

CHAPTER III

RECENT POLICY DEVELOPMENTS AND KEY ISSUES



A. NATIONAL INVESTMENT POLICIES

1. Overall trends

National investment policies continue to be geared towards investment liberalization and promotion.

In 2015, 46 countries and economies adopted 96 policy measures affecting foreign investment.¹ Of these measures, 71 related to liberalization, promotion and facilitation of investment, while 13 introduced new restrictions or regulations on investment (table III.1). The share of liberalization and promotion reached 85 per cent, which is above the average between 2010 and 2014 (76 per cent) (figure III.1).

Nearly half (42 per cent) of all policy measures were undertaken by Asian developing economies. Countries in Europe, Africa and the transition economies also introduced numerous policy measures (figure III.2). Those in Africa, Asia and North America were most active in liberalizing, promoting or facilitating foreign investment. Some countries in Oceania and some in Latin America and the Caribbean were more restrictive, mainly because of concerns about foreign ownership of land and natural resources.

a. Investment liberalization predominant in 2015

In 2015, 47 policy measures were related to partial or full investment liberalization in individual economic sectors.²

The largest emerging economies in Asia – *China* and *India* – were most active in opening up various industries to foreign investors. For example, *China* allowed foreign companies to set up bank card clearing companies and loosened restrictions on foreign investment in the real estate market. It also allowed full ownership of e-commerce business and designated Beijing for a pilot program for opening up certain service sectors. *China* also revised its “Catalogue for the Guidance of Foreign Investment Industries”, which stipulates in which of over 400 industry sectors foreign investment is “encouraged”, “restricted” or “prohibited”. Compared with its predecessor, the new Catalogue reduces the number of investment restrictions, in particular

Table III.1. Changes in national investment policies, 2001–2015 (Number of measures)

Item	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015
Number of countries that introduced changes	51	43	59	79	77	70	49	40	46	54	51	57	60	41	46
Number of regulatory changes	97	94	125	164	144	126	79	68	89	116	86	92	88	72	96
Liberalization/promotion	85	79	113	142	118	104	58	51	61	77	62	65	64	52	71
Restriction/regulation	2	12	12	20	25	22	19	15	24	33	21	21	21	11	13
Neutral/indeterminate ^a	10	3	-	2	1	-	2	2	4	6	3	6	3	9	12

Source: ©UNCTAD, Investment Policy Monitor database.

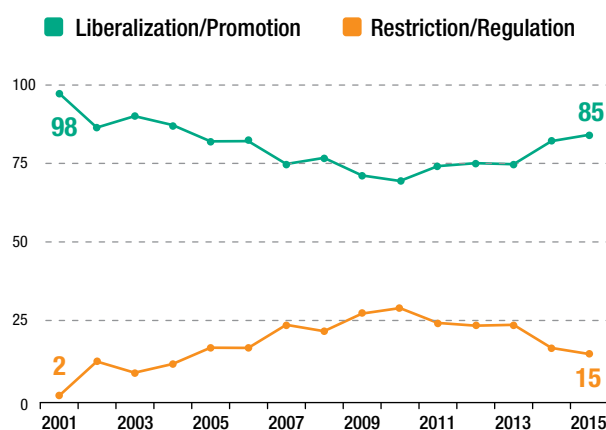
^a In some cases, the expected impact of the policy measures on the investment is undetermined.

in the manufacturing sector. *India* undertook various liberalization measures, such as (1) increasing the foreign direct investment (FDI) cap from 26 per cent to 49 per cent in the insurance sector and in pension funds; (2) permitting FDI up to 100 per cent under the automatic route for manufacturing of medical devices; (3) increasing the thresholds of inward FDI projects that require prior approval from Rs 20 billion to Rs 50 billion; (4) abolishing the subcellings between various forms of foreign investment such as FDI, portfolio, non-resident Indians' investments and venture capital; and (5) permitting partly paid shares and warrants as eligible capital instruments for the purpose of India's FDI policy. In November 2015, the country also introduced a comprehensive FDI liberalization strategy and relaxed FDI rules in 15 "major sectors", including agriculture, civil aviation, construction, defence, manufacturing and mining.³

Some noteworthy measures from other countries: *Brazil* fully liberalized foreign investment in the health care sector. *Maldives* approved a new law allowing foreign ownership of land in the country for the first time. *Myanmar* passed a new mining law that provides a more favourable environment for foreign investment. It also allowed import and trade of specific farming and medical products, provided that foreign investors engage in such activities in joint ventures with local firms. The *Philippines* removed the foreign ownership restriction on lending firms, investment houses and financing companies. The country also reduced the number of professions reserved for Filipino nationals. *Viet Nam* allowed foreign investors to purchase rights to manage airports and provide some ground services, with a cap of 30 per cent of the company's share. It also relaxed foreign ownership restrictions related to the purchase of houses. Furthermore, it removed the 49 per cent cap on foreign ownership of public companies, except in those industries governed by international treaties and industries restricted to foreign investors under the Law on Investment and other regulations.

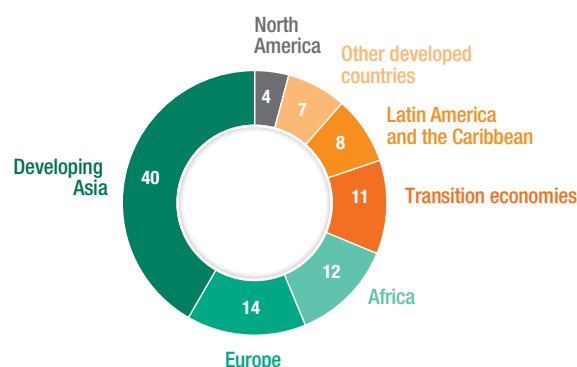
Another investment policy feature in 2015 was privatization. Developed countries were most active, in particular with regard to some infrastructure services, such as transportation and telecommunication. For example, *France* signed a contract for the sale of its space satellite launch company (CNES). *Greece* approved concession agreements with a foreign investor relating to the privatization of 14 regional airports. It also signed a privatization agreement for a seaside resort. *Italy* undertook a partial privatization of the national postal service – Poste Italiane – selling 38.2 per cent of the company. *Japan* launched the initial public offering (IPO) for parts of Japan Post. The *Slovak Republic* decided to sell its remaining stake in Slovak Telekom to a foreign company. *Spain* privatized 49 per cent of its national airport operator, Aena. *Ukraine* developed a list of approximately 300 State-owned enterprises to be privatized, by adopting a resolution on conducting a transparent and competitive privatization process.

Figure III.1. Changes in national investment policies, 2001–2015 (Per cent)



Source: ©UNCTAD, Investment Policy Monitor database.

Figure III.2. Regional distribution of national investment policy measures in 2015 (Number of measures)



Source: ©UNCTAD, Investment Policy Monitor database.

In 2016, *Indonesia* introduced its new “Negative Investment List”. It generally permits or increases the allowed ceiling for foreign investment in various industries, including tourism, film, health care and airport services. The list also adds new restrictions to foreign investment in a number of industries. *Zimbabwe* allowed foreign investors to own up to 49 per cent – up from 40 per cent – of companies listed on the Zimbabwe Stock Exchange. The *European Union* and the *United States* lifted some economic sanctions against the Islamic Republic of Iran, allowing, inter alia, individuals and companies to invest in the oil, gas and petrochemical industries.

b. Investment promotion and facilitation continues to be prominent

Numerous countries adopted policies to promote or facilitate investment. One element of such policies was the introduction of new investment laws. *Chile* promulgated a new Framework Law for Foreign Investment. It establishes a Foreign Investment Promotion Agency and guarantees investors access to the formal foreign exchange market, the free remittance of capital and earnings, protection against discrimination, and exemption from sales and service tax on imports of capital goods that comply with certain requirements. *Egypt* amended its investment law, creating alternative out-of-court forums to amicably settle investor-State disputes and granting incentives for investment in specific sectors or regions. *Guinea* adopted a new investment code providing new tax and customs exemptions, as well as protections for investments. *Myanmar* passed a new investment law, consolidating and replacing the 2012 Foreign Investment Law and the 2013 Citizens Investment Law. One aim of the new law is to pave the way for speedier investment approvals. *Rwanda* enacted a new investment code which includes additional tax incentives. The code also includes the principles of national treatment, free transfer of funds and protection in case of expropriation. *Serbia* introduced a new investment law, which, inter alia, provides for equal treatment of foreign and domestic investors, and differentiates between investments of special importance and those of local importance. It also provides investment incentives and includes investment protection provisions. *South Africa* adopted the Promotion and Protection of Investment Act. It confirms, inter alia, commitments on national treatment, security of investments and transfer of funds while preserving the Government’s right to pursue legitimate public policy objectives. It may serve as an alternative to bilateral investment treaties (BITs), unless there are compelling economic and political reasons for having them.

Meanwhile, the *Plurinational State of Bolivia* adopted a new conciliation and arbitration law, incorporating mechanisms of alternative dispute resolution for both domestic and foreign investors. At the same time, the law stipulates that investment disputes involving the State will be subject to Bolivian jurisdiction. In 2016, *Myanmar* enacted a new arbitration law, providing a comprehensive legal framework for the conduct of domestic and international arbitration.

A couple of countries improved business licensing procedures. *Angola* enacted new legislation to reduce the bureaucracy surrounding the procedures for the admission of eligible investments. *Indonesia* introduced a three-hour licensing process for certain categories of investors planning to open businesses. To be able to use the quick licensing program, investors must invest at least Rp 100 billion and/or employ at least 1,000 workers. *Ukraine* adopted a law on licensing of commercial activities which aims to simplify licensing procedures in a number of activities. In 2016, *Kazakhstan* introduced a one-stop shop, enabling investors to apply for more than 360 permits and licenses without having to visit various ministries or government agencies.

Some countries introduced special economic zones (SEZs) or revised policies related to existing SEZs. *Djibouti* established a free trade zone to attract investments and stimulate economic activities in the manufacturing and services sectors. *Kazakhstan* adopted a law on the Astana International Financial Centre, offering tax incentives and work permits, among other benefits. *Kenya* enacted a law on SEZs, providing investment incentives such as tax benefits and granting

additional work permits for skilled foreign employees. The *Republic of Korea* eased employment regulations for foreign investment in the Saemangeum region. *Portugal* adopted a new regime for the International Business Centre of Madeira, which offers a reduced corporate tax rate and withholding tax exemptions on dividend payments, among other incentives. The *Russian Federation* designated the port of Vladivostok and some other municipalities as a free port zone. In addition, it approved the establishment of five areas of priority socioeconomic development in the Far Eastern Federal District. Investors in these areas will benefit from a number of incentives.

Some countries provided various kinds of other incentives. For example, *Argentina* adopted a crude oil production stimulus program providing financial subsidies for oil production and exports. *The Plurinational State of Bolivia* adopted a law on the promotion of investment in exploration and exploitation of hydrocarbons that regulates the general framework for the granting of economic incentives. The *Czech Republic* amended the Investment Incentives Act and other related acts. Inter alia, the amendment introduces an exemption from real estate tax, expands the range of supported activities and reduces the eligibility requirements for investors. *Indonesia* expanded the economic sectors designated as pioneer industries eligible for tax holidays. The *Republic of Korea* allowed small foreign companies to hire more non-Korean employees during the first two years of operations. The *Russian Federation* set up a procedure for Special Investment Contracts, covering investment in certain industries over a minimum investment amount of Rub 750 million. It provides investors with various support measures, including financial incentives. The *United States* passed a law easing tax on foreign investment in United States real estate. Under the new law, foreign pension funds receive the same tax treatment as their United States counterparts for real estate investment.

c. New investment restrictions or regulations reflect concerns about strategic industries

Almost all of the newly adopted restrictive or regulatory measures related to the entry and establishment of investments. The share of new investment restrictions or regulations among all new policy measures was higher in developed countries than in developing or transition economies.

Most of the newly adopted investment restrictions and regulations reflect concerns about foreign investment in strategic industries or national security considerations (the latter are discussed in subsection 2). For instance, *Argentina* enacted a law requiring the government to get approval in Congress to sell the State's stakes in key Argentine companies. *Australia* reformed the foreign investment screening framework significantly to provide stronger enforcement of the rules, a better resourced system and clearer rules for foreign investments. Key changes include a lowering of the agricultural and agribusiness thresholds. This means more investors are required to come to the Foreign Investment Review Board for approval for agricultural investments. However, the threshold for developed commercial land has been lifted so that acquisitions below \$A 252 million generally do not require screening. As before, the framework seeks to ensure that proposed acquisitions are not contrary to the national interests. *Hungary* restricted the purchase by foreigners of privatized plots of State-owned farmland. *Poland* adopted a law requiring investors to get approval from the Government to buy a stake of 20 per cent or higher in strategic industries such as power generation, chemicals and telecommunication. In 2016, the *Russian Federation* lowered the foreign ownership cap in media companies from 50 per cent to 20 per cent.

