

7th Meeting of the Asia-Pacific Foreign Direct Investment (FDI) Network

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IIA Reform – phase II: modernizing the existing stock of old-generation treaties

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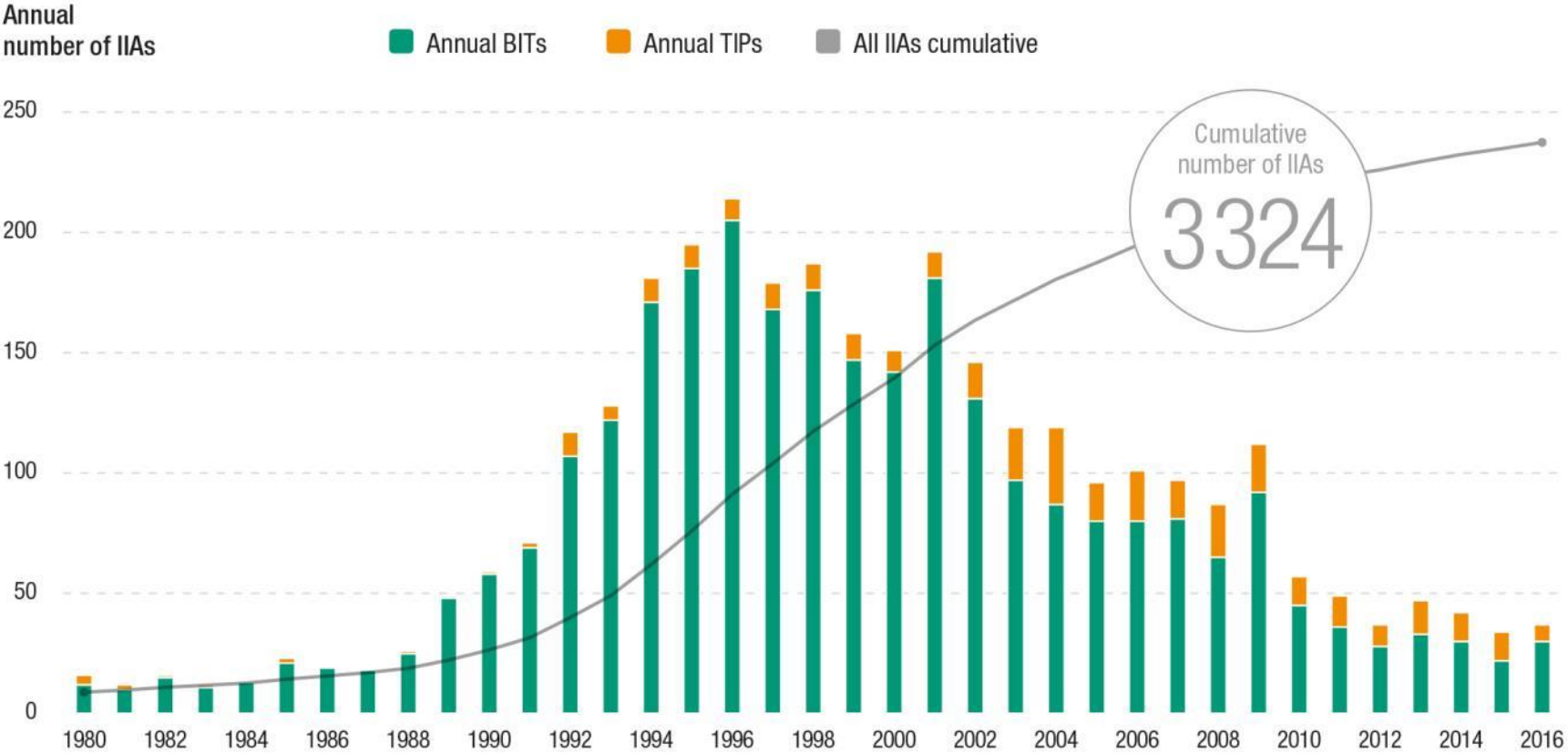
Division on Investment and Enterprise

