CHAPTER III

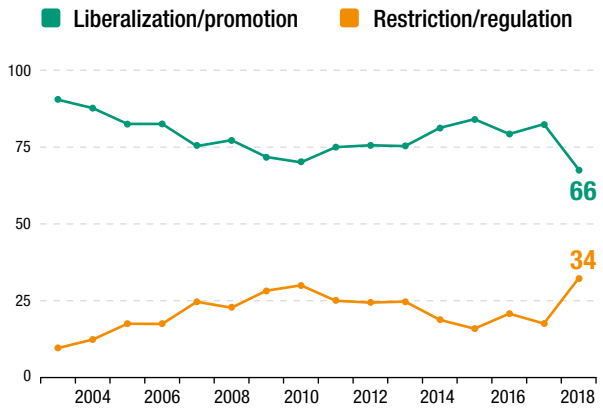
RECENT POLICY DEVELOPMENTS AND KEY ISSUES

A. NATIONAL INVESTMENT POLICIES

1. Overall trends

In 2018, according to UNCTAD's count, 55 countries and economies introduced 112 policy measures affecting foreign investment – a decrease of more than 11 per cent over the previous year's figure. Thirty-one of these measures related to new restrictions or regulations relevant to FDI, while 65 related to investment liberalization, promotion and facilitation. The remaining 16 were of neutral or indeterminate nature (table III.1). Accordingly, the proportion of more restrictive or more regulatory policy measures introduced soared from 21 per cent in 2017 to 34 per cent – an increase of more than 60 per cent. This ratio is the highest since 2003 (figure III.1).

Figure III.1. Changes in national investment policies, 2003–2018 (Per cent)



Source: UNCTAD, Investment Policy Hub.

New investment restrictions or regulations for foreign investors were mainly based on national security concerns about foreign ownership of critical infrastructure, core technologies, elements of the defence sector, sensitive business assets or residential property. In particular, numerous governments blocked M&A deals on the basis of national security concerns, with the aggregate amount of the transactions being approximately $153 billion. At the same time, many countries introduced policy measures for liberalizing, promoting or facilitating foreign investment. Steps toward liberalization were made in various industries, including agriculture, media, logistics, mining, energy, retail trade, finance, transportation, infrastructure and internet business. In addition, several countries made efforts to simplify or streamline administrative procedures, and some others expanded their investment incentive regimes.

Table III.1. Changes in national investment policies, 2003–2018 (Number of measures)

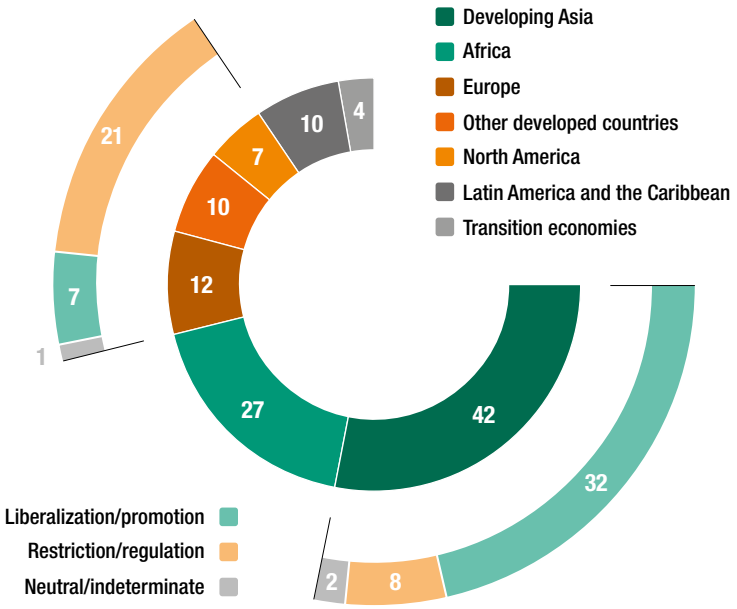
Item	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012	2013	2014	2015	2016	2017	2018
Number of countries that introduced changes	59	79	77	70	49	40	46	54	51	57	60	41	49	59	65	55
Number of regulatory changes	**125**	**164**	**144**	**126**	**79**	**68**	**89**	**116**	**86**	**92**	**87**	**74**	**100**	**125**	**144**	**112**
Liberalization/promotion	113	142	118	104	58	51	61	77	62	65	63	52	75	84	98	65
Restriction/regulation[a]	12	20	25	22	19	15	24	33	21	21	21	12	14	22	23	31
Neutral/indeterminate	-	2	1	-	2	2	4	6	3	6	3	10	11	19	23	16

Source: UNCTAD, Investment Policy Hub.

[a] "Restriction" means a policy measure that introduces limitations on the establishment of foreign investment; "regulation" means a policy measure that introduces obligations for established investment, be it domestically or foreign-controlled.

In geographical terms, developing countries in Asia continued to take the lead in adopting new investment policy measures, followed by developed countries and Africa (figure III.2). The nature of the new measures, however, differed significantly between regions. Thirty-two policy measures adopted in developing countries in the Asian region were about liberalization, promotion and facilitation of investment, while only two related to restrictions or regulations. In contrast, 21 investment policy measures introduced in developed countries aimed at reinforcing restrictions or regulations, while only seven were more favourable to investment. In Africa, these numbers were somewhat more balanced, with 14 policy measures favorable to investment and eight less favourable.

Figure III.2. **Regional distribution of national investment policy measures, 2018**
(Number of measures)



Source: UNCTAD.

a. National security concerns a main focus

(i) Rising national security-related concerns

Most of the newly introduced investment restrictions and regulations reflected the national security-related concerns of host countries, particularly in respect of foreign investment in strategic industries and critical infrastructure. For example, *Australia* tightened investment screening procedures in the electricity industry and strengthened regulations on the purchase of agricultural land by foreign investors. The Government of *Flanders* in *Belgium* established a new screening mechanism to intervene in foreign acquisitions under certain conditions. *China* set up national security review procedures for the acquisition by foreign investors of domestic enterprises and for the outbound transfer of intellectual property in the context of exporting technologies. *France* and *Germany* extended the scopes of their foreign investment screening systems to several new strategic technology activities. *Hungary* adopted a new law, introducing a foreign investment screening mechanism related to national security in politically sensitive activities such as defence, dual-use products, cryptography, utilities, the financial industry, electronic communication and public communication systems. *Lithuania* amended the Law on Enterprises and Facilities of Strategic Importance to National Security, mainly seeking to safeguard national security in certain industries such as military equipment, energy and information technologies. The

United Kingdom and the *United States* expanded the conditions or scope of application of their foreign investment review mechanisms related to national security. At the regional level, the *European Union* (EU) established a framework for FDI screening in April 2019. (For further information on rising national security-related concerns, see subsection III.3.)

(ii) New local content requirements

Several countries introduced new local content requirement for investors. For example, *Nigeria* issued a Presidential Executive Order requiring that all public procuring authorities give preference to local companies in the award of contracts. It also prohibits the Ministry of Interior from giving visas to foreign workers whose skills are readily available in the domestic labor force. *South Africa* adopted a 60 per cent local content requirement for the defence sector and also introduced a higher ratio for black ownership. The *United Republic of Tanzania* adopted regulations to promote the use of local expertise, goods and services, businesses and financing in the mining value chain. It also requires domestic Tanzanian companies to hold an equity participation of at least 20 per cent in a mandatory joint-venture arrangement, for the supply of goods and services. In January 2019, *Senegal* changed its petroleum code to reinforce the preservation of national interests and local content.

(iii) New regulations on access to land and on other industries

Several countries adopted new regulations on ownership of land by foreign investors. For instance, *Canada* increased the property transfer tax on residential property transfers to foreign entities. *Singapore* increased the Additional Buyer's Stamp Duty applicable to foreigners who acquire residential property. In February 2019, *India* introduced several restrictive changes in its FDI policy for e-commerce in order to safeguard the interests of domestic offline retailers.

b. Investment facilitation and promotion prominent

Investment facilitation and promotion continued to be a major part of newly adopted investment policy measures. Thirty-four such measures – about one third of the total – fall into this category. In several cases, facilitation and promotion measures are included in newly adopted laws.

(i) Streamlined administrative procedures

Several countries undertook measures to ensure that investors receive speedy administrative clearances from the pertinent authorities. For instance, *Australia* established a new online application portal to facilitate the process of foreign investment applications. *Côte d'Ivoire* reorganized the approval process for investment applications and determined that it would grant additional tax credits to companies in such industries as agriculture, agribusiness, health care and tourism. *Indonesia* lowered the minimum equity requirement for foreign investors to use the Online Single Submission portal from Rp 10 billion to Rp 2.5 billion. It also abolished the approval requirement for several business transactions involving foreign investors – e.g. changes of shareholders, changes of capital structure and conversion of a domestic firm into a foreign company. *Saudi Arabia* extended the licensing period for foreign investors to five years – up from the previous one-year period. The *United Republic of Tanzania* established an online registration system, simplifying investment registration processes by significantly reducing time and costs. *Uzbekistan* initiated a project to develop a special information portal, available in several languages, to provide information on visas, residence permits, registrations and tax mechanisms, among other matters.

(ii) Simplified procedures for work and residence permits

Some countries undertook measures to facilitate the issuance of work and residence permits for foreigners. For instance, *China* increased the quota for foreign technical personnel in foreign-invested construction and engineering design enterprises, and relaxed restrictions on recruitment agencies. *Thailand* introduced a new visa system (Smart Visa) to attract foreign highly skilled talent. *Uzbekistan* increased its quota for the issuance of work permits for highly qualified foreign specialists.

(iii) Fiscal incentives still an important investment promotion tool

Numerous countries expanded their systems of fiscal investment incentives. For instance, *Burkina Faso* reduced by one quarter the threshold for incentives to invest in strategic sectors. *China* expanded income tax benefits for overseas investors, exempting them from withholding of income tax on the reinvestment of profits made in *China*. *Ecuador* revised its investment law, establishing new incentives to promote FDI and providing a new arbitration route for settling disputes arising out of investment contracts. *Italy* introduced a reduced tax rate for profits reinvested to acquire assets or to increase employment. *Mauritius* introduced a five-year tax holiday for companies to collaborate in developing infrastructure in SEZs. *Poland* extended the fiscal incentive schemes previously available only in SEZs to the entire country. *Thailand* enacted the Eastern Economic Corridor Act, which provides fiscal incentives for investors in the Corridor. *Uganda* introduced tax incentives to promote both domestic and foreign investment focusing on industrialization, exports and tourism.

In January 2019, *Cameroon* introduced, inter alia, several tax incentives for the rehabilitation of an economic disaster area. In February 2019, *Guatemala* established fiscal incentives for companies operating in its new SEZs called special public economic development zones. Among the tax benefits provided are an exemption for 10 years from income tax and a temporary suspension of taxes associated with imports. To promote investment in hotels and recreation activities, in February 2019 *Panama* extended its fiscal incentives for the tourism industry until 2025. Also in February 2019, *Poland* introduced financial incentives aimed at boosting the audiovisual industry.

(iv) Other investment-facilitating and -promoting measures

Numerous countries adopted other policy measures to promote and facilitate investment. *Argentina* published a decree with 170 measures aimed at eliminating rules and regulations considered to reduce the country's competitiveness. *Egypt* relieved limited liability companies from the requirement to appoint Egyptian managers. *India* amended the Model Concession Agreement on public-private partnerships in the port sector. Among other things, the new Agreement provides easier exit routes for developers and lowers standard rents for land. *Myanmar* established the Ministry of Investment and Foreign Economic Relations to promote domestic and foreign investment. The country also allowed all branches of foreign banks to provide commercial services. In *South Africa,* the Protection of Investment Act entered into force, following the termination by that country of a series of investment treaties. The *United Arab Emirates* established an FDI unit within the Ministry of Economy, with the mandate to propose and implement FDI policies.

In January 2019, *Ecuador* introduced new regulations to clarify the Productive Development Law, to simplify environmental rules and to provide additional tax incentives. *Kazakhstan* liberalized the arbitration framework, allowing investors to opt for the applicability of a foreign law in a dispute involving the State and bringing its enforcement provisions in line with the New York Convention. In March 2019, *China* passed a new Foreign Investment Law, which

will enter into force on 1 January 2020 and which aims at improving the transparency of FDI policies and investment protection.

c. FDI liberalization ongoing

Thirty-two policy measures – about 30 per cent of those introduced – were related to partial or full investment liberalization in a variety of industries, including agriculture, media, logistics, mining, energy, retail trade, finance, transportation, infrastructure and internet business.

Developing countries in Asia took the lead in adopting investment liberalization measures in 2018, accounting for about 60 per cent of such measures. For example, *China* revised its foreign investment negative list for 11 pilot free trade zones, relaxing or removing restrictions on foreign investment in several industries. *India* liberalized rules on inward investment in several industries, including single-brand retail trading, airlines and power exchanges. *Kuwait* made a change to allow foreign investors to own and trade in Kuwaiti bank shares. *Myanmar* shifted to allow 100 per cent foreign ownership in the wholesale and retail industries, and in mining operations as well as 80 per cent foreign ownership in the agricultural sector. It also now permits foreign investors to hold up to 35 per cent of shares of domestic companies without those companies losing their domestic status. The *Philippines* revised its "negative list", relaxing foreign ownership ceilings in such industries as construction and repair of locally funded public works projects, private radio communication networks, internet businesses and financing companies. *Saudi Arabia* opened four more industries to foreign investment – recruitment and employment services, real estate brokerage, audiovisual and media services, and land transport services. The *United Arab Emirates* established a framework to permit foreigners to own up to 100 per cent of companies in certain industries to be identified in a "positive list". *Viet Nam* allowed foreign investors to contribute capital to establish commodity exchanges, not to exceed 49 per cent of their charter capital. Foreign investors are also now permitted to trade goods on the commodity exchange as clients and can become members of the exchange (brokers or traders) without any ownership restraint. In January 2019, *India* abolished the approval procedure used for foreign companies in defence, telecommunication and private security, among other industries, wishing to open branch offices under certain conditions. As of January 2019, *Qatar* permits, in principle, 100 per cent foreign ownership in all economic sectors except some businesses such as banking and insurance.

Countries outside of Asia also adopted investment liberalization measures. For instance, *Angola* introduced a new private investment law, abolishing the local partnership requirement for certain industries or activities and designating numerous priority industries including agriculture, textile, tourism and infrastructure development. *Canada* extended the foreign ownership ceiling for Canadian air carriers from 25 per cent to 49 per cent, subject to the conditions that a single foreigner may not own or control more than 25 per cent of the voting interests in a Canadian air carrier and that foreign air carriers may not own more than 25 per cent of the voting interests in a Canadian carrier. *Ethiopia* abolished the investment restriction in the logistics industry and initiated the process of privatizing major State-owned enterprises. *Namibia* abolished the requirement for companies seeking mining exploration licenses to be partly owned and managed by historically disadvantaged Namibians. *Ukraine* adopted a bill on the privatization of public property, which aims to make the privatization process more transparent and faster for investors.

2. Merger controls affecting foreign investors

In 2018, numerous host-country governments blocked a significant number of foreign takeover proposals, particularly those related to the sale of critical infrastructure or other strategic domestic assets to foreign companies (table III.2). Among all the cross-border M&A proposals of which the value exceeded $50 million, UNCTAD found at least 22 deals withdrawn for regulatory or political reasons – twice as many cases as in 2017.