Several countries undertook measures to counter tax evasion by investors. One policy has been to curb corporate tax inversions (chapter II). For example, the *United States* has taken a series of actions to rein in inversions and reduce the ability of companies to avoid taxes through earnings stripping. The change will make it harder for United States companies to buy a firm in another country and locate the combined entity's address there. The new rules also discourage

companies from “cherry picking”, i.e. finding an address in a country with a favourable tax treaty. In a similar vein, new tax legislation entered into force in the *Russian Federation*, aiming to prevent the cash drain from Russia to offshore places and the use of various cross-border tax evasion schemes. Policy reforms to stem offshore financial flows have also been under way in the *Netherlands* and *Luxembourg*.

2. Foreign investment and national security-related policies

National security considerations are increasingly becoming part of national investment policies and may cover broader national economic interests. There is a need to balance regulatory space for governments in applying national security regulations with the interests of investors for transparent and predictable procedures.

In recent years, national security considerations and related concerns have gained more prominence in investment policies. More countries have adopted legislation in this area or have reviewed foreign investment projects on national security-related grounds. Intensified threats of terrorism have further sensitized national authorities.

It is each country’s sovereign right to screen foreign investment for national security reasons; however, recent developments raise a number of policy issues. First, countries use different concepts of “national security”; domestic policy approaches range from a relatively narrow definition of national security and security-related industries to broader interpretations that extend investment review procedures to critical infrastructure and strategic industries. Second, countries differ as regards the content and depth of the investment screening process, and the degree and amount of information that they require from prospective investors. Third, there are also substantial differences between countries with respect to the possible consequences when an investment is considered sensitive from a national security perspective. Policy approaches include outright or partial investment prohibitions, but also investment authorizations under certain conditions.

As a result, foreign investors may face significantly different entry conditions in different countries in respect of similar or even the same economic activities. Whereas they may not face any obstacles in country A, the same investments may be blocked in country B. In addition, while sector-specific foreign investment restrictions are usually clearly defined and transparent, limitations based on national security are often less predictable and may leave room for instances of investment protectionism.

The rest of this section provides an overview of existing national approaches to investment reviews for national security-related reasons and the latest policy developments in this area.

a. Investment screening procedures apply different concepts of “national security”

An UNCTAD review of FDI entry and establishment regulations among 23 developed, developing and transition economies shows that countries differ significantly in their approaches to defining national security for investment screening purposes.

No country that was surveyed has an exhaustive and clear-cut definition of “national security” in the context of foreign investment. Most countries have chosen to identify a number of sectors or industries, which – by their nature – may pose national security-related concerns in connection with foreign investment. On the basis of UNCTAD’s review findings, several types of economic activities and/or sectors can be identified in which foreign investors are likely to be subject to national security-related FDI limitations and/or review procedures. They cover defence and security-related activities, as well as investment in critical infrastructure. Also, foreign investments in strategic economic sectors may sometimes be considered a potential threat to national security (table III.2).

Table III.2.

Illustrative list of activities subject to FDI limitations and/or review procedures, by country

	Defence industry, land purchase in security zones	Critical infrastructure ^a	Strategic economic sectors ^b
Algeria ^c	x	x	x
Argentina	x		
Brazil	x	x	x
Canada	o	o	o
Chile	x		x
China	x	x	x
Egypt	x	x	
Ethiopia	x	x	
Finland	x	x	o
France	x	x	
Germany	x	o	o
India	x	x	
Indonesia	x	x	x
Italy	x	x	
Japan	x	x	
Korea, Rep. of	x	x	x
Mexico	x	x	x
Myanmar		x	x
Poland	x	x	
Russian Federation	x	x	x
Turkey	x	x	
United Kingdom	x	o	o
United States	o	x	o

Source: ©UNCTAD, based on Investment Policy Monitor database and web research.

^a e.g. electricity, water and gas distribution; health and education services; transportation; communications.

^b e.g. natural resources.

^c Algeria has a foreign ownership restriction of 49 per cent for all domestic companies.

x = Industry-specific restriction.

o = Country with a cross-sectoral review potentially encompassing all transactions in any industry.

The broad concept of “national security” also translates into a variety of criteria that national authorities consider in their investment screening procedures. These criteria include, inter alia, the impact of a proposed transaction on public safety, social order, plurality of the media, strategic national interests, foreign relations, disclosure of State secrets, territorial integrity, independence of the State, protection of rights and freedoms of citizens, continuity of public procurements or terrorism related concerns.

b. Foreign investment screening for national security reasons on the rise

Over the past decade there has been an increase in laws and regulations concerning investment-related national security reviews.

Since 2006, at least eight developed, developing and transition economies have enacted legislation on foreign investment reviews on national security grounds (i.e. *Canada* (2009), *China* (2011 and 2015), *Finland* (2012), *Germany* (2009), *Italy* (2012), the *Republic of Korea* (2006), *Poland* (2015), and the *Russian Federation* (2008)).

During the same period, various countries have revised their mechanisms for the national security-related review of foreign investment through the addition of new sectors, guidelines or thresholds (box III.1). The majority of these amendments tended towards adding further restrictions on investment, while some countries also clarified procedural requirements, thereby improving the overall transparency of their national security-related review mechanisms.

Canada

In 2015, amendments were introduced to the Investment Canada Regulations and the National Security Review of Investments Regulations. These amendments required investors to provide more information with their filings in order to assist in the review process and extended the length of certain time periods for the Government to carry out national security reviews under the Investment Canada Act.

China

On 1 July 2015, the National Security Law came into effect. As a framework law, it lays down the general principles and obligations of the State in maintaining security in the country. Article 59 of the Law allows the State to establish, inter alia, a national security review and oversight mechanism to conduct a national security review of foreign commercial investment, special items and technologies, internet services, and other major projects and activities that might affect national security. The framework for such reviews based on national security considerations had first been established in 2011. In April 2015, trial procedures for a national security review of foreign investment in the free trade zones in Shanghai, Tianjin, and the provinces of Guangdong and Fujian were published by the State Council's general office.

France

In 2014, the Minister of Economy issued a decree amending the list of activities subject to review for foreign investors equipment, services and products that are essential to safeguard national interests in public order, public security and national defence, as follows: (i) sustainability, integrity and safety of energy supply (electricity, gas, hydrocarbons or other sources of energy); (ii) sustainability, integrity and safety of water supply; (iii) sustainability, integrity and safety of transport networks and services; (iv) sustainability, integrity and safety of electronic communications networks and services; (v) operation of a building or installations of vital importance as defined in articles L. 1332-1 and L.1332-2 of the Code of Defence; and (vi) protection of public health.

Germany

In 2009, Germany amended its legislation to be able to exceptionally prohibit investments by investors from outside the European Union (EU) and the European Free Trade Association that threaten to impair public security or public order.

Italy

In 2012 (and the subsequent years), Italy established a new mechanism for government review of transactions regarding assets of companies operating in the sectors of defence or national security, as well as in strategic activities in the energy, transport and communications industries.

Japan

In 2007, Japan expanded the coverage of the prior notification requirement for foreigners acquiring a stake in companies in designated industries. Amendments of the Cabinet Order on Inward Direct Investment and other rules adjusted the list of industries covered to include those that produce sensitive products (such as arms, nuclear reactors and dual-use products), as well as industries that produce sensitive products or provide related services. The stated purpose of the amendments is to prevent the proliferation of weapons of mass destruction and damage to the defence production and technology infrastructure.

Republic of Korea

In 2008, the Ministry of Commerce, Industry and Energy made an amendment to the Enforcement Decree of the Foreign Investment Promotion Act by Presidential Decree No. 20646. The amendment aims to provide more clarity on the bases and procedures for restricting foreign investment on the basis of national security concerns and to provide legal stability to both foreign and domestic investors by allowing them to request a preliminary investigation on whether a certain investment is subject to restriction for national security reasons.

Russian Federation

In 2014 amendments were made to the Federal Law "On the Procedures of Foreign Investments in the Business Entities of Strategic Importance for National Defence and State Security" (No. 57-FZ) by adding three types of activities deemed to be of such strategic importance: (i) evaluation of the vulnerability of transport infrastructure facilities and the means of transport by specialized organizations, (ii) the protection of transport infrastructure facilities (iii) the means of transport by transport security units from acts of unlawful intervention; and (iv) the support to certification of transportation security by the certifying authorities. Other amendments that were made to Federal Law No. 57-FZ exempt certain operations from the remit of the Law on Strategic Entities, but bring property classified as production assets of a strategic company – valued at more than 25 per cent of the strategic entity's balance sheet assets – under the law's scope.

United States

In 2007, the United States adopted the Foreign Investment and National Security Act, which amends the primary vehicle for screening foreign acquisitions on the basis of national security: the Defense Production Act of 1950. The Act expands, inter alia, the membership of and senior-level accountability within the Committee on Foreign Investment in the United States (CFIUS), adds to the illustrative list of national security factors for the CFIUS and the President to consider, requires the CFIUS to monitor and enforce compliance with mitigation measures and to track withdrawn notices, and allows the CFIUS to re-open a review if the parties made a material omission or misstatement to the CFIUS, or if the parties intentionally and materially breach a mitigation agreement.

Source: Based on UNCTAD's Investment Policy Hub and web research.

Also, during this period, some countries have adopted new foreign ownership restrictions in industries that may raise national security-related concerns or otherwise affect national interests. For example, in 2014, *Mozambique* amended its petroleum law, requiring investors who apply for oil and gas exploration licenses to form partnerships with the State. In 2014, *Myanmar* prohibited FDI in electric power generation projects of less than 10 MW and required that pharmaceuticals, health and postal services be undertaken through joint ventures with the recommendation of relevant Ministries. In 2009, *the Bolivarian Republic of Venezuela* enacted legislation under which new projects of basic and intermediate petro-chemistry cannot be carried out by entities that are not mixed companies with a State participation of at least 50 per cent (previously, no limitation existed).

In addition, there has been an increase in administrative decisions on the admission (or rejection) of foreign investment in national security-related screening procedures. Box III.2 provides a sample of recent cross-border mergers and acquisitions (M&As) that have raised concerns related to national security and other national interests in host States. Where reviews focus on the protection of national interests, it has become increasingly difficult to distinguish between decisions based explicitly on national security and those based on broader economic considerations.

Finally, at least 16 national security-related investment cases have been examined by international investment arbitration tribunals. In addition, over one third (277 cases) of all known international investment arbitration cases involve investments in industries that may affect a country's national interests. These include critical infrastructure and strategic economic industries (mining of minerals, exploration of oil and gas, energy generation and transmission, water supply).

In national security-related cases, national security arguments were used by the respondent State as a justification for measures taken against the investor (i.e. expropriations of investment through the adoption of legislative acts, cancellation of licenses or state contracts, or conduct of police investigations). Most of these cases (10) involved claims filed by investors from the United States, France and the United Kingdom against Argentina in response to Government measures in the gas, sanitation and insurance industries undertaken during the 2001–2002 financial crisis. In all these cases, the issue at the heart of the dispute was whether the emergency measures taken by Argentina at a time of severe economic crisis fell within the scope of a national security exception in a BIT or if they could be justified by the customary international law defence of necessity. In three cases the tribunals held that the Government measures were justified for a certain period of time, with the consequence that Argentina could not be held responsible for losses suffered by the foreign investor during that time. In the seven other cases, tribunals did not accept Argentina's defence and held it liable for compensation.

c. Countries have different types of FDI regulations for national security and related reasons

Surveyed countries have adopted different types of investment regulations to protect their national security interests relative to foreign investment (table III.3). These include (1) prohibiting, fully or partially, foreign investment in certain sensitive sectors; (2) maintaining State monopolies in sensitive sectors; and (3) maintaining a foreign investment review mechanism for a list of pre-defined sectors or across the board. Some countries maintain two types of FDI review mechanisms – a sector-specific review procedure (e.g. in the defence industry) complemented by a separate cross-sectoral review mechanism for other foreign investments. The latter may subject all FDI proposals to entry and establishment approval procedures or may only require approval of FDI proposals that meet certain monetary thresholds. Some cross-sectoral review mechanisms do not require any prior notifications by investors and are instead initiated at the discretion of national authorities.

