UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

Technical and statistical report

A practitioner's guide to investment laws

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Information about the products, frameworks, services and publications of the Division on Investment and Enterprise (DIAE) can be found free of charge at UNCTAD's website (www.unctad.org/diae) or on the organization's investment policy hub (www. investmentpolicy.unctad.org).

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Abbreviations

ADR	alternative dispute resolution
BIT	bilateral investment treaty
CSR	corporate social responsibility
DIAE	Division on Investment and Enterprise
FDI	foreign direct investment
FET	fair and equitable treatment
GATS	General Agreement on Trade in Services
IIA	international investment agreement
IL	investment law
IPA	investment promotion agency
IPFSD	Investment Policy Framework for Sustainable Development
IPR	investment policy review
ISDS	investor–State dispute settlement
ICSID	International Centre for Settlement of Investment Disputes
LDC	least developed country
MFN	most favoured nation
NT	national treatment
PPP	public–private partnership
REIO	regional economic integration organization
SDG	Sustainable Development Goal
SEZ	special economic zone
SME	small and medium-sized enterprise
SOE	State-owned enterprise
TRIMS	Trade-Related Investment Measures
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
WTO	World Trade Organization

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Introduction

Investment laws have gained prominence over the years, particularly in developing countries, as one of the few pieces of legislation that exclusively focus on investment. Designing these laws can be challenging, in view of their potential broad coverage, the complexity of the policy issues involved and their interaction with other parts of the legislation and international commitments.

At the national level, a broad variety of policy tools exist for dealing with these issues and determining a country’s general investment regime. They range from the overarching constitution to more distinctive legal instruments, which address, among others, sector-specific issues, company operations, corporate governance, taxation, trade, competition, intellectual property rights, labour, environmental protection, immigration and special economic zones (SEZ).

In addition to these policy tools, which are usually found in any jurisdiction, many economies have adopted laws dealing specifically with investment. Although the scope and content of these laws vary significantly between countries, they all share some common features and aim to 1) establish the basic legal framework for investment and 2) include key investment provisions. These instruments, hereinafter called investment laws – ILs, are the focus of this Guide. Most of them address entry and establishment, treatment and protection, investment promotion and facilitation as well as investor obligations and responsibilities. The majority of ILs cover both foreign and domestic investment.

This Guide does not deal with other investment-specific policies addressing exclusively foreign investment screening systems, rules on investment contracts between individual investors and the State, legislation on public-private partnerships (PPP) or incentives. These instruments differ from ILs because they all cover a narrower group/type of investors (e.g. investors in sectors relevant for national security) or regulate a specific aspect of the investment process (e.g. the entry of investors).

At the international level, cross-border investment is governed by a multitude of bilateral, regional or multilateral agreements as well as non-legally binding guidelines or principles.

All together, these various policy instruments constitute a country’s policy framework for investment.

ILs have gained much prominence over the years, particularly in developing countries. As one of the few pieces of legislation that exclusively focus on investment, they are of high importance for policymakers and investors alike. At the same time, designing such laws poses challenges in view of their potential broad coverage, the complexity of the policy issues involved and their interaction with other parts of the legislation and international commitments.

ILs have gained much prominence over the years

A further considerable challenge derives from the fact that ILs need to be adapted to changing political, economic, financial, social and environmental circumstances. Since there are already more than 130 ILs in place, the focus nowadays is in fact on revising and updating existing laws.[1] Recent examples are the enhanced emphasis on

[1] For a comprehensive overview of the evolution of investment laws, their main functions, as well as considerations for their reform see: Bonnitcha, J., Nikiéma, S.H. and St John, T. (2023), *Rethinking National Investment Laws: A study of past and present laws to inform future policy-making*, International Institute for Sustainable Development, July; and UNCTAD (2024), Investment Laws: Key trends and developments, Investment Policy Monitor No. 29, December.

the contribution of investment to sustainable development, notably after the adoption of the United Nations Sustainable Development Goals (SDGs), increasing national security concerns associated with foreign investment or the effects of cascading global crises on investment policymaking (box 1). Amending an IL – like any other law – may be a lengthy and cumbersome process, notably if the intended changes affect vested interests.

Box 1.
Enhancing investment policies to address cascading global crises

The world is facing a series of crises, each of which has profoundly impacted economies and investment flows. While the effects of the COVID-19 pandemic remain a challenge, they are compounded by other issues, including climate change, geopolitical tensions, high inflation and supply chain disruptions. These crises are interconnected and have long-term consequences that are still unfolding.

FDI flows have been significantly affected across various sectors. While the pandemic's immediate effects were felt most acutely, the global economic fallout from other crises has further hindered the implementation of ongoing investment projects, delayed new investments, and led to lower foreign affiliate earnings, which are a critical source of capital in many host countries.

In response to these multifaceted crises, policymakers worldwide are recognizing the need to adapt their approaches to investment, trade and economic development. The disruptions caused by the pandemic, along with the intensifying impacts of climate change and geopolitical tensions, have highlighted the need for investment strategies that foster resilience, sustainability and inclusivity.

To strengthen resilience, countries must continue to promote investment while ensuring that investment policies are responsive to current challenges and support green, fair, inclusive and sustainable economic growth. Policymakers are increasingly focused on revisiting the instruments at their disposal, including ILs, to enhance openness, transparency and predictability in their investment environments. Some countries are adopting new policies, while others are revising existing ones to better address the evolving landscape of global risks and secure broader, more sustainable benefits from investment.

This Guide aims to assist countries in this process, providing practical insights to adapt their investment policies to the evolving global landscape.

Source: UNCTAD

It is therefore not surprising that ILs are among the most frequently raised issues in UNCTAD's Investment Policy Reviews (IPRs). Since 1999, UNCTAD has reviewed ILs in many countries as part of the overall investment policy framework of these countries.[2] The IPRs conducted all included substantive discussions on the drafting of a new or the revision of an existing IL. Likewise, among the numerous policy suggestions made by UNCTAD in these IPRs, a considerable number of them focused on IL-specific issues. Each case showed that the pitfalls are numerous, even when the investment capacities in the country are high. Overall, the IPRs have revealed a need for more policy guidance on the design of ILs.

2 IPRs have been conducted for 60 economies worldwide (36 in Africa, 10 in Asia, eight in Europe and six in Latin America and the Caribbean); 53 of these economies have an IL as defined by this Guide.

Designing a high-quality IL is not enough. Even the best IL will be of limited benefit to host countries if other parts of the domestic investment policy framework are deficient. Ultimately, it is a country's overall policy package that determines both its attractiveness for investors and its effectiveness in regulating investment.

There is no single model IL. Existing laws differ significantly between countries in respect of their scope, structure and content.[3] Numerous countries have no IL at all. This variety of policy approaches reflects the fact that countries accord ILs different roles in their overall development strategies, depending on their different levels of development and diverging legal traditions.

The specific content of an IL very much depends on the policy objectives that a country seeks to pursue with it. For example, a country with a hitherto rudimentary policy framework for investment may adopt an IL to fill an important regulatory gap. In other countries, the main goal may be to consolidate existing investment-related legislation in one single law to improve clarity and transparency. Yet another aim could be to focus on a particular policy issue of great importance to a country, such as enhancing investment promotion and facilitation, or addressing concerns related to the entry of foreign investors in specific sectors of the economy. In each case, the IL will look different.

Each country needs to decide based on its specific circumstances whether it needs an IL and what type of IL would be most suitable for the pursuit of its development objectives and strategies.

The analysis in this Guide is based on UNCTAD's Investment Policy Framework for Sustainable Development (IPFSD), which provides the foundation for policy advice in the area of investment. Embedding the SDGs, the IPFSD elaborates on principles for investment policymaking, provides national investment policy guidance and gives options on the content of international investment agreements (IIA).

A core principle guiding policymakers wishing to ensure that investment contributes to sustainable development is to regularly review investment policies for effectiveness and relevance, and adapt them to changing development dynamics (IPFSD, principle 3). The objective of this Guide is to assist investment policymakers and other practitioners dealing with ILs in this complex decision-making process. It starts with an overview of the existing universe of ILs and their main characteristics (section A), and then elaborates on the main policy issues that arise when deciding whether to adopt or revise such a law and points out the main missteps to avoid (section B). This guide can also be useful for policymakers in countries that consider adopting or revising other national policy instruments on investment, such as a national investment policy or a policy statement on investment, as they would be confronted to similar questions. It is organized as follows:

- It discusses the arguments in favour and against the adoption of an IL.
- It maps options for policymakers to deal with individual policy areas in the IL and summarizes their likely pros and cons.
- It addresses the relevance and implications of the different policy options.
- It describes how existing ILs have dealt with each policy area and how to consider contemporary or emerging investment issues.
- It raises additional issues for consideration at the drafting stage.
- It refers whenever applicable to UNCTAD's relevant guidance and experience on the issues.

[3] See the UNCTAD Investment Laws Navigator at investmentpolicyhub.unctad.org/investment-laws for more details.

The Guide refrains from making specific drafting suggestions for individual law provisions or from presenting a complete model IL, which could be done through UNCTAD's country-specific technical assistance. Likewise, the Guide abstains from any in-depth discussion of individual aspects of investment policymaking and how they should be dealt with in the IL (e.g. establishment procedures for investment or the design of investment incentives). For more detailed information about specific IL issues and additional background material, readers are invited to consult the UNCTAD Investment Policy Hub.

A.

The existing universe of ILs – An overview


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ILs are widespread and relatively recent

Worldwide, UNCTAD has listed 132 ILs, most of them in developing economies.[4] ILs are not the only legal instrument that these countries use for dealing with investment and numerous countries do not have an IL at all.

Almost all the ILs in force were adopted after 1989 and in parallel to the expansion of global trade and investment.

Most ILs cover both domestic and foreign investment

One of the main distinguishing elements of ILs is whether they cover both domestic and foreign investment or are limited to foreign investment. Currently, most laws apply to investors irrespective of their nationality, while 41 laws target foreign investors (see section B.2). While most countries in Africa have adopted general investment laws, almost half of the ILs adopted in Asia target foreign investment specifically.

ILs pursue different policy objectives

ILs vary in respect of their overall policy objectives. In more than half of the cases, the main goal is encouraging investment, often in combination with the aim of protecting investors (figure A1). Less than half of the ILs explicitly refer to the goal of economic development and some highlight more specific aspects, such as economic growth, diversification, value-chain integration, industrial development, competitiveness, employment growth, poverty reduction, skills transfer or health. Only 15 ILs refer to environmental aspects. Moreover, only 24 of the 128 surveyed laws[5] refer to the concept of sustainable development in their objectives.
An explanation could be that most ILs were enacted before the adoption of the SDGs by the United Nations.

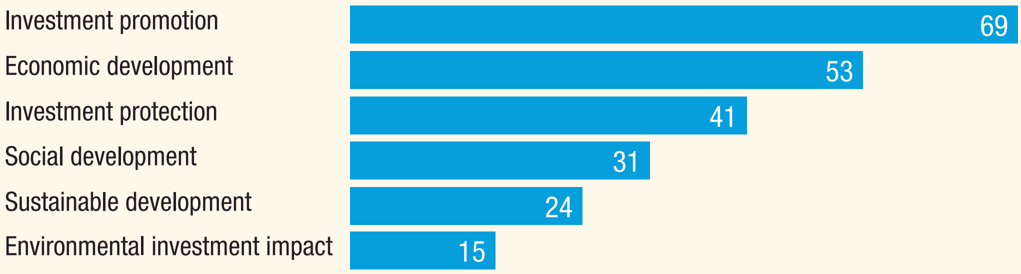
Almost all the ILs in force were adopted after 1989 and in parallel to the expansion of global trade and investment.

