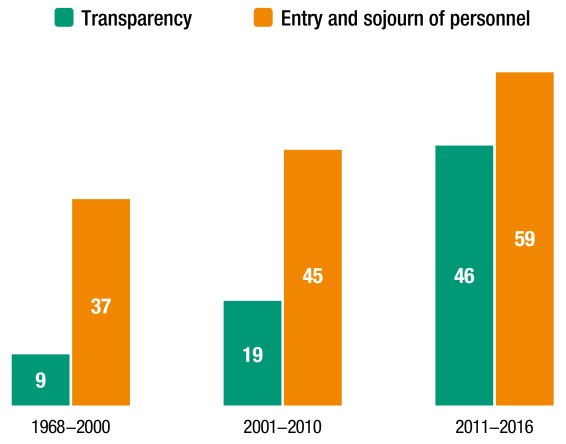
- **Clauses facilitating the entry and sojourn of personnel:** Action line 3 of the Global Action Menu encourages countries to improve their administrative procedures, among others including the option to facilitate visas and dismantle bureaucratic obstacles for investment project personnel within the framework of relevant legislation. Provisions aimed at facilitating the entry and sojourn for nationals of one party in the other party are included in over 40 per cent of all BITs analysed.

- **Clauses furthering transparency:** Action line 1 of the Global Action Menu promotes the accessibility of clear, up-to-date information on the investment-related legal regime. Similarly, IIA provisions on transparency typically require that the parties publish measures or laws that affect investments.[23] Such provisions have become more prominent over time, with nearly half of all analysed BITs concluded in the past six years containing a provision furthering transparency.

These two types of clauses have commonly been included in IIAs since at least the 1980s and the 2000s, respectively (figure III.17).

More recently, a broader range of facilitation-related clauses (e.g. establishment of Joint Committees assuming facilitation-related tasks, or amicable dispute settlement mechanisms such as mediation) have made their way into modern investment treaty making – typically, however, without establishing legally binding, enforceable obligations (UNCTAD, 2017a).

Figure III.17. **Share of mapped BITs containing an entry and sojourn of personnel or transparency provision, 1968–2016** (Per cent)



Source: ©UNCTAD, IIA Mapping Project.
Note: Based on 2,346 BITs signed between 1968 and 2016.

In addition to IIAs, investment facilitation has also been addressed in memorandums of understanding. These documents can be signed between various parties (including States or other State-affiliated entities, investment promotion agencies and private sector representatives). They can be both general and sector-specific, with the majority of those reviewed being sector-specific or at least sector-oriented. Generally, they are not legally binding and do not create financial obligations for the parties.

These developments all indicate that there is significant room for improvement in the effective implementation of investment facilitation policies. UNCTAD's Global Action Menu for Investment Facilitation can help policymakers in this effort.

Box III.2. UNCTAD's Global Action Menu for Investment Facilitation

Facilitating investment is critical for achieving the Sustainable Development Goals (SDGs). According to UNCTAD's calculations (*WIR14*), developing countries face an annual SDG investment gap of $2.5 trillion. Despite the fundamental importance of investment facilitation for growth and development, to date national and international investment policies have paid relatively little attention to it.

To remedy this, in 2016 UNCTAD launched its Global Action Menu for Investment Facilitation, which is based on the organization's rich experiences with investment promotion and facilitation efforts worldwide over the past decades. It incorporates measures considered of key importance by investment promotion agencies (IPAs) and by the business community. It also builds on the 2012 and 2015 editions of UNCTAD's Investment Policy Framework for Sustainable Development, as well as UNCTAD's SDG Investment Action Plan (2014).

Following the endorsement of the Global Action Menu at the July 2016 World Investment Forum, during UNCTAD XIV, Ministers, heads of IPAs, senior investment treaty negotiators and others endorsed the initiative and requested that UNCTAD develop further policy advice and technical assistance tools, and continue building global consensus. The September 2016 update of the Global Action Menu incorporates the feedback and lessons learned from these multi-stakeholder consultations and intergovernmental processes.

In December 2016, UNCTAD's Trade and Development Board, the organization's governing body, continued the debate in a dedicated session also benefiting from a review of investment facilitation-related policies prepared by UNCTAD. At the session, regional groups and delegations affirmed their support for the Global Action Menu as an instrument for investment facilitation. Member States commended UNCTAD on the timeliness and quality of the updated version and endorsed the Global Action Menu as a "high-quality reference document for investment facilitation policies".

Source: ©UNCTAD.

3. Phase 2 of IIA reform

a. The next phase of IIA reform

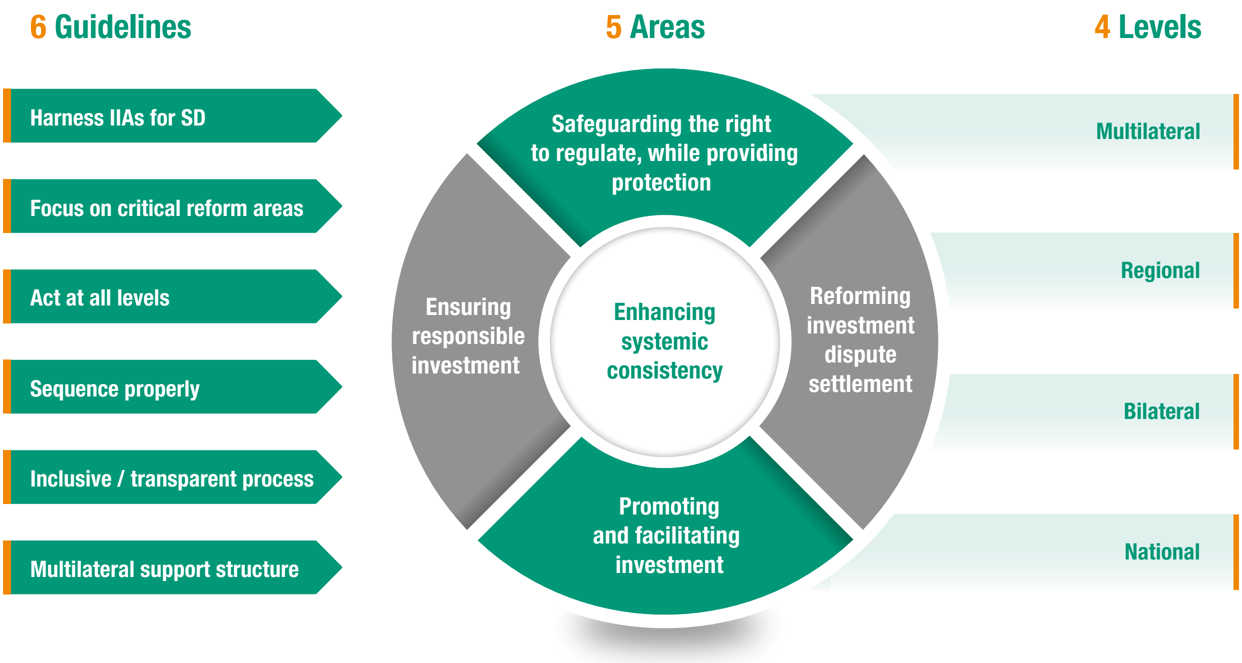
It is time to move to phase 2 of IIA reform: modernizing the existing stock of old-generation treaties. As sustainable development-oriented IIA reform manifests itself in new, more modern models and treaties (phase 1 of IIA reform), policy attention needs to focus on comprehensively modernizing the stock of outdated, first-generation treaties (phase 2 of IIA reform).

Sustainable development-oriented IIA reform has entered the mainstream of international investment policymaking (*WIR15*, *WIR16*). During the first phase of reform, countries have built consensus on the need for reform, identified reform areas and approaches, reviewed their IIA networks, developed new model treaties and started to negotiate new, more modern IIAs.

Despite significant progress, much remains to be done. First, comprehensive reform requires a two-pronged approach, i.e. not only concluding new treaties but also modernizing the existing ones. Second, reform needs to address the challenge of increasing fragmentation, both within the IIA regime, as well as between the IIA regime and other areas of international policymaking. Ultimately, only coordinated activity at all levels (national, bilateral and regional, as well as multilateral) will deliver an IIA regime in which stability, clarity and predictability serve the objective of all stakeholders: effectively harnessing international investment relations for the pursuit of sustainable development.

In terms of policy content, the five areas of reform identified in UNCTAD's Road Map for IIA Reform (*WIR15*) can serve as a basis for reform actions (figure III.18). When putting them into practice, countries would typically nuance, clarify or omit traditional treaty elements and

Figure III.18. | UNCTAD's Road Map for IIA Reform



Source: ©UNCTAD, *WIR16*.

add new sustainable development-oriented features. Sustainable development-oriented IIA reform may also include adding new treaty elements that can help make a country's investment climate more attractive, e.g. investment facilitation elements (sections III.A.1 and III.B.2).

At the same time, it is becoming more common for new IIAs to not only contain reform-oriented elements, but to also impose new, more far-reaching obligations on States. This includes broadening the scope of covered investments or introducing more far-reaching investor protections (e.g. expanding the list of prohibited performance requirements).

(i) Old treaties abound

Old-generation treaties abound: More than 2,500 IIAs (95 per cent of all treaties in force) were concluded before the year 2010. Meanwhile, some 700 treaties have not entered into force.

More than 2,500 treaties that are in force today were concluded before the year 2010 (95 per cent of all treaties in force) (figure III.19). Most of these IIAs were negotiated in the 1990s: a time when the IIA universe was light on jurisprudence, but heavy on treaty making (about three new treaties per week). These older treaties typically contained similar, broadly worded definitions and substantive provisions, and few safeguards (*WIR15*).

Today, many IIAs have been in force for longer than their initial periods of operation (most frequently set in the treaties at 10, 15 or 20 years). By the end of 2016, over 1,000 BITs had reached a stage where they could be unilaterally terminated by one contracting party immediately; many more are becoming available for such termination in the coming years (figure III.20). Moreover, the Vienna Convention on the Law of Treaties (VCLT) allows parties to terminate an agreement by mutual consent at any time (*WIR13*).

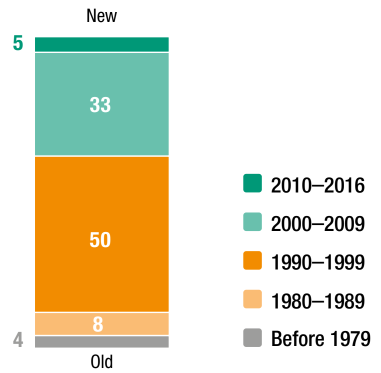
As agreements reach their expiry date, a treaty partner can opt for automatic prolongation of the treaty or notify its wish to terminate it. After reaching the end of the initial fixed term, many BITs can be unilaterally terminated at any time by giving notice ("anytime termination"), whereas some BITs – if not terminated at the end of the initial term – are extended for subsequent fixed terms and can be unilaterally terminated only at the end of the subsequent term ("end-of-term termination") (*WIR13*, box III.6).

Today's IIA universe is also characterized by a relatively large number of treaties that are not in force. By the end of 2016, there were 700 such treaties, about one fifth of all IIAs. Some are recently concluded treaties that are going through the process of domestic ratification (it takes 2.3 years on average for an IIA to proceed from signature to entry into force). However, the share of treaties dating from the 1990s and the 2000s that are not in force is quite significant, too (figure III.21). This provides a window of opportunity for States to consider "abandoning" unratified treaties (see option 8), or renegotiating them in line with sustainable development priorities.