United Nations Conference on Trade and Development

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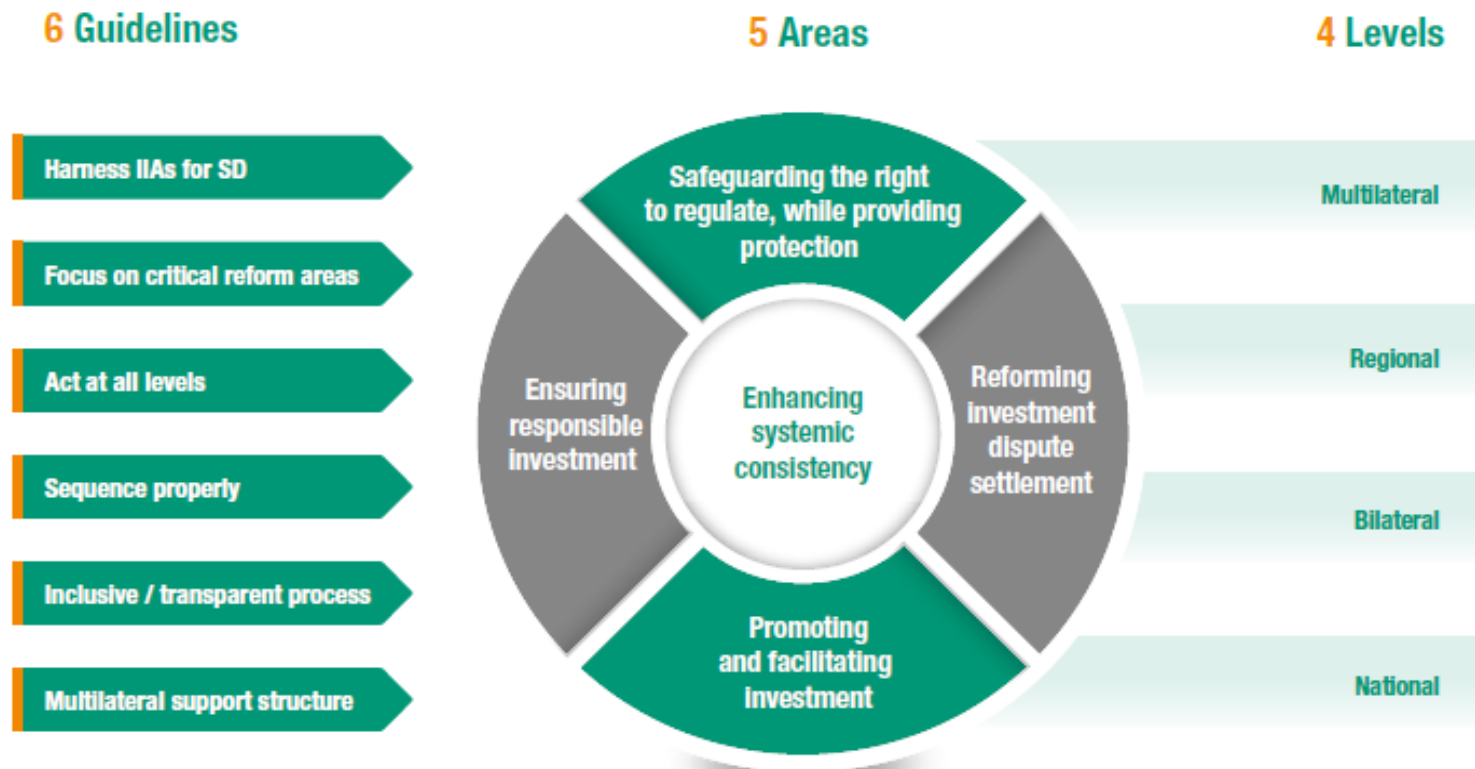
- IIA Reform
- National investment laws
- Country views
- UNCTAD investment policy databases

Trends in IIAs: 37 new IIAs concluded in 2016



Source: © UNCTAD, WIR17, IIA Navigator.

UNCTAD's Policy Tools: Road map for IIA reform (2015)



Source: © UNCTAD, WIR16.

Evidence of IIA reform: Reform-oriented provisions in IIAs signed in 2016

| | 1 | 2 | 3 | 4 | 5 | 6 | 7 | 8 | 9 | 10 | 11 |
|--|-----|-----|----------------|----------------|-----|-----|-----|-----|-----|-----|-----|
| Argentina–Qatar BIT | Yes | Yes | No | No | Yes | Yes | No | No | Yes | No | Yes |
| Austria–Kyrgyzstan BIT | Yes | Yes | No | Yes | Yes | No | No | Yes | Yes | Yes | No |
| Brazil–Peru ETEA | Yes | Yes | Not applicable | Not applicable | Yes | Yes | No | Yes | Yes | Yes | Yes |
| Canada–EU CETA | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Canada–Hong Kong, China BIT | Yes | Yes | Yes | Yes | Yes | Yes | Yes | No | Yes | No | No |
| Canada–Mongolia BIT | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | No |
| Chile–Hong Kong, China Investment Agreement | No | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |
| Islamic Republic of Iran–Japan BIT | No | No | Yes | No | Yes | No | Yes | No | No | No | No |
| Islamic Republic of Iran–Slovak Republic BIT | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | No |
| Japan–Kenya BIT | Yes | Yes | Yes | Yes | Yes | Yes | No | Yes | No | Yes | No |
| Mexico–United Arab Emirates BIT | No | Yes | Yes | No | Yes | Yes | No | No | No | Yes | No |
| Morocco–Nigeria BIT | Yes | Yes | Yes | Yes | Yes | Yes | No | Yes | Yes | Yes | Yes |
| Morocco–Russian Federation BIT | No | No | Not applicable | No | No | Yes | No | No | No | No | No |
| Morocco–Rwanda BIT | No | Yes | Not applicable | No | Yes | Yes | No | No | No | No | No |
| Nigeria–Singapore BIT | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | No |
| Nigeria–United Arab Emirates BIT | No | Yes | No | No | Yes | Yes | No | No | No | No | No |
| Rwanda–Turkey BIT | Yes | Yes | Yes | Yes | Yes | Yes | No | No | No | Yes | No |
| TPP | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes | Yes |