Table III.2. Foreign takeovers blocked or withdrawn for regulatory or political reasons, 2018
(Illustrative list)

For national security reasons	
Ant Small & Micro Financial Services Group Ltd–MoneyGram International Inca	On 2 January 2018, Ant (a company owned by the Alibaba Group) withdrew its $1.2 billion offer to acquire MoneyGram, a United States provider of financial transaction services. According to a statement by MoneyGram, the parties had been advised that CFIUS clearance of the merger would not be forthcoming and both parties agreed to terminate the deal.
HNA Group Co Ltd– UDC Finance[b]	On 17 January 2018, HNA (China) withdrew its plan to acquire UDC Finance (a subsidiary of ANZ Bank New Zealand Ltd) after New Zealand's Overseas Investment Office blocked the deal. According to the explanation provided by the Overseas Investment Office, the $460 million deal was declined because of "uncertainty over HNA's ownership structure, reflecting mounting international concerns about the aviation-to-shipping group's transparency and governance."
BlueFocus International Ltd–Cogint, Inc[c]	On 20 February 2018, Cogint (United States), a data solutions provider, and BlueFocus (Hong Kong, China) agreed to terminate their business combination agreement worth $100 million. Cogint stated that the CFIUS had indicated its unwillingness to approve the transaction.
Unic Capital Management Co Ltd–Xcerra Corporation[d]	On 22 February 2018, Xcerra (United States) terminated its $580 million merger agreement with Unic Capital Management. Xcerra stated that after careful review of feedback received from the CFIUS, it considered that approval of this merger would be highly unlikely.
Broadcom Ltd–Qualcomm Inc[e]	On 12 March 2018, the President of the United States prohibited the proposed takeover of chipmaker Qualcomm (United States) by Broadcom (Singapore) for national security reasons. In February 2018, Broadcom had proposed a $117 billion bid for the takeover of Qualcomm.
Atlantia SpA–Abertis Infraestructuras SA[f]	In October 2018, Atlantia withdrew its bid offer to acquire Abertis Infraestructuras. The bid had faced political opposition because the Spanish Government was concerned that the deal could leave the country's most important roads under full foreign control. Thereafter, the deal (€16.5 billion) was re-arranged as a joint acquisition by Atlantia and Hochtief (a German subsidiary of the Spanish company Actividades de Construccion y Servicios SA - ACS).
China Communications Construction Company International Holding Ltd (CCCI)–Aecon Group Inc[g]	On 23 May 2018, the Canadian Government blocked a proposed $1.5 billion acquisition of the Canadian construction company Aecon, by CCCI, a Chinese State-owned company and one of the world's largest engineering and construction firms. According to an official statement from the Canadian Minister of Innovation, Science and Economic Development, the deal compromised national security: The minister stated that the Canadian Government "is open to international investment that creates jobs and increases prosperity, but not at the expense of national security."
CK Asset Holdings Ltd–APA Group[h]	On 20 November 2018, the Investor Group, a consortium led by CK Asset Holdings Ltd, withdrew its agreement to acquire the entire share capital of APA Group, a Sydney-based owner and operator of a natural gas infrastructure business. The Australian Federal treasurer justified the decision to prohibit the $9.8 billion offer, stating "The FIRB was unable to reach a unanimous recommendation, expressing its concerns about aggregation and the national interest implications of such a dominant foreign player in the gas and electricity sectors over the longer term."
Grandland Holdings Group Co Ltd–Lixil Group[i]	On 27 November 2018, Grandland Holdings Group, a developer of real estate properties, withdrew its offer to acquire Lixil's building unit – Permasteelisa – for €467 million after the deal was disapproved by the CFIUS on the basis of national security.
For competition reasons	
NZME Ltd–Fairfax New Zealand[j]	On 3 March 2018, NZME abandoned its proposed merger agreement of $39 million with Fairfax New Zealand, following a rejection by New Zealand's Commerce Commission on the basis that it would create a concentration of power.
Aperam SA–VDM Metals Holding GmbH[k]	On 11 April 2018, Aperam announced the termination of the €438 million share purchase agreement with Falcon Metals and Lindsay Goldberg Vogel to acquire VDM Metals Holding because of concerns by the European Commission regarding the impact of the proposed merger on competition.
MEO Serviços de Comunicações & Multimedia –Media Capital[l]	On 18 June 2018, the Portuguese Competition Authority rejected the €404 million deal proposed by MEO Serviços de Comunicações & Multimedia, owned by Altice, to take over Media Capital through the purchase of the entire share capital of Vertix SGPS (which owns 95 per cent of the share capital of Media Capital) because the parties had inadequately addressed concerns about a restriction of competition. Consequently, the parties agreed to terminate the deal.

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Table III.2. Foreign takeovers blocked or withdrawn for regulatory or political reasons, 2018
(Illustrative list) (Concluded)

For other regulatory reasons	
Aeolus Tyre Co Ltd–Prometeon Tyre Group Srl[m]	Aeolus Tyre (China) withdrew its offer to acquire the remaining 90 per cent stake in Prometeon Tyre Group (Italy), a manufacturer and wholesaler of tyres, from other investors in a stock swap transaction. On 4 January 2018, Aeolus released a statement saying that the Chinese authorities had failed to grant approval for the overseas acquisition before the 31 December 2017 deadline. The parties were unable to reach a consensus on an extension, it said, so the deal was terminated.
Sparton Corporation–Ultra Electronics Holdings Plc[n]	On 5 March 2018, Sparton withdrew its plan to acquire the joint-venture partner Ultra Electronics Holdings for $234 million, after the United States Department of Justice had indicated that it may block the deal.
Blackstone Group LP–AMA Group Ltd[o]	On 22 June 2018, AMA Group (Australia) terminated a deal to sell its vehicle panel repairs business to Blackstone Group for $375 million, following an adverse tax ruling from the Australian Taxation Office.
Withdrawn while waiting for host-country approval	
Warburg Pincus India Pvt Ltd–Tata Technologies Ltd[p]	On 6 February 2018, Warburg Pincus India, a unit of Warburg Pincus (United States), a private equity firm, withdrew its offer to acquire a 43 per cent stake in Tata Technologies (for $360 million), an engineering service and design arm of India's largest truck maker Tata Motors. In a media statement, Tata Motors explained that the deal was mutually terminated "due to delays in securing regulatory approvals as well as due to the recent performance of the company not meeting internal thresholds because of market challenges."
UPC Polska–Multimedia Polska SA[q]	On 23 March 2018, UPC Polska, a subsidiary of Liberty Global, withdrew its application to acquire Multimedia Polska for $876 million, while waiting for approval from the Polish Office of Competition and Consumer Protection.
VEON Ltd–Global Telecom Holding SAE[r]	On 3 April 2018, VEON announced that it withdrew its plan to acquire $1 billion in assets of Global Telecom Holding, due to the lapse of time and absence of approval from the Egyptian Financial Regulatory Authority.
Horizon Global Corporation–Brink Group[s]	On 15 June 2018, Horizon Global, one of the world's leading manufacturers of branded towing and trailering equipment, announced that the company and H2 Equity Partners had mutually agreed to terminate the $200 million agreement to acquire the Brink Group (owned by H2 Equity Partners). The acquisition was withdrawn from regulatory review in Germany and the United Kingdom.
CC Logistics–Rand Refrigerated Logistics[t]	On 2 July 2018, the Automotive Holdings Group withdrew the disclosed sale of its subsidiary,Rand Refrigerated Logistics, to CC Logistics, a subsidiary of HNA International. The $207 million deal was terminated because of the delayed administrative process of the Australian Foreign Investment Review Board and liquidity problems of HNA International.
Shenzhen Energy–Recurrent Unit[u]	On 9 August 2018, Shenzhen Energy Group issued a statement terminating the $232 million deal to acquire Recurrent Energy, a unit of Canadian Solar. According to the company, the planned acquisition did not receive approval from the CFIUS within the agreed time.
Norsk Hydro ASA–Rio Tinto Iceland Ltdv	On 14 September 2018, Norsk Hydro terminated a $345 million deal to acquire Rio Tinto's Iceland subsidiary, an aluminum smelter, after a delay in the European Commission competition approval process.

Source: UNCTAD.

[a] https://www.reuters.com/article/us-moneygram-intl-m-a-ant-financial/u-s-blocks-moneygram-sale-to-chinas-ant-financial-on-national-security-concerns-idUSKBN1ER1R7.
[b] https://www.reuters.com/article/us-anz-bank-sale-hna/new-zealand-blocks-chinas-hna-due-to-ownership-doubts-idUSKBN1EE2VS.
[c] https://www.sec.gov/Archives/edgar/data/1460329/000129993318000201/htm_55915.htm.
[d] https://www.sec.gov/Archives/edgar/data/357020/000119312518054209/d533034d8k.htm.
[e] https://www.whitehouse.gov/presidential-actions/presidential-order-regarding-proposed-takeover-qualcomm-incorporated-broadcom-limited.
[f] https://www.reuters.com/article/us-abertis-m-a-atlantia-acs-es/italys-atlantia-joins-acs-to-end-22-billion-battle-for-spains-abertis-idUSKCN1GP2R4; https://www.ft.com/content/c5ae2fa4-22bf-11e8-ae48-60d3531b7d11.
[g] https://ca.practicallaw.thomsonreuters.com/w-014-9233?transitionType=Default&contextData=(sc.Default)&firstPage=true&bhcp=1.
[h] http://jaf.ministers.treasury.gov.au/media-release/046-2018/; https://www.reuters.com/article/us-apa-m-a-ck-infra/hong-kongs-cki-launches-9-8-billion-bid-for-australias-top-gas-transporter-idUSKBN1J832A.
[i] https://www.permasteelisagroup.com/news-media/press-releases/lixil-and-grandland-agree-to-terminate-planned-permasteelisa-transaction.
[j] https://de.reuters.com/article/us-newzealand-australia-media/nzme-says-new-zealand-high-court-upholds-move-to-block-purchase-of-fairfax-unit-idUSKBN1EC2JG.
[k] https://www.globenewswire.com/news-release/2018/12/21/1677412/0/en/Aperam-announces-the-termination-of-the-Share-Purchase-Agreement-with-Lindsay-Goldberg-to-acquire-VDM-Metals-following-objections-by-the-European-Commission.html.
[l] https://thelawreviews.co.uk/edition/the-technology-media-and-telecommunications-review-edition-9/1178052/portugal, https://shifter.sapo.pt/2018/06/meo-altice-tvi-media-capital-compra; https://www.anacom.pt/render.jsp?contentId=1418151.
[m] http://static.sse.com.cn/disclosure/listedinfo/announcement/c/2018-01-05/600469_20180105_6.pdf.
[n] https://sparton.com/news/sparton-corporation-reports-fiscal-2018-second-quarter-results-2.
[o] https://www.reuters.com/article/us-ama-group-divestiture-regulator/australias-ama-group-calls-off-blackstone-deal-after-tax-ruling-shares-slide-idUSKBN1JI02H.
[p] https://www.bloombergquint.com/business/warburg-pincus-calls-off-tata-tech-investment.
[q] https://www.spglobal.com/marketintelligence/en/news-insights/trending/t8lflbdxlpqcowpmdorf6g2.
[r] https://markets.businessinsider.com/news/stocks/veon-announces-withdrawal-of-mandatory-tender-offer-in-relation-to-global-telecom-holding-s-a-e-1020316801.
[s] https://www.apnews.com/8a203fcd3c3c48a986bd30b04b62762d.
[t] https://www.ahgrl.com.au/news/sale-of-ahg-refrigerated-logistics-terminated.
[u] http://westdollar.com/sbdm/finance/news/1354,20180810923796086.html.
[v] https://www.reuters.com/article/us-riotinto-m-a-norskhydro/norways-hydro-drops-plan-to-buy-rio-tinto-assets-idUSKCN1LU1TV.

Calculated in terms of the number of deals, this represents approximately 20 per cent of all withdrawn cross-border mergers and acquisitions (M&As) exceeding $50 million in 2018. The main industries in which M&A offers were withdrawn for regulatory or political reasons were high-tech businesses (e.g. data solution providers, precision instrument manufacturers and chipmakers), financial services, infrastructure business and telecommunication.

One of the most notable developments in 2018 was the significant increase in the number of cases – nine out of 22 – that were rejected or withdrawn over concerns about national security – three times more than in 2017. The aggregated value of these cases amounts to approximately $153 billion, with one case having a value of $117 billion. Given that UNCTAD's survey of such cases is limited to deals exceeding $50 million, the total number and value of all M&As withdrawn for national security considerations is still higher.

Among the nine rejected or discontinued deals, five were disapproved by the host-country authorities while the remaining four deals were voluntary withdrawals following an advice communicated before the official decision was made. This outcome mirrors recent investment policy trends in several countries, which are aiming at strengthening or expanding national security screening mechanisms. By the home economies of the targeted companies, the United States ranked first – five out of nine deals did not receive governmental approval. On the buyers' side, investors from China were the ones predominantly affected (table III.3).

Three M&As were withdrawn in 2018 because of concerns from competition authorities, and three more foreign takeovers were aborted for other regulatory reasons. In addition, seven M&A deals were withdrawn due to delays in receiving approval from the host-country authorities.

Table III.3. Foreign takeovers withdrawn for regulatory or political reasons, January–April 2019 (Illustrative list)

For competition reasons	
Alstom SA–Siemens AG[a]	On 6 February 2019, the merger proposal by Alstom (France) to acquire the mobility business of Siemens – which aimed at creating a European rail champion – was terminated due to serious competition concerns from the European Commission. According to the Commissioner Margrethe Vestager, "without sufficient remedies, this merger would have resulted in higher prices for the signaling systems that keep passengers safe and for the next generations of very high-speed trains".
Experian Plc–ClearScore Technology Ltd[b]	On 27 February 2019, Experian (the world's largest credit data firm) and ClearScore withdrew from their $364 million merger agreement after the British Competition and Markets Authority demonstrated its reluctance to approve the deal.
For other regulatory reasons	
Hydro One Ltd–Avista Corp[c]	On 23 January 2019, the Canadian State-owned company Hydro One and Avista (United States) agreed to end their $5 billion merger agreement after the Washington Utilities and Transportation Commission and the Idaho Public Utilities Commission denied approval. According to the Washington Utilities and Transportation Commission, "the proposed merger agreement did not adequately protect Avista or its customers from political and financial risk or provide a net benefit to customers as required by state law."
Withdrawn while waiting for host-country approval	
Tuvalu spzoo–Serenada and Krokus Shopping Centers[d]	On 4 January 2019, NEPI Rockcastle announced the termination of the $546 million acquisition deal between its subsidiary, Tuvalu, and Serenada and Krokus Shopping Centers, because certain regulatory approvals and the waiver of the right of first refusal had not been completed by the December 2018 deadline.

Source: UNCTAD.

[a] https://www.siemens.com/press/en/pressrelease/?press=/en/pressrelease/2019/corporate/pr2019020150coen.htm&content[]=Corp&content_0=Corp&sheet=1; https://www.reuters.com/article/us-alstom-m-a-siemens-eu/eu-antitrust-policy-under-fire-after-siemens-alstom-deal-blocked-idUSKCN1PV12L.

[b] https://www.reuters.com/article/us-clearscore-m-a-experian/experian-clearscore-scrap-merger-plans-idUSKCN1QG1CA; https://www.proactiveinvestors.co.uk/companies/news/215392/experian-abandons-clearscore-deal-after-cma-objections-215392.html.

[c] https://www.wsj.com/articles/hydro-one-and-avista-terminate-deal-11548285424; https://www.newswire.ca/news-releases/hydro-one-and-avista-mutually-agree-to-terminate-merger-agreement-822704964.html.

[d] https://www.spglobal.com/marketintelligence/en/news-insights/trending/GtlNn2CToc_Ywu61h2BdnA2; https://www.sharenet.co.za/v3/sens_display.php?tdate=20190104171500&seq=25.

In the first four months of 2019, two M&A deals were terminated because of the concerns of competition authorities. The remaining two known deals were withdrawn for other regulatory reasons.

3. Entry regulations for inward investment: recent developments in FDI screening

a. Entry regulation tools for inward investment

Host countries have various policy instruments at their disposal to exercise their sovereign right to regulate the entry and establishment of foreign investment on their territory.[1] They may fully or partially restrict foreign investment in certain sectors of the economy. They may also link the entry of foreign investment to the fulfilment of certain conditions. Another regulatory tool is the screening of individual foreign investments for national security reasons and other public concerns. Finally, host countries can use competition policies to regulate M&As involving foreign investors.

These different types of FDI entry regulations and procedures may overlap. For instance, the fact that a country has sector-specific FDI restrictions does not prevent it from also having a general review system related to national security that also covers these sectors. In such cases, the latter process provides an additional layer of entry regulation for the host country.

(i) Sector-specific FDI restrictions

Despite ongoing investment liberalization, countries continue to maintain numerous sector-specific restrictions to keep selected industries fully or partially in domestic hands. For this purpose, foreign ownership restrictions or other limits are put in place.

(ii) FDI entry subject to certain conditions

Other entry regulation tools are investment rules that allow full foreign ownership but make the establishment of the investment subject to certain conditions. Examples are requirements concerning minimum capital or the composition of the key management of the new company. Countries may also check on whether the planned investment conforms with their general economic development policies. Often an investment certificate is issued as a confirmation of meeting these criteria (box III.1).

(iii) Specific FDI screening procedures

Besides general legal safeguards related to national security and other public interests present in a number of investment laws, numerous countries have established distinctive FDI screening frameworks. Such frameworks include specific rules and procedures under which they assess whether a planned investment may negatively affect their national security or other essential public interests. If this is determined to be the case, the investment project may be blocked or may be allowed under the condition that the investment be modified in order to eliminate the risk.

In recent years, these FDI screening mechanisms have mainly targeted foreign M&As. This reflects the fact that a change of control over critical infrastructure or domestic key technologies has become a major policy concern.

Specific FDI screening procedures are predominantly used in developed countries, with a few important exceptions. UNCTAD research has identified 24 countries that have such

Box III.1. Establishment conditions for FDI (Policy examples)

- Under the Investment Promotion Act of 2004, the Kenya Investment Authority will issue an investment certificate to a foreign investor that commits at least $100,000, under the further condition that the investment is lawful and beneficial to *Kenya*.
- Foreign investors in *Fiji* need to obtain a foreign investment registration certificate, which is issued after a due diligence and credibility check aimed at ascertaining e.g. whether an investment complies with the foreign investment policy.
- In *Viet Nam*, foreign investors need to hold an investment certificate issued by the relevant local authorities. Before certifying an investment, a province office assesses the conformity of the project with the master socioeconomic development planning, industrial planning and land planning and evaluates the socioeconomic effects of the project.

Source: UNCTAD.

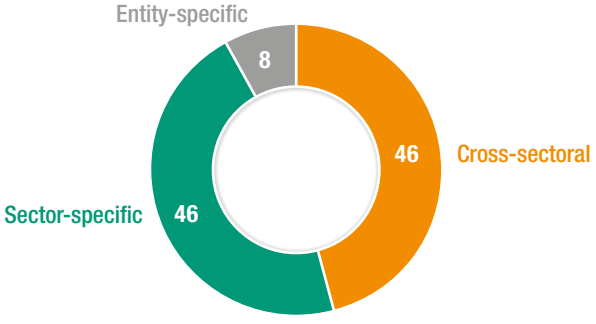
a mechanism. They are *Australia, Austria, Belgium, Canada, China, Finland, France, Germany, Hungary, Iceland, India, Italy, Japan, Latvia, Lithuania, Mexico, New Zealand, Norway, Poland*, the *Republic of Korea*, the *Russian Federation*, *South Africa*, the *United Kingdom* and the *United States*. In 2018, FDI inward stock of these 24 countries amounted to about 56 per cent of global FDI inward stock and their combined GDP equalled about 76 per cent of global GDP.

