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INVESTMENT POLICY MONITOR

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INVESTMENT POLICIES IN LDCs

TRENDS SINCE THE LDC IV CONFERENCE IN 2011

HIGHLIGHTS

- Least developed countries (LDCs) have been dynamic reformers in the area of investment policy. Since 2011, two thirds of all LDCs enacted at least one policy measure on investment, compared to 54 per cent of other developing countries. Over 80 per cent of the measures adopted were more favourable to investment, confirming their commitment to enhancing productive capacities by creating conditions for attracting investments and promoting private sector development.

- LDCs have been particularly active in the revision of investment laws. The reforms in this area focussed on opening of new sectors and activities to FDI, enhancing investment treatment and protection guarantees or creating investment promotion agencies and other investment support mechanisms.

- Investment promotion and facilitation measures represented about one third of all measures adopted by LDCs during the reporting period. Among these, the introduction of investment incentives was prominent among African LDCs, while in Asian LDCs the primary focus was on the establishment of one-stop-shops and other measures to facilitate investment.

- Around half of the investment policy measures concerned specific sectors, with extractive industries accounting for the lion's share of the sectoral measures. About one in ten measures targeted specifically investment in sectors related to the sustainable development goals (SDGs).

- Since 2011, LDCs have concluded 92 bilateral investment treaties (BITs) and became party to 10 regional agreements with investment provisions. LDCs' participation in international investment agreements thus followed the global trend, with a shift away from bilateral towards regional investment rulemaking.

- At least 48 known investor-State dispute settlement (ISDS) cases were brought against LDCs based on IIAs. Most of these cases (71 percent) were launched after LDC-IV and virtually all of them are based on treaties pre-dating 2011. 25 per cent of these cases resulted in damages awarded to investors (mostly from developed countries), with awards ranging up to $18.8 million.

- Despite those efforts, FDI inflows to LDCs have been underwhelming, pointing to the need to continue creating a conducive policy environment for investment in productive capacities, but also address other fundamental aspects of the investment environment, such as infrastructure and skills gaps. Actions to modernize investment promotion, facilitation and target SDG-relevant investment should also be pursued. These tasks cannot be achieved unless development partners cooperate with LDCs to tackle institutional and capacity constraints. The private sector, including international investors, can also be encouraged to commit resources and contribute expertise to the effort, collaborating with relevant national government institutions in a spirit of shared responsibility.

Context

At the Fourth United Nations Conference on the Least Developed Countries (LDC IV), which took place in Istanbul in May 2011, the member States of the United Nations recognized the need to mobilize financial resources for development and capacity-building in order to support LDCs. LDCs committed to creating conditions for attracting investments and promoting private sector development to enhance productive capacities and advance human and social development (UN General Assembly, 2011).

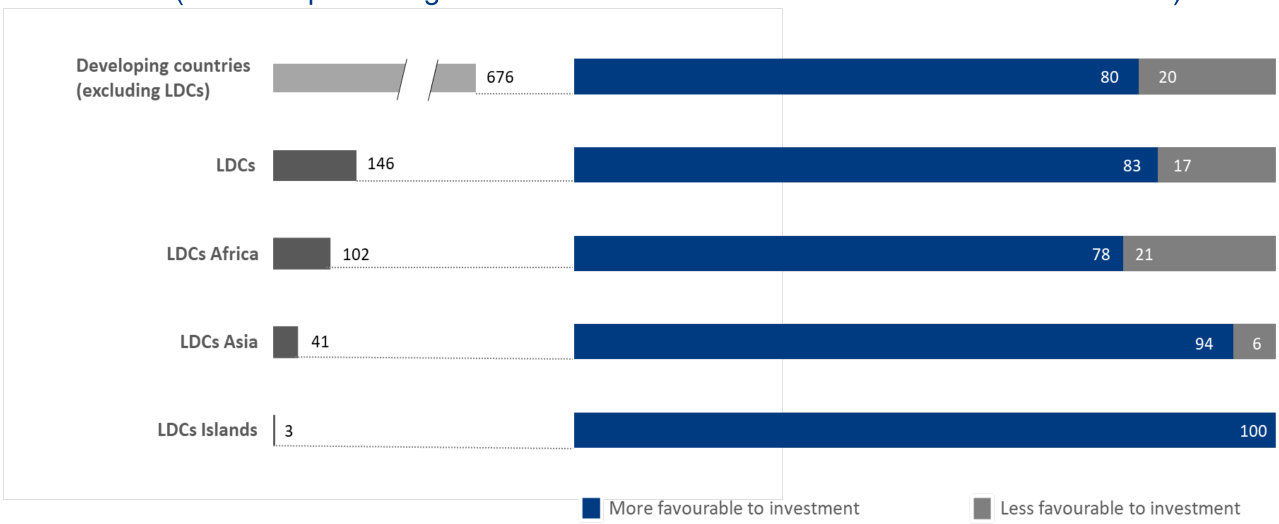
This special edition of UNCTAD's Investment Policy Monitor aims to analyse the investment policy reform trends in LDCs since the Conference. Section A provides an overview of national investment policy trends, while Section B focuses on the international investment policy dimension.

