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# Risk and Return

Foreign Direct Investment and the Rule of Law

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## THE ECONOMIST INTELLIGENCE UNIT'S OVERVIEW OF SURVEY RESULTS AND FINDINGS

**Every year, well over US\$1 trillion in foreign direct investment (FDI) flows across borders worldwide; the OECD estimates the 2013 total at US\$1.3 trillion.<sup>1</sup> This massive flow, reflecting the strong interest on the part of enterprises worldwide in establishing a lasting presence in foreign markets, is an important factor in political and cultural as well as economic globalisation. For host countries, the inflows are important sources of capital, job creation, and know-how, all of which contribute to their economic growth and development. For corporate investors, the investments represent opportunities to expand markets and increase profits.**

As is the case with all business ventures, FDI presents risks as well as opportunities. This study focuses on one category of risks: the possibility that arbitrary or discriminatory treatment by the host government will reduce or eliminate the benefits of an investment. The research looks at host-countries from the perspective of "Rule of Law"—that is, whether they are governed by laws which apply equally and fairly to all, rather than by the caprice of individual officials. The definition of "Rule of Law" used in this study goes further to include certain elements of justice in a country's body of law. As such, "the Rule of Law" is understood to include normative principles and practices such as freedom from expropriation, physical security of persons, respect for contracts, access to effective and efficient courts, and government adherence to agreements and dispute resolution procedures. Above all, the definition encompasses clarity, certainty and predictability of laws and their application.

The focus of this study is on the degree to which multinational corporations weigh Rule of Law considerations when they decide where to invest. We look at this issue from several perspectives:

- Where do rule-of-law issues figure in the **hierarchy of factors** that multinationals consider when choosing a host country for investment?
- Which **specific elements** of the Rule of Law are most important to multinationals considering a foreign direct investment?

- What is the nature of **multinationals' experience** with Rule of Law issues affecting their foreign direct investments?
- How important are **bilateral investment protection agreements**, compared to other legal instruments, in encouraging multinationals to invest in specific host countries?

To answer these questions, The Economist Intelligence Unit carried out a survey of senior executives of multinational corporations in September and October, 2014. The respondent sample has the following demographic profile:

- Number: 301
- All respondents have responsibility for or knowledge of their companies FDI decisions
- All respondents are C-suite or above
- All respondents represent large companies (At least \$1bn global annual revenue)
- Functions: Respondents cluster in general management, finance, operations and production
- Industry: A range, but cluster in energy/natural resources, financial services, healthcare
- 81% of respondents' companies made a direct foreign investment in the last five years
- 50% of respondents' companies have operations or investments in 1 - 5 countries; another 29% have operations or investments in more than 20 countries
- Respondents' companies are headquartered predominantly in Western Europe and in the US and Canada, with a somewhat smaller cluster in Asia-Pacific
- Respondents' companies make foreign direct investments globally, but predominantly in the US and Canada, Western Europe, and Asia
- 81% of companies are stock market listed

The sample for this survey was drawn on the basis of meeting certain specified demographic criteria and passing certain screener questions. As a result of the targeted approach to inviting and selecting survey respondents, the sample is best understood as a cluster (rather than a random) sample, which indicates tendencies in the views of the senior executives sampled.

<sup>1</sup> FDI in Figures, Organisation for Economic Cooperation and Development, February 2014.

## Findings

The survey shows the following trends with respect to the four key topics listed above:

### **The Rule of Law is among the top three considerations when multinationals make FDI decisions, together with “ease of doing business” and “a stable political environment”.**

- **Ease of doing business** is the most important consideration. 92% said this is either essential or very important. Most of the 92% - 73 percentage points – said this is “essential”.
- **A stable political environment** is second in importance: 92% said it is either essential or very important, although the proportion saying “essential” is only 30% of the total sample.
- **Strong Rule of Law** is a close third, with 88% saying this is either “essential” or “very important” to FDI decision-making. The proportion saying “essential” is 28% of the total sample.

### **For multinational investors, the three biggest “red flags” related to the rule-of-law are the prevalence of corruption, political or social instability, and lack of transparency in rulemaking.**

Stated more positively, the survey shows that for multinationals, the three most important elements of Rule of Law are integrity, stability, and transparency

- **Integrity** in the host country: 95% said that integrity (lack of corruption) is either “essential” or “very important”. Most of the 95% - 77 percentage points – said integrity is “essential”
- **Stability**: 93% said that political and social stability is either “essential” or “very important”
- **Transparency** in regulatory and legal rule-making is either “essential” or “very important” to 89% of the sample

### **Multinationals’ experience with Rule of Law issues cover a wide range, both geographically and in terms of type of problem and nature of solutions found.**

- The three most common rule-of-law problems concern opaque decision-making (39%), arbitrary or discriminatory treatment (29%), and lack of recognition of intellectual property rights (29%).
- Different regions pose different types of rule-of-law problems:
  - Opacity of decision making arose mainly in US/Canada, Latin America, and Asia
  - Arbitrary or discriminatory treatment arose mainly in Asia, US/Canada, and Latin America
  - Lack of recognition of intellectual property rights arose mainly in the Middle East and North Africa, Asia, and Australia/New Zealand
- Resolution of Rule of Law issues varies according to the type of problem encountered:
  - Opacity of decision making is typically resolved through negotiation, through choosing a different method of market entry, or through arbitration based on an investment treaty
  - Arbitrary or discriminatory treatment is typically resolved through host country judicial or administrative processes, or through home country diplomatic efforts
  - Lack of recognition of intellectual property rights is typically resolved through host country judicial/administrative processes, or through contractual arbitration

- Multinationals typically respond in measured ways when these types of problems arise, although intellectual-property violations tend to lead to a somewhat sharper response:
  - Opacity of decision making typically had no effect on a company’s decision to invest
  - Arbitrary or discriminatory treatment, in contrast, was more likely to lead to reduced investment than to have no effect on investment levels
  - Lack of recognition of intellectual property rights caused 42 companies in the sample to reduce investment, and 23 to withdraw investment. This reaction was mild, however, when compared to companies’ responses to arbitrary or discriminatory treatment: 56 reduced investment and 29 withdrew investment for this reason.
- The number of rule-of-law incidents that companies tended to experience in the past five years is small. However, the low number of events says nothing about their severity or impact. About three-quarters (73%) reported between one and five incidents, while 21% reported no incidents in the past five years.
- The individual countries that posed the biggest rule-of-law challenges are China (cited by 10%), Australia (8%), and Bangladesh (7%). (Q6)

**Bilateral investment protection treaties are among investors’ top three protective legal instruments, but national laws protecting investors are seen as more important.**

- 95% of respondents deem **national laws** either “essential” or “very important” to protecting their rights, property and security. Of these, 66 percentage points said “essential” and 29 percentage points said “very important”
- **Bilateral investment treaties** between home and host governments are either “essential” or “very important” to 76%, but compared to “national laws”, intensity of feeling is lower. Here, 9 percentage points said “essential” and 67 percentage points said “very important”
- Similarly, 47% of respondents said that the absence of a bilateral investment protection treaty between home and host governments deterred an investment the company was considering. Another 36% said the absence of such a treaty caused the company to reduce the size of an existing or planned investment.
- Beyond investment protection treaties, multinational investors place a premium on adherence by their host-country business partners to voluntary **corporate codes of conduct**, such as those governing human rights, employee rights and environmental protection. Four-fifths (81%) said this is either “essential” or “very important” to an investment decision. Of the 81%, 21 percentage points said “essential” and 60 percentage points said “very important”, indicating a high degree of commitment to this form of investor protection.

The report that follows provides detail on these survey findings, along with contextual information gleaned from follow-up interviews with selected respondents and extensive desk research. The report aims to provide a view of the role that certain Rule of Law considerations play in directing the massive investment flows which, each year, influence the pattern of worldwide economic growth and globalisation.

# EXECUTIVE SUMMARY

## Background and objectives

**The Economist Intelligence Unit, on behalf of Hogan Lovells and the Bingham Centre for the Rule of Law and the Investment Treaty Forum of the not-for-profit research body the British Institute of International Comparative Law, conducted a survey on the relationship between corporate Foreign Direct Investment (FDI) decision-making and the Rule of Law.**

This survey seeks to identify the factors multinational corporates consider in selecting where to invest internationally, and to gauge in particular the role of the Rule of Law, defined as *'certain, accessible and prospective laws; equally enforced; with access to justice (...) where rights may be asserted (...) through fair trials before an independent judiciary'*.

The survey was conducted with 301 senior decision makers at Forbes 2000 companies with global annual revenues of at least USD1bn. Most companies surveyed were headquartered in the US and Canada (40.9%), Western Europe (32.9%) and Asia (14.3%). Respondents represented companies operating in a variety of industry sectors, including financial services (19%), information industries and telecommunications (16%), energy and natural resources (15%) and healthcare, pharmaceuticals and biotechnologies (15%).

The following analysis and report is solely the work of Hogan Lovells and the Bingham Centre for the Rule of Law and the Investment Treaty Forum.

### Flow of FDI

The sample of respondents was selected in large part on the basis of their direct FDI experience. Accordingly, over 80% of the surveyed companies had made FDI in the past five years, many of them in more than one country. While the precise amounts invested in each region are not known, 68% of the respondents that did make FDI in the past five years invested in the US and Canada, 67% in Western Europe and 61% in Asia (excluding India and China). On the other hand, the regions that attracted investment from fewest respondents were Sub-Saharan Africa (26%), India (38%) and China (42%).

FDI often tended to be made in the same region in which a company is headquartered: for instance, 63% of the respondents headquartered in the US and Canada that made FDI in the past five years did so in the US and Canada region itself. Similarly, 57% of Western European investors made FDI in Western Europe and 68% of Asian investors made FDI in Asia.

Surveyed companies often undertook more than one type of FDI, such as the expansion of existing investments (70% of respondents), mergers and acquisitions (55%), greenfield investments (45%), joint ventures with a host country entity (45%) and establishment of a local subsidiary (41%).

The most frequent commercial reasons for FDI were access to new markets through local production or service provision, thereby replacing importation (59% of respondents), and access to locally sourced natural resources (24%). The reduction of operating costs through cross-border integration of production or provision of services was the key objective only for 10% of respondents.

As to the host-country conditions affecting FDI decisions, our survey has confirmed that a clear connection exists between FDI decision-making and the Rule of Law. The existence of a strong Rule of Law was identified as the third most important factor in selecting the location of FDI, after the ease of doing business and the existence of a stable political environment. On the other hand, the low cost of doing business, access to natural resources or raw materials and access to innovation or R&D in the host country were ranked as the least important factors.

Asked to indicate the importance of specific Rule of Law conditions to their FDI decisions, respondents identified the absence of corruption (both public and private) as the main factor, followed by political and social instability and risks to the physical security of in-country personnel.

### Rule of Law issues encountered

Responses to the survey showed that, on a day-to-day basis, Rule of Law failures are an all-too-common occurrence for FDI-making multinationals. Only about 10% of the surveyed executives said that they had not encountered a Rule of Law issue in the countries in which they had invested, while the majority had experienced several failures in the past five years.

