
Towards a New Generation of Investment Policies

UNCTAD's IPFSD

**Investment Policy Framework for Sustainable
Development**

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Vale Columbia Center on Sustainable International Investment
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UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

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UNCTAD's IPFSD: Why Now? Context

1. Evolving global **investment landscape** for a new investment-development paradigm/path
2. Imperative for mainstreaming **sustainable development** into the investment policy core
3. **Investment policy making at a crossroads**: at times of reflection, review and revision
4. Challenges of **systemic flaws**, issues of policy coherence, synergy and effectiveness

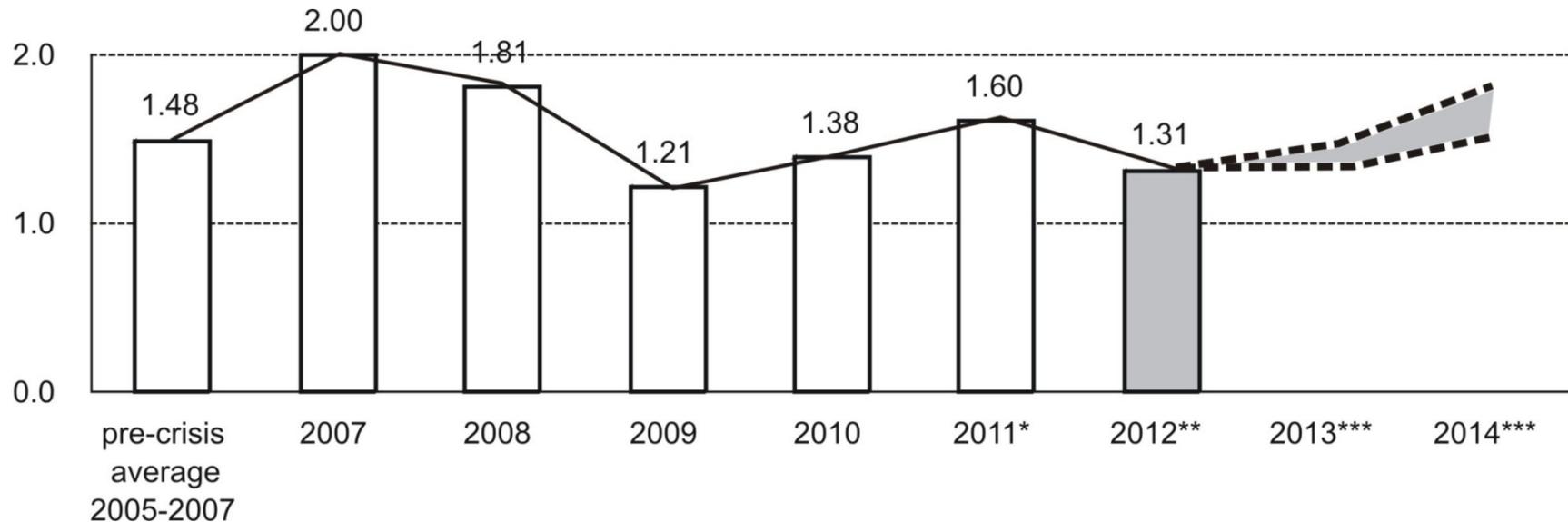


Need guidelines and tools



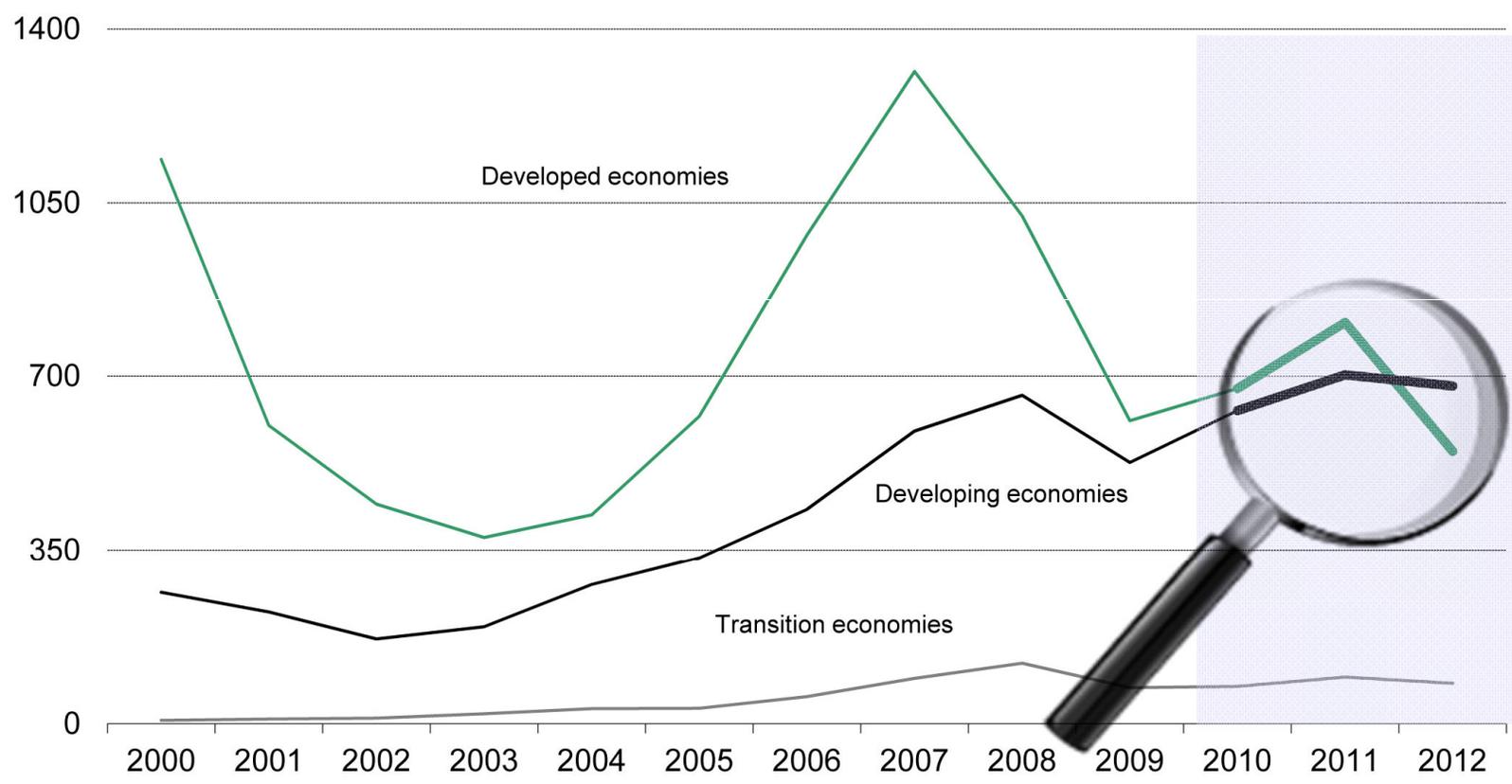
FDI recovery will take longer than expected: FDI declined by 18 per cent in 2012