A. National investment policy trends in LDCs since LDC IV

LDCs have been dynamic reformers in the area of investment policy since the LDC IV Conference in 2011. Between January 2011 and December 2021, two thirds of all LDCs[1] enacted at least one policy measure on investment, compared to 54 per cent of developing countries, excluding LDCs. African LDCs have led the reform drive, with 77 per cent of the LDCs in the continent adopting reforms in the area of investment, compared to 63 per cent of LDCs in Asia and 25 per cent of Island LDCs.

As for the direction of the policy measures, 83 per cent of all policy measures adopted by LDCs were more favourable to investment (when excluding policy measures of indeterminate nature), compared to 80 per cent for other developing countries. Noteworthy in this regard are the results for Asian LDCs and Island LDCs, where 94 per cent and 100 per cent of the adopted measures respectively were more favourable to investment (fig. 1).

Figure 1: Investment policy measures by LDCs and other developing countries
(total and percentage of measures more and less favourable to investment*)



Source: UNCTAD IPM Database
Notes: *The percentages refer to the total number of policy measures adopted, excluding those of neutral or indeterminate nature.

[1] For the purpose of this research, LDCs include Vanuatu, which graduated from LDC status in December 2020.

LDCs have also been very active in the adoption or revision of investment laws. Investment policy measures aimed at introducing, reforming or replacing investment-specific legislation were adopted by 28 per cent of LDCs and 15 per cent of other developing countries. They represented 17 per cent of all investment policy measures adopted by LDCs during the period, as opposed to only 4 per cent of the measures adopted by other developing countries. The overwhelming majority were adopted by African countries (80 per cent).

Box 1. The reform of investment laws in African LDCs

Over the last decade, 10 African LDCs introduced or amended investment-specific legislation (Angola, Benin, Burkina Faso, Burundi, Ethiopia, Guinea, Mauritania, Rwanda, Sudan and Uganda). Angola was the most active country in this respect, introducing 6 investment-related instruments during the review period.

About 85 per cent of the new or revised laws dealt with investment promotion and facilitation, indicating the willingness of African LDCs to encourage private investment. More than half were adopted between 2018 and 2021, reflecting a recent momentum to enhance their investment climate.

Half of the revisions to the investment legislation addressed FDI entry and establishment conditions, and typically opened new sectors or activities to FDI or streamlined the entry process. Seven dealt with treatment standards and operations of foreign investors, generally removing instances of discrimination in the conduct of business operations (see box 2 below for examples).

Source: UNCTAD IPM Database

Over 90 per cent of the investment policy measures related to the investment-specific legislation adopted by LDCs during the period were more favourable to investment, including the opening of new sectors and activities to FDI and enhanced investment treatment and protection guarantees (box 2), or the creation of an investment promotion agency and the introduction of other investment support mechanisms (box 3).

