TRAINING ON TRADE AND INVESTMENT NEGOTIATIONS

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Course curriculum

- Module 1 – **Trends and developments in FDI flows**
- Module 2 – **The international framework for trade and investment**
- Module 3 – **Trends in International investment, investment agreements and international dispute settlement**
- Module 4 – **Negotiation IIAs : Scope and definitions**
- Module 5 – **Negotiating IIAs: Treatment of investors and their investment**
- Module 6 - **Negotiating IIAs: Substantive protection provisions**
- Module 7 - **Investor-State dispute settlement (ISDS) in recent IIAs**
- Module 8 - **New disciplines in IIAs: including new disciplines and rebalancing IIAs. Is there a trend?**

Module 1 – Trends and developments in Foreign Direct Investment

- Understanding the international investment path
- The OLI paradigm
- FDI determinants
- Role of host country policies
- Trends in FDI

Why do firms invest abroad?

- The OLI paradigm
- To remain competitive, grow and survive, firms need to invest abroad.
- Three sets of determining conditions:
  - Ownership-specific advantages
  - Locational advantages in a host country
  - Internationalization is the condition for growth

  (Dunning, UNCTAD, Nunnenkamp)

Revisiting the OLI factors

- Ex. Proprietary technology can compensate for additional costs of establishing production facility abroad.
- Ex. Brand or product can overcome disadvantage *vis a vis* local competitors
- Locational advantages in the host country, such as ex. Size of local market, low labor cost, natural resources can allow greater benefits through internationalization.

New challenges for firms: global competition and financial/economic crisis. Emergence of new players: firms from developing countries, SWF, SOE,….

Host country determinants
I. Policy framework for FDI • economic, political and social stability • rules regarding entry and operations • standards of treatment of foreign affiliates • policies on functioning and structure of markets (especially competition and M&A policies) • international agreements on FDI • privatization policy • trade policy (tariffs and NTBs) and coherence of FDI and trade policies • tax policy
II. Economic determinants
III. Business facilitation • investment promotion (including image-building and investment-generating activities and investment-facilitation services) • investment incentives • hassle costs (related to corruption, administrative efficiency, etc.) • social amenities (bilingual schools, quality of life, etc.) • after-investment services

Type of FDI classified by motives of TNCs	Principal economic determinants in host countries
A. Market-seeking	• market size and per capita income • market growth • access to regional and global markets • country-specific consumer preferences • structure of markets
B. Resource/ asset-seeking	• raw materials • low-cost unskilled labour • skilled labour • technological, innovatory and other created assets (e.g. brand names), including as embodied in individuals, firms and clusters • physical infrastructure (ports, roads, power, telecommunication)
C. Efficiency-seeking	• cost of resources and assets listed under B, adjusted for productivity for labour resources • other input costs, e.g. transport and communication costs to/from and within host economy and costs of other intermediate products • membership of a regional integration agreement conducive to the establishment of regional corporate networks

Host-country determinants (revisited)

- Economic determinants for FDI: respond to what firms are seeking and include various kinds of FDI classified by motives for TNCs
- Policy determinants of FDI: macro-economic policies, FDI-specific policies, legal and institutional framework for doing business and investment climate.
- Additional facilitation policies: introducing , designing and implementing a new generation of targeted FDI policies: the extra-mile that makes a difference.

General remarks: role for governments to steer and direct, to pursue development strategies and integrate their economy in the GVC.

FDI to match host country priorities to contribute to sustainable development of the host country

Relative importance of determinants varies greatly.

Traditional types of motivation by types of FDI

- Resource-seeking
  - Natural resources: Oil and gas extraction, mining, water
  - Labour resource: abundant, low cost and flexible labor
- Market-seeking (horizontal FDI)
  - Access a domestic or regional (EU, NAFTA, ASEAN) market
  - Size and potential of growth
- Efficiency-seeking (vertical FDI)
  - Specialize and divide production in line with the comparative advantages of different locations; export-oriented FDI
- Strategic-asset seeking (primarily through M&As)
  - Penetrate a new market through brand, global reputation, marketing networks,

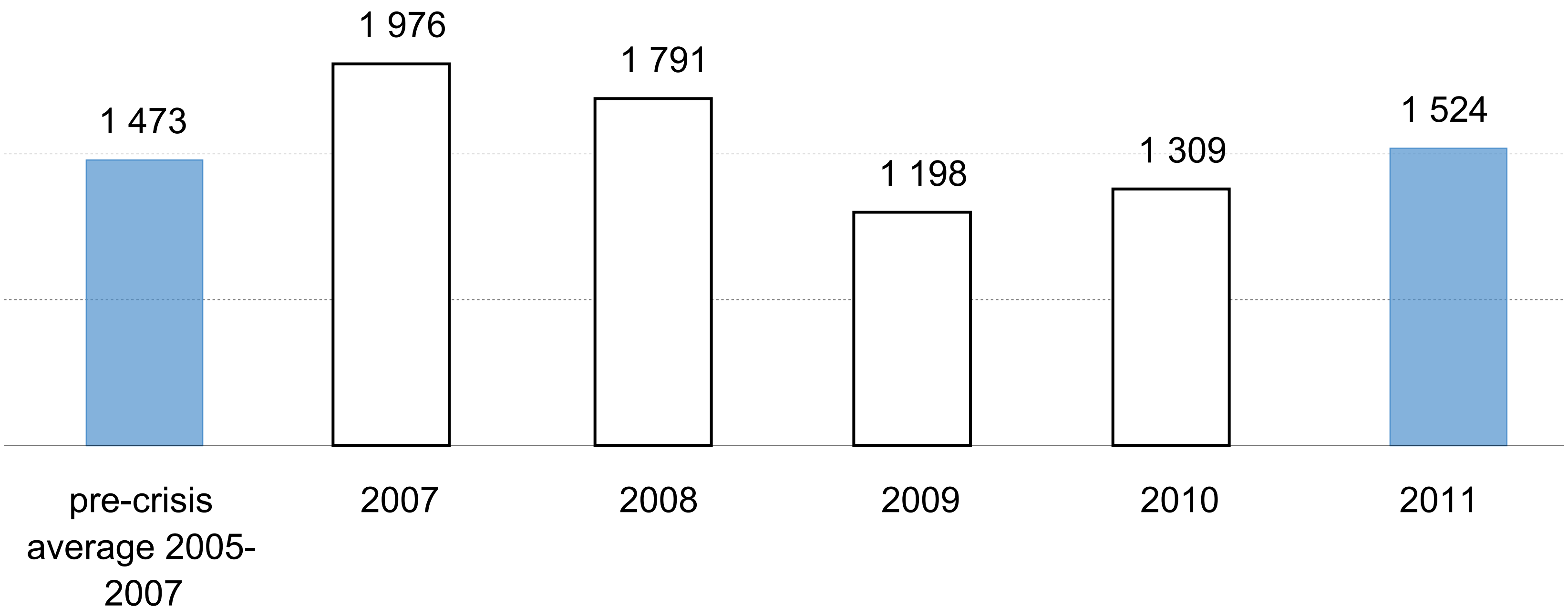
Traditional economic determinants of FDI