The concentration of these FDI screening mechanisms in developed countries may be explained by the fact that these economies show a relatively high degree of openness towards foreign investment, including in key economic sectors and infrastructure. FDI screening may thus serve as a safety valve for regulating the entry of foreign investment in critical cases. Moreover, the 24 countries identified as applying these mechanisms are the main global destinations for foreign investment in these sensitive sectors and activities, making them therefore more vulnerable to undesired foreign acquisitions.

Foreign investment screening mechanisms can be categorized in three main groups depending on their depth and scope (figure III.3). First, most countries that have specific screening procedures provide for sector-specific screening. National legislation enumerates sectors or activities (in particular, military and dual-use manufacturing, utilities, and the energy, telecommunication, transportation, media and financial industries) that are considered sensitive to national interests, thus requiring screening of inward investment. Second, some countries have implemented cross-sectoral screening with broadly defined review criteria that focus on specific risks rather than industries. These criteria differ significantly between countries and may include e.g. fundamental interests of society (*Finland*), national security (*United States*) or "national steady economic growth and basic social living order" (*China*). Third, a few countries have adopted an entity-specific screening mechanism. They identify individual domestic companies, mostly operating in sensitive sectors, and engage in reviewing planned foreign acquisitions in these entities. A few countries apply a blend of the first two types of FDI screening.

In addition, some countries use foreign investment screening regimes to address specific concerns relating to investments by *foreign State-owned enterprises* in strategic industries and companies (see also *WIR16*). These countries often introduce additional screening requirements in this regard, throughout all three categories of mechanisms. For example, in *Australia*, foreign State-owned enterprises must comply with extended disclosure

Figure III.3. FDI screening mechanisms by category (Per cent)



Source: UNCTAD.

obligations and generally require prior governmental consent for their investment. In the *Russian Federation*, an approval is compulsory for transactions involving foreign State-owned enterprises in minority stakes of domestic firms and such transactions are prohibited if a majority participation is intended.

As to the institutional set-up, FDI screening is conducted mostly at the highest governmental level – either ministerial or cabinet. On occasion, a separate public agency is formed. Frequently, national security agencies are involved – if not in the decision-making process, then at the consultation stage. As investment is a cross-cutting issue, quite often representatives of different ministries, agencies and authorities are involved. One example is the Committee on Foreign Investment in the *United States (CFIUS)*, which works under the auspices of the United States Treasury and the White House. It comprises the heads of the departments of the Treasury, Justice, Homeland Security, Commerce, Defense, State and Energy, as well as the Office of the U.S. Trade Representative and the Office of Science and Technology Policy, with the Director of National Intelligence and the Secretary of Labor as non-voting members.

(iv) Control of foreign acquisitions in competition policies

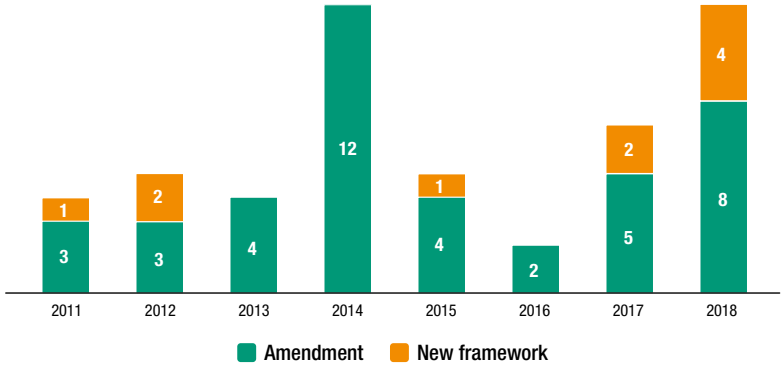
Another policy instrument that affects the establishment of foreign investors is merger control under antitrust laws. It allows a host country's competition authorities to block an acquisition or to impose certain conditions for it to avoid the emergence or abuse of a dominant market position. In recent years, the number of cases in which competition policies have prohibited foreign takeovers, including those involving the high-tech industry, have risen significantly (subsection III.A.2). Competition authorities may also block mergers in third countries because the deals would negatively affect competition in their own territory.

b. Specific FDI screening related to national interests on the rise

From January 2011 to March 2019, at least 11 countries introduced new regulatory frameworks for screening foreign investment. They are *Austria*, *Belgium* (the Flanders region), *China*, *Hungary*, *Italy*, *Latvia*, *Norway*, *Poland*, the *Republic of Korea*, the *Russian Federation* and *South Africa*. In addition, at least 41 significant amendments to regulatory regimes were recorded in 15 jurisdictions in this period. Most of them occurred in 2014 and 2018 (figure III.4).

Furthermore, legislative actions are currently under way in several countries. This is likely to result in some further new policy measures in the remaining months of 2019 (box III.2).

Figure III.4. **FDI screening, legislative changes by type of enactment, 2011–2018**
(Number of measures)



Source: UNCTAD.

Box III.2. Planned legislative acts relating to FDI screening (Policy examples)

- In July 2018, the Government of the *United Kingdom* published a white paper on national security and investment that presented plans for legislative reform of the FDI screening mechanism. They aim at introducing a comprehensive national security review process that will cover approximately 200 transactions a year.
- Within the broader context of *France*'s "company and business growth and transformation reform", at the last stage of the legislative process as of April 2019, the Government aims to strengthen its control over foreign investment. The Ministry of Economy would have at its disposal additional instruments related to unauthorized acquisitions, including injunctions and precautionary measures as well as increased administrative and pecuniary sanctions.

Source: UNCTAD.

The vast majority of legislative measures adopted had a restrictive nature; 80 per cent were less favourable to investors. Only nine were liberalization measures, pertaining to the partial narrowing of the economic sectors in which foreign investment is subject to screening or the raising of certain thresholds that trigger these procedures (box III.3).

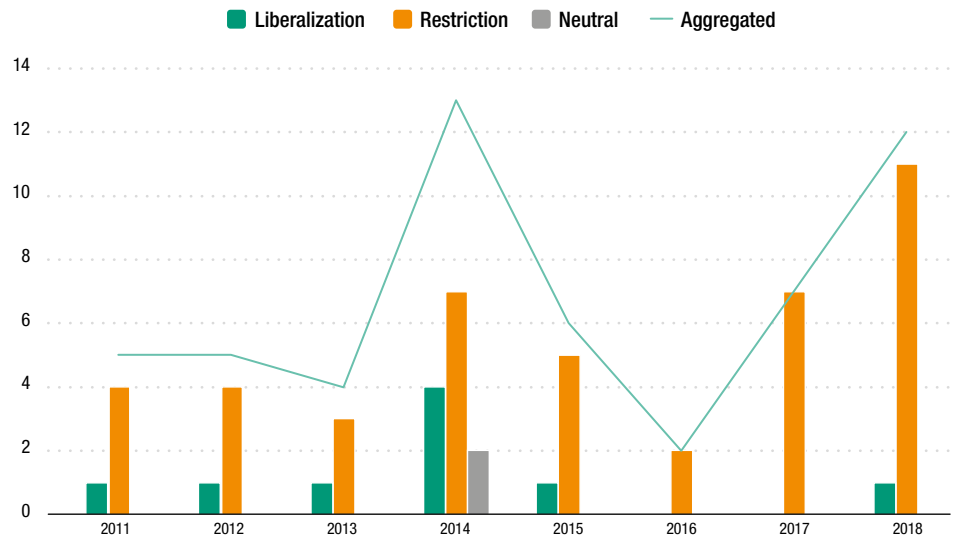
From 2011 to 2016, the number of restrictive legislative measures per year stayed roughly the same, but in 2017 and 2018, they increased substantially (figure III.5). New investment screening policies focus on the widening of the review scope in three main ways: First, they add new sectors or activities subject to FDI screening. Second, they lower the

Box III.3. Narrowing the scope of FDI screening mechanisms
(Policy examples)

- In 2014, *Mexico* narrowed the scope of the sectors in which foreign investor involvement requires a favourable resolution of the National Investment Commission, by excluding activities focused on gas and oil well drilling and pipeline construction, cellular telephony and the business of credit information companies, securities rating agencies and insurance agents.
- In 2014, the *Russian Federation* excluded from the FDI screening requirement investors involved in industries that use "infectious agents" for food production, as well as intragroup transactions.
- In *Australia*, the threshold for a foreign interest in a domestic business requiring governmental approval was raised from 15 per cent to 20 per cent in 2015.

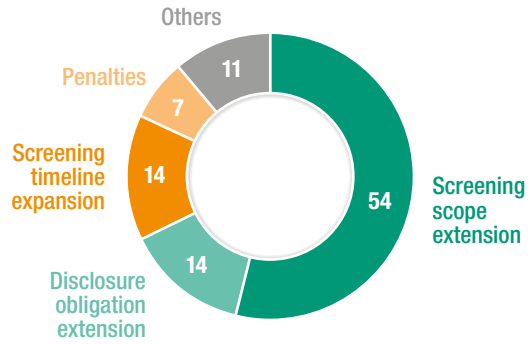
Source: UNCTAD.

Figure III.5. FDI screening, legislative changes by nature of measure, 2011–2018
(Number of measures)



Source: UNCTAD.

Figure III.6. **New FDI screening policies by category, 2011–March 2019** (Per cent)



Source: UNCTAD.

thresholds that trigger investment screening. Third, they broaden definitions of foreign investment subject to screening. In addition, some new policies expand the disclosure obligations of foreign investors during screening procedures and also extend their statutory timelines. Other legal acts introduced new civil, criminal or administrative penalties for not fulfilling or circumventing notification and screening obligations (figure III.6 and box III.4).

In parallel with the tightening of FDI screening mechanisms, the number of individual government decisions blocking foreign investments for national security reasons and other public concerns is also on the rise. Foreign acquisitions with a value exceeding $50 million that were blocked or withdrawn for national security reasons in 2018 were listed in table III.2. In some cases, host-country governments have found other means than a formal interdiction to prevent a foreign takeover or have allowed it only under the condition that the foreign ownership share be reduced (box III.5).

Finally, tighter control of foreign acquisitions due to national security and public interest concerns is also becoming a regional concern, as the example of the EU indicates. On 10 April 2019, the regulation establishing a framework for the screening of FDI into the EU entered into force after being approved by the Council of the EU and the EU Parliament. It aims at establishing an information-sharing mechanism for cooperation between national authorities and at including EU institutions in the screening processes, if a foreign acquisition affects the broader European market.

c. Conclusions and outlook

It is each country's sovereign right to design and apply those policy tools that it deems most fit for the entry of inward investment. This is also the case for the increasing number of FDI screening mechanisms to protect national interests.

This investment policy instrument has evolved significantly over the years. Originally, governments used FDI screening procedures for defence and other sectors strictly related to security. With the progress of technology and modern warfare, host countries added dual-use products and sophisticated cryptology systems as well as technologies and communication equipment.

In a second phase, the concept of national security advanced from countering military threats to also protecting strategic industries and critical infrastructure. The reasoning behind this move is that the protection of core domestic economic assets may be as important for a country's well-being as the absence of military threats. A further explanation may be that governments considered some sort of FDI screening in this area as a necessary counterweight to earlier privatization of State-owned companies and infrastructure facilities. Extending the scope of screening was in part also a reaction to the increasing investment activities of foreign State-owned enterprises.

The latest phase in FDI screening emanates from the unprecedented acceleration in technological development across industries with the new industrial and digital revolutions. Advanced countries that compete in this technological race may wish to protect domestic cutting-edge technologies that are considered key assets in the global competition against foreign takeovers.

Box III.4. New FDI screening policies (Policy examples)

Adding new sectors and activities:

- In the *Republic of Korea*, an amendment in 2011 provided for FDI screening when targeted companies are in possession of national core technologies defined as having high technological and economic value in the Korean and overseas markets or bringing high growth potential to its related industries.
- In 2014, *France* extended its list of sectors in which foreign acquisitions require screening to include water, electricity, gas, oil and energy supply, transport network operation, electronic communication, public health and the operation of critical plants and facilities.
- In 2018, *Germany* broadened the definition of critical infrastructure in its screening process to include news and media companies critical for the formation of public opinion.
- At the end of 2018, the *United States* launched the Critical Technologies Pilot Program, aimed at extending and clarifying the scope of foreign investment screening in relation to acquisitions of companies engaged in emerging and foundational technologies.

Lowering screening thresholds:

- In 2012, *Finland* adopted a new law on foreign corporate acquisitions, lowering the threshold for control over entities subject to review from 33 per cent to 10 per cent.
- In 2018, the *United Kingdom* lowered the thresholds that trigger investment screening from £70 million to £1 million in high-tech industries, specifically computing hardware design and production, and quantum technology development and production.

Broadening the definition of investment or control that triggers FDI screening:

- Starting in 2017, *Japan* began reviewing foreign acquisitions of shares and equity in all corporations in selected sectors, not only listed ones.
- In the *United States* the Foreign Investment Risk Review Modernization Act of 2018 adds new types of transactions covered by FDI screening, such as those that result in gaining access to material, non-public technical information, acquiring a right to nominate an individual to a position on the board of directors or an equivalent governing body, or being involved in substantive decision-making in regard to critical infrastructure and technologies as well as sensitive personal data of United States citizens.

Expansion of screening timelines

- In 2015, *Canada* extended certain deadlines provided in the National Security Review of Investments Regulations to enable the Government to take a more flexible approach. For example, the relevant minister is entitled to prolong the examination of an acquisition for an additional 45 days upon sending a notification.
- In 2017, *Germany* prolonged the maximum time frame for screening procedures from two to four months.

Extension of disclosure obligations:

- In 2011, *China* specified the documents to be disclosed in the screening procedure in its "Provisions for the Implementation of the Security Review System". The documents include a list of board members, general managers, partners and other senior managerial personnel to be appointed in the post-merger enterprise.
- In 2014, *Italy* specified the information to be disclosed in the FDI screening process (e.g. a financial plan, a general description of an acquisition project and its effects, detailed information on the purchaser and on its scope of operation).

Penalties related to FDI screening:

- In 2015, *Australia* introduced third-party liability for assisting in contravening the FDI screening requirements.
- Starting in 2017, any foreign investor in the *Russian Federation* acquiring 5 per cent or more of share capital in a company without having gone through a required screening has had its voting rights in the company suspended.

Source: UNCTAD.

Box III.5. Other means of government intervention in FDI screening (Policy examples)

- Although the planned acquisition of a 20 per cent minority share of 50Hertz – a German grid operator with 18 million connected users – by the State-owned State Grid Corporation of China did not meet the screening threshold, the Government of *Germany* succeeded in preventing the transaction in 2018 through a purchase of the Stake by the State-owned bank Kreditanstalt für Wiederaufbau.
- In 2017, Shanghai Fosun Pharmaceutical Group decided to scale down its acquisition of Hyderabad-based Gland Pharma to only a 74 per cent stake as the Government of *India's* Cabinet Committee on Economic Affairs raised some national security concerns. Governmental approval is required for takeovers of pharmaceutical companies when more than 75 per cent of the share capital is involved.

Source: UNCTAD.

This trend towards a more expansive interpretation of "national interests" or "public concerns" in connection with the screening of foreign investment shows that a growing number of countries see a need to take economic considerations into account when assessing their national security interests. At the same time, concerns have been expressed that an overly broad interpretation of these interests could create new investment barriers and make the investment climate less predictable.

International cooperation can contribute to minimizing these concerns. It includes, above all, aiming at a level playing field between countries where foreign investors have comparable access to foreign markets. It also includes establishing and maintaining an effective intergovernmental consultation mechanism that enables governments and other stakeholders to discuss problems in connection with investment screening. International dialogue may also aim at identifying international good practices and developing common criteria for FDI screening related to national security and other public interests, thus strengthening the transparency and legitimacy of adopted measures.

Finally, there is a role for international investment agreements. To the extent that they include establishment rights for foreign investors, they may affect host countries' sovereign power to reject foreign investment for reasons of national security and other public concerns. However, this can be the case only if (i) the establishment rights extend to those industries or activities for which an investment screening mechanism exists and (ii) the investment agreement lacks an exception clause releasing host countries from their treaty obligations for national security reasons or other public concerns.[2]

B. INTERNATIONAL INVESTMENT POLICIES

1. Trends in IIAs: new treaties and other policy developments

In 2018, countries concluded 40 IIAs. New treaties vary in content and nature and contribute to a more diversified IIA regime. Regional developments, particularly in Africa and Europe, have the potential to further change the contours of the global IIA regime. Sustainability, also reflected in policymaking principles that are developed across the globe, is at the core of modern treaty making.

