RECENT POLICY DEVELOPMENTS

CHAPTER III

Mobilizing investment to ensure that it contributes to sustainable development and inclusive growth is becoming a priority for all countries. Consequently, investment policymaking is in a transition phase.

Investment policy developments in 2012 show that countries are eager to attract foreign investment but that they have also become more selective. Countries specifically target those investments that generate jobs, deliver concrete contributions to alleviate poverty (e.g. investment in the poor, with the poor and for the poor), or help tackle environmental challenges (*WIR10*). Or they regulate investment with a view to maximizing positive and minimizing negative effects, guided by the recognition that liberalization needs to be accompanied – if not preceded – by a solid regulatory framework. Increasing emphasis on responsible investment and corporate social responsibility (CSR) reinforces the inclination of a new generation of investment policies to place sustainable development and inclusive growth at the heart of efforts to attract and benefit from such investment (*WIR12*). Yet, increasing State intervention also poses a risk that countries will resort to investment protectionism, in tackling economic crises and addressing other challenges.

Civil society and other stakeholders are taking an increasingly active part in the development of investment policies. This is particularly so for international investment policies, where the negotiation of international investment agreements (IIAs) and the growing number of investment arbitrations have gained the attention of parliaments and civil society. Similarly, foreign investors and business are adjusting their business models, emphasizing the contribution that their role as responsible investors entails (*WIR10*).

A. NATIONAL INVESTMENT POLICIES

1. Overall trends

Most countries are keen to attract and facilitate FDI but have become more selective and continue to reinforce their regulatory frameworks.

In 2012, according to UNCTAD's count, at least 53 countries and economies around the globe adopted 86 policy measures affecting foreign investment – an increase in measures of almost 30 per cent compared with the previous year (table III.1). Of these measures, 61 related to investment liberalization, promotion and facilitation to create a more favourable environment for foreign investment, while 20 introduced new restrictions or regulations.

As in previous years, most governments in 2012 were keen to attract and facilitate foreign investment. At the same time, numerous countries reinforced the regulatory environment for foreign investment. The share of new investment regulations and restrictions increased from 22 per cent in 2011 to 25 per cent in 2012, reaffirming a long-term trend after a temporary reverse in 2011 (figure III.1). In the first four months of 2013, this percentage rose to

Table III.1. Changes in national investment policies, 2000–2012
(Number of measures)

Item	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010	2011	2012
Number of countries that introduced changes	45	51	43	59	80	77	74	49	41	45	57	44	53
Number of regulatory changes	**81**	**97**	**94**	**126**	**166**	**145**	**132**	**80**	**69**	**89**	**112**	**67**	**86**
Liberalization/promotion	75	85	79	114	144	119	107	59	51	61	75	52	61
Restriction/regulation	5	2	12	12	20	25	25	19	16	24	36	15	20
Neutral/indeterminate[a]	1	10	3	0	2	1	0	2	2	4	1	0	5

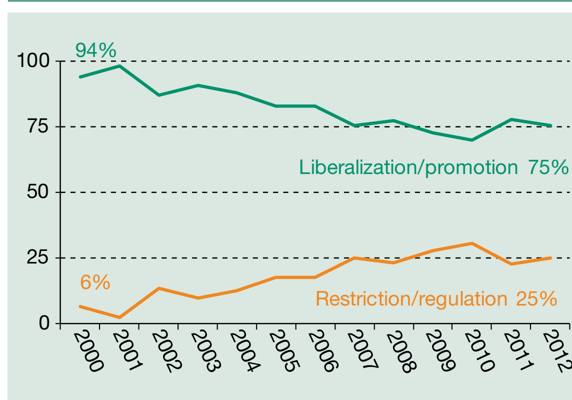
Source: UNCTAD, Investment Policy Monitor database.
[a] In some cases, the expected impact of the policy measure on the investment is undetermined.

38 per cent. The largest share of new restrictions or regulations appeared in developed countries (31 per cent), followed by developing countries (23 per cent) and transition economies (10 per cent). Although relatively small in quantity, investment restrictions and regulations particularly affected strategic industries (see section III.A.2.b).

In light of the persistent economic crisis, countries worldwide pursued FDI *liberalization policies.* These policies covered a broad range of industries, with a particular focus on services (box III.1). Privatization policies, for instance in air transportation and power generation, were an important component of this move.

Numerous countries adopted *investment promotion and facilitation* measures (box III.2). At least 16 countries introduced new investment incentive programs. Others – such as Armenia, Belarus, the Cayman Islands, Pakistan and Uzbekistan – established special economic zones (SEZs), introduced one-stop shops to attract and facilitate foreign investors (e.g. in Costa Rica and Ukraine), or supported outward investments. Several countries reduced corporate taxation rates.

Figure III.1. Changes in national investment policies, 2000–2012
(Per cent)



Source: UNCTAD, Investment Policy Monitor database.

The dominant trend of liberalizing and promoting investment contrasts with the move in several countries towards fostering a regulatory framework for investments in general (box III.3) and FDI more specifically (box III.4).

Box III.1. Examples of investment liberalization and privatization measures, 2012–2013

China raised the ownership ceiling for foreign investors in joint-venture securities firms to 49 per cent from 33 per cent.[a]

India took liberalization measures in several industries, including single- and multi-brand retail trading, power exchanges, broadcasting, civil aviation, foreign-owned non-banking financial companies, as well as in FDI to and from Pakistan.[b] It also raised the foreign ownership ceiling for FDI in asset reconstruction companies from 49 per cent to 74 per cent, subject to certain conditions.[c]

The Emirate of Dubai in the *United Arab Emirates* issued a regulation (Regulation No. 2 of 2012) expanding the area where non-UAE nationals may own real estate. According to this regulation, non-citizens are allowed to acquire a usufruct right (life interest) to property for a period not exceeding 85 years.[d]

Myanmar launched a new foreign investment law allowing 100 per cent foreign capital in businesses given permission by the Investment Commission.[e]

Portugal sold 100 per cent of the shares of ANA-Aeroportos de Portugal – the State-owned company managing Portuguese airports – to the French group Vinci Concessions SAS.[f]

Ukraine adopted a resolution to privatize six regional power companies.[g]

Source: UNCTAD, Investment Policy Monitor database. Additional examples of investment-related policy measures can be found in UNCTAD's *Investment Policy Monitors* published in 2012 and 2013.
Note: Notes appear at the end of this chapter.

Box III.2. Examples of investment promotion and facilitation measures, 2012–2013

China simplified review procedures related to capital flows and currency exchange quotas for foreign enterprises. They only need to register the relevant data with the relevant authorities; for instance, with regard to opening foreign currency accounts or reinvesting foreign exchange reserves.[a]

Costa Rica implemented a business facilitation programme that simplified the registration of companies. All formalities have been concentrated in one place and the time required to register a company has been reduced from nearly 90 days to 20 days or less.[b]

Japan adopted "Emergency Economic Measures for the Revitalization of the Japanese Economy", which, among other steps, facilitate the expansion of Japanese businesses into overseas markets.[c]

Pakistan enacted a Special Economic Zones (SEZs) Act. It allows for the establishment of SEZs anywhere in the country over a minimum area of 50 acres and offers several tax incentives to domestic and foreign investors in such zones.[d]

The Sudan ratified the Investment Act 2013, which offers tax and customs privileges in strategic industries. It also provides for the establishment of special courts to deal with investment-related issues and disputes, and offers guarantees to investors in cases of nationalization or confiscation.[e]

Source: UNCTAD, Investment Policy Monitor database. Additional examples of investment-related policy measures can be found in UNCTAD's *Investment Policy Monitors* published in 2012 and 2013.
Note: Notes appear at the end of this chapter.

Box III.3. Examples of new regulations for domestic and foreign investment, 2012–2013

Argentina established a committee to supervise investments by insurance and reinsurance companies. The measure is part of a Strategic National Insurance Plan, requiring that insurance companies use part of their invested funds for investment in the real economy.[a]

Indonesia introduced new regulations limiting private bank ownership. They restrict, in principle, ownership in new acquisitions of private banks by financial institutions to 40 per cent, by non-financial institutions to 30 per cent and by individual shareholders in conventional banks to 20 per cent.[b]

Kazakhstan approved a law that establishes the priority right of the State to take part in any new trunk pipeline built in the country, with at least a 51 per cent share.[c]

The Philippines released an executive order putting new mining contracts on hold until new legislation that modifies existing revenue-sharing schemes and mechanisms has taken effect. To ensure compliance with environmental standards, the order also requires a review of the performance of existing mining operations.[d]

Source: UNCTAD, Investment Policy Monitor database. Additional examples of investment-related policy measures can be found in UNCTAD's *Investment Policy Monitors* published in 2012 and 2013.
Note: Notes appear at the end of this chapter.

2. Iindustry-specific investment policies

FDI liberalization and promotion policies predominate in the services industries, while restrictive policies apply particularly in strategic industries.

Most of the investment policy measures undertaken in 2012 related to specific sectors or industries (table III.2). Almost all cross-industry measures were liberalizing and almost all restrictive measures were industry-specific.

a. Services sector

One focus of investment policies was the services sector. As in previous years, FDI liberalization and promotion policies dominated and targeted specific services, including wholesale and retail services and financial services. Between 2003 and 2012, on average approximately 68 per cent of all sector-specific liberalization and promotion policies have related to the service sector. In 2012, this development was most apparent in India, which relaxed FDI regulations in several industries (see box III.1).

Box III.4. Examples of specific FDI regulations and restrictions, 2012–2013

Benin prohibited land ownership by foreign entities, although they are still allowed to enter into long-term leases.[a]

The *Plurinational State of Bolivia* issued a decree that provided for the transfer to the State-owned Empresa Nacional de Electricidad (ENDE) of all the shares of the electricity distribution companies of La Paz (Electropaz) and Light and Power Corporation of Oruro (ELFEO SA), as well as all the shares of the management and investment service companies Business Bolivia SA (Cadeb) and Corporation Service Company (Edeser), all of which were held by Iberbolivia Investment Corporation, belonging to Iberdrola of Spain.[b] It also nationalized Bolivian Airport Services (SABSA), a subsidiary of the Spanish firms Abertis and Aena, which operated the Bolivian airports of El Alto, Cochabamba and Santa Cruz.[c]

The Government of *Canada* has clarified how it applies the Investment Canada Act to investments by foreign State-owned enterprises (SOE). In particular, it announced that it will find the acquisition of control of a Canadian oil-sands business by a foreign SOE to be of net benefit to Canada on an exceptional basis only.[d]

Hungary amended its Constitution to ensure that only citizens can purchase domestic farmland.[e]

Italy established a review mechanism for transactions involving assets of companies operating in the defence or national security sectors, as well as in strategic activities in the energy, transport and communications sectors.[f]

Source: UNCTAD, Investment Policy Monitor database. Additional examples of investment-related policy measures can be found in UNCTAD's *Investment Policy Monitors* published in 2012 and 2013.
Note: Notes appear at the end of this chapter.

b. Strategic industries

Restrictive policies vis-à-vis foreign investors were applied particularly in strategic industries, with a special focus on extractive industries. Almost 40 per cent of all industry-specific regulations and restrictions between 2000 and 2012 were targeted to extractive industries (figure III.2). Other industries frequently exposed to investment-related regulations or restrictions because of their political or economic sensitivity include, for instance, electricity, gas and water supply, and financial services. In addition, all these industries may be subject to non-industry-specific measures, such as limitations on land ownership. The real share of regulatory or restrictive measures that affect strategic or otherwise sensitive industries may therefore be higher (see also section A.3).

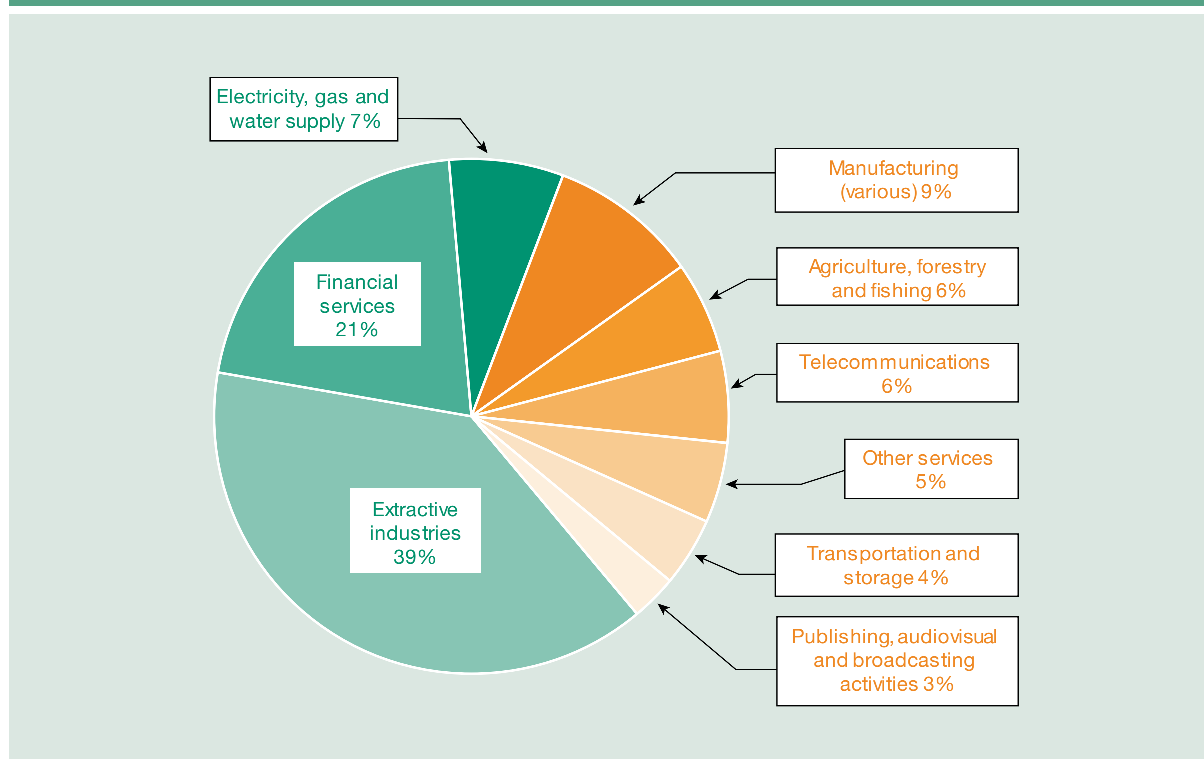
Table III.2. Changes in national investment policies, 2012

Sector/industry	More favourable (%)	Less favourable (%)	Neutral/ indeter-minate (%)	Total number of measures
Total	**74**	**22**	**4**	**120**
Cross-industry	82	8	10	40
Agribusiness	60	40	0	5
Extractive industries	54	46	0	13
Manufacturing	87	13	0	16
Services (total)	70	28	2	46
Electricity, gas and water	50	50	0	10
Transport, storage and communications	85	15	0	13
Financial services	59	33	8	12
Other services	82	18	0	11

Source: UNCTAD, Investment Policy Monitor database.
Note: Because some of the measures can be classified under more than one type, overall totals differ from table III.1.