In both LDCs and other developing countries, around 40 per cent of all investment policy measures were related to investor entry and establishment. Entry-related measures were particularly frequent in Asian LDCs, representing 59 per cent of all investment policy measures enacted during the period. Among the entry-related measures, 23 resulted in the opening of new sectors to FDI and only 1 entailed the closure of sectors or activities to FDI. In addition, over 60 per cent of the measures related to FDI entry conditions adopted by LDCs during the period lifted previously existing requirements (e.g., minimum capital investment or joint ventures) (box 2).

Box 2. Liberalization of investment regimes in LDCs - examples

In 2018, *Angola* passed an investment law which scrapped the rules that required foreign investors to partner with local firms and removed the minimum capital requirement for FDI. In 2021, a revision of the Private Investment Law marked the return of the so-called 'contractual system' in the area of private investment, which is based on a case-by-case negotiation of project implementation conditions, incentives and facilities

In 2020, *Benin* adopted a new Investment Code which offers new guarantees to investors, including protection of intellectual property rights. The Code also allows for the submission of investment disputes, mutually agreed between the parties, to designated domestic or international dispute settlement institutions.

In 2021, *Cambodia* adopted a new Law on Investment which provides new guarantees for investors, including non-discriminatory treatment, guarantees against nationalization and arbitrary expropriation as well as protection of intellectual property and free transfer of funds.

In 2019, *Ethiopia* liberalized its telecommunications sector and in 2020, the country removed several restrictions to foreign investment in transport services, allowing FDI in railway, cable car, cold-chain, and freight transportation. It also eased restrictions to FDI in retail trade, cement manufacturing and electronic commerce, as well as health, education, management consulting and other activities in the service sector.

In 2017, *Lao People's Democratic Republic* abolished the minimum capital requirement applying to FDI in several sectors, and in 2020 it allowed foreign nationals to own and invest in certain types of real estate in the country, including apartments and condominiums.

In 2017, *Myanmar* allowed foreign companies to hold up to 35 per cent of shares in a domestic company without the company losing its status as "local company", thus allowing for minority foreign investment in a broader range of activities. In 2018, the country allowed branches of foreign banks to provide commercial services and allowed full foreign capital investments in private schools, basic, vocational and higher education schools.

In 2021, *Nepal* opened several agricultural sectors to FDI by exempting large scale industries exporting at least 75 per cent of their production from the negative list of sectors closed to FDI. The measure covers poultry farming, fisheries, beekeeping, fruits, vegetables, oil seeds, pulse seeds, dairy, and other primary agriculture sectors.

In 2015, *Rwanda* adopted an Investment Code which enshrines the guarantee of national treatment with regards to certain operations, the free transfer of funds and the right to compensation in case of expropriation.

In 2019, *Uganda* adopted an investment law which removed restrictions on foreign investment in animal and crop production.

In 2016, *Vanuatu* removed the $50,000 minimum capital requirement that previously applied to foreign investments. As a result, there are no capital requirements to invest in any sector.

Source: UNCTAD IPM Database

Investment promotion and facilitation measures represented about one third of all measures adopted by LDCs (32 per cent) and other developing countries (31 per cent) during the reporting period. Among these, the introduction of investment incentives was prominent among African LDCs (representing 48 per cent of all facilitation measures), while in Asian LDCs a large focus was given to the establishment of one-stop-shops and other measures to facilitate business permits (44 per cent) (box 3).

Box 3. Examples of investment promotion and facilitation measures introduced by LDCs

In 2020, *Angola* adopted a Presidential Decree on "Single Investment Window", which facilitates the process for the establishment of private investment.

In 2017, *Benin*, with the assistance of UNCTAD, launched an intelligence platform ('iGuide') aimed at facilitating investment. In addition, in 2020, the country adopted a new law that provides clear and precise tax incentives, including advantages and benefits.

In 2016, *Cambodia* launched an online business registration portal (known as the "Single Portal"), which allows all existing and new businesses to register their business and tax return procedures under one platform. Also, in 2021, a new Law on Investment also established an investment incentive regime for 19 sectors.

In 2014, *Ethiopia* adopted new regulations to extend various kinds of incentives for investment in industrial development zones, manufacturing, and agriculture.

In 2015, *Guinea* adopted a new Investment Code which provided new tax and customs exemptions, as well as protections for investments, including the right of free transfer of funds to the country of origin.