(ii) Old treaties "bite"

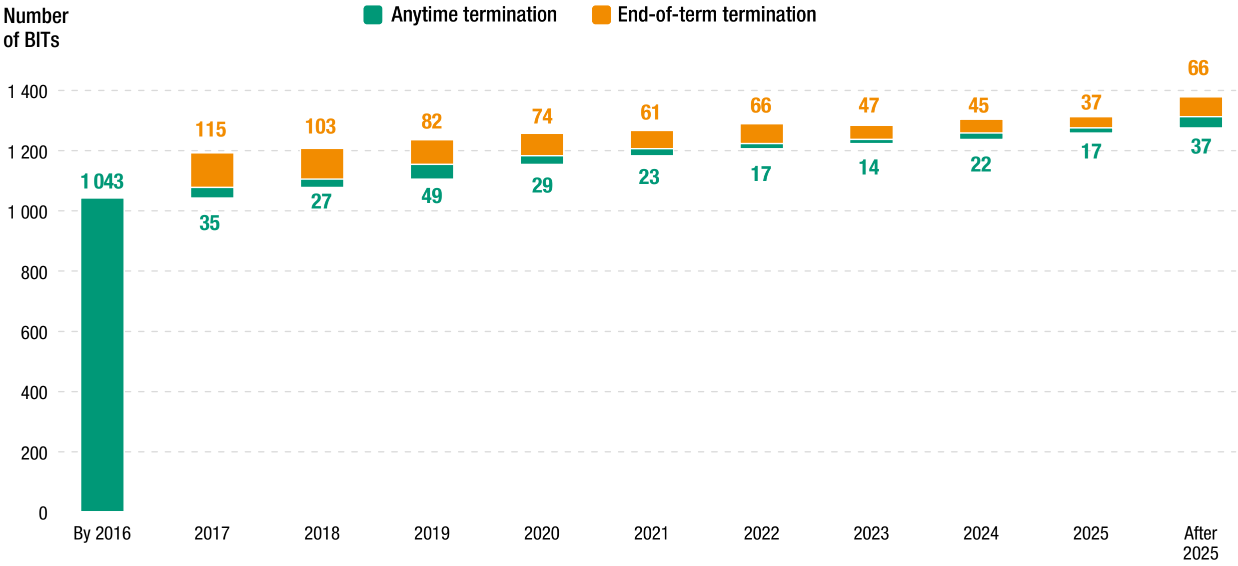
Old-generation treaties "bite": All of today's known ISDS cases are based on treaties that were concluded before the year 2010, most of which contain broad and vague formulations.

Figure III.19. Age of IIAs: share of IIAs in force, by year of signature (Per cent)



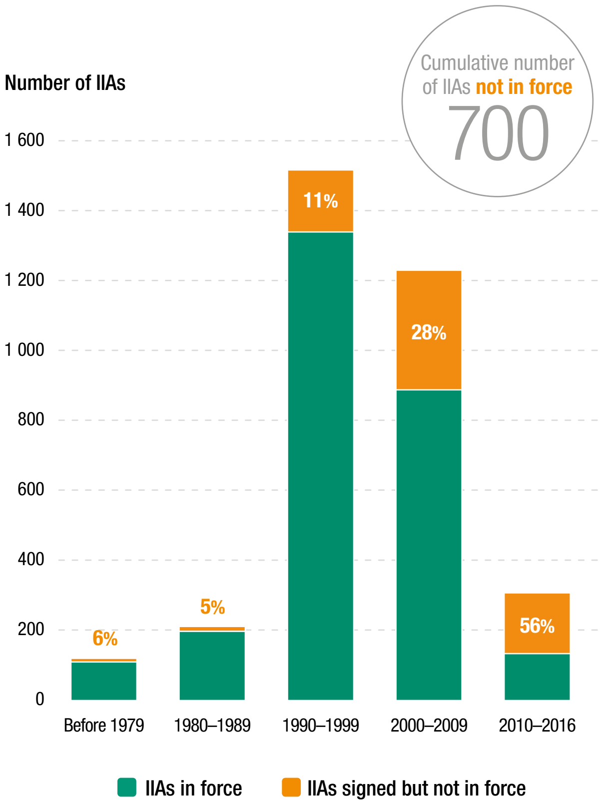
Source: ©UNCTAD, IIA Navigator.

Figure III.20. BITs in force "up for unilateral termination"



Source: ©UNCTAD.
Note: Data derived from UNCTAD's IIA Navigator and the IIA Mapping Project for 2,009 mapped BITs in force (1,313 BITs provide for automatic renewal for an indefinite period, with "anytime termination", and 696 BITs provide for renewal for a fixed term, with "end-of-term termination").

Figure III.21. Stock of IIAs and share not in force, by year of signature



Source: ©UNCTAD, IIA Navigator.

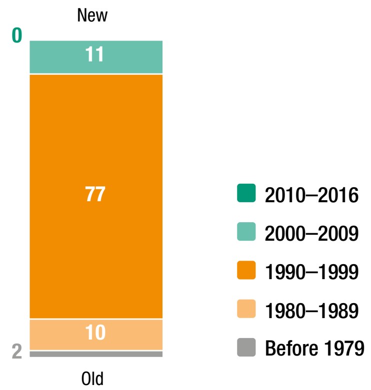
Countries' experience with ISDS cases shows that "old treaties bite". At the end of 2016, virtually all of the known treaty-based ISDS cases had been filed pursuant to treaties concluded before 2010, which typically feature broad and vague formulations and include few exceptions or safeguards. Even though the stock of older treaties that are in force is larger than the number of more recent treaties and those treaties have been in existence for longer, the relative number of cases based on old treaties is still significantly higher (figures III.19 and III.22).

It is also noteworthy that about 20 per cent of all ISDS cases were brought under two plurilateral agreements from the early 1990s, the Energy Charter Treaty (ECT) and the North American Free Trade Agreement (NAFTA) (though the latter agreement contains several of today's IIA reform features).

In recent years, many countries (developing and increasingly developed countries alike) have experienced first-hand that IIAs are not "harmless" political declarations, but do "bite". Broad and vague formulations of IIA provisions have enabled investors to challenge core domestic policy decisions – for instance, in environmental, financial, energy and health policies. They have also generated unanticipated, and at times inconsistent, arbitral interpretations of core IIA obligations, resulting in a lack of predictability as to the kinds of State measures that might violate a specific IIA provision.

As a result, there is today a broadly shared view that treaty provisions need to be more clear and more detailed, drafted on the basis of thorough legal analysis of their actual and potential implications, and that the current system of settling investment disputes needs to be reformed (*WIR15*). Recent treaty drafting practice has started to take account of this view for new agreements, and the same lessons should be applied with respect to the stock of existing treaties during the next phase of IIA reform.

Figure III.22. IIAs invoked in known treaty-based ISDS cases, by IIA year of signature (Per cent)



Source: ©UNCTAD, ISDS Navigator.

(iii) Old treaties perpetuate inconsistencies

Old-generation treaties perpetuate inconsistencies: Their continued existence creates overlaps and fragmentation in treaty relationships as well as interaction challenges within the IIA network, and between IIAs and other areas of international policymaking.

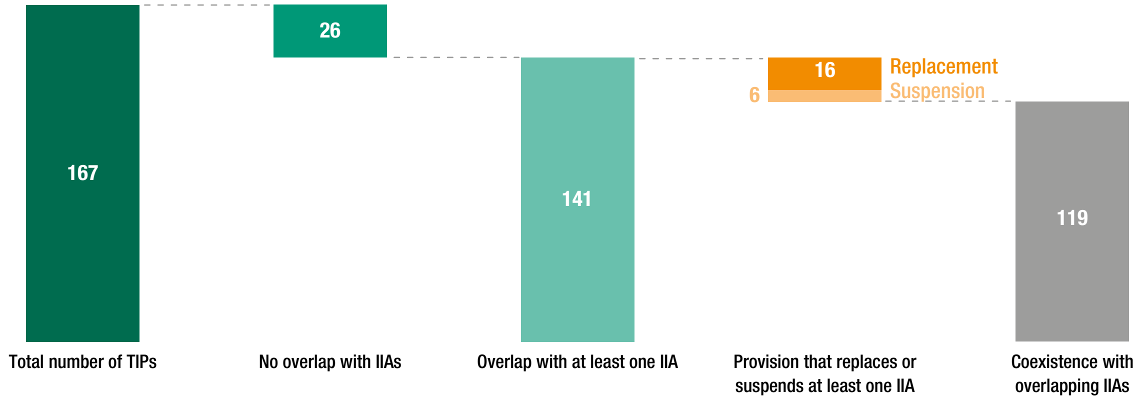
Today's IIA regime is characterized by gaps in treaty relationships (caused by a "patchy" treaty network), overlaps between treaties and divergence or inconsistencies in treaty clauses:

- The existing global treaty network only covers about one fifth of possible country relationships (calculated on the basis of the IIA network as it stood at the end of 2010, *WIR11*, figure III.4).
- Recent treaty making has resulted in increasing treaty overlaps. This is particularly pronounced in the context of megaregionals, but also in the case of FTAs. Among a sample of 167 TIPs (covering treaties with BITs-type substantive investment provisions and/or pre-establishment provisions), at least 119 overlap with earlier IIAs (concluded between all or some of the parties), which continue to exist in parallel to the new ones (figure III.23). Over two-thirds of the sampled TIPs thus potentially exacerbate the IIA regime's fragmentation. Less than one-third either create new, previously uncovered treaty relationships or replace or suspend pre-existing, overlapping IIAs.
- Most new treaties display significant differences to earlier generation models (table III.4). Sustainable development-oriented clauses that have become part of today's mainstream treaty practice (e.g. clarifications to treaty scope and substantive obligations as well as safeguards) are rarely found in old, first-generation IIAs. New, "reformed" IIAs with reformed treaty clauses thus often co-exist with old, "unreformed" IIAs containing unreformed treaty clauses.

To this must be added fragmentation (i.e. lack of coordination) with respect to current reform processes. Multiple, partially overlapping reform efforts are currently occurring – for example, in Africa (box III.3) or with respect to initiatives to improve investment dispute settlement. In addition to managing relationships between treaties, there is therefore also a need to coordinate different reform processes. This task includes synchronizing reform efforts at different levels of policymaking (in the case of Africa, at the continental, regional and national levels) or combining them in multilateral contexts.

Finally, there is fragmentation of the international legal governance system for investment more broadly. IIAs interact with other areas of international law, such as environmental, labour, human rights, tax, and trade law (*WIR15*). At times, ISDS cases have highlighted tensions between IIAs and these other areas of international law, as well as public policymaking in these areas (*WIR15*). Policymakers need to consider these linkages and prevent international

Figure III.23. Relationships between IIAs (Number of TIPs)



Source: ©UNCTAD, IIA Navigator.
Note: Based on 167 TIPs with texts available, comprising 127 with BITs-type substantive investment provisions and 40 that are "pre-establishment only" (i.e. that include limited investment provisions, as defined in *WIR16*, box III.3).

Box III.3. Synchronizing regional IIA reform efforts in Africa

African countries are actively engaged in IIA reform at the regional level through parallel negotiations of, and amendments to, various "new generation" international investment instruments. These include, among others, the Pan-African Investment Code, Phase II of the Tripartite FTA between the Common Market for Eastern and Southern Africa (COMESA), the East African Community (EAC) and the Southern African Development Community (SADC), the Continental Free Trade Area, the COMESA Common Investment Area and the SADC Finance and Investment Protocol. This is in addition to IIA reform efforts at the national level under way in a number of African countries (e.g. Botswana, Egypt, Nigeria, South Africa).

These initiatives express the determination of African countries to embark on IIA reform in order to make the policy framework for investment in Africa more balanced and more oriented to sustainable development. However, they risk overlapping with one another, potentially diluting the impact of regional reform efforts and creating a more complex regime instead of harmonizing and consolidating it.

Another challenge relates to the existing intra-African BITs, of which 165 had been signed by the end of 2016 (of which only 38 are in force). The fate of these first-generation treaties remains uncertain. If the new regional IIAs under negotiation do not entail the replacement of older BITs, the result will be an undesirable multiplication of treaty layers. On the other hand, replacing existing BITs with new regional initiatives would contribute to the consolidation and harmonization of the international investment policy framework in Africa.

It is therefore crucial to synchronize reform efforts at different levels of policymaking (continental, regional and national). This requires coordination and cooperation among African countries in order to avoid overlap, policy inconsistencies and fragmentation.