Type of FDI	Key determinants
Natural resource-seeking FDI	Abundance of natural resources Price movements Access to skills
Market-seeking FDI (national or regional)	Market size and purchasing power Market growth Tradability of product/service Need for local adaptation Structure and openness of markets
Efficiency-seeking, export-oriented FDI	Quality and cost of human resources Physical infrastructure (ports, roads, telecom, etc.) Technical infrastructure (MTSQ) Trade costs Quality of suppliers, clusters, etc. Economic and political stability
Strategic asset-seeking FDI	Presence of firm-specific assets Efficiency and transparency of financial markets

The role of host-State policies as locational determinants of FDI

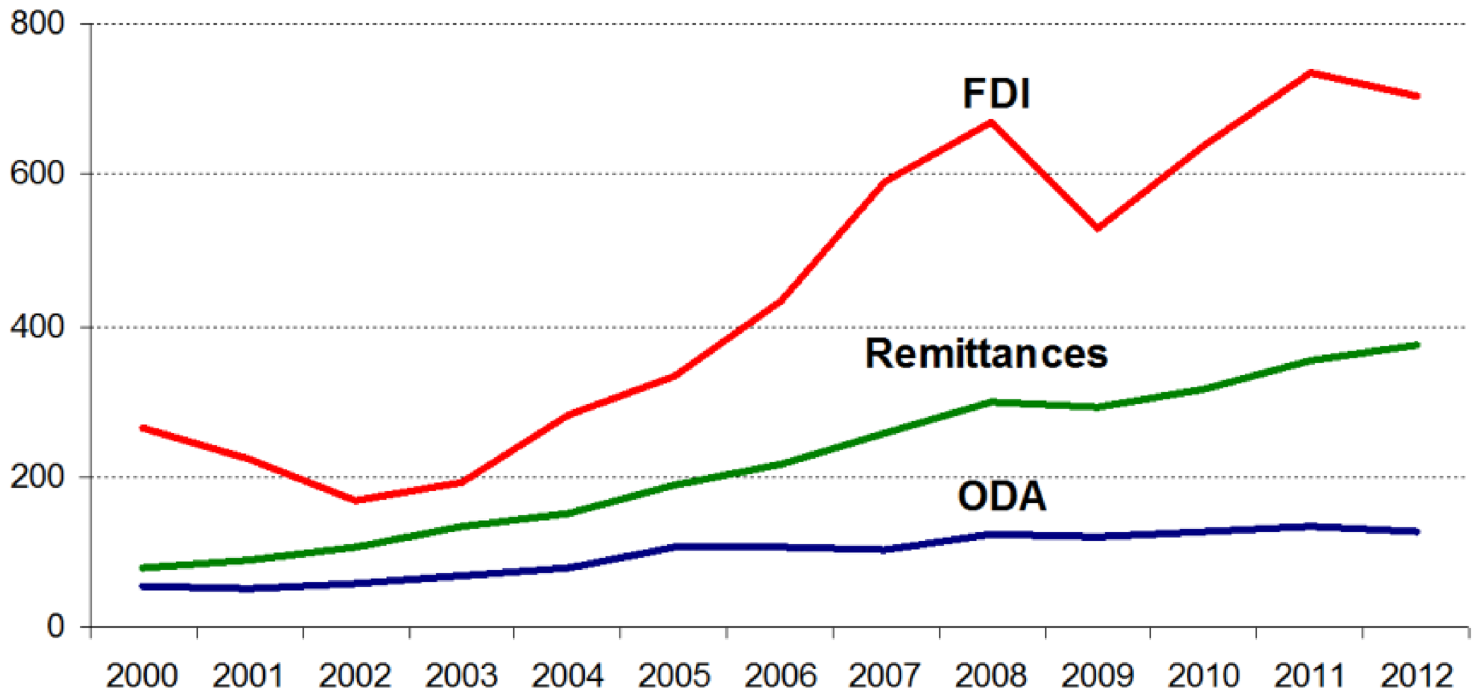
- Macro-economic policies: economic, political and social environment. **Essential determinants.** Monetary, fiscal, financial policies of the country or the REIO, inflation rates, exchange rates, participation in a single currency block, external and budgetary balance, cost of capital, interest rates
- FDI-specific policies: liberalization, protection and market-regulation. Role of IIAs in “locking-in”, liberalizing and protecting.
- The legal and institutional framework for doing business including trade policies, tax, labor market, access to financing, education/public health/public welfare, infrastructure development, R&D,….

FDI surpassed the pre-crisis average in 2011 but… (UNCTAD data)