1. Preamble references public policy interests as treaty objectives
2. Refined definition of investment
3. Circumscribed fair and equitable treatment
4. Clarification of indirect expropriation
5. Detailed exceptions from the free-transfer-of-funds obligation
6. Omission of the so-called “umbrella” clause
7. General exceptions
8. Not lowering of standards to attract investment
9. Promotion of Corporate and Social Responsibility standards
10. Limiting access to ISDS
11. Specific proactive provisions on investment promotion

Note: the scope and depth of commitments in each provision varies from one IIA to another.

Source: © UNCTAD, WIR17

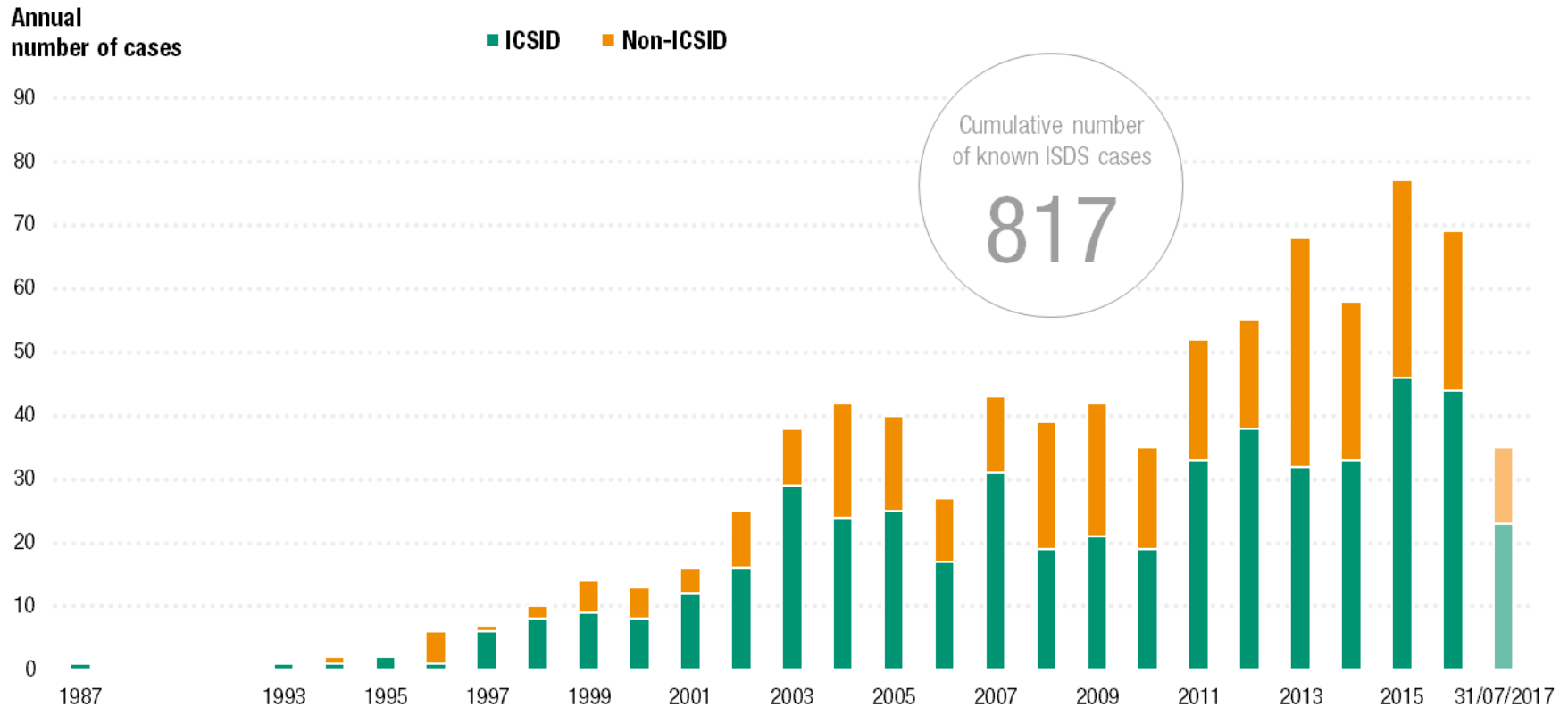
Yes
 No
 Not applicable

Evidence of IIA Reform: Comparing old and new treaties

| Treaty provisions Options for IIA Reform | UNCTAD Policy Framework Option | Earlier BITs (1959–2010) (2,432) | Recent BITs (2011–2016) (110) |
|--|-----------------------------------|--|-------------------------------------|
| Preamble Refer to the protection of health and safety, labour rights, environment or sustainable development | 1.1.2 | 8% | 56% |
| Definition of covered investment Expressly exclude portfolio investment, sovereign debt obligations or claims to money arising solely from commercial contracts | 2.1.1 | 4% | 39% |
| Definition of covered investor Include "denial of benefits" clause | 2.2.2 | 5% | 58% |
| Most-favoured-nation treatment Specify that such treatment is not applicable to other IIAs' ISDS provisions | 4.2.2 | 2% | 45% |
| Fair and equitable treatment Refer to minimum standard of treatment under customary international law | 4.3.1 | 1% | 29% |