Source: ©UNCTAD.

investment law from evolving further into an even more isolated system with a narrow set of objectives. Many newer IIAs include reference to other international agreements and global standards, but within the overall network they remain rare.

b. Ten options for phase 2 of IIA reform

Countries have numerous options for modernizing their stock of first-generation treaties and reducing fragmentation of the IIA regime. This WIR presents and analyses 10 options and their pros and cons, for countries to adapt and adopt in line with their specific reform objectives. Determining which reform option is "right" for a country in a particular situation *requires a careful and facts-based cost-benefit analysis, while addressing a number of broader challenges.*

There are at least 10 options available for countries that wish to change existing treaties to bring them into conformity with new policy objectives and priorities and to address the challenges arising from the fragmentation of the IIA regime (table III.5). The options are not mutually exclusive and can be used in a complementary manner, especially by countries that have extensive IIA networks.

The 10 options differ in several aspects, as they encompass actions that are more technical (e.g. interpreting or amending treaty provisions) or rather political (e.g. engaging multilaterally), focus on procedure (e.g. amending or replacing treaties) or also on substance (e.g. referencing international standards), or imply continuous engagement with the IIA regime (e.g. amending, replacing, engaging multilaterally) or "exit" from it (e.g. termination without replacement, withdrawing from multilateral treaties). They represent modalities for introducing change to the IIA regime, rather than for designing treaty content (for the latter, see the UNCTAD Investment Policy Framework for Sustainable Development and the UNCTAD Road Map for IIA Reform (included in *WIR15*), as well as the stocktaking of reform undertaken in *WIR16*).

Determining whether a reform option is "right" for a country in a particular situation requires a careful and facts-based cost-benefit analysis, while addressing a number of broader challenges. Strategic challenges include producing a holistic and "balanced" result, rather than "overshooting" on reform and depriving the IIA regime of its purpose of protecting and promoting investment. Systemic challenges arise from gaps, overlaps and fragmentation that create coherence and consistency problems. Coordination challenges require prioritizing reform actions, finding the right treaty partners to implement them and ensuring coherence between reform efforts at different levels of policymaking. Capacity challenges make it hard for smaller countries, particularly LDCs, to address the deficiencies of first-generation IIAs.

Choices must be made for identifying the best possible combination of the 10 policy options.[24] The chosen combination of options should ultimately reflect a country's international investment policy direction in line with its national development strategy. Moreover, when implementing IIA reform, policymakers have to consider the compound effect of options.

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

Action option	Outcome
1. Jointly interpreting treaty provisions	Clarifies the content of a treaty provision and narrows the scope of interpretive discretion of tribunals
2. Amending treaty provisions	Modifies an existing treaty's content by introducing new provisions or altering or removing existing ones
3. Replacing "outdated" treaties	Substitutes an old treaty with a new one
4. Consolidating the IIA network	Abrogates two or more old IIAs between parties and replaces them with a new, plurilateral IIA
5. Managing relationships between coexisting treaties	Establishes rules that determine which of the coexisting IIAs applies in a given situation
6. Referencing global standards	Fosters coherence and improves the interaction between IIAs and other areas of international law and policymaking
7. Engaging multilaterally	Establishes a common understanding or new rules among a multitude of countries, coupled with a mechanism that brings about change "in one go"
8. Abandoning unratified old treaties	Conveys a country's intent to not become a party to a concluded but as yet unratified treaty
9. Terminating existing old treaties	Releases the parties from their obligations under a treaty
10. Withdrawing from multilateral treaties	Similar in effect to termination, but leaves the treaty in force among the remaining parties who have not withdrawn

Source: ©UNCTAD.
Note: This classification is made for illustration purposes only. The table should not be seen as placing possible reform actions in any order of priority.

Some combinations of reform options may result in a treaty regime that is largely deprived of its traditional investment protection rationale or may result in a complete exit from the IIA regime. Reform efforts, particularly comprehensive ones, should harness the benefits that can be obtained from the rule of law and respond to investors' expectations of predictability, stability and transparency in policymaking.

When choosing among reform options, policymakers should also consider the attendant challenges, both legal and practical. Among the legal challenges, three stand out as being particularly pronounced: the MFN clause, the survival clause and the management of transitions between old and new treaties. Each of these challenges may be particularly relevant for certain specific reform options:

- *MFN clauses* aim to prevent nationality-based discrimination.[25] Many tribunals have interpreted broadly worded MFN provisions as allowing the importation of more favourable provisions from IIAs signed by the host State with third countries. This has led to some controversy and subsequently more careful treaty drafting that limits the scope of application of the MFN provision. The inclusion of a broadly worded MFN clause in a new treaty can undermine reform efforts, as it allows investors to cherry-pick the most advantageous clauses from a host State's "unreformed" treaties with third countries. For existing IIAs, MFN-related challenges arise in particular for four reform options: joint interpretation, amendment, replacement and management of treaty relationships.
- *Survival clauses* included in most BITs are designed to extend treaty application for a further period after termination (some for 5 years, but most frequently for 10, 15 or even 20 years).[26] Depending on how they are formulated, survival clauses apply either only to unilateral termination or potentially also to joint treaty termination (including termination owing to replacement by a new treaty). Allowing an old-generation (unreformed) treaty to apply for a long time after termination would undermine reform efforts, particularly if doing so results in parallel application with a new treaty. Thus, survival clauses may need to be "neutralized" in old treaties that are being jointly terminated or replaced (including through consolidation). Challenges related to survival clauses are particularly pronounced with respect to reform options that terminate, replace or consolidate.
- *Transition clauses* delineate a treaty's scope of temporal application by clarifying in which situations, and for how long after a treaty's termination, an investor may invoke the old IIA to bring an ISDS case. If included in the new treaty, such clauses help ensure a smooth transition from the old to the new by limiting situations in which both treaties apply concurrently (or by clarifying that upon the new treaty's entry into force, the old treaty is phased out). Transition clauses effectively modify the operation of the survival clause in the "outgoing" treaty; they are particularly relevant for reform options that replace old treaties, including through consolidation.

In addition to legal challenges, policymakers also need to keep in mind and plan for the many practical and political challenges that might arise, as outlined in the following subsections.

(i) Jointly interpreting treaty provisions

IIAs with broadly worded provisions can give rise to unintended and contradictory interpretations in ISDS proceedings. Joint interpretations, aimed at clarifying the meaning of treaty obligations, help reduce uncertainty and enhance predictability for investors, contracting parties and tribunals.

Clarifying IIA clauses can help reduce uncertainty arising from (broadly worded) provisions of first-generation BITs (UNCTAD, 2011). Authoritative joint party interpretations therefore offer a degree of much-needed clarity for investors, host States and arbitrators alike. This reform tool is potentially the easiest in its practical application as it allows treaty parties to voice

Table III.6. Reform action: Jointly interpreting treaty provisions

Clarifies the content of a treaty provision and narrows the scope of interpretive discretion of tribunals	
Outcomes (pros)	**Challenges (cons)**
• Allows the parties to clarify one or several specific provisions without amending or renegotiating the treaty (no ratification required, less cost- and time-intensive) • Is particularly effective if the treaty expressly provides that joint interpretations by the parties (or their joint bodies) are binding on tribunals • Becomes relevant from the moment of adoption, including for pending disputes • Has authoritative power as it originates from the treaty parties	• Is limited in its effect as it cannot attach an entirely new meaning to the provision being interpreted • Can raise doubts about its true legal nature (may not always be easy to distinguish between a joint interpretation and an amendment) • Can leave tribunals with a margin of discretion • Might be difficult to establish as genuine if either party has consistently acted in a way that does not comport with the interpretation • May be difficult to negotiate in cases when a pending dispute involves the application of the provision concerned

Source: ©UNCTAD.

their positions on a specific IIA clause without undertaking a comparatively higher-cost and more time-consuming amendment or renegotiation of the treaty (interpretative statements do not require ratification). By stating explicitly in the treaty that joint interpretation is binding on the tribunal, the parties can remove any doubt regarding its legal effect (*WIR13*). However, even in the absence of such a provision, the VCLT obliges arbitrators to take into account, together with the context, "[a]ny subsequent agreement between the parties regarding the interpretation of the treaty" (Article 31.3(a)).

Several countries have engaged in joint interpretations. In 2001, the NAFTA Free Trade Commission adopted "Notes of Interpretation of Certain Chapter 11 Provisions", clarifying e.g. NAFTA Article 1105(1) on the minimum standard of treatment. In 2013, through a joint interpretative understanding, Colombia and Singapore clarified several provisions (such as FET and MFN) of their BIT (also signed in 2013). In January 2016, the parties to the TPP issued the "Drafters' Note of interpretation of 'Like Circumstances'", which is applicable to the treaty's NT and MFN provisions.

Two recent policy developments, different from but related to the traditional understanding of "joint interpretations", also merit consideration: In February 2016, India proposed a "Joint Interpretative Statement" to 25 countries with which it has IIAs whose initial period of validity had not expired. The statement sets out India's proposed interpretation of several provisions in those treaties, including the definitions of "investor" and "investment"; the MFN, NT, FET and expropriation clauses; and the ISDS provisions. In October 2016, the EU, its member States and Canada released a "Joint Interpretative Instrument" on the Comprehensive Economic and Trade Agreement (CETA). It sets out the parties' agreement on a number of provisions that have been the subject of public debate and concern (such as the right to regulate and compensation).

Of note also is the frequent establishment in recent IIAs of joint bodies with a mandate to issue binding interpretations (e.g. Canada–EU CETA (2016); Morocco–Nigeria BIT (2016); Chile–Hong Kong, China BIT (2016)).

(ii) Amending treaty provisions

The expansively formulated obligations common to old IIAs may sometimes be difficult to "fix" through a joint interpretation. By amending treaty provisions, the parties can achieve a higher degree of change and thereby ensure that the amended treaty reflects their evolving policy preferences.

Typically, amendments are limited in number and do not affect the overall design and philosophy of a treaty (*WIR13*). Where treaty parties are concerned only with certain specific provisions (e.g. MFN, FET), discrete amendments might be preferred to the renegotiation

Table III.7. Reform action: Amending treaty provisions

Modifies an existing treaty's content by introducing new provisions or altering or removing existing ones	
Outcomes (pros)	**Challenges (cons)**
• Constitutes a broader, more far-reaching tool than interpretation: can introduce new rules rather than merely clarify the meaning of existing ones • Selectively addresses the most important issues on which the parties' policy positions align • Can be easier to agree upon with the treaty partner and more efficient to negotiate compared with a renegotiation of the treaty as a whole	• Typically requires domestic ratification in order to take effect • Only applies prospectively, i.e. does not affect pending disputes • Does not lead to overall change in treaty design and philosophy • May lead to "horse trading" in which desired amendments are achieved only through a quid pro quo with parties demanding other amendments

Source: ©UNCTAD.

of the whole treaty, an exercise that could be time-consuming and, depending on the other party (or parties), challenging.

Applicable amendment procedures depend on the treaty that is subject to change. For IIAs that do not regulate amendments, the general rules of the VCLT will usually apply. However, many newer IIAs include their own provisions on amendment. This is particularly important for pluri- or multilateral treaties, in which the large number of parties involved adds complexity to the process. IIA amendments are usually formalized through separate agreements (e.g. protocols or exchanges of letters or notes), which take effect following a procedure similar to the original treaty, i.e. after respective domestic ratification procedures are completed.