Foreign direct investment is the largest source of development finance

FDI, remittances and ODA to developing economies, 2000-2012

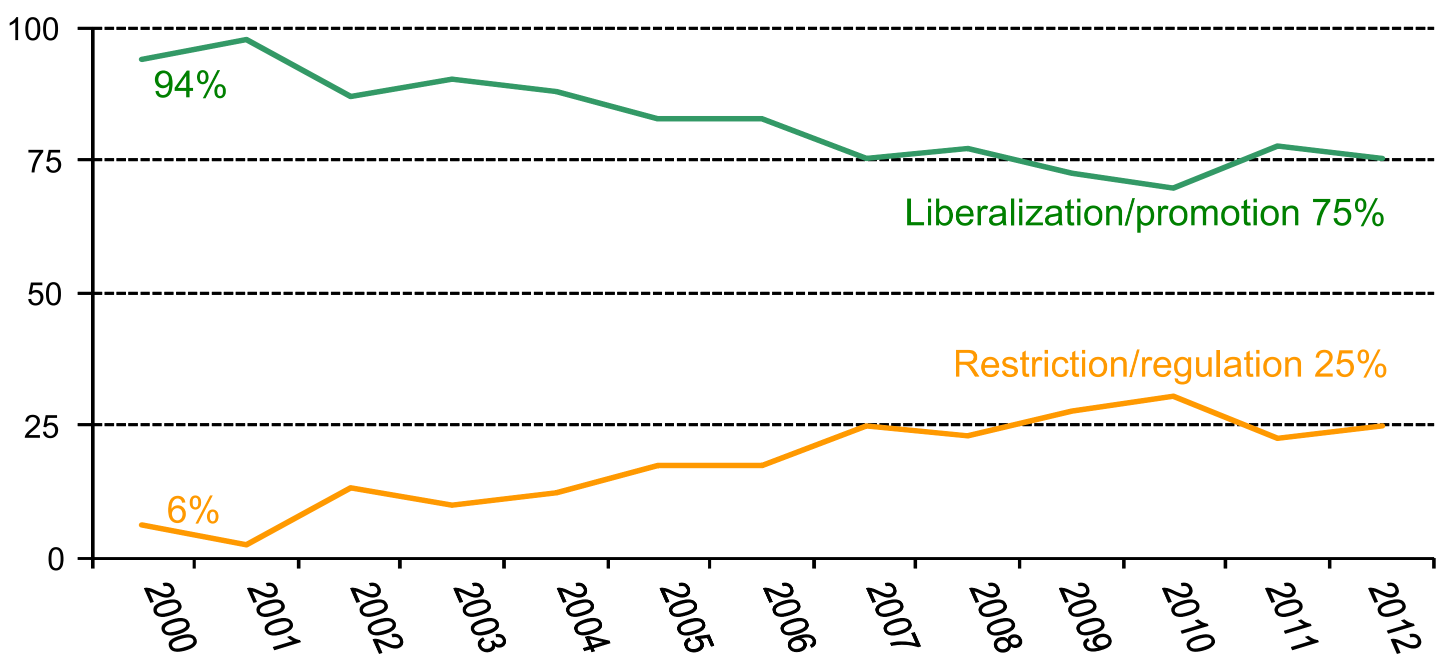


Source: UNCTAD for FDI and remittances and OECD for ODA.

Note: ODA from DAC members.

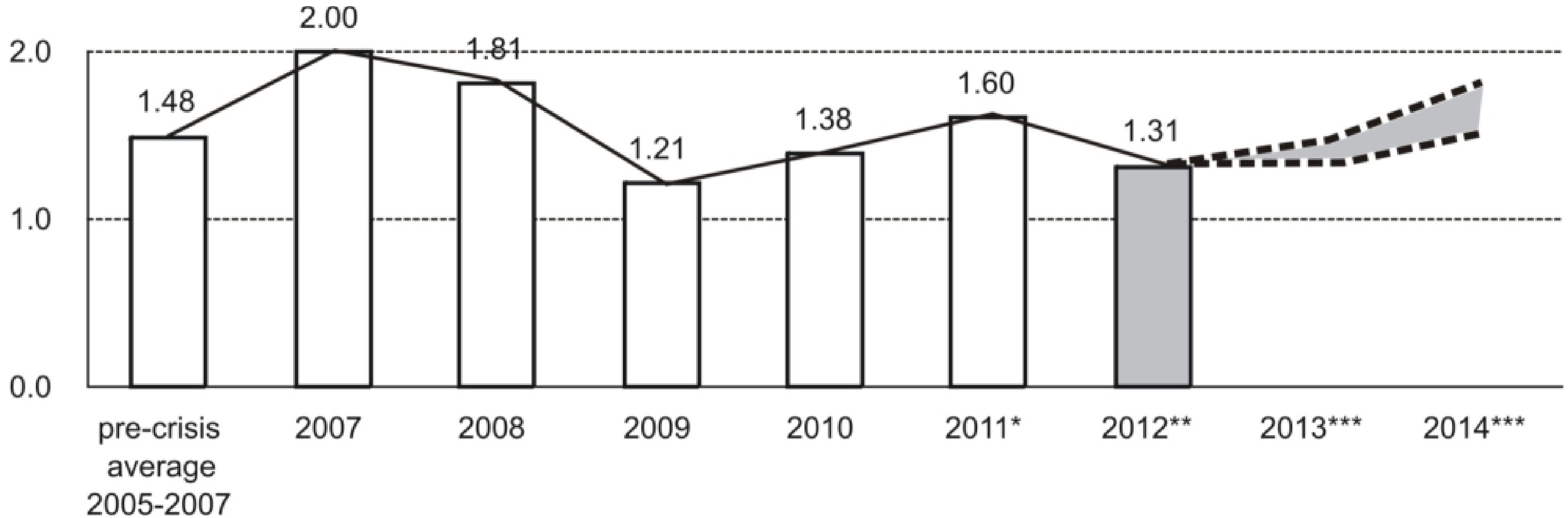
INVESTMENT POLICY MAKING AT A CROSSROADS: MOST COUNTRIES REMAIN KEEN TO ATTRACT FDI WHILE BECOMING MORE SELECTIVE AND REINFORCING REGULATORY FRAMEWORKS

Changes in national investment policies, 2000 – 2012
(Per cent)



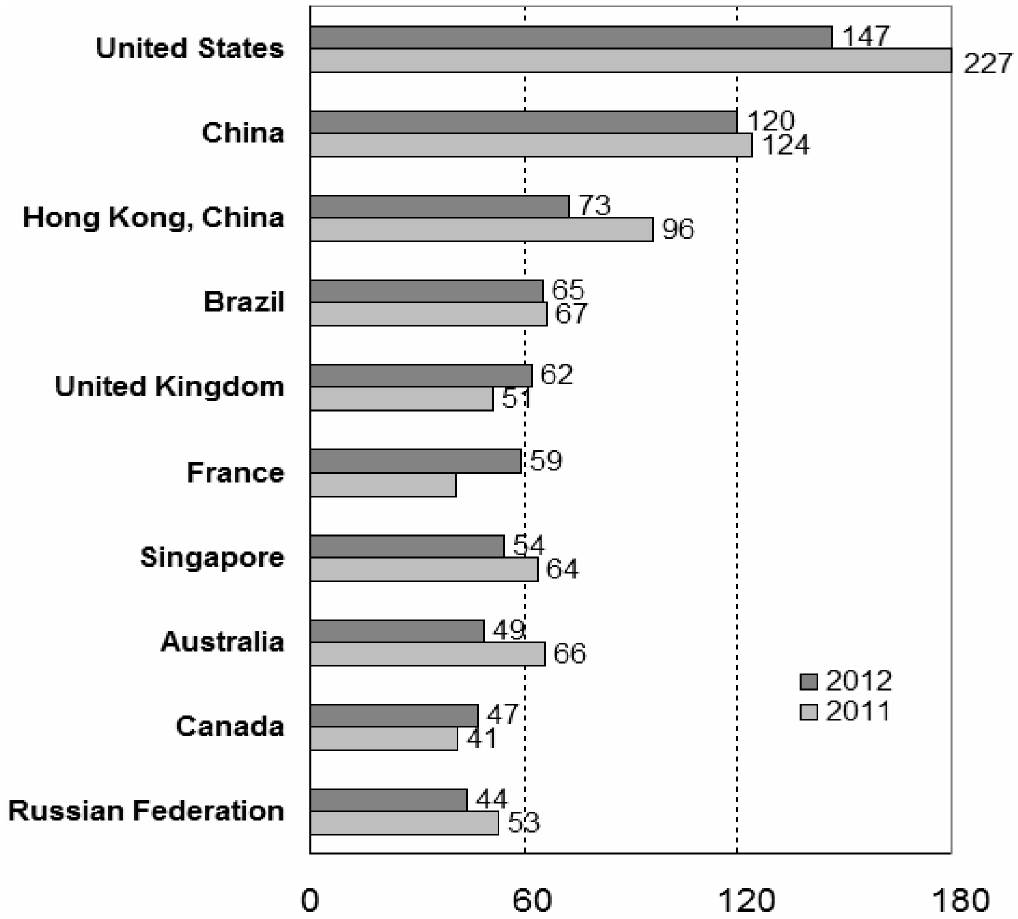
FDI declined by 18 per cent in 2012 and FDI recovery will take longer than expected