Full or partial foreign ownership restrictions exist in the defence industry (production of weapons and war materials); the purchase of real estate by foreigners in border areas or near other sensitive sites; air and maritime cabotage services and air traffic control. Sometimes restrictions also concern electricity power grids and exchanges, seaport or airport management, and oil and gas extraction activities.

State monopolies exist in sectors and for activities necessary to ensure basic public services and communications within a State, such as railway transport and infrastructure maintenance, landline telecommunications, oil and gas transportation, and electricity and water transmission.

Review mechanisms in pre-defined sectors or activities focus on critical infrastructure (e.g. electricity water, and gas distribution; health and education services; transportation; communications) or on specific industries such as defence industries, mineral extraction, real estate acquisition in border areas, and petroleum-related activities.

As illustrated in table III.3, many surveyed countries have elected to use more than one type of foreign investment control mechanism for national security and related reasons. These policies have their pros and cons. From a foreign investor's perspective, sector-specific investment restrictions have the advantage of clarity and transparency. From a government perspective such methods may lack flexibility. A cross-sectoral review mechanism, together with general criteria defining the concept of "national security", gives governments more discretion in the investment screening process. This, in turn, can lead to investor uncertainty as to the final outcome of the review. Governments therefore need to find a balance between these two policy approaches.

Table III.3.		Illustrative list of types of FDI regulations for national security and related reasons, by country			
	Full and/or partial FDI restriction in a given sector, area or activity	State monopoly	Review mechanism in pre-defined sectors and/or activities	Cross-sectoral review mechanism	
Algeria	x	x			
Argentina	x		x		
Brazil	x	x	x		
Canada				x	
Chile	x		x		
China	x	x	x		
Egypt	x	x			
Ethiopia	x	x	x		
Finland		x	x	x	
France		x	x		
Germany		x	x	x	
India	x		x		
Indonesia	x		x		
Italy		x	x		
Japan			x		
Korea, Rep. of	x	x	x	x	
Mexico	x	x	x	x	
Myanmar	x	x		x	
Poland			x		
Russian Federation	x	x	x		
Turkey	x	x	x		
United Kingdom			x	x	
United States	x			x	

Source: ©UNCTAD, based on Investment Policy Monitor database and web research.
x = Existing restriction.

Australia

Australia's foreign investment screening process allows the treasurer to review foreign investment proposals (that meet certain criteria) on a case-by-case basis to ensure that they are not contrary to Australia's national interest. The national interest test includes consideration of national security issues. The treasurer has the power to block foreign investment proposals or apply conditions to the way proposals are implemented to ensure they are not contrary to the national interest. It is very rare that the treasurer would block a proposal. In the past decade only a few proposals have been blocked (*China Nonferrous Metal Mining's 2009 bid for Lynas Corporation, Singapore Exchange Ltd's 2010 bid for ASX Ltd, ADM's 2013 bid for GrainCorp and Genius Link Asset and Shanghai Pengxin's 2015 bid for S. Kidman & Co Ltd*).

Canada

In 2013 the Government rejected on national security grounds *Accelero Capital Holdings' bid for the Allstream division of Manitoba Telecom Services*.

France

General Electric's 2014 bid for Alstom was met with opposition from the Government, which feared job losses and transfer of the national electric power generation and supply systems. Several months later, the Government adopted a decree extending its powers to block foreign investments in strategic industries relating in particular to energy supply. It is believed that this prompted General Electric to revise its initial offer and provide certain guarantees which led to the ultimate approval of the bid.

Japan

In 2008 the Minister of Finance and the Minister of Economy, Trade and Industry jointly recommended that the *United Kingdom fund TCI drop its plan to buy up to 20 per cent of J-Power*, an electricity wholesaler, since the investment was likely to impede the stable supply of electric power and Japan's nuclear and nuclear fuel cycle policy, and to disturb the maintenance of public order.

Italy

In 2014, the president of the Council of Ministers authorized the *acquisition of Piaggio Aero* (aircraft production) by *Mubadala Development Company* (United Arab Emirates), and in 2013, the *acquisition of Avio SpA* (aviation technology) by *General Electric* but subjected both transactions to strict conditions, such as compliance with requirements imposed by the Government on the security of supply, information and technology transfer; guarantees for the continuity of production, maintenance and overhaul of logistical systems; and control over the appointment of senior representatives.

India

In 2010, *Bahrain Telecommunications' plan to raise its holdings in S. Tel Private Limited*, as well as *Etisalat DB Telecom Private Limited's proposal to increase its ownership stake in Swan Telecom* were both rejected on national security grounds by India's Foreign Investment Promotion Board.

New Zealand

In 2015, an overseas investment by *Pure 100 Ltd., a unit of Shanghai Pengxin Group CO.*, in sensitive land (farmland) was declined because the relevant ministers were not satisfied that the relevant sections in the Overseas Investment Act 2005 were met.

Russian Federation

In 2013, the Government commission on foreign investment turned down *United States group Abbott Laboratories' request to buy Russian vaccine maker Petrovax Pharm*. The decision was made in order to protect the country's national security interests. The proposed transaction has prompted the Government to consider including vaccine production in its list of so-called strategic sectors deemed to be important to national security, which would imply restrictions on foreign ownership.

Source: Based on UNCTAD's Investment Policy Hub and web research.

d. Foreign investors face different degrees of disclosure requirements in national security-related FDI reviews

Most surveyed countries that undertake a national security-related FDI review require that investors provide information at some point during the review process. However, the extent, nature and timing of these information requirements vary considerably between countries (table III.4).

Besides basic information on the identity and nationality of the investor (e.g. through the disclosure of business relationships, the structure of the group, links with foreign governments), many countries seek additional information, such as the investing company's financial statements, origin of funds, methods of financing, list of people on the board of directors, agreements to act in concert, business plans, future intentions and sometimes even the reasons for the investment.

	Investor identity, including ultimate ownership	Financial information concerning the transaction	Links to foreign governments	Rationale of the transaction, future intentions, business plans
Canada	x	x	x	x
China	x	x	x	
Finland	x			x
France	x	x		
Japan	x	x		x
Italy	x	x		x
Korea, Rep. of				x
Mexico	x	x		x
Myanmar		x		x
Poland	x	x		x
Russian Federation	x	x	x	x
United Kingdom ^a	x	x		x
United States	x	x	x	

Source: ©UNCTAD, based on Investment Policy Monitor database and web research.

^a Disclosures are voluntary and are part of the ordinary merger control (competition rules). No special disclosure for national security reasons. x = Existing requirement.

e. Conclusion

In recent years, national security-related concerns have gained more prominence in the investment policies of numerous countries. Different approaches exist to reviewing and eventually restricting foreign investment on national security-related grounds. These range from formal investment restrictions to complex review mechanisms with broad definitions and broad scope of application to provide host country authorities with ample discretion in the review process. Although national security is a legitimate public policy concern, countries may wish to consider giving more clarity to the concept and scope of national security in their investment-related legislation. In addition, in cases where countries use a broad concept of national security, they may want to consider whether there is room for using alternative policy approaches (chapter IV).

B. INTERNATIONAL INVESTMENT POLICIES

1. Recent developments in the IIA regime

The IIA universe continues to grow.

a. Trends in the conclusion and termination of IIAs

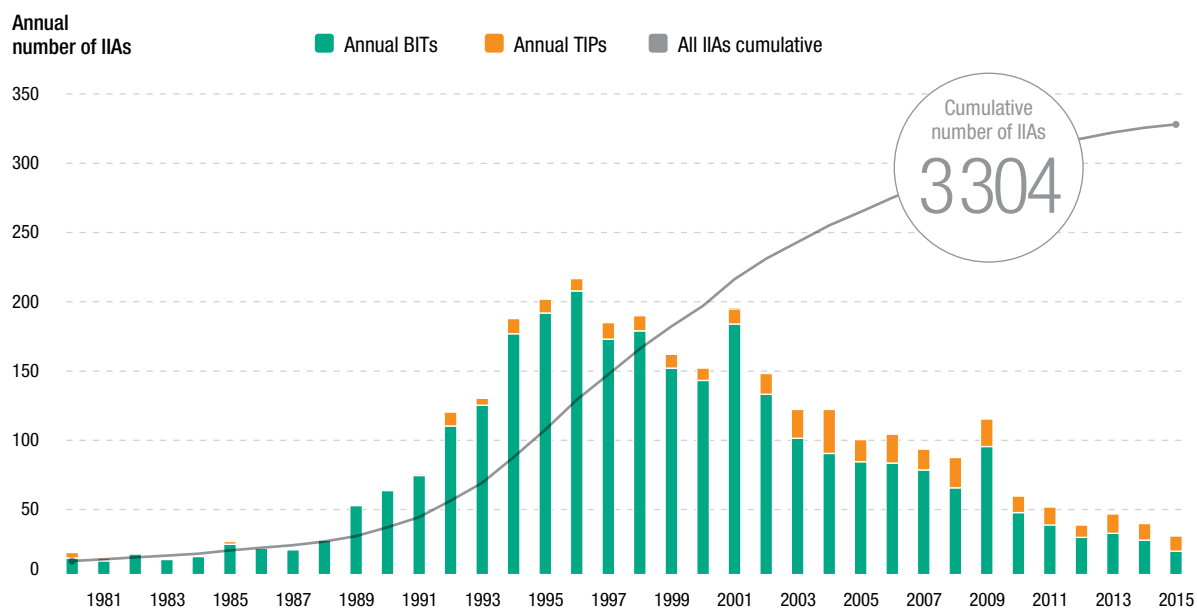
The year 2015 saw the conclusion of 31 new IIAs – 20 bilateral investment treaties (BITs) and 11 treaties with investment provisions (TIPs) (box III.3), bringing the IIA universe to 3,304 agreements (2,946 BITs and 358 TIPs) by year-end (figure III.3).

Countries most active in concluding IIAs in 2015 were Brazil with six, Japan and the Republic of Korea with four each, and China with three. Brazil is taking a new approach to BITs, focusing on investment promotion and facilitation, dispute prevention and alternatives to arbitration instead of traditional investment protection and investor-State dispute settlement (ISDS).

The first four months of 2016 saw the conclusion of nine new IIAs (seven BITs and two TIPs), including the Trans-Pacific Partnership (TPP) Agreement, which involves 12 countries.⁴ By the end of May 2016, close to 150 economies were engaged in negotiating at least 57 IIAs (including megaregional treaties such as the Transatlantic Trade and Investment Partnership (TTIP) and the Regional Comprehensive Economic Partnership (RCEP)) (WIR14). Although the numbers of new IIAs and of countries concluding them are continuing to go down, some IIAs involve a large number of parties and carry significant economic and political weight.

Some countries terminated their IIAs in 2015. Typically, by virtue of survival clauses, however, investments made before the termination of these IIAs will remain protected for periods ranging

Figure III.3. Trends in IIAs signed, 1980–2015



Source: ©UNCTAD, IIA Navigator.

Note: For a list of IIAs as of end 2015 by economy, see the Report website (unctad/diae/wir).

from 10 to 20 years, depending on the relevant provisions of each agreement and the terms of terminations.

In 2015, the termination of 8 Indonesian BITs became effective⁵ and the country sent notices of termination for 10 more BITs, to take effect in 2016.⁶

In June 2015, the European Commission initiated infringement proceedings against five EU member States (Austria, the Netherlands, Romania, Slovakia and Sweden), seeking the termination of their BITs with other EU member States. At the same time, the Commission requested information from and initiated an administrative dialogue with all other member States except Italy and Ireland, which had already terminated all of their intra-EU BITs.⁷ In February 2016, Poland announced its intention to terminate its 23 BITs with other EU member States. Similarly, Denmark, which has 10 intra-EU BITs in force,⁸ proposed to the other EU member States the mutual termination of their existing treaties.⁹

In April 2016, and further to an informal technical meeting of EU member States and the Commission held in October 2015, the delegations from Austria, Finland, France, Germany and the Netherlands submitted a non-paper with observations on intra-EU investment treaties to the Trade Policy Committee of the Council of the European Union. The non-paper proposes, as a possible compromise solution, 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.¹⁰

In December 2015, Ecuador's Citizen Audit Commission presented its preliminary conclusions on the legitimacy and legality of Ecuador's BITs,¹¹ recommending that Ecuador denounce its BITs and negotiate new instruments, whether State contracts or IIAs, based on a new model that is being developed. This outcome is in line with the Ecuadorian Constitutional Court judgments between 2010 and 2013 declaring 12 BITs unconstitutional.¹²

Box III.3.

What are treaties with investment provisions (TIPs)?

