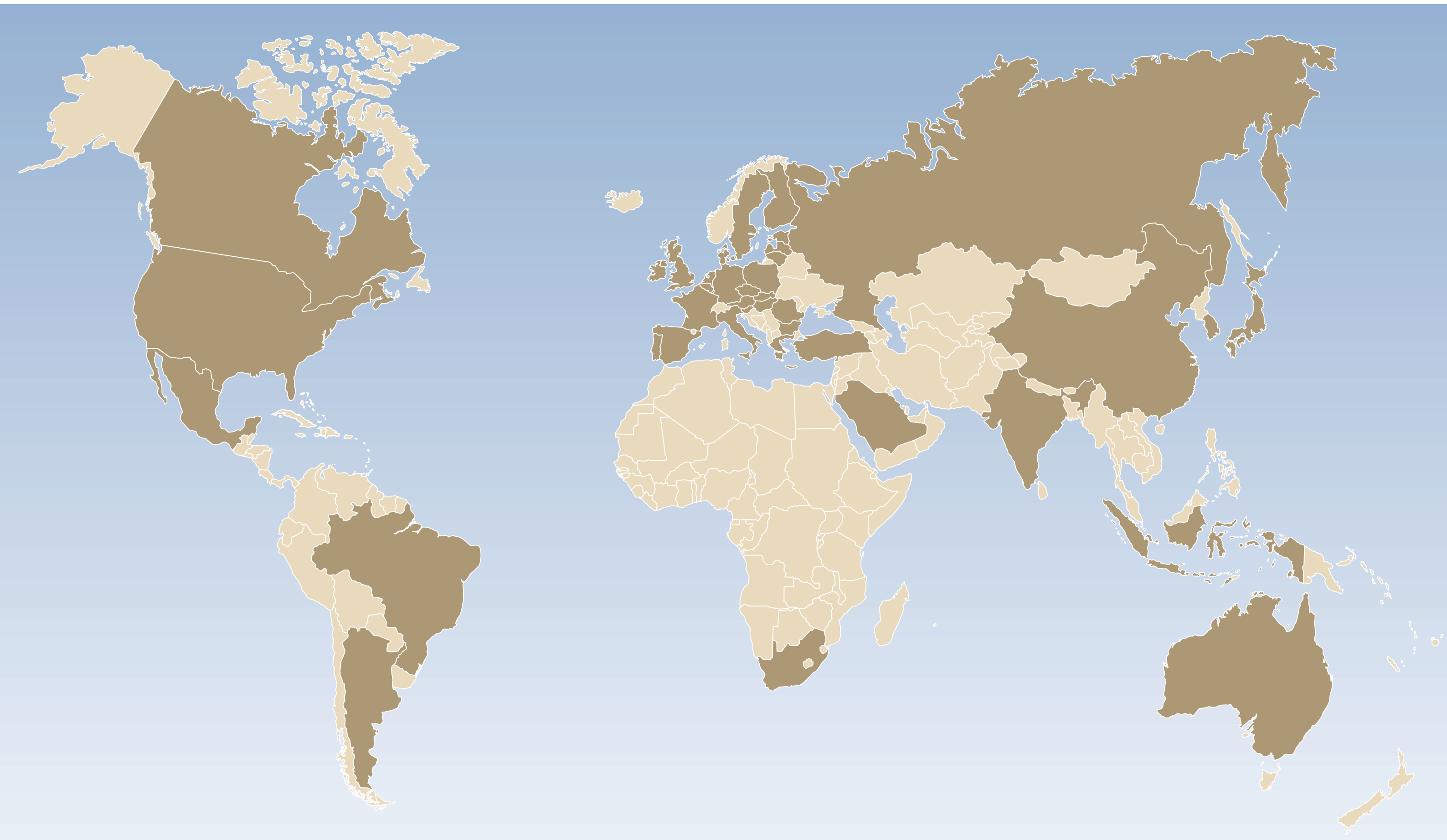
UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Investment Policy Developments in G-20 Countries



UNITED NATIONS

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
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DIVISION ON INVESTMENT AND ENTERPRISE

Investment Policy Developments in G-20 Countries[1]

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[1] The present report is in response to UNCTAD's mandate to monitor investment policy developments and their implications for development. It is also meant to contribute to a joint effort by the World Trade Organization (WTO), UNCTAD, the Organisation for Economic Cooperation and Development (OECD) and the International Monetary Fund (IMF) to respond to the 2 April 2009 G-20 Leaders' request for quarterly reporting on their adherence to maintain an open trade and investment regime and to avoid a retreat into protectionism. The summit called upon international bodies to monitor and report publicly on G 20 members' adherence to this pledge.