The most common Rule of Law issue encountered was a lack of transparency of regulatory and rule-making processes in the host country, which was experienced by 42% of respondents, while a third of those surveyed reported receiving arbitrary or discriminatory treatment by the host government. Three out of ten respondents said they had been victims of a lack of recognition of intellectual property rights, a lack of recognition of contract rights, and/or an unexpected or retrospective change to legal and regulatory measures.

When looking at the geographical regions where Rule of Law issues were most frequently experienced, the survey shows that a lack of independent and impartial host country courts was most prevalent in the Middle East and North Africa, with it being a problem for 17% of investors there. The lack of transparency of the regulatory and rule-making process was experienced by 13% of the respondents that invested in the US and Canada, by 13% of those going in to Latin America, and by 12% of companies investing in Asia. Meanwhile, unexpected and retrospective changes to regulation were reported by 12% of those investing in to the US and Canada.

The risk of expropriation of investment without adequate compensation, poor human rights conditions in the host country and the non-democratic character of its government were among the Rule of Law issues less frequently experienced (or, at least, reported) by investors.

Surprisingly, the 'safest' areas from a Rule of Law perspective appear to have been China (with 87% of those investing there not reporting any Rule of Law issue), Sub-Saharan Africa (81%) and India (80%). For China at least, this outcome is to some extent divergent from the responses given to other sections of the survey, where respondents identified it as the country in which they experienced the most significant Rule of Law issues (followed by Australia, Bangladesh and Brazil). On the other hand, only 33% of the companies investing in Asia (excluding China and India) did not report experiencing Rule of Law incidents, and similarly low percentages can be found in the Middle East and North Africa (36%) and – to some extent – in Latin America (50%).

Companies operating in the energy and natural resources sector appear to be those most frequently affected by a range of Rule of Law issues, with all of the 45 respondents in this industry reporting having experienced some Rule of Law incidents. The lack of transparency of regulatory and legal rule-making processes and unexpected or retrospective changes to such rules were the most frequently encountered Rule of Law problems, perceived across all industry sectors. Arbitrary and discriminatory treatment by the host country government was a particularly serious issue in the real estate sector, while financial institutions reported the highest incidence of cases of lack of recognition of IP rights.

#### **Reaction to and effect of Rule of Law incidents**

In only a small minority of cases did respondents faced with Rule of Law issues decide not to take action. In general, the surveyed companies adopted a variety of methods for addressing such issues, ranging from negotiation (particularly for lack of transparency of rule-making processes, unexpected or retrospective changes to legal and regulation measures and poor human rights conditions), to host country judicial processes (particularly for arbitrary or discriminatory treatment and lack of recognition of contract rights) and contractual or international arbitration (to address the same Rule of Law issues as above, as well as the lack of impartial and independent courts in the host country). Insurance coverage was resorted to, in particular in relation to cases of unexpected and/or retrospective changes to regulatory and legal measures.

Certain Rule of Law issues appear to have limited effects on a company's levels of investment in a given country. For instance, cases of lack of transparency of the regulatory and/or legal rule-making processes (one of the problems most frequently encountered in the FDI context, as noted above) prompted companies to withdraw or reduce their investment in a country in less than a third of cases, with companies maintaining or even increasing their investments despite such incidents in over 50% of cases. Conversely, risks to the physical security of in-country personnel and the lack of recognition of IP rights led companies to reduce or withdraw their investment from a given country in over 50% of cases.

Respondents indicated that the most important steps to be taken by host countries to address investors' Rule of Law concerns are the adoption of stronger laws for the enforcement of investors' rights (52%), better trained judiciary, police and security forces and legal profession (45%) and improved transparency in legal and administrative law-making (39%).

### **Rule of Law and importance of Bilateral Investment Treaties**

One way in which multinational corporations can mitigate the risks associated with the impact of a host country's national legal system on their investments is by seeking out nations with relevant bilateral investment treaties in place. These treaties have proliferated in the last 50 years as states have begun to negotiate terms for the promotion and protection of investment in their countries, such that there are now estimated to be nearly 3,500 treaties in force.

Even though the international legal framework concerning foreign investment has developed significantly in the last few decades, the treatment of investments by a host country's national legal system remain a key factor influencing FDI decisions. Over two-thirds of respondents indicated that the existence of national laws protecting investor rights, security and property was 'essential' to their FDI decisions and that they would not invest without it. By contrast, only 9% and 15% of interviewees indicated that the host country's ratification of, respectively, bilateral investment protection treaties and multilateral treaties protecting IP was 'essential'.

However, asked about the importance of the presence of a bilateral protection treaty to their company's decision to invest in particular regions, respondents surprisingly identified the US & Canada as the region in which this was of paramount importance (with over 50% of respondents stating such protection was 'essential' and they would not invest without it). This was all the more surprising given that many of the respondents answering in this way already held an investment in the US and Canada, even though they were often head-quartered in European states that do not have any bilateral or multilateral investment treaties with either of those countries. While respondent confusion cannot be excluded, this possibility appears unlikely given the clear terms of the survey.

It seems more likely, instead, that these results are reflective of the increasingly polarized public discourse concerning the possibility of the European Union concluding treaties containing investment disciplines with both the US and Canada.

On the other hand, a significant proportion of respondents indicated that the existence of such treaties was not of particular importance for investment in Eastern Europe and Sub-Saharan Africa.

Before making an investment in a given region, many respondent companies carry out research as to whether a bilateral investment treaty is in force between their home country and the potential host country. Others, however, do not (or not invariably so). Where this research discloses the absence of an investment protection treaty in force, this generally affects the company's decision to invest, either deterring the investment tout court (47% of respondents) or causing a reduction in size of the planned investment (36% of respondents). 14% of respondents stated that the absence of a treaty did not impact their investment decisions, while only a very small minority of respondents (approximately 1%) indicated that, where they could not find a BIT in force, they restructured their investment so as to be covered by an investment treaty between the host state and another state.

The main Rule of Law concerns that respondents sought to address with bilateral investment treaties were the lack of transparency of the host country's regulatory or legal processes (43% of respondents), arbitrary or discriminatory treatment by the host country governments (39%) and the lack of independent and impartial local courts (36%). Conversely, very few interviewees relied on BITs to address concerns relating to the non-democratic character of the host country government (1%), poor human rights conditions in the host country (3%) and, rather surprisingly, the risk of expropriation of investment without adequate compensation (9%), which is generally regarded as one of the 'textbook' scenarios covered by BITs.

As to the related question of whether bilateral investment treaties are effective, this appears to be the case for a significant majority of respondents.

Whereas only approximately 20% of respondents considered that this was the case for investment in Sub-Saharan Africa, Oceania and Eastern Europe, across all regions, however, over 75% of respondents rated the effectiveness of BITs as four out of five or higher.

### **Business and Human Rights**

The vast majority of respondents subscribed to at least one voluntary corporate code of conduct on labor and human rights practices, such as the 2000 OECD Guidelines for Multinational Enterprises (85%), the 1998 ILO Declaration on Rights at Work (47%) or the 2011 UN Guiding Principles on Business or Ruggie Principles (73%).

Approximately 40% of respondents regarded such codes of conduct as very effective in improving the legal environment in host countries, with a further 48% regarding them as somewhat effective. Further, over 80% of respondents stated that adherence to such codes of conduct was a 'very important' or 'somewhat important' factor in the selection of business partners, with only 2% of respondents indicating this was not a factor at all.

### **Strategies for states and investors**

#### **Lessons for states**

Respondents indicated that the most important steps that they would like to see host countries taking to address Rule of Law concerns were the adoption of stronger laws for the enforcement of investor rights (52%), better trained judiciary, police, security and legal professionals (45%), and improved transparency in legal and administrative law making (39%).

For states seeking to attract FDI, one of the key messages that emerges from the survey is that the Rule of Law matters, acting not only to pull investment in, but also to push it away when Rule of Law conditions are not satisfactory. For states in the Americas and Asia, the relative frequency with which investors identified problems with a lack of transparency in regulatory and legal rulemaking should be a cause for concern, as should the relatively high number of incidents reported by respondents related to a lack of judicial independence and impartiality in the Middle East and North Africa.

There is a clear need for states to take steps to improve their domestic Rule of Law institutions, not only by establishing clear rules and policies, but also by improving the efficacy with which state officials enforce them.

#### **Lessons for investors**

Rule of law conditions in host states can, and often do, lead to withdrawals or reductions of investments in states, and so implementing procedures for assessing Rule of Law conditions must be seen as best practice for investors. Such procedures are necessary not only at the establishment stage but also on an ongoing basis throughout the life of an investment, something that only 52% of respondents currently adhere to.

While only 9% of respondents indicated that the presence of a BIT between their home state and the host state is 'essential' for their investment decision, the potential value of these treaties for foreign investors should not be underestimated. Investment treaties provide substantive and procedural rights for foreign investors that are not available either to domestic investors or to foreign investors who do not come within their scope, so taking advantage of investment treaty protection wherever possible is generally a wise investment strategy.

Finally, investors need to be aware not only of their own responsibilities in host states but also more broadly how they can partner with or support host state governments and other stakeholders in developing and improving the Rule of Law. Working with local partners who agree to adopt and abide by corporate codes of conduct is just one way this is possible, and 34% of respondents considered this to be 'very important' to selecting suppliers or business partners in host states. That trend toward more active engagement by investors in the host state is one that is expected to continue.

# 1. Introduction

## 1.1 Background

**Hogan Lovells and the Bingham Centre for the Rule of Law and the Investment Treaty Forum of the not-for-profit research body the British Institute of International and Comparative Law, retained The Economist Intelligence Unit to conduct an unprecedented survey on the relationship between corporate Foreign Direct Investment (FDI) decision-making and the Rule of Law.<sup>2</sup>**

The survey, which was carried out in September and October 2014, aimed to ascertain which factors multinational corporates consider in deciding whether and where to invest internationally, and in particular to gauge the impact of the Rule of Law conditions in the host country on their FDI decision-making. In addition, respondents were asked about Rule of Law-related incidents they had experienced in the context of their FDI activity, as well as their reaction to such incidents, methods of risk management, and the importance of bilateral investment treaties and other instruments, including voluntary codes of conduct, in addressing Rule of Law concerns.

The survey was conducted with a sample of 301 senior decision makers at Forbes 2000 companies with global annual revenues of at least USD1bn. Most companies surveyed were headquartered in the US and Canada (40.9%), Western Europe (32.9%) and Asia (14.3%).<sup>3</sup> Respondents represented companies operating in a variety of industry sectors, including financial services (19%), information industries and telecommunications (16%), energy and natural resources (15%) and healthcare, pharmaceuticals and biotechnologies (15%).

It should be noted in this context that a deliberate decision was made with respect to geographic identification within the survey. For questions that required respondents to relate an issue to a specific geographical location, rather than ask respondents to identify specifically the relevant state or states, it was decided to create geographic groupings representing areas of principal economic activity, namely the United States and Canada; Latin America (including Mexico); Western Europe; Eastern Europe (including Russia); Asia (excluding India and China); China; India; Australia and New Zealand; Sub-Saharan Africa; and the Middle East and North Africa.