Comprehensive data on amendments are not yet available. Existing evidence suggests, however, that States have thus far used amendments rather sparingly (Gordon and Pohl, 2015; Broude et al., 2016). Exceptions are the EU member States from Eastern Europe (Bulgaria, Croatia, the Czech Republic, Estonia, Latvia, Lithuania, Poland, Slovak Republic, Slovenia and Romania), which have made amendments by using protocols before and after accession to the EU. Of a sample of 84 IIAs concluded by these countries that contain protocols, over 60 concern extra-EU BITs that were amended, among others, to bring their international obligations in line with their obligations under EU law. Some introduce exceptions to MFN clauses for regional economic integration organizations or include exceptions for national security reasons (e.g. Protocol (2007) to the Bulgaria–India BIT (1998) or the Protocol (2010) to the Czech Republic–Morocco BIT (2001)). Amendments have also been used by several EU member States to introduce balance-of-payments exceptions to provisions on the free transfer of funds (e.g. Protocol (2013) to the Kuwait–Lithuania BIT (2001), Protocol (2011) to the Bulgaria–Israel BIT (1993) or Protocol (2009) to the Czech Republic–Guatemala BIT (2003)). These latter amendments have also been made in reaction to the ruling of the European Court of Justice in 2009 that the transfer of funds provisions in certain EU member States' BITs with third countries breached EU law.[27]

Other countries have used amendments in a more sporadic manner to include adjustments to the ISDS mechanism (e.g. the Exchange of Notes (1997) to the Paraguay–United Kingdom BIT (1981), the Protocol (2000) to the Panama–United States BIT (1982), the Protocol (2003) to the Germany–Moldova BIT (1994)). More recent examples include the May 2016 amendments to the Singapore–Australia FTA (2003) agreed by the parties upon their third review of the treaty. The revised investment chapter includes numerous changes to definitions and substantive obligations, and adds exceptions to dispute settlement (including a carve-out from ISDS for tobacco control measures). These amendments are in the process of ratification.

Finally, in August 2016, members of the SADC amended Annex 1 of the SADC Finance and Investment Protocol. The amended version omits the FET provision and the ISDS mechanism, refines the definition of investment and investor, introduces exceptions to the expropriation provision and clarifies the NT provision and investor responsibilities as well as the right of host countries to regulate investment. These amendments are in the process of ratification.

(iii) Replacing "outdated" treaties

Treaty replacements offer an opportunity to undertake a comprehensive revision of the treaty instead of selectively amending individual clauses.

This reform action replaces "outdated" IIAs by substituting them with new ones. New IIAs can be concluded by the same treaty partners (e.g. when one BIT is replaced by a new BIT), or by a larger group of countries (e.g. when several BITs are replaced by a plurilateral treaty – see option 4). Approaching the treaty afresh enables the parties to achieve a higher degree of change (vis-à-vis selective amendments) and to be more rigorous and conceptual in designing an IIA that reflects their contemporary shared vision.

For replacement to be effective, countries need to be mindful of termination provisions in the earlier IIA, including how to ensure effective transition from the old to the new treaty regime (box III.4) and how to deal with any survival clause (box III.5).

To date, about 130 BITs have been replaced, mostly by other BITs or bilateral TIPs. Countries that have been active in this respect over the past 20 years include Germany, followed by China, Egypt, Romania and Morocco. Replacement treaties do not always incorporate elements of sustainable development-oriented reform. Current replacement examples include the ongoing renegotiation talks between Mexico and Switzerland on a treaty that will replace their BIT of 1995.

Of the 167 TIPs sampled, only 16 treaties – or 10 per cent – replaced at least one BIT they overlapped with (figure III.23). For example, Peru replaced three of its old BITs with subsequent FTAs that it concluded with the same partners, namely Chile (2006), Singapore (2008) and the Republic of Korea (2010). All three FTAs include an investment chapter, expressly provide for the termination of the prior BIT upon the FTA's entry into force and establish transition rules.

Alternatively, in rare instances some States suspend old BITs (or parts thereof) for the time that the new IIA is in force (e.g. Canada–Panama FTA (2010), Morocco–United States FTA (2004), European Free Trade Association (EFTA)–Republic of Korea Investment Agreement (2005)). This is not replacement per se, but rather a "conditional replacement", which leaves open the possibility that the old BIT may be revived if the new IIA is terminated.

Table III.8. Reform action: Replacing "outdated" treaties

Substitutes an old treaty with a new one	
Outcomes (pros)	**Challenges (cons)**
• Allows for a holistic approach to reform through a comprehensive revision of the treaty in line with the contracting parties' evolving policy objectives • Allows for the revision of the treaty's philosophy and overall design and the inclusion of new policy issues • Can be done at any time during the lifetime of the treaty	• Requires participation of a treaty partner or partners with similar views • Can be cost- and time-intensive, as it involves the negotiation of the treaty from scratch • Does not guarantee inclusion of reform-oriented elements (depends on the negotiated outcome) • Requires effective transition between the old and the new treaties

Source: ©UNCTAD.

Box III.4. Transition clauses

To ensure a smooth transition from the old to the new regime and prevent situations in which both apply concurrently, it is important to delineate clearly the respective treaties' scope of temporal application, e.g. by means of transition clauses. Such clauses clarify in which situations and for how long after an old IIA's termination an investor may invoke the old IIA to bring an ISDS case. Often such periods are limited to three years. Transition clauses typically modify the operation of survival clauses in the outgoing IIA (box III.5). They also ensure that investors do not fall between the cracks but remain protected throughout the transition from the old to the new IIA regime.

Anecdotal evidence suggests that only a minority of replacement IIAs contain transition clauses and that their prevalence is growing in recent regional and plurilateral IIAs. Treaty partners that are known to have used transition provisions at least once include Australia, Canada, Chile, the EU, the Republic of Korea, Mexico, Panama, Peru, Singapore and Viet Nam. Examples of transition clauses can be found in the Peru–Singapore FTA (2008) (Article 10.20), Australia–Chile FTA (2008) (Annex 10-E), Canada–EU CETA (2016) (Article 30.8) and other treaties.

Source: ©UNCTAD.

(iv) Consolidating the IIA network

Abrogating multiple old BITs and replacing them with a new plurilateral IIA helps to modernize treaty content and reduce fragmentation of the IIA network at the same time.

Consolidation is a form of replacement (see option 3). It means abrogating several pre-existing treaties and replacing them with one single new, modern and sustainable development-oriented one. From an IIA reform perspective, this is an appealing option as it has the dual positive effect of modernizing treaty content and reducing fragmentation of the IIA network (i.e. establishing uniform treaty rules for more than two countries).

For the EU, for example, whenever it signs an IIA with a third country, this new treaty replaces all BITs previously concluded with that country by individual EU member States. The Canada–EU CETA (2016), for example, is scheduled to replace eight prior BITs between Canada and EU member States (Article 30.8). Similar provisions are included in the EU's recently negotiated FTAs with Singapore (12 pre-existing BITs to be replaced) and Viet Nam (22 pre-existing BITs to be replaced).

Another example is the Mexico–Central America FTA concluded in 2011 (Costa Rica, El Salvador, Guatemala, Honduras, Mexico and Nicaragua), which replaced three earlier FTAs that were in place between Mexico and the other participating countries (i.e. Costa Rica–Mexico FTA (1994), Mexico–Nicaragua FTA (1997) and El Salvador–Guatemala–Honduras–Mexico FTA (2000)).

However, most other plurilateral IIAs have missed the opportunity for consolidation and, instead, have led to parallel application of the new and old treaties (figure III.23). This adds complexity and inconsistency to an already highly complex system (*WIR14*). Some of these

Table III.9. Reform action: Consolidating the IIA network

Abrogates two or more old BITs between parties and replaces them with a new, plurilateral IIA

Outcomes (pros)	Challenges (cons)
• Allows for a holistic approach to IIA modernization through a comprehensive revision of the treaty • Reduces fragmentation of the IIA network by decreasing the number of existing treaties • May be more cost-effective and time-efficient than pursuing multiple bilateral negotiations	• Requires the participation of numerous treaty partners • Does not guarantee inclusion of reform-oriented elements (depends on the negotiated outcome) • May be more difficult to achieve outcomes in plurilateral negotiations than in bilateral ones

Source: ©UNCTAD.

IIAs employ conflict clauses to manage overlapping treaty relationships (see option 5). Others adopt a default approach of parallelism but grant flexibility to the parties to decide between themselves. For example, in the TPP context, Australia separately agreed to terminate its BITs with Mexico, Peru and Viet Nam upon the entry into force of the TPP. Other TPP parties have thus far decided to keep their pre-existing IIAs in place (the number of IIAs with investment commitments between TPP parties that overlap with the TPP exceeds 20). In some ongoing plurilateral negotiations, the issue is still up for debate. For example, in Africa, the COMESA–EAC–SADC Tripartite FTA has the potential to replace more than 100 existing BITs between the participating States (box III.3).

As with replacement generally, when opting for consolidation, countries need to be mindful of termination provisions in the outgoing IIAs and ensure an effective transition from the old to the new treaty regime (see option 3).

(v) Managing relationships between coexisting treaties

Where countries opt for maintaining both old and new treaties in parallel, IIA reform objectives will be achieved only if – in the event of conflict or inconsistency – the new, more modern IIA prevails.

Instead of opting for replacement, some treaty parties decide that their old and new treaties should exist in parallel. This often appears to be the case when the new treaty is plurilateral (e.g. a regional FTA with an investment chapter), and the old, underlying treaties are bilateral. For instance, of the sample of 167 TIPs, more than two thirds (119) coexist with prior, overlapping IIAs (figure III.23). Generally, such parallelism adds complexity to the system and is not conducive to IIA reform. For the purpose of effective and comprehensive IIA reform, the better approach would be to avoid parallel application of coexisting IIAs between the same parties. However, States may have their reasons to opt for coexisting IIAs.

To mitigate potentially adverse consequences arising from this situation, States can include clauses that clarify the relationship between the coexisting IIAs.[28] For example, a conflict clause may specify which of the treaties prevails in case of conflict or inconsistency. Only about 35 treaties, or roughly one third of the 119 TIPs that overlap with coexisting IIAs, contain a clause explicitly allocating priority to either the existing or the new IIA.

Conflict clauses may be a useful tool for IIA reform if they prioritize new, more modern IIAs. For instance, of the 35 TIPs examined that contain conflict clauses, more than half (20) prioritize the newer IIA in cases of inconsistency. Examples include the Colombia–Republic of Korea FTA (2013) (Article 1.2(2)), the Mexico–Peru FTA (2011) (Article 1.3(2)) and the Panama–Taiwan Province of China FTA (2003) (Article 1.03(2)).

However, States often also opt to include clauses that give explicit priority to the earlier (often less reform-oriented) treaty (e.g. the Australia–Malaysia FTA (2012) (Article 21.2(2)) or the China–Japan–Republic of Korea Trilateral Investment Agreement (2012) (Article 25)).

Table III.10. Reform action: Managing relationships between coexisting treaties

Establishes rules that determine which of the coexisting IIAs applies in a given situation	
Outcomes (pros)	**Challenges (cons)**
• Ensures that countries are not subject to simultaneously applicable obligations found in overlapping treaties • May aid reform efforts by ensuring that the more recent treaty prevails • While keeping the earlier treaty "alive" (i.e. creating parallelism), clarifies the new treaty's relationship with the earlier one	• Does not terminate the earlier treaty • Only mitigates the adverse consequences arising from coexistence; does not advance effective and comprehensive IIA reform • Impact dependent on the formulation used in the conflict clause

Source: ©UNCTAD.

In fact, 15 of the above-mentioned 35 TIPs give priority to the earlier treaty. States sometimes also include clauses that yield priority to the treaty that is more favourable to investors (e.g. side letters to the TPP signed by New Zealand with Australia, Brunei Darussalam, Chile, Malaysia, Singapore and Viet Nam) or that do not provide full clarity but leave open the question about the status of the pre-existing IIA (e.g. China–Republic of Korea FTA (2015) (Article 1.3)). These types of relationship clauses do little to promote IIA reform.