In 2018, *Myanmar* established a new Ministry of Investment and Foreign Economic Relations, mandated to promote local and foreign investments and encouraging responsible investments. In 2019, the Ministry launched the Investment Promotion Committee as the country's investment promotion institution.

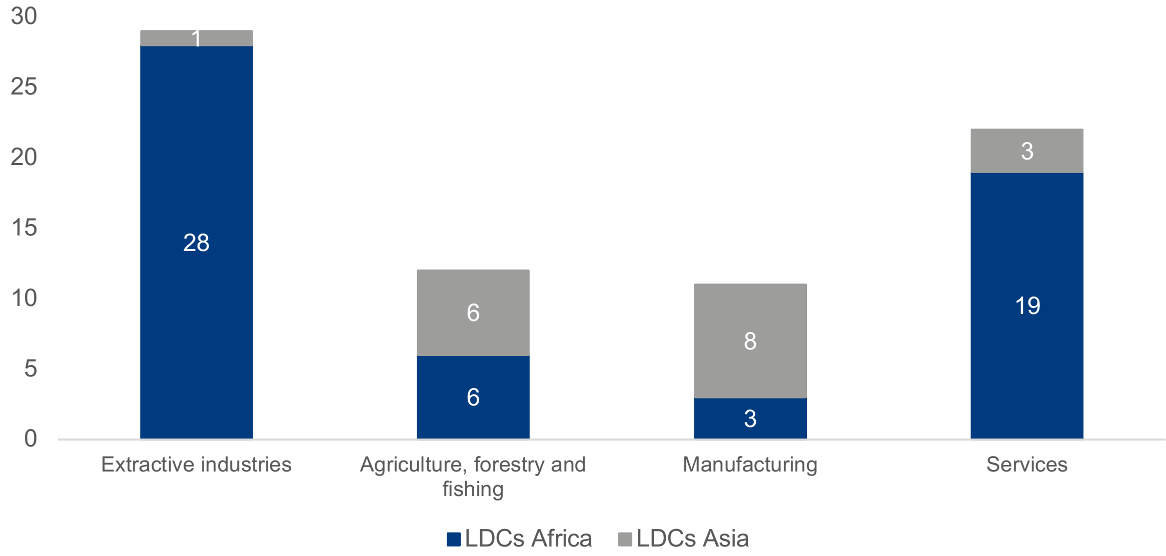
In 2018, the Business Registration and Licensing Agency of *the United Republic of Tanzania* set up an Online Registration System to simplify the investment registration processes in the country, by significantly reducing the time and costs associated with the registration of a business.

In 2019, *Uganda* enacted a new law which strengthens the National Investment Authority by establishing it as a “one-stop investment centre”.

Source: UNCTAD IPM Database

Around half of the investment policy measures in both LDCs and developing countries as a whole concerned specific sectors. In LDCs, extractive industries accounted for the lion's share of the sectoral measures (39 per cent of the total). This is due to the prominence of the sector for investment in Africa, where 97 per cent of all the sector-related measures were adopted. Services followed (30 per cent of all sectoral measures), again led by African LDCs (86 per cent of all sector-related measures). Measures to promote manufacturing (15 per cent of all sectoral measures) were prominent among Asian LDCs (44 per cent of the sectoral measures in the region), but only accounted for 5 per cent of the sectoral measures by African LDCs. Finally, policy measures affecting agriculture accounted for around 15 per cent of the total sectoral measures and their distribution across regions was more balanced (fig. 2).