| Indirect expropriation Clarify what does and does not constitute an indirect expropriation | 4.5.1 | 5% | 42% |
| Free transfer of funds Include exceptions for balance-of-payments difficulties and/or enforcement of national laws | 4.7.2 4.7.3 | 18% | 74% |
| Public policy exceptions Include general exceptions, e.g. for the protection of human, animal or plant life, or health; or the conservation of exhaustible natural resources | 5.1.1 | 7% | 43% |

Source: ©UNCTAD, WIR17. Note: The numbering refers to "Policy Options for IIAs: Part A. Post-Establishment", in the 2015 version of UNCTAD's Investment Policy Framework for Sustainable Development. Data derived from UNCTAD's IIA Mapping Project.

The rate of new treaty-based ISDS cases continues unabated, 1987–July 2017



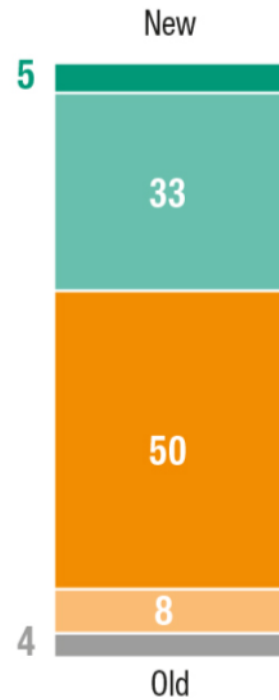
Source: ©UNCTAD, ISDS Navigator.

All of today's known ISDS cases are based on treaties concluded before the year 2010

- Old treaties abound
- **Old treaties "bite"**
- Old treaties perpetuate inconsistencies



Age of IIAs: share of IIAs in force, by year of signature (per cent)



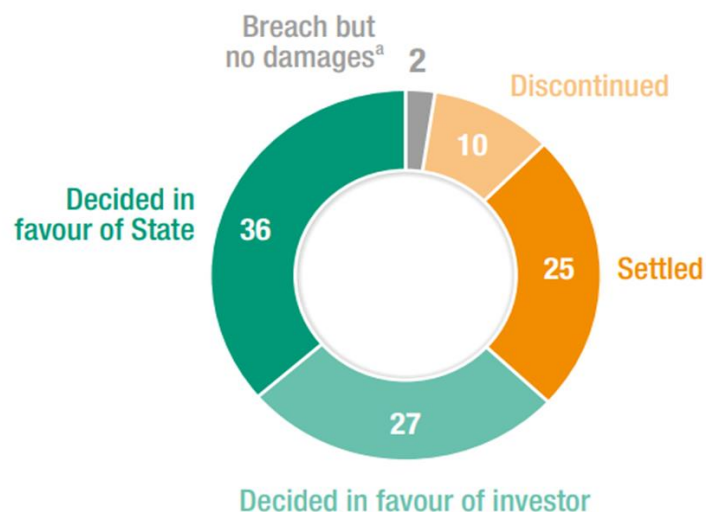
IIAs invoked in known treaty-based ISDS cases, by year of signature (per cent)



Source: ©UNCTAD, WIR17, IIA Navigator Source: ©UNCTAD, WIR17, ISDS Navigator.

Overall outcomes ISDS cases, 1987-2016

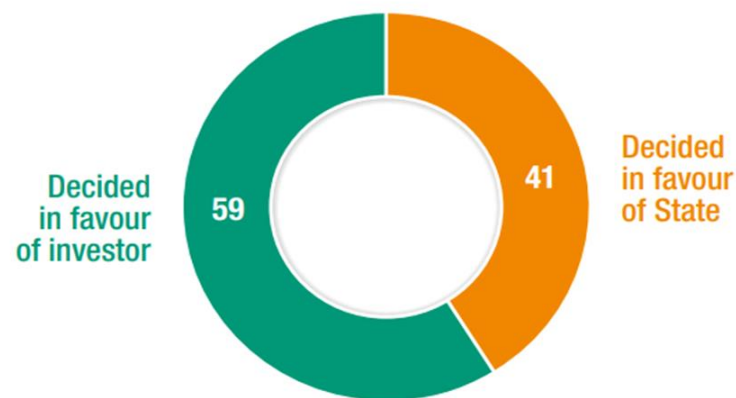
Figure III.15. Results of concluded cases, 1987–2016 (Per cent)



Source: ©UNCTAD, ISDS Navigator.

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

Figure III.16. Results of decisions on the merits, 1987–2016 (Per cent)



Source: ©UNCTAD, ISDS Navigator.