The challenge of managing relationships is also relevant for IIAs with distinct (but overlapping) coverage and for different chapters within an IIA. As rules on services and investment typically interact and overlap to some extent (e.g. Article I.2 of the General Agreement on Trade in Services, covering the so-called Mode 3 of services supply), it may be necessary to regulate this interaction. States have several options at hand. First, they may opt for overlapping coverage and use conflict clauses, providing that in case of inconsistency between the investment chapter and other chapters of an FTA, the other chapters prevail (e.g. Australia–United States FTA (2004) (Article 11.2)). Another option is to cover investment in services by both the services and investment chapters, but exclude certain investment protection obligations (typically NT and MFN) from the application to services investment (e.g. EFTA–Singapore FTA (2002) (Article 38(2) and (3)). States may also include a "Services-Investment" linkage clause in the services chapter that specifies which investment obligations apply mutatis mutandis to measures affecting the supply of services (e.g. India–Singapore Comprehensive Economic Cooperation Agreement (2005) (Article 7.24)). Or they may carefully delineate the scope of application, regulating the interaction in either the services or the investment chapter (e.g. excluding Mode 3 of services supply from the scope of the services chapter Article 10.1 TPP (2016)).

(vi) Referencing global standards

In their IIA reform efforts, countries can refer to multilaterally recognized standards and instruments. Such instruments reflect broad consensus on relevant issues and referencing them can help overcome the fragmentation between IIAs and other bodies of international law and policymaking.

IIAs are currently the most prominent tools that deal with foreign investment (at bilateral, regional, plurilateral and multilateral levels). However, international policymaking has also resulted in numerous other standards and instruments that may or may not be binding and – directly or indirectly – concern international investment (table III.12). In September 2015, for example, the global community adopted the 17 Sustainable Development Goals (SDGs), and several of the 169 targets note the important role of investment for achieving these global objectives (e.g. Goal 7 target 7.a or Goal 10 target 10.b) or related to investment policy (e.g. Goal 1 target 1.b, Goal 17 targets 17.14, 17.15, 17.16). Similarly, in the 2015 Addis Ababa Action Agenda, the outcome document of the Third UN Conference on Financing for

Table III.11. Reform action: Referencing global standards

Fosters coherence and improves the interaction between IIAs and other areas of law and policymaking

Outcomes (pros)	Challenges (cons)
• Can help shape the "spirit" (e.g. object and purpose) of the treaty and influence its interpretation by arbitral tribunals • Can inform the modernization of existing treaties and the creation of new ones • Can "reconnect" the different universes of international rules • Cost-effective and time-efficient (countries can make use of existing instruments that the parties have previously agreed to)	• Depending on the global standard at issue, can be seen as "overloading" the IIA regime with issues that are not central to IIAs' traditional objective of protecting foreign investment • Does not necessarily create "legal clarity" or restrict the interpretive discretion of arbitral tribunals • Does not give treaty parties control over future development of the respective instruments

Source: ©UNCTAD.

Development (FfD), member States noted (in paragraph 91) that "[t]he goal of protecting and encouraging investment should not affect our ability to pursue public policy objectives. We will endeavour to craft trade and investment agreements with appropriate safeguards so as not to constrain domestic policies and regulation in the public interest."

Noteworthy is also UNCTAD's Investment Policy Framework for Sustainable Development, a non-binding framework that aims at making investment work for sustainable development and inclusive growth. Developed in 2012, and re-launched in updated form at the 2015 FfD Conference, the UNCTAD Policy Framework has since served as a point of reference for policymakers in more than 130 countries.

To this must be added numerous voluntary and regulatory initiatives to promote CSR standards and guidelines that foster sustainable development (e.g. ISO 26000 "Social responsibility", the UN Global Compact). Such instruments are a unique and rapidly evolving dimension of "soft law". They typically focus on the operations of multinational enterprises (MNEs) and, as such, have increasingly shaped the global investment policy landscape over the last decades (*WIR13*).

Although some uncertainty remains about the role and weight that international arbitration tribunals would give to such instruments, policymakers have certain options for harnessing these global standards for IIA reform. For example, they can take the following actions:

- Introduce (e.g. by means of cross-referencing) global standards and instruments in their new IIAs, as a small, but growing number of agreements already do. Such clauses would – at a minimum – serve to flag the importance of sustainability in investor-State relations. They could also attune investors to their sustainable development-related responsibilities and operate as a source of interpretative guidance for ISDS tribunals.

Table III.12. Selected examples of global standards with investment relevance

Common reference	Full title	Area of focus
UNFCCC	United Nations Framework Convention on Climate Change, 1771 UNTS 107 (opened for signature 4 June 1992, entered into force 21 March 1994), including the 1997 Kyoto Protocol (entered in force 16 February 2005) and 2016 Paris Agreement (entered in force 4 November 2016)	Climate change
SDGs	Transforming our world: the 2030 Agenda for Sustainable Development, GA Res 70/1, UN GAOR, 70th sess, UN Doc A/RES/70/1 (25 September 2015)	Sustainable development
FfD/AAAA	Addis Ababa Action Agenda of the Third International Conference on Financing for Development (Addis Ababa Action Agenda), GA Res 69/313, UN GAOR, 69th sess, 99th plen mtg, UN Doc A/RES/69/313 (27 July 2015)	Sustainable development
UNCTAD Policy Framework	Investment Policy Framework for Sustainable Development, UN Doc UNCTAD/DIAE/PCB/2015/5 (2015 rev.)	Sustainable development
UN Guiding Principles on Business and Human Rights	Report of the Special Representative of the Secretary General on the issue of human rights and transnational corporations and other business enterprises, John Ruggie, Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework, HRC, UN GAOR, 17th sess, UN Doc A/HRC/17/31, annex I (21 March 2011); see also HRC Res 17/4, UN GAOR, 17th sess, 33rd mtg, UN Doc A/HRC/RES/17/4 (6 July 2011)	Human rights
UN Anti-Corruption Convention	The United Nations Convention against Corruption, GA Res 58/4, UN GAOR, 58th sess, 51st plen mtg, UN Doc A/RES/58/4 (31 October 2003, entered into force 14 December 2005)	Anti-corruption
ILO Tripartite MNE Declaration	Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (November 1977), and amended at its 279th (November 2000), 295th (March 2006) and 329th (March 2017) Sessions	Labour rights
Universal Declaration of Human Rights	Universal Declaration of Human Rights, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/810 (10 December 1948)	Human rights
UN Charter	Charter of the United Nations, 1 UNTS XVI (24 October 1945)	International peace, security and development

Source: ©UNCTAD.

- Adopt a joint statement, recalling their countries' commitments to certain enumerated global standards and instruments and noting that the investment (policy) relations among the participating countries are to be understood in light of these commitments. The effects would be similar to those of cross-referencing but would apply not only to new, but also to pre-existing treaties. The larger the group of participating countries (and, possibly, the longer the list of global standards), the stronger or the more far-reaching the effect would be.
- Incorporate, at a broader level, global sustainability issues into discussions on global economic governance and the international regulatory architecture for investment.

Overall, cross-referencing can play an important role in reducing fragmentation – and isolation – of different bodies of law and policymaking and can strengthen linkages between IIAs and international sustainability standards. All of this would help shape global policy understanding, as it applies not only to future investment policymaking, but also to existing treaties.

For instance, several recent IIAs reference CSR standards in a general manner, typically referring to "internationally recognized standards" in areas such as labour, environment, human rights, anti-corruption and the like (e.g. Burkina Faso–Canada BIT (2015); Colombia–Panama FTA (2013)). Meanwhile, other recent IIAs are more specific, referring to global standards such as the SDGs (e.g. Morocco–Nigeria BIT (2016)); the UN Charter, Universal Declaration of Human Rights and/or International Labour Organization instruments (e.g. EFTA–Georgia FTA (2016); CETA (2016)); or the Organization for Economic Cooperation and Development (OECD) MNE Guidelines and OECD Principles of Corporate Governance (e.g. CETA (2016); Bosnia and Herzegovina–EFTA FTA (2013)).

A recent example of standard setting in a plurilateral context are the G20 Guiding Principles for Global Investment Policymaking, agreed on by the G20 in July 2016 during the group's Shanghai Ministerial Meeting and endorsed in September 2016 at the Hangzhou Summit (box III.1). Being an example of standard setting themselves, the Guiding Principles also reference global standards, notably in Principle VIII which states that "investment policies should promote and facilitate the observance by investors of international best practices and applicable instruments of responsible business conduct and corporate governance".

(vii) Engaging multilaterally

Multilateral engagement is the most impactful but also most difficult avenue for IIA reform. When drawing inspiration from current or past multilateral processes, attention should be given to their differences in terms of intensity, depth and character of engagement.

If successful, a global multilateral reform effort would be the most efficient way to address the inconsistencies, overlaps and development challenges that characterize the

Table III.13. Reform action: Engaging multilaterally

Establishes a common understanding or new rules between a multitude of countries, coupled with a mechanism that brings about change "in one go"	
Outcomes (pros)	**Challenges (cons)**
• Among reform options, is best suited for dealing with policy issues of global relevance (e.g. sustainable development) or systemic issues (e.g. MFN clause) • If successful, is the most efficient type of reform action as it brings about change "in one go" for a multitude of countries or treaty relationships • Can help avoid further fragmentation arising from individual countries' piecemeal reform actions	• Is the most challenging reform path as consensus among many countries is hard to achieve • Can lead to a situation in which countries with small bargaining power or latecomers find themselves in the role of "rule-takers" • Is more likely to result – at least at the current stage – in non-binding instruments or instruments with a narrow substantive scope (e.g. individual aspects of ISDS); therefore has a limited overall impact on the IIA universe

Source: ©UNCTAD.

thousands of treaties that make up today's IIA regime. That said, multilateral reform action is challenging – in particular, how to pursue it (*WIR15*, *WIR16*).

The recent past has seen a number of policy developments at the multilateral (or plurilateral) level that can inspire future multilateral IIA reform efforts. Inspiration can be found in both the way the "new rules" were developed and the processes or "tools" employed to extend the new rules to existing treaties. In this regard, multilateral rulemaking processes in areas others than IIAs (e.g. the OECD-based base erosion and profit shifting (BEPS) project) may also be instructive.

When considering to what extent lessons can be learned from these initiatives, attention needs to be given to the characteristics of various multilateral processes. Differences may exist regarding, inter alia, the scope and breadth of content covered, the number of countries involved (during rule creation and for later rule application), its legal nature (both of the actual rules and the mechanism used to foster broader application) and the extent to which such processes are institutionalized or hosted by an intergovernmental organization.

For example, the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (the Mauritius Convention) fosters greater application of the UNCITRAL Transparency Rules to IIAs concluded prior to 1 April 2014. The Mauritius Convention effectively modifies a number of first-generation IIAs (of those countries that have ratified the Convention), which turns it into a collective IIA reform action.[29] Future IIA reform actions could draw upon (i) the process of multilateral negotiations that led to the UNCITRAL Rules and the Mauritius Convention and (ii) the Mauritius Convention's opt-in mechanism, which modifies certain aspects of pre-existing IIAs (section III.B.1).

Beyond the investment regime, the Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (the BEPS Multilateral Instrument) fosters States' implementation of the tax treaty related measures of the Final BEPS Package, potentially amending over 3,000 bilateral tax treaties concluded thus far. The BEPS Multilateral Instrument deals with a number of issues of concern (e.g. hybrid mismatch arrangements, treaty abuse, streamlining dispute resolution) and creates change in a flexible, à la carte way. For example, the BEPS Multilateral Instrument will apply only to the tax treaties specifically designated by the parties to the Convention, and it uses opt-out mechanisms that allow parties to exclude or modify the legal effects of certain provisions. Choices between alternative provisions and opt-in mechanisms give the possibility of taking on additional commitments.[30] Future IIA reform actions could draw upon (i) the multilateral stakeholder process that led to the adoption of the Final BEPS Package; and (ii) the treaty's architecture, which is similar to (but more complex than) the Mauritius Convention, allowing for unilateral declarations, and selective reservations to or amendments of pre-existing tax treaties.

Current discussions on the establishment of a multilateral investment court and/or appellate mechanism (section III.B.2) could result in an instrument that ultimately changes ISDS provisions included in earlier treaties. The opt-in technique of the Mauritius Convention as a potential model for reform is also explored in the ongoing process involving UNCITRAL and the CIDS that examines the establishment of a permanent investment tribunal or an appellate mechanism.