Treaties with investment provisions (TIPs), previously referred to as "other IIAs", encompass a variety of international agreements with investment protection, promotion and/or cooperation provisions – other than BITs. TIPs include free trade agreements (FTAs), regional trade and investment agreements (RTIAs), economic partnership agreements (EPAs), cooperation agreements, association agreements, economic complementation agreements, closer economic partnership arrangements, agreements establishing free trade areas, and trade and investment framework agreements (TIFAs). Unlike BITs, TIPs may also cover plurilateral agreements involving more than two contracting parties.

The 358 TIPs in existence today differ greatly in the extent to which and the manner in which they contain investment-related commitments. Of these, there are

- *132 TIPs that include obligations commonly found in BITs, including substantive standards of investment protection and ISDS.* Among the TIPs concluded in 2015, nine belong in this category: the Australia–China FTA, the China–Republic of Korea FTA, the Eurasian Economic Union (Armenia, Belarus, Kazakhstan, Kyrgyzstan and the Russian Federation)–Viet Nam FTA,^a the Honduras–Peru FTA, the Japan–Mongolia EPA, the Republic of Korea–New Zealand FTA, the Republic of Korea–Turkey Investment Agreement, the Republic of Korea–Viet Nam FTA, and the Singapore–Turkey FTA.
- *32 TIPs that include limited investment provisions.* Among the TIPs concluded in 2015, the EU–Kazakhstan Enhanced Partnership and Cooperation Agreement is an example of an agreement that provides limited investment-related provisions (e.g. national treatment with respect to commercial presence or free movement of capital relating to direct investments).
- *194 TIPs that establish an institutional framework between the parties to promote and cooperate on investment.* Examples include the Armenia–United States TIFA (2015).

The complete list of TIPs and their texts can be found on UNCTAD's IIA Navigator at the Investment Policy Hub (<http://investmentpolicyhub.unctad.org/IIA>).

Source: ©UNCTAD.

^a Chapter 8, "Trade in Services, Investment and Movement of Natural Persons", applies only between the Russian Federation and Viet Nam.

In December 2014, Italy notified its withdrawal from the Energy Charter Treaty,¹³ taking effect in January 2016.

In October 2013, Botswana, through a Presidential Directive, issued a moratorium on BITs owing to implementation challenges.

b. Other developments in international investment policymaking

In July 2015, the Third UN International Conference on Financing for Development adopted the Addis Ababa Action Agenda. The Agenda emphasizes the need for governments to establish the signals and enabling environments that can effectively catalyse and harness investment, channelling it into areas essential for achieving the Sustainable Development Goals (SDGs) and away from areas that are inconsistent with that agenda. Paragraph 91 of the Action Agenda is devoted to IIAs:

The 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. We will implement such agreements in a transparent manner. We commit to supporting capacity-building including through bilateral and multilateral channels, in particular to least developed countries, in order to benefit from opportunities in international trade and investment agreements. We request UNCTAD to continue its existing programme of meetings and consultations with Member States on investment agreements.

The SDGs, adopted at the United Nations Sustainable Development Summit on 25 September 2015, set out a new vision for the world by outlining priorities for inclusive and sustainable growth and development. The 17 goals and 169 targets comprehensively address the economic, environmental and social dimensions of sustainable development and point to the fundamental roles of public and private capital in achieving those objectives. According to *WIR14*, developing countries alone face an annual investment gap of \$2.5 trillion for meeting SDG-implied resource demands. IIAs can play a role in promoting and facilitating investment for the SDGs.

In early 2016, under the Chinese Presidency, the G20 launched a new work stream on trade and investment, and asked UNCTAD, the World Bank, the Organisation for Economic Cooperation and Development (OECD) and the World Trade Organization (WTO) to support this work. UNCTAD coordinated the interagency working group on investment. The G20 is an important player in international investment matters (see chapter I) and G20 member countries are party to 43 per cent of IIAs. UNCTAD has a long-standing role in supporting the G20's work on investment in the context of its contributions to the Development Working Group (food security, private investment and job creation) and the work streams on investment and infrastructure, as well as the work stream on green investment. UNCTAD also monitors G20 investment policymaking developments (together with the OECD).

Sixteen States¹⁴ signed and one State, Mauritius, ratified the United Nations Convention on Transparency in Treaty-based Investor-State Arbitration. The Convention was opened for signature on 17 March 2015; it will enter into force once three ratification instruments have been deposited. The United Nations Commission for International Trade Law (UNCITRAL) Transparency Rules set out procedures for greater transparency in investor-State arbitrations conducted under the UNCITRAL Arbitration Rules¹⁵ and provide for a "Transparency Registry", which will be a central repository for the publication of information and documents in treaty-based ISDS cases.¹⁶ The Rules are already applicable to a number of IIAs concluded *after* 1 April 2014.¹⁷ The Convention enables States, as well as regional economic integration organizations (REIOs), to make the UNCITRAL Transparency Rules applicable to ISDS proceedings brought under their IIAs concluded *prior* to 1 April 2014 and regardless of whether the arbitration was initiated under the UNCITRAL Arbitration Rules.¹⁸

In 2015, the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention) entered into force for San Marino and Iraq. Andorra, Comoros, the Democratic Republic of the Congo and the State of Palestine became parties to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention).

Negotiations for a Trade in Services Agreement (TISA) are being conducted by 23 members of the WTO. Several negotiating rounds took place in 2015 and 2016, accompanied by substantial intersession work. Negotiators worked to “stabilize” some of the most important chapters – domestic regulation, transparency in legislative processes, and financial services – and aim to have the Agreement text finalized by September 2016.

2. Investment dispute settlement

a. Latest trends in ISDS

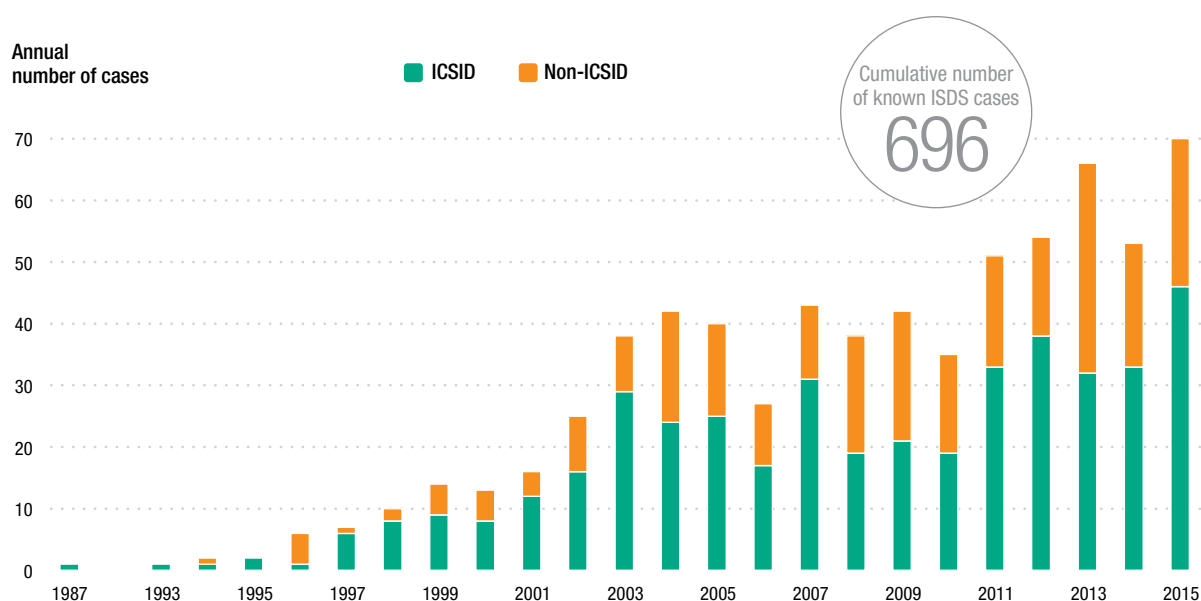
The number of new treaty-based ISDS cases reached a record high, with a continued large share of cases against developed countries.

New cases brought

In 2015, investors initiated 70 known ISDS cases pursuant to IIAs, which is the highest number of cases ever filed in a single year (figure III.4; see also UNCTAD, 2016 forthcoming). As arbitrations can be kept confidential under certain circumstances, the actual number of disputes filed for this and previous years is likely to be higher.

As of 1 January 2016, the total number of publicly known ISDS claims had reached 696. So far, 107 countries have been respondents to one or more known ISDS claims.

Figure III.4. | Known ISDS cases, annual and cumulative, 1987–2015



Source: ©UNCTAD, ISDS Navigator.

Note: Information about 2015 claims 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 exactly match case numbers reported in previous years.

Respondent States

As in the two preceding years, the relative share of cases against developed countries remained at about 40 per cent. Prior to 2013, fewer cases were brought against developed countries. In all, 35 countries faced new claims last year. Spain was the most frequent respondent in 2015, followed by the Russian Federation (figure III.5). Six countries – Austria, Cameroon, Cabo Verde, Kenya, Mauritius and Uganda – faced their first (known) ISDS claims.

Home States of claimants

Developed-country investors brought most of the 70 known cases in 2015. This follows the historical trend in which developed-country investors have been the main ISDS users, accounting for over 80 per cent of all known claims. The most frequent home States in ISDS in 2015 were the United Kingdom, followed by Germany, Luxembourg and the Netherlands (figure III.6).

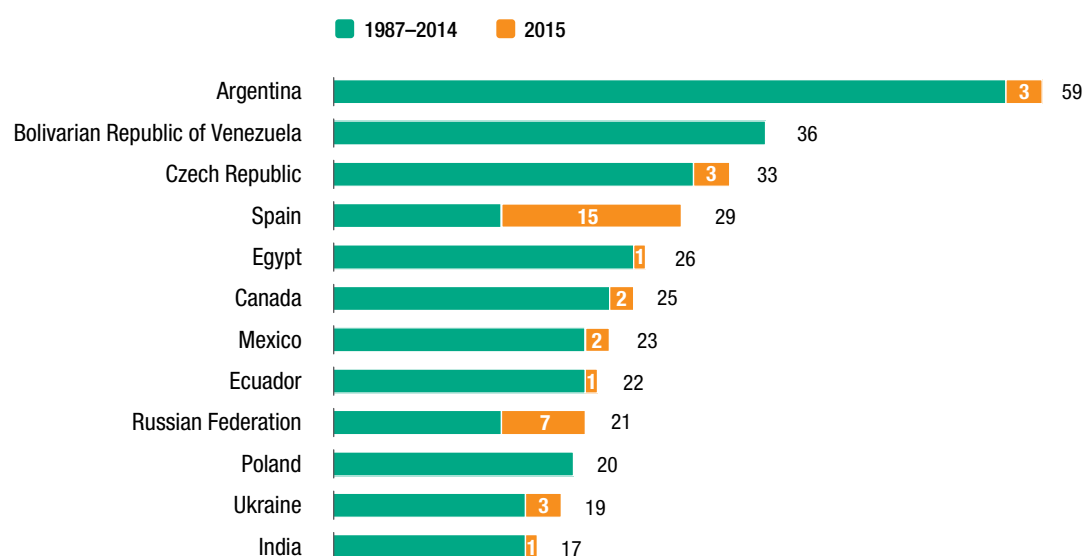
Intra-EU disputes

Similarly to the two preceding years, intra-EU cases accounted for about one third of investment arbitrations initiated in 2015. These are proceedings initiated by an investor from one EU member State against another member State. The overwhelming majority – 19 of 26 – were brought pursuant to the Energy Charter Treaty and the rest on the basis of intra-EU BITs. The overall number of known intra-EU investment arbitrations totalled 130 by the end of 2015, i.e. approximately 19 per cent of all known cases globally.