## 1.2 Foreign Direct Investment

### a. What is Foreign Direct Investment?

The Organization for Economic Co-operation and Development (OECD) defines FDI as an investment by an entity resident in one economy in an enterprise resident in another economy, with the objective of obtaining a lasting interest. The intention to obtain an ongoing interest generally implies the establishment of a long-term relationship between the investor and the enterprise, as well as a significant degree of influence by the former over the management of the latter. The threshold recommended by the OECD to signal such a relationship is that the investor must (directly or indirectly) own 10% or more of the voting power of the foreign enterprise.<sup>4</sup>

FDI can be distinguished from international trade in that it implies the investor's continued presence in the foreign market, with the intention of profiting through establishment in that market. Investors must therefore accept and manage the risks of investing in that particular jurisdiction.<sup>5</sup>

2 Appendix A to this Report sets out the methodology and questionnaire adopted for the purposes of the survey.

3 According to the 2014 World Investment Report from the United Nations Conference on Trade and Development (UNCTAD), in 2013 (the most recent year for which statistics are available) the principal sources of global FDI were: North America (27%); East and South-east Asia (including China) (20.7%) and the European Union (17.8%). This indicated the continuation of a trend observed in 2012, whereby East and South-East Asia overtook the European Union as the second-largest source of FDI, UNCTAD, World Investment Report (2014), p. xiv.

4 'Glossary of Foreign Direct Investment Terms and Definitions' to the OECD Benchmark Definition of Foreign Direct Investment (4th Edition, 2008).

5 'Glossary of Foreign Direct Investment Terms and Definitions' to the OECD Benchmark Definition of Foreign Direct Investment (4th Edition, 2008).

## b. Types of Foreign Direct Investment

The methods and business models employed in FDI undertakings can differ. For instance, when asked to specify the types of FDI their company had undertaken, survey respondents selected the following:<sup>6</sup>

1. Expansion of existing investments (69.8%)
2. Mergers and acquisitions (55.5%)
3. Greenfield investments (build or lease facilities) (44.9%)
4. Joint venture with a host country entity (44.9%)
5. Establishment of a local subsidiary (40.5%)

The types of FDI undertaken by respondent companies vary significantly depending on the primary industry sector in which they operate, as reflected in Table I below. For instance, companies in the financial services sector showed a particular predilection for greenfield investments (build or lease facilities) and for mergers and acquisitions, which were undertaken by 71.7% and 66.0% of respondents in that sector respectively.

Investors in the information industries and telecommunications sectors also focused on mergers and acquisitions (62.5%), as well as the expansion of existing investments (62.5%). Further, not unsurprisingly, the creation of joint ventures with local entities was a more frequent investment structure than the establishment of local subsidiaries for companies operating in the energy and natural resources industry (with the former solution being adopted by almost twice as many respondents as the latter). This can be contrasted with the healthcare, pharmaceutical and biotechnology sector where only 24.4% of respondents reported the use of a joint venture with a host-country entity, while 48.9% reported the establishment of a local subsidiary.

**Table 1 – Type of FDI undertaken by industry sector**

	Automotive, Chemical & Manufacturing	Construction & Real Estate	Consumer Goods & Retailing	Energy & Natural Resources	Financial Services	Healthcare, Pharmaceuticals & Biotechnology	Information Industries & Telecoms	Transportation & Logistics	Other	Total
<b>Expansion of existing investments</b>	82.4%	58.3%	73.5%	71.1%	64.2%	77.8%	62.5%	66.7%	55.6%	<b>69.8%</b>
<b>Mergers and acquisitions</b>	47.1%	50.0%	50.0%	51.1%	66.0%	51.1%	62.5%	57.1%	55.6%	<b>55.5%</b>
<b>Greenfield investments</b>	47.1%	33.3%	29.4%	55.6%	71.7%	31.1%	35.4%	38.1%	33.3%	<b>44.9%</b>
<b>Joint venture with host country entity</b>	47.1%	33.3%	32.4%	57.8%	60.4%	24.4%	47.9%	42.9%	33.3%	<b>44.9%</b>
<b>Establishment of local subsidiary</b>	50.0%	41.7%	38.2%	28.9%	34.0%	48.9%	45.8%	28.6%	66.7%	<b>40.5%</b>

<sup>6</sup> Risk and Return Survey, 'About You' Section, Question AY8.

### c. The commercial reasons for Foreign Direct Investment

FDI is a key dynamic in international economic integration as it can create stable and lasting links between economies.<sup>7</sup> It plays a strong role in global business by providing firms with diverse marketing channels, cheaper production facilities, integrated global value chains, and access to new technology. As such, it can provide a great stimulus for economic growth in both the states receiving FDI and in the states from which the FDI originates.<sup>8</sup>

The commercial drivers of FDI are varied.<sup>9</sup> Firms make decisions to invest directly in new markets for a variety of non-exclusive reasons: to use their control of a specific advantage (e.g. a technology) to produce abroad; to gain access to a specific advantage located outside of the home state (e.g. a natural resource, a new market or cheaper labor); or to internalize production or global value chain processes taking place in a different country.<sup>10</sup> Survey respondents reflected this variety of motivations in their answers. Respondents indicated that their main commercial reasons for FDI were:<sup>11</sup>

1. Access to new markets through local production or service provision, replacing importation (58.8%)
2. Access to locally sourced natural resources (23.9%)
3. Reduction of operating costs through cross-border integration of production or provision of services (9.6%)
4. Access to knowledge-based assets of the investment location (e.g. access to local innovation and/or R&D) (6.3%)

7 Forte R and Moura R, "The Effects of Foreign Direct Investment on the Host Country's Economic Growth: Theory and Empirical Evidence," (2013) 58 Singapore Econ. Rev. 1350017; Lipsey R E and Sjöholm F, "The Impact of Inward FDI on Host Countries: Why Such Different Answers?" in Moran T H, Graham E M, and Blomström M (eds.), *Does Foreign Direct Investment Promote Development?* (Peterson Institute for International Economics, 2005), 23-43.

8 Lipsey R E, "Home- and Host-Country Effects of Foreign Direct Investment" in Baldwin R E and Winters L A (eds.), *Challenges to Globalization: Analyzing the Economics* (University of Chicago Press, 2004), 333-382.

9 Research on the drivers of FDI is discussed in greater depth in Chapter 2.

10 J Dunning, 'Explaining International Production', 1988 (London: Unwin Hyman) ch. 12; J Dunning, 'Multinational enterprises and the global economy', 1993 (Wokingham: Adison Wesley) 79-80.

11 Risk and Return Survey, 'About You' Section, Question AY9.

While access to new markets through local production or service provision was consistently identified as the main objective, the commercial reasons driving respondents' FDI efforts varied depending on the region in which the investing company was headquartered. For instance, a significant proportion of respondents headquartered in the Americas (31%) and Oceania (33.3%) indicated that access to locally-available natural resources was their principal objective in undertaking FDI, while 18.8% of companies with HQs in the Middle East and North Africa referred to both access to locally-available natural resources and access to knowledge-based assets of the investment location as the key commercial reasons. Interestingly, reduction of operating costs was the main commercial objective for only a relatively small proportion of respondent companies, even among those headquartered in the Americas (13.5%) and Europe (8.9%).



Historically, access to natural resources has been a key driver for FDI in the Middle East. However, more recently the region has been striving to improve its own R&D and innovation efforts. The survey suggests that it has done so.

*Richard Kiddell, Partner  
Hogan Lovells, Dubai*



Table 2 – Main commercial reason for FDI by HQ Region

Main commercial reason for FDI	HQ Region					
	Africa and Middle East	Americas	Asia	Europe	Oceania	Total
Access to knowledge-based assets of the investment location (e.g. access to local innovation and/or R&D)	18.8%	4.0%	4.7%	8.9%	0.0%	<b>6.3%</b>
Access to locally sourced natural resources	18.8%	31.0%	18.6%	16.8%	33.3%	<b>23.9%</b>
Access to new markets through local production or service provision, replacing importation	62.5%	49.2%	69.8%	64.4%	66.7%	<b>58.8%</b>
Reduction of operating costs through cross-border integration of production or provision of services	0.0%	13.5%	7.0%	8.9%	0.0%	<b>9.6%</b>
Other	0.0%	2.4%	0.0%	1.0%	0.0%	<b>1.3%</b>

#### d. The direction of Foreign Direct Investment in the past five years

While the survey focused primarily on the relationship between FDI and Rule of Law considerations, the data collected also permits an insight into the investment trends and geographical investment patterns of respondents over the past five years. While the precise amounts invested by respondents in each region are not known, 67.5% of those respondents who have made FDI in the past five years indicated that they invested in the US and Canada, 67.1% in Western Europe and 61.3% in Asia (excluding India and China). By contrast, the regions that attracted investment from fewest respondents in the survey were Sub-Saharan Africa (25.5%), India (38.3%) and China (42.0%).<sup>12</sup>

The survey responses indicated that FDI is often made in the same region as a company is headquartered.<sup>13</sup> For instance, 80.6% of the respondents headquartered in the Americas that made FDI in the past five years did so in the US and Canada region itself. Similarly, 85.7% of Asian investors made FDI in Asia and 76.9% of investors from Africa and the Middle East made FDI in that same region. However, a very high proportion of companies headquartered in Africa and the Middle East (84.6%) also invested in the US and Canada.

**Table 3 – Direction of FDI by HQ region in the past five years**

HQ Region	Region of Investment									
	US & Canada	Latin America (inc. Mexico)	Western Europe	Eastern Europe (inc. Russia)	China	India	Asia (exc. India and China)	Middle East & North Africa	Sub-Saharan Africa	Australia and New Zealand
<b>Americas</b>	80.6%	62.2%	71.4%	56.1%	46.9%	42.9%	64.3%	53.1%	26.5%	52.0%
<b>Europe</b>	58.3%	63.1%	67.9%	64.3%	45.2%	39.3%	50.0%	50.0%	26.2%	45.2%
<b>Asia</b>	57.1%	54.3%	65.7%	31.4%	20.0%	31.4%	85.7%	40.0%	20.0%	57.1%
<b>Africa and Middle East</b>	84.6%	53.8%	46.2%	53.8%	53.8%	46.2%	38.5%	76.9%	46.2%	23.1%
<b>Oceania</b>	38.5%	23.1%	53.8%	46.2%	30.8%	7.7%	69.2%	7.7%	7.7%	53.8%
<b>Total</b>	<b>67.5%</b>	<b>58.8%</b>	<b>67.1%</b>	<b>54.7%</b>	<b>42.0%</b>	<b>38.3%</b>	<b>61.3%</b>	<b>49.0%</b>	<b>25.5%</b>	<b>49.0%</b>

<sup>12</sup> Risk and Return Survey, Screening Section, Question S2a.

<sup>13</sup> See Levis M, Gülnur Murado lu Y, and Vasileva K, "Home Bias Persistence in Foreign Direct Investments" (2015) The European Journal of Finance (forthcoming).