Figure 2. Sector-specific investment policy measures adopted in LDCs (number)

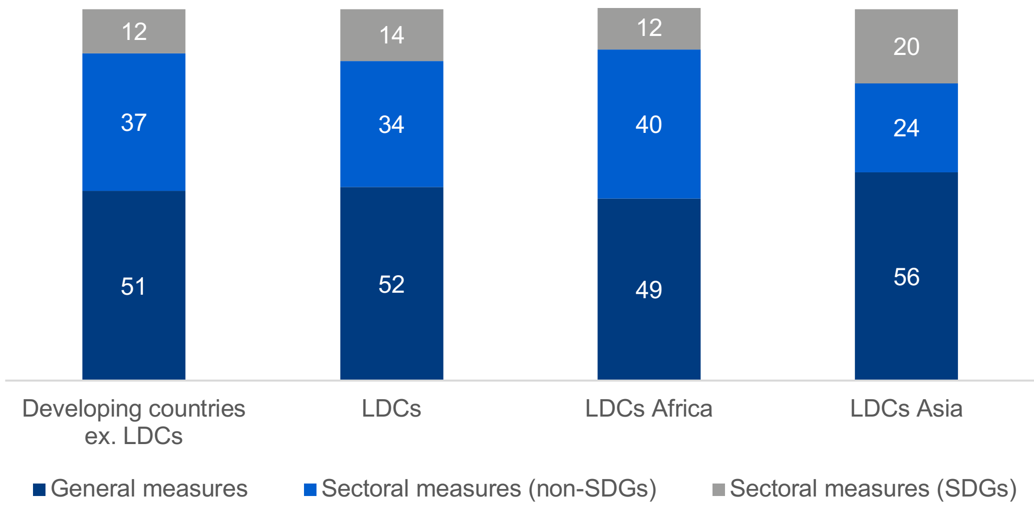


Source: UNCTAD IPM Database

Around one in 10 measures targeted specifically investment in SDG sectors. Measures concerning infrastructure, renewable energy, water, sanitation and hygiene (WASH), health and education represented 12 per cent of total investment policy measures in both African LDCs and in other developing countries. In the case of Asian LDCs, while measures of a sectoral nature represented only 44 per cent of the total, almost half of them were targeted specifically at SDG sectors (fig.3).

The SDG sector most targeted by investment policy measures in LDCs was infrastructure (45 per cent). This was followed by food and agriculture (32 per cent), education (16 per cent) and WASH (7 per cent) (fig.3). Some examples of measures adopted by LDCs to promote FDI in SDG sectors are presented in box 4.

Figure 3. Investment policy measures of general and sectoral nature including measures affecting SDG sectors (percentage)



Source: UNCTAD IPM Database

Box 4. Examples of measures targeted at SDG sectors

In 2016, *Lao People's Democratic Republic* introduced a profit tax holiday of maximum 15 years for investment in a new range of promoted sectors including clean and organic agriculture, crop seed production, modern hospitals, and medical equipment manufacturing. In 2020, the country also opened the condominium construction sector to foreign-owned companies on condition that the construction be carried out by a legal entity.

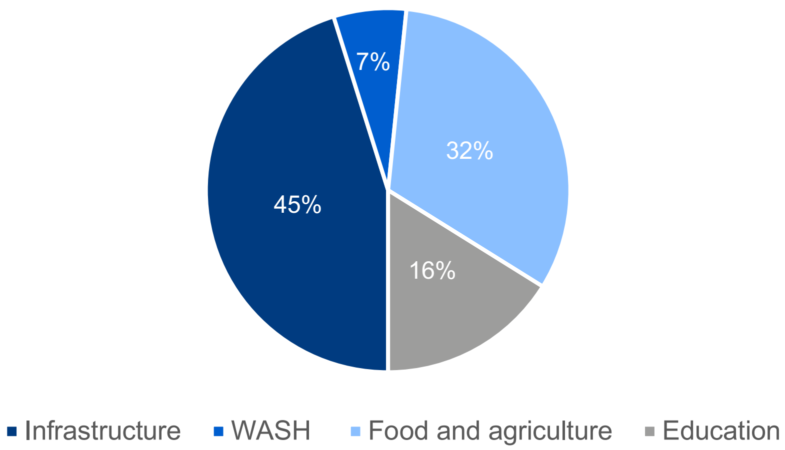
In 2017, *Liberia* issued a list of sectors qualifying for special tax incentives under the Revenue Code. Among the sectors qualifying for exemptions from goods and services tax and import duties were: energy, health services, real estate, transport, technology, agriculture, poultry, horticulture, exportation of sea products, rubber and oil palm cultivation and processing and waste management.