Reasons for FDI regulations in strategic industries are manifold. First, the role of FDI policies in *industrial policies* has changed. In the past, restrictive FDI policies have been applied particularly with a view to promote infant industries or for sociocultural reasons (e.g. land ownership restrictions). This relatively narrow scope has given way to a broader approach, extending nowadays to the protection of national champions, strategic enterprises and critical infrastructure.[1] Second, several countries have tightened their *national security* or *economic benefit* screening procedures for FDI, partially as a reaction to increased investment from State enterprises and sovereign wealth funds and increased FDI in natural resources (both in extractive industries and in agriculture). Third, the

Figure III.2. Share of industries affected by restritive or regulatory measures, 2000–2012



Source: UNCTAD, Investment Policy Monitor database.

recent *economic and financial crises* may have made governments more responsive to lobbying from industry and civil society to protect the national economy from foreign competition.

3. Screening of cross-border M&As

A considerable number of cross-border M&As have been withdrawn for regulatory or political reasons, in particular during the financial crisis.

Recent years have witnessed an expansion of the role of domestic screening and monitoring mechanisms for inward FDI. While countries remain eager to attract FDI, several have become more selective in their admission procedures. An important case in point: recent policy developments with regard to cross-border M&As.

M&As can bring significant benefits to host countries in terms of transfers of capital, technology and know-how and, especially, increased potential for follow-up investments and business expansions. But M&As can also bring costs, such as a potential downgrading of local capabilities, a weakening of competition or a reduction in employment.[2] FDI policies play an important role in maximizing the benefits and minimizing the costs of cross-border M&As; for instance, through sectoral reservations, ownership regulations, size criteria, competition screening and incentives.[3]

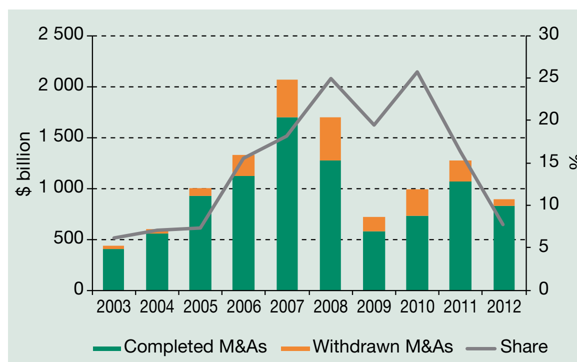
Over the past 10 years, more than 2,000 announced cross-border M&As were withdrawn. These deals represent a total gross value of $1.8 trillion, or on average almost 15 per cent of the total value of cross-border M&As per year (figure III.3).[4] The share of both the number and the value of the withdrawn deals peaked during the financial crisis.

This report analysed 211 of the largest withdrawn cross-border M&As – those with a transaction value of $500 million or more – in the period between 2008 and 2012. Within this group, announced M&As were withdrawn for a variety of reasons (figure III.4).

In most cases, plans were aborted for business considerations; for instance, because the parties could not agree on the financial conditions of the deal or because a third party outbid the potential acquirer (rival bid). Some deals were cancelled because of changes in the general economic conditions (especially in the aftermath of the financial crisis), because of legal disputes related to the planned takeover or because of difficulties in financing the acquisition.

M&As were also withdrawn because of regulatory reasons or political opposition (figure III.4). In some cases, companies did not wait for an official government decision but withdrew their bid upon receiving indications that it would not obtain approval, either for technical reasons or because of perceived general political opposition (e.g. the announced BHP Billiton–Potash Corporation M&A). Sometimes, proposed deals have been revised and then resubmitted to eventually pass the approval procedures in a subsequent round (e.g. the CNOOC–Nexen M&A). In some cases, government interventions may be influenced by a combination of regulatory and political motivations, making it difficult to assess the true motivations for the withdrawal of a deal.[5]

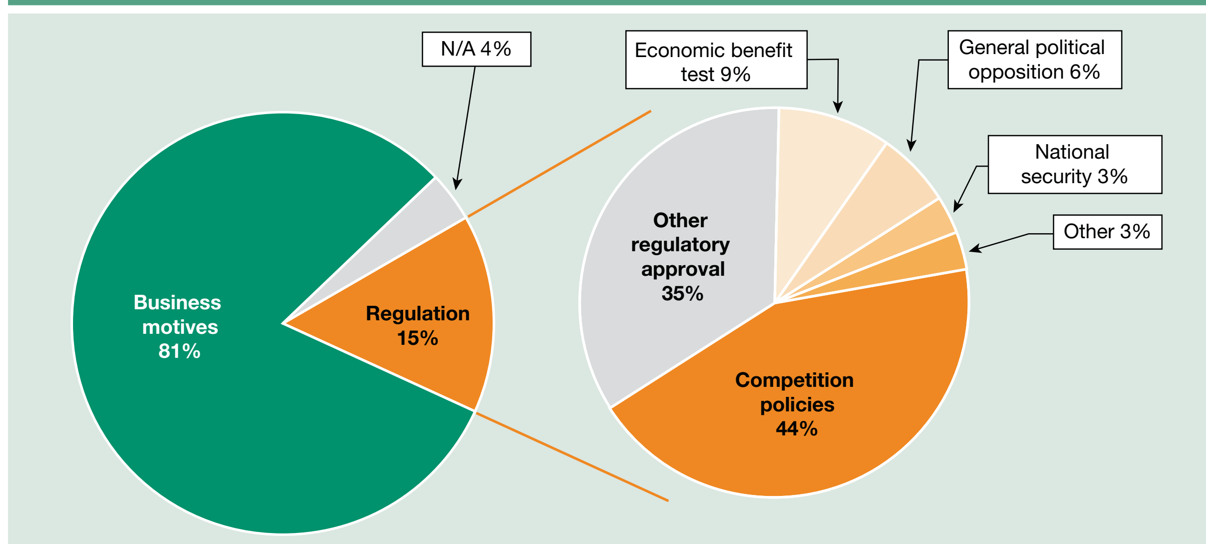
Figure III.3. Gross value of completed and withdrawn cross-border M&As and share of withdrawn M&As, 2003–2012



Source: UNCTAD, based on information from Thomson Reuters database on M&As.

Between 2008 and 2012, M&As withdrawn for regulatory reasons or political opposition had an approximate total gross value of $265 billion (figure III.5).[6] Their share among all withdrawn cross-border M&As stood at about 22 per cent in 2012, with a peak of over 30 per cent in 2010, showing the impact of the financial crisis on governments' regulatory and political stance on cross-border takeovers. Even though the value of withdrawn

Figure III.4. Reasons for withdrawn cross-border M&As, 2008–2012



Source: UNCTAD, based on information from Thomson Reuters database on M&As and various news sources.
Note: Based on number of deals with a value of $500 million or more. The seven separate M&A deals related to the withdrawn Chinalco–Rio Tinto deal are combined here into one.

deals dropped in 2012, their share of all withdrawn cross-border M&As remains relatively high.

The main industry from which M&As were withdrawn during this period was the extractive industry (figure III.6) (e.g. the Chinalco–SouthGobi Resources, BHP Billiton–Potash Corporation, and Chinalco–Rio Tinto M&As). Other key industries targeted include manufacturing, financial services and telecommunications (e.g. the Deutsche Boerse–NYSE Euronext, Singapore Exchange–ASX, and the MTN Group–Bharti Airtel M&As).

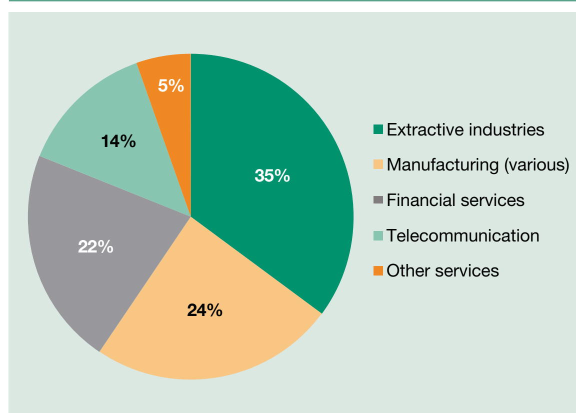
With respect to the countries of the targeted companies, Australia, the United States and Canada constitute the top three – both in number of deals withdrawn and in the value of those deals (table III.3). They are also the top three home countries of companies pursuing deals that were withdrawn because of regulatory reasons or political opposition.

Policy instruments for reviewing and rejecting M&As are manifold. Two basic categories can be distinguished – those applying to M&As irrespective of the nationality of the acquiring company and those applying only to foreign investors (table III.4). The most important example of the first category is competition policy. Competition rules may not only apply to planned M&As in the host country, but extend to M&As in third countries that affect the domestic market (e.g. the Gavilon takeover by Marubeni described in box III.5).[7] Other examples are rules that govern the transferability of shares or the issuance of "golden shares", giving the owner (often the State) voting powers disproportionate to the value of the shares, which can be used to block a hostile takeover, be it domestic or foreign.[8]

Examples of the second category include, in particular, foreign ownership ceilings and domestic screening procedures related to national security considerations, industrial policy objectives or national benefit tests. Countries may also have special screening rules for *individual types of foreign investors*, such as State-owned enterprises, or for *individual investment activities* (e.g. in critical infrastructure). Screening procedures may require a *positive contribution* from the investor to the host economy in order to get the deal approved, or they may require merely that the proposed M&A not have a *negative impact* in the host country.

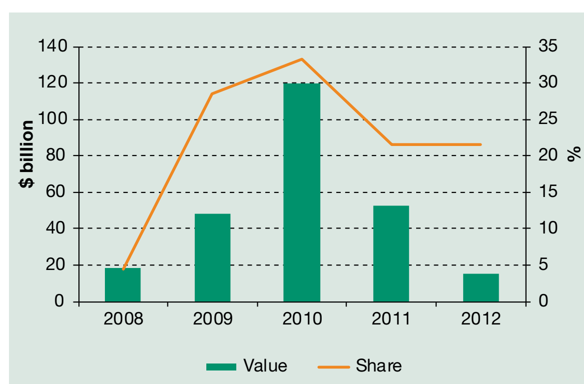
In addition to disapproving M&As, host countries may impose certain conditions before allowing them. This approach is often used in competition policies but may also play a role in other areas; for instance, in the framework of an economic benefits test (box III.5).

Figure III.6. Sectoral distribution of withdrawn cross-border M&As for regulatory reasons or political opposition, 2008–2012



Source: UNCTAD, based on information from Thomson Reuters database on M&As.
Note: Based on number of deals with a value of $500 million or more.

Figure III.5. Gross value of cross-border M&As withdrawn for regulatory reasons or political opposition and their share in the total value of withdrawn cross-border M&As, 2008–2012



Source: UNCTAD, based on information from Thomson Reuters database on M&As.
Note: Based on deals with a value of $500 million or more. In 2010 BHP Billiton withdrew its agreement to merge its Western Australian iron ore assets with the Western Australian iron ore assets of Rio Tinto to form a joint venture in a transaction valued at $58 billion.

Table III.3. Top 10 target and home countries of cross-border M&As withdrawn for regulatory reasons or political opposition, by value, 2008–2012

Rank	Target country			Home country		
	Country/economy	Total value ($ billion)	Number of deals	Country/economy	Total value ($ billion)	Number of deals
1	Australia	87.8	8	Australia	112.9	5
2	United States	54.5	7	United States	47.1	7
3	Canada	43.8	4	China	23.6	5[a]
4	Hungary	15.8	1	Austria	15.8	1
5	South Africa	11.4	1	India	11.4	1
6	India	8.8	1	Germany	10.2	1
7	United Kingdom	6.7	1	South Africa	8.8	1
8	Taiwan Province of China	5.6	3	Singapore	8.3	1
9	Hong Kong, China	4.1	3	France	6.1	1
10	Switzerland	4.0	2	Hong Kong, China	2.2	1

Source: UNCTAD, based on information from Thomson Reuters database on M&As.
Note: Based on deals with a value of $500 million or more.
[a] Combines the seven separate M&A deals related to the withdrawn Chinalco–Rio Tinto deal into one.

There are also *informal* instruments with which a government can hinder unwelcome foreign takeovers. Governments may put political pressure on potential foreign acquirers to prevent an M&A, for instance by indicating that the company will face an unfavourable domestic environment if the deal goes through, or may block an unwelcome foreign takeover by finding a "friendly" domestic buyer (a "white knight"). Another tactic is delay, for instance by establishing new or tightening existing regulatory requirements for the tender or by providing financing only to domestic bidders. Governments may also choose to support the merger of two domestic companies into a new entity that is "too big to be taken over" by foreign firms.[9] By using these informal instruments, governments enter a grey zone where it is difficult to challenge government actions in the courts.

Finally, there are recent examples of "post M&A" government policies aimed at reversing a foreign acquisition. In some cases, host governments nationalized companies after their acquisition by foreign investors; in other cases, governments purchased the foreigners' shares or introduced policies that negatively affected the operating conditions of foreign-owned companies.

Table III.4. Policy instruments affecting cross-border M&As

Applying only to foreign investors	Applying to both foreign and domestic investors
Formal	**Formal**
1. Ownership ceilings	1. Screening competition authority
2. FDI screening - National security - Economic benefit - Other screening (e.g. critical infrastructure)	2. Rules on transferability of shares (e.g. "poison pill", mandatory takeover) 3. "Golden share" options
Informal	
1. Delaying takeover procedures foreign acquisition	
2. Financial support of domestic companies	
3. Promotion of domestic mergers	
4. Political pressure	

Source: UNCTAD.