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



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

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



Taiwan – Inflows and outflows

Module 2 – The international framework for investment

- Interface between national and international FDI policies
- Objectives of the international framework for investment
- Hierarchy of norms
- International trade and investment
- FTA chapters and BITs

Interface between national and international FDI policies

- Unilateral efforts in FDI liberalization and promotion are complemented by efforts at bilateral, regional and multilateral levels.
- The international investment agreements (IIAs), depending on the purpose of the agreements, usually address issues related to investment admission, protection, distortion and promotion, etc.

Objectives of the international legal framework of investment

Liberalization

REDUCING

Restrictions to
- Entry and establishment
- Ownership and control
- Operational restrictions
- Authorization and reporting

Standards of treatment & protection

BUILDING

- Treatment (NT, MFN)
- Protection:
- FET
- FPS
- Transfer of funds
- Expropriation& compensation

- Transparency
- Dispute settlement
- Novel provisions

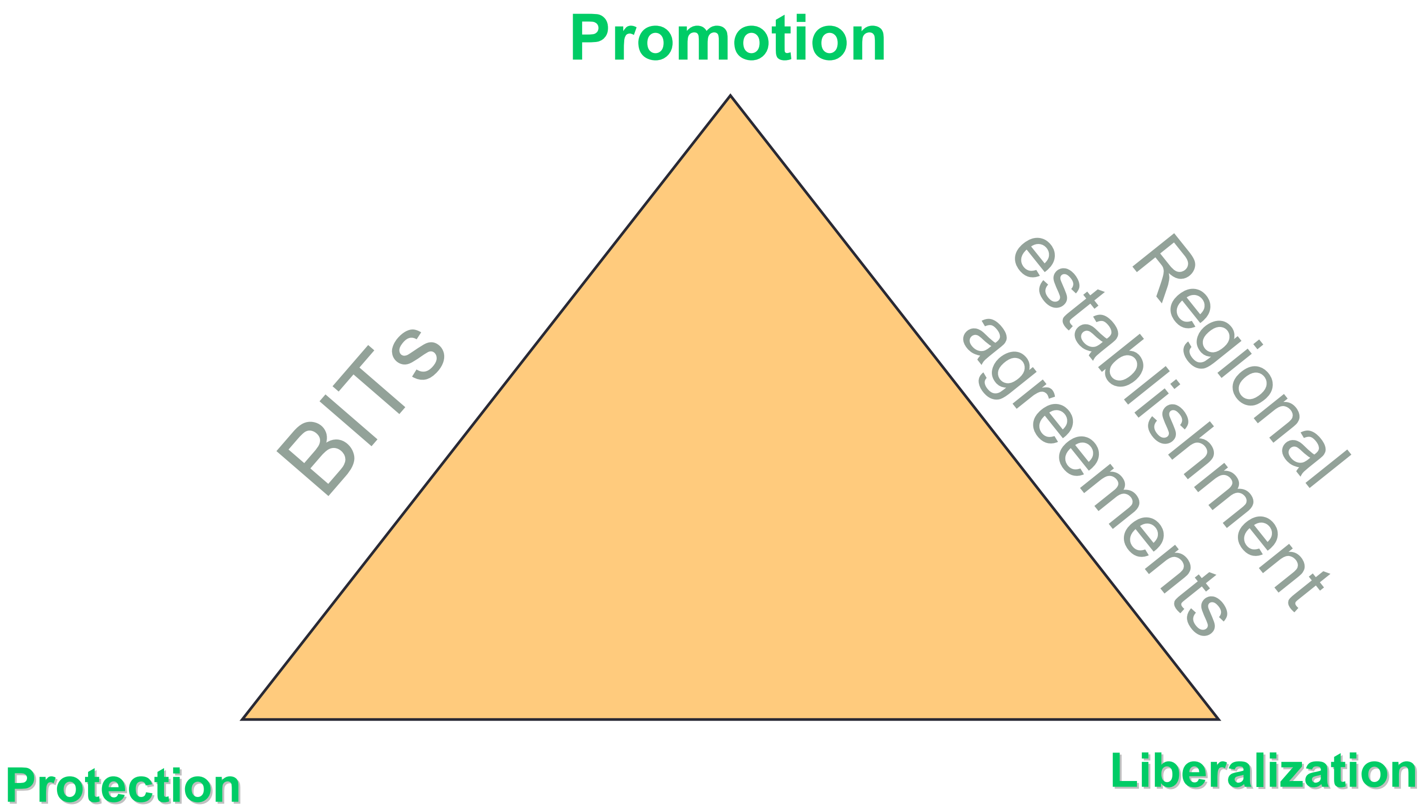
These objectives can be achieved through:

- National policies
- Investment contracts/State contracts
- International investment agreements (IIAs)

Hierarchy of norms

- National laws and regulations – Investment codes.
- State contracts, investment agreements, stabilization agreements.
- Bilateral investment treaties for the promotion and protection of investment.
- Regional agreements, Preferential trade and investment agreements.
- Multilateral disciplines and specific agreements.