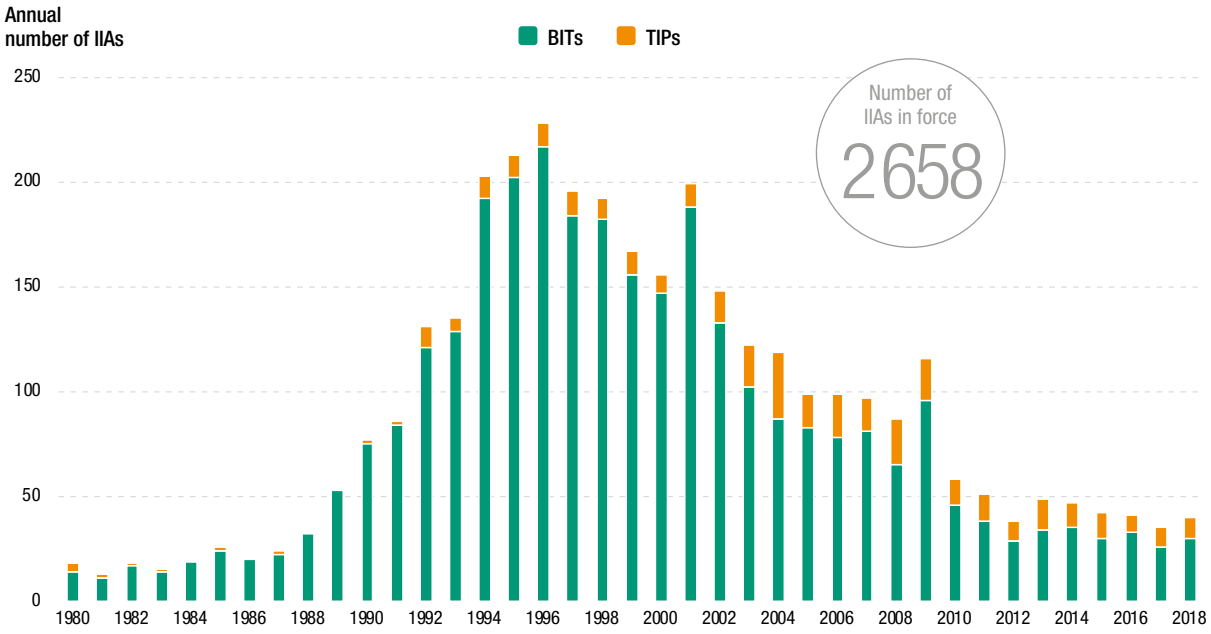
a. Developments in the conclusion of IIAs

In 2018, countries concluded 40 IIAs. During the same period 24 IIA terminations entered into effect, and more are expected in the years to come. New model treaties are being developed to guide future treaty making.

In 2018, countries concluded 40 international investment agreements (IIAs): 30 bilateral investment treaties (BITs) and 10 treaties with investment provisions (TIPs). This brought the size of the IIA universe to 3,317 agreements (2,932 BITs and 385 TIPs).[3] At least nine IIAs entered into force in 2018. By the end of the year, at least 2,658 IIAs were in force (figure III.7).

The economy most active in concluding IIAs in 2018 was Turkey, with eight BITs, followed by the United Arab Emirates with six BITs and Singapore with five treaties (two BITs and three TIPs).

Figure III.7. Number of IIAs signed, 1980–2018



Source: UNCTAD, IIA Navigator.

In parallel with the conclusion of IIAs, the number of IIA terminations continued to rise: In 2018, at least 24 terminations entered into effect ("effective terminations"), of which 20 were unilateral and 4 were replacements (through the entry into force of a newer treaty). These terminations concern, among others, 12 BITs concluded by Ecuador and five concluded by India. By the end of the year, the total number of effective terminations reached 309 (61 per cent having occurred since 2010).

The 10 TIPs concluded in 2018 can be grouped into three categories.

1. Six agreements with obligations commonly found in BITs, including substantive standards of investment protection and investor–State dispute settlement (ISDS):

- Australia–Peru Free Trade Agreement (FTA)
- Comprehensive and Progressive Agreement for Trans-Pacific Partnership (CPTPP)[4]
- European Union (EU)–Singapore Investment Protection Agreement (IPA)
- Central America–Republic of Korea FTA
- Singapore–Sri Lanka FTA
- United States–Mexico–Canada Agreement (USMCA)[5]

2. Three agreements with limited investment provisions (e.g. national treatment with regard to commercial presence or the right of establishment of companies) or provisions on free movement of capital relating to direct investments:

- EU–Japan Economic Partnership Agreement (EPA)
- European Free Trade Association (EFTA) States–Ecuador Comprehensive EPA
- EFTA States–Indonesia Comprehensive EPA

3. One agreement with investment provisions that emphasize investment promotion and facilitation as well as several investment protection provisions – but no ISDS:

- Brazil–Chile FTA

The past year has also seen important developments with respect to new model treaties. Countries develop model treaties with a view to concluding "new-generation" IIAs or amending existing agreements. Noteworthy among the recently adopted treaty models are those of Saudi Arabia (adopted in December 2018) and the Netherlands (in October 2018). Canada, Egypt and Morocco are expected to adopt new models by the end of 2019. Each of these models contains a number of innovative features aimed at addressing its sustainable development dimensions.

b. Developments at the regional level

Regional developments, particularly in Africa and in Europe, including non-binding guiding principles, have the potential to further change the contours of the global IIA regime.

African, Caribbean and Pacific (ACP) Group of States–EU Partnership Agreement (to replace the Cotonou Agreement): The ACP–EU Partnership Agreement, covering more than 100 countries, was signed in Cotonou on 23 June 2000 and will expire in 2020. The parties are currently negotiating a new framework that will include investment-related provisions. Negotiations are expected to focus on investment promotion, private sector development support and investment finance. The ACP and EU negotiating directives[6] reflect the need to include sustainable development and inclusive growth objectives in the investment provisions.

African Continental Free Trade Area (AfCFTA) Investment Protocol: Expert meetings hosted by the African Union Commission, UNCTAD and the Economic Commission

for Africa took place in November 2018 and February 2019 to develop a first draft of the Investment Protocol, to be negotiated in the second phase of the AfCFTA process. The draft is expected to be submitted to member States in the second half of 2019 for negotiations and adoption.

ASEAN Comprehensive Investment Agreement (ACIA): In April 2019, during the Association of Southeast Asian Nations (ASEAN) Economic Ministers meeting in Thailand, attending ministers signed the Fourth Protocol, amending the ACIA and the ASEAN Trade in Services Agreement. The amendments to the ACIA introduce clearer and additional commitments prohibiting the imposition of performance requirements on investors. The meeting also discussed the conclusion of negotiations for the Regional Comprehensive Economic Partnership, which is expected for 2019.

Brexit and the United Kingdom's continuity agreements: Having notified its decision to leave the EU, the United Kingdom has been concluding so-called "rollover" or continuity agreements with those countries that have a trade agreement with the EU. The objective is to prevent the disruption of trade relationships with those countries as a result of Brexit. As of 1 May 2019, the United Kingdom has concluded 10 continuity agreements (together covering 27 partner countries) and has several more in the pipeline.[7] The agreements are designed to take effect when the relevant existing EU trade agreements stop applying to the United Kingdom (i.e. if the country leaves the EU without a deal, or at the end of any agreed implementation period). The agreements are not homogenous. Seven of them incorporate by reference the provisions of the relevant existing EU agreements, listing only the required amendments. The remaining three treaties – with the CARIFORUM States (the Forum of the Caribbean Group of ACP States), Eastern and Southern Africa (ESA) States, and Pacific States (Fiji and Papua New Guinea) – set out their provisions in full.[8] None of them contain fully fledged rules on investment protection; the latter remain confined to the United Kingdom's BITs.

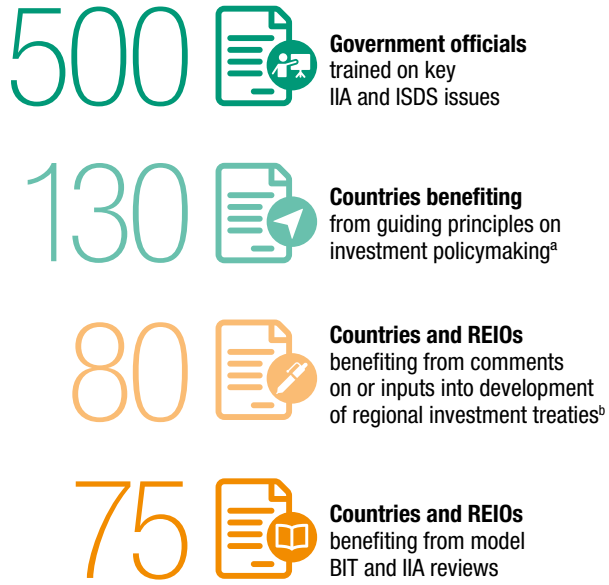
EU investment policymaking: Several significant developments occurred at the EU level (UNCTAD, 2019a). Confirming the European Commission's long-held position, the judgment of the Court of Justice of the European Union (CJEU) in the *Achmea* case in March 2018 found that the ISDS clause in the Netherlands–Slovakia BIT (1991) was incompatible with EU law. Following up on the legal consequences of the *Achmea* ruling, EU member States issued declarations in January 2019 that set a timeline for the termination of intra-EU BITs by 6 December 2019.

The EU continues to pursue its initiative to establish a multilateral investment court, following a March 2018 mandate by the EU Council to start inclusive and transparent negotiations under the auspices of the UN Commission on International Trade Law (UNCITRAL). Meanwhile, the EU's two-tier investment court system (set out in 2015) has been implemented with slight variations in the Canada–EU Comprehensive Economic and Trade Agreement (CETA) (2016), the EU–Singapore IPA (2018) and the EU–Viet Nam IPA (not yet signed).

In an opinion delivered on 30 April 2019, the CJEU (full court sitting) concluded that the new investment tribunal system included in the Canada–EU CETA is compatible with EU law. The CJEU proceeding concerned a request made by Belgium in 2017.

Guiding Principles on Investment Policymaking: An increasing number of country groupings and regional organizations are adopting non-binding principles for investment policymaking that aim to guide the development of national and international investment policies. These principles are typically in line with or based on the Core Principles contained in UNCTAD's Investment Policy Framework for Sustainable Development (UNCTAD, 2015c). Following on the adoptions of the G20 Guiding Principles for Global Investment

Figure III.8. UNCTAD's technical assistance on IIA-related issues since 2012



Source: UNCTAD.

REIO = regional economic integration organization.

[a] Developed with UNCTAD's assistance or facilitation.

[b] Such as the AfCFTA investment protocol and the COMESA (Common Market for Eastern and Southern Africa) Investment Area.

Policymaking in 2016 and the ACP Guiding Principles for Investment Policymaking in 2017, two additional sets of principles were adopted during the reporting period of this report.

In 2018, high-level experts of the member States of the Organization of Islamic Cooperation (OIC) agreed on 10 principles, in line with the OIC Action Programme and the UNCTAD Policy Framework.[9] The 10 principles cover areas such as policy coherence, balanced rights and obligations, the right to regulate, openness to investment, investment protection and intra-OIC cooperation. In 2019, Saudi Arabia adopted seven Guiding Principles for Investment Policymaking. In line with the country's Vision 2030 agenda and the UNCTAD Policy Framework, the principles include non-discrimination, investment protection, investment sustainability, enhanced transparency, protection of public policy concerns, ease of entry for employees, and the transfer of knowledge and technology.

Many of the above-mentioned developments benefited from UNCTAD's work on IIA-related technical assistance and capacity building. This work stream builds on the results of UNCTAD's policy research and analysis, notably the Reform Package for the International Investment Regime (UNCTAD, 2018b) and the updated Investment Policy Framework for Sustainable Development (UNCTAD, 2015c). Through national and regional training courses, as well as through demand-driven and tailor-made advisory services (e.g. IIA reviews, model commentaries), UNCTAD aims to assist countries by identifying policy options for maximizing the sustainable development dimension of IIAs. The reform-focused technical assistance that UNCTAD has carried out since 2012 has had an extensive impact (figure III.8).

2. Trends in ISDS: new cases and outcomes

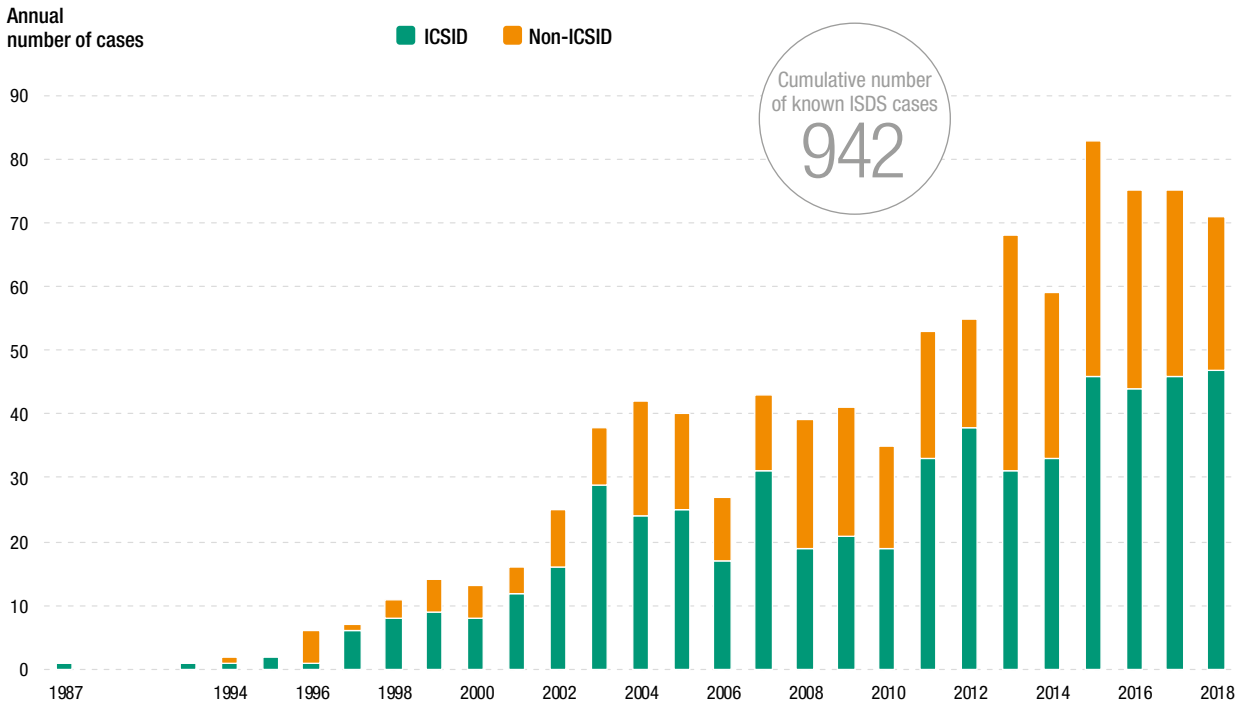
As the surge in ISDS cases continues, with at least 71 new arbitrations initiated in 2018, the total ISDS case count may reach one thousand by the end of 2019. About 70 per cent of the publicly available arbitral decisions in 2018 were rendered in favour of the investor, either on jurisdiction or on the merits.

a. New cases initiated in 2018

The number of new ISDS cases remains high. In 2018, at least 71 new treaty-based ISDS cases were initiated, all but one under old-generation treaties signed before 2012.

In 2018, investors initiated 71 publicly known ISDS cases pursuant to IIAs (figure III.9), a number nearly as high as in the previous three years. As of 1 January 2019, the total number of publicly known ISDS claims had reached 942. To date, 117 countries are known to have been respondents to one or more ISDS claims. As some arbitrations can be kept fully confidential, the actual number of disputes filed in 2018 and previous years is likely to be higher.

Figure III.9. | Trends in known treaty-based ISDS cases, 1987–2018



Source: UNCTAD, ISDS Navigator.

Note: Information has been compiled from 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 signaled its intention to submit a claim to ISDS but has not commenced the arbitration. Annual and cumulative case numbers are continually adjusted as a result of verification processes and may not match exactly case numbers reported in previous years.

(i) Respondent States

The new ISDS cases in 2018 were initiated against 41 countries. Colombia was the most frequent respondent, with six known cases, followed by Spain with five. Three economies – Belarus, Qatar and Rwanda – faced their first known ISDS claim. As in previous years, the majority of new cases were brought against developing countries and transition economies.

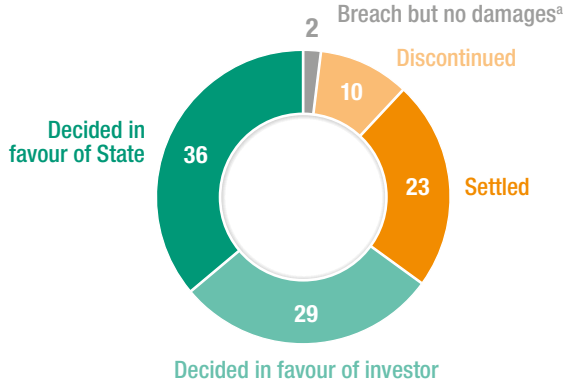
(ii) Claimant home States

Developed-country investors brought most of the 71 known cases in 2018. The highest numbers of cases were brought by investors from the United States and the Russian Federation, with 15 and six cases respectively.

(iii) Applicable investment treaties

About 60 per cent of investment arbitrations in 2018 were brought under BITs and TIPs signed in the 1990s or earlier. The remaining cases were based on treaties signed between 2000 and 2011, except for one case that was based solely on a later treaty (*Manolium Processing v. Belarus*). The Energy Charter Treaty (1994) was the IIA invoked most frequently in 2018 (with seven cases), followed by the Canada–Colombia FTA (2008), the Republic of Korea–United States FTA (2007) and the Treaty on the Eurasian Economic Union (2014), with three cases each. Looking at the overall trend, about 20 per cent of the 942 known cases have invoked the Energy Charter Treaty (121 cases) or the North American Free Trade Agreement (NAFTA) (63 cases).