Box III.5. Examples of cross-border M&As disapproved by governments or approved only under conditions, 2008–2012

In recent years, governments reviewed a considerable number of cross-border M&As for regulatory reasons related to e.g. competition policies, economic benefit tests and national security. Some of the decisions applied to M&As that were planned in third countries, meaning that policies were applied with extraterritorial effect.

Deutsche Boerse–NYSE Euronext (2012)
Regulators in the European Union vetoed the plan by Deutsche Boerse AG and NYSE Euronext to create the world's biggest exchange, after concluding that the merger would hurt competition.[a]

Singapore Exchange–ASX (2011)
The Australian Government rejected a major foreign takeover on national interest grounds for the first time since 2001, when it blocked Royal Dutch Shell's bid for Woodside Petroleum. The Australian Treasurer said the deal would have diminished Australia's economic and regulatory sovereignty, presented material risks and supervisory issues because of ASX's dominance over clearing and settlement, and failed to boost access to capital for Australian businesses.[b]

BHP Billiton–Potash Corporation (2010)
In November 2010, the Minister of Industry rejected BHP Billiton's proposed $38.6 billion acquisition of Potash Corp. as it did not show a "net benefit" to Canada, as required under foreign investment regulations. Although BHP had 30 days to come up with a proposal that would satisfy Ottawa, the company instead chose to withdraw its takeover offer.[c]

PETRONAS–Progress (2012)
The Minister of Industry of Canada approved the acquisition of the Canadian company Progress Energy Resources Corporation by PETRONAS Carigali Canada Ltd. (owned by the national oil and gas company of Malaysia). The Ministry announced that the investment is likely to be of net benefit to Canada after PETRONAS made significant commitments in relation to its governance and commercial orientation as well as to employment and capital investments that demonstrated a long-term commitment to the development of the Canadian economy.[d]

Marubeni–Gavilon (2012)
The Ministry of Commerce of China approved the acquisition of the United States grain supplier Gavilon Group LLC by the Marubeni Corporation of Japan, after imposing significant conditions in the Chinese soyabean market, including that Marubeni and Gavilon continue selling soya to China as separate companies, with different teams and with firewalls between them blocking the exchange of market intelligence.[e]

Rhodes–Del Monte (2011)
The Competition Commission of South Africa approved the acquisition by Rhodes Food Group of the business of its competitor Del Monte Fruits with behavioural conditions that addressed employment issues. Otherwise, the merged entity would have had a negative effect on employment as about 1,000 seasonal employees could have lost their jobs during the next canning season.[f]

Alliant Techsystems–Macdonald Dettwiler (2008)
MacDonald Dettwiler and Associates, a Canadian aerospace, information services and products company, tried to sell its Information Systems and Geospatial Services operations to Alliant Techsystems (United States). The Government of Canada rejected the sale on national security grounds related to the company's Radarsat-2 satellite.[g]

Source: UNCTAD.
Note: Notes appear at the end of this chapter.

4. Risk of investment protectionism

As government regulation, screening and monitoring grow, so does the risk that such measures can hide protectionist aims.

As countries make more use of industrial policies, tighten screening and monitoring procedures, closely scrutinize cross-border M&As and become more restrictive with regard to the degree of FDI involvement in strategic industries, the risk that some of these measures are taken for protectionist purposes grows.[10] With the emergence and rapid expansion of international production networks, protectionist policies can backfire on all actors, domestic and foreign, in such value chains (see also chapter IV).

In the absence of a commonly recognized definition of "investment protectionism", it is difficult to clearly identify measures of a protectionist nature among

investment regulations or restrictions.[11] Countries may have good reasons for restraining foreign investment. Restrictive or selective FDI policies have been recognized as potentially important elements of a development strategy and often are used for specific public policy purposes. National security considerations may also justify FDI restrictions. The problem is that what may be a legitimate reason to restrict investment for one country may not be justifiable in the view of others.

Efforts should be undertaken at the international level to clarify the meaning of "investment protectionism", with a view to establishing a set of criteria for identifying protectionist measures against foreign investment. Fact-finding endeavours could build upon UNCTAD's *Investment Policy Monitor* publications, which regularly report on developments in national and international investment policies, and the biannual UNCTAD-OECD reports on investment measures by G-20 countries.

At the national level, technical assistance can help promote quality regulation rather than overregulation. With regard to FDI policies, this means that a country's specific public policy needs should be the main guidance for the design and scope of restrictions. The non-discrimination principle included in most IIAs provides an additional benchmark for assessing the legitimacy of investment restrictions. It would also be helpful to consider extending the G-20's commitment to refrain from protectionism – and perhaps also expanding the coverage of monitoring to the whole world.

UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD) can serve as a point of reference. The IPFSD – which consists of a set of Core Principles for investment policymaking, guidelines for national investment policies and options for the design of IIAs – calls for an open and welcoming investment climate, while recognizing the need of governments to regulate investment for the common good (*WIR12*).

B. INTERNATIONAL INVESTMENT POLICIES

1. Trends in the conclusion of IIAs

a. *Continued decline in treaty-making*

Although the IIA universe continues to expand and numerous negotiations are under way, the annual treaty tally has dropped to an all-time low.

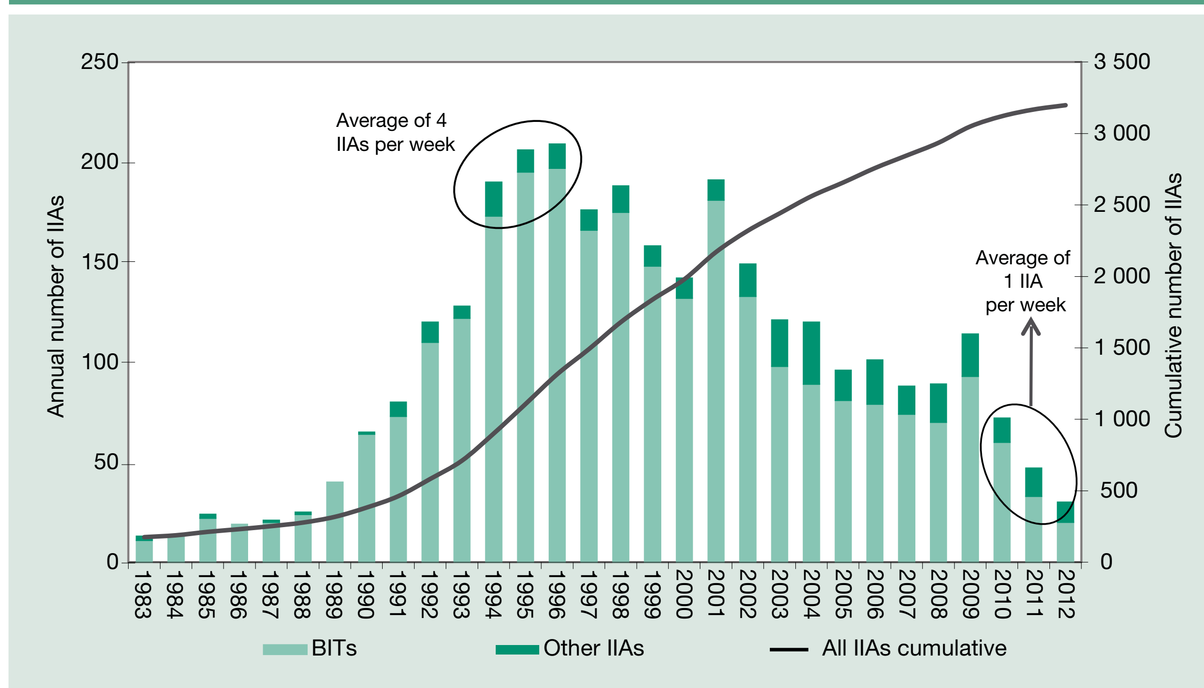
Last year saw the conclusion of 30 IIAs (20 BITs and 10 "other IIAs"[12]), bringing the total to 3,196 (2,857 BITs and 339 "other IIAs") by year-end (see annex table III.1 for a list of each country's total number of BITs and "other IIAs"). BIT-making bottomed out in 2012, with only 20 BITs signed – the lowest annual number in a quarter century.

This slowdown is revealed distinctly in multi-year period comparisons (figure III.7). From 2010 to 2012, on average one IIA was signed per week. This was a quarter of the frequency rate during the peak period in the 1990s, when an average of four treaties were concluded per week.

Of the 10 "other IIAs" concluded in 2012, eight were regional agreements. Whereas BITs largely resemble each other, "other IIAs" differ substantially. The agreements concluded in 2012 can be grouped into three broad categories, as identified in *WIR 2010* (chapter III.B):

- *IIAs with BIT-equivalent provisions.* The Australia–Malaysia Free Trade Agreement (FTA) and the China–Japan–Republic of Korea investment agreement fall in the category of IIAs that contain obligations commonly found in BITs, including substantive standards of investment protection and provisions for investor–State dispute settlement (ISDS).

Figure III.7. Trends in IIAs, 1983–2012



Source: UNCTAD.

- *IIAs with limited investment provisions.* The EU agreements with Peru and Colombia, Iraq, and the Central American States contain limited investment provisions (e.g. pre-establishment national treatment based on a positive-list approach, free movement of capital relating to direct investments). The Chile–Hong Kong (China) FTA also belongs in this category (e.g. national treatment for the establishment of companies, services and service suppliers, including in the financial sector, according to each party's schedule).

- *IIAs with investment cooperation provisions and/or a future negotiating mandate.* The Gulf Cooperation Council (GCC) Framework Agreements with Peru and the United States, the EU–Viet Nam Framework Agreement and the Pacific Alliance Framework Agreement (Chile, Colombia, Mexico and Peru) fall in the third category. These agreements contain general provisions on cooperation in investment matters and/or a mandate for future negotiations on investment.

b. Factoring in sustainable development

New IIAs illustrate the growing tendency of policymakers to craft treaties in line with sustainable development objectives.

A perusal of the content of the 17 IIAs concluded in 2012 for which texts are available shows that they increasingly include sustainable-development-oriented features.[13] Of these IIAs, 12 (including 8 BITs) refer to the protection of health and safety, labour rights, environment or sustainable development in their preamble; 10 (including 6 BITs) have general exceptions – e.g. for the protection of human, animal or plant life or health, or the conservation of exhaustible natural resources;[14] and 7 (including 4 BITs) contain clauses that explicitly recognize that parties should not relax health, safety or environmental standards to attract investment. References to CSR occur less frequently but can be found in the "trade and sustainable development" chapter of the EU–Colombia–Peru FTA and in the preamble of

the China–Japan–Republic of Korea investment agreement (see annex table III.2 for details).

These sustainable development features are supplemented by treaty elements that aim more broadly to preserve regulatory space for public policies in general or to minimize exposure to investment litigation in particular. The analysed agreements include provisions that (i) focus the treaty scope narrowly (e.g. by excluding certain assets from the definition of investment), (ii) clarify obligations (by crafting detailed clauses on fair and equitable treatment or indirect expropriation); (iii) set forth exceptions to the transfer-of-funds obligation or carve-outs for prudential measures; or (iv) carefully regulate access to ISDS (clauses that, e.g. limit treaty provisions that are subject to ISDS, exclude certain policy areas from ISDS, set out a special mechanism for taxation and prudential measures, or restrict the allotted time period within which claims can be submitted). Some agreements leave out umbrella clauses or omit ISDS altogether.

All of the 17 IIAs signed in 2012 for which texts were available included one or more provisions along these lines. Many of these provisions correspond to policy options featured in UNCTAD's Investment Policy Framework for Sustainable Development or IPFSD, set out in chapter IV of *WIR12*.

2. Trends in the negotiation of IIAs

a. Regionalism on the rise

More than 110 countries involved in 22 negotiations.

The importance of regionalism, evident from the fact that 8 of the 10 "other IIAs" concluded in 2012 were regional ones, is also manifest in current negotiations. By 2013 at least 110 countries were involved in 22 negotiations.[15] Regional and inter-regional investment treaty-making involving more than two parties can take different forms – notably, negotiations within a regional grouping, negotiations between a regional bloc and a third country, or negotiations between like-minded countries. Some of the regional investment policy developments are described below.

Asia

On 22 November 2012, ASEAN officially launched negotiations with Australia, China, India, Japan, New Zealand and the Republic of Korea on a Regional Comprehensive Economic Partnership Agreement (RCEP). The RCEP seeks to create a liberal, facilitative and competitive investment environment in the region. Negotiations on investment under the RCEP will cover the four pillars of promotion, protection, facilitation and liberalization, based on its Guiding Principles and Objectives for Negotiating the Regional Comprehensive Economic Partnership.[16] The RCEP agreement will be open for accession by any ASEAN FTA partner that did not participate in the RCEP negotiations and any other partner country after the conclusion of the RCEP negotiations.

On 20 December 2012, ASEAN and India concluded negotiations on trade in services and on investment. The ASEAN–India Trade in Services and Investment Agreements were negotiated as two stand-alone treaties pursuant to the 2003 Framework Agreement on Comprehensive Economic Cooperation between ASEAN and India. The agreements are expected to complement the already signed FTA in goods.[17]

Latin America

In 2012, Chile, Colombia, Mexico and Peru signed a framework agreement that established the Pacific Alliance as a deep integration area – an initiative launched in 2011.[18] In line with the mandate established therein, negotiations continue for the free movement of goods, services, capital and people and the promotion of investment on the basis of the existing trade and investment frameworks between the parties. The investment negotiations emphasize objectives to attract sustainable investment and address novel elements such as responsible investment and CSR.

Africa

Negotiations towards the creation of a free trade area between the Southern African Development Community, the East African Community and the Common Market for Eastern and Southern Africa (COMESA) picked up momentum in 2012 with the establishment of the Tripartite Trade Negotiation

Forum, the body responsible for technical negotiations and guided by the road map adopted for the negotiations. Investment talks are scheduled as part of the second phase of negotiations, envisaged to commence in the latter half of 2014.[19]

Europe

In Europe, regional treaty-making activity is dominated by the European Union (EU), which negotiates as a bloc with individual countries or other regions.[20] Most of the recently launched negotiations encompass investment protection and liberalization. This is in line with the shift of competence over FDI from Member States to the EU after the entry into force in December 2009 of the Lisbon Treaty (*WIR10*, *WIR11*). Since new EU-wide investment treaties will eventually replace BITs between the EU Member States and third parties, these negotiations will contribute to a consolidation of the IIA regime (see section 2.2).