Global FDI inflows, average 2005–2007, 2007–2014
(Trillions of dollars)



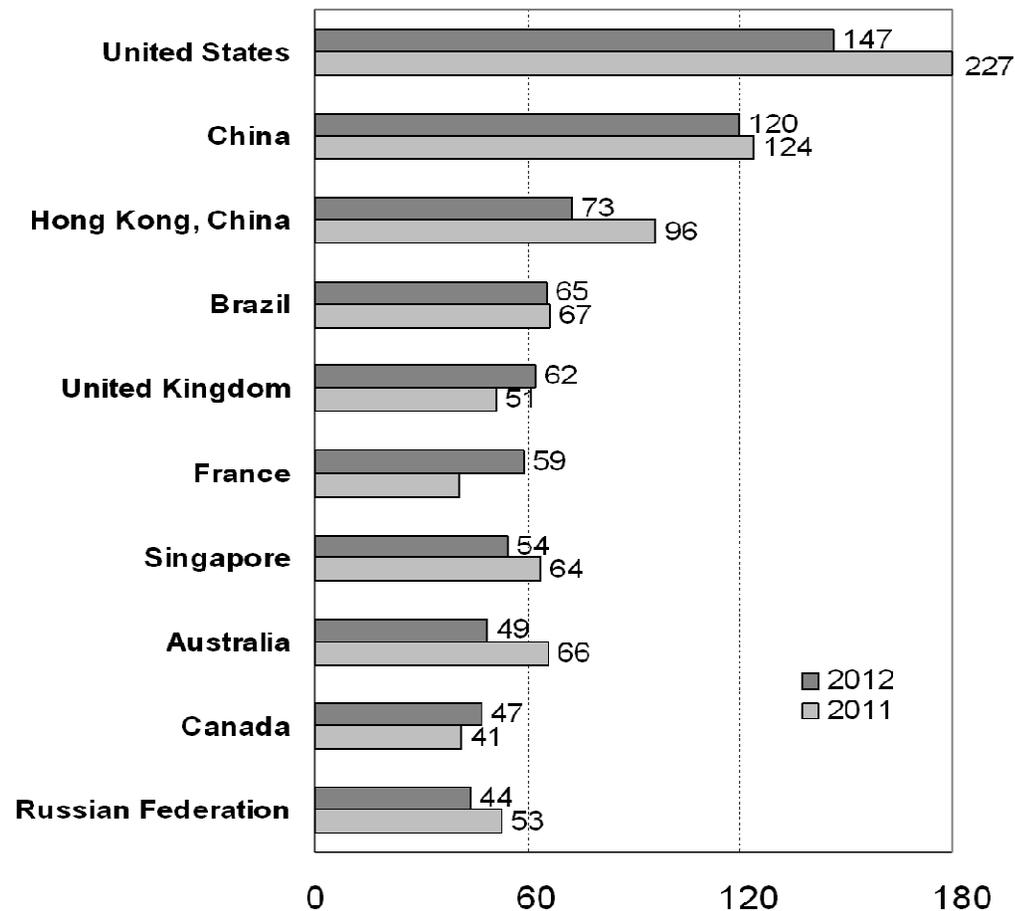
Developing countries surpassed developed countries in FDI inflows by some \$130 billion

FDI inflows, developed, developing and transition economies, 2000–2012
(Billions of dollars)