Most of the 132 investment laws globally are by developing countries

[4] See the UNCTAD Investment Laws Navigator (data retrieved on 16 October 2024) at https://investmentpolicy.unctad.org/investment-laws for more details. The 132 ILs listed are in 115 developing economies and 15 developed economies. The list is as follows: Afghanistan, Albania, Algeria, Andorra, Angola, Argentina, Armenia, Azerbaijan, Bangladesh, Belarus, Benin, Bolivia (Plurinational State of), Bosnia and Herzegovina, Burkina Faso, Burundi, Cabo Verde, Cambodia, Cameroon, Central African Republic, Chad, Chile, China, Taiwan Province of China, Colombia, Congo, Côte d’Ivoire, Cuba, Democratic People’s Republic of Korea, Democratic Republic of the Congo, Djibouti, Dominican Republic, Egypt, El Salvador, Equatorial Guinea, Eritrea, Eswatini, Ethiopia, Gabon, The Gambia, Georgia, Ghana, Guatemala, Guinea, Guinea-Bissau, Guyana, Haiti, Honduras, Hungary, Iceland, Indonesia, Iran (Islamic Republic of), Iraq, Jordan, Kazakhstan, Kenya (two ILs), Kiribati, Kuwait, Kyrgyzstan, Lao People’s Democratic Republic, Liberia, Libya, Lithuania, Madagascar, Malawi, Maldives, Mali, Mauritania, Mexico, Micronesia (Federated States of), Mongolia, Montenegro, Morocco, Mozambique, Myanmar, Namibia, Nepal, Nicaragua, Niger, Nigeria, Pakistan (two ILs), Palau, Papua New Guinea, Paraguay, Peru, Philippines, Qatar, Republic of Korea, Republic of Moldova, Romania, Russian Federation, Rwanda, Samoa, Sao Tome and Principe, Saudi Arabia, Senegal, Serbia, Seychelles, Sierra Leone, Solomon Islands, Somalia, South Africa, South Sudan, Sudan, Suriname, Syrian Arab Republic, Tajikistan, Thailand, Timor-Leste, Togo, Tonga, Trinidad and Tobago, Tunisia, Turkmenistan, Türkiye, Uganda, Ukraine, United Arab Emirates, United Republic of Tanzania, Uruguay, Uzbekistan, Vanuatu, Venezuela (Bolivarian Republic of), Viet Nam, Yemen, Zambia, Zimbabwe, State of Palestine, Cook Islands, Niue, Kosovo (United Nations Administrative Region, Security Council resolution 1244 (1999)).

[5] The UNCTAD Investment Laws Navigator lists 132 ILs, of which 128 were surveyed and mapped following the framework reflected on the Investment Laws Navigator. Unless otherwise specified in the IL Guide, the percentages provided are based on the number of surveyed laws.

Figure A1.
Objectives mentioned in IL, by category
(Number of laws)



Source: UNCTAD, Investment Laws Navigator | UNCTAD Investment Policy Hub, accessed 16 October 2024.

ILs use different definitions of investment and investor

Almost all surveyed ILs (117) include a definition of the key concepts of investment and investor, with 99 laws containing both.

About half of the laws (54) apply an asset-based definition of investment and 37 have adopted a more limited enterprise-based approach. While the first alternative usually covers any kind of asset in the host country, the second option is limited to ownership rights in companies and the assets of the latter (see section B.3). Most laws (105) include a definition of investor or foreign investor, which generally includes both natural and legal persons (see section B.4).

Most ILs include entry rules for foreign investors and deal with administrative admission procedures

ILs typically contain provisions concerning the entry of foreign investors into the host country. The majority are industry-specific entry restrictions (60 laws). Most ILs use a negative-list approach. Another approach is a positive list of industries in which foreign investment is permitted – by default excluding investors in any other industry. Restricted sectors include, inter alia, defence, extractive industries and energy (see section B.5).

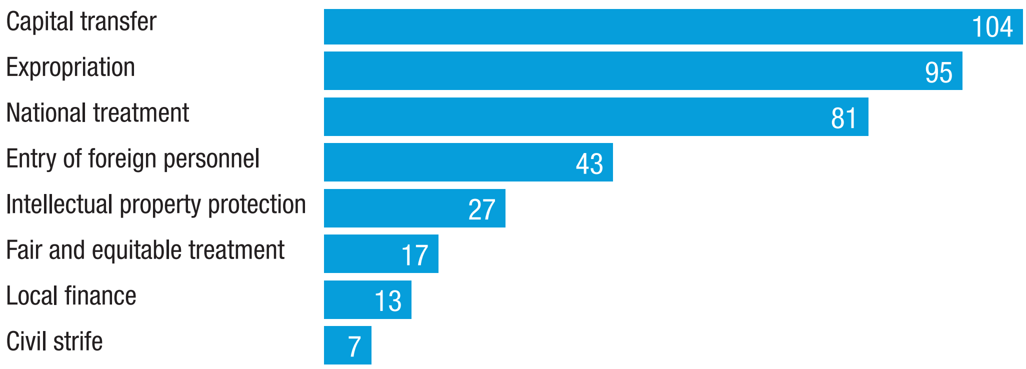
Some ILs contain one or more general safeguards, such as the protection of national security, public order, environmental protection or public health (38 laws). Other entry requirements sometimes included in ILs are minimum investment capital conditions or limitations on the access to land.

Of the surveyed ILs, 88 deal with the registration or authorization procedures for investment, although often in different manners (see section B.6).

Investment protection is a key feature in almost all ILs

The majority of the surveyed ILs cover three core investment protection standards:
1) the right of cross-border capital transfer,
2) protection against expropriation, and
3) national treatment or non-discrimination

Figure A2.
Investment protection provisions in IL
(Number of laws)



Source: UNCTAD, Investment Laws Navigator | UNCTAD Investment Policy Hub, accessed 16 October 2024.

(see section B.7). Other protection provisions less frequently found in ILs concern the entry of foreign personnel, the protection of intellectual property, access to local finance, the standard of fair and equitable treatment or protection against civil strife (figure A2).

Of the surveyed ILs, 89 include provisions on investor-State dispute settlement (ISDS). Among them, international arbitration and recourse to local courts are the most widespread mechanisms (present in 60 and 79 laws respectively), while alternative dispute resolution mechanisms such as conciliation or mediation (24 laws), are much less frequent. Often, the three options are used in combination.

Among the ILs offering investors recourse to international arbitration, some reserve the host country's consent on a case-by-case basis (25 laws), while others, mostly in Africa, contain a general consent (22 laws). Concerning the ILs providing for international arbitration, most refer to the Convention on the International Centre for Settlement of Investment Disputes (ICSID) or – to a lesser extent – to the United Nations Commission on International Trade Law (UNCITRAL) arbitration rules.

Numerous ILs include investment incentives or promotion provisions

Most of the reviewed ILs include provisions on investment incentives (88 laws). A smaller number of laws refers to investment authorities, investment promotion agencies (IPA), or other institutions with a remit as investment promoters (see section B.8).

Most investment incentives in ILs take the form of fiscal benefits for investors who fulfil certain conditions, such as a minimum invested capital or job creation requirements. African ILs are most detailed in depicting investment incentives and typically include a description of the different investment incentives regimes available to investors. In contrast, most European ILs refer to investment incentives that are provided in other parts of the legislation.

Almost half of the ILs deal with IPAs (60 laws). In some cases, the IPA is established by the IL itself. Common stated responsibilities of IPAs include building the country's image and investor confidence, as well as identifying and promoting investment opportunities.

Half of the ILs include provisions on investment facilitation

Investment facilitation provisions are becoming increasingly prominent in ILs

Among surveyed ILs, 64 include provisions on investment facilitation, which have become increasingly common in laws enacted since the early 2000s. These provisions cover streamlining, facilitation services and transparency (figure A3).

Streamlining provisions aim at simplifying administrative procedures with almost a quarter of the ILs mentioning the establishment of one-stop shops. These may take the form of physical centres or digital platforms, such as online single windows. While most of these facilities are accessible to all investors, some specifically target foreign or strategic investors.

Facilitation services encompass ADR mechanisms and investor assistance services offered by IPAs. These agencies may provide counselling, administrative support for permits, visa facilitation and help with securing land and utilities. Finally, at least 22 ILs include explicit clauses to enhance the clarity, transparency, and accessibility of investment-related laws and regulations.

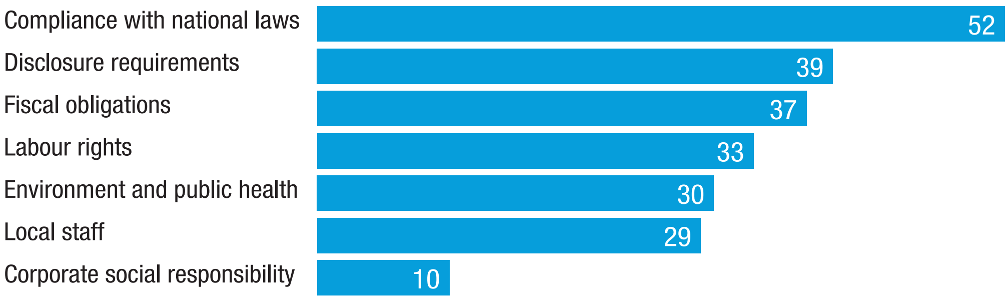
Figure A3.
Investment facilitation provisions in ILs
(Number of laws)

Source: UNCTAD, Investment Laws Navigator | UNCTAD Investment Policy Hub, accessed 16 October 2024.

The majority of ILs contain investor obligations

About two-thirds of the examined ILs make explicit reference to certain obligations of investors (see section B.10). The most common obligation is that investors must comply with the host country's laws and regulations. Often this is complemented by more specific obligations, such as corporate disclosure requirements or respect of certain labour rights and standards. Where present, environmental and public health protection obligations remain very general. Some ILs explicitly specify that investors should honour their fiscal obligations or refer to obligations regarding local staff, such as training, skill transfer or hiring preferences for locals. Only 10 ILs refer to international principles on corporate social responsibility (CSR) (figure A4).

Figure A4.
Investor obligations in ILs
(Number of laws)



Source: UNCTAD, Investment Laws Navigator | UNCTAD Investment Policy Hub, accessed 16 October 2024.

A limited number of ILs contains explicit provisions on coherence

A country's investment framework is made of national and international rules (box A1). It is therefore important that the various instruments regulating investment foster coherence. In this regard, about a quarter of the ILs explicitly refer to the precedence of IIAs over the content of national laws when investors benefit from a favourable treatment provided in the treaties. Most ILs, however, remain silent on the relationship with the rest of the domestic legislation.

Box A1.
Fostering coherence between national and international instruments

While ILs and IIAs present many similar features, they differ in key aspects and can be used as complementary tools.

ILs and IIAs are used by countries to attract and regulate investment, and are, in this regard, key instruments to assist in achieving development objectives. They both list the standards of treatment and protection that apply to investors and can contain a number of similar provisions.

However, ILs and IIAs differ with respect to their content. For example, the determination of the nationality of the investor is not necessary in ILs; it is only necessary to know whether the investor is domestic or foreign (as a general category). In the case of an IIA, this is of key importance as the investor must hold the nationality of the treaty partner to the host country to benefit from its provisions. While the scope and content of the IL can be determined solely by the host country in line with its national development objectives and existing legislation, IIAs are the result of negotiations that need to be agreed upon by the two treaty partners (or all of them, in the case of regional IIAs). In addition, IIAs, contrary to ILs, rarely cover entry or apply pre-establishment, thus leaving entry regulation to the domestic legal framework of the host country. Moreover, certain standards of treatment that are traditionally present in IIAs, particularly fair and equitable treatment (FET) and full protection and security (FPS), as well as the most favoured nation (MFN) clause, are rarely mentioned in ILs. Finally, IIAs and ILs can contain investment promotion provisions. However, these are typically different in content and in nature (e.g. encouragement of investment by the parties in IIAs and investment incentives in ILs).

Source: UNCTAD, International Investment Agreements Navigator | UNCTAD Investment Policy Hub.[6]

[6] See UNCTAD Investment Policy Hub for more information on the reform of the international investment regime, available at: investmentpolicy.unctad.org/.

B.