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

UNCTAD Policy Tools (2017) – Phase 2 of IIA Reform

10 options for modernizing old-generation treaties



Source: © UNCTAD, WIR17.

Reform options: Actions and outcomes

| Action option | Outcome |
|---|---|
| 1. Jointly interpreting treaty provisions | Clarifies the content of a treaty provision and narrows the scope of interpretive discretion of tribunals |
| 2. Amending treaty provisions | Modifies an existing treaty's content by introducing new provisions or altering or removing existing ones |
| 3. Replacing "outdated" treaties | Substitutes an old treaty with a new one |
| 4. Consolidating the IIA network | Abrogates two or more old IIAs between parties and replaces them with a new, plurilateral IIA |
| 5. Managing relationships between coexisting treaties | Establishes rules that determine which of the coexisting IIAs applies in a given situation |
| 6. Referencing global standards | Fosters coherence and improves the interaction between IIAs and other areas of international law and policymaking |
| 7. Engaging multilaterally | Establishes a common understanding or new rules among a multitude of countries, coupled with a mechanism that brings about change "in one go" |
| 8. Abandoning unratified old treaties | Conveys a country's intent to not become a party to a concluded but as yet unratified treaty |
| 9. Terminating existing old treaties | Releases the parties from their obligations under a treaty |
| 10. Withdrawing from multilateral treaties | Similar in effect to termination, but leaves the treaty in force among the remaining parties who have not withdrawn |

UNCTAD Roadmap for IIA Reform: Reforming Investment Dispute Settlement

| Reforming existing investor-State arbitration | | Replacing existing investor-State arbitration |
|--|---|---|
| Fixing existing ISDS mechanisms | Adding new elements to existing ISDS mechanisms | |
| <ol style="list-style-type: none"> 1. Improving the arbitral process, e.g. by making it more transparent and streamlined, discouraging submission of unfounded claims, addressing ongoing concerns about arbitrator appointments and potential conflicts. 2. Limiting investors' access, e.g. by reducing the subject-matter scope, circumscribing the range of arbitrable claims, setting time limits, and preventing abuse by “mailbox” companies 3. Using filters for channelling sensitive cases to State-State dispute settlement 4. Introducing local litigation requirements as a precondition for ISDS | <ol style="list-style-type: none"> 1. Building in effective alternative dispute resolution 2. Introducing an appeals facility (whether bilateral, regional or multilateral) | <ol style="list-style-type: none"> 1. Creating a standing international investment court 2. Replacing ISDS by State-State dispute settlement 3. Replacing ISDS by domestic dispute resolution |