### 1.3 The Rule of Law

The Rule of Law is often regarded by business actors as a nebulous and abstract concept. Prior efforts to examine the relationship between the Rule of Law and FDI have invariably struggled either to define the term with precision or to disaggregate operational aspects of the Rule of Law. To avoid this potential pitfall, the survey required a clear definition of the concept of Rule of Law. In his book, *The Rule of Law*, Lord Tom Bingham defined this concept as:

*All persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly made, taking effect (generally) in the future and publicly administered in the courts.*<sup>14</sup>

Accompanying this definition are eight 'ingredients' of the Rule of Law: that law be accessible, clear and predictable; that matters are decided by law and not normally by discretion; that there is equality before the law; that power be exercised lawfully fairly and reasonably; that human rights are protected; that disputes are resolved without undue cost or delay; that trials are fair and, finally that the state complies with its obligations arising under international, as well as national law.

Using Lord Tom Bingham's definition as our starting point, we adopted the following definition of the Rule of Law, which was provided to respondents in the survey introduction:

*In this survey, the term 'Rule of Law' is understood to mean 'Certain, accessible and prospective laws; equally enforced; with access to justice (i.e., the right to challenge decisions in courts or other equivalent bodies); where rights may be asserted (human rights and rights such as property, contracts, etc.); through fair trials before an independent judiciary'.*

While we provided this overarching definition of the Rule of Law at the outset, in structuring the survey questions we chose not to ask respondents about the 'Rule of Law' as a general concept, but instead refer to concrete and particular aspects of the Rule of Law – in other words, to operationalize the definition for the purposes of specific survey questions.<sup>15</sup>

In so doing, we broke the concept down into 12 factors covering a broad range of Rule of Law considerations inherent in Lord Tom Bingham's articulation.

This innovative approach allowed us to pinpoint and measure various aspects of the Rule of Law in relation to the experiences multinationals might encounter in FDI with host states:

1. Absence of corruption (public or private)
2. Political and social stability
3. Transparency of regulatory/legal rule-making processes
4. No unexpected and/or retrospective changes to regulatory/legal measures
5. No arbitrary or discriminatory treatment by the host country government
6. Recognition of contract rights
7. Recognition of intellectual property rights
8. Independence and impartiality of courts in the host country
9. Physical security of in-country personal
10. No expropriation of investment without adequate compensation
11. Good human rights conditions in host country
12. Democratic character of the host country government

These factors were used to construct survey questions designed to elicit information about whether respondents conducting FDI have been attracted or deterred by Rule of Law considerations, whether they have experienced Rule of Law-related incidents and, if so, in which regions and how they reacted to these.

<sup>14</sup> Lord Tom Bingham, *The Rule of Law* (Allen Lane, Penguin Press, 2010), at 8.

<sup>15</sup> The one exception was in Question 7, in which we referred to the 'Rule of Law' specifically to ask respondents indicate its importance relative to other host state-related factors, such as political stability and ease of doing business. See Table 4.

#### 1.4 Mechanisms for internationalising the Rule of Law

Variable conditions of the Rule of Law in states around the world have long been a matter of concern to investors considering FDI. In an effort to address these concerns and to resolve long-standing debates regarding the relationship between host states and foreign investors in customary international law, over the past 30 years states have entered into thousands of bilateral investment treaties and hundreds of investment-related chapters in larger economic integration agreements. These treaties (collectively referred to as 'BITs' in this study) are designed to promote and protect investment in host states. The theory behind BITs has been that by agreeing to an international treaty, which both guarantees internationalised standards of treatment for investors and creates a mechanism for investors to resolve disputes regarding that treatment, host states (principally in the developing world) will encourage investment and receive more FDI than they would otherwise. Whether in fact this actually takes place, however, is a contested proposition.

The inclusion of questions about BITs and investors' consideration of these treaties in a survey more generally focused on the role of the Rule of Law in FDI decision-making was guided by a number of considerations. First, as noted, concerns about the adequacy of the Rule of Law in host states and the treatment of foreign investors have been a principal driver of the development of investment treaties. Second, an open question in the economic literature about the effects of investment treaties on FDI flows has been whether BITs can serve as substitutes for effective domestic Rule of Law institutions. Third, from the perspective of states eager to attract FDI into their economies, there is a growing question as to whether BITs adequately serve this purpose or whether the development of stronger domestic institutions might be more suitable and effective in attracting foreign investors.

In addition to BITs, other international treaties may be of relevance to FDI decision-making. International human rights treaties and conventions on the protection of workers are of particular note.<sup>16</sup> The survey focused in particular on the role of three key, albeit not legally binding, 'instruments of Rule of Law mitigation' in the context of FDI decision-making: the 1998 ILO Declaration on Rights at Work; the 2000 OECD Guidelines for Multinational Enterprises and the 2011 UN Guiding Principles on Business (or 'Ruggie Principles').

<sup>16</sup> An authoritative list of the core internationally recognized human rights is contained in what is described by the UN system as the International Bill of Human Rights (consisting of the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights). In addition, the UNGPs identify as core for businesses the principles concerning fundamental rights in the eight ILO core conventions as set out in the Declaration on Fundamental Principles and Rights at Work.

## 2. The importance of the Rule of Law for FDI decision-making

The causes and effects of the rapid growth of FDI – over 9900% between 1970 and 2013<sup>17</sup> – are extensively analyzed in economic literature from both theoretical and empirical perspectives.

### 2.1 The link between the Rule of Law, FDI and economic development in economic theory

Economic theory has generally analyzed the link between the Rule of Law and economic development by addressing two interdependent propositions: (a) that Rule of Law compliance attracts FDI; and (b) that FDI is a key determinant of economic growth and development.

#### a. The relationship between Rule of Law and FDI in economic theory

Economic theory suggests that firms engage in FDI in order to gain benefits from: using their ownership of a specific advantage (e.g. a technology) to produce abroad; securing access to a specific advantage located abroad (e.g. a natural resource, a new market or cheaper labor); and internalizing production or services that take place overseas.

Depending on the kind of benefit pursued, foreign investments can be grouped into four distinct types:

- a) resource seeking FDI, driven by a state's comparative advantage in natural resources or labor market characteristics (low-cost or specialized labor);
- b) market seeking FDI, aimed at reaching local or regional markets in order to overcome real or threatened import barriers, such as regulation or transportation costs;
- c) efficiency seeking FDI, which aim to increase firm competitiveness by taking advantage of a more cost-effective cross-border integration of production; and
- d) strategic asset-seeking FDI, which involves acquisitions of, or investment in, companies based in another state for the purpose of promoting long-term strategic objectives (e.g. undertaking mutually beneficial R&D).

On this view, the investor's motivation plays a key role in the choice of investment location and, often, mode of entry into the host state.

The investor, of course, does not act in a vacuum. Conditions in prospective host states, including Rule of Law conditions, also play a role in FDI decision-making. In this context, there has been growing interest in the role of institutions in attracting FDI. In social science terms, 'institutions' are broadly conceived as 'stable, valued, recurring patterns of behavior'. Thus, theory in this area looks not only to political structures, but also to legal frameworks and their role in shaping economic conditions.

A central focus of this analysis rests on the importance of property rights and contract enforcement: individuals and firms are incentivized to invest and trade when these rights are secured. A related strand has looked at the need to restrain the abuse of official discretion. A further branch considers the way in which weak institutions impact on FDI through imposing additional costs, as is the case with corruption. As articulated in much of the literature, these conditions, together with security of the person, are treated as encapsulating the 'Rule of Law'. All things being equal, a stronger Rule of Law will in principle encourage FDI by ensuring a transparent, stable and predictable environment in which host governments credibly commit to the enforcement of contracts and the protection of property rights and rights of the person.

17 UNCTAD Stat, Outward foreign direct investment flows 1970 - 2013 (<http://unctadstat.unctad.org/wds/TableViewer/tableView.aspx>).

18 J Dunning, 'Explaining International Production', 1988 (London: Unwin Hyman) ch. 12; J Dunning, 'Multinational enterprises and the global economy', 1993 (Wokingham: Addison Wesley) 79-80. Although the ownership, location, and internalization (OLI) model developed by John Dunning in the late 1980s has been subsequently complemented and refined by other studies (see for example P J Buckley and M Casson, 'The future of the Multinational Enterprise', 1991 (London: Macmillan, revised 2nd edition with new introduction) 2; M Y Yoshino and U Srinivasa Rangan, 'Strategic Alliances: An entrepreneurial Approach to globalization', 1995 (Harvard: Harvard Business School Press); J Dunning, 'Alliance Capitalism and Global Business', 1997 (London and New York: Routledge) ch. 3), it still provides a good paradigmatic explanation of why firms invest abroad.

19 A Rugman and A Verbeke 'Location Competitiveness and the multinational enterprise' in A Rugman and T L Brewer (eds), *The Oxford Handbook of International Business*, 2000 (Oxford: Oxford University Press) 158-60; J Dunning, 'Global Capitalism, FDI and Competitiveness', 2002.

20 J Dunning, 'Location and the Multinational enterprise: A neglected Factor?' (1998) 29 *Journal of International Business Studies* 45.

## b. The link between FDI and economic growth in economic theory

A second strand of literature addresses the impact of FDI on economic growth. There is a widespread belief among researchers and policymakers, confirmed by empirical studies, that FDI can have positive effects on the host state, including by increasing employment, causing technology and skill spill-overs, and increasing exports – all of which contribute to economic growth.<sup>21</sup>

## 2.2 The link between the Rule of Law, FDI and economic development in policy

The relationship between the Rule of Law and economic growth and development builds upon the research discussed above and draws on the incentives that the Rule of Law creates for investment and trade. The importance of the Rule of Law is broadly accepted across countries and regions,<sup>22</sup> and the link between the Rule of Law, growth and development is often echoed in international policy documents.

A number of UN documents contain clear statements of positive connection between development and the Rule of Law.<sup>23</sup> Notably, in its September 2012 Declaration, the High Level Meeting of the General Assembly on the Rule of Law at the National and International Levels took the view that:

*the advancement of the Rule of Law at the national and international levels is essential for sustained and inclusive economic growth, sustainable development (...) and for this reason we are convinced that this interrelationship should be considered in the post-2015 international development agenda.*<sup>24</sup>

Accordingly, the Rule of Law has now been included as a specific target related to one of the Sustainable Development Goals, which are currently being negotiated as part of the Post-2015 Development Agenda.<sup>25</sup>

## 2.3 Attempts to test the 'Rule of Law-FDI' relationship

Numerous studies have attempted to gauge the impact of Rule of Law factors on investors' FDI decisions. Some studies have looked primarily at economic determinants, such as levels of economic growth, wages and market size, finding a general preference for investment in economies with strong, growing markets and relatively cheap labour. Other studies have looked at the role of host state economic and fiscal policies, such as tax rates, capital controls and trade liberalization. Despite some mixed results, empirical research generally indicates that investors favour open capital markets and policies that encourage trade.

<sup>21</sup> For a review of the relevant literature, see: Forte R and Moura R, "The Effects of Foreign Direct Investment on the Host Country's Economic Growth: Theory and Empirical Evidence," (2013) 58 Singapore Econ. Rev. 1350017; See also J Sachs, Special Advisor to UN Secretary General Kofi Annan, 'The End of Poverty: How We Can Make It Happen in Our Lifetime' 2005 (London) 356.