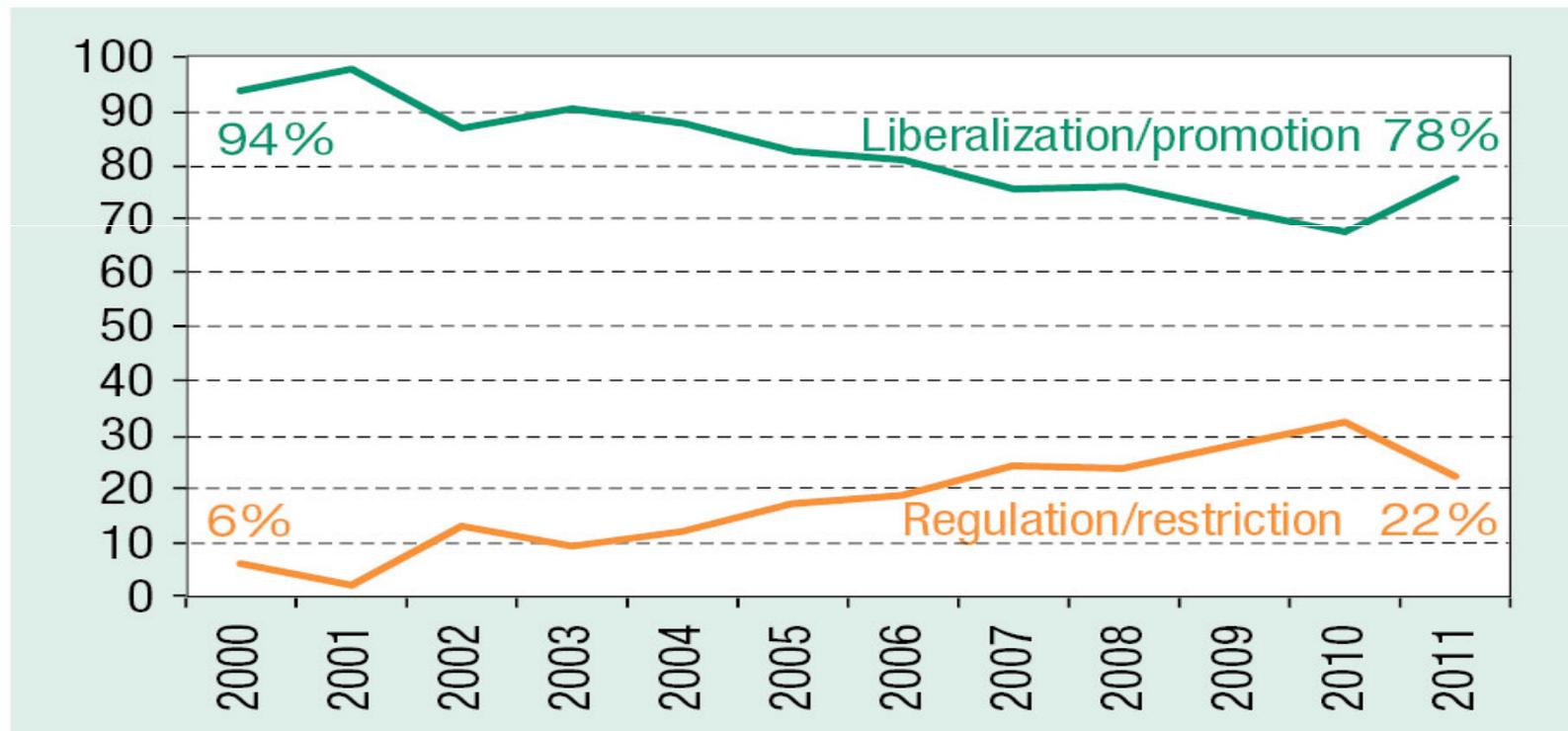
Five out of top 10 FDI recipients are developing or transition economies

FDI inflows, top 10 economies in 2012
(Billions of dollars)



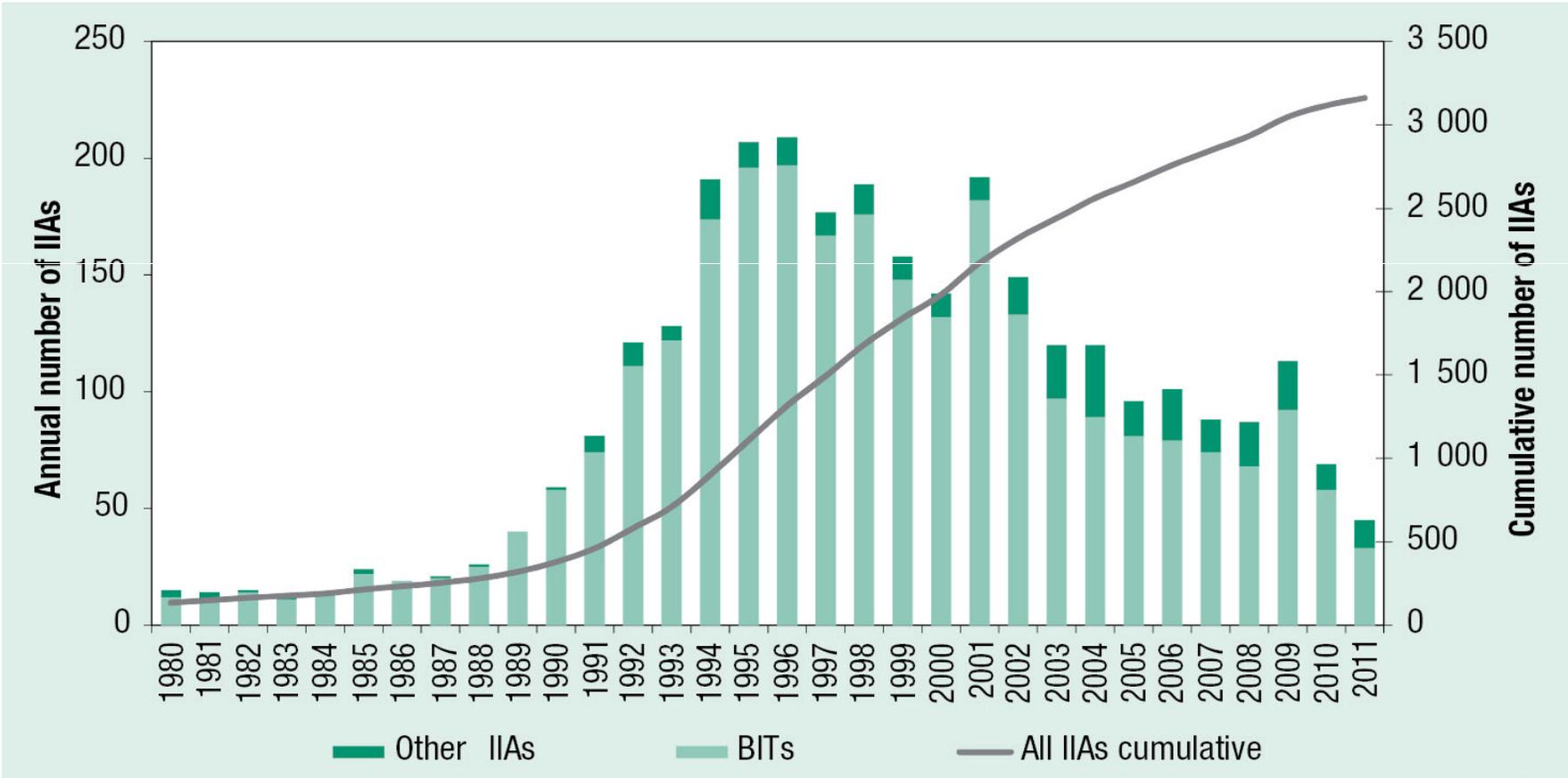
National Investment Policies: Continuous Dichotomy

National investment policy changes, 2000 – 2011
(Per cent of measures)