Figure III.10. Results of concluded cases, 1987–2018 (Per cent)



Source: UNCTAD, ISDS Navigator.

[a] Decided in favour of neither party (liability found but no damages awarded).

b. ISDS outcomes

Over two thirds of the publicly available arbitral decisions rendered in 2018 were decided in favour of the investor, either on jurisdictional grounds or on the merits.

(i) Decisions and outcomes in 2018

In 2018, ISDS tribunals rendered at least 50 substantive decisions in investor–State disputes, 29 of which are in the public domain (at the time of writing). Of these public decisions, most – about 70 per cent – were decided in favour of the investor, either on jurisdictional grounds or on the merits.

Eight decisions (including rulings on preliminary objections) principally addressed jurisdictional issues, with six upholding the tribunal's jurisdiction and two denying jurisdiction.

Sixteen decisions on the merits were rendered, with 11 accepting at least some investor claims and 5 dismissing all the claims. In the decisions holding the State liable, tribunals most frequently found breaches of the fair and equitable treatment (FET) provision.

In addition, five publicly known decisions were rendered in annulment proceedings at the International Centre for Settlement of Investment Disputes (ICSID). Ad hoc committees of ICSID rejected the applications for annulment in all five cases.

(ii) Overall outcomes

By the end of 2018, some 602 ISDS proceedings had been concluded. The relative share of case outcomes changed only slightly from that in previous years (figure III.10).

3. Taking stock of IIA reform

Forward-looking IIA reform is well under way and involves countries at all levels of development and from all geographical regions. Almost all the treaties concluded in 2018 contain a large number of reform features, and the core focus of reform action is moving towards ISDS. However, a lot remains to be done in Phase 2 of IIA Reform, as the stock of old-generation treaties is 10 times larger than the number of new, reform-oriented treaties.

a. Phase 1: concluding new-generation IIAs

All of today's new IIAs include several sustainable development-oriented reform elements, in line with UNCTAD's policy tools.

All of today's new IIAs include several clauses that were set out in UNCTAD's Investment Policy Framework for Sustainable Development (*WIR12*, updated in 2015) or follow UNCTAD's Road Map for IIA Reform as included in UNCTAD's Reform Package for the International Investment Regime (UNCTAD, 2018b). The latter sets out five action areas: safeguarding the right to regulate, while providing protection; reforming investment dispute settlement; promoting and facilitating investment; ensuring responsible investment; and enhancing systemic consistency. This section reviews the extent to which recent treaties use reform features in their substantive and procedural clauses.

(i) Treaties concluded in 2018: key features of substantive clauses

UNCTAD reform tools are shaping modern treaty making. Reform-oriented clauses abound in IIAs concluded in 2018.

Twenty-seven of the 29 IIAs concluded in 2018 (with texts available) (table III.4) contain at least six reform features and 20 of the 29 contain at least nine reform features. Provisions that were considered innovative in pre-2012 IIAs now appear regularly. Highlights of modern treaty making include a sustainable development orientation, preservation of regulatory space, and improvements to or omissions of investment dispute settlement. The most broadly pursued area of reform is preservation of regulatory space.

Sustainable development orientation. IIAs concluded in 2018 include a large number of provisions explicitly referring to sustainable development issues (including the right to regulate for sustainable development-oriented policy objectives). Of the 29 agreements reviewed, 19 have general exceptions – for example, for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources. Sixteen recognize that the parties should not relax health, safety or environmental standards to attract investment. Twenty-five of the preambles refer to the protection of health and safety, labour rights, the environment or sustainable development. Finally, corporate social responsibility (CSR) obligations and the inclusion of pro-active investment promotion and facilitation provisions are becoming more prevalent, but they still do not feature consistently in recent IIAs. This is especially true for CSR provisions, which appeared in only 13 of the 29 IIAs.

Preservation of regulatory space. Treaties concluded in 2018 include elements that aim more broadly than ever at preserving regulatory space and/or at minimizing exposure to investment arbitration. The number of new treaties that incorporate these reforms are substantial. Elements include (i) general exceptions (19 IIAs), (ii) clauses that limit the treaty scope (e.g. by excluding certain types of assets from the definition of investment (27 IIAs)), (iii) clauses that limit or clarify obligations (e.g. by omitting or including more detailed clauses on FET (all 29 IIAs) and/or indirect expropriation (23 IIAs)) and (iv) clauses that contain exceptions to transfer-of-funds obligations and/or carve-outs for prudential measures (all 29 IIAs). Notably, 28 of the 29 treaties omit the so-called umbrella clause (thus also narrowing the range of possible ISDS claims).

Investment dispute settlement. Nineteen of the 29 IIAs concluded in 2018 carefully regulate ISDS, and four omit ISDS (see next subsection).

It is worth highlighting a number of innovative features included in IIAs in 2018. These features either go beyond traditional reform-oriented clauses, have rarely been encountered in earlier IIAs and/or break new ground:

- Conditioning treaty coverage on the economic contribution of the investment to the host State economy, by including this requirement in the definition of investment (e.g. Argentina–United Arab Emirates BIT, Belarus–India BIT, Belarus–Turkey BIT, Lithuania–Turkey BIT, State of Palestine–Turkey BIT).
- Excluding intangible rights from the definition of investment. Noting that rights such as goodwill, brand value and market share are excluded from the definition of investment (e.g. Belarus–India BIT).
- Excluding measures by local governments from the scope of the treaty. Clarifying that measures taken by local governments fall outside the scope of the treaty (e.g. Belarus–India BIT).
- Formulating general public policy exceptions as self-judging (e.g. Argentina–United Arab Emirates BIT).

Gender balance. Some recent IIAs or treaty models also contain explicit references to gender: The Netherlands model BIT emphasizes the importance of women's contribution to economic growth through their participation in international investment and encourages the contracting parties to remove barriers to women's participation in the economy by promoting gender-responsive policies. The USMCA, in the CSR provision of its investment chapter, refers to gender equality as an example of CSR policies that the contracting parties should encourage investors to comply with. The CPTPP reaffirms the promotion of gender equality in its preamble (which also applies to investment).

(ii) Treaties concluded in 2018: ISDS reform approaches

Investor–State arbitration continues to be controversial, spurring debate in the investment and development community and the public at large. Five principal approaches emerge from IIAs signed in 2018: (i) no ISDS, (ii) a standing ISDS tribunal, (iii) limited ISDS, (iv) improved ISDS procedures and (v) an unreformed ISDS mechanism.

As part of broader IIA reform, countries have implemented many ISDS reform elements in recent IIAs. From the IIAs signed in 2018 emerge five principal approaches to ISDS, used alone or in combination:

(i) *No ISDS:* The treaty does not entitle investors to refer their disputes with the host State to international arbitration (either ISDS is not covered at all or it is subject to the State's right to give or withhold arbitration consent for each specific dispute, in the form of the so-called "case-by-case consent") (four IIAs entirely omit ISDS and two IIAs have bilateral ISDS opt-outs between specific parties).[10]

(ii) *Standing ISDS tribunal:* The treaty replaces the system of ad hoc investor–State arbitration and party appointments with a standing court-like tribunal (including an appellate level), with members appointed by contracting parties for a fixed term (one IIA).

(iii) *Limited ISDS:* The treaty may include a requirement to exhaust local judicial remedies (or to litigate in local courts for a prolonged period) before turning to arbitration, the narrowing of the scope of ISDS subject matter (e.g. limiting treaty provisions subject to ISDS, excluding policy areas from the ISDS scope) and/or the setting of a time limit for submitting ISDS claims (19 IIAs).

(iv) *Improved ISDS procedures:* The treaty preserves the system of investor–State arbitration but with certain important modifications. Among other goals, such modifications may aim at increasing State control over the proceedings, opening proceedings to the public and third parties, enhancing the suitability and impartiality of arbitrators, improving the efficiency of proceedings or limiting the remedial powers of ISDS tribunals (15 IIAs).

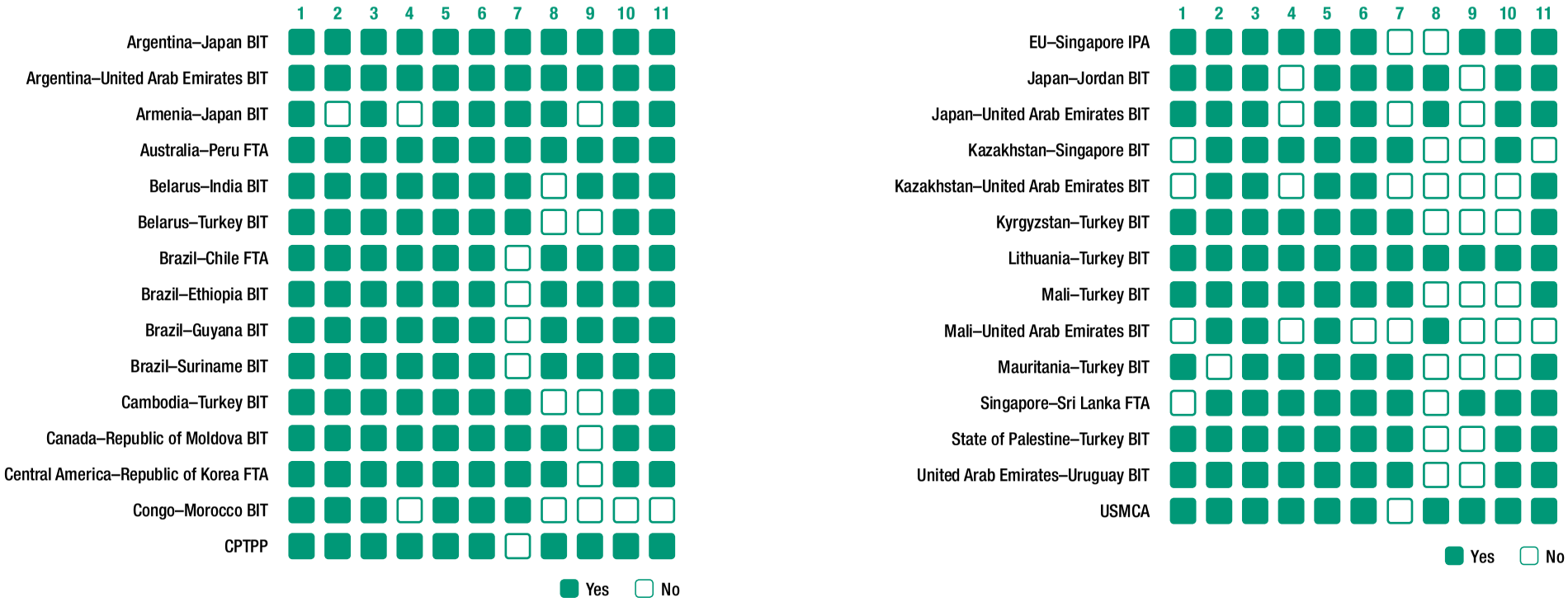
(v) *Unreformed ISDS mechanism:* The treaty preserves the basic ISDS design typically used in old-generation IIAs, characterized by broad scope and lack of procedural improvements (six IIAs).

Some of the reform approaches have more far-reaching implications than others. The extent of reform engagement within each approach can also vary (significantly) from treaty to treaty. For example, "limited ISDS" covers a very broad array of options which may range from a treaty that requires exhaustion of local remedies to a treaty that sets a three-year time limit for submitting claims.

For 2018, the most frequently used approaches were "limited ISDS" and "improved ISDS procedures", often in combination.

About 75 per cent of IIAs concluded in 2018 contain at least one mapped ISDS reform element, and many contain several (table III.5). Most of these reform elements resonate

Table III.4. Reform–oriented provisions in IIAs concluded in 2018



Selected aspects of IIAs

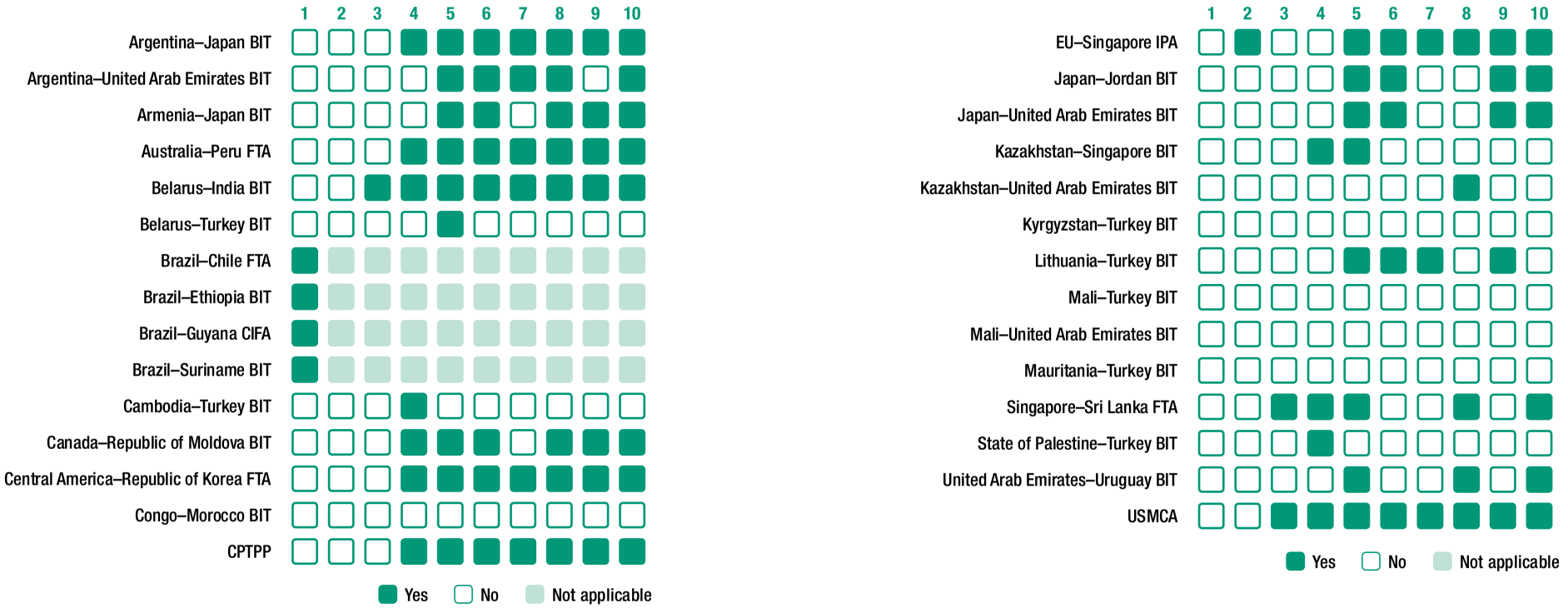
The scope and depth of commitments in each provision varies from one IIA to another.

1. References to the protection of health and safety, labour rights, environment or sustainable development in the treaty preamble
2. Refined definition of investment (e.g. reference to characteristics of investment; exclusion of portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts)
3. Circumscribed FET (in accordance with customary international law, equated to the minimum standard of treatment of aliens under customary international law or clarified with a list of State obligations), or FET omitted
4. Clarification of what does and does not constitute an indirect expropriation, or indirect expropriation omitted
5. Detailed exceptions from the free-transfer-of-funds obligation, including for 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 for the conservation of exhaustible natural resources
8. Explicit recognition in the treaty text 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, omitting the ISDS mechanism)
11. Specific proactive provisions on investment promotion and/or facilitation (e.g. facilitating the entry and sojourn of personnel, furthering transparency of relevant laws and regulations, enhancing exchange of information on investment opportunities)

Source: UNCTAD.

Note: Based on 29 IIAs concluded in 2018 for which texts are available, not including "framework agreements" that lack substantive investment provisions.

Table III.5. ISDS reform elements in IIAs concluded in 2018



Selected aspects of IIAs

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

I. No ISDS

1 Omitting ISDS (e.g. in favour of domestic courts and/or State–State dispute settlement)

II. Standing ISDS tribunal

2 Replacing the system of ad hoc arbitrations and party-appointed arbitrators with a standing court-like tribunal (including an appellate level) consisting of adjudicators with fixed terms

III. Limited ISDS

3 Requiring investors to pursue local remedies (for 18 months or more) or to exhaust local remedies before turning to arbitration

4 Limiting treaty provisions subject to ISDS and/or excluding certain policy areas from ISDS

5 Setting a time limit for submitting ISDS claims (limitations period)

IV. Improved ISDS procedures

6 Enhancing the State role in ISDS: binding joint interpretations, renvoi for joint determination, non-disputing party participation, review of draft arbitral award, submission of counterclaims

7 Enhancing the suitability and impartiality of arbitrators or adjudicators: rules on qualifications, code of conduct, rules on conflicts of interest, "double hatting" prohibition

8 Enhancing the efficiency of dispute settlement: early dismissal of frivolous claims, consolidation of claims, time limit on maximum duration of proceedings, voluntary alternative dispute resolution procedures

9 Opening ISDS proceedings to the public and third parties: transparency rules, amicus curiae participation

10 Limiting remedial powers of tribunals: legal remedies, types of damages

Source: UNCTAD.