<sup>22</sup> This has become evident in the context of the negotiations of the Sustainable Development Goals that have been taking place at the regional level. See for instance: Economic Commission for Europe, Economic and Social Commission for Asia and the Pacific, Economic Commission for Latin America and the Caribbean, Economic Commission for Africa and Economic and Social Commission for Western Asia, 'A Regional Perspective on the Post 2015 United Nations Development Agenda', Doc. no. E/ESCWA/OES/2013/2, p. 72.

<sup>23</sup> For a review see: Report of the UN Secretary General, 'The Rule of Law and transitional justice in conflict and post-conflict societies', Doc. no. S/2004/616, para. 6; Report of the UN Secretary General, 'A life of dignity for all: accelerating progress towards the Millennium Development Goals and advancing the United Nations Development Agenda beyond 2015', Doc. no. A/68/202; 'Background Note: The President of the General Assembly's High-level event on the Contributions of Human Rights and the Rule of Law in the Post-2015 Development Agenda' June 2014, 6-8. Other documents are reviewed in L-A Berg and D Desai, 'Background Paper: Overview on the Rule of Law and Sustainable Development for the Global Dialogue on Rule of Law and the Post 2015 Development Agenda', August 2013, 81-83.

<sup>24</sup> Declaration of the High-level Meeting of the General Assembly on the Rule of Law at National and International Levels, A/67/L.1 (2012).

<sup>25</sup> See <https://sustainabledevelopment.un.org/focussdgs.html>. Target 16.3 of Goal 16 (Promote peaceful and inclusive societies for sustainable development, provide access to justice for all and build effective, accountable and inclusive institutions at all levels) reads: 'promote the Rule of Law at the national and international levels, and ensure equal access to justice for all.'

### a. Attempts to test the 'Rule of Law-FDI' relationship through econometric studies

Many studies in this field have adopted an econometric approach, analysing large data sets and looking for correlation between Rule of Law compliance and inward flows of FDI.

As noted, the Rule of Law is a multi-faceted concept and there has been relatively little research into how its different aspects impact FDI.<sup>26</sup> As a result, the existing literature can only present a variety of views and evidence on the impact of the Rule of Law on investments, growth and development.<sup>27</sup> In 2008, a large-scale study that measured Rule of Law indicators across widely used data sets found a 'relatively low level of correlation both within and across categories,' and in some cases found negative correlations between different measured variables.<sup>28</sup> In a more recent analysis of 11 leading cross-country 'Rule of Law' datasets, the authors came to a similar conclusion.<sup>29</sup>

Against this background, there is limited scope to draw definitive conclusions from these econometric efforts as to the impact of Rule of Law conditions in host states on levels of FDI and economic growth. Perhaps the strongest correlation that emerges from these studies is the link between conceptions of the Rule of Law which focus measurements of the protection of individual property rights and economic growth.<sup>30</sup> It is important, however, not to conflate correlation in these studies with conclusions of causation;<sup>31</sup> counter-examples abound.<sup>32</sup>

### b. Attempts to test the 'Rule of Law-FDI' relationship through surveys and firm-level studies

Another group of studies undertaken by academics, international organizations and the private sector tests the link between the Rule of Law and FDI through survey data analysis.<sup>33</sup> In general, these studies share three common limitations. First, they do not focus on the influence of the Rule of Law as such in FDI decision-making, but look at the Rule of Law (or sometimes specific aspects of it) as one of many factors for survey respondents to consider. Second, many such surveys seek to assess the role of specific Rule of Law factors through questions relating to host state risk factors, rather than in a positive context relating to host state attractiveness.<sup>34</sup>

Finally, the concept of 'Rule of Law' is often not defined for respondents, which leads to obvious problems of later interpretation of the data and severely limits the ability to draw concrete conclusions.

Our study seeks to eliminate these ambiguities by providing a clear definition of the Rule of Law and making it central to an inquiry of investor preference. It differs from previous studies not only because it is primarily focused on the Rule of Law, but also because it inquires as to the Rule of Law both as a source of risk factors for investors and as positively attracting investment to a host state. Further, the survey breaks down the concept of Rule of Law into 12 factors in an attempt to gain precision in a way that has not yet been done.

26 Haggard and Tiede 2011, p. 1.

27 For a review and summary see E G Lim, 'Determinants of, and the Relation Between, Foreign Direct Investment and Growth: A Summary of the Recent Literature' (2001) IMF Working Paper No.175, International Monetary Fund, Washington; Blonigen 2005; F Ali, N Fiess and R MacDonald, 'Do Institutions Matter for Foreign Direct Investment?', (2008) Scottish Institute for Research in Economics, University of Glasgow, SIRE discussion papers SIRE-DP-2008-34, www.sire; Haggard and Tiede 2011; Berg Desai 2013.

28 Stephan Haggard, Andrew MacIntyre and Lydia Tiede, 'The Rule of Law and Economic Development' (2008) 11 Annual Review of Political Science 205 at 222.

29 Stephan Haggard and Lydia Tiede, 'The Rule of Law and Economic Growth: Where are We?' (2011) 39 World Development 673 at 677.

30 Stephan Haggard and Lydia Tiede, 'The Rule of Law and Economic Growth: Where are We?' (2011) 39 World Development 673 at 674 ('A broad literature has found that more robust property rights protection is associated with better long-run economic performance.')

31 C Arndt and C Oman, 'Uses and Abuses of Governance Indicators' (2006), Organization for Economic Cooperation and Development (OECD), Paris; Bénassy-Quéré et al 2007.

32 See, e.g. J E Campos, D Lien and S Pradhan, 'The Impact of Corruption on Investment: Predictability Matters' (1999) World Development, 27 (6), 1059 -1067; M T Rock and H Bonnett, 'The Comparative Politics of Corruption: Accounting for the East Asian Paradox in Empirical Studies of Corruption, Growth and Investment' (2004) World Development, 32 (6), 999 -1017.

33 An important early study was conducted in relation to Sri Lanka in 2000, see A Perry, 'An Ideal Legal System for Attracting Foreign Direct Investment? Some Theory and Reality' (2000) 15(6) American Univ Int'l Law Rev 1627.

34 Some studies refer to host state legal systems or the host state's legal environment. These are ambiguous terms, not defined for respondents, which may include some or all of the aspects of the Rule of Law as defined in this study, but may also include other aspects of the host state's legal framework which do not properly come within the rubric of the Rule of Law. We have reviewed these studies and refer to them here as background but their usefulness is limited by the same definitional issues confronted by studies which use the term 'Rule of Law' but do not define it and those which address aspects of the Rule of Law without considering the Rule of Law in toto.

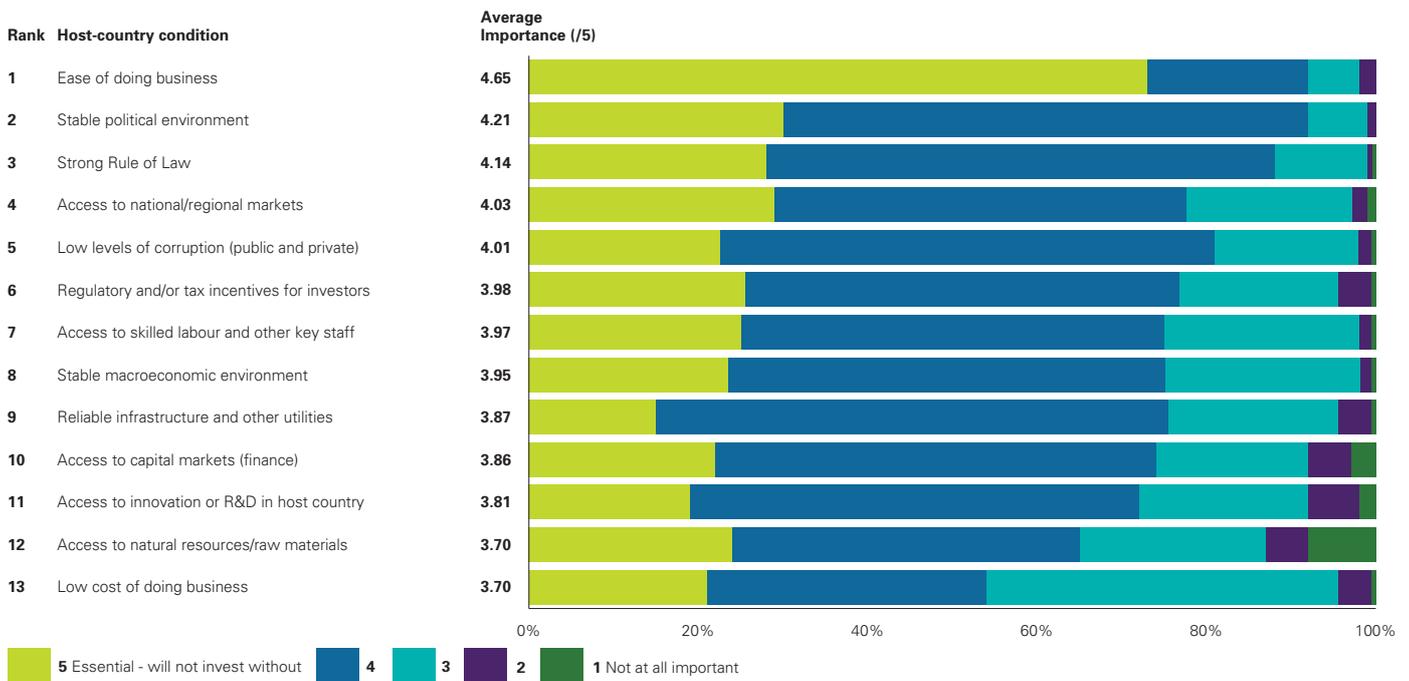
### 2.4 Country-selection criteria and the impact of Rule of Law factors in FDI decisions

With a view to ascertaining the role played by Rule of Law considerations in FDI decision-making, respondents were asked to indicate the importance of various host-country conditions to their FDI decisions.<sup>35</sup> Their answers confirmed that a clear connection exists between FDI decision-making and aspects of the Rule of Law. The survey required respondents to rank each condition on a scale from 1 to 5, with 5 being ‘essential – will not invest without’ and 1 being ‘not at all important’. Responses highlighted that the strength of the host country’s Rule of Law framework is one of the top three determinants of FDI decision-making, but the most crucial factor remains the ease of doing business in the host country.

Respondents were also asked to rank the importance of various sub-component factors relevant to the host country’s Rule of Law environment, so as to assess the impact of each such factor on FDI decisions.<sup>36</sup> Corruption was identified as the main factor affecting FDI decision-making (with its importance ranked 4.71/5 on average), followed by political and social instability (4.25/5) and risk of physical security of in-country personnel (4.16/5). The non-democratic character of the host country government and, more surprisingly, the lack of recognition of intellectual property rights were attributed the least importance, scoring on average 3.88/5 and 3.89/5 respectively. The latter is to be contrasted with the fact that a lack of recognition of IP rights was a category of Rule of Law issue most encountered by respondents.<sup>37</sup>

**Table 4 – Importance of each host-country condition to investment decision-making**

**On a scale of 1 to 5, please indicate the degree of importance to your FDI decision-making in your main foreign investment markets of the following host-country conditions:**



<sup>35</sup> Risk and Return Survey, Question 7.

<sup>36</sup> Risk and Return Survey, Question 8.