(i) Recently launched negotiations[21]

On 1 March 2013, the EU and Morocco launched negotiations for a Deep and Comprehensive Free Trade Agreement (DCFTA). Morocco is the first Mediterranean country to negotiate a DCFTA with the EU that includes investment. Negotiations with Egypt, Jordan and Tunisia are expected to follow.[22]

On 6 March 2013, FTA negotiations between the EU and Thailand were officially launched. In addition to investment liberalization, negotiations will also cover tariff reduction, non-tariff barriers and other issues, such as services, procurement, intellectual property, regulatory issues, competition and sustainable development.[23]

On 12 March 2013, the European Commission requested Member States' approval to start negotiations towards a Transatlantic Trade and Investment Partnership (TTIP) with the United States.[24] Besides investment, the TTIP is expected to include reciprocal market opening in goods and services and to foster the compatibility of regulatory regimes. With respect to investment, the EU–United States High-Level Working Group on Jobs and Growth has recommended that the future treaty include investment liberalization and protection provisions based on the highest levels of liberalization and protection standards that both sides have negotiated to date.[25] It also recommended "that the two sides explore opportunities to address these important issues, taking into account work done in the Sustainable Development Chapter of EU trade agreements and the Environment and Labor Chapters of U.S. trade agreements".[26]

On 25 March 2013, the EU and Japan officially launched negotiations for an FTA.[27] Both sides aim to conclude an agreement covering the progressive and reciprocal liberalization of trade in goods, services and investment, as well as rules on trade-related issues.[28]

(ii) Ongoing negotiations[29]

The EU is negotiating a Comprehensive Economic and Trade Agreement (CETA) with Canada. The CETA will likely be the first EU agreement to include a substantive investment protection chapter (adopting the post-Lisbon approach).[30]

Following the conclusion of free trade negotiations between the EU and Singapore in December 2012, the two sides are pursuing talks on a stand-alone investment agreement – again, based on the new EU competence under the Lisbon Treaty.[31] The FTA between the EU and India, under negotiation since 2007, is expected to include a substantive investment protection chapter (also following the post-Lisbon approach).[32]

EU negotiations with Armenia, Georgia and the Republic of Moldova are under way and address establishment-related issues, among other elements. In addition, negotiations to strengthen investment-related provisions in existing partnership and cooperation agreements are under way with Azerbaijan, Kazakhstan and China.[33]

Interregional negotiations

In terms of interregional negotiations – i.e. those conducted between numbers of individual countries from two or more geographical regions – discussions on the Trans-Pacific Partnership Agreement (TPP) continued, with the 17th negotiation round concluded in May 2013.[34] As of May 2013, 11 countries were participating in the negotiations – namely Australia, Brunei Darussalam, Canada, Chile, Malaysia, Mexico, New Zealand, Peru, Singapore, the United States and Viet Nam.

Japan officially declared its intention to join the TPP negotiations on 13 March 2013, and Thailand has also expressed its interest in joining. The agreement is expected to include a fully fledged investment chapter containing typical standards of investment liberalization and protection.

In North Africa and the Middle East, Arab countries are expected to continue discussions and negotiations on a revised Unified Agreement for the Investment of Arab Capital in the Arab States. A draft text was adopted early in 2013, ensuring free movement of capital and providing national treatment and most-favoured-nation (MFN) status to investments.

Progress in 2013 is also expected in the interregional negotiations between the EU and MERCOSUR (the Mercado Común del Sur), which were first launched in 2000. Those negotiations had stalled for several years, but were relaunched in May 2010 at the EU–LAC Summit in Madrid.[35]

In the context of the World Trade Organization (WTO), a new, informal group of WTO Members, spurred by the WTO Doha Round impasse, is discussing a Trade in Services Agreement. Twenty-two WTO Members, also known as the "Real Good Friends of Services",[36] are participating in the talks.[37] The proposed agreement builds on the WTO General Agreement on Trade in Services (GATS) and targets liberalization commitments beyond those currently prevailing under the GATS.[38] The scheduling of market access obligations is envisaged to follow the format generally used by WTO Members under the GATS, based on a "positive-list approach".[39] In contrast, national treatment commitments are intended to apply across all service sectors, combined with "standstill" and "ratchet" obligations, which may be subject to reservations. Although the new trade in services agreement will address all four modes of trade in services, particular attention is said to be given to mode 3 (commercial presence, akin to investment). Accordingly, some stakeholders explicitly refer to the investment dimension of the current discussions.[40] Negotiating Members hope to eventually multilateralize the results of the negotiations, if a critical mass of WTO Members can be convinced to participate.

As governments continue concluding BITs and "other IIAs" with the support of business and the private sector, other stakeholders are voicing different opinions about the costs and benefits of IIAs, and the optimal future orientation of such agreements (*WIR11*, chapter III). The past 12 months have witnessed numerous expressions of opposition to ongoing IIA negotiations around the globe.

Examples include lawyers based in Australia, New Zealand and the United States urging TPP negotiators to abandon plans to include ISDS;[41] the Citizens Trade Campaign, representing 400 labour, consumer and environmental groups, petitioning the United States Congress about multiple perceived rights-infringing aspects of the TPP and other 21st century agreements;[42] 13 Thai groups, representing environmental and consumer interests, urging to rethink Thailand's position on joining the TPP negotiations;[43] more than 80 civil society organizations from nine countries issuing a statement opposing "excessive corporate rights" in the CETA;[44] a coalition of Indian and European non-government organizations[45] and European parliamentarians[46] opposing the investment chapter of the EU–India FTA; the Hupacasath First Nation challenging in Canadian courts the recently signed Canada–China BIT, alleging that the government had failed to fulfil its constitutional obligation to consult First Nations on this agreement and claiming that it would adversely impact First Nations' rights.[47]

b. Systemic issues arising from regionalism

Although regionalism provides an opportunity to rationalize the IIA regime, the current approach risks adding a layer of complexity.

The current IIA regime is known for its complexity and incoherence, gaps and overlaps. Rising regionalism in international investment policymaking presents a rare opportunity to rationalize the regime and create a more coherent, manageable and development-oriented set of investment policies. In reality, however, regionalism is moving in the opposite direction, effectively leading to a multiplication of treaty layers, making the network of international investment obligations even more complex and prone to overlap and inconsistency.

An analysis of 11 regional IIAs signed between 2006 and 2012 reveals that most treaties do not provide for the phasing out of older BITs. Instead, most treaty provisions governing the relationship between regional agreements and other (investment) treaties allow for the continuing existence of the BITs in parallel with the regional treaty (table III.5).

Regional IIAs use different language to regulate the relationship between prior BITs and the new treaty. Some expressly confirm parties' rights and obligations under BITs, which effectively means that the pre-existing BITs remain in force. This is done, for example, by referring to an annexed list of BITs (e.g. the Consolidated European Free Trade Agreement, or CEFTA) or to all BITs that exist between any parties that are signatories to the regional agreement (e.g. China–Japan–Republic of Korea investment agreement). Some IIAs include a more general provision reaffirming obligations under *any* agreements to which "a Party" is party (e.g. the ASEAN Common Investment Area, as well as agreements between ASEAN and China, and ASEAN and the Republic of Korea).

Another group of regional IIAs includes clauses reaffirming obligations under agreements to which "the Parties" are party (e.g. the ASEAN–Australia–New Zealand FTA, CAFTA, and COMESA). This ambiguous language leaves open the question of whether prior BITs remain in force and will co-exist with the regional IIAs.[48]

A regional agreement can also provide for the replacement of a number of prior IIAs, as is the case with the Central America–Mexico FTA, [49] or they can simply remain silent on this issue. In the latter scenario, the rules of the Vienna Convention on the Law of Treaties[50] on successive treaties that relate to the same subject matter could help to resolve the issue.

The parallel existence of such prior BITs and the more recent regional agreements with investment provisions has systemic implications and poses a number of legal and policy questions. For example, parallelism raises questions about how to deal with possible inconsistencies between the treaties. While some IIAs include specific "conflict rules", stating which treaty prevails in the case of an inconsistency,[51] others do not. In the absence of such a conflict rule, the general rules of international law enshrined in the Vienna Convention on the Law of Treaties (notably, the "lex posterior" rule) apply. Next, parallelism may pose a challenge in the context of ISDS. Parallel IIAs may create situations in which a single government measure could be challenged by the same foreign investor twice, under two formally different legal instruments.

Parallelism is also at the heart of systemic problems of overlap, inconsistency and the concomitant lack of transparency and predictability arising from a multi-faceted, multi-layered IIA regime. It adds yet another layer of obligations and further complicates

Table III.5. Relationship between regional and bilateral IIAs (illustrative)

Regional Agreement	Affected bilateral treaties	Relationship	Relevant article
ASEAN Comprehensive Investment Agreement (2009)	26	Parallel	Article 44
COMESA Common Investment Area (CCIA) (2007)	24	Parallel[a]	Article 32
SADC Protocol on Finance and Investment (2006)	16	Silent	N.A.
Consolidated Central European Free Trade Agreement (CEFTA) (2006)	11	Parallel	Article 30
ASEAN–China Investment Agreement (2009)	10	Parallel	Article 23
Eurasian Economic Community investment agreement (2008)	9	Silent	N.A.
ASEAN–Republic of Korea Investment Agreement (2009)	8	Parallel	Article 1.4
Dominican Republic–Central America–United States FTA (CAFTA) (2004)	4	Parallel[a]	Article 1.3
Central America–Mexico FTA (2011)	4	Replace	Article 21.7
China–Japan–Republic of Korea investment agreement (2012)	3	Parallel	Article 25
ASEAN–Australia–New Zealand FTA (2009)	2	Parallel[a]	Article 2 (of chapter 18)

Source: UNCTAD.
Note: All except CEFTA include substantive and procedural investment protection provisions as commonly found in BITs. (CEFTA contains some BIT-like substantive obligations but no ISDS mechanism.)
[a] The language of the relevant provision leaves room for doubt as to whether it results in the parallel application of prior BITs and the regional IIA.

countries' ability to navigate the complex spaghetti bowl of treaties and pursue a coherent, focused IIA strategy.

Current regional negotiations present an opportunity to consolidate the IIA regime.

Although parallelism appears to be the prevalent approach, current regional IIA negotiations nevertheless present a window of opportunity to consolidate the existing network of BITs. Nine current regional negotiations that have BIT-type provisions on the agenda may potentially overlap with close to 270 BITs, which constitute nearly 10 per cent of the global BIT network (table III.6). The extent to which parties opt to replace *several* existing BITs with an investment chapter in *one* regional agreement could help consolidate the IIA network.

Such an approach is already envisaged in the EU context, where Regulation 1219/2012, adopted in December 2012, sets out a transitional arrangement for BITs between EU Member States and third countries. Article 3 of the Regulation stipulates that "without prejudice to other obligations of the Member States under Union law, bilateral investment agreements notified pursuant to article 2 of this Regulation may be maintained in force, or enter into force, in accordance with the [Treaty on the Functioning of the European Union] and this Regulation, *until a bilateral investment agreement between the Union and the same third country enters into force*." (Italics added.)

3. IIA regime in transition

a. Options to improve the IIA regime

Interpretation, revision, replacement, termination – they all offer opportunities to improve the IIA regime.

Many countries have accumulated a stock of older BITs that were concluded in the 1990s, before the rise of ISDS cases prompted a more cautious approach. The risks exposed by this growing number of disputes, together with countries' desire to harness the sustainable development contribution of foreign investment, has led to the emergence of "new generation" IIAs (*WIR12*). The desire to move towards a more sustainable regime has precipitated a debate about possible ways to reform the IIA regime.

Countries have several avenues for taking pre-emptive or corrective action, depending on the depth of change they wish to achieve:

Interpretation. As drafters and masters of their treaties, States retain interpretive authority over them. While it is the task of arbitral tribunals to rule on ISDS claims and interpret and apply IIAs to this end, the contracting States retain the power to *clarify* the meaning of treaty provisions through authoritative interpretations – stopping short, however, of attaching a *new* or *different* meaning to treaty provisions that would amount to their amendment.[52] The interpretative statement issued

Table III.6. Regional initiatives under negotiation and existing BITs between the negotiating parties (illustrative)

Regional initiative	Existing BITs between negotiating parties
Inter-Arab investment draft agreement	96
Regional Comprehensive Economic Partnership Agreement (RCEP) between ASEAN and Australia, China, India, Japan, New Zealand and the Republic of Korea	68
Comprehensive Economic and Trade Agreement (CETA)	23
Trans-Pacific Partnership Agreement (TPP)	21
EU–India FTA	20
EU–Morocco Deep and Comprehensive Free Trade Area (DCFTA)	12
EU–Singapore FTA	12
EU–Thailand FTA	8
EU–United States Transatlantic Trade and Investment Partnership (TTIP)	8

Source: UNCTAD.
Note: These nine regional negotiations cover investment protection issues as currently addressed in BITs.

by the NAFTA Free Trade Commission (clarifying among other things the "minimum standard of treatment") is an example of this approach.[53]

Revision. Revision can be pursued through amendments that are used to modify or suppress existing provisions in a treaty or to add new ones. Amendments are employed when the envisaged changes do not affect the overall design and philosophy of the treaty and, usually, are limited in number and length. Amendments require the consent of all contracting parties, often take the form of a protocol to the treaty and typically require domestic ratification. An example is the amendment of 21 BITs by the Czech Republic, following its accession to the EU in May 2004, which was aimed at ensuring consistency between those BITs and EU law with regard to exceptions to the free transfer-of-payments provision.