Investment laws

Mostly a developing and transition economy instrument

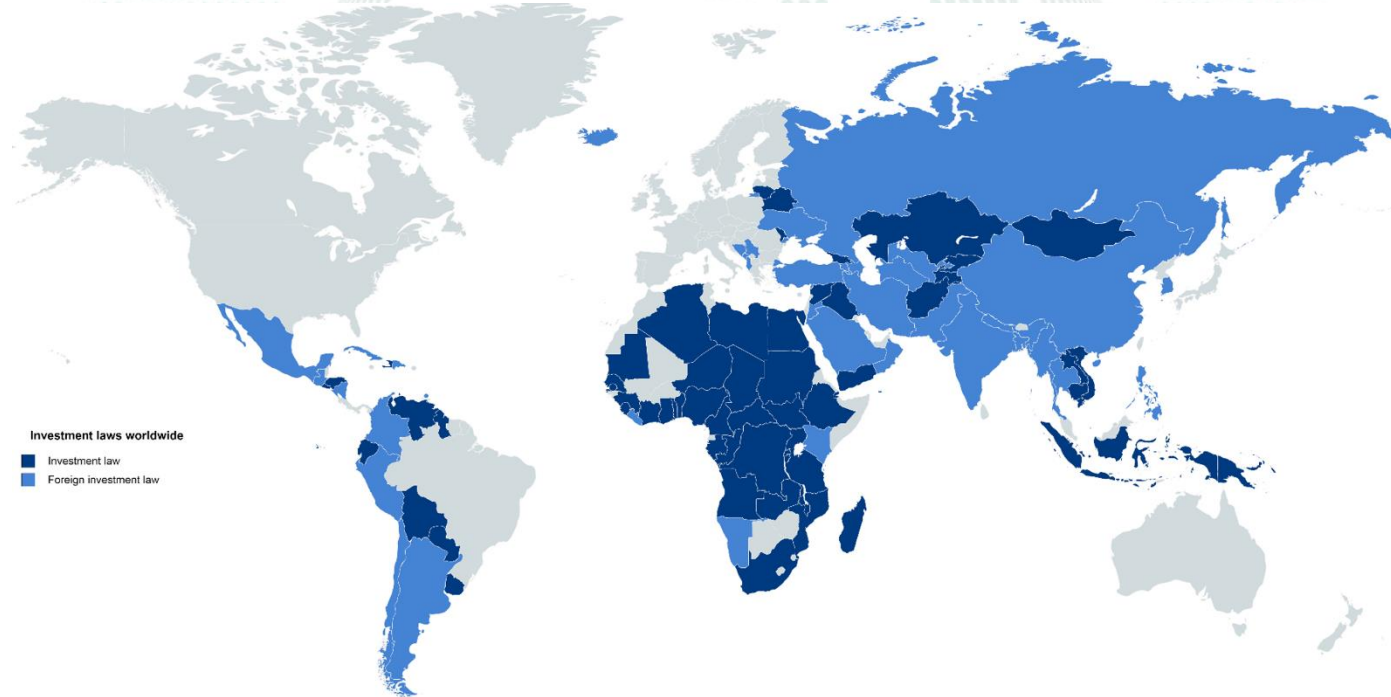
Developing economies: **90**

Transition economies: **17**

Developed economies: **2**

Domestic & foreign investment: **64**

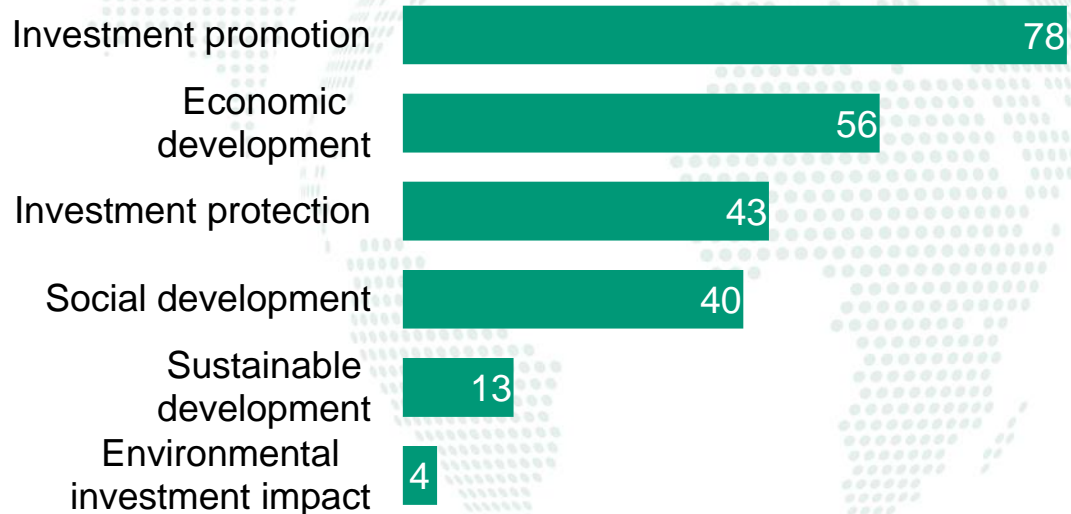
Foreign investment specific: **47**



Source: UNCTAD, Investment Laws Database.

Investment promotion driving regulation

Objectives mentioned in investment laws, by category (Number of laws)

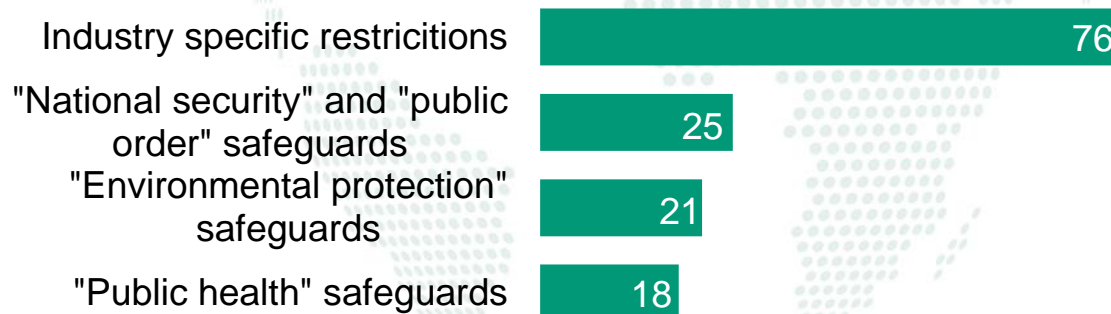


Source: UNCTAD, Investment Laws Database.