<sup>37</sup> See Table 7.



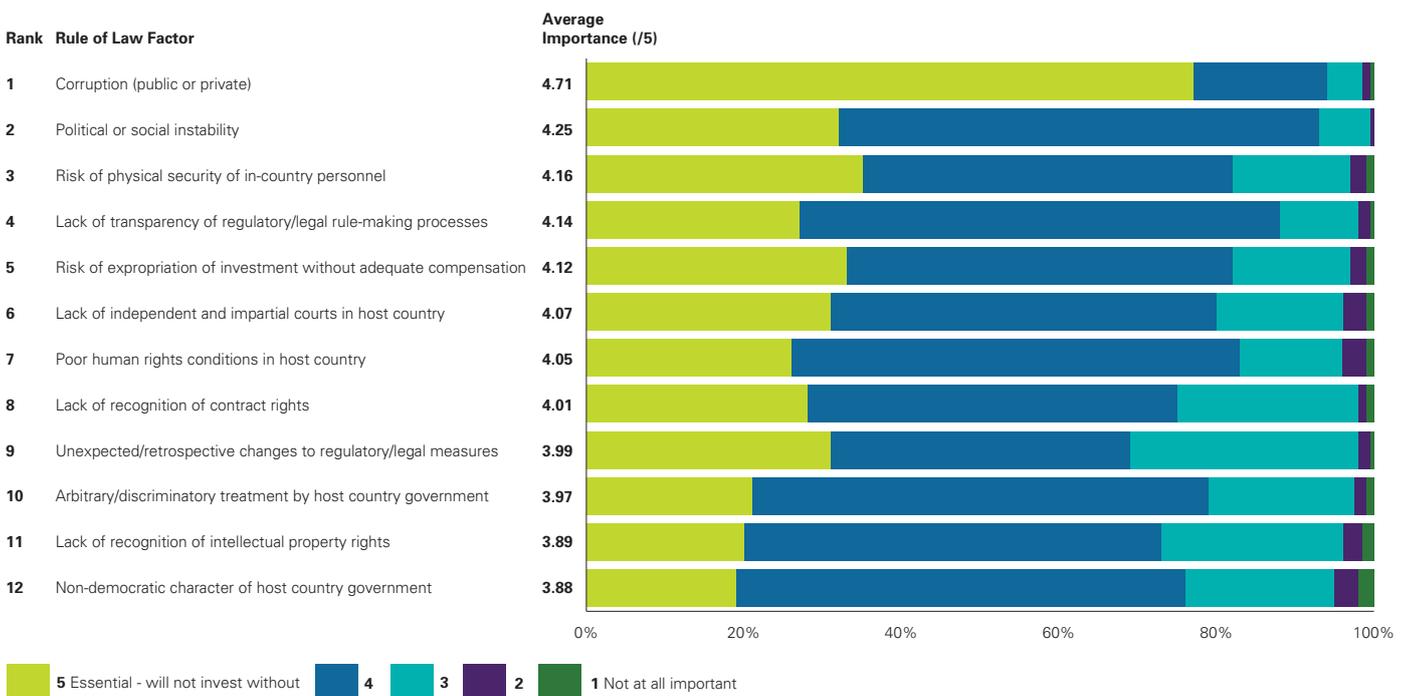
The survey’s finding that corruption is a key factor affecting FDI decision-making chimes with our own experience: more and more countries are tightening their bribery and corruption laws and, equally importantly, stepping up their enforcement of those laws. It is paramount that boards give due consideration to these issues at the point of entry into a market and beyond.

*Michael Roberts, Partner  
Hogan Lovells, London*



**Table 5 – Importance of each host-country condition to investment decision-making**

**On a scale of 1 to 5, please indicate the degree of importance to your FDI decision-making in your main foreign investment markets of the following host-country Rule of Law factors:**



Survey respondents were asked to identify, within a given list, the three most important sources of information on Rule of Law factors in the various countries in which their companies invest.<sup>38</sup>

The following were selected as key sources:

**Table 6 – Sources of information on Rule of Law factors**

Source		
1	Our external financial management advisors	43%
2	Investment committee / task force / internal analytics team	42%
3	Our trade association(s)	42%
4	Our external legal advisors	39%
5	Our previous experience in the region	36%
6	Host state investment promotion agencies	29%
7	Our in-house legal team	21%
8	Insurers	21%
9	Home government agencies	14%
10	Press reports and general knowledge	3%
11	Non-governmental organizations and similar bodies	2%
12	None /no particular information sources	0%

The survey outcomes also confirmed that Forbes 2000 companies systematically review the Rule of Law conditions in the host countries in which they invest on a continuing basis, with 93% of respondents saying they undertake such reviews in 'most' or 'all cases'.<sup>39</sup> There are, however, differences in the systematic nature of the review among different industry sectors and for companies headquartered in different regions. For instance, all respondents operating in the energy and natural resources sector and the construction and real estate sector state that their companies review host countries' Rule of Law conditions either 'in most cases' or 'in all cases'. By contrast, 34% of respondents in the transportation and logistics sector stated they only undertake such review 'in some cases' or 'rarely'. From a geographical perspective, companies headquartered in the Americas indicated they undertake ongoing reviews much more consistently than those headquartered in all other regions.

<sup>38</sup> Risk and Return Survey, Question 9.

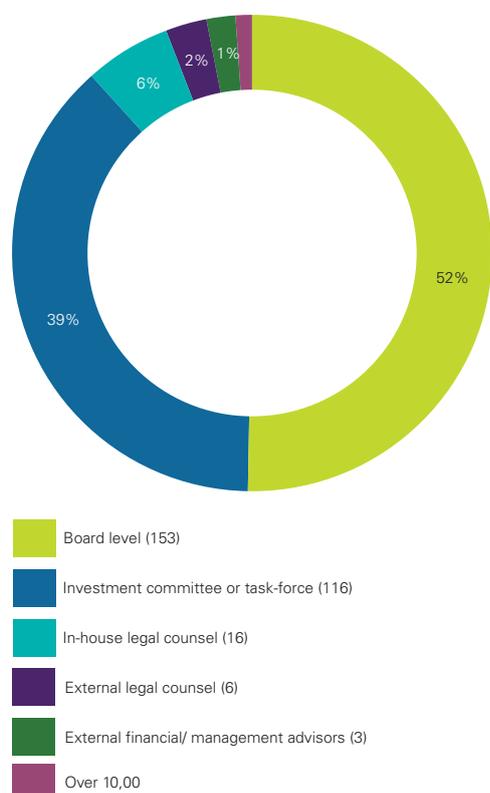
<sup>39</sup> Risk and Return Survey, Question 10.

**Table 7 – Systematic nature of review of legal environment in host countries**

<b>Does your company systematically review the legal environment in its host countries on an ongoing basis?</b>	<b>Yes, in all cases</b>	<b>Yes, in most cases</b>	<b>Yes, in some cases</b>	<b>Rarely</b>	<b>Never</b>
All Respondents	<b>52.3%</b>	<b>41.3%</b>	<b>4.7%</b>	<b>1.7%</b>	<b>0.0%</b>
<b>By industry Sector</b>					
Automotive, Chemical & Manufacturing	48.5%	48.5%	3.0%	0.0%	0.0%
Construction & Real Estate	58.3%	41.7%	0.0%	0.0%	0.0%
Consumer Goods & Retailing	35.3%	61.8%	2.9%	0.0%	0.0%
Energy & Natural Resources	71.1%	28.9%	0.0%	0.0%	0.0%
Financial Services	75.5%	18.9%	3.8%	1.9%	0.0%
Healthcare, Pharmaceuticals & Biotechnology	24.4%	71.1%	2.2%	2.2%	0.0%
Information Industries & Telecoms	54.2%	37.5%	6.3%	2.1%	0.0%
Transportation & Logistics	52.4%	14.3%	28.6%	4.8%	0.0%
Other	22.2%	66.7%	0.0%	11.1%	0.0%
<b>By HQ Region</b>					
Africa and Middle East	87.5%	0.0%	12.5%	0.0%	0.0%
Americas	38.4%	59.2%	0.8%	1.6%	0.0%
Asia	67.4%	23.3%	9.3%	0.0%	0.0%
Europe	55.4%	35.6%	5.9%	3.0%	0.0%
Oceania	66.7%	26.7%	6.7%	0.0%	0.0%

The main locus of corporate responsibility for these reviews was at board level for 52% of respondents and with the investment committee or task-force for 39% of respondents.<sup>40</sup> Only a small proportion of respondents indicated that such responsibility lies with in-house legal counsel (6%), external legal counsel (2%) and external financial or management advisors (less than 1%).

**Table 8 – Locus of corporate responsibility for review**



## 2.5 Types and location of Rule of Law incidents encountered

Responses to the survey indicated that, in the day-to-day operations of FDI-making companies, Rule of Law failures are an all-too-common occurrence. Only approximately 10% of the surveyed executives indicated that they had not encountered a Rule of Law issue in host countries where they invested.<sup>41</sup> Over two-thirds of respondents whose companies had undertaken FDI in the past five years encountered at least three different types of Rule of Law failures.

The categories of Rule of Law issues encountered by most respondents were lack of transparency of regulatory and rule-making processes within the host country (experienced by 41.6% of respondents making FDI over the past five years), arbitrary or discriminatory treatment by the host country government (32.1%) and lack of recognition of IP rights (30.5%) and contractual rights (30.5%). By comparison, only a small minority of respondents reported experiencing incidents relating to poor human rights conditions in host countries (1.2%) or the non-democratic character of the host country government (1.6%).<sup>42</sup>

**Table 9 – Incidence of Rule of Law issues among investors**

	Type of Rule of Law issue	Incidence <sup>43</sup>
1	Lack of transparency of regulatory/legal rule-making processes	41.6%
2	Arbitrary or discriminatory treatment by host country government	32.1%
3	Lack of recognition of intellectual property rights	30.5%
4	Lack of recognition of contract rights	30.5%
5	Unexpected and/or retrospective changes to regulatory/legal measures	30.0%
6	Lack of independent and impartial courts in host country	29.6%
7	Political or social instability	22.6%
8	Risk of physical security of in-country personnel	18.5%
9	Corruption (public or private)	11.1%
10	Risk of expropriation of investment without adequate compensation	6.6%
11	Non-democratic character of host country government	1.6%
12	Poor human rights conditions in host country	1.2%

<sup>40</sup> Risk and Return Survey, Question 11.

<sup>41</sup> Risk and Return Survey, Question 1.

<sup>42</sup> This data of course begs the question of whether such issues were not often experienced by respondents, or whether they were encountered but regarded as being of limited significance. We look forward to exploring this further during our global roll-out of the survey findings when experts and corporates will discuss the overall results.

<sup>43</sup> As a percentage of the respondents whose companies made FDI in the past five years.

Looking at the geographical regions in which Rule of Law issues were experienced,<sup>44</sup> the survey responses indicate that lack of independent and impartial host country courts was prevalent in the Middle East and North Africa region (a problem affecting 17% of the investors there). The lack of transparency of the regulatory and legal rule-making process was experienced by 13% of the respondents that invested in the US and Canada, 13% of those that invested in Latin America and 12% of investors in Asia, while unexpected and/or retrospective changes to regulatory or legal measures were reported in respect of the US and Canada (with a 12% incidence among investors in that region).