Replacement. Replacement can be done in two ways. First, a BIT might be replaced with a new one as a result of a renegotiation (i.e. conclusion of a new treaty between the same two parties).[54] Second, one or several BITs can be replaced through the conclusion of a new plurilateral/regional agreement. The latter case leads to the consolidation of the IIA network if *one* new treaty replaces several old ones, entailing a reduction in the overall number of existing treaties. One of the few examples of this second approach is the Central America–Mexico FTA, which provides for the replacement of a number of FTAs; i.e. the FTAs between Mexico and Costa Rica (1994); Mexico and El Salvador, Guatemala and Honduras (2000); and Mexico and Nicaragua (1997) (see section B.2.1).

Termination. A treaty can be terminated unilaterally or by mutual consent. The Vienna Convention allows parties to terminate their agreement by mutual consent at any time.[55] Rules for unilateral treaty termination are typically set out in the BIT itself.[56] Treaty termination may result from a renegotiation (replacing the old BIT with a new one). It can also be done with the intent to relieve respective States of their treaty commitments (eliminating the BIT). Furthermore, a *notice* of termination can be an attempt to bring the other contracting party back to the negotiation table. Countries that have terminated their BITs include the Bolivarian Republic of Venezuela (denouncing its BIT with the Netherlands in 2008), Ecuador (denouncing nine of its BITs in 2008),[57] the Plurinational State of Bolivia (denouncing its BIT with the United States in 2011) and South Africa (denouncing one BIT in 2012). Countries wishing to unilaterally terminate their IIAs – for whatever reason – need to have a clear understanding of the relevant treaty provisions (box III.6), as well as the implications of such actions.

Depending on their IIA strategy (see section E.1. of the IPFSD) and the degree of change they wish to achieve, countries may wish to carefully consider options appropriate to reach their particular policy goals and accordingly adapt tools to implement them. To the extent that contracting parties embark on changes by mutual consent, the range of options is vast and straightforward. The situation becomes more complex, however, if only one party to an IIA wishes to amend, renegotiate or terminate the treaty.

b. Treaty expirations

By the end of 2013, more than 1,300 BITs will have reached their "anytime termination stage".

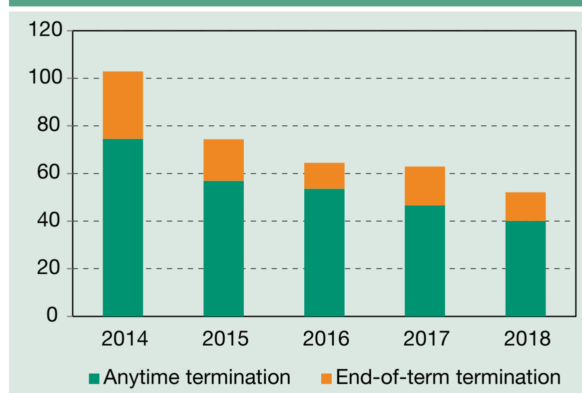
BIT-making activity peaked in the 1990s. Fifteen years on, the inclination to enter into BITs has bottomed out. This has brought the IIA regime to a juncture that provides a window of opportunity to effect systemic improvement.[58] As agreements reach their expiry date, a treaty partner can opt for automatic prolongation of the treaty or notify its wish to revoke a treaty.[59] The latter option gives treaty partners an opportunity to revisit their agreements, with a view to addressing inconsistencies and overlaps in the multi-faceted and multi-layered IIA regime. Moreover, it presents the opportunity to strengthen its development dimension.

In September 2012, South Africa informed the Belgo–Luxembourg Economic Union, through a notice of termination, that it would not renew the existing BIT, which was set to expire in March 2013. South Africa further stated its intent to revoke its BITs with other European partners, as most of these treaties were reaching their time-bound window for

termination which, if not used, would trigger the automatic extension of these agreements for 10 years or more.[60]

The significant number of expired or soon-to-expire BITs creates distinct opportunities for updating and improving the IIA regime. Between 2014 and 2018, at least 350 BITs will reach the end of their initial duration. In 2014 alone, the initial fixed term of 103 BITs will expire (figure III.9). After reaching the end of the initial fixed term, most BITs can be unilaterally terminated at any time by giving notice ("anytime termination"); the minority of BITs – if not terminated at the end of the initial term – are extended for subsequent fixed terms and can be unilaterally terminated only at the end of each subsequent term ("end-of-term termination") (see box III.6).

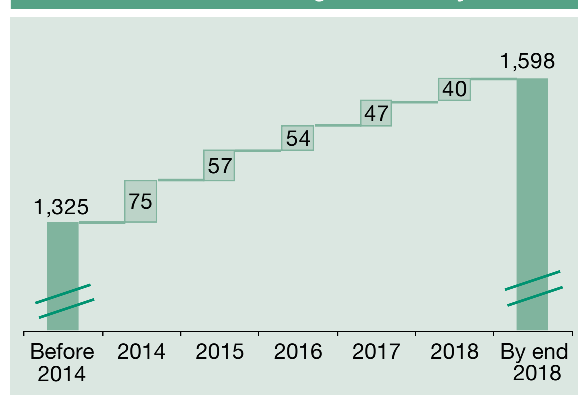
Figure III.8. BITs reaching the end of their initial term, 2014–2018



Source: UNCTAD.
Methodology: Data for BITs in force; derived from an examination of BITs for which texts were available, extrapolated to BITs for which texts were unavailable. Extrapolation parameters were obtained on the basis of a representative sample of more than 300 BITs.

The great majority of BITs set the initial treaty term at 10 years or 15 years, and about 80 per cent of all BITs provide for the "anytime termination" approach after the end of the initial term. Given that a large proportion of the existing BITs were signed in the 1990s and that most of them have reached the end of their initial period, the overall number of BITs that can be terminated by a party at any time is estimated to exceed 1,300 by the end of 2013. This number will continue to grow as BITs with the "anytime termination" option reach their expiry dates (figures III.8 and III.9).

Figure III.9. Cumulative number of BITs that can be terminated or renegotiated at any time



Source: UNCTAD.
Methodology: Data for BITs before 2014 with an "anytime termination" option; based on an examination of a representative sample of more than 300 BITs, extrapolated to the universe of BITs in force after accounting for the initial fixed term of treaty duration.

Using treaty expirations to instigate change in the IIA regime is not a straightforward endeavour. First, there is a need to understand how BIT rules on treaty termination work, so as to identify when opportunities arise and what procedural steps are required (see box III.6).

A second challenge originates from the "survival clause", contained in most BITs, which prevents unilateral termination of the treaty with immediate effect. It prolongs the exposure of the host State to international responsibility by extending the treaty's application for a further period, typically 10 or 15 years.[61]

Third, renegotiation efforts aimed at reducing or rebalancing treaty obligations can be rendered futile by the MFN obligation. If the scope of the MFN clause in the new treaty is not limited, it can result in the unanticipated incorporation of stronger investor rights from IIAs with third countries. Hence, in case of amendments and/or renegotiations that reduce investors's rights, IIA negotiators may wish to formulate MFN provisions that preclude the importation of substantive IIA provisions from other IIAs.[62]

In addition, countries need to analyse the pros and cons of treaty termination and its implication for the overall investment climate and existing investments.

Box III.6. Treaty termination and prolongation clauses

BITs usually specify that they shall remain in force for an initial fixed period, most typically 10 or 15 years. Very few treaties do not set forth such an initial fixed term, providing for indefinite duration from the outset.

BITs that establish an initial term of application typically contain a mechanism for their prolongation. Two approaches are prevalent. The first states that, after the end of the initial fixed term and unless one party opts to terminate, the treaty shall continue to be in force indefinitely. However, each party retains the right to terminate the agreement at any time by giving written notice. The second approach provides that the treaty shall continue to be in force for additional fixed terms (usually equal in length to the initial term, sometimes shorter), in which case the treaty can be terminated only at the end of each fixed period.

The majority of BITs thus fall in one of the two categories: (1) those that can be terminated at any time after the end of an initial fixed term, and (2) those that can be terminated only at the end of each fixed term. These two options may be referred to as "anytime termination" and "end-of-term termination" (see box table III.6.1).

Box table III.6.1. Types of BITs termination clauses

Anytime termination			End-of-term termination
Duration: Initial fixed term; automatic renewal for an indefinite period	**Duration:** Initial fixed term; automatic renewal for further fixed terms	**Duration:** No initial fixed term; indefinite duration from the start	**Duration:** Initial fixed term; automatic renewal for further fixed terms
Termination: (1) At the end of the initial fixed term (2) At any time after the end of the initial fixed term	**Termination:** (1) At the end of the initial fixed term (2) At any time after the end of the initial fixed term	**Termination:** At any time	**Termination:** (1) At the end of the initial fixed term (2) At the end of each subsequent fixed term
Example: Hungary–Thailand BIT (1991)	**Example:** Iceland–Mexico BIT (2005)	**Example:** Armenia–Canada BIT (1997)	**Example:** Azerbaijan–Belgium/Luxembourg BIT (2004)

The "anytime termination" model provides the most flexibility for review as the parties are not tied to a particular date by which they must notify the other party of their wish to terminate the BIT. The "end-of-period" model, in contrast, provides opportunities to terminate the treaty only once every few years. Failure to notify the intention to terminate within a specified notification period (usually either 6 or 12 months prior to the expiry date) will lock the parties into another multi-year period during which the treaty cannot be unilaterally terminated.

Source: UNCTAD.

4. Investor–State arbitration: options for reform

a. ISDS cases continue to grow

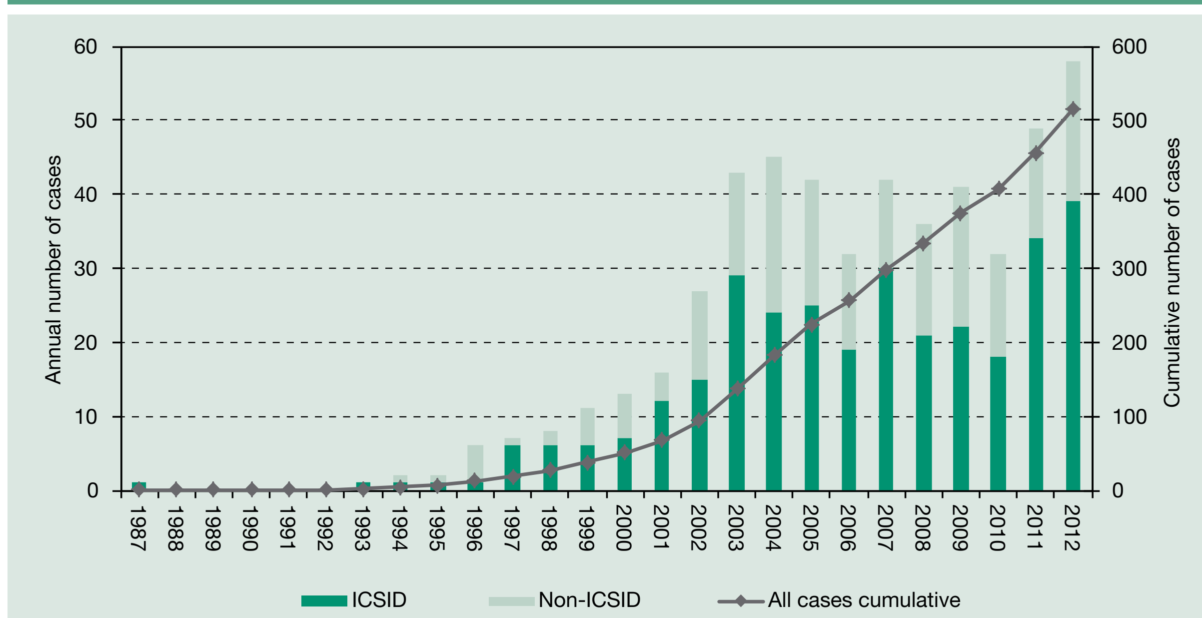
A record number of new ISDS cases were initiated in 2012.

In 2012, 58 new international investor–State claims were initiated.[63] This constitutes the highest number of known ISDS claims ever filed in one year and confirms foreign investors' increased inclination to resort to investor–State arbitration (figure III.10). In 66 per cent of the new cases, respondents were developing or transition economies.

In 2012, foreign investors challenged a broad range of government measures, including changes to domestic regulatory frameworks (with respect to gas, nuclear energy, the marketing of gold, and currency regulations), as well as measures relating to revocation of licences (in the mining, telecommunications and tourism sectors). Investors also took action on the grounds of alleged breaches of investment contracts; alleged irregularities in public tenders; withdrawals of previously granted subsidies (in the solar energy sector); and direct expropriations of investments.

By the end of 2012, the total number of known cases (concluded, pending or discontinued[64]) reached 514, and the total number of countries that have responded to one or more ISDS claims increased to 95. The majority of cases continued

Figure III.10. Known ISDS cases, 1987–2012



Source: UNCTAD.

to accrue under the ICSID Convention and the ICSID Additional Facility Rules (314 cases) and the UNCITRAL Rules (131). Other arbitral venues have been used only rarely.

At least 42 arbitral decisions were issued in 2012, including decisions on objections to a tribunal's jurisdiction, on the merits of the dispute, on compensation and on applications for annulment of an arbitral award.

In 12 of the 17 public decisions addressing the merits of the dispute last year, investors' claims were accepted, at least in part.

Of all cases concluded by the end of 2012, 31 per cent ended in favour of the investor and another 27 per cent were settled.

By the end of 2012, the overall number of concluded cases reached 244. Of these, approximately 42 per cent were decided in favour of the State and 31 per cent in favour of the investor. Approximately 27 per cent were settled.[65]

Last year saw some notable developments, including:

- the highest monetary award in the history of ISDS ($1.77 billion) in *Occidental v. Ecuador*,[66] a case that arose out of that country's unilateral termination of an oil contract; and
- the first treaty-based ISDS proceeding in which an arbitral tribunal affirmed its jurisdiction over a counterclaim that had been lodged by a respondent State against the investor.[67]

b. Mapping five paths for reform

The ISDS mechanism, designed to ensure fairness and neutrality, has in practice raised concerns about its systemic deficiencies.

In light of the increasing number of ISDS cases, the debate about the pros and cons of the ISDS mechanism has gained momentum, especially in those countries where ISDS is on the agenda of IIA negotiations or those that have faced controversial investor claims.