In 2013, *Malawi* designated agro-processing and electricity generation and distribution as priority sectors eligible for tax holidays under the Taxation Act. Among the conditions for eligibility, the measure included export-orientation, value addition, employment creation and generation of foreign exchange for the economy.

In 2017, *Myanmar* designated a new list of "Promoted Sectors", which would benefit from income tax exemption. The sectors included agriculture and its related services, education and the health sector. In 2018, the country allowed foreigners to make full capital investments in private schools, basic, vocational and higher education schools.

Source: UNCTAD IPM Database

Figure 4. Distribution of investment policy measures by SDG sectors (percentage)



Source: UNCTAD IPM Database

B. International investment policy trends in LDCs

1. International investment agreements (IIAs) concluded by LDCs

As of December 2021, LDCs have concluded a total of 544 bilateral investment treaties (BITs) (304 of which are in force). The bulk of these treaties were concluded before LDV-IV (fig. 5). LDCs were also active in international investment policymaking. They concluded 92 bilateral investment treaties (BITs) and became party to 10 regional agreements with investment provisions since 2011. LDC bilateral treaty activity has hence followed the overall trend in IIAs, with a shift away from bilateral towards regional investment rulemaking. LDCs are now party to 75 treaties with investment provisions (TIPs).[2] These include for example recent megaregional IIAs such as the Regional Comprehensive Economic Partnership (2020); [3] the CARIFORUM-UK EPA (2019);[4] the ASEAN - Hong Kong, China SAR Investment Agreement (2017);[5] the Pacific Agreement on Closer Economic Relations Plus (2017)[6] as well as the African Continental Free Trade Area (AfCFTA) Investment Protocol currently under negotiations.[7]

Such megaregional IIAs have been proliferating in recent years, with possible significant implications for future international investment rulemaking. The trend towards megaregional IIAs is resulting in a smaller number of IIAs but with multiple parties. They provide opportunities to consolidate and rationalize the IIA regime of LDCs, but also presents challenges by significantly expanding the investment treaty relationships between LDCs and treaty partners.

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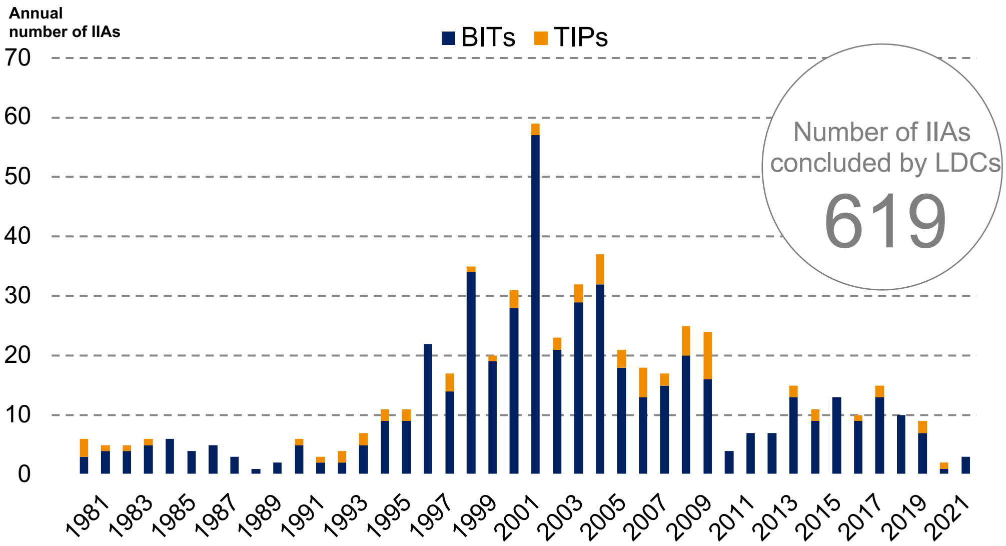
[2] TIPs include Free Trade Agreements (FTAs), Economic Partnership Agreements (EPAs) or other regional economic agreements with investment provisions.
[3] LDCs parties to the Regional Comprehensive Economic Partnership: Myanmar, Lao People's Democratic Republic and Cambodia.
[4] LDCs parties to the CARIFORUM-UK EPA: Haiti.
[5] LDCs parties to the ASEAN - Hong Kong, China SAR Investment Agreement: Cambodia, Lao People's Democratic Republic and Myanmar.
[6] LDCs parties to the Pacific Agreement on Closer Economic Relations Plus: Kiribati and Solomon Islands.
[7] LDCs parties to the AfCFTA: Angola, Benin, Burkina Faso, Burundi, Central African Republic, Chad, Comoros, Democratic Republic of Congo, Djibouti, Eritrea, Ethiopia, Gambia, Guinea, Guinea-Bissau, Lesotho, Madagascar, Malawi, Mali, Mauritania, Mozambique, Niger, Rwanda, Sao Tome and Principe, Senegal, Sierra Leone, Somalia, South Sudan, Sudan, Togo, Uganda, United Republic of Tanzania and Zambia. See: ibid.