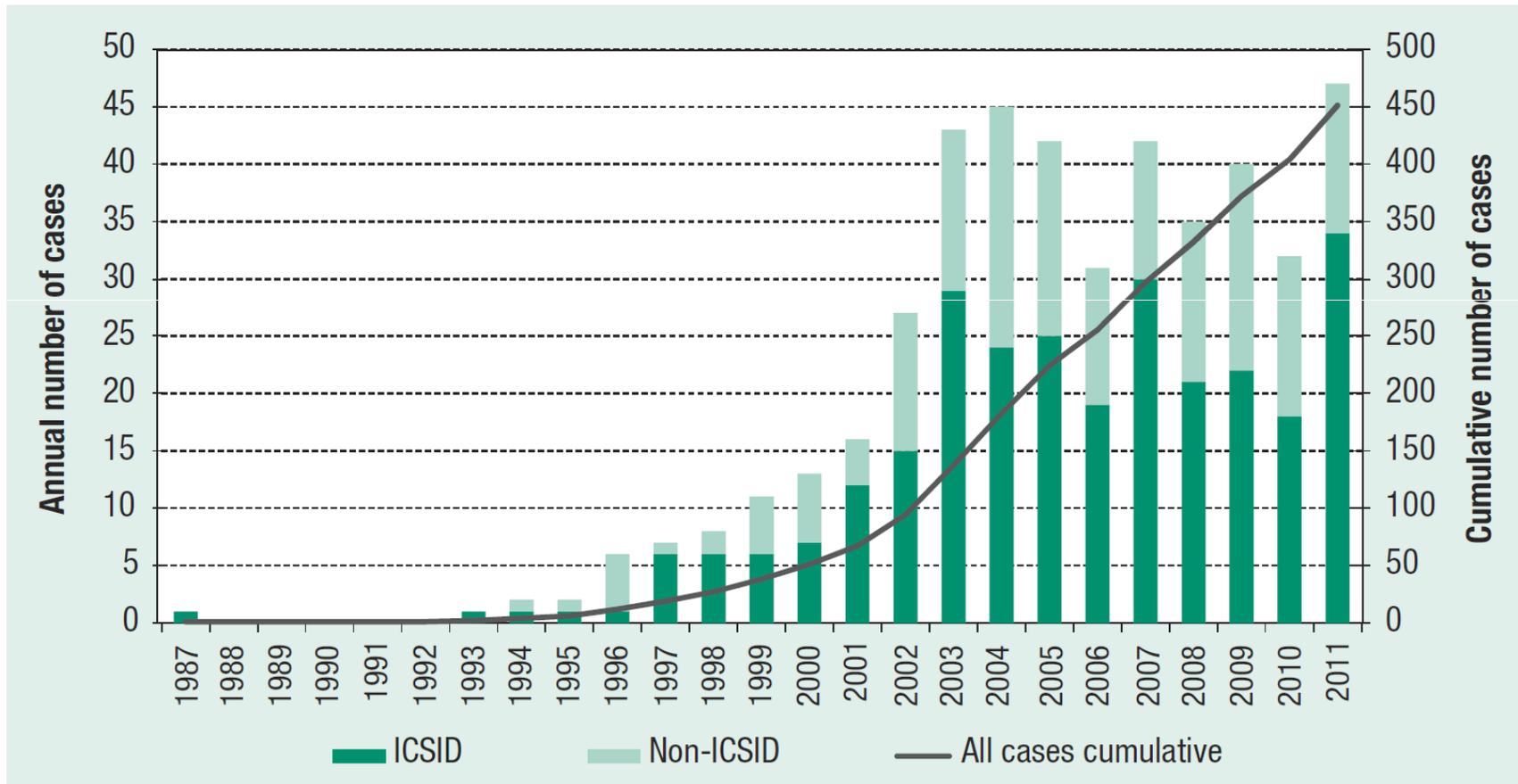
International Investment Policies: Shifting from the bilateral to the regional level

Trends of BITs and “other IIAs”, 1980 – 2011
(Number of treaties)



ISDS Mechanism: Investors continue using it – some States express discontent

Known investor-State treaty-based disputes, 1987 – 2011



Source: UNCTAD.