Investment Policy Developments in G-20 Countries

Report by the UNCTAD secretariat

A. Background

1. In their 2 April 2009 summit, Group of Twenty (G-20) members pledged to maintain an open trade and investment regime and to avoid a retreat into protectionism (paragraph 22), reiterating the earlier commitment made at the Washington summit in response to the global economic and financial crisis. They also called on "WTO, together with other international bodies, within their respective mandates, to monitor and report publicly on [the G-20 members] adherence to these undertakings on a quarterly basis" (paragraph 22, bullet 3). In the same vein, the G-20 also pledged to "take, at the same time, whatever steps we can to promote and facilitate trade and investment" (paragraph 22, bullet 4).

2. This is against the background of a continuing fall of global foreign direct investment flows. UNCTAD estimates suggest that the 2008 decline of 15 per cent will worsen considerably in 2009, reaching a 50 per cent decline in global inflows, 60 per cent in inflows to developed countries, 40 per cent in inflows to transition economies and 26 per cent in inflows to developing countries.[2] This is also reflected in the estimated more than 66 per cent decrease in cross-border mergers and acquisitions expected for 2009.[3] Given the important role of G-20 members in global investment flows (they accounted for 86 per cent of the global inflows in 2007–2008), the estimated decline is likely to affect the G-20 members the most.

3. UNCTAD is the mandated focal point within the United Nations for all matters related to foreign investment and development. It has over 30 years of experience and expertise in collecting data and undertaking research on trends in investment flows and policies, both nationally and internationally, with an emphasis on helping countries to make investment work for development.

4. The UNCTAD Investment, Enterprise and Development Commission, in its first session (4–8 May 2009), reiterated the secretariat's mandate in this regard. It also endorsed UNCTAD's involvement in this endeavor:

> "The Commission *welcomes* the recently reiterated commitments to refrain from raising barriers to – and to further promote – investment, and *underscores* the importance of fulfilling those commitments to mitigate the adverse impact of the global economic crisis. It also welcomes the call on international bodies to monitor and report on investment measures within their respective mandates, and encourages UNCTAD to collaborate with other relevant international organizations in this endeavour" (paragraph 5).

B. Methodology and scope

5. In response to this call, the UNCTAD secretariat has compiled this interim report on policy measures in the area of investment taken by G-20 member countries (including the individual member countries of the European Union (EU)).[4] The report contributes to UNCTAD's reporting in the context of its *World Investment Report*

2 Final data will be in the *World Investment Report 2009*, to be issued on 17 September 2009.

3 Final data will be in the *World Investment Report 2009*, to be issued on 17 September 2009.

4 The EU is the 20th member of the G-20, represented by its rotating presidency and the European Central Bank. Hence, for purposes of completeness, all member countries of the EU have been included in this report.

series. It also contributes to a joint effort by the WTO, OECD, IMF and UNCTAD to respond to the 2 April 2009 G-20 Leaders' request for quarterly reporting on their adherence to their trade and investment policy commitments. The collection of related data and information is based on UNCTAD's established methodology of data compilation as applied in its annual report on changes in national investment-related laws and regulations for the *World Investment Report* series, as well as its ongoing research and data gathering activities in connection with its work on international investment agreements, investment promotion and facilitation, and investment policy reviews.