Applicable investment treaties

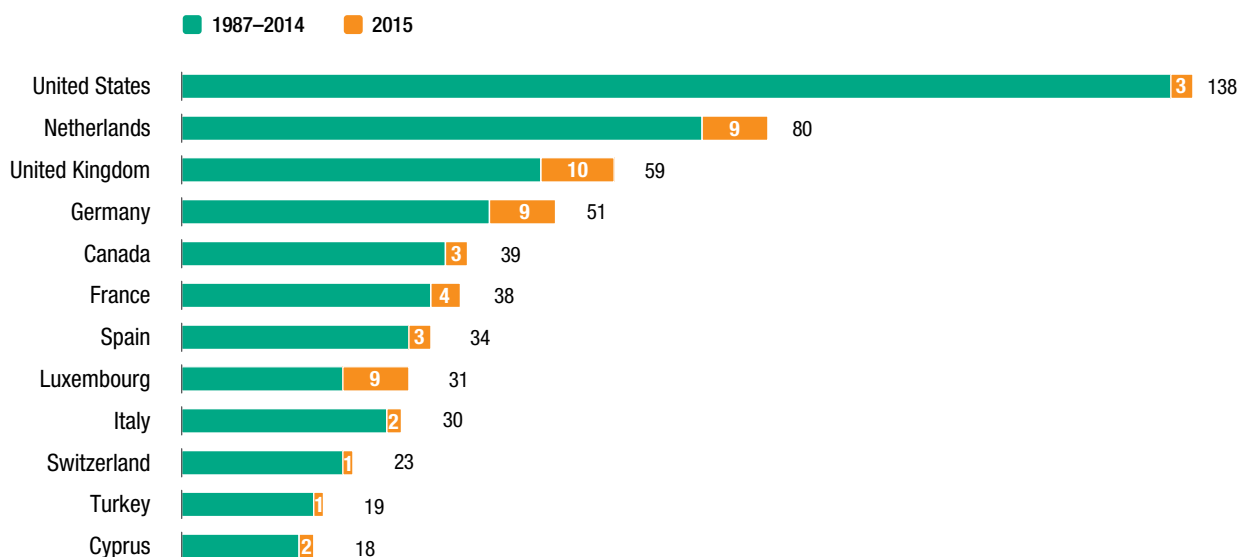
Whereas the majority of investment arbitrations in 2015 were brought under BITs, the Energy Charter Treaty was invoked in about one third of the new cases. Looking at the overall trend, the Energy Charter Treaty is by far the most frequently invoked IIA (87 cases), followed by the North American Free Trade Agreement (NAFTA) (56 cases). Among BITs, the Argentina–United States BIT (20 cases) remains the agreement most frequently relied upon by foreign investors.

Figure III.5. Most frequent respondent States, total as of end 2015
(Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

Figure III.6. Most frequent home States of claimants, total as of end 2015
(Number of known cases)



Source: ©UNCTAD, ISDS Navigator.

In addition to the Energy Charter Treaty (23 new cases), three other treaties were invoked more than once in 2015:

- Russian Federation–Ukraine BIT (6 cases)
- NAFTA (3 cases)
- Czech Republic–United Kingdom BIT (2 cases)

Some TIPs invoked by claimants in 2015 included the Commonwealth of Independent States (CIS) Investor Rights Convention (1997), the Unified Agreement for the Investment of Arab Capital in the Arab States (1980) and the Investment Agreement of the Organization of the Islamic Conference (1981). In one case, the claimants relied on four legal instruments at once, including the WTO General Agreement on Trade in Services (GATS). This is the first known ISDS case invoking GATS as a basis for the tribunal’s jurisdiction.¹⁹

Measures challenged

Investors in 2015 most frequently challenged four types of State conduct:

- Legislative reforms in the renewable energy sector (at least 20 cases)
- Alleged direct expropriations of investments (at least 6 cases)
- Alleged discriminatory treatment (at least 6 cases)
- Revocation or denial of licenses or permits (at least 5 cases)

Other challenged measures included cancellations or alleged violations of contracts or concessions, measures related to taxation and placement of enterprises under external administration, as well as bankruptcy proceedings. Some of the 2015 cases concerned environmental issues, indigenous protected areas, anti-corruption and taxation. In several cases, information about governmental measures challenged by the claimant is not publicly available.

b. ISDS outcomes

Publicly available arbitral decisions issued in 2015 had a variety of outcomes, with States often prevailing at the jurisdictional stage of the proceedings, and investors winning more of the cases that reached the merits stage.

2015 decisions and outcomes

In 2015, ISDS tribunals rendered at least 51 decisions in investor-State disputes, 31 of which are in the public domain (at the time of writing).²⁰ Of these public decisions, most of the decisions on jurisdictional issues were decided in favour of the State, while those on merits were mostly decided in favour of the investor.

More specifically:

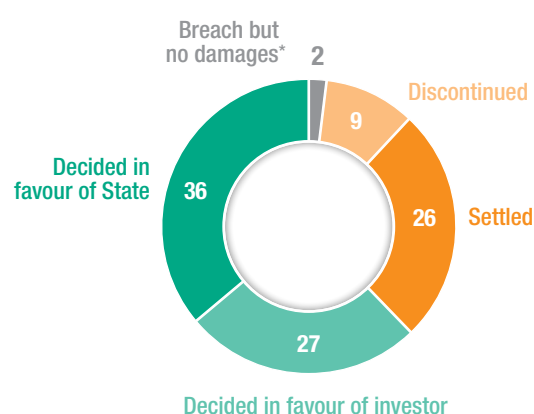
- Ten decisions principally addressed jurisdictional issues, with one upholding the tribunal's jurisdiction (at least in part) and nine denying jurisdiction.
- Fifteen decisions on the merits were rendered in 2015, with 12 accepting at least some of investors' claims, and 3 dismissing all of the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the fair and equitable treatment (FET) provision and the expropriation provision.
- Six publicly known decisions related to annulments. ICSID ad hoc committees rejected five applications for annulment and partially annulled one award.

Overall outcomes

By the end of 2015, a total of 444 ISDS proceedings are known to have been concluded. About one third of all concluded cases were decided in favour of the State (claims dismissed either on jurisdictional grounds or on the merits) and about one quarter were decided in favour of the investor, with monetary compensation awarded. Twenty-six per cent of cases were settled; the specific terms of settlements often remain confidential (figure III.7).

Of the cases that ended in favour of the State, about half were dismissed for lack of jurisdiction.²¹ Looking at the totality of decisions on the merits (i.e. where a tribunal made a determination of whether the challenged governmental measure breached any of the IIA's substantive obligations), 60 per cent were decided in favour of the investor and 40 per cent in favour of the State (figure III.8).

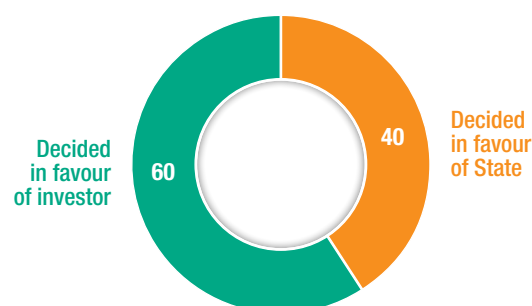
Figure III.7. Results of concluded cases, total as of end 2015
(Per cent)



Source: ©UNCTAD, ISDS Navigator.

*Decided in favour of neither party (liability found but no damages awarded).

Figure III.8. Results of decisions on the merits, total as of end 2015
(Per cent)



Source: ©UNCTAD, ISDS Navigator.

Note: Excluding cases (1) dismissed by tribunals for lack of jurisdiction, (2) settled, (3) discontinued for reasons other than settlement (or for unknown reasons) and (4) decided in favour of neither party (liability found but no damages awarded).

3. IIA reform: taking stock and charting the way forward

IIA reform is intensifying and yielding the first concrete results.

a. IIA reform – addressing five reform areas and taking actions at four levels of policymaking

UNCTAD's Policy Framework and Road Map for IIA Reform are shaping reform objectives and approaches.

Reform to bring the IIA regime in line with today's sustainable development imperative is well under way. Today, the question is not about whether to reform, but about the *what, how* and *extent* of such reform. UNCTAD's advocacy for systemic and sustainable development-oriented investment policymaking started in 2010 (box III.4). It culminated in 2015, when the *WIR* laid out a road map for such reform, providing six guidelines for reform, addressing five areas of reform, and providing options for actions at four levels of policymaking (figure III.9). The UNCTAD Road Map sets out concrete actions that can be pursued and outcomes that can be achieved for each level of policymaking. As confirmed by a recent UNCTAD survey, both developed and developing countries consider all of these areas of reform important and are pursuing them through different types of reform actions. The following section takes stock of IIA reform efforts at the national, bilateral, regional and multilateral levels.

Box III.4.

UNCTAD's policy advocacy for IIA reform

UNCTAD's advocacy for systemic and sustainable development-oriented reform of the IIA regime started in 2010. It covers all three pillars of UNCTAD's activities: research and policy analysis, technical assistance and intergovernmental consensus building.

In terms of policy research and policy development:

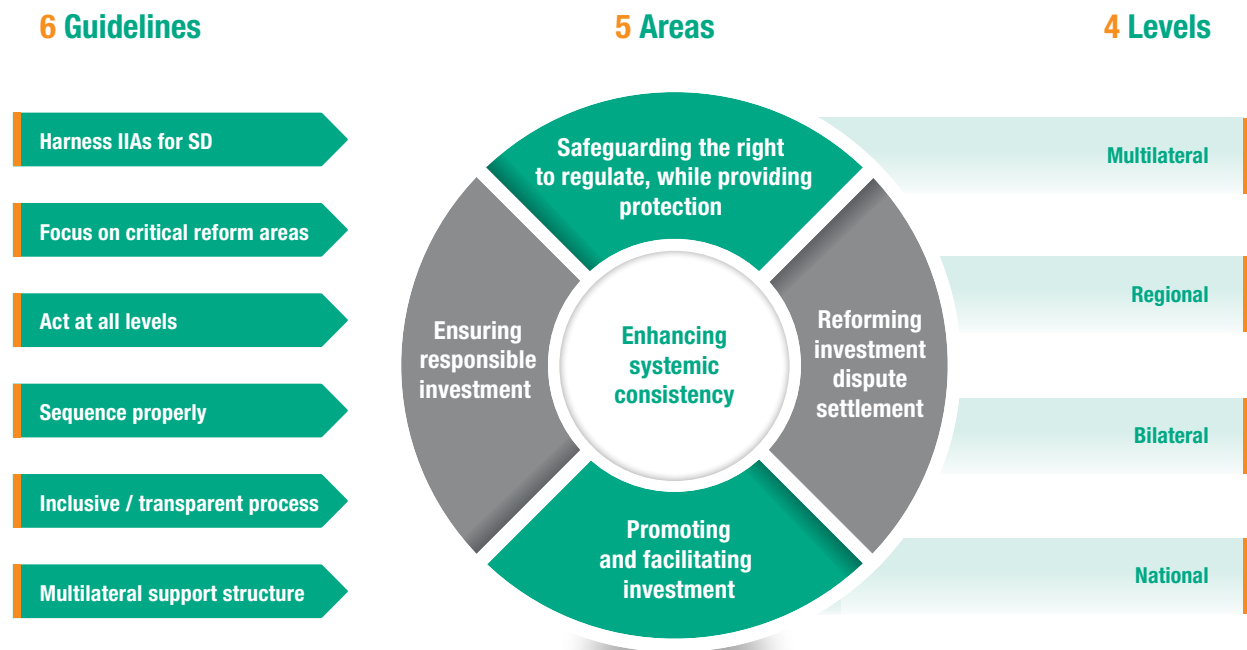
- *WIR10* built on UNCTAD's long-standing experience with its Work Programme on IIAs and highlights the need to reflect broader policy considerations in IIAs, with a view to formulating new generation investment policies.
- *WIR12* launched UNCTAD's Investment Policy Framework for Sustainable Development, which offers guidance and options for modernizing investment policies at national and international levels.
- *WIR13* responded to concerns about the ISDS system and proposes five paths of reform for investor-State arbitration, building on UNCTAD's longstanding human and institutional capacity building work on managing ISDS in developing countries. In fact, as early as 2009 UNCTAD spearheaded the possibility of establishing an Advisory Facility on International Investment Law and ISDS for Latin America.
- *WIR14* presented four pathways of reform for the IIA regime that were emerging from State practice. *WIR14* linked these pathways to the overall objective of mobilizing foreign investment and channelling it to key SDG sectors.
- *WIR15* laid out a comprehensive Road Map for IIA Reform.
- In July 2015, an update of the Investment Policy Framework was launched at the Third UN Conference on Financing for Development, in Addis Ababa (UNCTAD, 2015c).
- In 2016, UNCTAD launched its Action Menu for Investment Facilitation, based on its 2012 Policy Framework and its 2008 study on investment promotion provisions in IIAs. The Action Menu also draws on UNCTAD's rich experiences and lessons learned in investment promotion and facilitation efforts worldwide over the past decades.

The catalytic role of UNCTAD's work on IIA reform is evident from a stakeholder survey conducted at the end of 2015:

- Roughly half of the respondents confirmed that the UNCTAD Policy Framework had triggered policy change or reform actions in their countries.
- More than 60 per cent of respondents noted that UNCTAD's work on investment policymaking for sustainable development is reflected in their country's investment policymaking (e.g. a model IIA or recently concluded treaties).
- About 85 per cent of respondents considered UNCTAD's Road Map for IIA Reform to be highly relevant.

Source: ©UNCTAD.