The ISDS mechanism was designed to depoliticize investment disputes and create a forum that would offer investors a fair hearing before an independent, neutral and qualified tribunal. It was seen as a mechanism for rendering final and enforceable decisions through a swift, cheap and flexible process, over which disputing parties would

have considerable control.[68] Given that investor complaints relate to the conduct of sovereign States, taking these disputes out of the domestic sphere of the State concerned provides aggrieved investors with an important guarantee that their claims will be adjudicated in an independent and impartial manner.

However, the actual functioning of ISDS under investment treaties has led to concerns about systemic deficiencies in the regime. These have been well documented in the literature and need only be summarized here:[69]

- *Legitimacy.* It is questionable whether three individuals, appointed on an *ad hoc* basis, can be entrusted with assessing the validity of States' acts, particularly when they involve public policy issues. The pressures on public finances[70] and potential disincentives for public-interest regulation may pose obstacles to countries' sustainable development paths.
- *Transparency.*[71] Even though the transparency of the system has improved since the early 2000s, ISDS proceedings can still be kept fully confidential – if both disputing parties so wish – even in cases where the dispute involves matters of public interest.[72]
- *"Nationality planning"*. Investors may gain access to ISDS procedures using corporate structuring, i.e. by channelling an investment through a company established in an intermediary country with the sole purpose of benefitting from an IIA concluded by that country with the host State.
- *Consistency of arbitral decisions.* Recurring episodes of inconsistent findings by arbitral tribunals have resulted in divergent legal interpretations of identical or similar treaty provisions as well as differences in the assessment of the merits of cases involving the same facts. Inconsistent interpretations have led to uncertainty about the meaning of key treaty obligations and lack of predictability as to how they will be read in future cases.[73]
- *Erroneous decisions.* Substantive mistakes of arbitral tribunals, if they arise, cannot be corrected effectively through existing review mechanisms. In particular, ICSID annulment committees, besides having limited review powers,[74] are individually created for specific disputes and can also disagree among themselves.
- *Arbitrators' independence and impartiality*. An increasing number of challenges to arbitrators may indicate that disputing parties perceive them as biased or predisposed. Particular concerns have arisen from a perceived tendency of each disputing party to appoint individuals sympathetic to their case. Arbitrators' interest in being re-appointed in future cases and their frequent "changing of hats" (serving as arbitrators in some cases and counsel in others) amplify these concerns.[75]
- *Financial stakes.* The high cost of arbitrations can be a concern for both investors (especially small and medium-size enterprises), and States. From the State perspective, even if a government wins the case, the tribunal may refrain from ordering claimant investors to pay the respondents' costs, leaving the average $8 million spent on lawyers and arbitrators as a significant burden on public finances and preventing the use of those funds for other goals.[76]

These challenges have prompted a debate about the challenges and opportunities of ISDS. This discourse has been developing through relevant literature, academic/practitioner conferences and the advocacy work of civil society organizations. It has also been carried forward under the auspices of UNCTAD's Investment Commission and Expert Meetings, its multi-stakeholder World Investment Forum[77] and a series of informal conversations it has organized,[78] as well as the OECD's Freedom-of-Investment Roundtables.[79]

Five broad paths for reform have emerged from these discussions:

1. Promoting alternative dispute resolution
2. Tailoring the existing system through individual IIAs
3. Limiting investors' access to ISDS
4. Introducing an appeals facility
5. Creating a standing international investment court

(i). Promotion of alternative dispute resolution methods

Reform options range from tailored modifications by individual States to systemic change that requires dialogue and cooperation between countries.

This approach advocates for increasing resort to so-called alternative methods of dispute resolution (ADR) and dispute prevention policies (DPPs), both of which have formed part of UNCTAD's technical assistance and advisory services on IIAs. ADR can be either enshrined in IIAs or implemented at the domestic level, without specific references in the IIA.

Compared with arbitration, non-binding ADR methods, such as conciliation and mediation,[80] place less emphasis on legal rights and obligations. They involve a neutral third party whose main objective is not the strict application of the law but finding a solution that would be recognized as fair by the disputing parties. ADR methods can help to save time and money, find a mutually acceptable solution, prevent escalation of the dispute and preserve a workable relationship between the disputing parties. However, there is no guarantee that an ADR procedure will lead to resolution of the dispute; an unsuccessful procedure would simply increase the costs involved. Also, depending on the nature of a State act challenged by an investor (e.g. a law of general application), ADR may not always be acceptable to the government.

An investment ombudsman can help defuse disputes in the early stages.

ADR could go hand in hand with the strengthening of dispute prevention and management policies at the national level. Such policies aim to create effective channels of communication and improve institutional arrangements between investors and respective agencies (e.g. investment aftercare services) and between different ministries dealing with investment issues. An investment ombudsman office or a specifically assigned agency that takes the lead should a conflict with an investor arise, can help resolve investment disputes early on, as well as assess the prospects of, and, if necessary, prepare for international arbitration.[81]

In terms of implementation, this approach is relatively straightforward, and much has already been implemented by some countries. Importantly, given that most ADR and DPP efforts are implemented at the national level, individual countries can also proceed without need for their treaty partners to agree. However, similar to some of the other options mentioned below, ADR and DPPs do not solve key ISDS-related challenges. The most they can do is to reduce the number of full-fledged legal disputes, which would render this reform path a complementary rather than stand-alone avenue for ISDS reform.

(ii). Tailoring the existing system through individual IIAs

This option implies that the main features of the existing system would be preserved and that individual countries would apply "tailored modifications" by modifying selected aspects of the ISDS system in their new IIAs. A number of countries have already embarked on this course of action.[82] Procedural innovations, many of which also appear in UNCTAD's IPFSD, have included:[83]

- *Setting time limits for bringing claims*; e.g. three years from the events giving rise to the claim, in order to limit State exposure and prevent the resurrection of "old" claims;[84]
- *Increasing the contracting parties' role in interpreting the treaty* in order to avoid legal interpretations that go beyond their original intentions; e.g. through providing for binding joint party interpretations, requiring tribunals to refer certain issues for determination by treaty parties and facilitating interventions by the non-disputing contracting parties;[85]
- *Establishing a mechanism for consolidation of related claims*, which can help to deal with the problem of related proceedings, contribute to the uniform application of the law, thereby increasing the coherence and consistency of awards, and help to reduce the cost of proceedings;[86]
- *Providing for more transparency in ISDS*; e.g. granting public access to documents and hearings, and allowing for the participation of interested non-disputing parties such as civil society organizations;[87]

- *Including a mechanism for an early discharge of frivolous* (unmeritorious) *claims* in order to avoid waste of resources on full-length proceedings.[88]

To these, add changes in the wording of IIAs' substantive provisions – introduced by a number of countries – that seek to clarify the agreements' content and reach, thereby enhancing the certainty of the legal norms and reducing the margin of discretion of arbitrators.[89]

Tailored modifications can be made to suit individual countries' concerns, but they also risk neglecting systemic deficiencies.

The approach whereby countries provide focused modifications through their IIAs allows for individually tailored solutions and numerous variations. For example, in their IIAs, specific countries may choose to address those issues and concerns that appear most relevant to them. At the same time, this option cannot address all ISDS-related concerns.

What is more, this approach would require comprehensive training and capacity-building to enhance awareness and understanding of ISDS-related issues.[90] Mechanisms that facilitate high-quality legal assistance to developing countries at an affordable price can also play a role (box III.7).

Implementation of this "tailored modifications" option is fairly straightforward given that only two treaty parties (or several – in case of a plurilateral treaty) need to agree. However, the approach is limited in effectiveness: unless the new treaty is a renegotiation of an old one, the "modifications" are applied only to newly concluded IIAs while some 3,000 "old" ones remain intact. Moreover, one of the key advantages of this approach, namely, that countries can choose *whether* and *which* issues to address, is also one of its key disadvantages, as it turns this reform option into a piecemeal approach that stops short of offering a comprehensive, integrated way forward.

(iii) Limiting investors' access to ISDS

Limiting investors' access to ISDS can help to slow down the proliferation of ISDS proceedings, reduce States' financial liabilities and save resources.

This option narrows the range of situations in which investors may resort to ISDS. This could be done in three ways: (i) by reducing the subject-matter scope for ISDS claims, (ii) by restricting the range of investors who qualify to benefit from the treaty, and (iii) by introducing

Box III.7. Addressing ISDS-related challenges: initiatives from Latin America

On 22 April 2013 during a ministerial-level meeting held in Ecuador, seven Latin American countries (the Plurinational State of Bolivia, Cuba, the Dominican Republic, Ecuador, Nicaragua, Saint Vincent and the Grenadines, and the Bolivarian Republic of Venezuela) adopted a declaration on "Latin American States affected by transnational interests".[a] In the declaration ministers agreed to establish an institutional framework to deal with challenges posed by transnational companies, especially legal claims brought against governments under BITs. The declaration also supports the creation of a regional arbitration centre to settle investment disputes and an international observatory for cooperation on international investment litigation. To that effect, the Dominican Republic, Ecuador and the Bolivarian Republic of Venezuela have agreed to produce a proposal to create such an observatory by July 2013.

This follows various earlier initiatives, undertaken by groups of countries in the region, that were aimed at helping countries find an adequate response to the lack of capacity and resources on one hand, and the overall legitimacy of the ISDS system on the other. As early as 2009, UNCTAD, together with the Academia de Centroamerica, the Organization of American States and the Inter-American Development Bank, was invited to pursue the possibility of establishing an Advisory Facility on International Investment Law and ISDS. This resulted in a series of meetings that addressed technical issues, including what type of services such a facility should offer (e.g. capacity-building for IIA negotiations and implementation, management or prevention of ISDS cases, provision of legal opinions, and legal representation in ISDS cases), what its membership limits could be (open to all countries and organizations or only a limited number of countries) and how it should be financed.

Source: UNCTAD.
Note: Notes appear at the end of this chapter.

the requirement to exhaust local remedies before resorting to international arbitration. A far-reaching version of this approach would be to abandon ISDS as a means of dispute resolution altogether and return to State–State arbitration proceedings, as some recent treaties have done.[91]

Some countries have adopted policies of the first kind; e.g. by excluding certain types of claims from the scope of arbitral review.[92] Historically, this approach was used to limit the jurisdiction of arbitral tribunals in a more pronounced way, such as allowing ISDS only with respect to expropriation disputes.[93]

To restrict the range of covered investors, one approach is to include additional requirements in the definition of "investor" and/or to use denial-of-benefits provisions.[94] Among other things, this approach can address concerns arising from "nationality planning" and "treaty shopping" by investors and ensure that they have a genuine link to the putative home State.

Requiring investors to exhaust local remedies, or alternatively, to demonstrate the manifest ineffectiveness or bias of domestic courts, would make ISDS an exceptional remedy of last resort. Although in general international law, the duty to exhaust local remedies is a mandatory prerequisite for gaining access to international judicial forums,[95] most IIAs dispense with this duty.[96] Instead, they allow foreign investors to resort directly to international arbitration without first going through the domestic judicial system. Some see this as an important positive feature and argue that reinstating the requirement to exhaust domestic remedies could undermine the effectiveness of ISDS.

These options for limiting investor access to ISDS can help to slow down the proliferation of ISDS proceedings, reduce States' financial liabilities arising from ISDS awards and save resources. Additional benefits may be derived from these options if they are combined with assistance to strengthen the rule of law and domestic legal and judicial systems. To some extent, however, this approach would be a return to the earlier system, in which investors could lodge claims only in the domestic courts of the host State, negotiate arbitration clauses in specific investor–State contracts or apply for diplomatic protection by their home State.

In terms of implementation – like the options described earlier – this alternative does not require coordinated action by a large number of countries and can be put in practice by parties to individual treaties. Implementation is straightforward for future IIAs; past treaties would require amendments, renegotiation or unilateral termination.[97] Similar to the "tailored modification" option, however, this alternative results in a piecemeal approach towards reform.

(iv) Introducing an appeals facility[98]

Consistent and balanced opinions from an authoritative appeals body would enhance the credibility of the ISDS system.

An appeals facility implies a standing body with a competence to undertake a substantive review of awards rendered by arbitral tribunals. It has been proposed as a means to improve the consistency of case law, correct erroneous decisions of first-level tribunals and enhance the predictability of the law.[99] This option has been contemplated by some countries.[100] If the facility is constituted of permanent members appointed by States from a pool of the most reputable jurists, it has the potential to become an authoritative body capable of delivering consistent – and balanced – opinions, which could rectify some of the legitimacy concerns about the current ISDS regime.[101]

Authoritative pronouncements on points of law by an appeals facility would guide both the disputing parties (when assessing the strength of their respective cases) and arbitrators adjudicating disputes. Even if today's system of first-level tribunals remains intact, concerns would be alleviated through the effective supervision at the appellate level. In sum, an appeals facility would add order and direction to the existing decentralized, non-hierarchical and ad hoc regime.

At the same time, absolute consistency and certainty would not be achievable in a legal system that consists of about 3,000 legal texts; different outcomes may still be warranted by the language of specific applicable treaties. Also, the introduction of an appellate stage would further add to the time and cost of the proceedings, although that could

be controlled by putting in place tight timelines, as has been done for the WTO Appellate Body.[102]

In terms of implementation, for the appeals option to be meaningful, it needs to be supported by a significant number of countries. In addition to an in-principle agreement, a number of important choices would need to be made: Would the facility be limited to the ICSID system or be expanded to other arbitration rules? Who would elect its members and how? How would it be financed?[103] In sum, this reform option is likely to face significant, although not insurmountable, practical challenges.

(v) Creating a standing international investment court

A standing international investment court would be an institutional public good – but can it serve a fragmented universe of thousands of agreements?

This option implies the replacement of the current system of *ad hoc* arbitration tribunals with a standing international investment court. The latter would consist of judges appointed or elected by States on a permanent basis, e.g. for a fixed term. It could also have an appeals chamber.

This approach rests on the theory that a private model of adjudication (i.e. arbitration) is inappropriate for matters that deal with public law.[104] The latter requires objective guarantees of independence and impartiality of judges, which can be provided only by a security of tenure – to insulate the judge from outside interests such as an interest in repeat appointments and in maintaining the arbitration industry. Only a court with tenured judges, the argument goes, would establish a fair system widely regarded to be free of perceived bias.[105]

A standing investment court would be an institutional public good, serving the interests of investors, States and other stakeholders. The court would address most of the problems outlined above: it would go a long way to ensure the legitimacy and transparency of the system, and facilitate consistency and accuracy of decisions, and independence and impartiality of adjudicators.[106]

However, this solution would also be the most difficult to implement as it would require a complete overhaul of the current regime through the coordinated action of a large number of States. Yet, the consensus would not need to be universal. A standing investment court may well start as a plurilateral initiative, with an opt-in mechanism for those States that wish to join.