As shown in Table 10 below, the significant incidence of Rule of Law issues in the US and Canada was highlighted by the survey responses. It appears from additional qualitative interviews performed in the aftermath of the survey that this perception may be based on a number of concerns, including regarding the federal character of the US and Canadian legal systems. This adds a layer of complexity to the legal framework faced by foreign companies wishing to invest in those countries, and can give rise to a disparity in approach to regulation and to the prosecution of corporate crimes, and in some instance an actual or perception of bias as against foreign entities by local juries and elected judges during court proceedings or in public tenders.

Surprisingly, according to respondents, the 'safest' regions from a Rule of Law perspective appear to have been China (with 87% of those investing there not reporting any Rule of Law issue), Sub-Saharan Africa (81%) and India (80%).



The reason may lie in the fact that different jurisdictions in the US approach regulation in different ways. Well-known instances are threats of high penalties and the continuation of prosecution even in the face of slim evidence. This naturally induces early settlements in view of the adverse consequences of publicity. Also mentioned is the possible prejudice against foreign entities, particularly by local juries and (elected) judges.

*Three leading US attorneys*





Given the regulatory uncertainty prevalent in the region, it is not surprising that 36% of respondents experienced Rule of Law issues in the Middle East and North Africa. Naturally, the lack of recourse to an independent and impartial judiciary is a major concern for investors.

*An African perspective for a multi-national company*



**Table 10 – Incidence of Rule of Law issues by region of investment**

Region of Investment	Corruption (public or private)	Political or social instability	Lack of transparency of regulatory/legal rule-making processes	Unexpected and/or retrospective changes to regulatory/legal measures	Arbitrary or discriminatory treatment by host country government	Lack of recognition of contract rights	Lack of recognition of intellectual property rights	Lack of independent and impartial courts in host country	Risk of physical security of in-country personnel	Risk of expropriation of investment without adequate compensation	Poor human rights conditions in host country	Non-democratic character of host country government	Did not report encountering any Rule of Law issue in that region
<b>US &amp; Canada</b>	1%	4%	13%	12%	7%	3%	3%	2%	1%	1%	0%	0%	54%
<b>Latin America</b>	2%	4%	13%	6%	7%	8%	7%	2%	1%	1%	0%	1%	50%
<b>Western Europe</b>	2%	1%	4%	5%	6%	5%	1%	2%	1%	1%	0%	0%	71%
<b>Eastern Europe</b>	1%	5%	4%	2%	3%	4%	2%	2%	2%	0%	0%	1%	79%
<b>China</b>	0%	1%	4%	1%	2%	0%	2%	1%	2%	0%	0%	0%	87%
<b>India</b>	6%	0%	3%	1%	4%	1%	3%	2%	0%	0%	0%	0%	80%
<b>Rest of Asia</b>	3%	9%	12%	9%	9%	9%	9%	7%	7%	2%	1%	0%	33%
<b>Oceania</b>	0%	0%	1%	4%	4%	3%	4%	5%	2%	2%	0%	0%	75%
<b>Sub-Saharan Africa</b>	2%	5%	2%	3%	2%	2%	3%	2%	2%	0%	0%	0%	81%
<b>MENA</b>	1%	6%	7%	4%	5%	5%	10%	17%	10%	3%	0%	0%	36%

For China at least, while subsequent qualitative interviews suggested that this statistic may not be surprising for those corporates for which China is a key location of FDI, this outcome is to some extent divergent from the responses given to other sections of the survey: asked to identify the country in which they experienced the most significant Rule of Law issues, most respondents referred to China (11%), Australia (9%), Bangladesh (7%), and Brazil (7%).<sup>45</sup> Beyond that it is difficult to extrapolate why these jurisdictions did not feature more highly as Rule of Law ‘risk jurisdictions’.

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As the 12th largest economy but also a country of significant inequality, Brazil stands at the intersection of Rule of Law and economic developments.

*Claudette Christian, Partner,  
Hogan Lovells, Brazil*

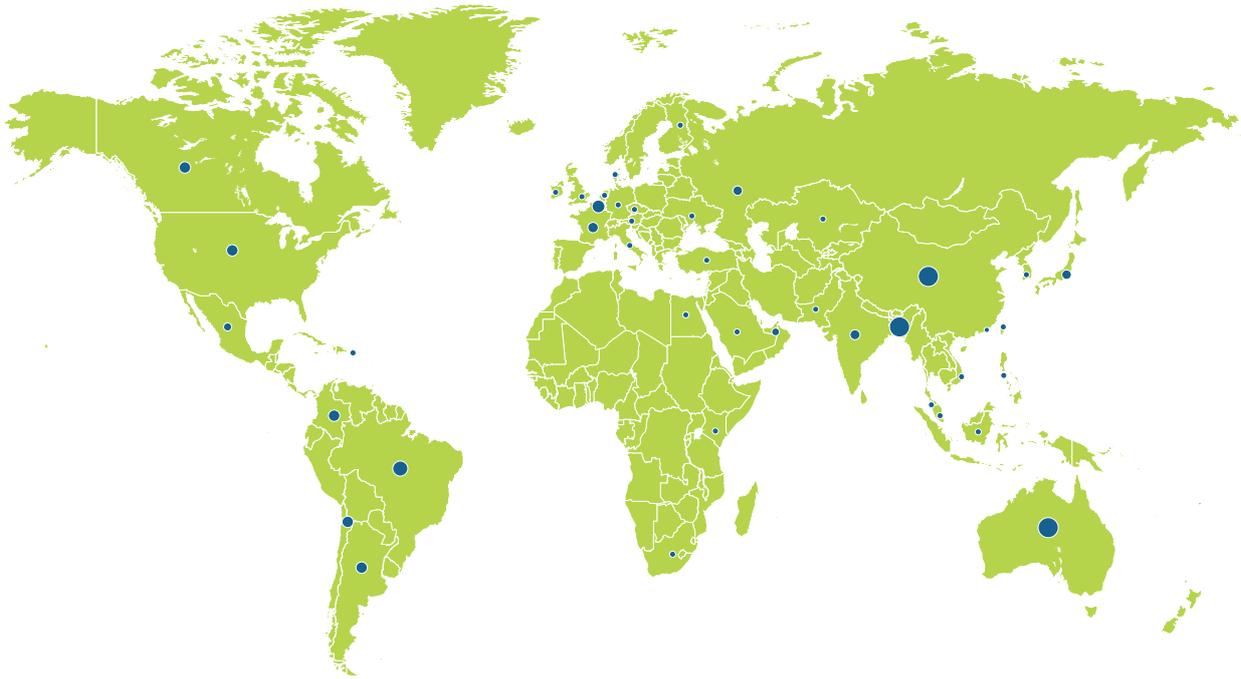
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One cannot rule out that recent high profile BIT and WTO claims related to the Australian Tobacco Plain Packaging Act 2011 may have featured in the respondents’ answers.

*Markus Burgstaller, Partner,  
Hogan Lovells, London*

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**Table 11 – Country where most significant incident(s) occurred**

<b>1</b>	China	25	<b>11%</b>	<b>23</b>	Vietnam	3	<b>1%</b>
<b>2</b>	Australia	20	<b>9%</b>	<b>24</b>	Italy	3	<b>1%</b>
<b>3</b>	Bangladesh	16	<b>7%</b>	<b>25</b>	Germany	3	<b>1%</b>
<b>4</b>	Brazil	15	<b>7%</b>	<b>26</b>	Mexico	3	<b>1%</b>
<b>5</b>	Belgium	12	<b>5%</b>	<b>27</b>	Hong Kong	3	<b>1%</b>
<b>6</b>	Chile	8	<b>3%</b>	<b>28</b>	Kenya	2	<b>1%</b>
<b>7</b>	USA	7	<b>3%</b>	<b>29</b>	Ireland	2	<b>1%</b>
<b>8</b>	Argentina	7	<b>3%</b>	<b>30</b>	Puerto Rico	2	<b>1%</b>
<b>9</b>	Colombia	7	<b>3%</b>	<b>31</b>	Singapore	2	<b>1%</b>
<b>10</b>	India	6	<b>3%</b>	<b>32</b>	Austria	2	<b>1%</b>
<b>11</b>	Japan	6	<b>3%</b>	<b>33</b>	Ukraine	2	<b>1%</b>
<b>12</b>	Philippines	6	<b>3%</b>	<b>34</b>	Malaysia	2	<b>1%</b>
<b>13</b>	Canada	6	<b>3%</b>	<b>35</b>	South Africa	2	<b>1%</b>
<b>14</b>	Taiwan	6	<b>3%</b>	<b>36</b>	South Korea	2	<b>1%</b>
<b>15</b>	France	6	<b>3%</b>	<b>37</b>	Turkey	2	<b>1%</b>
<b>16</b>	Denmark	6	<b>3%</b>	<b>38</b>	Czech Republic	2	<b>1%</b>
<b>17</b>	UAE	5	<b>2%</b>	<b>39</b>	Dominican Rep.	1	<b>0%</b>
<b>18</b>	Finland	5	<b>2%</b>	<b>40</b>	Pakistan	1	<b>0%</b>
<b>19</b>	Indonesia	4	<b>2%</b>	<b>41</b>	Egypt	1	<b>0%</b>
<b>20</b>	Russia	4	<b>2%</b>	<b>42</b>	Kazakhstan	1	<b>0%</b>
<b>21</b>	UK	4	<b>2%</b>	<b>43</b>	Saudi Arabia	1	<b>0%</b>
<b>22</b>	Netherlands	3	<b>1%</b>		Would rather not say	4	<b>2%</b>

Reverting to the data set out in Table 10 above, other regions were identified by respondents as those in which Rule of Law issues arise more frequently. Indeed, only 33% of the companies investing in Asia (excluding China and India) did not report experiencing any Rule of Law incidents, and similarly low percentages in terms of those who did not experience Rule of Law incidents can be found in the Middle East and North Africa (36%) and – to some extent – in Latin America (50%).

Companies operating in the energy and natural resources sector appear to be most frequently affected by a range of Rule of Law issues, with all of the 45 respondents in that industry reporting having experienced at least one type of Rule of Law incident. The lack of transparency of regulatory and legal rule-making processes and unexpected or retrospective changes to such rules were the most significant Rule of Law problems, perceived across all industry sectors. Arbitrary and discriminatory treatment by the host country government was a particularly frequent issue in the construction and real estate sector, while financial institutions reported the highest incidence of lack of recognition of IP and contractual rights.

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Their long term relationships with host governments (via licensing or other arrangements) and the huge capital expenditure required for exploration and production may render participants in the oil and gas sector more concerned about Rule of Law issues.