Designing or revising an investment law: key questions and issues

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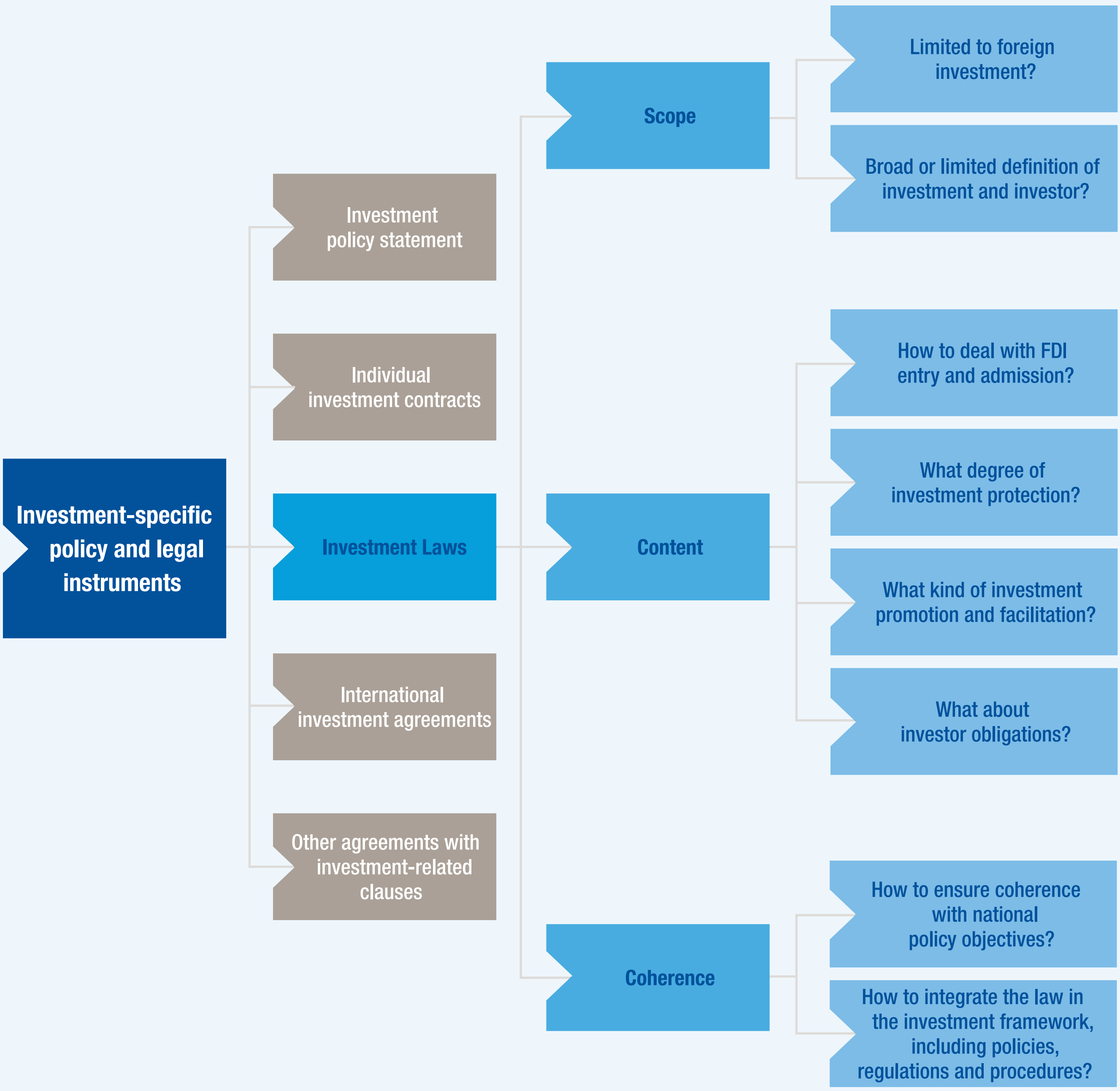
The final shape and content of an IL is country specific. Nevertheless, policymakers worldwide are confronted with the same basic questions when designing or revising an IL:

1. whether to have a separate IL at all;
2. what scope the IL should have;
3. what should be its substantive content; and
4. how to establish coherence between the IL and the rest of the country's national and international investment policy framework.



B.1. Investment law – Yes or No?

PRO

- Improves clarity of the regulatory environment
- Increases investor confidence
- May fill a regulatory gap
- Faster to adopt and easier to amend than a multitude of related laws and regulations
- *If foreign investment-specific:* tailor-made to the specificities of *foreign* investment

CONTRA

- Redundant in an already comprehensive regulatory framework
- Risk of regulatory overlaps and incoherence
- *If foreign investment-specific:* may create the impression that foreign investors are treated differently (either favoured or discriminated against)

Why does it matter?

An IL can be a powerful tool to enhance the clarity and transparency of the investment climate, define investment-related policy objectives and determine the conditions for the entry and treatment of foreign investors in the economy. When properly formulated, an IL can therefore enhance investor confidence and support public officials in the day-to-day implementation of the investment-related regulatory framework.

However, not all countries need an IL. When investment policy objectives are clearly spelled out in other policy tools, and the entry, treatment, protection, promotion and obligations of investors, including foreign ones, are sufficiently covered by the general legal regime, an IL might not be necessary. Box B1 provides examples of how countries use other instruments to deal with specific investment issues.

While ILs can be a powerful tool to enhance the clarity and transparency of the investment climate, not all countries need an IL. If other policy tools clearly spell out the procedures and conditions for investors to operate, an IL might not be necessary.

Box B1.
How do countries without an IL deal with investment issues?

Investment-specific issues can be addressed in different ways outside of an IL. This box presents a non-exhaustive overview on how countries without an IL deal with different aspects of entry, establishment, treatment, protection and promotion of investment.

Regarding *entry and establishment*, specific FDI screening legislation has been adopted to regulate the entry of foreign investors in sectors considered sensitive for national security reasons. Such rules have been adopted, for instance, by most member States of the European Union as well as by Australia and the United States. Other countries maintain entry restrictions and requirements in sector-specific legislation, or in separate regulations listing the areas opened or closed to foreign investment. This is the case, for example, of Botswana. Yet another set of entry rules can be found in competition laws that aim at preventing the creation of dominant market positions or in foreign exchange regulation (e.g. India).

Regarding *treatment and protection*, the constitution or other national laws may contain references to the free repatriation of capital and profits, the protection against expropriation of tangible and/or intangible assets, as well as regarding dispute settlement. In most developed countries and in some developing countries, such as Botswana and Mauritius, an explicit reference to the core standard of treatment (e.g. national treatment) is absent. In such case, the legislation typically applies equally to domestic and foreign investors.

Provisions that apply specifically to foreign investors can also be contained in the general legislation or in *ad hoc* instruments. These instruments typically cover only individual aspects of investment policy, such as the repatriation of capital and profits (e.g. Brazil), the establishment of the investment authority or IPA along with procedure for registration of investments (e.g. Tuvalu), or incentives (e.g. Bulgaria).

Source: UNCTAD, Investment Laws Navigator | UNCTAD Investment Policy Hub, accessed 16 October 2024.

ILs should be clearly integrated into a country's overall development strategy

If a country opts for an IL, it should be clearly integrated into its overall development strategy and aligned with the domestic economic, social and environmental context. Coherence with pre-existing commercial and investment-related laws and regulations should be sought to avoid duplications and/or contradictions, ensure a smooth legal transition, build predictability for investors and reduce the exposure of the State to potential disputes with investors.

How do countries deal with the issue?

UNCTAD has identified 132 ILs which are in force worldwide. Among these, the majority are in developing countries. ILs are particularly widespread in Africa and Asia but exceptions exist (e.g. there are no ILs in Bhutan, Botswana, Malaysia, or Mauritius).

Issues for consideration

There are arguments in favour and against adopting an IL.

A first consideration is to ask whether the IL would contribute to clarifying and strengthening a country's investment policies in terms of its economic, social, environmental objectives and sustainable development. The preamble and the provisions on the objectives of the IL should indicate what the host country aims to achieve by adopting an IL, as well as the principles or strategic policy directions that would determine its content. This is particularly relevant if the country does not have another document – such as a national development plan, an investment promotion strategy, sectoral development plans or an investment policy statement – defining the objectives and priorities of its investment policies, including the role of foreign investment and its expected impact on sustainable development.

A second question is whether the IL would fill gaps in the existing investment policy framework. If this is the case, the IL can be a useful tool to improve clarity, transparency and predictability. Otherwise, an IL might result in duplications or even contradictions with existing rules.

Although the scope of an IL can vary, no such instrument can, by itself, cover all the legal and regulatory aspects related to the investment process. The IL needs to be designed as an integrated and coherent component of a more comprehensive regulatory framework for investment, which also includes, among others, corporate governance, labour, competition, taxation and environmental protection regimes. In addition, more specific legislation might be required alongside the IL, including for example to regulate capital markets. In some cases, countries also conclude specific investment contracts with investors.

When an IL only covers foreign investment (see section B.2), it allows for introducing provisions that specifically apply to this category of investors – e.g. in relation to their entry in different sectors of the economy, to dispute settlement or to incentives. However, such an approach might also give the impression that foreign investors are treated differently from domestic ones, including potential discrimination.

The following questions may help policymakers in their decision-making process whether to adopt an IL:

- What is the rationale for the adoption of the IL?
- Are FDI-related and sustainable development-related objectives explicitly stated in other official documents (e.g. development plans or strategies, sectoral strategies, regional development strategies, investment policy statements)?
- Is the IL an appropriate instrument to formulate FDI and sustainable development-related objectives (e.g. in the preamble and objectives sections of the law), or would an investment policy statement be sufficient?
- Are provisions relating to the entry, establishment, treatment, protection and

promotion of investors clearly spelled out in other laws or regulations?

- If the decision is to adopt an IL, how will the law interact with the rest of the regulatory framework (i.e. coherence with other domestic and international investment-related legal instruments and/or prevalence in case of contradiction)?
- If a new IL is introduced, would the law cover already established investors, or only new ones as of the date of entry into force of the new law? In the latter case, transitory provisions may be required, in particular if the new IL amends or replaces an already existing IL.
- Is the IL meant to address broader policy objectives, e.g. related to migration, labour, access to land, taxation or competition?
- Would the IL be easier to amend than other investment-related laws and regulations?

Guidance from the IPFSD and the IPRs

The IPFSD indicates in section 1.1.2 of the National Investment Policy Guidance that strategic investment policy priorities may be effectively formalized in a published document (e.g investment strategy), making explicit the intended role of private and foreign investment in the country's sustainable development strategy and development priorities, and providing a clear signal to both investors and stakeholders involved in policymaking. Some countries chose the IL as a channel to do so. In this regard, it is important for policymakers to examine if it is the most appropriate tool to achieve the intended policy objectives.

UNCTAD examined ILs in more than 60 developing economies in the context of the preparation of IPRs. The analysis has shown that several countries adopted ILs with the primary objective to introduce investment incentives or to achieve policy objectives indirectly related to investment, e.g. to limit investment-related migration. In many cases, these laws concentrated on promotion aspects and missed the basic elements of an IL, such as provisions concerning the entry, treatment and protection of investors. Finally, the analysis often found inconsistencies between the laws and the treatment of investors in practice, or between the IL and sectoral legislation, thus defeating the original purpose of the law.

B.2. Scope of investment law

Domestic and foreign investors

PRO

- Signals that all investors are, in principle, treated equally
- Signals general openness to investment from all countries

CONTRA

- May require exceptions for the treatment of foreign investors

Foreign investors only

PRO

- Improves transparency and clarity for foreign investors
- Allows to focus on foreign investment-specific policy issues

CONTRA

- May signals that foreign investors are treated differently
- Unwarranted if non-discriminatory treatment of foreign investors is provided

Why does it matter?

The decision whether an IL should apply to both foreign and domestic investors or to foreign investors only has important policy implications. In the first alternative, the regulatory framework is basically the same for all investors independent of whether they are domestic or not; in the second case, foreign investors are subject to a special legal regime.

In practice, however, the distinction between the two options is more subtle, as most ILs follow a hybrid approach. ILs covering both domestic and foreign investors usually include some specific provisions that apply to foreign investors only, while ILs limited to foreign investors generally do not establish a legal regime that is entirely different from the pre- and post-establishment treatment of domestic investors.