Finally, it is questionable whether a new court would be fit for a fragmented regime that consists of a huge number of mostly bilateral IIAs. It has been argued that this option would work best in a system with a unified body of applicable law.[107] Nonetheless, even if the current diversity of IIAs is preserved, a standing investment court would likely be much more consistent and coherent in its approach to the interpretation and application of treaty norms, compared with numerous ad hoc tribunals.

Given the numerous challenges arising from the current ISDS regime, it is timely for States to assess the current system, weigh options for reform and then decide upon the most appropriate route.

Among the five options outlined here, some imply individual actions by governments and others require joint action by a significant number of countries. Most of the options would benefit from being accompanied by comprehensive training and capacity-building to enhance awareness and understanding of ISDS-related issues.[108]

Although the collective-action options would go further in addressing the problems, they would face more difficulties in implementation and require agreement between a larger number of States. Collective efforts at the multilateral level can help develop a consensus on the preferred course of reform and ways to put it into action.

An important point to bear in mind is that ISDS is a system of *application* of the law. Therefore, improvements to the ISDS system should go hand in hand with progressive development of substantive international investment law.[109]

The national policy trends outlined in this chapter give mixed signals to foreign investors. Most countries continue to attract FDI, but ongoing macro economic, systemic and legal reforms, together with the effects of political elections in several countries, also created some regulatory uncertainty. Together with ongoing weakness and

instability in the global economy, this uncertainty has constrained foreign investors' expansion plans. Overall, the investment policymaking is in a transition phase, adjusting previous liberalization policies towards a more balanced approach that gives more weight to sustainable development and other public policy objectives. This is also reflected by policy developments at the international level, where new-generation IIAs and opportunities for reform of the ISDS system are gaining ground.

Notes

1 See also UNCTAD (2011: 105–106).
2 See Lall (2002).
3 See UNCTAD (2000).
4 Data do not include pending deals that may be withdrawn later or withdrawn deals for which no value is available. In some cases, a business or regulatory/political motivation to withdraw a cross-border M&A may affect more than one deal, as recorded in the Thomson Reuters database on M&As.
5 See Dinc and Erel (2012) and Harlé, Ombergt and Cool (2012).
6 Although in some cases regulatory or political motivations for withdrawn M&As have been recorded, in many other deals are aborted for these reasons before they can be recorded as an announced M&A. For this reason, it is safe to assume that in reality more deals would fall in this category and thus that the impact of regulatory reasons and political opposition is in fact bigger (see also Dinc and Erel, 2012 and Heinemann, 2012).
7 The reason is the so-called "effects doctrine" in competition law, allowing for jurisdiction over foreign conduct, as long as the economic effects of the anticompetitive conduct are experienced on the domestic market.
8 See Dinc and Erel (2012: 7–10) and Heinemann (2012: 851).
9 See Dinc and Erel (2012: 7–10).
10 The share of regulations and restrictions in governments' new FDI measures has increased from 6 per cent in 2000 to 25 per cent in 2012 (see figure III.1).
11 See UNCTAD (2012: 101).
12 "Other IIAs" refer to economic agreements, other than BITs, that include investment-related provisions (for example, framework agreements on economic cooperation), investment chapters in economic partnership agreements and FTAs.
13 The analysis is based on the review of 16 IIAs signed in 2012 for which text was available namely, the Albania–Azerbaijan BIT, Australia–Malaysia FTA, Bangladesh–Turkey BIT, Cameroon–Turkey BIT, Canada–China BIT, China–Japan–Republic of Korea Trilateral investment agreement, EU–Central America Association Agreement, EU–Colombia–Peru FTA, EU–Iraq Partnership and Cooperation Agreement (PCA), Former Yugoslav Republic of Macedonia–Kazakhstan BIT, Gabon–Turkey BIT, Iraq–Japan BIT, Japan–Kuwait BIT, Nicaragua–Russian Federation BIT and Pakistan–Turkey BIT. The analysis does not include framework agreements.
14 In two of these, the exceptions are included in a chapter that is not entirely dedicated to investment but applies to it. See the EU–Iraq Partnership and Cooperation Agreement (Article 203) and the EU–Colombia–Peru FTA (Article 167).
15 This includes the 27 EU Member States counted individually.
16 The Guiding Principles were adopted by the economic ministers in Siem Reap, Cambodia in August 2012 and endorsed by the ASEAN leaders at the 21st ASEAN Summit, http://www.asean.org/news/asean-secretariat-news/item/asean-and-fta-partners-launch-the-world-s-biggest-regional-free-trade-deal.
17 Vision Statement, ASEAN–India Summit, New Delhi, India, 20 December 2012, http://www.asean.org/news/asean-statement-communiques/item/vision-statement-asean-india-commemorative-summit. Because the two agreements were awaiting signature at the end of 2012, they are not reported as IIAs concluded in 2012.
18 "Mandatarios suscriben Acuerdo Marco de la Alianza del Pacífico", Presidency of the Republic of Peru Antofagasta, 6 June 2012, http://www.presidencia.gob.pe/mandatarios-suscriben-acuerdo-marco-de-la-alianza-del-pacifico.
19 The first phase of the negotiations, scheduled to conclude in June 2014, will focus on merchandise trade liberalization, infrastructure development and industrial development.
20 This section highlights negotiations involving the EU that were launched in 2013, as well as negotiations that were started earlier and that cover investment protection and liberalization based on the new EU mandate. Negotiations that were started earlier and that do not directly address investment protection (e.g. such as those carried out in the EPA context) are not included in the review.
21 This section covers negotiations that began in 2013. For a comprehensive overview of EU FTAs and other negotiations, see http://trade.ec.europa.eu/doclib/docs/2006/december/tradoc_118238.pdf.
22 These negotiations are taking place after the European Commission, in December 2012, received a mandate to upgrade association agreements with its Mediterranean partner countries to include investment protection. See http://trade.ec.europa.eu/doclib/press/index.cfm?id=888.
23 http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/thailand.
24 http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/united-states.
25 "Final Report of the High Level Working Group on Jobs and Growth", 11 February 2013, http://trade.ec.europa.eu/doclib/docs/2013/february/tradoc_150519.pdf.
26 This follows the April 2012 "Statement on Shared Principles for International Investment," which set out a number of principles for investment policymaking, including the need for sustainable-development-friendly elements, (see http://europa.eu/rapid/press-release_IP-12-356_en.htm and *WIR 2012*, chapter III.B) .
27 http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/japan.
28 http://trade.ec.europa.eu/doclib/press/index.cfm?id=881.
29 This section refers to the latest developments in negotiations that were launched before 2013.
30 http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/canada.
31 http://trade.ec.europa.eu/doclib/press/index.cfm?id=855.
32 http://ec.europa.eu/trade/creating-opportunities/bilateral-relations/countries/india.
33 At the EU–China Summit on 14 February 2012, the leaders agreed that "a rich in substance EU–China investment agreement would promote and facilitate investment in both directions" and that "[n]egotiations towards this agreement would include all issues of interest to either side, without prejudice to the final outcome". See http://europa.eu/rapid/press-release_MEMO-12-103_en.htm.
34 Press release, United States Trade Representative, 13 March 2013, http://www.ustr.gov/about-us/press-office/press-releases/2013/march/tpp-negotiations-higher-gear.
35 During a joint EU-MERCOSUR Ministerial Meeting (26 January 2013), the parties stressed the importance of ensuring progress in the next stage of the negotiation and agreed to start their respective internal preparatory work for the exchange of offers, http://trade.ec.europa.eu/doclib/docs/2013/january/

tradoc_150458.pdf. Note that these negotiations currently focus on establishment and do not cover BITs-type protection issues. See http://eeas.europa.eu/mercosur/index_en.htm.

[36] The 22 WTO Members in the Real Good Friends group are Australia, Canada, Chile, Colombia, Costa Rica, the EU, Hong Kong (China), Iceland, Israel, Japan, Mexico, New Zealand, Norway, Pakistan, Paraguay, Peru, the Republic of Korea, Singapore, Switzerland, Taiwan Province of China, Turkey, and the United States.

[37] Press release, European Commission, 15 February 2013, http://europa.eu/rapid/press-release_MEMO-13-107_en.htm.

[38] None of the Real Good Friends will ever match the levels scheduled by Moldova, Kyrgyzstan and some others.

[39] Strictly speaking, the GATS does not prescribe any particular scheduling format, whether bottom-up or top-down.

[40] News alert, Crowell & Morning, 15 October 2012, http://www.crowell.com/NewsEvents/AlertsNewsletters/all/1379161; Global Services Coalition, Statement on Plurilateral Services Agreement, 19 September 2012, http://www.keidanren.or.jp/en/policy/2012/067.pdf.

[41] http://tpplegal.wordpress.com/open-letter.

[42] http://www.citizenstrade.org/ctc/p-content/uploads/2013/03/CivilSocietyLetteronFastTrackandTPP_030413.pdf.

[43] http://www.bilaterals.org/spip.php?page=print&id_article=22300.

[44] http://tradejustice.ca/pdfs/Transatlantic%20Statement%20on%20Investor%20Rights%20in%20CETA.pdf.

[45] http://www.globaleverantwortung.at/images/doku/aggv_28092010_finaljointletter_eu_india_fta_forsign.doc.

[46] http://www.dewereldmorgen.be/sites/default/files/attachments/2011/01/18/mep_open_letter_final.pdf.

[47] http://canadians.org/blog/?p=18925.

[48] This lack of clarity arises from the fact that the treaty's reference to "the Parties" could be understood as covering either *all* or *any* of the parties to the regional agreement. The latter interpretation would also include BITs, hence resulting in parallel application; the former interpretation would only include agreements which all of the regional treaty parties have signed, hence excluding bilateral agreements between some – but not all – of the regional agreement's contracting parties.

[49] The Central America–Mexico FTA (2011) replaces the FTAs between Mexico and Costa Rica (1994), Mexico and El Salvador, Guatemala and Honduras (2000), and Mexico and Nicaragua (1997).

[50] Vienna Convention on the Law of Treaties (1969), http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf.

[51] The COMESA investment agreement, for example, states in Article 32.3: "In the event of inconsistency between this Agreement and such other agreements between Member States mentioned in paragraph 2 of this Article, this agreement shall prevail to the extent of the inconsistency, except as otherwise provided in this Agreement." Article 2.3 of the ASEAN–Australia–New Zealand FTA enshrines a "soft" approach to inconsistent obligations whereby "In the event of any inconsistency between this Agreement and any other agreement to which two or more Parties are party, such Parties shall immediately consult with a view to finding a mutually satisfactory solution."

[52] On various interpretative tools that can be used by States, see UNCTAD, "Interpretation of IIAs: What States Can Do", *IIA Issues Note*, No.3, December 2011.

[53] "Notes of Interpretation of Certain NAFTA Chapter 11 Provisions", NAFTA Free Trade Commission, 31 July 2001. Available at http://www.sice.oas.org/tpd/nafta/Commission/CH11understanding_e.asp.

[54] As opposed to amendments, renegotiations are used when the parties wish to make extensive modifications to the treaty.

[55] Article 54(b) of the Vienna Convention on the Law of Treaties.

[56] If not, and if needed, in addition to the rules set out in the treaty, the rules of the Vienna Convention on the Law of Treaties apply.

[57] These were BITs with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay. Subsequently, on 9 March 2013, Ecuador announced its intent to terminate all remaining IIAs and that the legislative assembly would work on the requisite measures to that effect from 15 May 2013 onward. See Declaration by the President of Ecuador Rafael Correa, ENLACE Nro 312 desde Piquiucho - Carchi, published 10 March 2013. Available at http://www.youtube.com/watch?v=CkC5i4gW15E (at 2:37:00).

[58] This section is limited to BITs and does not apply to "other IIAs" as the latter raise a different set of issues. Importantly, an investment chapter in a broad economic agreement such as an FTA cannot be terminated separately, without terminating the whole treaty.

[59] In accordance with general international law, a treaty may also be terminated by consent of the contracting parties at any time, regardless of whether the treaty has reached the end of its initial fixed term (Article 54(b) of the Vienna Convention on the Law of Treaties).

[60] Publication by a spokesman of South Africa's Department of Trade and Industry. Available at http://www.bdlive.co.za/opinion/letters/2012/10/01/letter-critical-issues-ignored.

[61] It is an open question whether the survival clause becomes operative only in cases of *unilateral* treaty termination or also applies in situations where the treaty is terminated by mutual consent by the contracting parties. This may depend on the wording of the specific clause and other interpretative factors.

[62] This will not automatically solve the issue of those older treaties that were not renegotiated; but it will gradually form a new basis on which negotiators can build a more balanced network.

[63] For more details, see UNCTAD, "Latest Developments in Investor-State Dispute Settlement", *IIA Issues Note*, No. 1, March 2013.

[64] A case may be discontinued for reasons such as failure to pay the required cost advances to the relevant arbitral institution.

[65] A number of arbitral proceedings have been discontinued for reasons other than settlement (e.g. due to the failure to pay the required cost advances to the relevant arbitral institution). The status of some other proceedings is unknown. Such cases have not been counted as "concluded".

[66] *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012.

[67] *Antoine Goetz & Others and S.A. Affinage des Metaux v. Republic of Burundi*, ICSID Case No. ARB/01/2, Award, 21 June 2012, paras. 267–287.

[68] For a discussion of the key features of ISDS, see also, "Investor-State Dispute Settlement – a Sequel", UNCTAD Series on Issues in IIAs (forthcoming).

[69] See Michael Waibel et al. (eds.), *The Backlash against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010); D. Gaukrodger and K. Gordon, "Investor–State Dispute Settlement: A Scoping Paper for the Investment Policy Community", OECD Working Papers on International Investment, No. 2012/3; P. Eberhardt and C. Olivet, *Profiting from Injustice: How Law Firms, Arbitrators and Financiers are Fuelling an Investment Arbitration Boom* (Corporate Europe Observatory and Transnational Institute, 2012), available at http://corporateeurope.org/sites/default/files/publications/profiting-from-injustice.pdf.