Most investment laws include industry-specific restrictions

- Negative list approach: **67**
- Positive list approach: **8**

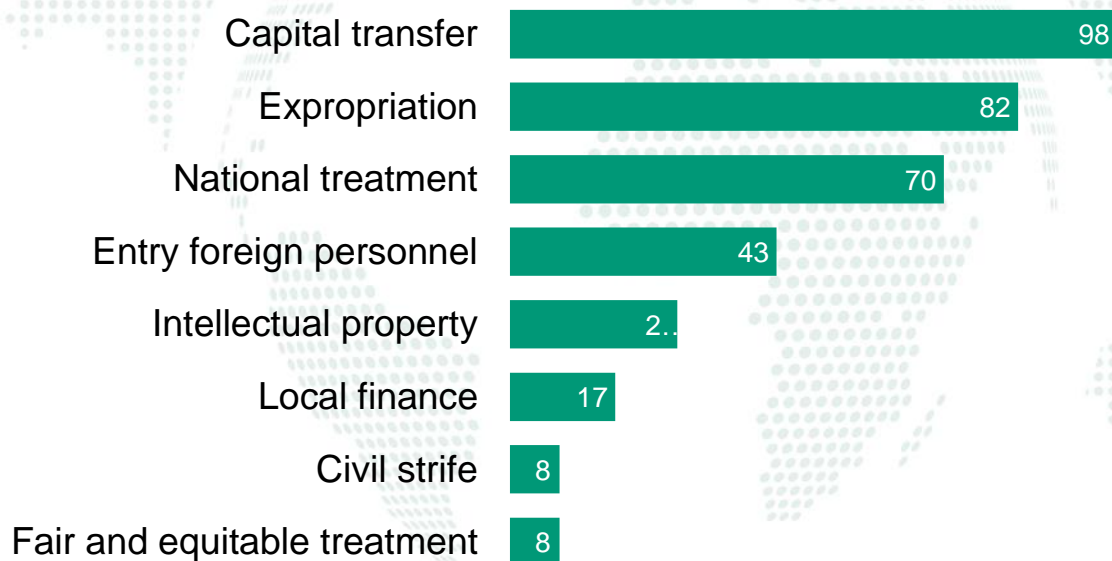
Entry restrictions in investment laws (Number of laws)



Source: UNCTAD, Investment Laws Database.

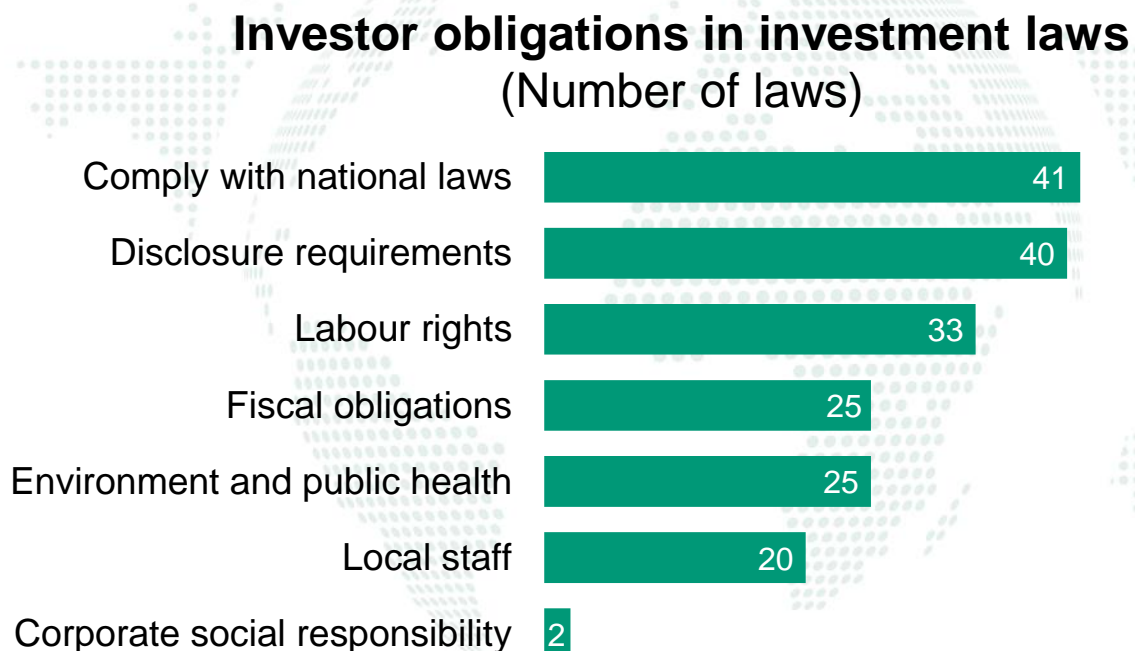
Investor rights and guarantees show strong similarities to IIAs

Investor rights and guarantees in investment laws (Number of laws)



Source: UNCTAD, Investment Laws Database.

Investor obligations, not so common in investment laws



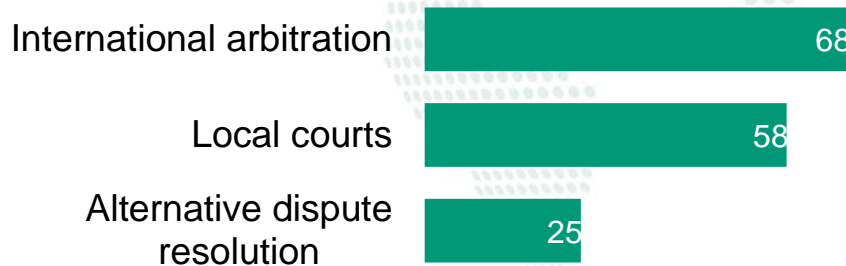
Source: UNCTAD, Investment Laws Database.