6. For the timeframe from 1 October 2008 to 15 June 2009, the report covers laws and regulations that either specifically address foreign investment (i.e. those related to investment liberalization, regulation, protection and facilitation/promotion) or that are related to the general legal framework within which foreign investors operate. In line with the dual G 20 pledge to avoid a retreat into protectionism (paragraph 22, bullets 1-2) and, at the same time, to take steps to promote and facilitate investment (paragraph 22, bullet 4), the report includes all foreign investment-related measures, regardless of whether they are restrictive or facilitating in nature. The report aims at offering a broad and comprehensive picture of relevant regulatory and legislative changes. Proposals, plans and suggestions for new laws and regulations that have so far only been announced but not enacted into actual laws or regulations at the time of this reporting have been excluded from the report. Furthermore, the current Report does not purport to evaluate the impact of the measures, given the fact that there is usually a time-lag for those fairly recent policy measures to make such an impact.

7. Individual stimulus packages and State aid measures are included in the category of investment related measures.[5] While their direct link with foreign investment might not be explicit, stimulus packages and State aid measures aim at improving the (economic) conditions in host countries, which in turn can improve the investment climate and affect the economic determinants of foreign investment. Similarly, by strengthening economic actors domestically, they can also encourage outward investment. The report includes such emergency measures, as well as certain rules governing stimulus packages and State aid – such as those developed at the EU level – as part of the general legal framework within which foreign – and domestic – investors operate. The report does not, however, offer a detailed categorization and classification of such measures, nor does it focus on their possible discriminatory effect. Similarly, the report also stops short of including project- or company-specific measures, such as individual rescue packages (bail-outs) or decisions by governments to refuse approval of individual foreign investment undertakings that are based on existing laws and regulations.

C. Investment policy measures

8. Overall, 167 policy measures have been undertaken, contained in laws and legislation adopted between 1 October 2008 and 15 June 2009 by the 42 countries surveyed.[6] (The number includes five measures taken by the EU.[7]) Three countries did not take any measures in the reporting period. Forty (24 per cent) are measures that specifically address foreign investment, and 127 (76 per cent) are measures that are part of the general framework for the operations of foreign affiliates/foreign investments, including stimulus packages taken in response to the crisis (see summary table). Also, 38 of the 42 countries surveyed also

[5] If a package includes several investment-related elements, each of them is reported separately.

[6] These include Argentina, Australia, Austria, Belgium, Brazil, Bulgaria, Canada, China, Cyprus, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, India, Indonesia, Ireland, Italy, Japan, Latvia, Lithuania, Luxembourg, Malta, Mexico, the Netherlands, Poland, Portugal, the Republic of Korea, Romania, the Russian Federation, Saudi Arabia, Slovakia, Slovenia, South Africa, Spain, Sweden, Turkey, the United Kingdom and the United States.

[7] Measures taken by the individual member countries of the EU are listed separately in the table. It is noteworthy in this regard that the EU has issued new guidelines for applying its state aid rules (including for their specific application to the financial sector) and for implementing stimulus packages, and also plays a role in monitoring compliance. The corresponding approval measures taken by the European Commission are not included in the table separately.

engaged in international investment rule-making.

1. *Investment-specific policy measures*

9. Among the measures that are specific to foreign investment, eight countries have taken measures concerning the entry of foreign investors (15 measures altogether). Five countries have undertaken measures aimed at facilitating investment flows (nine measures), and seven countries have enacted laws and regulations that concern the operation of foreign affiliates (seven measures). Three countries have changed their relevant tax laws (nine measures).[8]

10. Concerning the **entry of foreign investors**, measures range from **opening up of previously closed sectors** of the economy to foreign investment and **removing/relaxing sectoral caps** for foreign investment, to **restricting private** (including foreign) **participation** in specific types of business (typically in highly sensitive sectors such as social and public services).

11. In the same category, countries have also taken measures aimed at **streamlining approval procedures**, e.g. by lowering the threshold for review of investment and acquisition projects, clarifying decentralized responsibilities for approval of foreign investment projects, or relaxing the review procedures for foreign investment in real estate.

12. Some countries have introduced **new criteria/tests for review** of investment projects, sometimes with a national security test for investments that raise national security concerns or ensuring that investment reviews would capture foreign investments made through complex investment structures. It should be noted, however, that some of these measures have been under preparation for some time – i.e. although enacted during the review period, they were not necessarily taken in response to the economic crisis.