Yet another example are the G20 Guiding Principles on Global Investment Policymaking, adopted with the backstopping of UNCTAD (section III.B.1). Although non-binding, the principles are meant to serve as an important reference for negotiating IIAs and modernizing existing ones. They could effectively be the touchstone for global reform of the existing IIA regime and for the formulation of a new generation of IIAs, more appropriately aligned with 21st century concerns and priorities. Inspiration may be found in suggestions that

(i) the principles may not only give guidance to treaty drafting but, by stating the G20 members' shared understanding of today's investment policymaking priorities, may also offer guidance for the interpretation of existing IIAs; and (ii) they may lay the basis for their broader application to countries other than members of the G20.

Finally, multi-stakeholder platforms and processes such as UNCTAD's World Investment Forum, the international forum for high-level and inclusive discussions on today's existing multi-layered and multifaceted IIA regime, and the FfD, mandating UNCTAD to continue consultations with member States on IIAs, are useful as a platform for the expert research, analysis, backstopping and exchange on how to carry reform further.

(viii) Abandoning unratified old treaties

A relatively large number of BITs, many of them old, have not yet entered into force. A country can formally indicate its decision not to be bound by them as a means to help clean up its IIA network and promote the negotiation of new, more modern treaties.

Under international law, countries are "obliged to refrain from acts which would defeat the object and purpose of a treaty" they have signed, even before the said treaty enters into force (VCLT Article 18). Formally "abandoning" a treaty ("abandonment" being used as a colloquial and legally neutral term) would make certain that a country has released itself from that obligation. This is usually a straightforward process because the treaty is not in force.

To date, few countries are known to have undertaken this reform action, though not all cases may have received public attention. Brazil abandoned 14 BITs signed in the 1990s after some of them were rejected by its Congress, as certain provisions were deemed unconstitutional. In 2008, Ecuador "denounced" two unratified BITs (with Honduras and Nicaragua). Most recently, in January 2017, the United States publicly stated its intention not to become a party to the TPP.[31]

However, in certain treaties, countries agree to "provisional application", which means that the treaty (or part of it) is applied after its signature but before its entry into force. Relinquishing a provisionally applied treaty is usually more complicated, as it comes close to terminating a treaty that has entered into force. Typically, the IIA will stipulate a process that a country must follow in order to terminate provisional application; this may also trigger the operation of a survival clause (box III.5). Provisional application is more common in plurilateral IIAs (e.g. the ECT (1994); Canada–EU CETA (2016)[32]) as ratification by multiple parties is likely to be a protracted process.

For example, in 2009, the Russian Federation issued a notice to terminate the provisional application of the ECT (the treaty contains a separate 20-year survival clause for signatories terminating provisional application).

Table III.14. Reform action: Abandoning unratified old treaties

Conveys a country's intent not to become a party to a concluded but as yet unratified treaty	
Outcomes (pros)	**Challenges (cons)**
• Can help clean up a country's IIA network • Is procedurally simple, requiring only a notice to the other parties • Can send a reform message to other treaty parties and the public	• Could be perceived as negatively affecting the country's investment climate • Could disturb relations with other treaty parties • May not affect existing cases arising from provisional application • May not affect future ISDS claims (during the survival clause period) if a country accepted provisional application pending ratification

Source: ©UNCTAD.

(ix) Terminating existing old treaties

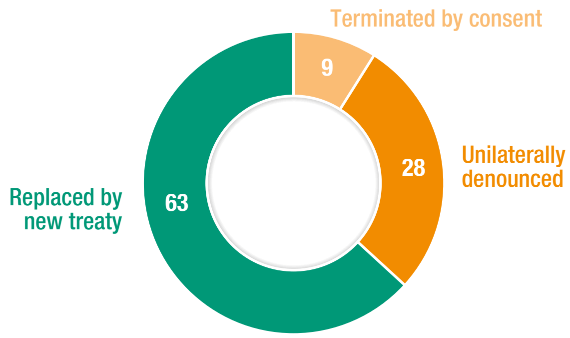
Terminating "outdated" BITs – whether unilaterally or jointly – is a straightforward (although not always instantaneous) way to release the parties from their obligations.

Terminating a treaty releases the parties from the obligation to further perform according to it (this differs from a treaty's termination due to its replacement by a new one, see options 3 and 4). A treaty can be terminated unilaterally (when the treaty permits) or by mutual consent (at any time). Rules for unilateral treaty termination are often set out in the BIT itself. Typically, BITs set out an initial period of operation of between 10 and 20 years, which must expire before a party may unilaterally terminate the treaty. Unilateral termination will trigger the survival clause (if existing in the treaty), which will prolong the treaty's operation for a set time after it has been terminated. For the sake of clarity, countries may consider neutralizing the survival clause when terminating a treaty jointly (box III.5).

Of 212 BITs terminated as of March 2017, 19 treaties (9 per cent) were jointly terminated, without any replacement or consolidation; another 59 (28 per cent) were unilaterally terminated, while 134 (63 per cent) were replaced by a new treaty (figure III.24). This suggests that countries are often receptive to termination, but generally when it is part of the process of concluding a new IIA. Noteworthy is also the process of termination of intra-EU BITs (box III.6).

Over the past decade, several countries have terminated their BITs (unilaterally or jointly); examples include South Africa (9), the Plurinational State of Bolivia (10), Ecuador (10), and Indonesia (at least 20). The Argentina–Indonesia BIT (1995) provides an instance in which the parties have agreed to terminate the treaty while at the same time extinguishing the survival clause. Following the adoption of its new model BIT at the end of 2015, in 2016, India sent notices of termination to more than 50 treaty partners with whom the initial treaty term has expired, with the intention to renegotiate a new treaty based on the revised model BIT (India has already started to renegotiate with various countries). Most recently, in May 2017, Ecuador's National Assembly has also approved the termination of 12 BITs (subsequent steps need to be taken to finalize the domestic termination process).

Figure III.24. Terminated BITs, by type of termination as of March 2017 (Per cent)



Source: ©UNCTAD, IIA Navigator.
Note: Based on 212 terminated BITs (excluding expired BITs).

Table III.15. Reform action: Terminating existing old treaties

Releases the parties from their obligations under the treaty

Outcomes (pros)	Challenges (cons)
• Can be unilateral or joint termination (without replacement by a new treaty) • Sends a strong signal to reform-oriented domestic stakeholders and critics of the IIA regime • Can promote sustainable development-oriented reform, if part of a coordinated, joint replacement strategy	• Could be perceived as worsening the investment climate in the terminating country or countries • Could result in investors of one party no longer being protected in the other party's territory • Might not be instantaneous if a survival clause is triggered (i.e. ISDS exposure remains for the duration of the survival clause period)

Source: ©UNCTAD.

Box III.5. Survival clauses

Survival clauses, included in most BITs, are designed to extend a BIT's application for an additional period (some for 5 years, but most commonly for 10, 15 or 20 years) after treaty termination. Survival clauses apply to investments made prior to the date of termination but cover governmental measures adopted both before and after the date of termination (for the duration of the survival period). There are two main types of survival clauses: some are formulated to apply to unilateral treaty termination only (type 1); others do not make it clear whether they are limited to cases of unilateral termination or also apply to joint termination by the parties (type 2). Unilateral treaty terminations will invariably trigger the survival clause. In joint terminations, the situation is less clear: the survival clause may or may not be triggered, depending on its formulation (type 1 or 2) and whether it has been neutralized by the treaty parties at the time of termination.

To date, two known ISDS cases have been filed pursuant to BITs that had been jointly terminated (without replacement by a new treaty) by the contracting parties: *Marco Gavazzi and Stefano Gavazzi v. Romania* (ICSID Case No. ARB/12/25), filed in 2012 under the Italy–Romania BIT (1990), jointly terminated on 14 March 2010; and *Impresa Grassetto SpA, in liquidation v. Republic of Slovenia* (ICSID Case No. ARB/13/10), filed in 2013 under the Italy–Slovenia BIT (2000), jointly terminated on 10 June 2009. In both cases, the tribunals have issued their jurisdictional decisions, but their texts were not public at the time of writing. Available evidence suggests that both proceedings are going forward, i.e. that the tribunals dismissed any jurisdictional objections raised. It is unknown, however, whether the respondent States in these two cases raised an objection based on the purported inapplicability of the survival clause.

Given the lack of certainty on the matter, when jointly terminating an IIA countries are well advised to clarify their intention with regard to the survival clause, either by explicitly amending and/or suppressing it (neutralization), or explicitly confirming that they wish for the survival clause to apply. For instance, the survival clause was neutralized by the parties' express agreement in the context of the joint termination of the Argentina–Indonesia BIT (1995) as well as the joint termination of several BITs between the Czech Republic and several other EU member States.

Source: ©UNCTAD.

Box III.6. Termination of intra-EU BITs

Almost 200 BITs are in force among EU member States. The European Commission's position is that these intra-EU BITs need to be terminated because they are incompatible with EU law. In the Commission's view, they overlap and conflict with the EU single market rules, thereby discriminating against investors from other EU member States and interfering with the EU court's exclusive competence to ensure full effect of EU law (e.g. through the substantive protection they provide and due to ISDS). In 2015, the Commission initiated infringement proceedings against five member States for failing to terminate their intra-EU BITs (i.e. the Austria–Czech and Slovak Federal Republic BIT (1990), the Netherlands–Czech and Slovak Federal Republic BIT (1991) and the Sweden–Romania BIT (2002)), followed by a so-called reasoned opinion to these member States issued in September 2016, formally requesting them to terminate the BITs under investigation. In parallel, the Commission has also initiated separate "EU Pilot" proceedings against 21 other member States. With the latter, the Commission seeks to achieve compliance without having to resort to formal infringement proceedings. The Commission has urged the member States not only to terminate their intra-EU BITs, but also to make sure that all the "legal effects" of those BITs are likewise terminated.

Some member States have already terminated all their intra-EU BITs (e.g. Ireland, Italy), and termination efforts are currently under way or being considered in several others (e.g. the Czech Republic, Romania, the Slovak Republic). Certain member States have sought to propose compromise solutions going forward and to retain aspects of the status quo, notably ISDS. For example, in April 2016, Austria, Finland, France, Germany and the Netherlands presented to the Trade Policy Committee of the EU Council a "non-paper" suggesting such a compromise, which envisages the conclusion of an agreement among all EU member States in order to coordinate the phasing out of existing intra-EU BITs, to codify existing investor rights under EU law, and to provide protection to EU investors further to the termination of these BITs, including a binding and enforceable settlement mechanism for investment disputes as a last resort to mediation and domestic litigation. The proposal also refers to the parallel elimination of survival clauses in the respective intra-EU BITs.

Source: ©UNCTAD.

Table III.16.	Reform action: Withdrawing from multilateral treaties
Releases the withdrawing parties from the instrument's binding force	
Outcomes (pros)	**Challenges (cons)**
• Can help narrow a country's exposure to (future) investor claims (subject to the denounced treaty's survival clause and without prejudice to investor claims under other IIAs or before other international fora) • May reduce annual expenditures (e.g. if the treaty requires annual contributions) • Can be a second-best solution for countries that would prefer to reform the existing treaty, but cannot do so alone	• Could be perceived as negatively affecting the country's investment climate and/or could put the country into an "outsider" position • Deprives the country of further cooperation with other treaty partners and the opportunity to have a word in the evolution of the agreement • Applies prospectively only • Since most IIAs provide consent to multiple fora for ISDS, may not eliminate the risk of ISDS claims entirely • Could narrow protection for nationals investing abroad

Source: ©UNCTAD.

(x) Withdrawing from multilateral treaties

Unilateral withdrawal from an investment-related multilateral treaty (e.g. the ICSID Convention) can help reduce a country's exposure to investor claims but may also create challenges for future multilateral cooperation on investment.