Figure 5. BITs and TIPs concluded by LDCs, 1980-2021*



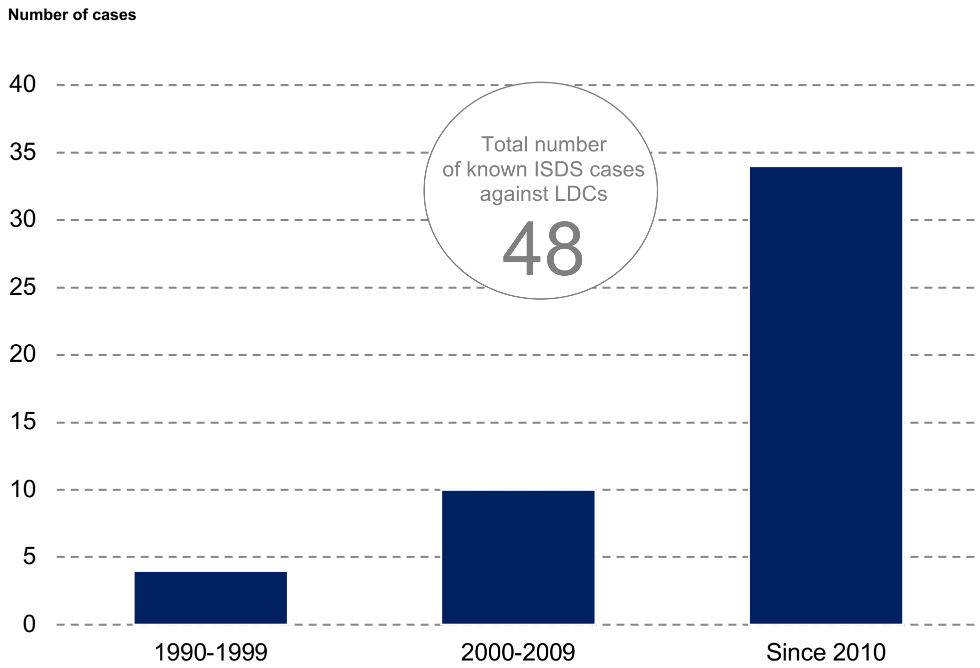
Source: UNCTAD, IIA Navigator, available at https://investmentpolicy.unctad.org/international-investment-agreements.
* Preliminary data for 2021 (as of November).

2. Investor-State arbitration cases against LDCs

A total of at least 48 known investor-State dispute settlement (ISDS) cases, were brought against LDCs based on IIAs (fig. 8). The bulk of these cases were brought in the period since LDC-IV. ISDS cases against LDCs account for 4 per cent of the 1,100 known ISDS cases globally. Nineteen LDCs have faced at least one IIA-based ISDS case.

Developed-country claimants brought most of the cases against LDCs (35). Claimants from the Netherlands (with 8 cases), the United Kingdom (7), Belgium (6) and the United States of America (5) were the most active. Virtually all cases invoked old-generation IIAs signed before 2010 (except for one case based on a later IIA). Over half of the cases were based on IIAs originally signed in the 1990s or earlier.