Investor-State dispute settlement in national investment laws may also “bite”

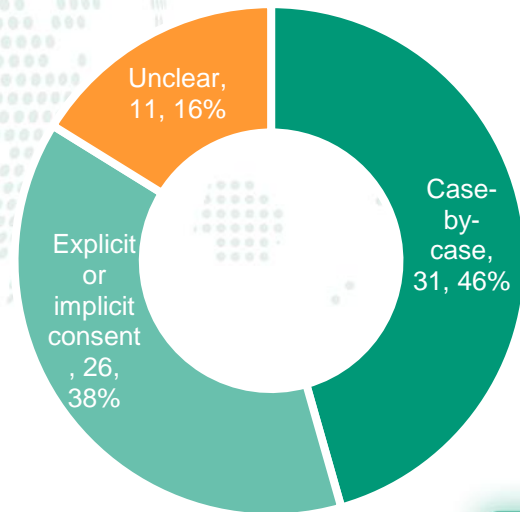
ISDS provisions: **85**

Access to domestic courts and international arbitration:
44 (53%)

Investor–State dispute resolution mechanisms
in investment laws
(number of laws)



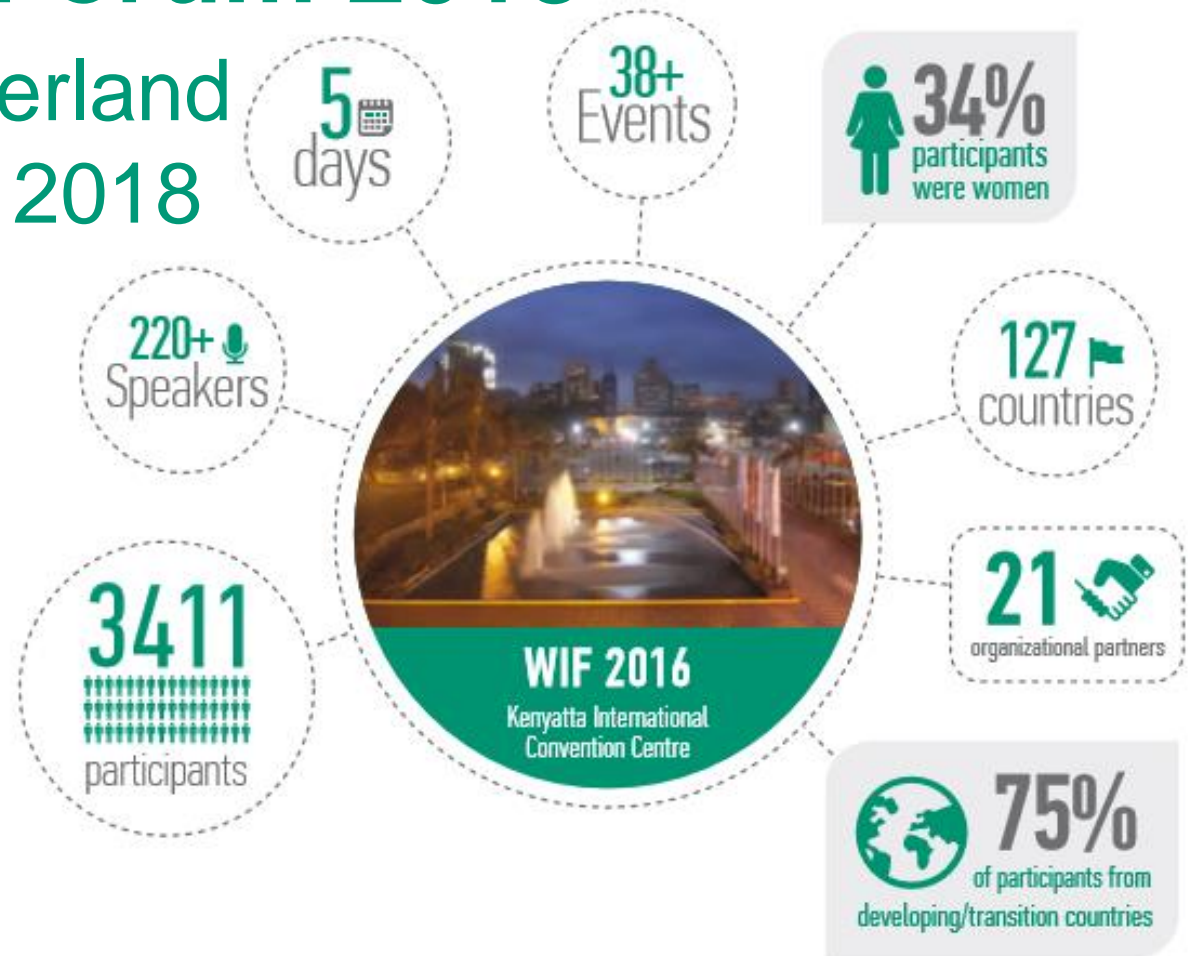
Type of consent to
international arbitration



Source: UNCTAD, Investment Laws Database.

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Geneva, Switzerland
22-26 October 2018



Source: © UNCTAD, WIF 2016 Review.

THANK YOU

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