IIAs have several possible objectives



US-CAN-JAP BITS
FTAs
NAFTA

A great number of IIAs

cover more or less the same issues

- Scope and definition of foreign investment;
- Admission of investment or pre-establishment NT and MFN
- Treatment of investment, i.e. National Treatment, MFN and FET;
- Guarantees and compensation in respect of expropriation;
- Transfer of funds and repatriation of capital and profits;
- Operation conditions; and
- Dispute settlement, both State-State and investor-State.

…but the ***concrete way in which they are addressed differs substantially***

Investment contracts

- State contracts and investment agreements between individual investors and the host State set rules, rights and obligations for both parties.
- Focus on a specific investment project.
- Possible conflict between the provisions of a contract and the provisions of a treaty.
- Umbrella effect of the treaty:
  - Definition of investment: concession and other contracts,…
  - Umbrella clauses,
  - Wording of dispute settlement clause.

Bilateral investment treaties

- Bilateral treaties for the promotion and protection of investment
- There are 3750 BITs worldwide (end 2012).
- Historical perspective
- Three issues:
  - Promotion
  - Protection
  - Liberalization

Double taxation treaties

- Treaties for the avoidance of double taxation.
- Two main models: UN Model and OECD model.
- Hand in hand with BITs.
- The total number of DTTs rose to 3000 by the end of 2012.

Economic integration agreements

- Terminology: EIAs, PTIAs, FTAs, partnership agreements, regional agreements.
- Free trade areas.
- Customs unions.
- Common markets.
- Economic and monetary unions.
- Regional and inter-regional agreements.

Investment in the multilateral context

- Historical overview: The Havana Charter, the World Bank Guidelines, the UN Code of Conduct, the OECD MAI
- Investment in the WTO: a missed opportunity?
- Investment-specific agreements: ICSID, MIGA, NY Convention,…
- Limited membership: OECD rules, APEC,
- Limited scope: Energy Charter Treaty,…

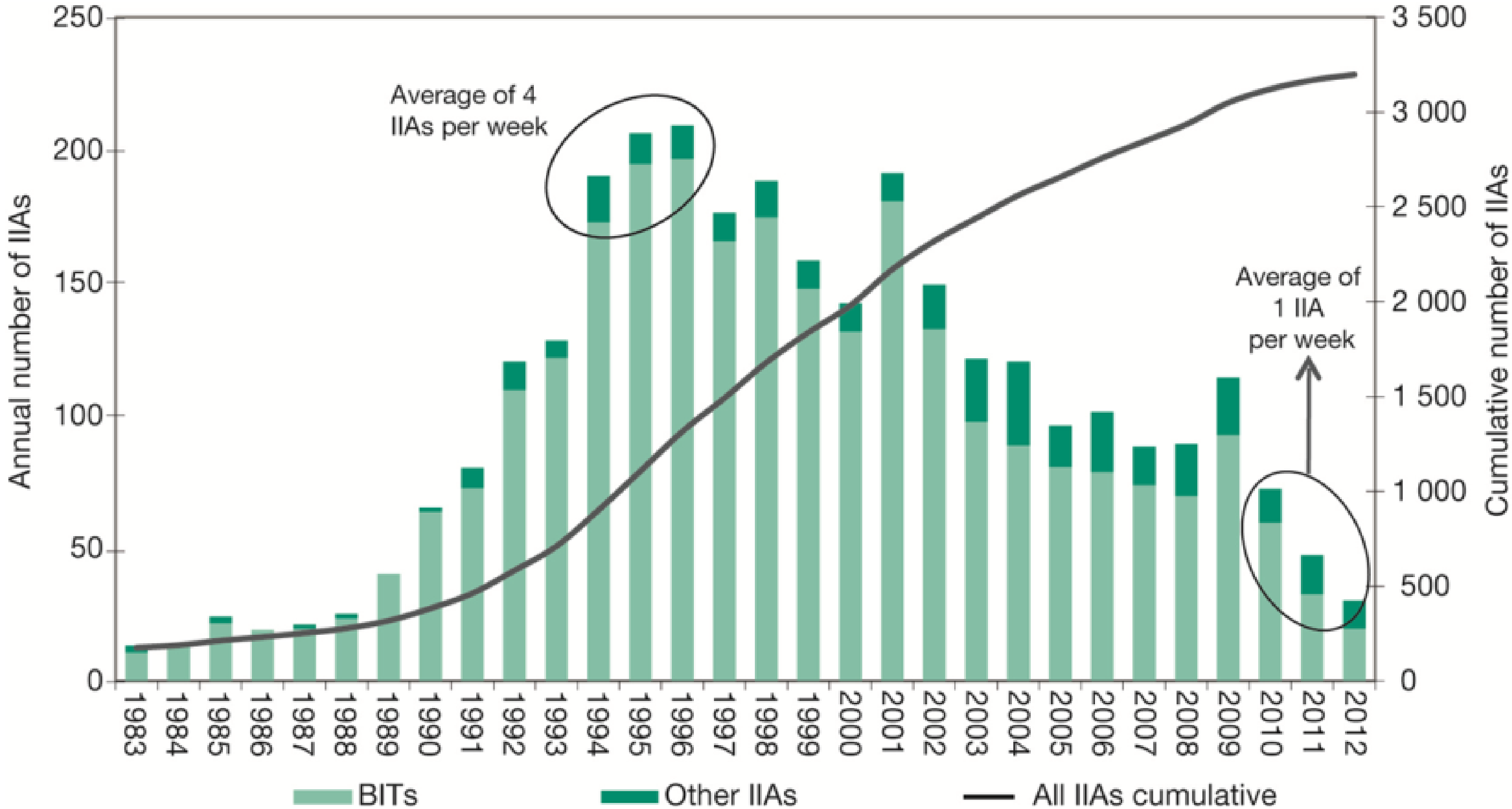
Taiwan IIAs

- BITs
- FTAs
- PTIAs

Module 3– Trends and developments in IIAs

- Trends in the negotiation of IIAs

Investment policy making at a crossroads: The number of newly signed IIAs continues to decline



The current three-year average of one new IIA per week is considerably lower than the 4 new IIAs per week average of the mid-1990s.