How do existing ILs deal with the issue?

One hundred twenty-eight ILs explicitly demarcate their scope. Out of these, 87 laws apply to domestic and foreign investors, while the other 41 laws target only foreign investors.

Countries with an IL covering domestic and foreign investors include, for instance, Honduras, Indonesia, Kyrgyzstan, Liberia, Timor-Leste and Zambia. Those covering foreign investors only include Albania, Argentina, China, the Islamic Republic of Iran, Türkiye, the Russian Federation and Somalia.

Issues for consideration

There are arguments in favour and against each option. A starting point is to ask whether non-discriminatory treatment of domestic and foreign investment is the general principle in a country’s regulatory regime or if there are numerous and substantial exceptions to this rule. In the first case, the option covering both domestic and foreign investors may be the most suitable, whereas in the second scenario an IL limited to foreign investors could be more appropriate.

The decision also depends on the intended substantive scope and content of the IL. If it will mainly cover policy areas where there is little or no discrimination between domestic and foreign investors (e.g. concerning the treatment of established investors or in respect of investor obligations), a general IL may be preferable. If, by contrast, the IL focuses on policy issues where different treatment of foreign investors is relatively common or where the provisions only apply to foreign investors (e.g. FDI entry restrictions, FDI promotion, profits repatriation, international arbitration), a foreign IL might be the more appropriate solution.

Another consideration has to do with policy clarity and transparency. Countries may opt for a foreign IL rather than a general IL because it allows to combine most – if not all – applicable rules for foreign investors in one single legal instrument. In this case, a foreign IL may become an additional investment promotion tool. On the other hand, it cannot be excluded that foreign investors may perceive a foreign IL as an instrument with the potential to discriminate them. Vice versa, domestic investors may feel disadvantaged in the presence of a foreign IL offering foreign investors special or preferential treatment.

Independent of whether the IL applies to both domestic and foreign investors or to foreign investors only, there is a need to define the criteria for determining the nationality (see section B.4).

The decision whether an IL should apply to both foreign and domestic investors or to foreign investors only has important policy implications.

Over two thirds of ILs apply to domestic and foreign investors.

Beyond these general considerations, the following questions may help policymakers in their decision-making process concerning the type of IL to choose:

- In the case of an IL covering domestic and foreign investors: In what policy areas would exceptions from the principle of non-discrimination be needed? What is the reasoning behind them? Could these exceptions be limited to a reasonable number?
- In the case of an IL addressing foreign investors only:
  - » Which policy areas should the law cover? Should it be limited to those in which foreign investors are treated differently (e.g. FDI entry regulations, dispute settlement, specific foreign investment promotion) or should it have a broader scope?
  - » For policy areas outside the scope of the foreign IL: is it clear to which legal rules foreign investors are subject in these areas?
  - » Is it excluded that foreign investors are subject to overlapping or even contradictory rules deriving from the foreign IL and other pieces of legislation, i.e. is it clear which law would prevail in these cases? (See also section B.11).

Guidance from the IPFSD and the IPRs

The IPFSD does not, in the National Investment Policy Guidance, specifically deal with the scope of an IL. It is applicable to any IL, independent of whether it covers both domestic and foreign investors, or foreign investors only.

IPRs have typically refrained from commenting on the appropriateness of adopting laws specific to FDI or applicable to all investors. They have, however, frequently recommended countries to clearly identify instances of differential treatment between domestic and foreign investors in law or practice, and adequately reflect them in the legislation, or remove them when they lack legal grounds.

B.3. Definition of investment

	PRO	CONTRA
Asset-based	Promotional effect on all types of investment	May reduce regulatory space for different asset types
Limited asset-based	Leaves regulatory space for uncovered asset types Avoids incoherence with asset-specific legislation	Risk of legal gap for uncovered asset types May reduce attractiveness for excluded types of investment and reinvestment
Enterprise-based	Leaves regulatory space for uncovered asset types Focus on companies as main economic actors	Risk of legal gap for uncovered asset types May reduce attractiveness for excluded types of investment and reinvestment

The definition of investment is a core element of an IL and determine the types of assets that are covered and protected by the law.

Why does it matter?

The definition of investment is a core element of each IL as it determines what assets are covered and protected by the law.

The archetypes of definition, derived from the IIA approach, differ substantially in their scope:

- Asset-based: a broad definition that covers every kind of asset invested in the host country. This method is frequently used in ILs as the leading formula to introduce a non-exhaustive list of assets, including property rights, shares of companies or other kinds of interest in companies, claims to money, intellectual property rights, concessions and licences (including natural resources exploration and exploitation), and income of investment (in particular profit, interest, capital gains, dividends, royalties) that qualify as an investment. Several ILs explicitly specify that investment also includes portfolio investment.
- Limited asset-based: the definition might specifically exclude certain types of assets, such as contractual rights, or even entire sectors, from the scope of the IL.
- Enterprise-based: a definition that only covers an enterprise established in the country of investment and its assets there.

These three options are not mutually exclusive. ILs often combine them in one way or another. This means that in practice there exist more approaches than the ones mentioned above. Despite these differences, these three categories remain the reference types for the analysis and for illustrating the pros and cons of each approach.

Depending on the definition chosen, the substantive provisions of the IL (e.g. on entry, establishment procedures, treatment, protection, investors' obligations, and promotion) apply either: 1) to any kind of asset in the host country; 2) to various, but not all assets in the host country or; 3) only to enterprises established therein and their assets, and hence have different impact on the host countries' regulatory space. A broad definition may leave less room for treating different asset classes differently (see below). With a broad definition, the IL would cover both direct and portfolio investment, while these two types of investment may require different legal treatment through separate legal instruments.

The definition of investment may also have consequences for the relationship between the IL and other pieces of the domestic legislation, including coherence between them (on the latter issue, see section B.10). In case of a broad definition, it is unlikely that the IL will be able to deal with all regulatory aspects of each type of investment. Other legislation needs to be in place dealing with the issues not covered by the IL. Examples are financial regulations on portfolio investment and capital markets or commercial laws dealing with contractual rights. If, by contrast, a limited, enterprise-based definition is chosen, it seems more feasible to cover all relevant regulatory issues in the IL; however, other assets not covered might end up in a regulatory vacuum.

Finally, the issue of the definition of investment needs to be distinguished from entry rules for foreign investment. Excluding certain asset types usually does not mean that these forms of investment would be prohibited – it only implies that they are not covered by the IL. If a country wants to ban certain types of investment, it will have to do so in the entry regulations of the IL or other pieces of the domestic legislation, including sector-specific laws, dealing with the entry of investment.

How do existing ILs deal with the issue?

Most ILs include a definition of investment or foreign investment (111 laws). As mentioned, many laws do not fall exclusively into one of the categories above, but in broad terms nearly a half (54 laws) of them apply an asset-based definition (e.g. those of Chile, Guatemala, Lithuania, Papua New Guinea, Tajikistan), while 37 laws have implemented an enterprise-based approach (e.g. those of Bosnia and Herzegovina, Democratic People's Republic of Korea, Dominican Republic, Sierra Leone, Tunisia). Eighteen ILs apply an asset-based definition with some limitations (e.g. those of Belarus, Madagascar, Romania).

Issues for consideration

Several additional factors play a role when deciding whether to opt for a definition of investment that is broad, limited or only applies to enterprises.

One consideration is linked with the objective of the IL. Depending on whether the law aims to encourage investment in general or exclusively direct investment, countries may opt for a broad or an enterprise-based definition.

Another issue is whether the definition should establish some additional conditions, such as the one that the asset needs to fulfil the characteristics of an investment, namely the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk (for further details on this issue, including its pros and cons, see UNCTAD, IPFSD, Framework for IIAs: Options).

Moreover, the IL may also require that the investment:

- Is made in accordance with the host country laws, which helps ensure that established investments fulfil all host country requirements.
- Contributes to the sustainable development of the host country, which may help promoting investment with desired impacts, e.g. on employment, environmental protection, poverty reduction or technological upgrading. However, defining and monitoring the contribution may be challenging.
- Has a certain minimum value, which may help to concentrate investment promotion efforts on investment projects with a potentially significant development effect, but it may at the same time discourage smaller investments that would also be beneficial.
- Has been made after the entry into force of the IL. Excluding existing investments from the coverage of the law limits host countries' responsibilities but may also raise concerns about potential discrimination and incoherence.

Concerning the possibility of limiting the definition of investment, some more technical issues may arise in case of:

- a broad definition:
  - » Should the definition be exhaustive (i.e. listing of all covered asset types) or indicative (i.e. providing examples of covered asset types)?
- limiting the definition:
  - » Should specific asset types be excluded from the definition through a negative or positive list approach?
- an enterprise-based definition:
  - » How should the term enterprise (or an equivalent term) be defined and which assets of the enterprise should be covered by the definition?

Guidance from the IPFSD and the IPRs

The IPFSD does not, in the National Investment Policy Guidance, deal with the definition of investment in an IL. However, the Framework for IIAs: Options part of the IPFSD presents policy options for the definition that are similar to the ones mentioned above.

Most of the ILs examined in the IPRs contain a broad asset-based definition of investment. IPRs frequently raised coherence issues between the definition of investment in the IL and other related legal texts, in particular rules on transfer of funds, including in regional economic integration organizations (REIO) (see section B.10). In these cases, UNCTAD recommended harmonizing the definition of investment across the legal framework.

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B.4. Definition of investor

PRO		CONTRA
	Any natural or legal person	
Promotional effect on all types of investors		Protects all investors, independent of nature and purpose
	Substantial economic activity needed	
Excludes non-genuine investors from the protection of the law		Potential loss of employment and tax revenues
	Exclusion of foreign SOEs	
May be useful for host countries concerned about foreign political control of the investment		Potential discouragement of beneficial investment

A broad definition of investor may increase a country's attractiveness as an investment destination. However, it may also result in the coverage of some undesired categories of investors.

Why does it matter?

The definition of investor determines who is covered by the IL.

A broad definition of investor, i.e. covering any natural and legal person, may increase a country's attractiveness as an investment destination. On the other hand, it may also result in the coverage of some undesired categories of investors (see below).

The term investor may cover domestic and/or foreign investors, with each option having important policy implications (see section B.2).

How do existing ILs deal with the issue?

The vast majority of ILs surveyed include a definition of investor (105 laws), which, in general, comprises both natural and legal persons. In most cases, natural persons include both citizens and foreigners. It may also cover nationals with permanent residence outside the host country (e.g. those of Ethiopia or Türkiye).

105 laws out of **128** of surveyed ILs include a definition of investor.

Issues for consideration

Discussions about the definition of investor focus on the following three issues:

Requiring substantial economic activity in the host country

As part of ongoing international efforts to fight tax avoidance and combat money laundering as well as terrorism financing, policies have been developed in recent years, which are relevant to the definition of investor.[7] For example, excluding investors without *substantial economic activity* from the definition would help prevent that entities established specifically to benefit from preferential tax treatment (e.g. mailbox companies) are covered by the IL and benefit from its provisions. IIAs often adopt this approach. To enhance clarity and predictability, the IL may also include a definition of the term substantial economic activity (see also section B.3).

If the IL excludes mailbox companies from coverage, other domestic legislation should be in place dealing with them.

Foreign State-owned enterprises

Given their economic and strategic importance, domestic State-owned enterprises (SOEs) are typically covered by specific legislation. The issue is therefore how to regulate the entry and the treatment of foreign SOEs.

Countries concerned about potential unfair competition or risk of political influence from foreign SOEs may consider excluding them from the definition of investor in the IL. This, however, may result in discouraging new or losing existing otherwise beneficial investment (such as in infrastructure, etc.).

An alternative approach would be to include SOEs in the definition of investor, but to establish specific rules for them in the IL or other legislation, including a foreign investment screening system for national security purposes in sensitive sectors (e.g. utilities, infrastructure, defence, telecommunications).