[8] Under the UNCTAD methodology, one measure might fall into several categories, e.g. facilitation and entry, facilitation and operation, etc.

13. Some measures address the **facilitation** of foreign investment projects into a host country, whether, for example, in the form of granting specific incentives to investments in certain areas of a country, or facilitating the operation of companies in Special Economic Zones. Other measures aim at facilitating the **operation** of foreign investors. Some countries have enacted measures specifically aimed at encouraging **outward investment** by their domestic companies, e.g. in the form of simplifying approval procedures, providing financing for their internationalization or insurance for exports and outward investments.

14. Several **taxation measures** identified have a direct bearing on foreign investments, such as, for example, those that harmonize the fiscal status of "foreign-invested" enterprises within the overall tax regime. Measures taken with regard to taxes levied on overseas investors in relation to dividends are also noteworthy in this regard.

2. *Investment-related policy measures*

15. Among the measures related to investment, 11 countries enacted laws and regulations that concern the general legal framework for the operation of companies, including foreign affiliates (17 measures). Seven countries adopted new taxation measures (7 measures) and 33 countries enacted state aid measures and/or stimulus packages in response to the crisis (98 measures).

16. Measures aiming at regulating or clarifying the **general legal framework** that are also applicable to foreign investors in their operation in the country include, for example, modifications of the laws on bankruptcy and corporate law. These contribute to the transparency and predictability of the legal framework that constitutes an important determinant for foreign investment in host economies.

17. A number of **taxation measures** relate to the overall framework for economic activity, and are therefore also relevant to the operation of foreign investors. These range from lowering the corporate tax

rate to changes in withholding tax and tax bonuses.

18. The relevance of **state aid** measures or **economic stimulus packages** enacted in response to the financial and economic crisis has already been alluded to above. Briefly, such measures impact on foreign investment as they usually apply to all established companies in a given jurisdiction, including foreign affiliates, and have the effect of improving the economic conditions in host countries, which in turn might improve the host countries' investment climate. In addition, such measures strengthen economic actors domestically, which in turn might strengthen their ability to engage in outward investment. Some stimulus packages also include support to the operations of overseas subsidiaries.

19. Some countries have shown a particularly strong legislative and regulatory activity during the reporting period. These activities relate to changes in the general legal framework and the attendant specific adjustments and transition arrangements required for the implementation of such new regimes or a streamlining of general investment procedures which predate the onset of the crisis.

3. *International investment rule-making*

20. Apart from their national investment-specific and investment-related policy measures, G-20 member countries have also been engaged in international investment rule-making. During the reporting period, 38 of the 42 countries surveyed concluded 27 bilateral investment treaties (BITs), 36 double taxation treaties (DTTs) and 11 other international investment agreements (IIAs).[9]

21. The **27 BITs,** which G-20 member countries signed during the reporting period, exhibit important differences, depending on the key signatory countries involved. Most BITs were concluded by European countries, which typically do not include pre-establishment rights in their IIAs. Four BITs were concluded by Canada, whose approach is characterized, amongst others, by including important clarifications and novel provisions aimed at balancing investment protection with other legitimate policy objectives.[10] Also, China and India – two emerging economy members of the G-20 – signed BITs, a development reflecting their growing role as capital exporting countries. Moreover, three of these countries' IIAs are South–South agreements, demonstrating the increasing importance of South–South economic cooperation in the field of FDI.

22. The **11 other IIAs** involving G-20 member countries include **free trade agreements (FTAs) with investment provisions,** such as (a) the January 2009 Trade and Investment Cooperation Agreement between Iceland and the United States (establishing an institutional framework to monitor trade and investment relations); (b) the February 2009 Economic Partnership Agreement (EPA) between Japan and Switzerland (offering protection and liberalization); (c) the April 2009 FTA between China and Peru (including protection and liberalization); (d) the December 2008 EPA between Japan and Viet Nam (which includes the provisions of the November 2003 BIT between Japan and Viet Nam); and (e) the October 2008 FTA between China and Singapore (covering cooperation and promotion issues).