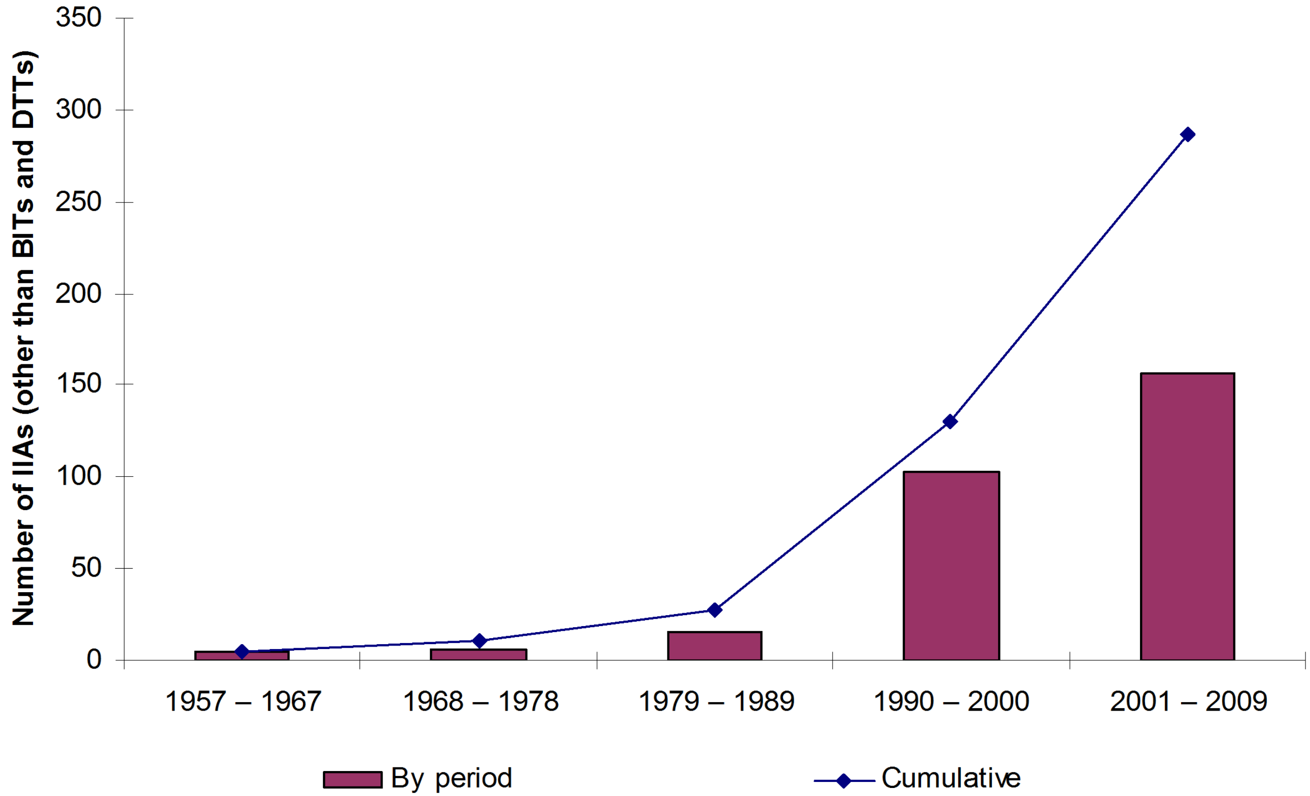
B. Free Trade Agreements with Investment Chapters

- International investment rules are increasingly being formulated as part of agreements that encompass a broader range of issues (including trade, services, competition, intellectual property)

- Regional integration with investment disciplines: ASEAN investment liberalization and protection

- The total number of such economic agreements with investment provisions exceeded 290, as of end 2012

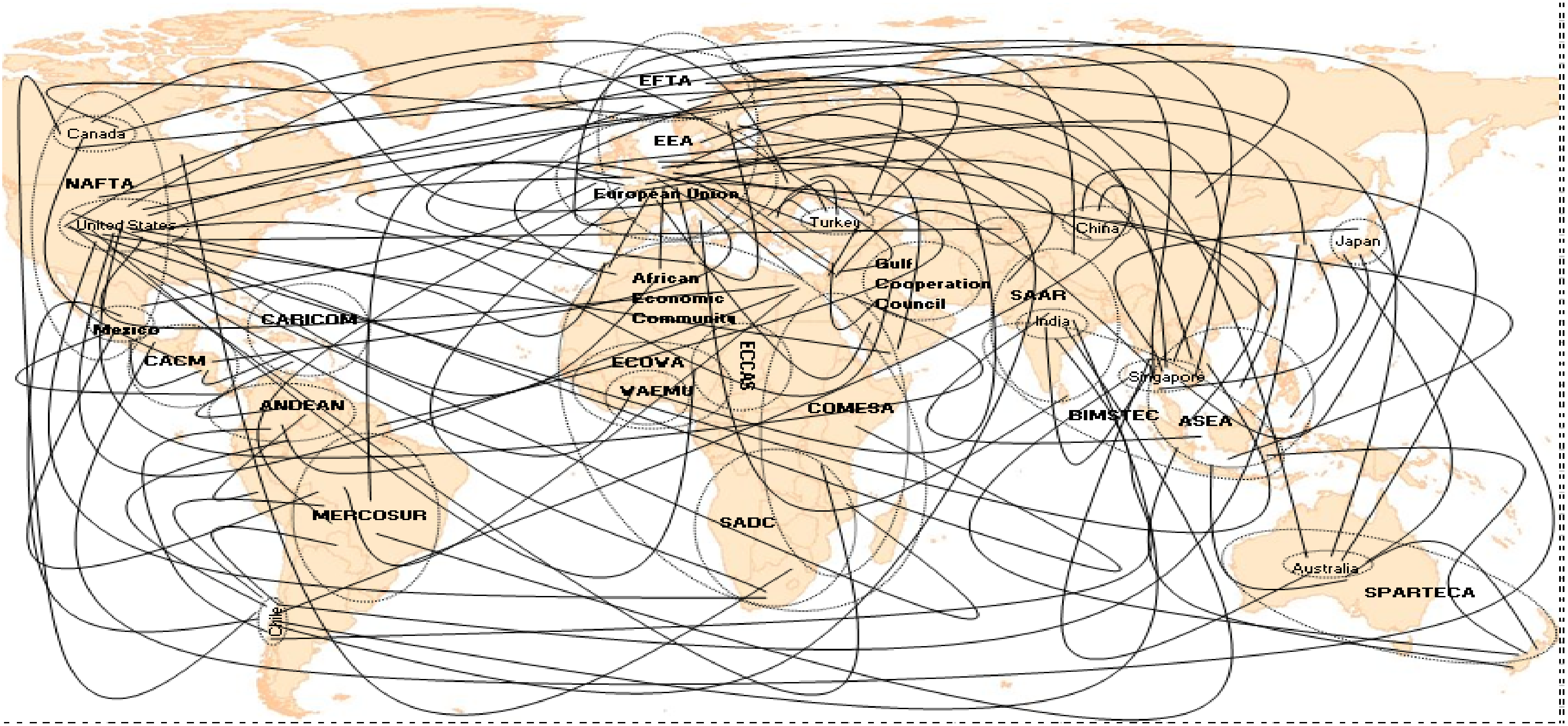
Over 300 economic cooperation agreements with investment provisions