Unilateral withdrawal from an investment-related multilateral treaty releases the withdrawing party from the instrument's obligations and – depending on the treaty at issue – can help minimize a country's exposure to investor claims. Unilateral withdrawal can also signal the country's apparent loss of faith in the system and a desire to exit from it (rather than reform it). It can show a preference for an alternative dispute settlement forum – for instance, a regional one (e.g. UNASUR).

So far, two countries have withdrawn from the ECT, a treaty with over 50 signatories that has been used more frequently than any other IIA to bring ISDS cases. In 2009, the Russian Federation submitted its notice to terminate provisional application and declare its intention not to become party to the ECT. In 2014, Italy filed a notice of denunciation of the ECT, which took effect on 1 January 2016 (unlike the Russian Federation, Italy had ratified the ECT and was a fully fledged party to it). The ECT contains two separate 20-year survival clauses: for signatories that applied the treaty on a provisional basis and for fully fledged parties. The ICSID Convention has to date been terminated by three countries – the Plurinational State of Bolivia in 2007, Ecuador in 2009 and the Bolivarian Republic of Venezuela in 2012. All three had had multiple treaty-based investor claims filed against them at ICSID, with high financial stakes.

c. Concluding remarks

Determining which reform option is "right" for a country in a particular situation requires a careful and facts-based cost-benefit analysis, while addressing a number of broader challenges. Comprehensive regime reform would benefit from intensified multilateral backstopping. UNCTAD, through its three pillars of work – research and policy analysis, technical assistance and intergovernmental consensus building – can play a key role, as the United Nations' focal point for international investment and the international forum for high-level and inclusive discussions on today's existing multi-layered and multifaceted IIA regime.

Sustainable development-oriented IIA reform has entered the mainstream of international investment policymaking (*WIR15, WIR16*). The second phase of IIA reform builds on progress achieved in the past, by focusing on what can be done to modernize the large stock of first-generation treaties and to reduce fragmentation of the global IIA network.

This *WIR* has identified and discussed 10 reform actions that can be pursued to bring about such sustainable development-oriented IIA reform. It has taken stock of countries' experiences with these options, their respective pros and cons, and lessons learned along the way.

The 10 reform actions represent modalities for introducing change to the IIA regime rather than designing treaty content (for the latter, see the UNCTAD Investment Policy Framework for Sustainable Development and the UNCTAD Road Map for IIA Reform, as well as the stocktaking of reform in *WIR16*). When striving to make IIAs work for sustainable development, policymakers may also wish to consider complementary policy actions, including actions with respect to the implementation of treaties or the prevention and management of investment disputes.

Although many countries have already begun to pursue one or more of the 10 options identified here, this *WIR* also shows that there remains much scope for further reform. Countries therefore have ample opportunity to consider each option, its pros and cons and its lessons learned, in order to adapt them as necessary and adopt those that are in line with their individual objectives for IIA regime reform.

In so doing, policymakers face a number of challenges, including strategic and systemic ones, as well as those relating to capacity and coordination. At the strategic level, countries need to determine the right extent of reform, on the basis of a comprehensive and facts-based cost-benefit analysis in light of their offensive and defensive interests. Importantly, this means ensuring that reform produces holistic results (covering all five areas of reform and all four levels of policymaking; see *WIR15* and section III.B.1), but without depriving the IIA regime of its fundamental purpose of protecting and promoting investment. When examining different reform options, policymakers need to consider the need for balance between preserving those elements of the current investment policy regime that work well and improving those parts on which action is required to make it work better for sustainable development. Similarly, policymakers need to avoid unintended consequences of reform. Ultimately, the regime must be reoriented so that it becomes balanced, predictable and conducive to sustainable development.

In terms of systemic challenges, policymakers need to address the challenges that arise from gaps, overlaps and fragmentation that create coherence and consistency problems. This includes improving the coherence of the IIA regime consisting of thousands of agreements that differ in content and type, consolidating and streamlining the IIA network, and managing the interaction between IIAs and other bodies of international law. Cross-cutting systemic challenges that policymakers should keep in mind also arise from the operation of MFN provisions, and survival and transition clauses.

A third set of challenges relates to coordination. These challenges include finding treaty partners with similar reform objectives and prioritizing individual reform actions and options, considering their importance and feasibility, as well as their suitability in light of long- and short-term IIA reform objectives and overall development strategies. Coordination also benefits from communicating reform to affected stakeholders – within and outside the country. Treaty partners, the international community and foreign investors (both established and prospective) need to receive a clear message that a country's reform endeavours will not result in a less attractive business environment or encourage protectionism.

Coordination challenges also include ensuring coherence between reform efforts at different levels of policymaking. Coordination challenges include prioritizing reform actions, finding the right treaty partners to implement them and ensuring coherence between reform efforts at different levels of policymaking, including the national and international levels (section III.A.2). Only coordinated activity at all levels (national, bilateral and regional, as well as multilateral) will deliver an IIA regime in which stability, clarity and predictability serve the objectives of all stakeholders: effectively harnessing international investment relations for the pursuit of sustainable development. In the absence of such a coordinated approach, the risk is that IIA reform efforts could become fragmented and incoherent. Reform needs to be pursued with a common agenda and vision in mind.

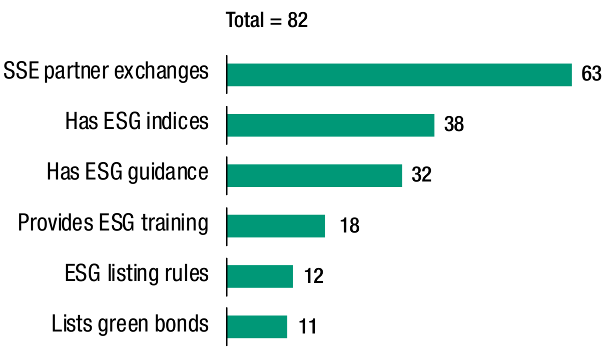
A final set of challenges relate to capacity. Successful reform requires strong internal structures for preparing and carrying out actions, with solid processes and decision-making and implementation capacities (e.g. sustained internal coordination among State organs, awareness raising and capacity-building). This is particularly difficult for developing countries and LDCs, which face challenges in terms of bargaining power, negotiating and implementing capacities, and greater vulnerability to reform risks.

In practice, these challenges make it very difficult for LDCs and smaller developing countries to be effective in altering their existing IIA networks and addressing the drawbacks of existing first-generation IIAs. For such countries it is particularly important to benefit from opportunities to build the capacity of IIA negotiators, to ensure that knowledge of IIA issues is preserved in institutional memory and does not disappear due to turnover of officials, as well as to ensure some continuity in the staff engaged in IIA reform in order to maintain a coherent and cohesive IIA reform approach over time.

All these challenges call for a coordinated approach to IIA reform, supported by multilateral backstopping. UNCTAD, through its three pillars of work – research and policy analysis, technical assistance and intergovernmental consensus building – can play a key role in this regard. In particular, UNCTAD's role as the United Nations' focal point for international investment and the international forum for high-level and inclusive discussions on today's multilayered and multifaceted IIA regime, as reconfirmed in its mandates from the Nairobi Maafikiano and the Addis Ababa Action Agenda, can help bring coordination and coherence to reform efforts. Ultimately, the higher the degree of coordination at various levels of policymaking (national, bilateral and regional, as well as multilateral), the higher the chances of creating a less fragmented and more balanced, stable and predictable IIA regime that effectively pursues sustainable development objectives.

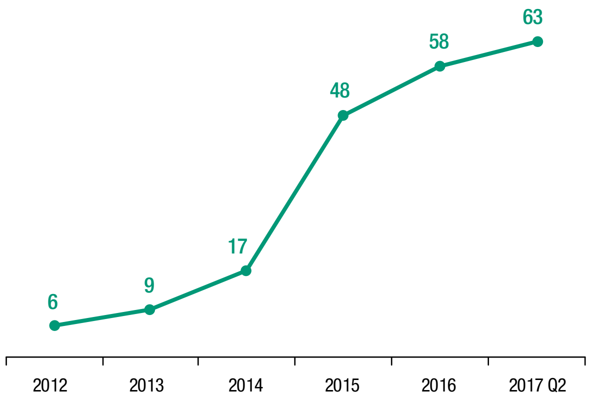
C. CAPITAL MARKETS AND SUSTAINABILITY

Figure III.25. Overview of sustainability mechanisms used by stock exchanges (Number of exchanges)



Source: ©UNCTAD, SSE initiative database.

Figure III.26. Sustainable Stock Exchanges initiative members, by year, 2012–2017 Q2



Source: ©UNCTAD, SSE initiative database.

A further important investment policy development in recent years has been the growth of capital market policies and instruments designed to promote investment in sustainable businesses and support the achievement of the SDGs.[33] These policies and instruments are emanating primarily from stock exchanges and their regulators, but with strong involvement from other capital market stakeholders such as institutional investors. Stock exchanges in particular are uniquely positioned to influence their market in a way few other actors can. In addition to their ability to influence investor and company behavior, exchanges often support regulators in promoting the adoption of market standards.

An examination of stock exchange-related instruments focusing on environmental, social and governance (ESG) factors around the world indicates that exchange actions to promote corporate ESG practices are becoming more commonplace (figure III.25).

1. Sustainable Stock Exchanges initiative

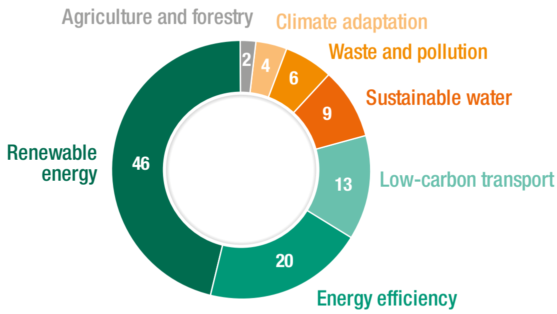
The growth of the United Nations Sustainable Stock Exchanges (SSE) initiative,[34] in which membership has more than tripled in the last two years (figure III.26), can be seen as a proxy for the growing attention that exchanges are giving to sustainability in their markets. Launched in 2009 by the UN Secretary General, the SSE was developed in response to the demand from exchanges for a place to come together with investors, companies, regulators and policymakers to share good practices and challenges. The initiative has grown into a global partnership platform that includes most of the world's exchanges. Through the SSE, exchanges have access to consensus and capacity-building activities, guidance, research and other support to assist in their efforts to contribute to sustainable development. The SSE is organized by UNCTAD, the UN Global Compact, UN Environment and Principles for Responsible Investment.

As of 2017 Q2, 63 partner exchanges from five continents, listing over 30,000 companies and representing a market capitalization of more than $55 trillion, have made a public commitment to advancing sustainability in their market. They range from global giants such as the NYSE and Nasdaq (United States) to large emerging-market exchanges such as B3 (Brazil) and Johannesburg Stock Exchange (South Africa) to small-developing country exchanges such as the Rwanda Stock Exchange or the Namibia Stock Exchange.

2. Green bonds

Another significant development is the growth of green finance. Green bonds, first issued in 2007, finance industries in an array of sectors, from clean and efficient energy to low-carbon transport and water (figure III.27). In the past five years, green bond listings have grown considerably,[35] and the green bond market is estimated to reach $100 billion in 2016.[36] Today 19 stock exchanges offer green bond listings, and just under half of all green bonds are listed on stock exchanges. This demonstrates both that exchanges are already involved in the transition to a green economy and that there is room for further growth.

Figure III.27. **What sectors green bonds finance** (Per cent of funds)



Source: Climate Bonds Initiative.

By listing green bonds, stock exchanges can play a leading role in promoting standards for assurance and guidance for issuing such bonds, while opening new channels of finance for climate mitigation and adaptation projects. The Luxembourg Stock Exchange, for example, is one of the pioneers, listing its 100th green bond in 2016. Exchanges in developing countries are also active; for example, Nairobi Securities Exchange of Kenya announced in 2016 that it would be listing a green bond. Although exchanges have expressed intentions to list more green bonds in the near future and green finance experts foresee more growth in this area in the coming years, the number of exchanges listing green bonds is still low.