23. Finally, G-20 member countries are also participants in **regional integration processes,** which are active in investment rule-making. Indonesia, for example, is an Association of South-East Asian Nations (ASEAN) member, and as such party to the February 2009, ASEAN Comprehensive Investment Agreement (ACIA).[11] The ACIA sets out rules for investment protection and pre-establishment national treatment and most-favoured-nation treatment, according to a positive list approach. ASEAN

9 As of June 2009, there were over 2,700 BITs, 2,800 DTTs and 270 free trade agreements (FTAs) or economic cooperation agreements containing investment provisions, making a total of nearly 5,770 IIAs.

10 This includes clarifications on e.g. the meaning of indirect expropriation or provisions on e.g. the protection of human health or the environment or cultural aspects.

11 The ACIA replaces the 1998 Framework Agreement on the (ASEAN) Investment Area and the 1987 ASEAN Agreement for the Promotion and Protection of Investments.

also concluded an FTA with Australia and New Zealand, with an investment chapter containing pre-establishment national treatment. Saudi Arabia is a member of the Gulf Cooperation Council (GCC) and as such is party to the FTA with Singapore of December 2008.[12] The European Commission (27) concluded EPAs with Cote d'Ivoire and with the CARIFORUM countries, which aim at the progressive, reciprocal and asymmetric liberalization of investment, through commercial presence.

24. Each of these agreements presents a step towards increasing the predictability and stability of an open investment framework and hence offers an important contribution to the G-20 objective to avoid receding into investment protectionism. However, the different configurations at the regional level and the substantial divergences in the details of the provisions also increase the potential for overlaps, gaps and inconsistencies.

D. Overall policy trends and prospects

25. Overall, these investment policy developments paint a comforting picture. Both nationally and internationally, G-20 member countries have taken investment measures that are non-discriminatory in nature and most have refrained from measures that are restrictive towards inward and outward investments. Few measures could be characterized as being "restrictive" towards foreign investment as they allow for greater control over the entry or the operation of foreign investments. It is worth noting that, in the case of member countries of the EU, the approval by the European Commission of the economic stimulus packages submitted by the member countries is based on a set of guidelines on the application of state aid rules and relief packages, including avoidance of any discrimination amongst EU member countries or distortive effects on competition.

26. Indeed, a substantial number of policy changes surveyed were directed at facilitating investment. The crisis has galvanized G-20 members to promote and facilitate FDI and to create clarity and stability concerning their investment frameworks. Furthermore, a number of G-20 member countries have further encouraged their companies to venture abroad, and to support their foreign affiliates in times of economic crisis. For example, some stimulus packages include support to the business activities of overseas subsidiaries.

27. However, there is no room for complacency. Indeed, a number of areas exist where caution in terms of protectionist dangers and investment distortions appears warranted.

- Firstly, the **economic stimulus packages** put in place by several countries do not expressively exclude foreign affiliates from their scope and also generally improve the economic determinants for foreign investment. However, much depends on their implementation and the discretion left to local governments. These could discriminate against foreign investors and their investments in a "hidden" way. Indeed, there is scope for what can be labeled **"smart" protectionism**, for example, using the gaps in international regulations to discriminate against foreign investors and/or products. This could include favoring products with high "domestic" content in government procurement – particularly in huge public infrastructure projects, de facto preventing banks from lending for foreign operations, invoking "national security" exceptions that stretch the definition of national security, or moving protectionist barriers to sub-national levels that are outside the scope of the application of international obligations (e.g. in procurement issues);
- Secondly, there are the potential **distortive effects** of stimulus packages that can arise from the measures' subsidy-like nature. Akin to subsidies, stimulus packages may effectively create advantages for domestic sectors and put foreign players at a disadvantage. In the same vein, their focus on improving domestic economic conditions may also result in divestments abroad, and see the withdrawal of foreign investment from developing countries;

[12] This FTA includes an agreement by the parties to deal with investment issues through the negotiations of further BITs.