UNCTAD's IPFSD: Why Now? Context

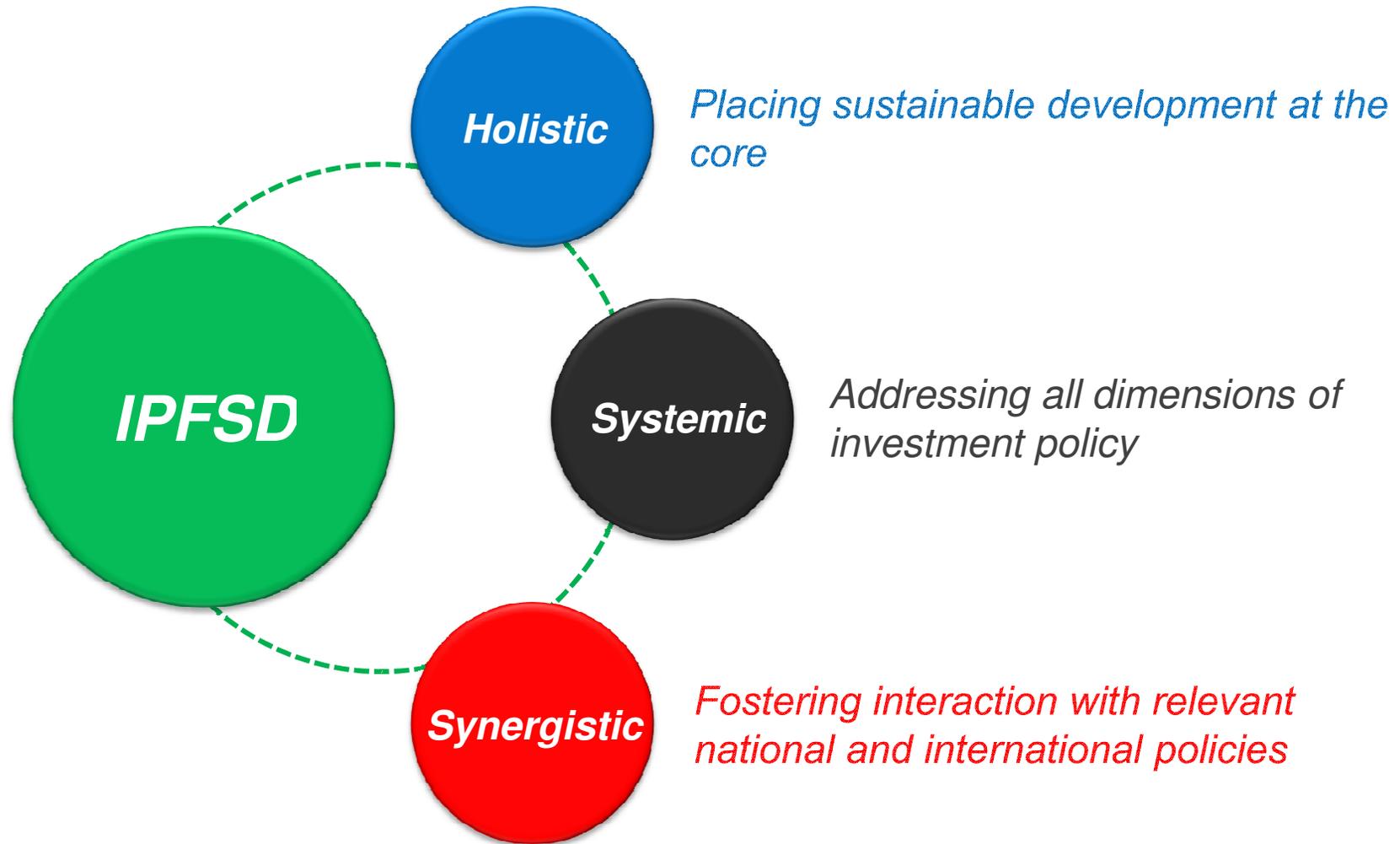
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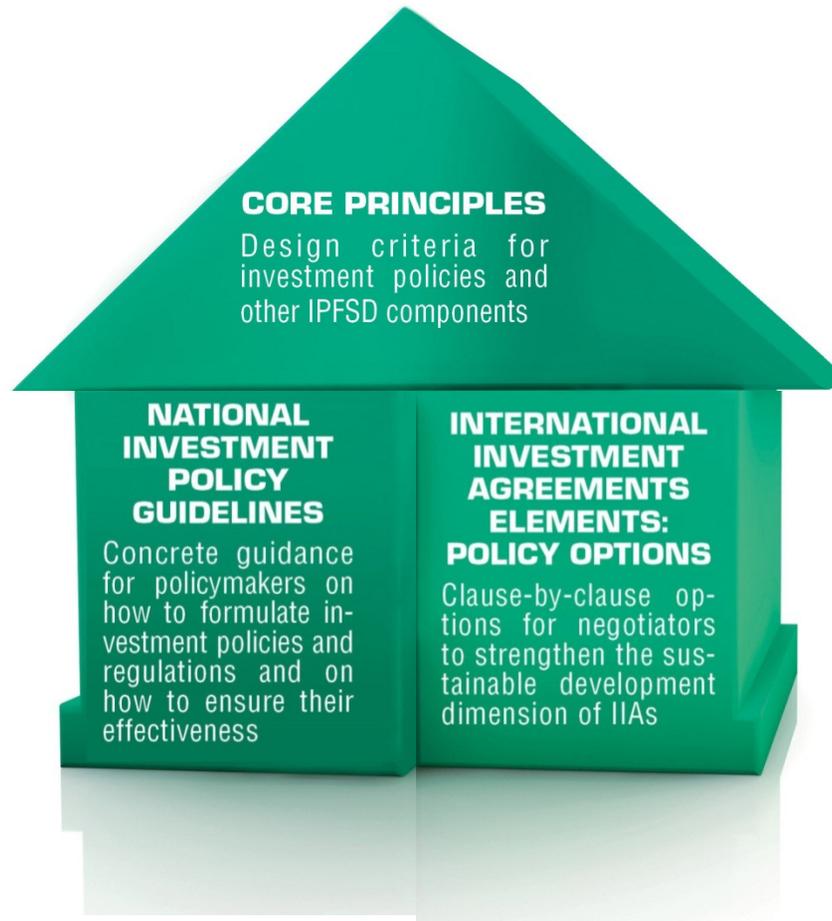


IPFSD: Key Characteristics



IPFSD: Structure & Components

IPFSD helps policymakers address today's investment policy challenges



IPFSD: Core Principles for Investment Policymaking

- ① **Investment for sustainable development**
 - ...overarching objective of investment policymaking ...
- ② **Policy coherence**
 - ...grounded in a country's overall development strategy
 - ... coherent and synergetic ...
- ③ **Public governance and institutions**
 - ...involving all stakeholders ... standards of public governance
 - ...predictable, efficient and transparent procedures for investors
- ④ **Dynamic policymaking**
 - ...regular reviews for effectiveness and relevance ...
- ⑤ **Balanced rights and obligations**
 - ...setting out rights and obligations of States and investors in the interest of development
- ⑥ **Right to regulate**
 - ...in the interest of the public good and to minimize potential negative effects
- ⑦ **Openness to investment**
 - ...in line with development strategy
 - ... open, stable and predictable entry conditions ...
- ⑧ **Investment protection and treatment**
 - ...adequate protection to established investors ... non-discriminatory
- ⑨ **Investment promotion and facilitation**
 - ...aligned with sustainable development goals
 - ... minimize risk of harmful competition for investment
- ⑩ **Corporate governance and responsibility**
 - ...promote adoption of and compliance with best international practices of CSR ...
- ⑪ **International cooperation**
 - ...address shared investment-for-development challenges
 - ... avoid investment protectionism



National Investment Policymaking: the Challenges

Integrating investment policy in development strategy

- Channeling investment to areas key for the build-up of productive capacity and international competitiveness
- Ensuring coherence with the host of policy areas geared towards overall development objectives