Figure 8. Known IIA-based ISDS cases brought against LDCs, 1990-2020 (By period)

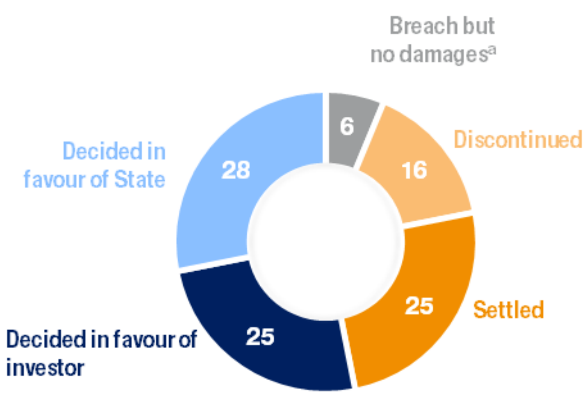


Source: UNCTAD, ISDS Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement.

By the end of 2020, 32 of the 48 known ISDS proceedings had been concluded (fig. 9). About 28 per cent of the concluded cases were decided in favour of the State (claims were dismissed either on jurisdictional grounds or on the merits); 25 per cent were decided in favour of the investor, with monetary compensation awarded, and about 25 per cent of the cases were settled (in most cases, the terms of settlement remained confidential). The remaining cases were discontinued (16 per cent) or the tribunal found a treaty breach but did not award monetary compensation (6 per cent).

Fifteen of the 48 known ISDS cases against LDCs are pending. For one ISDS case, information on the status is not publicly available.

Figure 9. LDC respondent States: results of concluded cases, 1990-2020 (Per cent)



Source: UNCTAD, ISDS Navigator, available at https://investmentpolicy.unctad.org/investment-dispute-settlement.
[a] Decided in favour of neither party (liability found but no damages awarded).

The amounts at stake in ISDS proceedings can be in the hundreds of millions and even billions of dollars. Where information regarding the amounts sought by investors had been disclosed (in about half of the ISDS cases against LDCs), the reported amounts claimed ranged from $1 million to $1 billion. The average amount claimed was $161 million and the median $44 million. In cases decided in favour of the investor, amounts awarded ranged from $0.2 million to $18.8 million. These amounts do not include interest or legal costs, and some of the awarded sums may have been subject to set-aside or annulment proceedings. In general, the disputing parties – including the respondent States – incur significant costs for the arbitrators' work, the administration of proceedings and legal representation, all of which usually amount to several million dollars or more per ISDS case.

C. Conclusion

LDCs have made significant policy efforts to increase investment attraction and promote private sector development over the last decade, adopting a large number of reforms aimed at opening their economies to FDI, improving investor treatment and protection guarantees and facilitating investment operations. Despite those efforts, FDI inflows to these countries have been underwhelming,[8] pointing to the need to also address other fundamental aspects of the investment environment, such as infrastructure and skills gaps.

In this regard, more targeted policy reform and investment promotion and facilitation efforts aimed at increasing investment in SDG sectors could prove more effective in building productive capacities and helping them achieve long-term and inclusive development. This should be accompanied by efforts to reform the aging IIA regime of LDCs to ensure that Governments have sufficient regulatory space to protect public policy concerns while providing protection to investments that are conducive to the SDGs.

Critically, reform efforts by LDCs need to be accompanied by the supporting actions that development partners have committed to in the last LDC Conference, but which have failed to deliver on the broad and intensive scale needed to make a difference. For example, SDG indicator 17.5.1., which refers to the number of countries that adopt and implement outward investment promotion regimes for LDCs, shows that only 22 countries have taken active measures in this regard (see UNCTAD, 2021). With the global health and environmental crises worsening, particularly developed countries need to fulfil their commitments in this regard. UNCTAD stands ready to continue assisting LDCs in their efforts to establish investment policy environments conducive to the attraction of investment for sustainable development.

[8] UNCTAD data indicates that FDI inflows to LDCs as a group have displayed only modest growth since LDC IV, and that their share in global FDI remains below 2 per cent (UNCTAD, forthcoming).

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