Determining investor nationality

ILs distinguish between domestic and foreign investors (see also section B.2), but not among foreign investors of different nationals, contrary to IIAs. Determining nationality is relatively straightforward when the investor directly owns or controls the investment. However, issues arise when the IL also requires considering indirect ownership or control. Complex and multi-layered ownership structures in multinational companies may make it difficult to identify ultimate ownership.

7 See, for example: https://www.oecd.org/tax/beps/beps-actions/action5/.

Guidance from the IPFSD and the IPRs

The IPFSD does not deal with the definition of investor in the National Investment Policy Guidance. The Framework for IIAs: Options part of the IPFSD, by contrast, includes various policy options for the definition. However, they are not applicable in the context of an IL, because they address specific issues that exclusively arise in relation to investment treaties.

Most of the ILs examined in the IPRs refer to the investor as any natural or legal person. In recent years, with the adoption of agreements on tax compliance at the international level, and the increased scrutiny of tax optimization and evasion, references to substantial economic activity are slowly being introduced, more often, however, in the regulation of services, particularly financial services, than in the IL. When the IL did not provide a definition of the foreign investor and/or did not indicate how "foreign" should be determined, a recommendation was made in the IPRs to clarify these elements.

B.5. Entry of foreign investors

PRO | CONTRA

Reference to domestic legislation

PRO	CONTRA
Avoids that the IL overlaps or conflicts with other laws	Risks a lack of clarity, transparency and predictability May be difficult to administer

Negative list

PRO	CONTRA
Promotional effect on investment not included in the list Provides clarity and transparency Signals openness, if the list is short	Challenging if the list is long

Positive list

PRO	CONTRA
Provides clarity and transparency Practical for countries with limited FDI openness	Risk of omissions and foregone investment May signal protectionism and reduce countries' attractiveness for investors

Entry conditions

PRO	CONTRA
Can be tailor-made for specific host country policy objectives Less restrictive than absolute entry barriers	May reduce countries' attractiveness for investors Requires solid market analysis from the host government

Why does it matter?

Entry rules are those through which a country regulates (i.e. allows, restricts or prohibits) the access of an investor on its territory. They include entry regulations, restrictions, requirements and admission procedures, which can all apply exclusively or cumulatively.

Entry regulations or *restrictions* can be an important tool for industrial policy purposes and – more generally – for development strategies. They may be adopted, in particular, with the objective of: 1) Supporting domestic infant industries by shielding them from foreign competition; 2) Facilitating the growth of national champions in specific industries; 3) Protecting strategic industries from foreign interference; 4) Strengthening independence in industries related to public health and other essential public interests; 5) Preserving a public monopoly in the restricted sector(s). The record on the effectiveness of entry restrictions in achieving these objectives, however, is mixed, and very much dependent on country-specific circumstances.

Entry regulations or restrictions may be spelled out in the ILs, in sector-specific legislation or be decided on a case-by-case basis during the admission procedures for individual investment projects. The latter option usually consists in a screening mechanism for foreign investment (see section B.6).

Entry rights for foreign investors are closely linked to the issue of access to land. From a legal point of view, however, the two subjects need to be separated. The fact that an industry is open to foreign investors does not mean that investors would be automatically allowed to acquire title to land for their business purposes. Including explicit rules on land ownership and access by foreign investors in the IL therefore helps to avoid legal uncertainties.

Entry restrictions should be clearly listed in a legal instrument, either in the IL or in separate legislation, such as sector-specific laws and regulations. In addition, entry restrictions may also result from the application of host countries' competition laws, for instance, if a foreign takeover would create a dominant market position for the acquirer.

At the international level, entry rules for foreign investment may be found in bilateral investment treaties (BITs), investment chapters of free trade agreements, regional integration agreements and multilateral treaties on this subject, for example the World Trade Organization's General Agreement on Trade in Services (WTO GATS).

Given the potential overlap of entry regulations deriving from different legal instruments at the national and international level, there is a need for clarifying the relationship between them and for ensuring coherence (see sub-section c and section B.11). Referrals in the IL to specific provisions on entry contained in other pieces of legislation may help clarify this issue.

Entry rules for foreign investment may be found in bilateral investment treaties, investment chapters of free trade agreements, regional integration agreements and multilateral treaties on this subject.

How do existing ILs deal with the issue?

Most ILs include regulations on the entry of foreign investment. The approach, however, may differ (figure B1).

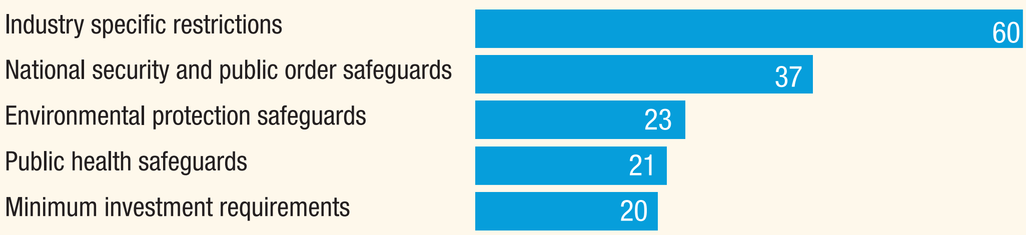
Numerous ILs include sector-specific entry restrictions (60 laws), with the negative list approach being the most frequently used in at least 30 laws (e.g. those of Colombia, Dominican Republic, Zambia). An alternative approach is a positive list of industries in which foreign investment is permitted – by default barring it in any other industry. This approach was more prevalent in investment laws prior to the liberalization wave of the 1990s and 2000s.

Yet, at least 36 ILs refer to the existence of entry restrictions in other legislation, with or without indications of the laws in question. Some of these ILs explicitly confirm that the restricted sectors are reserved for nationals or refer to the fact that sector-specific laws and regulations may include (foreign) investment restrictions (e.g. those of Burkina Faso, Kazakhstan, Papua New Guinea).

Most entry restrictions in ILs concern strategic and/or sensitive industries, such as defence, extractive industries, currency printing or energy. Other ILs also include selected small service business and certain traditional agriculture sectors essential for the local population (e.g. those of Ghana, Liberia, Nepal). Furthermore, at least 20 ILs include certain minimum investment capital requirements (e.g. those of Democratic Republic of the Congo, Georgia, Bolivarian Republic of Venezuela). This requirement, however, is often regulated in separate decrees implementing the IL.

At least one third of ILs include references to one or more general safeguards. The most frequently utilized relate to the protection of national security and public order (e.g. in Belarus, Cuba, Guyana, Lao People's Democratic Republic), environmental protection (e.g. in Albania, Democratic People's Republic of Korea, Qatar) or public health (e.g. in Ethiopia, Republic of Moldova, Nicaragua). None of the surveyed ILs defines these safeguards in more detail.

Figure B1.
Types of entry restrictions in investment laws
(Number of laws)



Source: UNCTAD, Investment Laws Navigator | UN CTAD Investment Policy Hub, accessed 16 October 2024.

Issues for consideration

Host countries need to decide whether the IL should be the exclusive domestic legal instrument dealing with entry restrictions for foreign investment. This approach has the advantage of providing investors with a comprehensive overview of existing regulations, thereby enhancing the clarity and transparency of the legal framework. It would also exclude the risk of incoherence between the IL and other existing domestic legislation on the entry of foreign investment. On the other hand, compiling all entry-related regulations in one single law or regulation could be a demanding exercise if existing rules are complex and manifold, and includes the risk that some existing investment restrictions are overlooked.

An alternative approach would be that the IL refers to existing entry restrictions in sector-specific legislation. Investment limitations in the IL could be limited to general safeguards, such as the protection of national security, public health and other essential public interests. While this approach would be easier to implement, it may also pose challenges concerning the transparency of the legal framework and its overall coherence.

Entry restrictions for foreign investment may be reflected in negative or positive lists in the IL. The negative list approach catalogues those sectors and activities from which foreign investors are fully or partially excluded. Generally, it signals a country's general openness to foreign investment, provided that the list is relatively short. The positive list approach, by contrast, registers the sectors and activities where foreign investment is permitted. Contrary to the above, it could be interpreted as an expression of caution vis-à-vis foreign investors, particularly if the list is short.

A negative list approach may seem to be more demanding for host countries, as an omission to include an existing restriction could result in investors claiming entry rights. Positive lists do not pose this risk, as no foreign investment would be permitted in industries beyond those mentioned in the list. However, if the positive list is incomplete, host countries might end up restricting investment in more sectors or activities than desired.

ILs may also subject foreign investment to certain *entry conditions*. These are requirements that the State imposes on the investor to allow entry in a sector or an economic activity. Entry conditions can complement the negative or positive list or feature independently. They may take the form of minimum capital requirements, mandatory transfer of technology or mandatory joint ventures, with or without the indication of specific thresholds for a local partner. Such conditions allow adjusting entry rules to the host country's specific policy objectives (e.g. business linkages), while avoiding the full closure of sectors to foreign investors. Some countries, for instance, have opted for the introduction of minimum capital requirements to shield local small and medium-sized enterprises (SMEs) from foreign competition, others to limit immigration disguised as investment.

To bring about the intended positive impact on development, such policies require an in-depth local market analysis and knowledge of the capabilities of the local private sector. Minimum capital requirements, for instance, risk discouraging bona fide foreign SMEs from investing in sectors and activities in which their development impact could be high (e.g. high-tech services). Furthermore, it is important to choose the most appropriate policy instruments for achieving specific objectives (e.g. the immigration regime and its implementation to control the flow of migrants).

Entry conditions need to be distinguished from performance requirements imposed in the post-establishment phase (such as levels of employment or exports), which are typically linked to the granting of investment incentives.

A country's entry regulations for foreign investment tend to change over time. New restrictions may be introduced and existing bans modified or abolished. In principle, there are three options for implementing such changes: 1) by formally amending the IL itself; 2) by amending a separate regulation linked to the IL that contains the entry restrictions; 3) through an administrative decision, e.g. by the minister in charge of investment. The first alternative requires that the amendment passes the entire legislative process, including adoption of the revised law by the parliament. Revising the negative or positive list through a regulation or administrative decision offers more flexibility and would speed up the procedure but might also lead to a higher degree of unpredictability.

Once entry restrictions are introduced, revising or lifting them may be complicated. Beyond the legislative or administrative processes required, it may encounter resistance from vested interests. For this reason, countries may consider the adoption of structured mechanisms for the automatic revisions of entry restrictions based on periodic cost-benefit assessments, or on sunset provisions. In each case, it is important that a consultation process integrating the key stakeholders be followed.

Entry restrictions and conditions can be tailored to achieve specific policy objectives

Guidance from the IPFSD and the IPRs

Openness to investment is one of the Core Principles of UNCTAD's IPFSD. Principle 6 stipulates that, in line with each country's development strategy, investment policy should establish open, predictable and stable entry conditions for investment. Furthermore, Principle 3 states that investment policies should be regularly reviewed for effectiveness and relevance and adapted to changing development dynamics.

Sections 2.1.2 to 2.1.5 of the National Investment Policy Guidance of the IPFSD provide detailed suggestions concerning the design of entry policies for foreign investment.

Most IPRs address issues related to the entry of foreign investors. In many countries, the IPRs found a discrepancy between the ILs and sectoral laws and regulations as regards the sectors and activities closed or restricted for foreign investors. This has a negative impact on the clarity and predictability of the investment climate and on a country's image as a welcoming investment destination. The IPRs also noted that countries, which apply minimum capital requirements across all sectors, risk precluding entry to small but innovative investors who may have a large impact in terms of sustainable development. In these cases, the IPRs advised countries to opt for the selective closing of sectors, which warrant protection (e.g. in case of crowding out concerns), rather than applying restrictions across the board.