Recent FTAs with investment chapters

- Free Trade Agreement between the EFTA States and Canada
- Free Trade Agreement between China and New Zealand
- Free Trade Agreement between Singapore and Panama
- Economic Partnership Agreement between Japan and Thailand
- Free Trade Agreement between the United States and the Republic of Korea
- EC-CARIFORUM Economic Partnership Agreement
- Hong Kong-New Zealand Closer Economic Partnership agreement (CEPA)

Multiple overlapping FTAs with investment provisions



- IIAs proliferate at all levels
- Constituting a complex system of multi-layered and multi-faceted investment rules

Recent developments in investor-State dispute settlement

The increase in IIAs has been paralleled by an increase in investor-State disputes

25 new cases were filed, bringing the total number of known treaty-based cases to 390

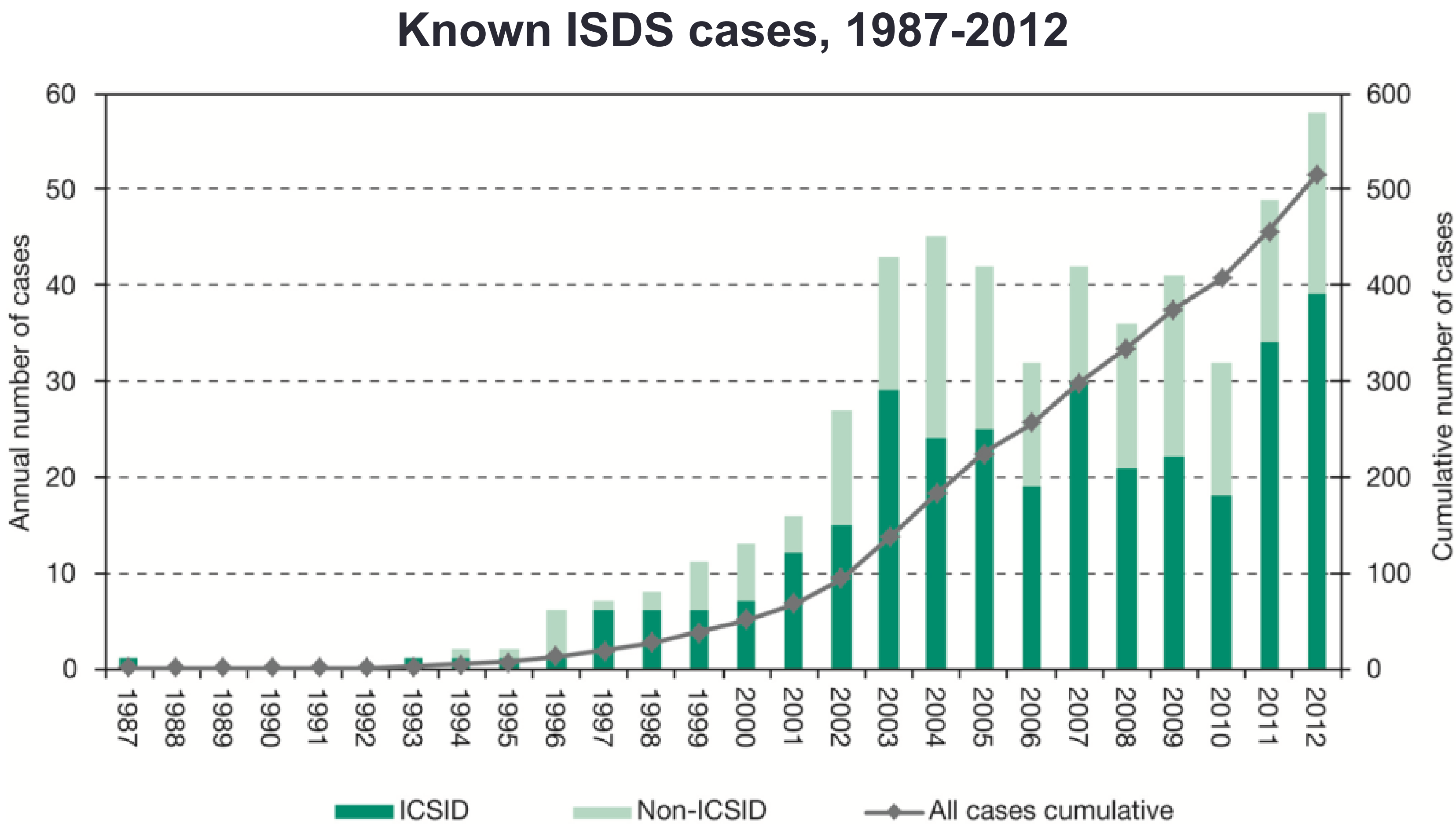
Of the total 390 known disputes:

- 245 were filed with ICSID (or the ICSID Additional Facility)
- 109 under the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules
- 19 with the Stockholm Chamber of Commerce
- six with the International Chamber of Commerce and four were ad hoc.
- One further case was filed with the Cairo Regional Centre for International Commercial Arbitration.
- In six cases, the applicable arbitration rules are unknown so far.

Some disputes in 2010…

- In Latin and Central America, Bolivia and Venezuela responded to three new claims each as a result of nationalization measures aiming at strengthening state control over strategic sectors.
- Uruguay is responding to its first claim arising from consumer protection legislation involving marketing restrictions and labeling requirements of cigarettes
- In Central Asia, Kazakhstan and Turkmenistan responded to two new cases each relating to energy and power facilities and construction projects
- In Africa, Zimbabwe responded to two new cases relating to timber processing and commercial farms while Tanzania faced one new case dealing with a power purchase agreement.
- In Europe, Lithuania, Romania and Slovakia responded to a new case each relating to alcohol industry, press distribution and claims arising out of alleged reversal of health insurance policy.
- Canada faced one NAFTA case dealing with an investment in a pulp and paper mill.