Note: Based on 29 IIAs concluded in 2018 for which texts are available, not including "framework agreements" that lack substantive investment provisions.

with the options identified by UNCTAD in the Investment Policy Framework for Sustainable Development (*WIR12,* updated in 2015) and in the Road Map for IIA Reform (*WIR15*), subsequently included in UNCTAD's Reform Package for the International Investment Regime (UNCTAD, 2018b).

Alongside ISDS-specific reform elements, a large number of the IIAs reviewed also include important modifications to other treaty components that have implications for ISDS reform (e.g. refined treaty scope, clarified substantive provisions and added exceptions; table III.4).

ISDS reform is being pursued across various regions and by countries at different levels of development. Some countries and regions have been the driving forces behind certain approaches (e.g. Brazil for the "no ISDS" approach, India for "limited ISDS", the EU for the "standing ISDS tribunal").

In parallel, multilateral engagement on ISDS reform is gaining prominence at UNCITRAL and ICSID, among other institutions. On the basis of the three-phase mandate provided by the UNCITRAL Commission in July 2017, deliberations in UNCITRAL Working Group III on possible reform options have so far focused mostly on the "improved ISDS procedures" approach, while giving some consideration to the "standing ISDS tribunal" approach. The proposed amendments to the ICSID Arbitration Rules published by the ICSID Secretariat in August 2018 put forward procedural improvements.

These plurilateral and multilateral efforts have the potential to contribute to Phase 2 of IIA Reform. However, the current undertakings may be unlikely to generate "big picture" results for Phase 2, as a number of caveats apply (e.g. related to the processes' focus on procedural improvements to ISDS).

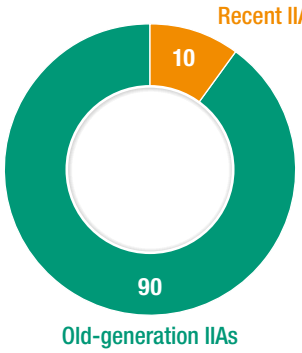
b. Phase 2: modernizing old-generation treaties

UNCTAD's reform tools are spurring action on Phase 2 reforms. However, a lot remains to be done. The stock of old-generation treaties is 10 times larger than the number of new, reform-oriented treaties.

Since the launch of UNCTAD's options for Phase 2 of IIA Reform (*WIR17*), a growing number of countries have taken steps to modernize their old-generation treaties. Given that so far such reform actions have addressed a relatively small number of IIAs, there is broad scope and urgency to pursue them further. The stock of old-generation IIAs, which typically do not include reform-oriented features, still amounts to more than 3,000 (10 times larger than the number of IIAs concluded since 2012) (figure III.11). The great majority of known ISDS cases have thus far been based on old-generation treaties. Modernization of treaties remains an important policy challenge.

An overview of recent Phase 2 reform actions follows.

Figure III.11. Stock of old-generation (1959–2011) and recent (2012–2018) IIAs (Per cent)



Source: UNCTAD, IIA Navigator.

(i) Jointly interpreting treaty provisions

Several countries have recently issued joint interpretations for existing IIAs and/or established joint bodies in their IIAs with a mandate to issue binding interpretations of treaty provisions. This can help reduce uncertainty and enhance predictability for investors, contracting parties and tribunals.

In 2018, Colombia and India signed a joint interpretative declaration on their 2009 BIT. It refines key clauses found in the 2009 treaty to reflect

sustainable development objectives, to strengthen the right of the parties to regulate in the public interest and to clarify the provisions on FET, expropriation, national treatment, most-favoured-nation treatment and ISDS.

In 2017, Bangladesh and India signed a similar joint declaration on their 2009 BIT. Also in 2017, Colombia and France signed a joint interpretative declaration for their 2014 BIT. The latter clarifies that Article 16 on "Other Dispositions" should not be read as a stabilization clause and that a violation of a state contract between an investor and a party does not constitute a treaty violation.

Several recent IIAs and models establish joint bodies with a mandate to issue binding interpretations of treaty provisions (e.g. the Australia–Peru FTA (2018), the Belarus–India BIT (2018), the Central America–Republic of Korea FTA (2018), the CPTPP (2018), the EU–Singapore IPA (2018), the proposed EU–Viet Nam IPA, the 2018 amendments to the Republic of Korea–United States FTA (2007), the USMCA (2018), the Netherlands model BIT (2018)).

(ii) Amending treaty provisions

Amendments were used in both bilateral and regional contexts in 2018. In megaregional IIAs, parties used protocols and exchanges of side letters or notes. Amendments can achieve a higher degree of change and ensure that the amended treaty reflects evolving policy preferences.

The 11 parties to the CPTPP agreed to retain core elements of the TPP text with amendments in select areas. With respect to investment (Chapter 9), the parties agreed to suspend the application of the provisions related to investor–State contracts and investment authorizations.

In September 2018, the Republic of Korea and the United States signed an amendment to their FTA (2007). The amendment includes clarifications on the meaning of minimum standard of treatment and excludes ISDS procedures from the scope of the most-favoured-nation clause. It also tasks the joint committee to consider improvements to the ISDS provision that meet both countries' objectives (e.g. ways to resolve disputes and eliminate frivolous claims).

The Energy Charter Conference approved the timeline for the discussion on modernization of the Energy Charter Treaty and agreed on a set of topics to be reviewed as part of its discussion. These include the right to regulate, sustainable development, CSR, FET and indirect expropriation. The modernization process will identify the possible policy options for each of the topics listed. The members of the Subgroup of the Energy Charter Conference will commence negotiations to modernize the Energy Charter Treaty in accordance with the proposed topics and the identified policy options.

(iii) Replacing "outdated" treaties

An increasing number of recently concluded IIAs are replacing old-generation treaties, typically substituting a new treaty for an old one. Replacement offers an opportunity to undertake a comprehensive revision of the treaty.

Of the 30 BITs signed in 2018, four replaced older BITs between the two countries (e.g. the Belarus–Turkey BIT replaced their 1995 BIT; the Kyrgyzstan–Turkey BIT replaced their 1992 BIT; the Lithuania–Turkey BIT replaced their 1994 BIT; the Serbia–Turkey BIT replaced their 2001 BIT).

Three TIPs concluded in 2018 replaced one treaty each or are set to do so. The Singapore–Sri Lanka FTA replaced one BIT (1980); the Australia–Peru FTA (2018) foresees the

replacement of the Australia–Peru BIT (1995) (unless replaced upon the CPTPP's entry into force for the two countries). Once in force, the USMCA will replace NAFTA (1992). Three other TIPs replaced several agreements at once (see next subsection).

The effective transition from an old to a new treaty can be ensured through transition clauses. Such clauses specify how long after an old IIA's termination an investor may invoke the old IIA to bring an ISDS case. In three TIPs, this period is limited to three years after the entry into force of the new agreement (e.g. the USMCA (2018), the Singapore–Sri Lanka FTA (2018), the Australia–Peru FTA (2018)).

(iv) Consolidating the IIA network

A growing number of regional IIAs include specific clauses providing for the replacement of treaties between the parties. Abrogating two or more old treaties through the creation of a single new one can help to modernize treaty content and avoid fragmentation of the IIA network.

Three TIPs concluded in 2018 replaced more than one older BIT. Replacements were recorded in specific clauses in the text of the new IIAs or in side letters providing for termination and replacement. For example, the EU–Singapore FTA (2018) will replace 12 older BITs between the EU member States and Singapore. The Central America–Republic of Korea FTA (2018) will replace five BITs.

In the CPTPP, some parties provide for replacement of pre-existing BITs (e.g. the Australia–Viet Nam BIT (1991), the Australia–Peru BIT (1995), the Australia–Mexico BIT (2005)) under terms set out in relevant side letters.

The Investment Protocol of the AfCFTA, scheduled to be negotiated as part of phase II of the African continental integration process, could potentially replace over 170 intra-African BITs.

(v) Managing relationships between coexisting treaties

Managing treaty relationships is crucial when pursuing policy coherence.

In some TIPs, countries continue to be bound by overlapping, pre-existing treaties. In the case of the CPTPP, a total of 37 earlier IIAs remain in force and coexist with the CPTPP. For example, Australia and Singapore have an overlapping FTA (2003) between them. Japan and Viet Nam have two older treaties in force (Japan–Viet Nam BIT (2003) and Japan–Viet Nam EPA (2008)), with the BIT incorporated into the EPA.

At least 12 BITs signed in 2018 have parallel treaty relationships. For example, the Azerbaijan–Turkmenistan BIT (2018) and the Belarus–Turkey BIT (2018) overlap with the Energy Charter Treaty (1994) for the sector in question. The Indonesia–Singapore BIT (2018) coexists with the ASEAN Comprehensive Investment Agreement (2009). The Kazakhstan–United Arab Emirates BIT (2018) and the Mauritania–Turkey BIT (2018), among others, overlap with the OIC Investment Agreement (1981).

The parties to the Australia–Indonesia CEPA remain bound by the Australia–Indonesia BIT (1992) and the ASEAN–Australia–New Zealand FTA (2009). The Australia–Indonesia CEPA includes a relationship clause that provides for consultations between the parties where a party considers there is an inconsistency between agreements, with a view to reaching a mutually satisfactory solution.

To mitigate the potentially adverse consequences arising from overlapping treaty relationships, some TIPs include conflict clauses clarifying which of the coexisting treaties will prevail in case of conflict or inconsistency. The relationship clause included in the Australia–Peru FTA (2018) provides that the parties should consult with each other in case of inconsistency between agreements.

(vi) Referencing global standards

Reference to global standards, with a view to ensuring more responsible and regulated investment activities, has become an increasingly prominent treaty feature. It can help overcome the fragmentation between IIAs and other bodies of international law and policymaking.

Of the 29 treaties signed in 2018 for which texts are available, at least 18 refer to the achievement of sustainable development objectives. At least four refer to one or more specific global standards related to the promotion of sustainable development. The UN Charter and the Universal Declaration of Human Rights were both mentioned three times. The UN Global Compact, obligations tied to membership in the International Labour Organization (ILO) and the OECD Guidelines for Multinational Enterprises were all mentioned in two treaties.

Most significantly, the EFTA–Indonesia EPA (2018) specifically refers to the UN 2030 Agenda for Sustainable Development (the second treaty to do so, after the Canada–EU CETA (2016)). EFTA treaties refer to the largest number of global standards (up to seven standards in the EFTA–Indonesia EPA (2018), followed by four in the Ecuador–EFTA EPA (2018)).

(vii) Engaging multilaterally

Multilateral engagement is potentially the most effective but also most difficult avenue for reforming pre-existing IIAs.

Multilateral developments in investment policymaking continued to gain prominence in 2018, with discussions taking place in several fora (e.g. ICSID, the OECD, the World Trade Organization, UNCITRAL, UN Working Group on Business and Human Rights). However, the current undertakings may be unlikely to generate "big picture" results for the sustainable development-oriented modernization of old-generation investment treaties. Of particular relevance is work at the Energy Charter, where the Conference approved a timeline for the discussion on modernization of the Energy Charter Treaty and agreed on a set of topics to be reviewed.

(viii) Abandoning unratified old treaties

For old-generation treaties that have not yet entered into force, a country can formally indicate its decision to not be bound by them as a means to help clean up its IIA network.

Although explicit actions to abandon unratified treaties have been rare, notable examples include India's "termination" of several BITs that had been signed but not entered into force (e.g. BITs with Ethiopia (2007), Ghana (2002), Nepal (2011) and Slovenia (2011)). Close to 480 IIAs were signed more than 10 years ago and have not yet entered into force. This may signal that States have abandoned efforts to ratify them.

(ix) Terminating existing old treaties

Terminating outdated BITs – whether unilaterally or jointly – is a straightforward (although not always instantaneous) way to release the parties from their obligations. IIA terminations are on the rise, reaching a total of 309 by the end of 2018.

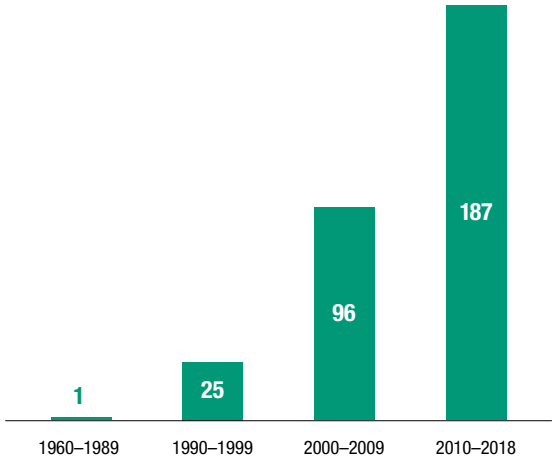
Between 2010 and 2018 alone, 187 terminations of IIAs took effect (figure III.12), of which 128 were the result of unilateral terminations. In 2018, at least 24 terminations entered into effect. Half (12) concerned BITs signed by Ecuador; another five were BITs signed by India.

At least two intra-EU BIT terminations took effect in 2017 and two more at the beginning of 2019. A number of termination notifications were sent in 2017 and 2018 (e.g. by Poland), which have yet to enter into effect.

The number of treaty terminations is expected to increase in the years to come:

- The planned termination of intra-EU BITs, which concerns some 190 treaties in force between EU member States, will outpace previous termination actions. In a January 2019 declaration, 22 EU member States announced their intention to terminate all BITs concluded between them by 6 December 2019. In separate declarations, the six remaining member States reaffirmed, in essence, the statement on intra-EU BITs.
- Once several recently signed regional, plurilateral or megaregional treaties (e.g. the EU–Singapore IPA) enter into force, they will effectively replace older BITs; i.e. those BITs will be terminated.

Figure III.12. Effective IIA terminations
(Number of IIAs by selected period)



Source: UNCTAD, IIA Navigator.
Note: This includes treaties (i) unilaterally denounced, (ii) terminated by consent, (iii) replaced by a new treaty and (iv) expired automatically.

Terminating IIAs does not necessarily mean that a country envisages fully disengaging from the system. Terminations can form part of a country's overall approach to recalibrating its international investment policymaking, accompanied by the development of a revised treaty model and the start of new IIA negotiations. Two countries – India and Indonesia – that recently terminated a large number of their IIAs, many of them on a unilateral basis, concluded new BITs in 2018 (e.g. the Belarus–India BIT, the Indonesia–Singapore BIT).

Moreover, terminations do not always instantaneously release the parties from their treaty obligations. They may trigger the operation of a survival clause, typically included in IIAs, unless it is neutralized by the treaty parties at the time of termination. Survival clauses are designed to prolong a treaty's application to covered investments made prior to the termination date for an additional period (commonly ranging between 10 and 20 years).

(x) Withdrawing from multilateral treaties

No example could be found of this reform option during this reporting period, suggesting that withdrawal from multilateral treaties is not currently a preferred reform path.

4. Conclusions: lessons learned and way forward

Today's IIA regime is characterized by diversity, with clauses that aim to pursue sustainable development by providing clarity, parity and flexibility. However, some new clauses remain untested and much remains to be done. For reform to become truly successful, the international investment community needs to meet four challenges.

Sustainable development-oriented reform has made its way into today's investment policymaking. Reform actions have taken place at all levels (national, bilateral, regional and multilateral), and they cover all five areas of reform set out in UNCTAD's Reform Package for the International Investment Regime (UNCTAD, 2018b).

Following the gradual changes in investment treaty making practices over the past 15 years, today's IIA regime is characterized by a number of distinctive features (table III.6).

Table III.6. Salient features of new IIAs

Cross-cutting feature	Manifestation in treaties	Examples
Diversity	Different approaches to overall treaty objective or coverage	• Protection-focused • Facilitation-focused • Liberalization-focused
	Different approaches to investment dispute settlement	• No ISDS • Standing ISDS tribunal • Limited ISDS • Improved ISDS procedures • Unreformed ISDS mechanism
	Different approaches to specific treaty elements	• Treaty scope (definitions of investment and investor, exclusions for policy areas or economic sectors) • FET (customary international law, specific State obligations, no FET)
Sustainability	Inclusion of sustainable development-oriented provisions that…	• Flag overall importance of sustainable development (e.g. preamble, clause on objectives) • Preserve policy flexibility (e.g. exceptions for health, environment, social policies) • Guide government behaviour and investor expectations (e.g. clauses on not lowering standards, CSR, impact assessments)
Clarity	Clarification of the scope and meaning of key clauses	• Coverage (investor or investment) • Protections (FET, indirect expropriation, national and most-favoured-nation treatment, full protection and security, free transfers)
Parity	Balance between investor protections and investor obligations through investor's duty to…	• Comply with host State domestic laws and regulations • Abstain from corruption • Uphold labour rights • Undertake impact assessments • Meet CSR standards
	Balance between powers of arbitrators and those of State parties through right to…	• Jointly determine certain issues under consideration by a tribunal • Issue joint interpretations binding on tribunals • Preview and comment on draft arbitral awards • Launch counterclaims
	Balance between host and home States through home-country obligations that…	• Promote CSR uptake by outward investors and through technical assistance (e.g. for investment facilitation) • Encourage responsible investment • Commit to abstaining from requiring transfers
Flexibility	Preservation of the right to regulate through…	• Exceptions (e.g. for general public policy objectives, national security, prudential measures) • Exclusions (e.g. from treaty scope, specific obligations, ISDS)
	Allowance for asymmetry in parties' obligations through…	• Reservations • Bilateral side letters
	Plans for adjustments over time through…	• Programmes for future work or negotiations (e.g. ISDS provisions, pre-establishment schedules) • Periodic reviews of the treaty
Untested	New provisions untested by tribunals, such as…	• Requirement for investments to contribute to (sustainable) development of the host State • Requirement for investors to uphold human rights and core labour standards • Clarification of FET with a list of State obligations

Source: UNCTAD.