- Thirdly, there are the dangers arising out of the **spreading of the crisis** to less affected sectors and its further intensification across all countries – including non-G-20 members. This also implies the possibility of protectionist pressures arising out of **retaliation** and the fact that, given the close relationship between trade and investment, barriers to one can affect the entry and operation of the other;
- Finally, some of the bailouts and state aids could give rise to increased protectionist tendencies in the **aftermath of the crisis**. Once the global economy is on its way to recovery, the exit of the state from many bailed-out flagship industries will cause a boom of private investment, including foreign investment. This could trigger a **new wave of economic nationalism** to protect "national champions" from foreign takeovers.

E. Policy implications

28. These issues raise the question of what further policies are needed to enable the potential of foreign investment to contribute to economic and social development, with a view to achieving sustainable global recovery.

- Firstly, effective **promotion of foreign investment** is needed more than ever. While this is particularly the case for developing countries, foreign investment as a means to finance the recovery and (re-)achieve growth and stability also matters for the developed world. Intensified investment promotion efforts, both as regards inward and outward investment, are called for, as is the continued dismantling of visible and hidden investment obstacles. A special focus has to be put on retaining existing investment in times of crisis;
- Secondly IIAs have a role to play in ensuring predictability, stability and transparency of national **investment regimes**. Moreover, policymakers should consider strengthening the investment promotion dimension of IIAs through effective and operational provisions. Investment insurance and other home country measures encouraging outward investment are cases in point where continued international cooperation can be useful;
- Thirdly, the current discussions aimed at an in-depth **institutional reform** of the global financial system suggest that governments need to address the interaction between the global financial system and the international investment regime (consisting of over 5,600 international investment and investment-related treaties). The latter regulates both global long-term and short-term capital movements. The two systems need to be coherent with each other, as the two types of capital flows are closely interwoven and interrelated, with a view towards ensuring long-term, sustainable and development-friendly solutions to the crisis;
- Finally, there is need to ensure that current endeavours against investment protectionism do not remain one-off initiatives. Instead, collective efforts to refrain from investment protectionism should continue beyond the current crisis. This will be particularly necessary when the current crisis begins to ease and the expected exit of public investment could trigger new tendencies of economic nationalism. Hence, there might also be value in extending the G-20 commitment for refraining from protectionism beyond its current 2010 time line. **Continuity regarding the current monitoring** of and reporting on policy trends as undertaken by UNCTAD and other relevant international organizations (within their mandate) would also go a long way in offering policy makers information, guidance and advice, with a view towards long term and sustainable recovery.

Summary table of national and international G-20 policy measures

Country	Measures							
	Specific investment measures				Investment-related measures			
	Entry	Facili-tation	Operation	Investment-specific taxation measures	General legal framework	Stimulus package/ state aid	General taxation measures	IIAs
Argentina			●			●	●	●
Australia	●	●				●		
Austria						●		●
Belgium [a]						●		●
Brazil			●			●		
Bulgaria								●
Canada [b]	●	●			●	●	●	●
China [c]	●	●	●	●	●	●	●	●
Cyprus								●
Czech Republic						●		●
Denmark						●		●
Estonia						●		●
Finland						●		●
France						●		●
Germany	●				●	●		●
Greece						●	●	●
Hungary					●	●		●
India [d]	●	●	●					●
Indonesia		●	●				●	●
Ireland						●		●
Italy						●		●
Japan				●		●	●	●
Korea, Rep. of	●					●		
Latvia						●		●
Lithuania								●
Luxembourg [e]						●		●
Malta						●		●
Mexico [f]	●		●			●		
Netherlands					●	●		●
Poland				●	●			●
Portugal					●	●		●
Romania					●			●
Russian Federation					●	●	●	●
Saudi Arabia					●			●
Slovakia						●		●
Slovenia						●		●
South Africa			●			●		●
Spain						●		●
Sweden						●		●
Turkey					●			●
United Kingdom						●		●
United States	●					●		●
EU [g]						●		●

a Five of Belgium's IIAs were concluded by the Belgium–Luxembourg Economic Union.
b The entry measure has also been counted as a facilitation measure.
c Three entry measures have also been counted as facilitation measures.
d One entry measure has also been counted as an operational measure.
e Five of Luxembourg's IIAs were concluded by the Belgium–Luxembourg Economic Union.
f The entry measure has also been counted as a facilitation measure.
g IIAs of the EU are the EPAs.