Figure III.9. | UNCTAD's Road Map for IIA Reform



Source: ©UNCTAD.

b. National level

Numerous countries are reviewing their IIA network and/or developing a new treaty model. Frequently, their actions are based on UNCTAD policy guidance.

National-level reform options include national IIA reviews and action plans resulting, among others, in new model treaties. A large number of countries are engaged in national-level reform activities (box III.5).

About 100 countries, including those that undertook a review as part of the REIO they are a member of, have used the UNCTAD Policy Framework when reviewing their IIA networks. About 60 of these have used the UNCTAD Policy Framework when designing their treaty clauses.

National-level IIA reform covering different areas has produced modernized content in recent model treaties. A review of recent models shows that most of them strive to safeguard the right to regulate while ensuring protection of investors, as well as to improve investment dispute settlement. For example, all recent models reviewed refine the definition of investment, include exceptions to the free transfer of funds obligation and limit access to ISDS. Nine of the 10 models reviewed include a clarification of what does and does not constitute an indirect expropriation, and 8 models include clauses to ensure responsible investment (e.g. a CSR clause or a “not lowering of standards” clause), while only 2 models have specific proactive provisions on investment promotion and/or facilitation (table III.5). The inclusion of specific reform-oriented clauses in model IIAs – as shown in the table – is not fully indicative of the scope and depth of the reform aspect in the relevant provision (which can vary from one model to another) or of the overall extent of reform in the model in question.

Brazil developed a new BIT model focusing on investment promotion and facilitation. The new model has been used in Cooperation and Facilitation Investment Agreements (CFIAs) concluded with Angola, Chile, Colombia, Malawi, Mexico and Mozambique, and is the basis for the country's negotiations with Peru.

Canada continuously updates its IIA policy on the basis of emerging issues and arbitral decisions. Most recent changes (set out in the legal review of the Canada-EU Comprehensive Economic and Trade Agreement (CETA)) include stronger provisions on the right to regulate and the creation of a new Investment Court System (ICS) (box III.6).

Colombia is reviewing its 2011 model BIT. The review is expected to continue the earlier trend of strengthening the right to regulate and ensuring responsible investment.

Egypt's updated model BIT is awaiting release after a comprehensive review that involved all concerned stakeholders. The update aims to balance investment protection and the State's right to regulate and includes provisions on combating corruption, SDG consideration, investors' responsibilities and a refined ISDS mechanism.

India approved a new model BIT which includes a chapter on investor obligations, requiring investors to comply with host State legislation and voluntarily adhere to internationally recognized standards of corporate social responsibility (CSR). In addition, it includes an ISDS mechanism that provides, amongst others, for exhaustion of local remedies prior to commencing arbitration and strict timeframes for the submission of a dispute to arbitration.

Indonesia's draft model BIT is being finalized. The draft version is characterized by carve-outs, safeguards and clarifications aimed at striking a balance between the right of the State to regulate and the rights of investors, while maintaining its policy space.

The Netherlands has recently reviewed its international investment policy engagement. This resulted in a decision to revise the current portfolio of Dutch IIAs, subject to consultations with concerned stakeholders and the authorization of the European Commission.

Mongolia established a working committee in January 2016 to develop a new BIT model that aligns its IIA policy with its national laws and development strategy. Mongolia will then embark on amending or renegotiating its previous BITs with partner countries to align them with the model.

Norway's draft model BIT was presented for public consultation in May 2015. With more than 900 inputs received, the review is ongoing. The draft model contains a clause on the right to regulate and a section with exceptions, including general exceptions and exceptions for essential security interests, cultural policy, prudential regulations and taxation.

South Africa is reshaping its investment policy in accordance with its objectives of sustainable development and inclusive economic growth. The country adopted a new Promotion and Protection of Investment Act (see also section III.1).

Slovakia's new model BIT, adopted in 2014 and currently available in its draft 2016 version, introduced a number of provisions aimed at balancing investment protection while maintaining the right to regulate. It is a "living document" based on the country's experience with investment arbitrations and follows the EU's new investment approach.

Switzerland regularly updates its model BIT provisions (most recently in 2012). In February 2015 an interdepartmental working group took up its work to review provisions where necessary.

The United States' 2012 model BIT builds on the country's earlier model from 2004 and benefited from inputs from Congress, private sector, business associations, labour and environmental groups and academics (ongoing review).

Source: ©UNCTAD, based on UNCTAD (2016).

c. Bilateral level

The most prominent bilateral reform action is the negotiation of new IIAs. Most of the recently concluded treaties include sustainable-development-friendly clauses.

Newly concluded IIAs display important reform-oriented provisions and represent the most prominent reform action at the bilateral level. Other bilateral-level reform actions include joint IIA consultations and plans for a joint course of action. Another action, a joint IIA review, aims to take stock of the situation and assess the impact and the risks of the bilateral IIA relationship, and to identify reform needs. The review is undertaken bilaterally and can result in joint interpretations by the contracting parties of a treaty, as well as renegotiations, amendments and the conclusion of new IIAs.

Reform actions aimed at changing the stock of treaties are undertaken comparatively less frequently than, for example, efforts to update a country’s model BIT. A recent survey indicated that relatively few countries are renegotiating, amending or interpreting existing IIAs. Little information is available in general or on the specifics of these reform activities. Yet, engagement in renegotiation, amendment or interpretation of IIAs is the most pressing issue when pursuing comprehensive IIA reform and dealing with the stock of existing IIA commitments.

The most visible results of bilateral-level reform actions are the modernized treaty provisions found in newly concluded IIAs. A review of the 21 bilateral IIAs concluded in 2015 for which texts are available shows that most include elements addressing the reform areas. These elements mirror and are in line with the content of the new model IIAs described in the preceding section.

For example, most of the IIAs that include key traditional protection standards have refined them with a view to circumscribing their scope and clarifying their meaning and/or have

Table III.5. Reform-oriented provisions in selected model IIAs

	1	2	3	4	5	6	7	8	9	10	11
Austria Model BIT (2008)	Yes	Yes	No	Yes	Yes	No	No	Yes	Yes	Yes	No
Azerbaijan Model BIT (2016)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	No
Brazil Model CFIA (2015)	Yes	Yes	Not applicable	Not applicable	Yes	Yes	No	Yes	Yes	Yes	Yes
Canada Model BIT (2014)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Egypt draft Model BIT (2015)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	Yes	Yes
India Model BIT (2015)	Yes	Yes	Not applicable	Yes	Yes	Yes	Yes	No	Yes	Yes	No
Serbia Model BIT (2014)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Slovakia draft Model BIT (2016)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No
Turkey draft Model BIT (2016)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	No	Yes	No
United States Model BIT (2012)	Yes	Yes	Yes	Yes	Yes	Yes	Yes	Yes	No	Yes	No

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

Yes No Not applicable

Selected aspects of IIAs

- 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 and/or facilitation

Source: ©UNCTAD. “Draft” model means that the model has not been adopted by the country yet or that it is continually being updated.

complemented them with provisions that cater to other public policy objectives. Several new IIAs include clauses aimed at fixing the ISDS system; several others omit ISDS. Many new IIAs also omit the so-called umbrella clause. Several of the recent IIAs include provisions that promote responsible investment, through the inclusion of CSR clauses and/or the “not lowering of standards” clauses. About half have specific proactive provisions on investment promotion and/or facilitation (table III.6). The inclusion of specific reform-oriented clauses in IIAs – as shown in the table – is not fully indicative of the scope and depth of the reform aspect in the relevant provision or of the overall extent of reform in the treaty on question.

Evidence of IIA reform is particularly pronounced when comparing treaties over time. Table III.7 shows the prevalence of modern treaty clauses, focusing on some of those IIA clauses that are particularly relevant for the reform area of preserving the right to regulate, while maintaining protection of foreign investors.

d. Regional level

Regional-level IIA reform actions can have significant impacts. They can expand the use of modern IIA clauses and help consolidate the existing treaty network.

Regional-level IIA reform actions include collective treaty reviews and IIA action plans, which can result in common IIA models, joint interpretations, renegotiations, and/or the consolidation of treaties. A regional IIA model can significantly contribute to IIA reform by guiding a block of countries (instead of a single one) and regional organizations, and by influencing negotiations of megaregional agreements. Megaregional agreements could consolidate and streamline the IIA regime and help enhance the systemic consistency of the IIA regime, provided they replace prior bilateral IIAs between the parties (WIR14).

Regional reform-oriented action is prevalent in Africa, Europe and South-East Asia.

In *Africa* the African Union (AU) is working on the development of a Pan-African Investment Code (PAIC), which is expected to include innovative provisions aimed at balancing the rights and obligations of African host States and investors.

Modern IIA elements are also expected to be included in the second phase of negotiations of the African Continental Free Trade Agreement (CFTA)²² as well as in the revision of the Common Market for Eastern and Southern Africa (COMESA) Investment Treaty (2007).

A draft regional model for the East African Community (EAC) was submitted to the Sectoral Council on Trade, Industry, Finance and Investment for adoption and guidance in autumn 2015. The model includes carefully drafted national treatment and most-favoured-nation provisions, and replaces FET with a provision focusing on administrative, legislative and judicial processes.

The Southern African Development Community (SADC) member States are reviewing the 2012 Model Bilateral Investment Treaty Template, as contemplated when the model was completed. The model, launched shortly after the UNCTAD Policy Framework, contains numerous reform-oriented features. SADC is also revising Annex 1 of its Protocol on Finance and Investment with refinements to the definition of investment, clarifications to FET and a provision on the right to regulate. In addition, SADC is in the final stages of developing a Regional Investment Policy Framework (IPF).

In *Asia*, between 2008 and 2014, the Association of Southeast Asian Nations (ASEAN) concluded five TIPs with third parties (India, China, the Republic of Korea, Australia and New Zealand, and Japan, in chronological order) that include reform-oriented provisions. Reform aspects relate, for instance, to the granting of special and differential treatment to ASEAN member States, in recognition of their different levels of economic development, through technical assistance and

Table III.6. Selected aspects of IIAs signed in 2015

	1	2	3	4	5	6	7	8	9	10	11
Angola–Brazil CFIA	■	■	■	■	■	□	□	□	■	■	■
Australia–China FTA	□	■	■	■	■	■	■	□	□	■	■
Azerbaijan–San Marino BIT	■	□	□	□	■	■	□	□	□	□	□
Brazil–Chile CFIA	■	■	■	■	■	■	■	■	■	■	■
Brazil–Colombia CFIA	■	■	■	■	■	■	■	■	■	■	■
Brazil–Malawi CFIA	■	■	■	■	■	■	□	□	■	■	■
Brazil–Mexico CFIA	■	■	■	■	■	■	□	□	■	■	■
Brazil–Mozambique CFIA	■	□	■	■	■	■	□	□	■	■	■
Burkina Faso–Canada BIT	■	■	■	■	■	■	■	■	■	■	■
Cambodia–Russian Federation BIT	□	□	□	□	□	■	□	□	□	□	□
China–Republic of Korea FTA	■	■	■	■	■	■	□	■	□	■	■
Denmark–Macedonia FYRO BIT	□	□	□	□	□	■	□	□	□	□	□
Guinea-Bissau–Morocco BIT	□	■	□	□	■	■	□	□	□	□	□
Honduras–Peru FTA	□	■	■	■	■	■	□	■	□	■	□
Japan–Mongolia EPA	■	□	■	■	■	□	■	■	□	■	■
Japan–Oman BIT	■	■	□	□	■	□	□	■	□	■	□
Japan–Ukraine BIT	■	■	□	□	■	□	□	■	□	■	■
Japan–Uruguay BIT	■	■	■	□	■	□	■	■	□	■	■
New Zealand–Republic of Korea FTA	■	■	■	■	■	■	■	■	□	■	□
Republic of Korea–Turkey Investment Agreement	□	■	■	■	■	■	□	■	□	■	□
Republic of Korea–Viet Nam FTA	□	■	■	■	■	■	■	□	□	■	□

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

■ Yes □ No ■ Not applicable

Selected aspects of IIAs

- | | |
|--|--|
| <p>1 References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble</p> <p>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)</p> <p>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)</p> <p>4 Clarification of what does and does not constitute an indirect expropriation</p> <p>5 Detailed exceptions from the free-transfer-of-funds obligation, including balance-of-payments difficulties and/or enforcement of national laws</p> | <p>6 Omission of the so-called “umbrella” clause</p> <p>7 General exceptions, e.g. for the protection of human, animal or plant life or health; or the conservation of exhaustible natural resources</p> <p>8 Explicit recognition that parties should not relax health, safety or environmental standards to attract investment</p> <p>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</p> <p>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)</p> <p>11 Specific proactive provisions on investment promotion and/or facilitation</p> |
|--|--|

Source: ©UNCTAD.