B.6. Administrative establishment and entry procedures of foreign investors

PRO

CONTRA

No specific procedure

PRO

- Signals openness to investors
- Investor-friendly/non-discriminatory
- Easy to administer

CONTRA

- Limits scope for entry control
- Alternative FDI statistics collection needed

Registration

PRO

- Contributes to FDI data collection
- Investor-friendly/non-discriminatory
- May assist IPAs in interfacing with new investors

CONTRA

- Limits scope for entry control
- Does not capture reinvestments

Limited screening or approval

PRO

- Relatively investor-friendly and relatively easy to administer
- Provides regulatory discretion and flexibility
- Tool to bar undesired investment

CONTRA

- Creates legal uncertainty if approval criteria are vague
- Risks politicizing the admission process
- Adds a layer of red tape
- Complex intra-governmental coordination

Comprehensive screening or approval

PRO

- Ample regulatory discretion
- Tool to bar undesired investment

CONTRA

- Creates legal uncertainty if approval criteria are vague and heightens the risks of rent-seeking
- Cumbersome for investors
- Reduces country attractiveness
- Complex to administer

While many ILs require all investors to undergo the same ordinary business establishment process, several ILs have opted for the introduction of FDI-specific entry channels and procedures.

Why does it matter?

Establishment refers to the procedures that an investor must comply with to be admitted to the host country and operate there. These establishment procedures need to be distinguished from the host countries' entry rules that determine the degree of openness of the economy to foreign investors and which are dealt with in section B.5.

Entry rules and establishment procedures work together and cannot always be clearly separated. This is most obvious in respect of investment approval and screening schemes that combine both procedural elements and a substantive administrative decision on the admission or rejection of an investment. This Guide covers these hybrid systems in this section B.6.

Establishment procedures usually comprise the formal incorporation or registration of an investment in the host country, together with obtaining the administrative licences and permits required for the specific activity.[8]

Opting for equal administrative establishment procedures for domestic and foreign investors – i.e. having no specific procedures for foreign investors only – signals openness of the investment climate, attests to non-discriminatory treatment of foreign investors and generally allows for a more streamlined establishment process, thus enhancing the ease of doing business. It does, however, forego a channel for FDI statistics collection, and reduces the scope for entry-point regulatory control, if compared to more comprehensive registration or screening approaches. These issues can be dealt with through the adoption of more sophisticated FDI statistical collection mechanisms (e.g. survey-based FDI data collection) as well as enhanced ex-post regulatory monitoring or activity-based permitting.

For FDI data collection, countries may also require foreign investors to register their investment upon entry. This is typically done by the investment promotion agency (IPA) and provides these agencies with an opportunity to establish contacts with the foreign investors, and offer their services, which may range from facilitation to match-making with domestic companies and aftercare (see section B.8). Depending on how it is implemented, however, FDI registration can also become an additional burden for investors, and while it does allow for the collection of entry-level data, it typically fails to capture re-investments and investment-related data (e.g. employment, trade, etc.) in the years following the original investment.

Foreign investment screening and/or approval mechanisms allow host countries to control the entry of foreign investors, be it in respect of specific sectors and types of activities, where entry restrictions exist, or concerning all foreign investment projects. The screening process aims to examine and eventually reject foreign investment based on some criteria that can include whether it is contrary to the public interest, for instance, because it threatens national security, creates health risks or jeopardizes sustainable development. In addition, a screening system enables the enforcement of sector-specific entry restrictions for foreign investors. Screening procedures apply at the pre-establishment phase and differ from incorporation, licensing and permitting, which provide the necessary authorizations to operate in an economic activity.

One specific type of FDI screening, which has been gaining traction in recent years, is the screening for national security reasons. Intensified foreign investment screening reflects rising concerns in numerous jurisdictions about foreign companies seeking to acquire strategic domestic firms and key technologies. In response to a series of global crises, the scope of national security has been broadened to encompass additional economic sub-sectors considered strategic. Governments have expanded screening to include emerging critical knowledge areas and strategic technologies,

[8] The term licence in this document refers to the sectoral authorizations needed to operate a business (e.g. in health, tourism) and the term permit includes notably an environmental permit.

particularly those involving access to sensitive personal data or potential influence on public opinion (UNCTAD, 2023).[9]

While screening procedures provide host countries with regulatory discretion and flexibility, they are also associated with some challenges, which increase in severity as the scope of application of the screening procedures broadens. When applied to a limited number of sensitive sectors, and based on clear criteria, FDI screening can be a powerful tool to protect public interests. But the broader and the more discretionary it becomes, the more complex it is to administer. It also increases the risks of rent-seeking behaviour. This comes at the expense of legal certainty and the overall quality of the investment climate.

How do existing ILs deal with the issue?

ILs use different approaches to the establishment process for foreign investors. While many do not differentiate among investors based on nationality, thus requiring all investors to undergo the ordinary business establishment process (company incorporation, licensing or permitting), several ILs have opted for the introduction of specific entry channels and procedures. These can vary from a simple registration process (e.g. in Angola, the Plurinational State of Bolivia, Georgia, Nigeria, Samoa, Yemen) to a more comprehensive approval procedure for foreign investment (e.g. in Cuba, Kenya, Nepal, Pakistan, Vanuatu, Zimbabwe) and finally to complex screening regimes, which can be either limited to certain sectors and activities or apply across the board. According to UNCTAD's count, at least 41 countries have a dedicated FDI screening mechanism in place (e.g. Australia, China, Finland, Germany, United States of America) – independent of the existence of an IL.10

Issues for consideration

There is often a fine line between FDI registration and FDI screening. Many ILs call "registration" what is *de facto* a screening mechanism. Whenever host country authorities can stop an investment project based on qualitative criteria and not only on procedural aspects, the procedure can be tantamount to investment screening.

Screening is also different from licensing and permitting, as these take place in the post-establishment phase and apply equally to domestic and foreign investors. It should also not be confused with the process where host country authorities verify the eligibility of investors for investment incentives.

Due to the confusion between investment registration and screening, the entity mandated with the gatekeeping function in the screening process is often the IPA. This may create excessive pressure for its staff, typically ill-equipped to undertake the reviews required by a screening process. It may also generate conflicts of interest for the IPA, as it adds an atypical regulatory function to its usual promotional role. In particular, the performance of an IPA is commonly evaluated based on the quantity of FDI projects that it facilitates – not on the number of projects that it has stopped.

Particularly in the case of FDI screening across the board, there is a risk of duplicating regulatory processes, which serve the same purpose, and generating conflicting decisions. Examples are parallel administrative procedures for protecting the public interest in the areas of environmental protection, competition or tax compliance. An additional screening mechanism risks deciding on the approval of an investment project before a full assessment by all relevant authorities has been made.

ILs use different approaches to the establishment process for foreign investors

[9] UNCTAD (2023). The evolution of FDI screening mechanisms: Key trends and features. Investment Policy Monitor, No. 25. February.

[10] UNCTAD (2024). World Investment Report 2024: Investment facilitation and digital government. United Nations: Geneva.

Guidance from the IPFSD and the IPRs

Section 2.1.5 of the National Investment Policy Guidance of the IPFSD states that investment screening procedures should, where applicable, be conducted following pre-established objective criteria.

Entry procedures for foreign investment in IPR countries vary significantly. Their level of complexity typically mirrors the degree of openness to FDI, with more restrictive countries adopting more complex *ex ante* regulatory controls. In many cases, they involve multiple agencies in addition to the IPA. The IPRs have consistently advised countries to limit screening to sensitive sectors or activities and to adopt simple notification or registration requirements for the others, combined with a strengthening of regular permitting, monitoring and inspection mechanisms.

B.7. Standards of treatment and protection

	PRO	CONTRA
Unqualified	▸ Improves country attractiveness	▸ Limits regulatory space ▸ Risks liabilities for the host country
Qualified	▸ Increases clarity and predictability of the policy framework ▸ Preserves regulatory space ▸ Retains the basic standards of protection	▸ May reduce country attractiveness if qualifications are far-reaching
Exception clauses	▸ Preserves regulatory space ▸ Is less restrictive than carveouts	▸ May reduce country attractiveness if exceptions are far-reaching
Carveouts	▸ Preserves regulatory space ▸ Provides for clear-cut solutions	▸ May reduce country attractiveness if carveouts are far-reaching ▸ Is more restrictive than exception clauses

Investment treatment and protection provisions are key considerations for investors deciding to invest in a specific country.

Why does it matter?

Investment treatment and protection provisions usually include clauses on non-discrimination, transfer of investment-related funds, protection against expropriation and dispute settlement. Protection from civil strife may also be included. These provisions apply at the post-establishment stage.

The guarantees of non-discrimination and the degree of investment protection afforded are key considerations for investors when deciding whether to invest in a specific country.

Finding the right balance between offering treatment and protection standards that are attractive for investors, while also safeguarding the host countries' regulatory power for the public interest has been a constant challenge in investment policies, not only in the drafting of ILs, but also of other instruments, including IIAs (UNCTAD, 2018).[11]

How do existing ILs deal with the issue?

The overwhelming majority of ILs contain at least one of the following four investment protection provisions: national treatment (NT) qualified or unqualified (81 laws, e.g. in Guinea-Bissau, Haiti, Iraq, Mauritania, Senegal), protection against expropriation (95 laws, e.g. in Benin, Burundi, Libya, Mongolia), free transfer of capital and profits (104 laws, e.g. in Cambodia, Colombia, Ghana, Niger, Somalia) and ISDS (89 laws, see examples below). The scope and content of these provisions differ between ILs.

Core standards of treatment can be qualified or not. For instance, several ILs circumscribe NT by the notion that it only applies if domestic and foreign investors are in like circumstances (e.g. those of Solomon Islands, South Africa, Zimbabwe).

At least 17 ILs (e.g. in Bangladesh, Egypt, Seychelles, Uzbekistan) offer fair and equitable treatment (FET), while only one, in Azerbaijan, contains most-favoured nation (MFN) treatment.

Numerous ILs clarify the applicability of the transfer of funds provision, with 66 laws providing for certain conditions in this regard (e.g. those of Angola, Armenia, Cabo Verde, El Salvador). The most common one is requiring a foreign investor to settle local taxes before transferring funds abroad.

The scope of the protection against expropriation can vary greatly in ILs. Some ILs refer to other pieces of legislation containing the conditions and procedures for expropriation. In 34 ILs the protection is extended to indirect expropriation, i.e. when an act of the State, administrative decision, judiciary or legal measure indirectly results in the deprivation of property for the investor, without it being the primary intent of the act considered (e.g. those of Guatemala, Hungary, Kyrgyzstan).

Another key protection provision in ILs relates to dispute settlement, not only as regards guarantees of access by foreign investors to domestic courts, but often also mechanisms for international arbitration in case of investor-State disputes. A range of different options are available in ILs in terms of ISDS provisions, using ADR mechanisms, namely, conciliation, mediation and arbitration, and/or recourse to the national courts (e.g. those of Algeria, Azerbaijan, Congo; see section B.9). Some ILs also refer to ADR mechanisms in the context of contract enforcement by private parties (i.e. commercial arbitration).

At least 37 ILs offer investor protection vis-à-vis regulatory changes that may negatively affect their operations. Such protection, in the form of a stability clause (e.g. in Kyrgyzstan, Qatar, Ukraine, Uruguay), is typically time-bound (generally three to five years), concerns a specific policy area (e.g. changes in the tax regime) or covers the entire content of the IL.

[11] UNCTAD (2018). Reform Package for the International Investment Regime. United Nations. Geneva.

Issues for consideration

Depending on the role that they accord to investment protection in their overall development strategies, host countries have different options for designing the respective provisions in the IL.

A broad approach would include the key treatment and protection provisions highlighted above, without introducing qualifications or exceptions. From a host country perspective, providing high standards of investment protection may give it a competitive edge in the global competition for attracting investment. At the same time, high protection levels may unduly limit regulatory space for host countries and increase their exposure to investment disputes with potentially huge financial consequences. This is particularly the case when the related provisions grant automatic State consent to arbitral proceedings. Another aspect to take into consideration is the differential treatment that might result from unqualified treatment and protection standards with other companies operating under the ordinary regime.

Some core standards of treatment, like FET, full protection and security (FPS) and MFN, have given rise to numerous investor claims and arbitration proceedings against the host country. Also, if the IL is to include stability clauses (see above), they affect the right of a State to regulate, and their adoption should thus be subject to careful consideration. While still referring to the key principles of protection, a more limited approach would qualify their terms of scope and coverage in the IL, without depriving them of their substance. This approach has the benefit of providing the host country with legal certainty and the investor with predictability.