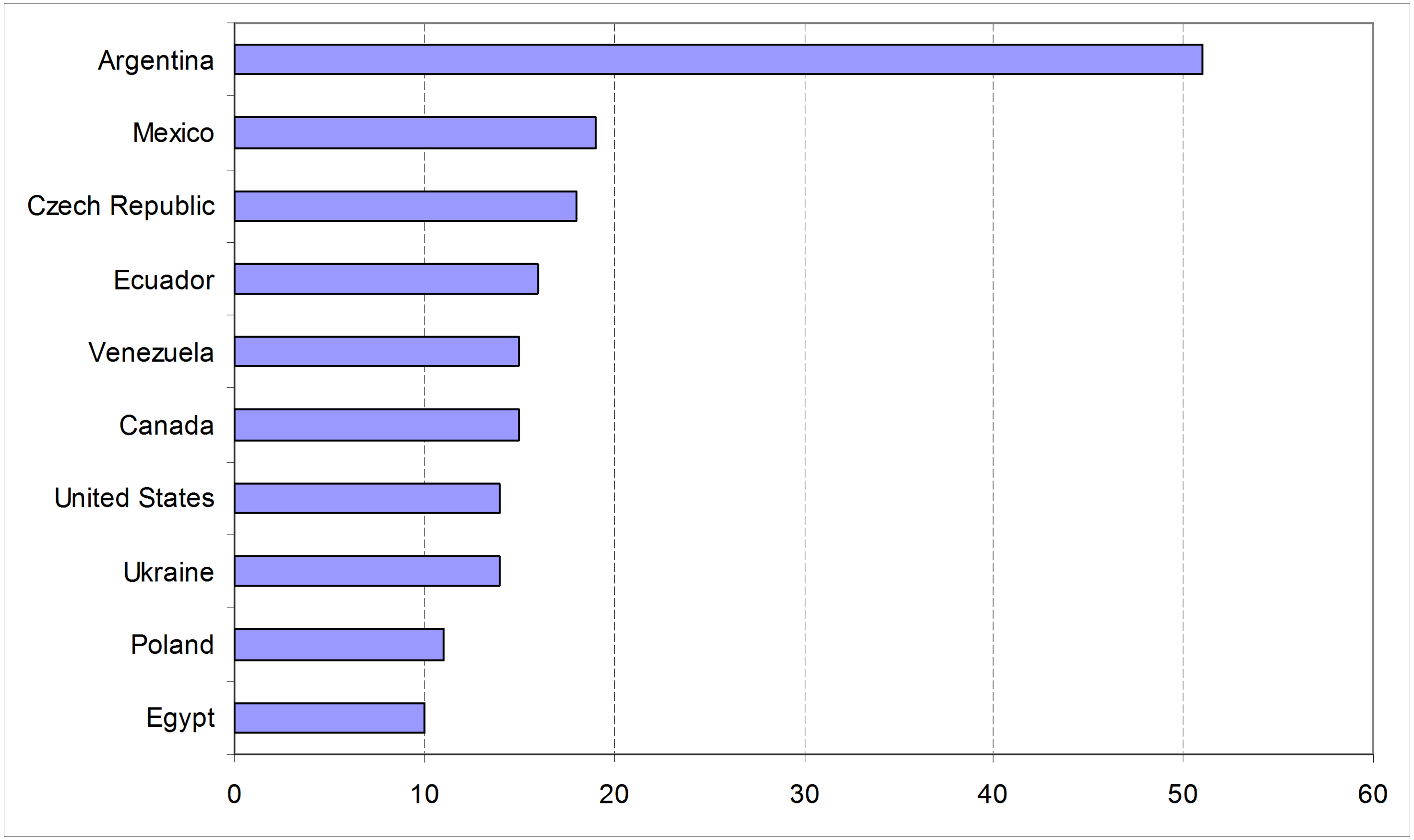
A record number of 58 new ISDS cases were initiated in 2012



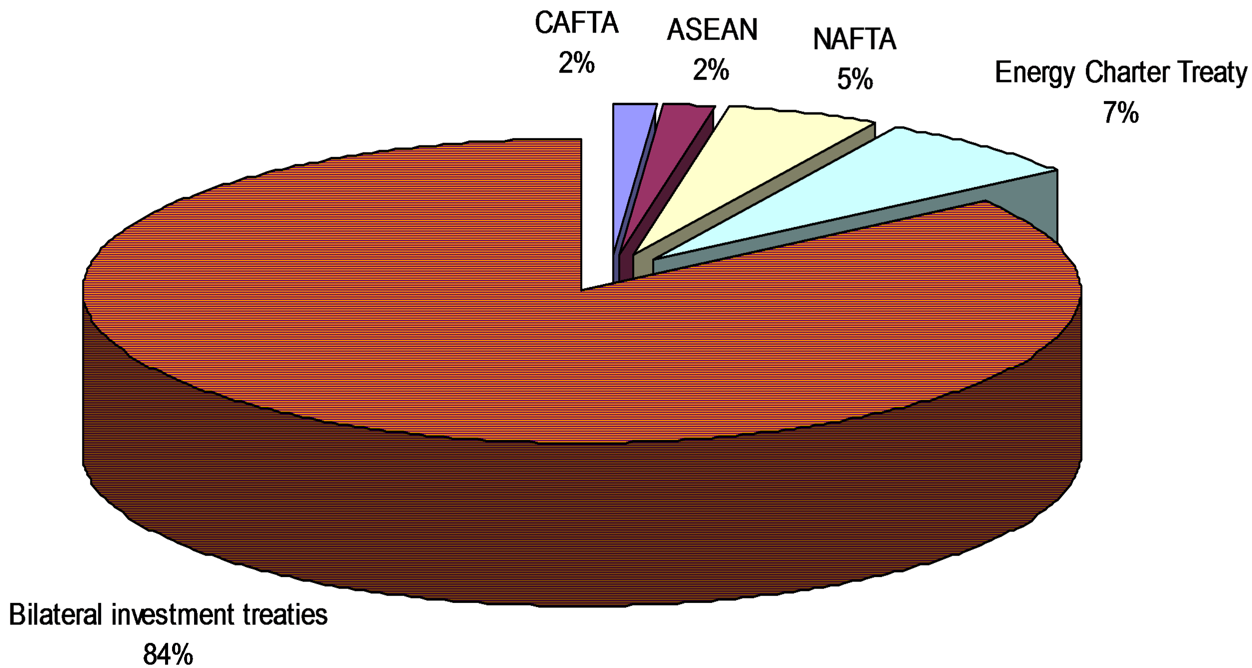
58 new ISDS claims in 2012 - the highest number for a single year.

Total number of known cases at the end of 2012: 514.

Known investment treaty claims, by defendants



international investment agreements in investment treaty arbitrations, end 2011



Challenges