[70] Host countries have faced ISDS claims of up to $114 billion (the aggregate amount of compensation sought by the three claimants constituting the majority shareholders of the former Yukos Oil Company in the ongoing arbitration proceedings against the Russian Federation) and awards of up to $1.77 billion (*Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador*, ICSID Case No. ARB/06/11, Award, 5 October 2012).

[71] UNCTAD, *Transparency – A Sequel*, Series on Issues in IIAs II. (United Nations, New York and Geneva, 2012).

[72] It is indicative that of the 85 cases under the UNCITRAL Arbitration Rules administered by the Permanent Court of Arbitration (PCA), only 18 were public (as of end-2012). *Source*: Permanent Court of Arbitration International Bureau.

[73] Sometimes, divergent outcomes can be explained by differences in wording of a specific IIA applicable in a case; however, often they represent differences in the views of individual arbitrators.

[74] It is notable that even having identified "manifest errors of law" in an arbitral award, an ICSID annulment committee may find itself unable to annul the award or correct the mistake. See *CMS Gas Transmission Company v. The Republic of Argentina*, ICSID Case No. ARB/01/8, Decision of the ad hoc Committee on the application for annulment, 25 September 2007. Article 52(1) of the Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) enumerates the following grounds for annulment: (a) improper constitution of the arbitral Tribunal; (b) manifest excess of power by the arbitral Tribunal; (c) corruption of a member of the arbitral Tribunal; (d) serious departure from a fundamental rule of procedure; or (e) absence of a statement of reasons in the arbitral award.

[75] For further details, see Gaukrodger and Gordon (2012: 43–51).

[76] Lawyers' fees (which may reach $1,000 per hour for partners in large law firms) represent the biggest expenditure: on average, they have been estimated to account for about 82 per cent of the total costs of a case. D. Gaukrodger and K. Gordon, p. 19.

[77] http://unctad-worldinvestmentforum.org.

[78] During 2010 and 2011, UNCTAD organized seven "Fireside" talks – informal discussions among small groups of experts about possible improvements to the ISDS system.

[79] See e.g. OECD, "Government perspectives on investor-state dispute settlement: a progress report", Freedom of Investment Roundtable, 14 December 2012. Available at www.oecd.org/daf/inv/investment-policy/foi.htm.

[80] Mediation is an informal and flexible procedure: a mediator's role can vary from shaping a productive process of interaction between the parties to effectively proposing and arranging a workable settlement to the dispute. It is often referred to as "assisted negotiations". Conciliation procedures follow formal rules. At the end of the procedure, conciliators usually draw up terms of an agreement that, in their view, represent a just compromise to a dispute (non-binding to the parties involved). Because of its higher level of formality, some call conciliation a "non-binding arbitration".

[81] See further UNCTAD, *Investor–State Disputes: Prevention and Alternatives to Arbitration* (United Nations, New York and Geneva, 2010); UNCTAD, *How to Prevent and Manage Investor-State Disputes: Lessons from Peru*, Best Practice in Investment for Development Series (United Nations, New York and Geneva, 2011).

[82] In particular, Canada, Colombia, Mexico, the United States and some others. Reportedly, the European Union is also considering this approach. See N. Bernasconi-Osterwalder, "Analysis of the European Commission's Draft Text on Investor–State Dispute Settlement for EU Agreements", *Investment Treaty News*, 19 July 2012. Available at http://www.iisd.org/itn/2012/07/19/analysis-of-the-european-commissions-draft-text-on-investor-state-dispute-settlement-for-eu-agreements.

[83] Policy options for individual ISDS elements are further analysed in UNCTAD, *Investor–State Dispute Settlement: A Sequel* (forthcoming).

[84] See e.g. NAFTA Articles 1116(2) and 1117(2); see also Article 15(11) of the China–Japan–Republic of Korea investment agreement.

[85] See UNCTAD, *Interpretation of IIAs: What States Can Do*, IIA Issues Note, No.3, December 2011. Two issues merit attention with respect to such authoritative interpretations. First, the borderline between interpretation and amendment can sometimes be blurred; second, if issued during an ongoing proceeding, a joint party interpretation may raise due-process related concerns.

[86] See e.g. NAFTA Article 1126; see also Article 26 of the Canada–China BIT.

[87] See e.g. Article 28 of the Canada–China BIT; see also NAFTA Article 1137(4) and Annex 1137.4.

[88] See e.g. Article 41(5) ICSID Arbitration Rules (2006); Article 28 United States–Uruguay BIT.

[89] UNCTAD, *World Investment Report 2010*. Available at http://unctad.org/en/Docs/wir2010_en.pdf. See also UNCTAD's Pink Series Sequels on Scope and Definition, MFN, Expropriation, FET and Transparency. Available at http://investmentpolicyhub.unctad.org/Views/Public/IndexPublications.aspx

[90] Such capacity-building activities are being carried out by among others, UNCTAD (together with different partner organizations). Latin American countries, for example, have benefited from UNCTAD's advanced regional training courses on ISDS on an annual basis since 2005.

[91] Recent examples of IIAs without ISDS provisions are the Japan–Philippines Economic Partnership Agreement (2006), the Australia–United States FTA (2004) and the Australia–Malaysia FTA (2011). In April 2011, the Australian Government issued a trade policy statement announcing that it would stop including ISDS clauses in its future IIAs as doing so imposes significant constraints on Australia's ability to regulate public policy matters: see Gillard Government Trade Policy Statement: Trading Our Way to More Jobs and Prosperity, April 2011. Available at www.dfat.gov.au/publications/trade/trading-our-way-to-more-jobs-and-prosperity.pdf.

[92] For example, claims relating to real estate (Cameroon–Turkey BIT); claims concerning financial institutions (Canada–Jordan BIT); claims relating to establishment and acquisition of investments (Japan–Mexico FTA); claims concerning specific treaty obligations such as national treatment and performance requirements (Malaysia–Pakistan Closer Economic Partnership Agreement); and claims arising out of measures to protect national security interest (India–Malaysia Closer Economic Cooperation Agreement). For further analysis, see UNCTAD, *Investor–State Dispute Settlement: Regulation and Procedures* (New York and Geneva, forthcoming).

[93] For example, Chinese BITs concluded in the 1980s and early 1990s (e.g. Albania–China, 1993; Bulgaria–China, 1989) provided investors access to international arbitration only with respect to disputes relating to the amount of compensation following an investment expropriation.

[94] Denial of benefits clauses authorize States to deny treaty protection to investors who do not have substantial business activities in their alleged home State and who are owned and/or controlled by nationals or entities of the denying State or of a State who is not a party to the treaty.

[95] Douglas, Z. (2009). *The international law of investment claims*. Cambridge: Cambridge University Press.

[96] Some IIAs require investors to pursue local remedies in the host State for a certain period of time (e.g. Belgium/Luxembourg–Botswana BIT and Argentina–Republic of Korea BIT). A small number of agreements require the investor to exhaust the host State's administrative remedies before submitting the dispute to arbitration (e.g. China–Côte d'Ivoire BIT).

[97] Termination of IIAs is complicated by "survival" clauses that provide for the continued application of treaties, typically for 10 to 15 years after their termination.

[98] In 2004, the ICSID Secretariat mooted the idea of an appeals facility, but at that time the idea failed to garner sufficient State support. See ISCID, "Possible Improvements of the Framework for ICSID Arbitration", Discussion paper, 22 October 2004, Part VI, and Annex "Possible Features of an ICSID Appeals Facility". In the eight years that have passed since, the views of many governments may have evolved.

[99] For the relevant discussion, see e.g. C. Tams, "An Appealing Option? A Debate about an ICSID Appellate Structure", *Essays in Transnational Economic Law*, No.57, 2006.

[100] Several IIAs concluded by the United States have addressed the potential establishment of a standing body to hear appeals from investor–State arbitrations. The Chile–United States FTA was the first one to establish a "socket" in the agreement into which an appellate mechanism could be inserted should one be established under a separate multilateral agreement (Article 10.19(10)). The Dominican Republic–Central America–United States FTA (CAFTA) (2004) went further, and required the establishment of a negotiating group to develop an appellate body or similar mechanism (Annex 10-F). Notwithstanding these provisions, there has been no announcement of any such negotiations and no text regarding the establishment of any appellate body.

[101] An alternative solution would be a system of preliminary rulings, whereby tribunals in ongoing proceedings would be enabled or required to refer unclear questions of law to a certain central body. This option, even though it does not grant a right of appeal, may help improve consistency in arbitral decision making. See e.g. C. Schreuer, "Preliminary Rulings in Investment Arbitration", in K. Sauvant (ed.), *Appeals Mechanism in International Investment Disputes* (OUP, 2008).

[102] At the WTO, the appeals procedure is limited to 90 days.

[103] Other relevant questions include: Would the appeal be limited to the points of law or also encompass questions of fact? Would it have the power to correct decisions or only a right of remand to the original tribunal? How to ensure the coverage of earlier-concluded IIAs by the new appeals structure?

[104] Because these cases "involve an adjudicative body having the competence to determine, in response to a claim by an individual, the legality of the use of sovereign authority, and to award a remedy for unlawful State conduct." G. Van Harten, "A Case for International Investment Court", Inaugural Conference of the Society for International Economic Law, 16 July 2008, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1153424.

[105] Ibid.

[106] A system where judges are assigned to the case, as opposed to being appointed by the disputing parties, would also save significant resources currently spent on researching arbitrator profiles.

[107] Similarly to the European Court of Human Rights, which adjudicates claims brought under the European Convention for the Protection of Human Rights and Fundamental Freedoms.

[108] Such capacity-building activities are being carried out by, among others, UNCTAD (with different partner organizations). Latin American countries, for example, have benefitted from UNCTAD's advanced regional training courses on ISDS on an annual basis since 2005: see http://unctad.org/en/Pages/DIAE/International%20Investment%20Agreements%20(IIA)/IIA-Technical-Cooperation.aspx.

[109] IPFSD, 2012.

Box III.1

[a] Decree No.86, China Securities Regulatory Commission, 11 October 2012.

[b] Press Notes No. 4, 5, 6, 7 and 8, Ministry of Commerce and Industry, 20 September 2012, Circular No. 41, Reserve Bank of India, 10 October 2012.

[c] Press release, Ministry of Finance, 21 December 2012.

[d] "New areas in Dubai where expats can own property", *Khaleej Times*, 22 June 2012.

[e] Foreign Investment Law (Law No, 21/ 2012), Presidential Office, 2 November 2012. See www.president-office.gov.mm/en/hluttaw/law/2012/11/23/id-1103.

[f] Resolution No. 111-F/2012, *Official Gazette*, 28 December 2012.

[g] "Government adopted a decree on privatization of the fuel and energy complex enterprises", Ukraine government portal, 19 February 2013.

Box III.2

[a] "Simplification of direct investment foreign exchange management to promote trade and investment facilitation", State Administration of Foreign Exchange, 21 November 2012.

[b] Press release, Ministry of Economy, Industry and Commerce, 23 October 2012.

[c] "Emergency Economic Measures for the Revitalization of the Japanese Economy", Cabinet Office, 11 January 2013.

[d] "President Asif Ali Zardari signs Special Economic Zones Bill 2012", Board of Investment, 10 September 2012.

[e] "Cabinet Approves Bill of National Investment for 2013", Ministry of Cabinet Affairs, 3 February 2013.

Box III.3

[a] Resolución Conjunta 620/2012 y 365/2012, Official Gazette, 23 October 2012.

[b] Regulation No. 14/8 / PBI/2012, Bank Indonesia, 13 July 2012.

[c] "Kazakh Law Sets State Control of New Oil Pipelines", Reuters 14 June 2012.

[d] Executive Order No.79-S-2012, Official Gazette, 16 July 2012.

Box III.4

[a] New Land Code (Law No. 2013-1), 14 January 2013.

[b] "Government nationalizes Electropaz, Elfeo and ensures job security and salary workers", Official press release, 29 December 2012.

[c] "Morales Dispone Nacionalización del Paquete Accionario de Sabsa", Official press release, 18 February 2013.

[d] Statement by the Prime Minister of Canada on foreign investment, 7 December 2012.

[e] Act T/9400/7 amending the Fundamental Law, 18 December 2012.

[f] Law 56 of 2012, Official Gazette No. 111, 14 May 2012.

Box III.5

[a] Bloomberg, "Deutsche Boerse-NYSE Takeover Vetoed by European Commission", 1 February 2012. Available at www.bloomberg.com/news/2012-02-01/european-commission-blocks-proposed-deutsche-boerse-nyse-euronext-merger.html (accessed 30 April 2013).

[b] Reuters, "Singapore Exchange ends ASX bid after Australia rebuff", 8 April 2011. Available at www.reuters.com/article/2011/04/08/us-asx-sgx-idUSTRE7370LT20110408 (accessed 30 April 2013).

[c] The Economic Times, "BHP Billiton abandons bid for fertiliser-maker Potash", 15 November 2010. Available at http://articles.economictimes.indiatimes.com/2010-11-15/news/27607057_1_potash-corp-marius-kloppers-saskatchewan (accessed 30 April 2013).

[d] Press release, Ministry of Industry, Canada, 7 December 2012. Available at http://news.gc.ca/web/article-eng.do?nid=711509 (accessed 30 April 2013).

[e] Financial Times, "China clears Marubeni-Gavilon deal", 23 April 2013. Available at www.ft.com/cms/s/0/032f2e7c-ac33-11e2-9e7f-00144feabdc0.html#axzz2Rw2yv1Ly (accessed 30 April 2013).

[f] Competition NEWS, "The Rhodes-Del Monte merger", March 2011. Available at www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/Comp-Comm-Newsletter-38-March-2011.pdf (accessed 6 May 2013).

[g] CBCNews, "Govt. confirms decision to block sale of MDA space division", 9 May 2008. Available at http://www.cbc.ca/news/technology/story/2008/05/09/alliant-sale.html (accessed 30 April 2013).

Box III.7

[a] http://cancilleria.gob.ec/wp-content/uploads/2013/04/22abr_declaracion_transnacionales_eng.pdf.