An alternative are exception clauses concerning the applicability of certain treatment and protection provisions. An example is a clause allowing host countries to temporarily restrict the transfer of capital in a balance-of-payment crisis. Host countries need to take care that exception clauses are coherent with the rest of the domestic legislation and their international commitments, including those deriving from their membership in a REIO (section B.11).

The host country can also decide to exclude individual protection provisions in the IL altogether, either because they already exist in other domestic legislation or in IIAs, or because it does not want to provide a particular guarantee to investors. When making this decision, the host country should, however, be careful that the result is not to deter investment or to create a legal vacuum in an area of importance for investors.

Guidance from the IPFSD and the IPRs

The IPFSD refers to several treatment and protection provisions. Principle 7 indicates that investment policies should provide adequate protection to established investors and that their treatment should be non-discriminatory in nature.

In addition, section 2.2 of the National Investment Policy Guidance of the IPFSD refers to treatment under the rule of law, core standards of treatment, transfer of funds, contract enforcement and dispute settlement, expropriation and international commitments.

The IPRs have encouraged countries to provide basic standards of treatment, however ensuring that they are sufficiently qualified to limit exposure of the State to claims. They have also advised countries against providing unconditional consent to ISDS in the IL.

B.8. Investment incentives and promotion provisions

Incentives

PRO	CONTRA
Increases transparency when consolidated in IL	May "overload" the IL
Improves clarity on eligibility criteria	Risks omissions or overlaps with other incentives instruments
	May require frequent updates
	May transform the IL into an "incentives law"

Institutions

PRO	CONTRA
May clarify the role of institutions involved in investment promotion	Risks turning the IPA into a regulatory agency
Can clarify coordination mechanisms between different government agencies	

Why does it matter?

Provided that they are effectively implemented, investment incentives and promotion provisions in ILs can be powerful tools for attracting investment. Incentives may steer it into individual sectors or incentivize certain investor activities. Furthermore, establishing and strengthening investment promotion institutions can enhance the coordination and effectiveness of investment promotion activities.

How do existing ILs deal with the issue?

Many countries use ILs to incentivize and promote investment. The range of these provisions in ILs is broad: 70 per cent of ILs include provisions on incentives.

Eighty-eight ILs reviewed by UNCTAD include provisions on incentives available to investors in specific sectors or under specific conditions. Investment incentives encompass fiscal and financial incentives, along with other measures such as land allocation and the provision of infrastructure facilities (e.g. those of Angola, Cambodia, Eritrea, Kazakhstan). On a regional basis, more than two thirds of investment laws in Africa and Asia include a section on tax incentives. In other regions, the treatment of tax incentives in investment laws is less prominent.[12]

Investment promotion in ILs concerns provisions on the establishment of investment-related institutions, such as investment authorities, IPAs, or other institutions with a remit as investment promoters. In several cases, the ILs legally establish these institutions, and they sometimes include details on their mandate and functions. Fifty-two ILs refer to an investment authority (e.g. those of Djibouti, Sierra Leone, Samoa), 60 laws to the IPA (e.g. those of Bosnia and Herzegovina, Mongolia, United Republic of Tanzania, Togo). In addition to or independent of ILs, some economies address incentives and investment promotion separately through Investment Promotion Acts (e.g., those of Bulgaria, Cameroon, the Cook Islands, and Djibouti).

Investment incentives and promotion provisions in ILs can be powerful tools for attracting investment.

Issues for consideration

While introducing incentives in the IL can play a positive role, it should not be the main purpose of the law and should not replace other core elements of the investment policy framework dealt with in this Guide. If a country decides to include investment incentives in the IL, it should do so in a way that promotes sustainable development, following some principles and criteria set out in UNCTAD's IPFSD (see box below) and its individual development objectives.

Consolidating in the IL the incentives available for investment, which are often scattered across sectoral laws and policies, can improve transparency and regulatory coherence (see also section B.11). The risk, however, particularly in countries with complex and highly unstable tax regimes, is that frequent updates of the IL may become necessary to reflect the latest policy changes. A preferable alternative, in these cases, may be for the IL to refer to the sectoral or other laws that offer investment incentives (e.g. the legislation on special economic zones, on regional development schemes or on sectoral investment promotion).

70%
of ILs include provisions on incentives

Problems may arise when ILs assign investment promotion institutions a mix of regulatory and promotional functions. Most frequently, this takes the form of an IPA being assigned a role in the screening of investment projects, or in determining whether an investment project deserves incentives which are not attributed subject to clear criteria. As mentioned above (see section B.6), allocating the IPA a role in the decision-making process regarding

[12] UNCTAD (2022). World Investment Report 2022: International Tax Reforms and Sustainable Investment. United Nations: Geneva.

Investment incentives should promote sustainable development

incentives risks being detrimental, as it creates conflict of interest situations and increases the potential for rent-seeking.

Ensuring that host country commitments in ILs concerning investment promotion and facilitation are translated into practice is important, as it affects the credibility of the government and impacts negatively the investment climate. However, this task can be very challenging. While many countries strive to maintain up to date and publicly available repositories of investment-related information, many examples of incomplete and outdated websites exist.

Guidance from the IPFSD and the IPRs

UNCTAD's IPFSD contains in the National Policy Guidance some policy guidelines on the promotion and facilitation of investment (sub-section 2.4). The guidelines on the use of investment incentives aim to ensure that incentives contribute to sustainable development (see sections 2.4.12 to 2.4.20). They include, for instance, the need to derive incentives directly from the country's development strategy, to link them to achieving sustainable development outcomes, and to ensure a comprehensive cost-benefit analysis and periodically review their effectiveness. In addition, as mentioned, the administration of incentives should be the responsibility of an independent entity or ministry that does not have conflicting objectives or performance targets for investment attraction.

The IPFSD also contains several guidelines on ensuring the effectiveness of promotion institutions (section 2.4.1 to 2.4.11). They include guidance on their core functions and responsibilities, position within government and relationship with other government entities. The latter can be a critical aspect in determining the effectiveness of a country's overall investment promotion effort.

Based on the experience of the IPR programme, investment incentives are often overused and adopted without an adequate cost-benefit analysis, frequently in order to make up for the complexity and/or the lack of competitiveness of the general tax regime. The experience of several countries, however, has shown that a simple and competitive general tax regime applicable to all investors is easier to administer and to comply with, and dispenses of the need for additional specific incentives.

In several countries, the IPRs have found a lack of clarity in the mandates and functions of the various investment-related institutions (e.g. the national and local IPAs, the free zone authorities, the line ministries, the SME agency and the PPP units) and the absence of adequate coordination mechanisms. In these cases, the IPRs have often recommended that the IL clarifies which agency shall lead the effort in each area. It can also be helpful to provide additional clarity as to the specific modalities of inter-agency cooperation through the adoption of protocols of cooperation (service-level agreements) among the lead agency in investment promotion and the other entities.

B.9. Investment facilitation provisions

Streamlining

PRO	CONTRA
Makes it easier to establish and operate business Potentially benefits local businesses Could serve as a foundation for digital government	Requires ongoing updates and sufficient resources Risks contributing to digital resource overload

Facilitation services

PRO	CONTRA
Facilitates tailored assistance for investors	If foreign-specific: may create the impression that foreign investors are treated differently

Transparency

PRO	CONTRA
Promotes clarity and predictability	Risks negatively impacting the host country image if transparency is not implemented

Investment facilitation has emerged as a top priority for investment policymakers worldwide.

Why does it matter?

Investment facilitation has emerged as a top priority for investment policymakers worldwide. Since the publication of the UNCTAD Global Action Menu on Investment Facilitation in 2016, an international agreement on investment facilitation for development has been negotiated, facilitation has become a mainstay in regional and bilateral trade and investment agreements, and national implementation efforts have proliferated. Investment facilitation is also gaining prominence in national investment policies and laws. Making it easier to establish and operate a business not only attracts foreign investors but also improves the business environment for local enterprises.

How do existing ILs deal with the issue?

Sixty-four surveyed ILs include clauses on investment facilitation. These clauses have become more common in laws enacted after the early 2000s. There are some regional differences; 63 per cent of investment laws in Africa incorporate investment facilitation provisions, but only 20 per cent do so in Latin America and the Caribbean.[13] Investment facilitation provisions in ILs relate to streamlining, services and transparency.

Streamlining provisions encompass initiatives designed to simplify administrative procedures related to investment and largely involve the establishment of one-stop-shops for investors (in 31 of 36 ILs with streamlining provisions). Government may choose to set up physical one-stop shops (e.g. those of Cambodia, Libya, Malawi) or digital platforms like online single windows (e.g. those of Azerbaijan, Jordan, Mongolia). While most of these one-stop shops cater to all investors, some are specifically designed to support foreign or strategic investors.

Facilitation services provisions in ILs include ADR mechanisms such as conciliation and mediation (24 laws) and investor support by IPAs or agencies (17 laws). ILs provide institutional mechanisms, such as mediation, conciliation, or investment ombudsmen (e.g., the Republic of Korea), to prevent or resolve disputes between investors and the host country as part of investment aftercare and to avoid escalation into litigation or international arbitration (e.g. those of Angola, Myanmar, Uzbekistan). IPAs or other administrative entities may support investors through counselling, administrative help with permits, visa facilitation, and assistance in accessing land and utilities (e.g. those of Malawi, Romania, Turkmenistan).

Finally, at least 22 ILs contain explicit provisions aimed at promoting the clarity, transparency and accessibility of investment-related laws and regulations (e.g. those of China, Liberia, South Sudan). These can either include general commitments to publish all relevant laws, rules and regulations or more specific provisions to ensure free access to selected information, including, for instance, company incorporation data, titles to land or licences.

Issues for consideration

Facilitation provisions in ILs emphasize streamlining processes, offering facilitation services, and ensuring transparency. Since these aspects revolve around information and procedural efficiency, digitalization is central for effective implementation. Business and investment facilitation have thus led to a wave of digital government initiatives, including information portals and online single windows. Such initiatives now make up a significant share of national investment policy measures monitored by UNCTAD; modern IIAs also increasingly encourage digitalization to implement commitments. For digital facilitation platforms to achieve long-term success,

[13] UNCTAD (2024). World Investment Report 2024: Investment facilitation and digital government. United Nations: Geneva.

they require continuous updates, clear governance, and adequate resources. A separate issue related to the provision of investment facilitation services is the success of dispute prevention mechanisms established in ILs. This is generally associated with the personal profile of the mediators as well as their capacity to offer an independent and impartial mediation service. However, these mechanisms are not meant to replace the provisions on litigation procedures provided by the host country.

Investment facilitation is gaining prominence in investment laws

B.10. Investor obligations

No obligation

PRO

- Avoids overlaps and incoherence
- IL not affected by changes to other laws and regulations

CONTRA

- Investor obligations remain unclear

General obligation to respect the laws

PRO

- Confirms a general principle
- Avoids compiling obligations and/or referring to specific laws
- IL not affected by changes to other laws and regulations

CONTRA

- Specific investor obligations remain unclear

Specific obligations

PRO

- Allows to focus on the most relevant obligations
- Enables linking obligations to privileges

CONTRA

- Potential uncertainty about other, unmentioned obligations
- Risk of incoherence with obligations in other laws

Why does it matter?

Investor obligations are key instruments that contribute to the sustainable development of host countries and – more generally – reflect the fact that each member of a society has specific responsibilities. They are the flipside of investors rights and together the two set the legal framework within which the investment operates. The scope of investor obligations is usually broad and encompasses economic, social and environmental issues as expressed, for instance, in laws and regulations in taxation, labour, environment, trade, corporate governance, competition or CSR.

When discussing investor obligations in the context of ILs, the issue is therefore not whether investors *should* have obligations – these exist irrespective of the adoption of an IL. Rather, the issue is *how* the IL should reflect already existing investor obligations and whether the Law should modify or reinforce them, for instance by establishing additional investor responsibilities in line with the development priorities of the host country.