Note: Based on bilateral IIAs concluded in 2015 for which the text is available; does not include “framework agreements” without substantive investment provisions. Available IIA texts can be accessed at UNCTAD’s IIA Navigator at <http://investmentpolicyhub.unctad.org/IIA>.

Table III.7.

Evidence of reform in recent IIAs: preserving the right to regulate, while maintaining protection

Treaty provisions Options for IIA Reform	UNCTAD Policy Framework	Earlier BITs (1962–2011) (1,372)	Recent BITs (2012–2014) (40)
Preamble Refer to the protection of health and safety, labour rights, environment or sustainable development	1.1.2	11%	63%
Definition of covered investment Expressly exclude portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts	2.1.1	6%	45%
Definition of covered investor Include “denial of benefits” clause	2.2.2	7%	58%
Most-favoured-nation treatment Specify that such treatment is not applicable to other IIAs’ ISDS provisions	4.2.2	3%	33%
Fair and equitable treatment Refer to minimum standard of treatment under customary international law	4.3.1	2%	35%
Indirect expropriation Clarify what does and does not constitute an indirect expropriation	4.5.1	20%	53%
Free transfer of funds Include exceptions for balance-of-payments difficulties and/or enforcement of national laws	4.7.2 4.7.3	20%	83%
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	12%	58%

Source: ©UNCTAD.

Note: The numbering refers to the policy options set out in table III.1. “Policy Options for IIAs: Part A”, 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 25 universities around the globe. Over 1,400 IIAs have been mapped to date, for over 100 features each. The Project’s results will be available at <http://investmentpolicyhub.unctad.org/IIA/>.

capacity building or to the promotion and facilitation of investment through specific and well-defined activities.

In *Europe*, much policy attention has been given by the European Commission to developing a new approach to investment protection, with a particular emphasis on the right to regulate and the establishment of a permanent investment court (box III.6). This new approach was implemented in the EU–Viet Nam FTA (negotiations concluded in December 2015) and the Canada–EU CETA (legal review concluded in February 2016).

In the *trans-Pacific* context, the investment chapter of the 12-party TPP, which builds on the 2012 United States model BIT, contains a number of reform-oriented features. For example, it includes provisions to ensure the right of governments to regulate in the public interest, including on health, safety and environmental protection; and an ISDS mechanism with safeguards to prevent abusive and frivolous claims. In addition, several contracting parties have made use of side letters to clarify, reserve or carve out certain issues, including with respect to ISDS.

Finally, regional agreements have the potential to consolidate the IIA regime if the parties opt to phase out the BITs between them (*WIR14*). Conversely, the parallel existence of existing BITs and any subsequent regional agreements poses a number of systemic legal and policy questions, adds to the “spaghetti bowl” of intertwined treaties and complicates countries’ abilities to pursue coherent, focused international engagement on investment policy issues (*WIR13*). The EU–Viet Nam FTA overlaps with 21 BITs (between EU member States and Viet Nam), while the CETA overlaps with 7 BITs (between EU member States and Canada), respectively. The TPP overlaps with 39 bilateral or regional IIAs among TPP parties. Although the new EU FTAs are expected to

In 2015, the EU set out its new approach to substantive IIA clauses and ISDS. A key feature of this new approach is the establishment in all EU trade and investment agreements of a new Investment Court System (ICS), consisting of a first instance tribunal and an appeal tribunal, both composed of individuals appointed as “judges” by the contracting parties and subject to strict ethical standards.

This new approach has since been implemented with some slight variations, in the EU–Viet Nam FTA (for which negotiations were concluded in December 2015), and in the CETA (February 2016 text emanating from the legal review, following the conclusion of negotiations in 2014). The proposal has also been submitted by the EU to the negotiations for the TTIP (November 2015) and is part of ongoing EU negotiations with a number of other countries.

The ICS proposal is designed to

- Improve legitimacy and impartiality, by establishing in each EU trade and investment agreement an institutionalized dispute settlement system with independent and permanent judges
- Enhance the consistency and predictability of law, including by introducing an appeals facility, with the power to review with an eye to annul and/or correct a first-instance decision, on the basis of errors in the application or interpretation of applicable law, manifest errors in the appreciation of the facts, or ICSID grounds for annulment

Some critics note, however, that the ICS maintains a number of aspects of the current ISDS system and does not go far enough in addressing ISDS-related concerns. Others point to a number of potential challenges:

- Procedural challenges, such as those relating to efficiency, ease of access, and choice, appointment and remuneration of judges
- Systemic challenges, such as those relating to interpretative coherence
- Development challenges, e.g. how to ensure that “rule-taking” States are not overburdened by multiple coexisting dispute settlement mechanisms such as ICS and ISDS in their IIAs

The ICS is an important ISDS reform option that represents a critical step towards improving the dispute settlement system. Although it addresses a number of key concerns about ISDS, for the ICS to become fully operational and effective, a number of procedural and systemic challenges will need to be overcome.

Moreover, as part of its overall policy approach, the EU has also proposed to pursue with interested countries the establishment of a future Multilateral Investment Court to replace the existing ISDS mechanisms in current and future IIAs. The objective would be to address systemic challenges resulting from the current coexistence of multiple dispute settlement systems, such as interpretative coherence across IIAs, issues of cost efficiency and the legitimacy of the investment dispute settlement system.

Source: ©UNCTAD, based on UNCTAD (2016) as well as the September 2015 EU Internal Proposal, the November 2015 EU TTIP Proposal to the United States, the February 2016 EU–Viet Nam FTA text and the February 2016 CETA (revised) text.

replace existing IIAs between EU member States and the other parties, the TPP does not include provisions on the termination of existing IIAs between the 12 parties.²³

e. Multilateral level

Stepping up multilateral reform activities can help avoid fragmentation and ensure that reform efforts deliver benefits to all stakeholders.

Multilateral IIA reform is the most challenging reform dimension. The UNCTAD Road Map identifies several possible options for multilateral IIA reform with different levels of intensity, depth and character of engagement. Extensive and in-depth discussions have been conducted at UNCTAD, and certain reform actions are being undertaken in UNCITRAL and the UN Human Rights framework. In addition, international organizations traditionally less focused on international investment policymaking (e.g. the United Nations Environment Programme, the World Health Organization Framework Convention on Tobacco Control) have started to look at IIA reform within their respective areas of competence.

The importance of multilateral consultations on IIAs in the pursuit of today’s sustainable development agenda has been recognized in the Addis Ababa Action Agenda, the outcome document of the Third UN Conference on Financing for Development, held in July 2015. In the

Agenda, Member States mandated UNCTAD “to continue its existing programme of meetings and consultations with Member States on investment agreements”.

f. Concluding remarks

UNCTAD's 2016 World Investment Forum offers the opportunity to discuss how to carry IIA reform to the next level.

The overview suggests that sustainable development-oriented IIA reform has entered the mainstream of international investment policymaking:

- Numerous countries are engaging in national-level reform actions and implementing the results in bilateral negotiations and new treaties.
- Most of today's new IIAs include refined language that aims to preserve the right to regulate while maintaining protection of investors, as well as at improving the existing ISDS mechanism (with several treaties omitting the international arbitration option altogether).
- Innovative ideas for improving investment dispute settlement define today's discourse on IIA reform and are making their way into new IIA negotiations.

During this first phase of IIA 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: modernizing existing treaties and formulating new ones. Although new treaty design is yielding important results for IIA regime reform, dealing with the existing stock of IIAs remains the key challenge. This holds especially true for developing countries and least developed countries.

Second, reform has to address the challenge of increasing fragmentation. Although the continuing experimentation in treaty making is beneficial, 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 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 will become fragmented and incoherent.

Unlike the first phase of IIA reform, in which most activities took place at the national level, phase two of IIA reform will require countries to intensify collaboration and coordination between treaty partners to address the systemic risks and incoherence of the large body of old treaties. UNCTAD stands ready to provide the investment and development community with the necessary backstopping in this regard. UNCTAD's Road Map for IIA Reform and its Action Menu on Investment are key guidance for reform. UNCTAD's 2016 World Investment Forum offers the opportunity to discuss how to carry IIA reform to the next level.

C. INVESTMENT FACILITATION: FILLING A SYSTEMIC GAP

Facilitating investment is crucial for the post-2015 development agenda. To date, national and international investment policies have paid relatively little attention to investment facilitation. UNCTAD's Global Action Menu for Investment Facilitation provides options to adapt and adopt for national and international policy needs. Any investment facilitation initiative cannot be considered in isolation from the broader investment for development agenda.

Facilitating investment is crucial for the post-2015 development agenda, with developing countries facing an annual SDG-financing gap of \$2.5 trillion (WIR14). Facilitating investment is also one of the five areas of reform outlined in the UNCTAD Road Map.

Investment promotion and facilitation work hand in hand. However, they are two different types of activities. One is about promoting a location as an investment destination (and is therefore often country-specific and competitive in nature), while the other is about making it easy for investors to establish or expand their investments, as well as to conduct their day-to-day business in host countries.

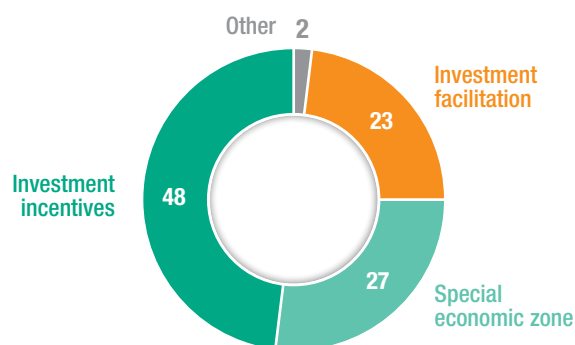
Investment facilitation covers a wide range of areas, all with the ultimate objective of attracting investment, allowing investment to flow efficiently, and enabling host countries to benefit effectively. Transparency, investor services, simplicity and efficiency of procedures, coordination and cooperation, and capacity building are among the important principles. It interacts at all stages of investment, from the pre-establishment phase (such as facilitating regulatory feasibility studies), through investment installation, to services throughout the lifespan of an investment project. To date, however, national and international investment policies have paid relatively little attention to investment facilitation.

At the national level, many countries have set up policy schemes to promote foreign investment. Between 2010 and 2015, at least 173 new investment promotion and facilitation policies were introduced around the world. Almost half of these measures related to investment incentives.²⁴ followed by special economic zones²⁵ and only 23 per cent related to investment facilitation specifically²⁶ (figure III.10).

Overall, the number of investment facilitation measures adopted by countries over the past six years remains relatively low compared with the numbers of other investment promotion measures. In addition, only about 20 per cent of the 111 investment laws analyzed by UNCTAD deal with specific aspects of investment facilitation, such as one-stop shops.

At the international level, in the most common international instruments for investment, relatively little attention is being paid to ground-level obstacles to investment, such as a lack of transparency on legal or administrative requirements faced by investors, lack of efficiency in the operating environment and other factors causing high costs of doing business.

Figure III.10. Categories of promotion and facilitation policies, 2010–2015 (Per cent)



Source: ©UNCTAD, Investment Policy Monitor Database.

In the overwhelming majority of the existing 3,304 IIAs, concrete investment facilitation actions are either absent or weak.²⁷ A review of a sample of recent model IIAs and IIAs concluded in 2015 (see tables III.5 and III.6) show that investment facilitation provisions are not as prevalent as other major provisions. Even those agreements that explicitly deal with investment facilitation issues use general treaty language. Brazil's new CFAs are an exception (see table III.6).

It is therefore crucial to expand the investment facilitation dimension of IIAs together with national policy tools, and to target them towards foreign investment that is capable of promoting sustainable development.

To respond to this systemic gap, in January 2016 UNCTAD launched an Action Menu on Investment Facilitation.²⁸ The Action Menu aims to help countries address ground-level obstacles to investment such as a lack of transparency on legal or administrative requirements faced by investors, a lack of efficiency in the operating environment and other factors causing high costs of doing business. By focusing on these obstacles, the Action Menu aims to complement existing investment policies. It therefore excludes policy measures aimed at the protection of investment, which are well-established in the existing national regulatory frameworks and IIAs. Similarly, the Action Menu does not propose direct investment support measures such as fiscal or financial investment incentives.

The Action Menu consists of actions to support investment facilitation for development in low-income countries. Its 10 action lines provide a series of options for investment policymakers to adapt and adopt for national and international policy needs: the package includes actions that countries can choose to implement unilaterally and options that can guide international collaboration or that can be incorporated in IIAs.