Incorporating sustainable development objectives in investment policy

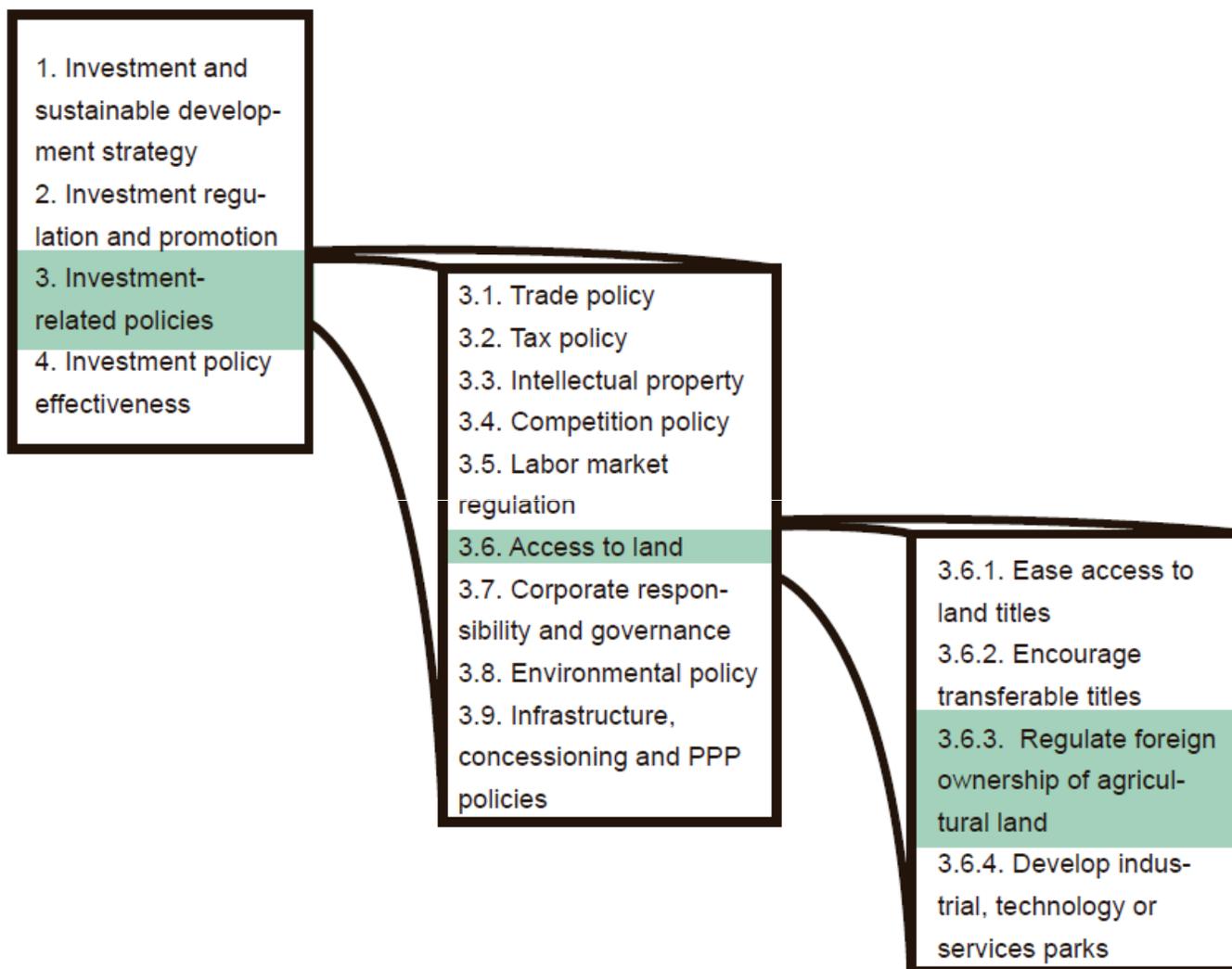
- Maximizing positive and minimizing negative impacts of investment
- Fostering responsible investor behaviour

Ensuring investment policy relevance and effectiveness

- Building stronger institutions to implement investment policy
- Measuring the sustainable development impact of investment



National Investment Policymaking in the IPFSD: How It Works



National Investment Policymaking: IPFSD's Features

1 Integrating investment policy in development strategy

- Section on *strategic investment priorities* and investment policy coherence for *productive capacity building*, including sub-sections on investment and: Human resource development, Infrastructure (including section on PPPs), Technology, Enterprise development
- Attention to investment policy options for the *protection of sensitive industries*
- Sections on other policy areas geared towards overall sustainable development objectives to ensure *coherence* with investment policy

2 Incorporating sustainable development objectives in investment policy

- Specific guidelines for the design of investment-specific policies and regulations, including not only establishment and operations, treatment and protection of investments, and investment promotion and facilitation, but also *investor responsibilities*
- Guidance on the encouragement of responsible investment and on guaranteeing compliance with *international core standards*
- Guidance on investment promotion and use of *incentives in the interest of inclusive and sustainable development*
- Specific guidelines aimed at *minimizing potential negative effects of investment*, such as tax avoidance, anti-competitive behaviour, core labour standards, environmental impact
- A sub-section on access to land, incorporating the *Principles for Responsible Agricultural Investment (PRAI)*

3 Ensuring investment policy relevance and effectiveness

- Section on investment policy effectiveness, including guidance on *public governance and institutional capacity-building*
- Guidance on the *measurement of policy effectiveness*, with reference to quantitative investment impact indicators and UNCTAD tools (FDI Attraction and Contribution Indices)



International Investment Policymaking: the Challenges

- 1 Strengthening the development dimension of IIAs
 - Safeguarding policy space for sustainable development needs
 - Making investment promotion provisions more concrete and consistent with sustainable development objectives
 - 2 Balancing the rights and obligations of states and investors
 - Reflecting investor responsibilities in IIAs
 - Learning from and building on CSR principles
 - 3 Managing the systemic complexity of the IIA regime
 - Dealing with gaps, overlaps and inconsistencies in IIA coverage and content and resolving institutional and dispute settlement issues
 - Ensuring effective interaction and coherence with other public policies and systems
-