Investor obligations are incomplete without the existence of an effective sanction system, which enables host countries to enforce compliance.

Too heavy investor burdens are likely to discourage investment. Policymakers therefore need to find the right balance between investor rights and obligations in IL. Giving business associations and trade unions a voice in the law-making process can contribute to avoiding unbalanced outcomes.

Investor obligations in ILs need to be compliant with existing international obligations of host countries, particularly those deriving from a country's WTO membership (such as the prohibition of certain performance requirements) or from IIAs. The latter prohibit, in principle, investor obligations that are discriminatory or in conflict with any other IIA provision, for instance the rules on expropriation and capital transfers.

Finally, an IL provides an opportunity for promoting voluntary standards concerning sustainable development and other CSR issues. While not being legally binding investor obligations, such guidelines for investor behaviour can nevertheless significantly impact investor conduct, particularly if they are accompanied by an effective monitoring system. It is important that these CSR mechanisms are open to all companies, including SMEs.

How do existing ILs deal with the issue?

Of all surveyed ILs, two-thirds of them explicitly refer to certain investor obligations (see figure A4 above). The most stated (and fundamental) obligation is that investors must comply with the host country's laws and regulations (52 ILs, e.g. in Belarus, Guinea).

Often, this general obligation is complemented by more specific obligations. Other frequently used obligations include the requirement to provide accurate and timely accounting information on investor's operations (39 ILs, e.g. in Angola, Liberia) and requirement to fulfil their fiscal obligations (37 laws, e.g. in Haiti, Uzbekistan)

Thirty-three ILs pay particular attention to the respect of labour rights and standards, such as those pertaining to social security, minimum wages and trade union rights (e.g. those of South Sudan, Timor-Leste). In the 30 ILs dealing with environmental and health issues, investor obligations remain very general and lack any specifics as to the concrete legal acts or sectors involved (e.g. those of Cuba, Qatar).

Some ILs refer to obligations regarding local staff, such as training and skill transfer, or an obligation to give preference to locals when hiring personnel (29 ILs, e.g. in Iraq, Somalia). These obligations may be tantamount to performance requirements in some cases and may be a condition for receiving investment incentives.

Investor obligations are key instruments that contribute to the sustainable development

Of surveyed ILs, two-thirds explicitly refer to certain investor obligations

Issues for consideration

There are different ways for dealing with investor obligations in an IL.

The most straightforward option is introducing a general statement that investors are subject to the host countries' laws and regulations or to explicitly refer to existing investor obligations in other domestic legal instruments. This approach does not create any new obligations for investors, but only confirms the status quo. It also implies that investors need to find out which host country laws contain what obligations for them.

An IL could also contain an exhaustive list of investor obligations. While possible in theory, this approach may run into considerable practical difficulties given the potentially high number and complexity of existing regulations.

Under an intermediate approach, the IL could limit the scope of investor obligations included therein to those that are specifically linked to the investment process and not contained in other parts of the domestic legislation. Their centrepiece could be, for example, investor obligations linked to investment incentives or voluntary guidelines on investor behaviour (CSR standards). Other, more general obligations (e.g. those related to taxation, labour and environment) would be dealt with by the ordinary regime.

An intermediate approach implies that the investor obligations in the IL and other parts of the domestic legal framework might interact and possibly overlap. This might raise issues concerning policy consistency and coherence (see section B.11).

Guidance from the IPFSD and the IPRs

UNCTAD's Core Principles for Investment Policymaking deal with investor obligations in various ways. Principle 4 stipulates that investment policies should be balanced in setting out rights and obligations of States and investors in the interest of development for all. Principle 5 reiterates the sovereign right of States to establish entry and operational conditions for foreign investment. Principle 9 states that investment policies should promote and facilitate the adoption of and compliance with best international practices of CSR and good corporate governance.

In addition, section 2.3 of the National Investment Policy Guidance of the IPFSD deals with investor obligations, including CSR. It stipulates that investors' first and foremost obligation is to comply with a host country's laws and regulations. This obligation should apply and be enforced indiscriminately to national and foreign investors, as should sanctions for non-compliance. Governments should also encourage adherence to international standards of responsible investment and codes of conduct by foreign investors. Standards which may serve as reference include the International Labour Organization Tripartite Declaration, the Organization for Economic Cooperation and Development Guidelines for Multinational Enterprises, the UNCTAD, the Food and Agriculture Organization, the International Fund for Agricultural Development and World Bank Principles for Responsible Agriculture Investment, the United Nations Guiding Principles on Business and Human Rights and others.

The notion of investor obligation is also addressed in IPRs. The reviews focused on several aspects, including CSR, and the recommendations included issues related to the requirement for investors to comply with the laws and regulations of the host country, including to observe labour, environmental, health and safety standards.

B.11. Coherence

With domestic policies

- National development objectives and strategies
- Overall regulatory framework for investment

With international policies

- IIAs
- Other international agreements affecting investment
- Non-legally binding international commitments, including the SDGs

Tools for promoting coherence

- Transparency of policies
- Effective intra-governmental consultation and coordination
- Public-private dialogue
- Reduction of regulatory overlaps

Remedies for lack of coherence

- Establish conflict of law rules
- Confirm priority of international law
- Amend IL to ensure coherence with international law and obligations

The dynamic nature of investment policymaking poses significant challenges to ensuring policy coherence.

Why does it matter?

ILs usually interact with numerous pieces of legislation at the domestic level (e.g., laws on taxation, labour, environment, competition, immigration, trade, intellectual property, sector-specific issues, foreign investment screening), as well as with IIAs and other investment-related treaties and other instruments at the bilateral, regional or multilateral level.

Establishing and maintaining coherence is therefore essential for a smooth and efficient implementation of development strategies and associated policies. Coherence improves the clarity of the regulatory framework and predictability of administrative decisions. It can also create synergies, improve investor confidence and reduce the risk of investment disputes.

Coherence issues only arise if different legal instruments overlap. At the national level, this happens if – as usual – both the IL and other domestic legislation include investor rights (including investment incentives) and investor obligations.

In the relationship between ILs and IIAs, this is particularly the case for some investment protection provisions that can be found in both ILs and IIAs (namely definitions, national treatment, expropriation, capital transfer, dispute settlement). They may extend to FDI entry rules, provided that the respective IIA covers the pre-establishment phase.

Seeking coherence between ILs and IIAs does not necessarily imply that overlapping provisions have to be similar or even identical. Some IL provisions and approaches may not be suitable for IIAs and vice versa. For instance, while IIAs may carve out certain types of investors or investment from treaty protection, such a solution in an IL would risk creating an undesirable legal gap. Also, environmental and social safeguards often included in IIAs may not need an equivalent in ILs because they are already effectively operationalized through the domestic environmental and labour regimes, including relevant case law.

The dynamic nature of investment policymaking makes ensuring coherence particularly challenging. Coherent policies are warranted not only when a new IL is adopted, but also when future revisions are made. The same challenges arise when the host country introduces new or amends other parts of its investment-related legislation or concludes new IIAs.

How do existing ILs deal with the issue?

A quarter of the ILs (35) explicitly acknowledge that existing international investment instruments, such as IIAs, take precedence over the content of national ILs if investors are entitled to more favourable treatment provided by these international treaties (e.g. those of Armenia, Mauritania, Ukraine). While most of the time ILs remain silent on their relationship with other parts of the domestic investment-related legislation, in some countries, they incorporate explicit references (e.g. Belarus, South Africa).

Issues for consideration

The following checklist may help governments to effectively deal with coherence in the context of IL:

- Compiling and surveying existing investment-related legislation and treaties
    - » What other investment-related laws, regulations or international agreements are in place that interact with the IL?
    - » Are there policy areas in the IL that could potentially conflict with existing domestic legislation or international agreements to which the host country is a party?
- Reducing the risk of incoherence
    - » Does an intra-governmental information and consultation process exist concerning investment policymaking at the national

and international level? Is this process efficient and effective?

» Is the existing investment policy framework transparent so that potential policy inconsistencies can be detected easily and in time? Is there need for improvement?

» Is a centralized policy clearance mechanism in place that checks coherence before the IL is adopted?

» To what extent can overlaps between different pieces of investment-related legislation be avoided to reduce the risk of policy incoherence?

- Addressing incoherence

» Does the legal framework provide for rules in case that laws and regulations are incoherent, overlap, or contradict each other at the national or international level?

» How would these rules apply in the case of incoherence between the IL and IIAs?

» In case that provisions of the IL are incoherent with other existing investment-related legislation, which regulation shall prevail and which incoherent other law provisions therefore need to be amended or repealed?

» In case that provisions of the IL are incoherent with international treaties to which the host country is a party, what is the preferred means to establish coherence (amendment of IL, renegotiation or termination of existing treaty)? How feasible is each of these options?

Coherence between ILs and other instruments is essential

Guidance from the IPFSD and the IPRs

Coherence is a Core Principle of UNCTAD's IPFSD. It states that "investment policies should be grounded in a country's overall development strategy. All policies that impact on investment should be coherent and synergetic at both the national and international level."[14] In addition, section 1.2 of the National Investment Policy Guidance of the IPFSD underlines the importance of coherence, particularly in relation to human resource development, technology and know-how, infrastructure and enterprise development. Section 4.1 calls for regulatory coherence across levels of government.[15]

The experience of IPR countries shows that policy incoherence between the ILs and the other instruments of the investment framework is a widespread issue. It can be risky for a host country, potentially exposing it to costly litigations with investors. Beyond addressing the key sources of incoherence by amending the relevant laws, regulations or agreements, the IPRs have frequently called on reviewed countries to adopt early detection and prevention mechanisms.

When coherence issues arise in IPRs, they relate mostly to definitions, including the ones on investment and investor, particularly in relation to the repatriation of capital and profits. These can also be often found in the provisions of the ordinary legal regime determining the rules of foreign exchange. This is particularly the case in countries which are part of monetary unions, i.e. their monetary policy and regime are determined at the regional level. Another area where contradictions and overlaps may arise is expropriation, including when the ordinary legal regime contains provisions defining the applicable procedure and compensation mechanisms. In such cases, UNCTAD recommended to amend the relevant provisions or to introduce, where possible, a clause in the IL indicating that in case of contradiction or overlap, its provisions shall prevail.

14 https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf#page=27
15 https://unctad.org/en/PublicationsLibrary/diaepcb2015d5_en.pdf#page=37

IL adoption and reform needs to consider the scope, content and coherence issues.

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Conclusion

More than 130 countries around the globe have adopted an IL as a key tool for attracting and regulating investment within the framework of their overall development strategies. In doing so, they have taken important decisions concerning the scope and content of the IL, its integration into the other national investment-related legislation and its interaction with international investment policies.

Have these ILs fulfilled the expectations that were associated with them at the time of adoption? Did they contribute to attracting more investment, to improve and clarify the investment climate, to effectively regulate investment, to enhance sustainable development outcomes and to address the pressing needs arising from cascading global crises? Many ILs were originally adopted several decades ago, and time is therefore ripe to ask these questions.

UNCTAD's IPRs over the years have provided ample evidence that many ILs have serious deficiencies and need to be revisited to live up to today's manifold investment policy challenges, including those brought about by cascading global crises. This Guide has been developed to provide investment policymakers considering updating their ILs with advice concerning the main issues to consider. It goes without saying that the Guide can equally be used by governments intending to design an IL for the first time.

ILs do not belong to the category of indispensable legislation. Any issue addressed in these laws could also be dealt with in other parts of the domestic policy framework. This distinguishes ILs from other legal instruments, such as laws on taxation, labour or environmental issues. In fact, numerous countries, in particular developed countries, never adopted an IL.

While some countries may decide to phase out their ILs, particularly where differential treatment of foreign investors is rare, others may hold the view that ILs have a value of their own and make sense even in the context of a highly developed and basically non-discriminatory investment policy framework. In both cases, the policy issues discussed in this Guide remain relevant – either for the specific design or revision of an IL or the drawing of the broader investment-related legislation.

More than 130 countries have adopted an IL as a key tool for attracting and regulating investment within the framework of their overall development strategies.

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