Key among them is diversity, and the fact that modern treaties aim to pursue sustainable development by providing clarity, parity and flexibility. However, some new clauses remain untested, and much remains to be done.

In their further pursuit of sustainable development-oriented IIA reform, policymakers need to consider four key issues.

First, modernizing old-generation treaties remains a priority. Despite ongoing reform efforts, the stock of treaties belonging to the old generation of IIAs that do not include reform-oriented features still accounts for over 3,000 IIAs (10 times as many as the number of "modern" IIAs concluded since 2012) (figure III.12). This illustrates the magnitude of the task of reforming the bulk of the IIA regime to make it more balanced, manageable and sustainable development-friendly.

Second, reform needs to be holistic. Although reform efforts converge in their objective to make the IIA regime more sustainable development-oriented, they are implemented only intermittently by countries and they focus on specific aspects of the regime that are often addressed in isolation. The reform of investment dispute settlement for example, a focus of worldwide attention recently, is not synchronized with the reform of the substantive rules embodied in IIAs. However, reorienting the investment policy regime towards sustainable development requires reforming both the rules on dispute settlement and the treaties' substantive rules.

Third, some reform clauses may yet be tested. It is too early to assess the effectiveness of some of the innovative language introduced in IIAs in achieving their objectives of safeguarding countries' right to regulate. Many of the new refinements in IIAs have yet to be tested in investment disputes, and doubts remain about how arbitrators may interpret them in ISDS proceedings. This applies to both new clauses that are widely used in treaties and those that have been used relatively rarely so far.

Fourth, reform efforts must be inclusive and not be constrained by capacity constraints. Successful reform requires a transparent and inclusive process. Governments and international fora need to ensure the availability of possibilities for meaningful stakeholder engagement and build the skills and experience of negotiators and policymakers. Bilateral or regional technical assistance programmes can follow up on the capacity-building needs identified by governments. Sharing of experiences and best practices on IIA reform can foster peer-to-peer learning about sustainable development-oriented reform options.

UNCTAD, as the United Nations' focal point for international investment and development, backstops ongoing policymaking processes in the pursuit of sustainable development-oriented IIA reform. It supports such reform through its three pillars of work: development of policy tools based on research and policy analysis; technical assistance (including capacity-building and advisory services) and intergovernmental consensus building. The November 2019 High-level IIA Conference will provide an opportunity to take stock of reform efforts so far.

C. CAPITAL MARKETS AND SUSTAINABILITY

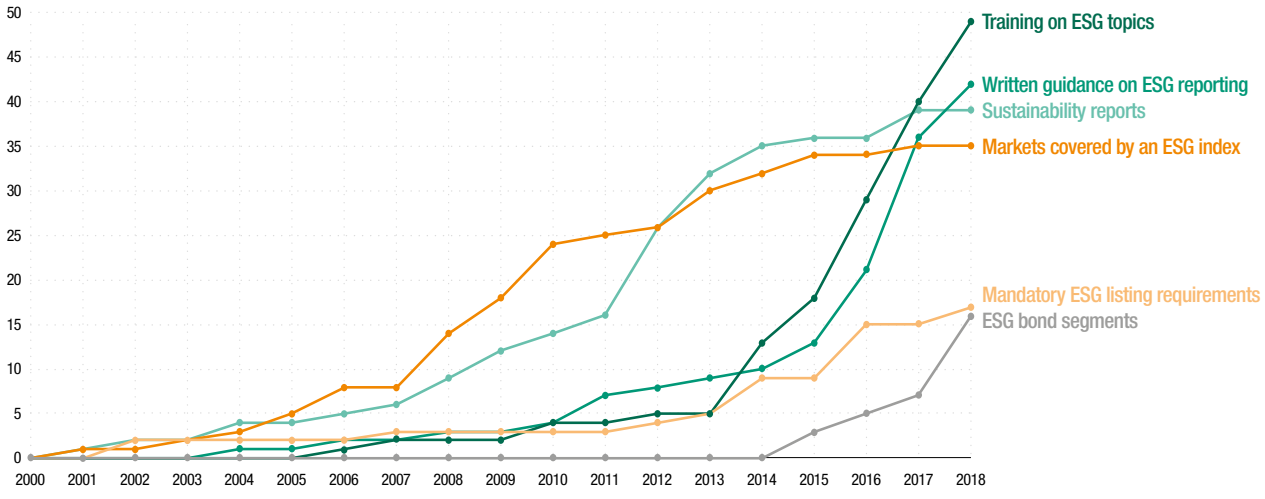
Capital markets play an important role in global investment chains. Portfolio investment is the third largest form of external finance for developing countries, and capital market practices in developed countries can influence the sustainable development practices of MNEs engaged in FDI worldwide. Key actors influencing capital markets include security market regulators, stock exchanges, issuers (listed companies), asset owners and asset managers (investors). Stock exchanges sit at the centre of this web of actors, and as such the sustainability practices of stock exchanges can be a useful benchmark for monitoring trends in sustainable finance.

1. Stock exchanges' sustainability trends

The United Nations Sustainable Stock Exchanges (SSE) database tracks the global universe of stock exchanges. It contains data on 95 stock exchanges worldwide, including all of the world's major exchanges, as well as a large number of smaller national exchanges in developing countries. These exchanges collectively list over 52,000 companies, with a market capitalization of close to $90 trillion. The database focuses specifically on the sustainability activities at stock exchanges – those related to environmental, social and governance (ESG) factors – which have increased exponentially since the beginning of the century (figure III.13).

The number of exchanges with written guidance on ESG disclosure for issuers continues to grow rapidly, from 14 exchanges in 2015 to at least 42 at the end of 2018. Likewise, the number of stock exchanges providing training on ESG topics to issuers and/or investors continues to rise rapidly, from fewer than 10 in 2013 to nearly 50 by the end of 2018. Mandatory ESG reporting is also on the rise in recent years, supported by both exchanges

Figure III.13. Stock exchange sustainability mechanisms offered (Number of exchanges)



Source: UNCTAD, SSE initiative database.

Box III.6. WFE Principles for Sustainable Exchanges

In 2018, the World Federation of Exchanges (WFE), the main industry association for stock exchanges worldwide, launched its "Principles for Sustainable Exchanges". These principles mark a major milestone in the evolution of WFE members' engagement with sustainability. With the launch, WFE member exchanges formally recognized their role in contributing to the achievement of the United Nations Sustainable Development Goals and explicitly acknowledged their role in fostering and promoting the development of a sustainable financial system, making finance flows consistent with a pathway towards low greenhouse gas emissions and climate-resilient development, and promoting the transition towards an inclusive and sustainable economy. The five principles:

Principle 1: Exchanges will work to educate participants in the exchange ecosystem about the importance of sustainability issues.

Principle 2: Exchanges will promote the enhanced availability of investor-relevant, decision-useful ESG information.

Principle 3: Exchanges will actively engage with stakeholders to advance the sustainable finance agenda.

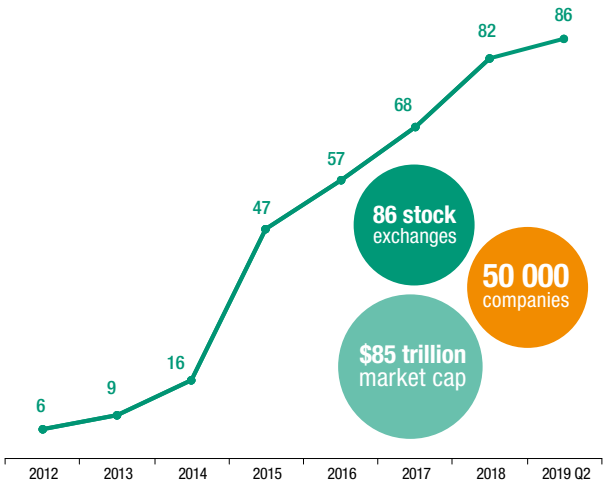
Principle 4: Exchanges will provide markets and products that support the scaling-up of sustainable finance and reorientation of financial flows.

Principle 5: Exchanges will establish effective internal governance and operational processes and policies to support their sustainability efforts.

Source: World Federation of Exchanges.

and security market regulators. Collectively these trend lines show a sharp uptake in sustainability activities among the world's stock exchanges. This overall upward trend is expected to continue as public policies to promote sustainable development continue to strengthen in a number of jurisdictions and more stock exchanges recognize the important role that they can play in promoting investment in sustainable development (box III.6).

Figure III.14. SSE initiative members, 2012–2019 Q2 (Number of stock exchanges)



Source: UNCTAD, SSE initiative database.

a. Sustainable Stock Exchanges initiative

Since its launch in 2009, the United Nations SSE initiative has grown to include over 90 per cent of stock exchanges tracked in the SSE database: as of Q2 2019 the initiative included 86 exchanges, listing 50,000 companies with a combined market capitalization of over $85 trillion, and it is still growing.[11] The SSE counts most of the world's stock exchanges as members, including all 10 of the largest exchanges in the world as well as many small and medium-sized exchanges from developing countries. The growth of this UN partnership programme, now in its tenth year, illustrates that participating in a conversation on ESG factors has become a necessary part of the investor-exchange-issuer dialogue. The SSE has emerged as the premier platform for collaboration and learning for stock exchanges together with capital market regulators, investors, issuers and financial service providers to meet global sustainability goals. In the context of economic and technology transitions, social pressures, climate change and regulatory intervention, the SSE supports exchanges in fully integrating sustainability across service lines, in turn supporting policymakers, investors and companies in achieving their sustainability objectives.

Since 2012, when the five founding SSE partner exchanges signed a commitment to promote sustainable and transparent capital markets, the number of stock exchanges committing to sustainability has grown rapidly (figure III.14).

b. ESG training activities

Stock exchanges are increasingly playing an important capacity-building role in helping issuers and investors to better understand new ESG standards, products, services and practices. This can be done through promotional activities such as bell-ringing ceremonies or communication campaigns, or through training activities including seminars, online courses and workshops. These activities include the development of printed educational materials, workshops, larger conferences and mentorship programmes.

In addition, some exchanges are adding training to listing requirements. For example, Oslo Børs has made ESG training mandatory for board members of listed companies as well as for management and board members of companies that have applied to list on the exchange. The exchange provides this training, as well as continuing education courses, for listed company management and advisors.

By the end of 2018, at least 48 stock exchanges were providing ESG training to their listed companies, investors or other relevant stakeholders: 18 in Europe, 17 in Asia, eight in Latin America and the Caribbean, four in Africa and one in North America. Figure III.14 illustrates the sharp increase in training activities provided by stock exchanges from 2014 onwards. One of the first programmes was launched in 2010, when Brazil's B3 (formerly BM&F Bovespa) stock exchange launched a partnership with the World Bank to organize seminars and other education activities to increase the participation of public and private sector actors in the carbon market. In 2014, the number of exchanges providing training on sustainability nearly tripled, from five to 13 and, over the following four years, it increased nearly four-fold. Some stock exchanges have organized one-time specially designated events or ESG-related sessions as a component of broader training programmes. Other exchanges stand out through their consistent and well-coordinated strategies for training and raising awareness among market participants about sustainable development.

Common topics addressed by stock exchanges' sustainability training programmes include training issuers on ESG reporting and criteria for inclusion in ESG-themed indexes, training investors on sustainability-themed financial products and training issuers on gender equality in boardrooms and in the workplace more generally.

2. Securities regulators and sustainability

a. Increasing involvement of securities regulators

As noted in figure III.14, the use of mandatory ESG disclosure for listed companies is increasing, with the number of stock exchanges with such rules having more than tripled between 2013 and 2018. In some cases, these rules originate from stock exchanges with devolved regulatory authority, but in most instances, they emanate from securities market regulators that are sharpening their focus on sustainability issues.

In October 2018, the Secretary-General of the International Organization of Securities Commissions (IOSCO) announced the creation of the IOSCO Sustainable Finance Network, which provides a platform for IOSCO's members to share their experiences and discuss sustainability-related issues. The network was formed at the initiative of the Swedish Capital Market Authority Finansinspektionen, whose Director General will chair the network.

In January 2019, IOSCO released a statement on disclosure of ESG matters by issuers.[12] The statement sets out the importance performance for issuers of considering the inclusion of ESG issues when disclosing information that is material to investors' decisions. IOSCO

emphasized that ESG matters, "though sometimes characterized as non-financial, may have a material short-term and long-term impact on the business operations of the issuers as well as on risks and returns for investors and their investment and voting decisions."[13] IOSCO announced at the time that it is monitoring developments in this area closely, given the growing importance of ESG matters to investors and the continuing need to enhance transparency in the capital markets. IOSCO indicated that this statement aimed to remind issuers of their obligations to consider the disclosure (voluntary or otherwise) of the potential impact on their businesses of ESG-related risks and opportunities when these are material.

Also in early 2019, IOSCO's Growth and Emerging Markets Committee released for public comment a draft report entitled "Sustainable Finance in Emerging Markets and the Role of Securities Regulators". This report recognizes the trend over the past several years whereby market participants, regulators and policymakers have increased their focus on issues concerning sustainable finance. The Committee finds these issues particularly relevant for developing countries that seek to expand their capital markets, and it aims to assist emerging-markets regulators in better understanding the issues and challenges that affect the development of sustainable finance (box III.7). The draft report contains a proposed set of 11 recommendations regarding sustainability-themed products and ESG disclosure requirements. Although the recommendations are nonbinding, the Committee encourages its members to consider the extent to which the guidance should be implemented in the context of their legal and regulatory frameworks, given the significance of the associated risk and opportunities.

b. How securities regulators can promote the SDGs

The sustainability objectives identified in the SDGs, as well as policy responses to these issues, can create financially material risks and opportunities for investors and may affect the resilience of the financial system as a whole. These impacts and consequences are of direct relevance to securities regulators' three overarching and interrelated objectives: to protect investors; to ensure that markets are fair, efficient and transparent; and to reduce systemic risk. Consequently, a number of securities regulators around the world have begun to act on sustainability-related risks and opportunities.

Box III.7. Importance of ESG performance for attracting portfolio investment to emerging markets

Two new reports by the WFE found a strong, positive correlation between foreign portfolio investment inflows and markets that adopted a range of widely accepted corporate governance practices.[a]

The qualitative elements of the studies revealed differences in how investors approach corporate governance and ESG performance more generally. Some investors indicated that they would not invest in firms that exhibited poor corporate governance practices or "failures" on environmental or social measures. Others said they used corporate governance to assess how well the firm was likely to manage risks and opportunities, including those arising from environmental and social factors. Some investors used their assessment of the firm's ESG performance in determining a suitable discount rate for the valuation of the firm.

Several investors interviewed for the WFE studies (particularly those who did not adopt an exclusionary approach but looked for best-in-class performers) said they would engage with firms on their ESG performance, both prior to investing and throughout the period of the investment. These themes were repeated during a 2019 meeting of the WFE's Emerging Markets Working Group, with participants stressing the importance of good-quality data and reporting on ESG topics.

These findings provide support for emerging-market exchanges, many of which have implemented measures to improve the quality of corporate governance among their listed issuers, increase awareness of the relevance of environmental and social issues for corporate performance, and enhance the quality of ESG disclosure.

Source: World Federation of Exchanges.

[a] WFE (2018), "What Attracts International Investors to Emerging Markets"; WFE (2019), "Investing in Emerging and Frontier Markets: an Investor Viewpoint".

Working with such regulators, the SSE initiative published in 2018 the report "How Securities Regulators Can Support the SDGs", which includes a compilation of 35 examples from jurisdictions around the world. The report identifies five main action areas along with concrete steps by which securities regulators can contribute to a more stable and resilient financial system that better supports the SDGs (table III.7).

3. Sustainability-themed indexes, segments and products

Capital market participants have been promoting sustainable companies and projects through products such as indexes and ratings, as well as helping to channel funds towards these companies and projects through listing thematic products such as exchange-traded funds and bonds by supporting the development of these products or services, stock exchanges are helping investors better align their investment practices with sustainability considerations, while rewarding companies that demonstrate strong sustainability performance.