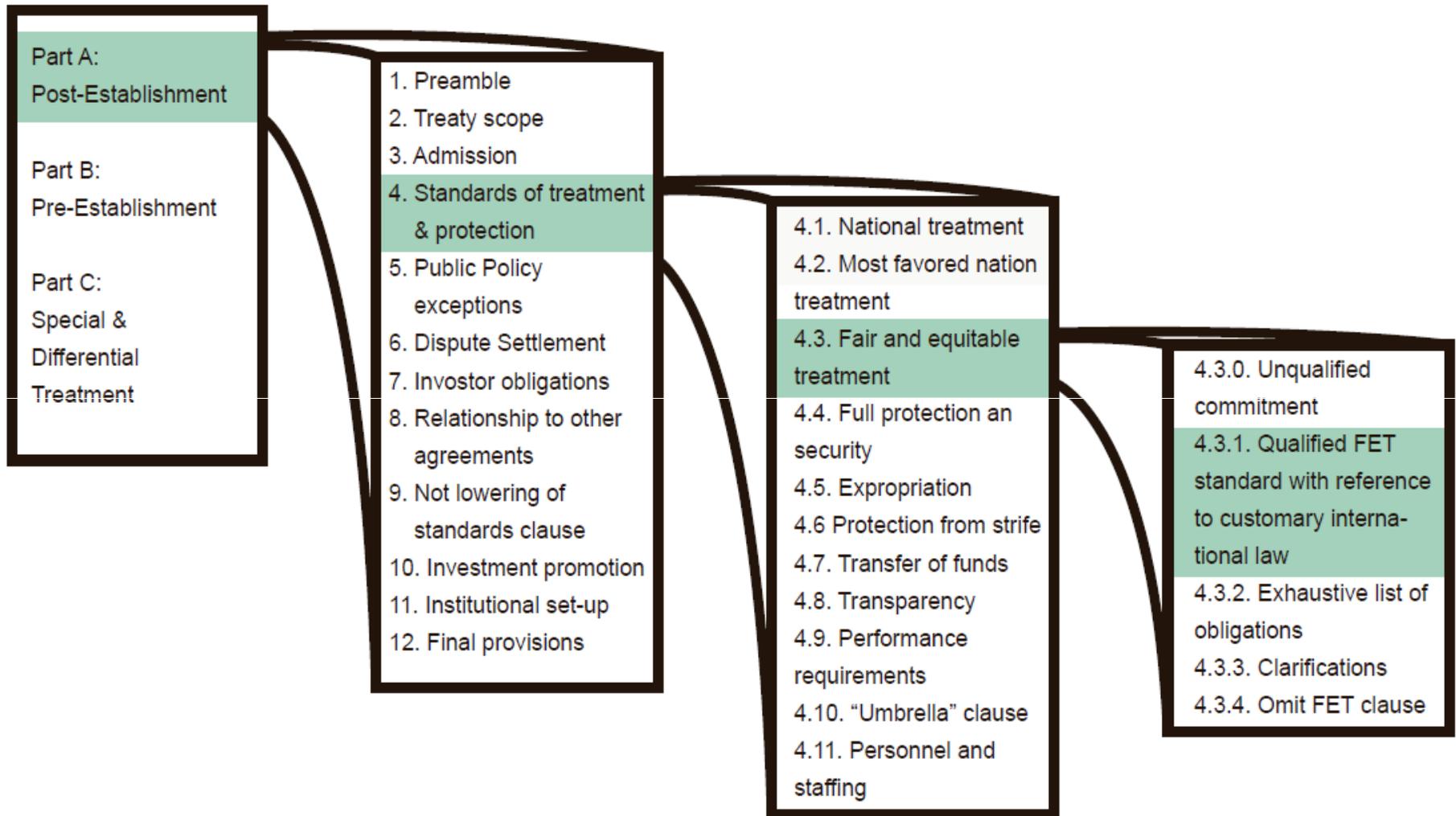


International Investment Policymaking: 3 Levels

- Formulating a strategic approach to international engagement on investment
 - Integrating IIAs into a country's development strategy
 - Understanding what IIAs can and cannot do
- Designing sustainable development friendly IIA clauses
 - What type of agreement (BIT or FTA)
 - What type of relationship (bilateral or regional)
 - With whom
- Engaging in multilateral consensus building



IIA Table of Elements in the IPFSD: How It Works



An Excerpt from the IPFSD Framework

4.3 Fair and equitable treatment (FET)

... protects foreign investors/ investments against, e.g. denial of justice, arbitrary and abusive treatment

- 4.3.0 Give an unqualified commitment to treat foreign investors/investments “fairly and equitably”.
- 4.3.1 Qualify the FET standard by reference to:
 - minimum standard of treatment of aliens under customary international law (MST/CIL)
 - international law or principles of international law.
- 4.3.2 Include an exhaustive list of State obligations under FET, e.g. obligation not to
 - deny justice in judicial or administrative proceedings
 - treat investors in a manifestly arbitrary manner
 - flagrantly violate due process
 - engage in manifestly abusive treatment involving continuous, unjustified coercion or harassment
 - infringe investors’ legitimate expectations based on investment-inducing representations or measures.
- 4.3.3 Clarify (with a view to giving interpretative guidance to arbitral tribunals) that:
 - the FET clause does not preclude States from adopting good faith regulatory or other measures that pursue legitimate policy objectives
 - the investor’s conduct (including the observance of universally recognized standards, see section 7) is relevant in determining whether the FET standard has been breached
 - the country’s level of development is relevant in determining whether the FET standard has been breached
 - a breach of another provision of the IIA or of another international agreement cannot establish a claim for breach of the clause.
- 4.3.4 Omit FET clause.