3. Indices

ESG indices remain the most popular sustainability instrument among exchanges, with 38 of 82 exchanges providing them. Indices with ESG themes are used to promote sustainable investments, while encouraging greater voluntary transparency among issuers. There are more than a hundred ESG-themed indices around the world, created by exchanges as well as by specialist companies such as FTSE Russell, Standard & Poor's, Stoxx, Thomson Reuters and MSCI.

Looking at the policy landscape, governments are also encouraging corporate disclosure of ESG factors, with 30 of the largest 50 economies having in place at least one regulation on disclosure of such factors. Government involvement on the investment side is less developed, however, with only 8 of the 50 countries implementing an investor stewardship code that addresses ESG factors.

Despite many reasons to be optimistic, data from the SSE initiative show that more action is needed if stock exchanges are to play an important role in promoting the reorientation of financial markets to support the SDGs.

To transition to a financial system that is more supportive of the SDGs, market incentives should be aligned with long-term values and ESG considerations need to be integrated into standard practice.[37] The SDGs outline many of these ESG factors and provide a framework for addressing them.

Achieving the SDGs requires significant financing, estimated at $5–7 trillion per year (*WIR14*). Although public funding and development assistance remains important, the scale of the investment challenge requires new flows of private capital.[38] The SDGs provide a global growth strategy for the next decade. As the intersection between companies and investors, stock exchanges are well positioned to contribute to them.

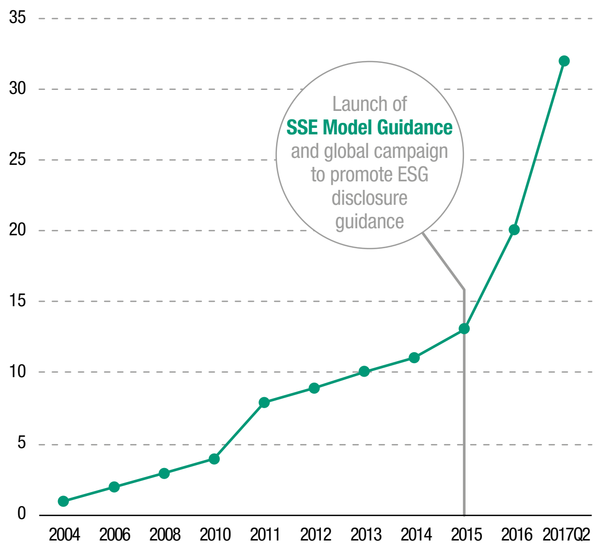
4. Guidance and listing requirements on ESG disclosure

Historically, exchanges have had the mandate of helping companies comply with, as well as stay ahead of, regulations that enable stable, transparent and fair markets. Exchanges play a critical role in helping markets navigate emerging ESG disclosure and management demands.

By mid-2017 there were 32 stock exchanges providing formal guidance to issuers on reporting ESG information, including 17 that introduced guidance for the first time in 2016 and early 2017. Still more exchanges are expected to introduce such guidance as the global trend among stock exchanges shifts towards explicitly recommending that issuers report on sustainability topics (figure III.28).

Figure III.28. Global trend in stock exchange ESG disclosure guidance, 2004–2017 Q2

(Number of stock exchanges with guidance)



Source: ©UNCTAD, SSE initiative database.

The number of stock exchanges issuing guidance is growing, facilitated by the (WFE), both of which issued model guidance documents in 2015 to assist exchanges in the creation of ESG reporting guidance. The SSE also launched in 2015 a global outreach campaign to encourage stock exchanges to adopt voluntary guidance on ESG disclosure. Institutional investors, led by Allianz Global Investors, a long-time member of the SSE Investor Working Group, supported this SSE outreach campaign: over 100 investors and companies representing more than $10 trillion in assets under management and $400 billion in market capitalization signed letters to 65 stock exchanges asking them to issue guidance on ESG disclosure. As indicated in figure III.28, the outreach campaign has led to a significant acceleration in the global trend of stock exchanges issuing guidance on ESG disclosure.

This trend responds to demands from investors for a more comprehensive view of a company's relevant issues. A growing number of investors are incorporating ESG factors into investment decision-making. Globally there is a higher level of understanding that failing to consider ESG information is a failure of an investor's fiduciary duty.[39]

While the spectrum of company approaches to reporting on ESG information continues to evolve rapidly, standards are emerging – for instance, the GRI standard for ESG disclosure, the most widely used by companies and the most commonly referenced by stock exchanges.

Moving beyond voluntary guidance, ESG information is incorporated into the listing rules on 12 exchanges as of mid-2017. Mandatory ESG disclosure rules are emanating from stock exchanges (e.g. Hong Kong Stock Exchange, Singapore Stock Exchange) as well as securities regulators (e.g. Securities and Exchange Board of India). Mandatory rules can have different scopes of application, sometimes applying only to a subset of the largest listed companies, thus relieving smaller companies of any undue additional disclosure burden.

Findings from a 2016 Corporate Knights survey of stock exchanges[40] emphasize the impact of mandatory disclosure rules: all but one of the top 10 most transparent stock exchanges in that study had at least one mandatory policy instrument designed to regulate sustainability disclosure in force in the jurisdictions where they operate. The report noted that although governments remain the most prevalent initiator of policy instruments aimed at sustainability disclosure, the cases of B3, Bursa Malaysia, Johannesburg Stock Exchange and Stock Exchange of Thailand represent instances in which exchanges, through their ability to influence the reporting behaviour of their listed entities, are successfully generating a rapid uptake of sustainability disclosure practices.

NOTES

1 The sources for the following investment measures can be found in UNCTAD's Investment Policy Hub (http://investmentpolicyhub.unctad.org).

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

3 "EU capitals seek stronger right of veto on Chinese takeovers", *Financial Times*, 14 February 2017; "EU plans measures to block foreign takeovers of strategic firms", Reuters, 10 March 2017.

4 "Guidelines on the National Security Review of Investments", *Innovation, Science and Economic Department Canada*, 19 December 2016.

5 According to the latest *Trade Monitoring*, 9 December 2016. See www.wto.org/english/news_e/news16_e/trdev_09dec16_e.htm.

6 See http://investmentpolicyhub.unctad.org/News/Hub/Archive/508. The G20 Guiding Principles for Investment Policymaking cover nine areas: (i) anti-protectionism, (ii) non-discrimination, (iii) investment protection, (iv) transparency, (v) sustainable development, (vi) the right to regulate, (vii) investment promotion and facilitation, (viii) responsible business conduct and (ix) international cooperation.

7 In total, 111 investment laws were identified for 108 countries, with China and Uzbekistan having more than one investment law (respectively three and two laws). Almost all laws are from either a developing country (90) or an economy in transition (16). Only two developed countries (Iceland and Lithuania) were identified as having general investment laws.

8 For further details, see UNCTAD, *Investment Policy Monitor*, Special Issue, November 2016.

9 For the list of IIAs signed and entered into force in 2016, see UNCTAD's IIA Navigator, http://investmentpolicyhub.unctad.org/IIA.

10 The Japan–Mongolia BIT (2001) was replaced by the Japan–Mongolia Economic Partnership Agreement (2015). The Partnership and Cooperation Agreement between the European Communities and Their Member States and Ukraine (1994) was replaced by the Association Agreement between the European Union and the European Atomic Energy Community and their Member States, of the One Part, and Ukraine, of the Other Part (2014).

11 United States, The White House - Office of the Press Secretary, Presidential Executive Order Addressing Trade Agreement Violations and Abuses, 29 April 2017.

12 United States, The White House, "Trade Deals that Work for All Americans", 9 March 2017.

13 The Brazil–Peru ETEA does not contain an ISDS provision.

14 The EFTA–Georgia FTA includes provisions applying to commercial presence.

15 The EU–SADC EPA contains limited investment provisions, including a commitment to cooperate on investment matters and a provision relating to capital movements (subject to safeguards for monetary policy operations and balance-of-payments difficulties).

16 The Chile–Uruguay FTA contains provisions on strengthening investment promotion and facilitation between the parties as well as a chapter on trade in services providing for market access, NT and MFN. At the same time, the services chapter expressly excludes the provision of services in the territory of a Party by a covered investment, as defined in the Chile–Uruguay BIT (2010).

17 The RCEP is a proposed FTA between the 10 member States of the Association of Southeast Asian Nations (ASEAN) (Brunei Darussalam, Cambodia, Indonesia, the Lao People's Democratic Republic, Malaysia, Myanmar, the Philippines, Singapore, Thailand, Viet Nam) and Australia, China, India, Japan, the Republic of Korea and New Zealand.

18 The EU proposed that principles could build on UNCTAD's Investment Policy Framework on Sustainable Development and draw inspiration from relevant sources such as the G20 Guiding Principles.

19 The 23 WTO members that are taking part in the TISA talks are Australia, Canada, Chile, Taiwan Province of China, Colombia, Costa Rica, the European Union, Hong Kong (China), Iceland, Israel, Japan, the Republic of Korea, Liechtenstein, Mauritius, Mexico, New Zealand, Norway, Pakistan, Panama, Peru, Switzerland, Turkey and the United States.

20 European Commission, "Report of the 21st TiSA Negotiation Round", 2–10 November 2016.

21 Note has to be taken of the limited investment dimension of the Chile–Uruguay FTA.

22 UNASUR's members include Argentina, the Plurinational State of Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay and the Bolivarian Republic of Venezuela. Mexico and Panama hold observer status.

23 Some IIAs include clauses setting out a mechanism for consultation of affected stakeholders when designing new investment-related policies or regulations (so-called "a priori transparency requirement"). The information provided here does not refer to this type of clause.

[24] For example, treaty termination is frequently combined with replacement or consolidation.

[25] MFN clauses typically prohibit less favourable treatment of investors from a signatory State when compared with treatment of "like" investors from any third country.

[26] Typically, such clauses cover governmental measures adopted both before and after the date of termination (for the duration of the survival period), but apply only to investments made before the treaty's termination.

[27] See European Court of Justice (ECJ), Commission v Austria, C-205/06, Judgement (3 March 2009); ECJ, Commission v Sweden, C-249/06, Judgement (3 March 2009); ECJ, Commission v Finland, C-118/07, Judgement (19 November 2009).

[28] If the new overlapping treaty does not include a relationship clause of any kind, the relationship between the co-existing treaties will be guided by the VCLT, notably its Articles 30 and 59 (as applicable).

[29] For the status of the Convention, see the UNCITRAL website at www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Convention_status.html.

[30] Multilateral Convention to Implement Tax Treaty Related Measures to Prevent Base Erosion and Profit Shifting (adopted 24 November 2016).

[31] United States, The White House, "Presidential Memorandum Regarding Withdrawal of the United States from the Trans-Pacific Partnership Negotiations and Agreement", 23 January 2017.

[32] Note that only some provisions of the investment chapter will be provisionally applied. See Council of the European Union, 10974/16 (5 October 2016).

[33] The text in this section is based on UNCTAD, UN Global Compact, UNEP and PRI (2016).

[34] The SSE initiative is a peer-to-peer learning platform for exploring how exchanges, in collaboration with investors, regulators, and companies, can enhance corporate transparency and ultimately performance on environmental, social and corporate governance issues and encourage sustainable investment. For more information, visit www.SSEinitiative.org.

[35] SSE, "Green Finance Policy Brief", 2016.

[36] Climate Bonds Initiative, "Bonds and Climate Change – The State of The Market 2016", 2016.

[37] UNEP Inquiry, "The Financial System We Need", 2015.

[38] Global Compact, UNCTAD, UNEP FI and PRI, "Private Sector Investment and Sustainable Development", 2015.

[39] Global Compact, UNEP FI, PRI and UNEP Inquiry, "Fiduciary Duty in the 21st Century", 2015.

[40] Corporate Knights, "Measuring Sustainability Disclosure: Ranking the World's Stock Exchanges", 2016.