Action line 1 proposes promoting accessibility and transparency in the formulation of investment policies and regulations and procedures relevant to investors, with the following actions:

- Provide clear and up-to-date information on the investment regime.
- Adopt a centralized registry of laws and regulations and make this available electronically.
- Establish a single window or special enquiry point for all enquiries concerning investment policies and applications to invest.
- Maintain a mechanism for providing timely and relevant notice of changes in procedures, applicable standards, technical regulations and conformance requirements.
- Make widely available screening guidelines and clear definitions of criteria for assessing investment proposals.
- Publicize outcomes of periodic reviews of the investment regime.

Action line 2 suggests enhancing predictability and consistency in the application of investment policies, as follows:

- Systematize and institutionalize common application of investment regulations.
- Give equal treatment in the operation of laws and regulations on investment, and avoid discriminatory use of bureaucratic discretion.
- Establish clear criteria and transparent procedures for administrative decisions including with respect to investment project screening, appraisal and approval mechanisms.
- Establish amicable dispute settlement mechanisms, including mediation, to facilitate investment dispute prevention and resolution.

Action line 3 proposes improving the efficiency and effectiveness of investment administrative procedures through the following actions:

- Shorten the processing time and simplify procedures for investment and license applications, investor registration and tax-related procedures.
- Promote the use of time-bound approval processes or no objections within defined time limits to speed up processing times, where appropriate.

- Provide timely and relevant administrative advice; keep applicants informed about the status of their applications.
- Encourage and foster institutional cooperation and coordination. Where appropriate, establish online one-stop approval authority; clarify roles and accountabilities between different levels of government or where more than one agency screens or authorizes investment proposals.
- Keep the costs to the investor in the investment approval process to a minimum.
- Facilitate entry and sojourn of investment project personnel (facilitating visas, dismantling bureaucratic obstacles).
- Simplify the process for connecting to essential services infrastructure.
- Conduct periodic reviews of investment procedures, ensuring they are simple, transparent and low-cost.
- Establish mechanisms to expand good administrative practices applied or piloted in special economic zones to the wider economy.

Action line 4 advocates building constructive stakeholder relationships in investment policy practice, as follows:

- Maintain mechanisms for regular consultation and effective dialogue with investment stakeholders throughout the life cycle of investments, including approval and impact assessment stages and post-establishment stages, to identify and address issues encountered by investors and affected stakeholders.
- To the extent possible, establish a mechanism to provide interested parties (including the business community and investment stakeholders) with an opportunity to comment on proposed new laws, regulations and policies or changes to existing ones prior to their implementation.
- Promote improved standards of corporate governance and responsible business conduct.

Action line 5 proposes designating a lead agency or investment facilitator with a mandate to, e.g.:

- Address suggestions or complaints by investors and their home states.
- Track and take timely action to prevent, manage and resolve disputes.
- Provide information on relevant legislative and regulatory issues.
- Promote greater awareness of and transparency in investment legislation and procedures. Inform relevant government institutions about recurrent problems faced by investors which may require changes in investment legislation or procedures.

Action line 6 suggests establishing monitoring and review mechanisms for investment facilitation:

- Adopt diagnostic tools and indicators on the effectiveness and efficiency of administrative procedures for investors to identify priority areas for investment facilitation interventions.
- Benchmark and measure performance of institutions involved in facilitating investment or in providing administrative services to investors, including in line with international good practices.

Action line 7 advocates enhancing international cooperation for investment facilitation. Possible mechanisms include the following:

- Establish regular consultations between relevant authorities, or investment facilitation partnerships, to
 - ▶ Monitor the implementation of specific facilitation measures (e.g. related to dismantling bureaucratic obstacles).
 - ▶ Address specific concerns of investors.
 - ▶ Design, implement and monitor progress on investment facilitation work plans.
- Collaborate on anti-corruption in the investment process.
- Arrange for regulatory and institutional exchanges of expertise.

Action line 8 proposes strengthening investment facilitation efforts in developing-country partners, through support and technical assistance to:

- Bolster efforts towards transparent, effective and efficient administrative processes for business and investors, including tools and techniques for the documentation and simplification of procedures (e.g. UNCTAD's eRegulations, eRegistration and Business Facilitation Services).
- Increase capacity in IPAs and relevant authorities on business and investor facilitation services, including support in administrative and compliance processes.
- Build capacity for the preparation or facilitation of regulatory feasibility studies for potential investment projects (including environmental and social impact assessments and regulatory and administrative requirements).
- Maintain mechanisms for regular consultation and effective dialogue with the private sector and investment stakeholders throughout the investment life cycle, including with a view to preventing the escalation of investment disputes.
- Enhance the role of policy advocacy within IPAs or investment authorities as a means of supporting investment climate reforms and of addressing specific problems raised by investors.

Action line 9 suggests enhancing investment policy and proactive investment attraction in developing-country partners, through the following actions:

- Build expertise in IPAs (or relevant agencies) for investment project proposal development and project appraisal, and for the development of pipelines of directly investable projects.
- Build expertise in IPAs (or relevant agencies) for the promotion of sustainable-development-focused investments such as green investments and social impact investments.
- Build capacity to provide post-investment or aftercare services, including for the expansion of existing operations.
- Strengthen capacities to maximize positive impacts of investment, e.g. to
 - ▶ Facilitate linkages between foreign affiliates and local enterprises.
 - ▶ Promote and support programs for certification and compliance with standards relating to, e.g. product quality or safety, to enable firms to engage in linkages with foreign affiliates.
 - ▶ Adopt frameworks to promote responsible business conduct by international investors.

Action line 10 advocates enhancing international cooperation for investment promotion for development, including through provisions in IIAs. Possible mechanisms include the following:

- Encourage home countries to provide outward investment support, e.g. political risk coverage, investment insurance and guarantees, or facilitation services.
- Encourage high standards of corporate governance and responsible business conduct by outward investors.
- Establish regular consultations between relevant authorities, or formal collaboration between outward investment agencies (OIAs) and IPAs.

The Action Menu is based on UNCTAD's Investment Policy Framework – which proposed action on investment facilitation in its first edition in 2012 – and the rich experiences and practices of investment promotion and facilitation efforts worldwide over the past decades.

An investment facilitation package could form the basis for formulating a legal instrument, or serve as an informative or guidance instrument, reflecting a collaborative spirit and best endeavour. Importantly, any investment facilitation initiative cannot be considered in isolation from the broader investment for development agenda. Effective investment facilitation efforts should support the mobilization and channelling of investment towards sustainable development, including the build-up of productive capacities and critical infrastructure. It should be an integral part of the overall investment policy framework, aimed at maximizing the benefits of investment and minimizing negative side effects or externalities.

NOTES

- ¹ The sources for the following investment measures can be found in UNCTAD's Investment Policy Hub (see <http://investmentpolicyhub.unctad.org>).
- ² Some of these measures were also of a promoting nature.
- ³ In addition to these measures, India has raised the investment ceiling in the primary market and stock exchanges to a certain degree for at least 30 individual companies.
- ⁴ Australia, Brunei Darussalam, Canada, Chile, Japan, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Viet Nam.
- ⁵ BITs with Bulgaria, China, France, Italy, the Lao People's Democratic Republic, Malaysia, the Netherlands and Slovakia.
- ⁶ BITs with Argentina, Cambodia, Hungary, India, Pakistan, Romania, Singapore, Switzerland, Turkey and Viet Nam.
- ⁷ http://europa.eu/rapid/press-release_IP-15-5198_en.htm.
- ⁸ BITs with Bulgaria, Croatia, Estonia, Hungary, Latvia, Lithuania, Poland, Romania, Slovakia and Slovenia.
- ⁹ For more information, see <https://www.iareporter.com/>.
- ¹⁰ <http://www.bmw.de/BMWi/Redaktion/PDF/I/intra-eu-investment-treaties,property=pdf,bereich=bmw2012,sprache=de,rwb=true.pdf>.
- ¹¹ Those with Argentina, the Bolivarian Republic of Venezuela, Bolivia, Canada, Chile, China, Italy, the Netherlands, Peru, Spain, Switzerland and the United States. See <http://unctad-worldinvestmentforum.org/wp-content/uploads/2016/03/Statement-Ecuador.pdf>.
- ¹² https://issuu.com/periodicodiagonal/docs/recomendaciones_caitisa/1?e=6636556/33004953.
- ¹³ <http://www.energycharter.org/who-we-are/members-observers/countries/italy/>.
- ¹⁴ Belgium, Canada, the Democratic Republic of the Congo, Finland, France, Gabon, Germany, Italy, Luxembourg, Madagascar, Mauritius, Sweden, Switzerland, the Syrian Arab Republic, the United Kingdom and the United States.
- ¹⁵ The Transparency Rules came into effect on 1 April 2014 and are incorporated into the latest version of the UNCITRAL Arbitration Rules.
- ¹⁶ The Transparency Rules foresee the UN Secretary-General performing the repository function of published information. Information is to be published on the 'Transparency Registry', hosted by UNCITRAL (see <http://www.uncitral.org/transparency-registry/registry/index.jsp>).
- ¹⁷ For example, the Canada–Côte d'Ivoire BIT (2014), Canada–Mali BIT (2014), Canada–Nigeria BIT (2014), Canada–Senegal BIT (2014), Canada–Serbia BIT (2014) (entered into force), Canada–Republic of Korea FTA (2014) (entered into force), Colombia–France BIT (2014), Colombia–Turkey BIT (2014), Egypt–Mauritius BIT (2014), Republic of Korea–Australia FTA (2014) (entered into force), Japan–Kazakhstan BIT (2014), Japan–Uruguay BIT (2015) and Japan–Ukraine BIT (2015). See also http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2014Transparency_Rules_status.html.
- ¹⁸ In the absence of reservations by the signatories, the Convention will apply to disputes where (i) both the respondent State and the home State of the claimant investor are parties to the Convention; and (ii) only the respondent State is party to the Convention but the claimant investor agrees to the application of the Rules.
- ¹⁹ *Menzies Middle East and Africa S.A. and Aviation Handling Services International Ltd. v. Republic of Senegal* (ICSID Case No. ARB/15/21). The claimants invoked two BITs, a national investment law of the host State and the WTO GATS. One of the two claimants is a company incorporated in Luxembourg, which does not have an IIA with the respondent State (Senegal). This claimant argues, however, that it qualifies as a "service supplier" under the GATS, and that the GATS' MFN clause entitles it to benefit from the Netherlands–Senegal BIT, including the right to bring ISDS proceedings. In other words, the claimant does not allege any breaches of the GATS itself, but uses the GATS as a bridge to a BIT that would otherwise be unavailable to it.
- ²⁰ This number includes decisions (awards) on jurisdiction and awards on liability and damages (partial and final) as well as follow-on decisions such as decisions rendered in ICSID annulment proceedings and ICSID resubmission proceedings. It does not include decisions on provisional measures, disqualification of arbitrators, procedural orders, discontinuance orders, settlement agreements or decisions of domestic courts.
- ²¹ These are cases in which a tribunal found, for example, that the asset/transaction did not constitute a "covered investment", that the claimant was not a "covered investor", that the dispute arose before the treaty entered into force or fell outside the scope of the ISDS clause, that the investor had failed to comply with certain IIA-imposed conditions (e.g. the mandatory local litigation requirement) or other reasons that deprived the tribunal of the competence to decide the case on the merits.

- ²² http://www.au.int/en/sites/default/files/newsevents/workingdocuments/12582-wd-update_on_the_report_on_the_continental_free_trade_en.pdf.
- ²³ Australia and Peru agreed that their existing BIT (dated 7 December 1995) will be terminated upon entry into force of the TPP.
- ²⁴ There is no uniform definition of what constitutes an investment incentive. Investment incentives are typically the form of financial incentives, such as outright grants and loans at concessionary rates, fiscal incentives such as tax holidays and reduced tax rates or other incentives, including subsidized infrastructure or services, market preferences and regulatory concessions, including exemptions from labour or environmental standards (UNCTAD, 2004).
- ²⁵ A special economic zone (SEZ) is a geographically demarcated region where investors receive specific privileges, such as duty-free enclaves, tax privileges or access to high-quality infrastructure.
- ²⁶ Investment facilitation are mechanisms that expedite or accelerate investment. Common mechanisms that are the reduction of red tape or the establishment of one-stop shops designed to help investors through all necessary administrative, regulatory and legal steps to start or expand a business and accelerate the granting of permits and licences. This allows investors to save both time and money.
- ²⁷ Based on a representative sample of over 1,400 IIAs for which UNCTAD's IIA Mapping Project has mapped treaty content, as well as specific research on investment promotion provisions in IIAs.
- ²⁸ <http://investmentpolicyhub.unctad.org/Blog/Index/51>.