Table III.7. SSE action plan for securities regulators

Main action area		Concrete steps
Facilitate Investment	**1.1**	Convening and supporting dialogue and projects to develop innovative financing solutions (e.g. green securities, green bonds, social bonds) for SDGs
	1.2	Developing guidance and case studies on how to access the investment opportunities presented by the SDGs
	1.3	Identifying the role of different market participants in contributing to sustainable finance
	1.4	Developing, supporting or incentivizing labelling processes or framework for fund, index and sustainable investment product certification
Strengthen corporate sustainability-related disclosures	**2.1**	Supporting the development of voluntary reporting guidelines
	2.2	Integrating sustainability reporting guidance into listing requirements that define who should report, what should be reported and how reporting should be practiced
	2.3	Working with counterparts in other jurisdictions, and with relevant international organizations such as IOSCO, to encourage internationally consistent and comparable disclosures of financially material sustainability-related information
Clarify investor duties on sustainability	**3.1**	Clarifying that institutional investors and asset managers should understand and take account of the views and interests of their clients and beneficiaries
	3.2	Introducing/strengthening stewardship and corporate governance codes
	3.3	Encouraging institutional investors to report on how they are exercizing their stewardship responsibilities, delivering on their ESG responsibilities to beneficiaries and contributing to the delivery of the SDGs
	3.4	Supporting efforts at the international level to harmonize policy instruments on the integration of sustainability issues by institutional investors and asset managers regarding investment decision-making, corporate engagement and investor disclosure
Strengthen corporate governance to support sustainability	**4.1**	Integrating sustainability factors into corporate governance codes
	4.2	Encouraging boards of directors to produce formal statements that set out their duties as stewards of the company and that commit them to long-term decision-making and to acting in ways that promote the long-term interests of the company
	4.3	Enabling investors to engage effectively with companies on sustainability and SDG issues, by allowing them to raise and discuss these issues with boards through established corporate governance processes and by ensuring that the formal rights granted to investors function effectively
Build market capacity and expertise on sustainability	**5.1**	Analysing the specific capacity, expertise and information gaps in the market related to sustainability, and providing capacity-building sessions for issuers, investors and other market participants based on these gaps
	5.2	Supporting the development of professional qualifications to require a recognized level of sustainability training and knowledge
	5.3	Supporting the formation of peer-to-peer learning platforms for sharing of best practices related to the SDGs and highlighting examples and case studies of successful SDG-related investments
	5.4	Building capacity to assess and monitor the potential for sustainability issues to lead to corporate failure and to impact the stability and resilience of the financial system

Source: SSE (2018). How securities regulators can support the SDGs.

a. Sustainability equity indexes

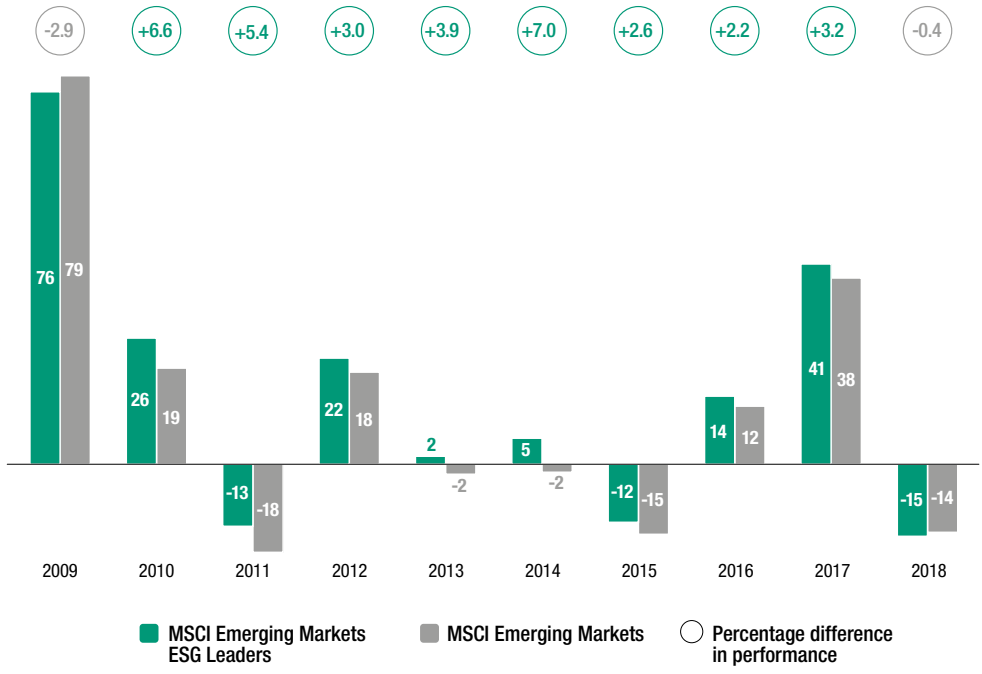
Sustainability indexes, whether created by an exchange itself or by a third party, track the performance of companies listed on the exchange selected using ESG metrics or sustainability themes. Such metrics and themes include greenhouse gas emissions, renewable energy, human rights, water management and gender equality.

As of Q2 2019, sustainability indexes (covering either social or environmental factors or ESG themes) covered companies on 35 stock exchanges across five continents: 12 each in Asia and Europe, eight in the Americas and three in Africa. These indexes are typically created by investment services firms such as Dow Jones, FTSE Russell, MSCI, Standard & Poor's, Stoxx and Thomson Reuters. They are often licensed to large asset managers that create specific products, such as exchange-traded funds, that are used by both institutional and retail investors. ESG indexes can help asset managers who seek to incorporate material sustainability factors into their asset allocation strategies. ESG indexes are also encouraging greater voluntary transparency among listed companies.

A growing number of investors believe that ESG factors will increasingly affect investment performance, especially over the longer term. This belief is supported by data coming in from ESG index providers. For example, the MSCI emerging-markets "ESG Leaders" index has outperformed its conventional benchmark in eight of the past 10 years (figure III.15).

Environmental issues, and climate-related issues in particular, are increasingly seen as material risk factors by portfolio investors. Large asset owners and asset managers are especially concerned about the medium- to long-term viability of fossil fuel companies faced with the risk of a possibly permanent oil price decline. Climate change concerns have exposed the way fossil fuel companies are valued by capital markets, which is to assume that a company's value could be determined in large part by its proven reserves (e.g. number of barrels of oil still underground). If however, the fuel reserves cannot be burned

Figure III.15. **ESG index versus conventional index, 2009–2018**
Calendar-year returns and relative performance (Per cent)



Source: MSCI.

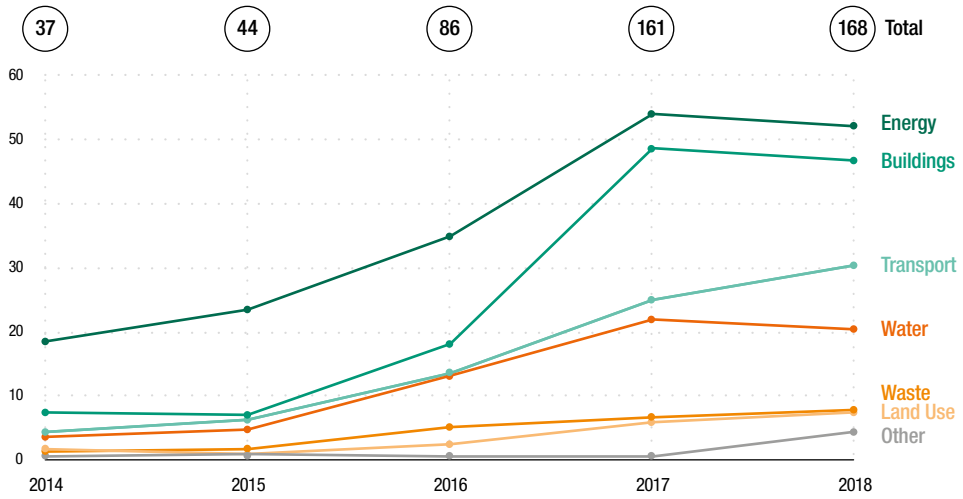
due to new public policies aimed at reducing CO_2 emissions, then these reserves cease to have value and become "stranded assets". Awareness of this valuation flaw is leding to new patterns in risk analysis and asset allocation, including divestment from companies holding fossil fuel reserves. For example, in early 2019, Norway's Government Pension Fund Global – the world's largest sovereign wealth fund, with approximately $1 trillion in assets under management – announced a plan to divest $7.5 billion from oil and gas companies that are focused purely on exploration and production. As global efforts to combat climate change increase, in line with the outcomes of the UN Paris Agreement and the SDGs, more investors are considering divesting from the fossil fuel industry and civil society activism is further encouraging this trend. This investment trend has given rise to "fossil-free" equity indexes, and the out performance of these indexes over their conventional benchmarks further has strengthened investor confidence in the materiality of sustainability issues. For both all-world and emerging market indexes, the fossil-fuel-free versions have outperformed their conventional benchmarks in seven of the past 10 years.

b. Sustainability bonds

Sustainability bonds have seen significant growth in recent years, particularly green bonds aimed at funding climate mitigation, adaptation and resilience projects (figure III.16). The industries receiving the largest investment through green bonds are energy, buildings, transport and water: all key elements of basic infrastructure. The green bond market exceeded $168 billion in 2018 with a five-year growth rate of 466 per cent. Although green bonds remain a small portion of the global debt market, they continue to attract interest from issuers.

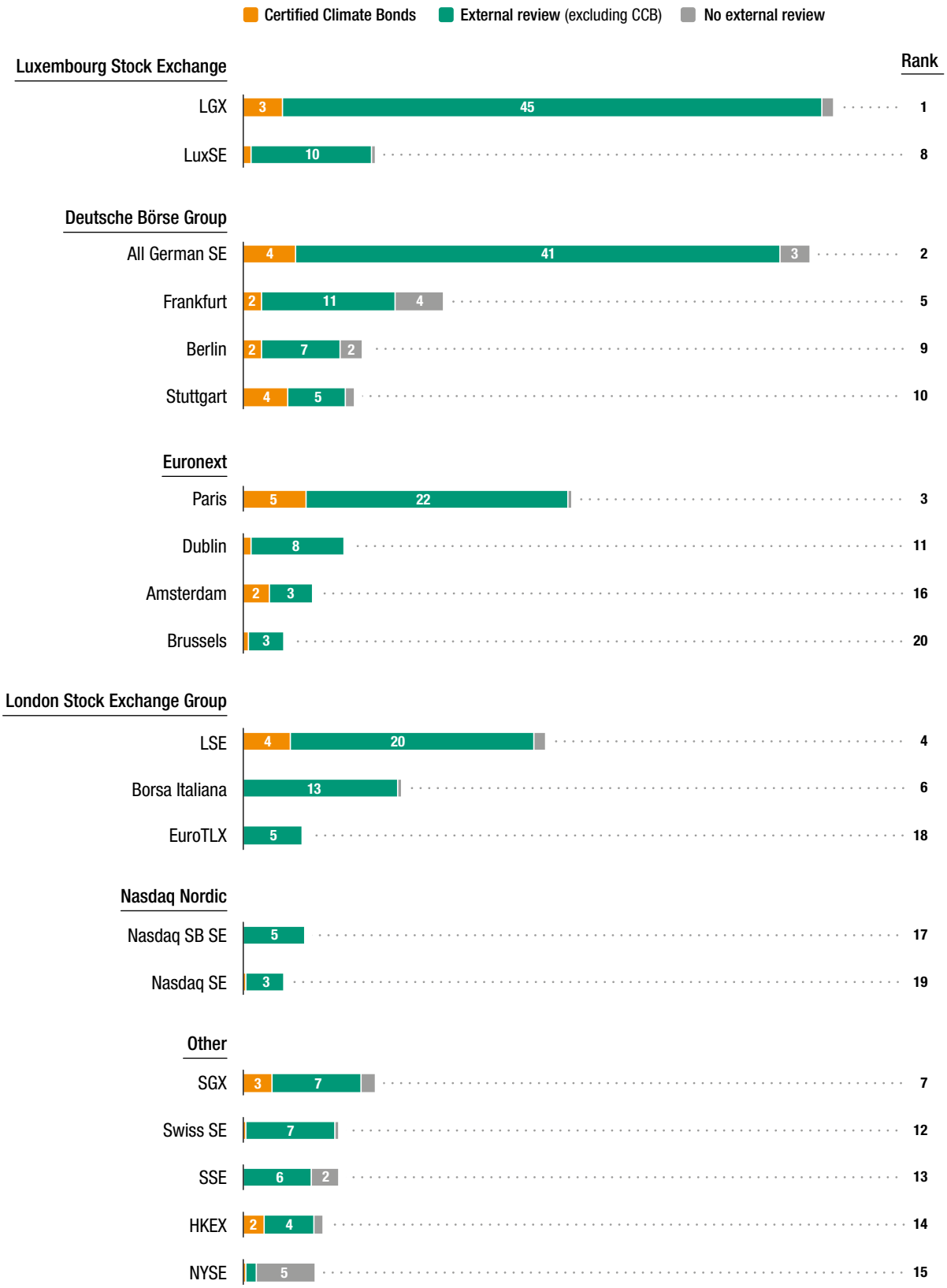
Stock exchanges have been active in building markets for tradable green bonds (figure III.17). European exchanges in particular have taken a lead, with the Luxembourg Green Exchange currently the largest single platform for trading green bonds, followed closely by exchanges in Germany, France and the United Kingdom. Three of the 20 largest exchanges for green bonds are in Asia, with two in China and one in Singapore.

Figure III.16. **Green bond market size and industries financed, 2014–2018**
(Billions of dollars)



Source: Climate Bonds Initiative.

Figure III.17. Top 20 exchanges for green bonds, 2014–2018 (Billions of dollars)



Source: Climate Bonds Initiative.

c. Real estate

Another asset class in which investors are integrating ESG factors is real estate. Worldwide approximately $57 trillion is invested in income-producing real estate that is tradeable between investors, with an additional $3.3 trillion invested in over 2,200 listed real estate companies.[14] The real estate industry (commercial and residential property), with about 28 per cent of global emissions and 6 per cent more than the transportation industry, represents one of the largest sources of climate-related emissions.[15] Consequently, transforming efficiency of buildings and drastically reducing or eliminating their climate emissions will be a central component of public policies aimed at achieving the global emission reduction targets defined in the Paris Agreement. This presages an imminent transformation in the industry that asset managers have begun to anticipate and incorporate into their investment analysis and portfolio allocations. FTSE Russell warns investors that "as policymakers seek ways to accelerate emission reductions, buildings with poor environmental performance face growing regulatory risks that could substantially reduce their asset value and liquidity."[16] A number of national, regional and municipal rules have already been introduced (e.g. in the United Kingdom, the Netherlands, and Singapore, as well as in California and in New York City), mandating a range of schemes that all aim at drastically reducing emissions in the sector over the next decade.

4. Conclusions

ESG factors continue to be increasingly integrated into capital market activities and instruments: in the operations of exchanges, investors and issuers; in the oversight functions of securities regulators; and in product innovation on both the equity and the debt side. As the inclusion of ESG factors transitions from a niche practice to a mainstream practice, three key areas will need to be addressed:

- *Fully integrating sustainability throughout the entire investment chain.* This means integrating ESG issues into every stage of the investment chain from the fiduciary duty of asset owners, to the portfolio allocation and proxy-voting practices of asset managers, to the listing rules of exchanges, to the FDI practices of large listed MNEs.
- *Connecting upstream asset managers to downstream investment projects.* Promoting investment in the SDGs in particular will require more work to develop investment-ready projects on the ground in developing and least developed countries. An enormous amount of capital currently held in low-yield investments in developed countries could be unleashed to fund SDG-related investments, but doing so requires more project development work and capital market development in recipient countries.
- *Strengthening the credibility of ESG-themed financial products.* As the mainstream investment community increasingly integrates ESG factors, more work will be required on standards and assessment criteria to establish minimum standards for sustainability-themed investment products.

To address these challenges, all actors in the global investment chain will need to work together.

NOTES

[1] This section does not deal with control tools that exist for both domestic and foreign investors, such as business registration requirements and licensing requirements for specific economic activities.

[2] See also UNCTAD (2015c), Investment Policy Framework for Sustainable Development; UNCTAD, The Protection of National Security in IIAs, UNCTAD Series on International Investment Policies for Development, 2009.

[3] The total number of IIAs is being revised in an ongoing manner as a result of retroactive adjustments to UNCTAD's IIA Navigator.

[4] No ISDS is available between specific parties (five bilateral ISDS opt-outs).

[5] No ISDS is available between Canada and the United States or between Canada and Mexico; the treaty's ISDS provisions apply only to the Mexico–United States relationship.

[6] ACP negotiating mandate: http://www.acp.int/sites/acpsec.waw.be/files/acpdoc/public-documents/ACP0001118_%20ACP_Negotiating_Mandate_EN.pdf. EU negotiating directive: http://data.consilium.europa.eu/doc/document/ST-8094-2018-ADD-1/en/pdf.

[7] The concluded agreements include the ones with the CARIFORUM States, Chile, the ESA States, Faroe Islands, Iceland and Norway, Israel, Liechtenstein, the Pacific States, the State of Palestine, and Switzerland.

[8] The pact with the CARIFORUM States contains a chapter on commercial presence (not confined to services sectors), while the agreement with the ESA States includes provisions on investment-related cooperation, including in specific areas such as industrial development, small and medium-sized enterprises, mining and tourism.

[9] The Guiding Principles were submitted to OIC Member States for comments and formal endorsement following the meeting.

[10] The two IIAs with ISDS opt-outs between specific parties are the CPTPP (five bilateral ISDS opt-outs) and the USMCA (ISDS opt-out for Canada–Mexico and for Canada–United States).

[11] The SSE is administered by UNCTAD, the UN Global Compact, UN Environment and the PRI. For more information, visit www.SSEinitiative.org.

[12] IOSCO (2019), "Statement on Disclosure of ESG Matters by Issuers".

[13] IOSCO (2019), "Statement on Disclosure of ESG Matters by Issuers".

[14] FTSE Russell (2018), "Building Blocks for the Low Carbon Economy: Managing Climate Risk in Real Estate Investing".

[15] UNEP (2017), "Towards a Zero-Emission, Efficient and Resilient Buildings and Construction Sector".

[16] FTSE Russell (2018), "Building Blocks for the Low Carbon Economy: Managing Climate Risk in Real Estate Investing".