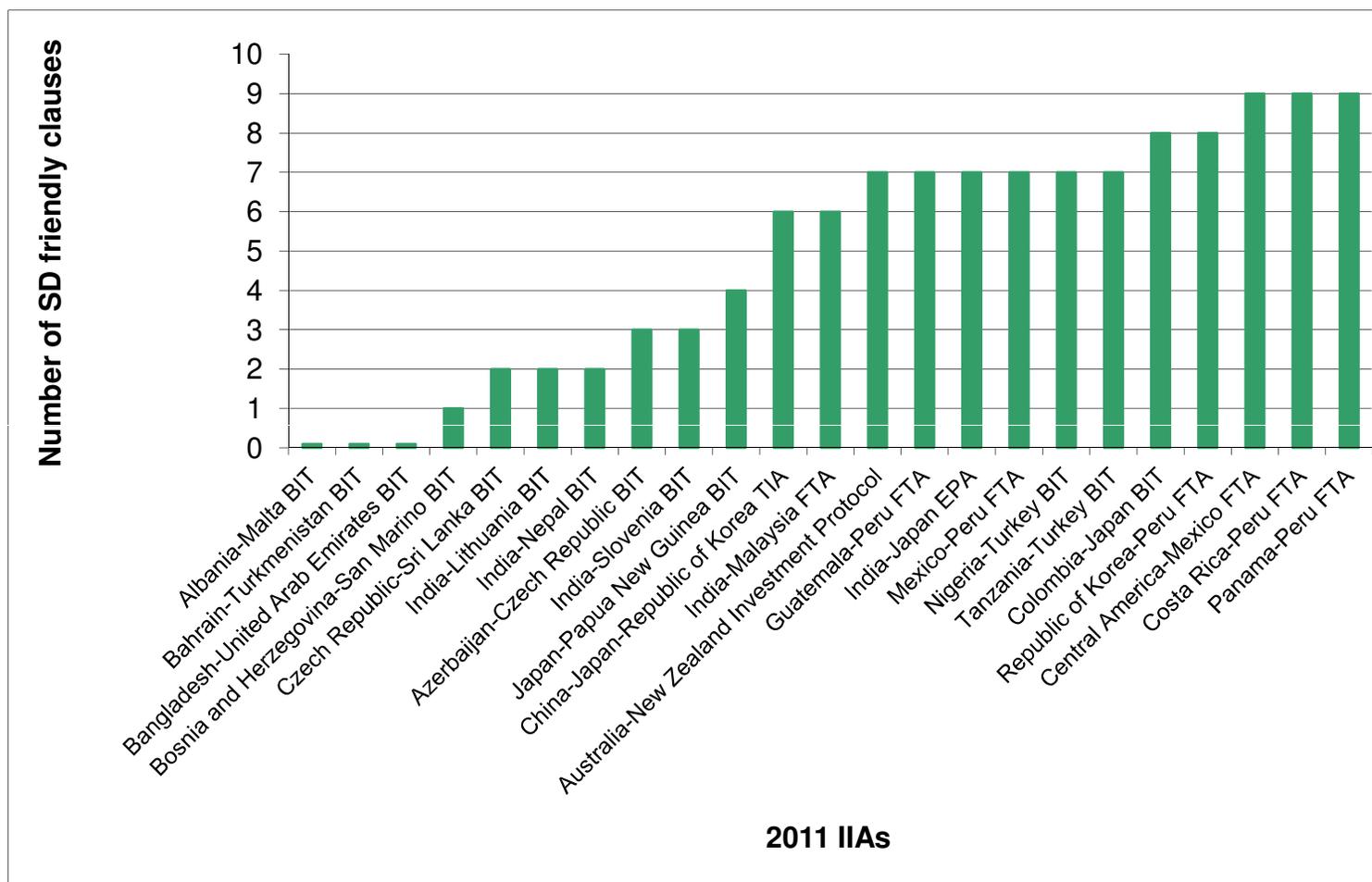


IPFSD Policy Options – Some Examples

- Carefully **craft scope and definitions** clause.
- Structure **FET** as an exhaustive list of State obligations.
- Distinguish legitimate regulations from **regulatory takings**.
- Make **full protection and security** commensurate with a country's level of development.
- Limit the scope of the **transfer of funds clause**.
- Include **exceptions** to protect human rights, health, labor standards, and the environment.
- Consider no **ISDS**, or last resort ISDS jurisdiction.
- Create an **institutional setup** that makes the IIA adaptable to changing development contexts.



Sustainable Development Aspects of IIAs (2011)



IPFSD: What for? End-use

- ✓ **Reference for policy making:** a "policy at a glance" for politicians, a handbook for national policy makers, and "checklist of options" for treaty negotiators
- ✓ **Tool for technical assistance:** framework for IPRs, basis for updating regulatory regimes, menu for training, a handbook for general advisory services
- ✓ **Basis for consensus-building:**
 - Short-term: promoting common understanding on key issues related to investment for sustainable development;
 - Longer-term: a stepping stone for formulating common denominators of multilateral cooperation
- ✓ **Living framework for all stakeholders to contribute:** "open source" on the web and discussion forum for best practices.



The Investment Policy Hub and the IPFSD

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News & Events



28 January 2013 - Renewed Efforts Towards Regional Economic Integration Amid Slower FDI Recovery

"The FDI recovery from the economic crisis will take longer than expected", UNCTAD Director James Zhan said at an UNCTAD expert meeting today while presenting the latest trends in 2012 global FDI flows. Mr. Zhan also highlighted that regional integration can provide a strong boost to intra-regional cross-border investment linkages as the experiences of long-established regional groups - the EU and ASEAN - suggest. Many initiatives towards (inter-)regional economic integration across the globe are currently underway. [\[More info\]](#) [\[Global Investment Trends Monitor\]](#)



11 January 2013 - Canada and Benin Signed New Bilateral Investment Treaty

The Prime Minister of Canada and the President of Benin [signed](#) a "Foreign Investment Promotion and Protection Agreement" in Canada on last Tuesday (8 January). As of today, the



About Us

The Investment Policy Hub is an initiative by the United Nations Conference on Trade and Development (UNCTAD), Division on Investment and Enterprise (DIAE). It provides stakeholders in the field of investment policymaking an interactive platform where they can stay up to date and discuss the latest developments in this area.

Investment Policy Framework For Sustainable Development

The IPFSD is the UNCTAD programme that designs and collects recommendations for national and international investment rule making. It consists of a set of [\[...\]](#)



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Featured Discussion



The concept of 'necessity' and non-precluded measures in international investment law: three lessons from WTO tribunals

Andrew D. Mitchell, University of Melbourne (Australia) and
Caroline Henckels, University of Cambridge (United Kingdom)

So far investment tribunals' approaches to necessity analysis have not delivered consistent and analytically robust results.

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