*David Moss, Partner  
Hogan Lovells, London*

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Table 12 – Incidence of Rule of Law issues by industry sector

Industry Sector	Corruption (public or private)	Political or social instability	Lack of transparency of regulatory/legal rule-making processes	Unexpected and/or retrospective changes to regulatory/legal measures	Arbitrary or discriminatory treatment by host country government	Lack of recognition of contract rights	Lack of recognition of intellectual property rights	Lack of independent and impartial courts in host country	Risk of physical security of in-country personnel	Risk of expropriation of investment without adequate compensation	Poor human rights conditions in host country	Non-democratic character of host country government	Did not report encountering any Rule of Law issue in that region
<b>Automotive, Chemical &amp; Manufacturing</b>	24%	15%	41%	26%	35%	32%	24%	21%	18%	0%	0%	6%	9%
<b>Construction &amp; Real Estate</b>	25%	25%	42%	8%	50%	8%	25%	8%	0%	0%	8%	0%	17%
<b>Consumer Goods &amp; Retailing</b>	9%	18%	41%	29%	29%	26%	32%	24%	21%	6%	0%	0%	12%
<b>Energy &amp; Natural Resources</b>	9%	22%	38%	33%	33%	31%	29%	38%	31%	2%	0%	0%	0%
<b>Financial Services</b>	2%	17%	43%	34%	28%	34%	38%	32%	28%	11%	2%	0%	6%
<b>Healthcare, Pharma &amp; Biotechnology</b>	2%	22%	44%	33%	27%	27%	27%	27%	9%	9%	0%	0%	7%
<b>Information Industries &amp; Telecoms</b>	10%	29%	35%	23%	25%	31%	29%	21%	8%	4%	2%	0%	17%
<b>Transportation &amp; Logistics</b>	14%	19%	29%	10%	19%	14%	14%	29%	14%	0%	0%	14%	24%

## 2.6 Respondents' reactions to Rule of Law incidents

The questionnaire submitted to the respondents asked them to provide two types of information concerning their reaction to Rule of Law incidents in host countries: which methods they adopted to resolve such incidents and the effects they had on their level of investment in a given country.

Concerning methods of resolution, respondents were given the option to select one or more potential options, including both solutions of a preventive nature (such as securing insurance coverage) and post-incident avenues for redress (such as judicial or arbitral proceedings).<sup>46</sup> Only in a small minority of cases did respondents faced with Rule of Law issues decide not to take action. In general, the surveyed companies adopted a variety of methods of resolution ranging from negotiation (particularly for lack of transparency of rule-making processes, unexpected or retrospective changes to legal and regulation measures and poor human rights conditions), to host country judicial processes (particularly for arbitrary or discriminatory treatment and lack of recognition of contract rights) and contractual or international arbitration (to address the same Rule of Law issues as above, as well as the lack of impartial and independent courts in the host country). Insurance coverage was resorted to, particularly in connection with cases of unexpected and/or retrospective changes to regulatory and legal measures.

Overall, survey responses indicated that at least seven options are frequently resorted to by investors, with between 58% and 70% of respondents stating their company had pursued each of these avenues for at least one Rule of Law incident:

**Table 13 – Methods of resolution adopted for Rule of Law incidents**

	Method of resolution	Incidence <sup>47</sup>
1	Host country judicial or administrative processes	69.8%
2	Contractual arbitration	67.4%
3	Investment treaty-based arbitration	66.1%
4	Negotiation	65.8%
5	Home country diplomatic efforts	65.4%
6	Insurance coverage	62.8%
7	Opted for a different method of market entry	58.1%

As to the effect that Rule of Law incidents had on the respondents' levels of investment within a given host country, the survey revealed that – as a general rule – Rule of Law incidents often led to a reduction of investment levels or even a complete withdrawal of investment.<sup>48</sup> The impact of such incidents varied, however, depending on the nature of the Rule of Law issue at stake. In particular, risks to the physical security of in-country personnel and the lack of recognition of IP rights triggered the most serious reactions by respondents, leading to a reduction or withdrawal of investment in 69% and 65% of cases respectively. By contrast, respondents' reactions to the lack of transparency of regulatory or legal rule-making processes and to political and social instability were more mixed, with levels of investment being negatively impacted in only 39% and 47% of cases respectively.<sup>49</sup>

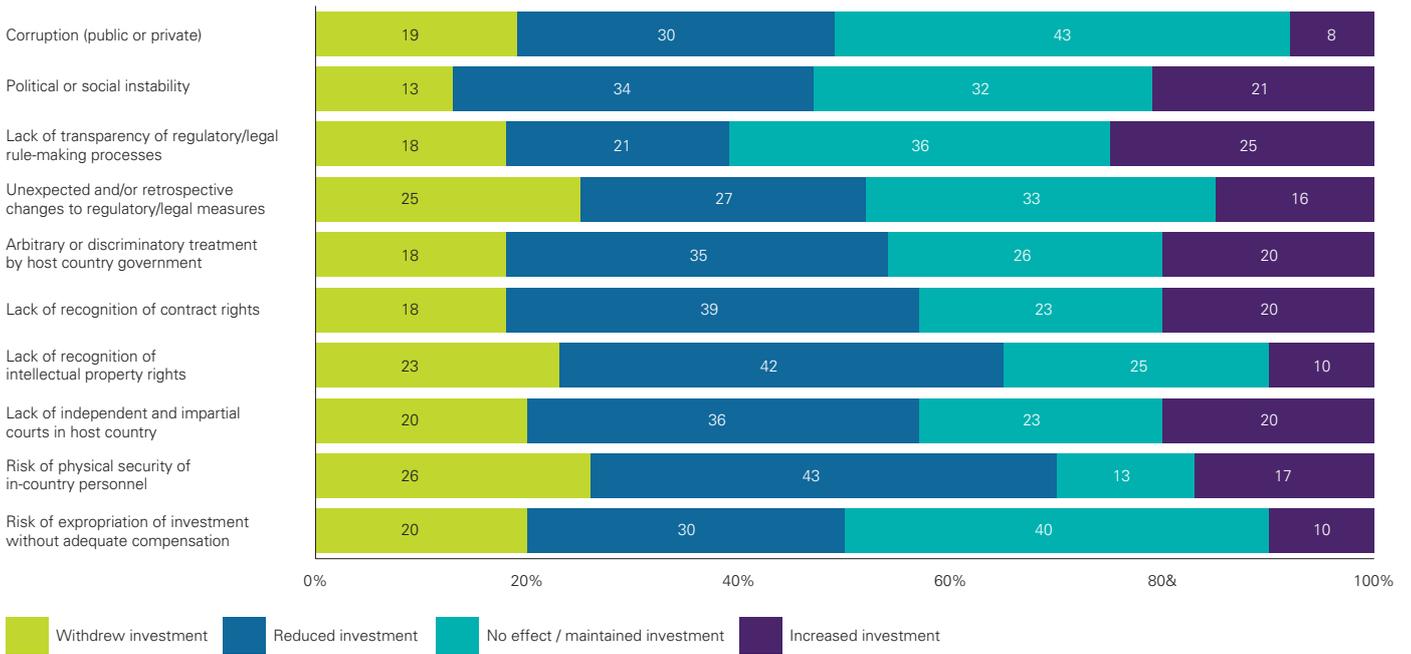
<sup>47</sup> Percentage of respondents indicating their company had pursued this method of resolution for at least one Rule of Law incident.

<sup>48</sup> Risk and Return Survey, Question 4.

<sup>49</sup> The impact on investment levels of poor human rights conditions in the host country and non-democratic character of the host country government is not covered in the chart as the sample of respondents having experienced such Rule of Law issues is too small to be representative.

<sup>46</sup> Risk and Return Survey, Question 3.

**Table 14 – Impact of Rule of Law incidents on levels of investment**

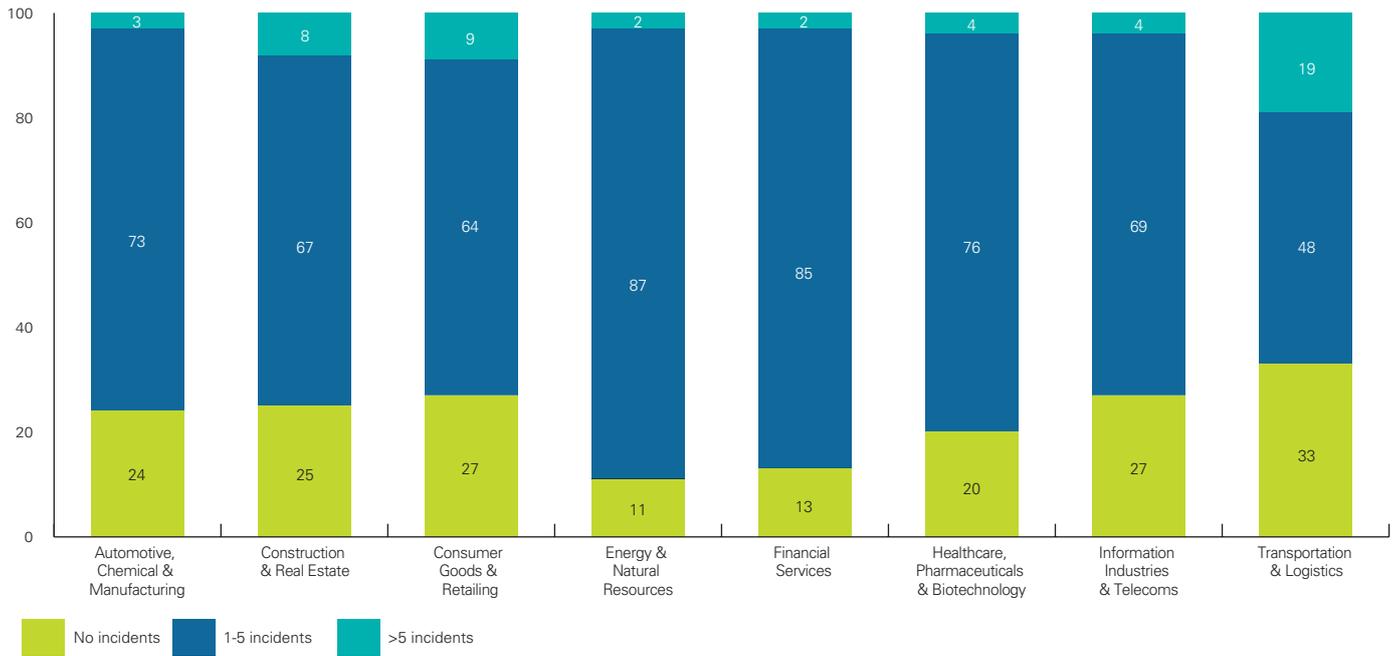


Respondents were also asked to state how many Rule of Law incidents had resulted in their company withdrawing or reducing its investment over the past five years.<sup>50</sup> Answers to this survey question are of particular note, as they reveal different levels of ‘sensitivity’ to Rule of Law incidents across various geographical areas and industry sectors.

For most industry sectors, a vast majority of respondents indicated that between one and five incidents had resulted in their company withdrawing or reducing investment. This was particularly the case in the energy and natural resources sector (where 86.7% of respondents selected this answer), in the financial services sector (84.9%) and in the healthcare, pharmaceuticals and biotechnology sector (75.6%). Other industries witnessed a more polarized reaction to Rule of Law incidents. In the transportation and logistics sector, for instance, 33.3% of respondents stated that no Rule of Law incidents had led to a reduction or withdrawal of investment, 47.6% replied one to five incidents and 19.0% over five incidents.

<sup>50</sup> Risk and Return Survey, Question 5.

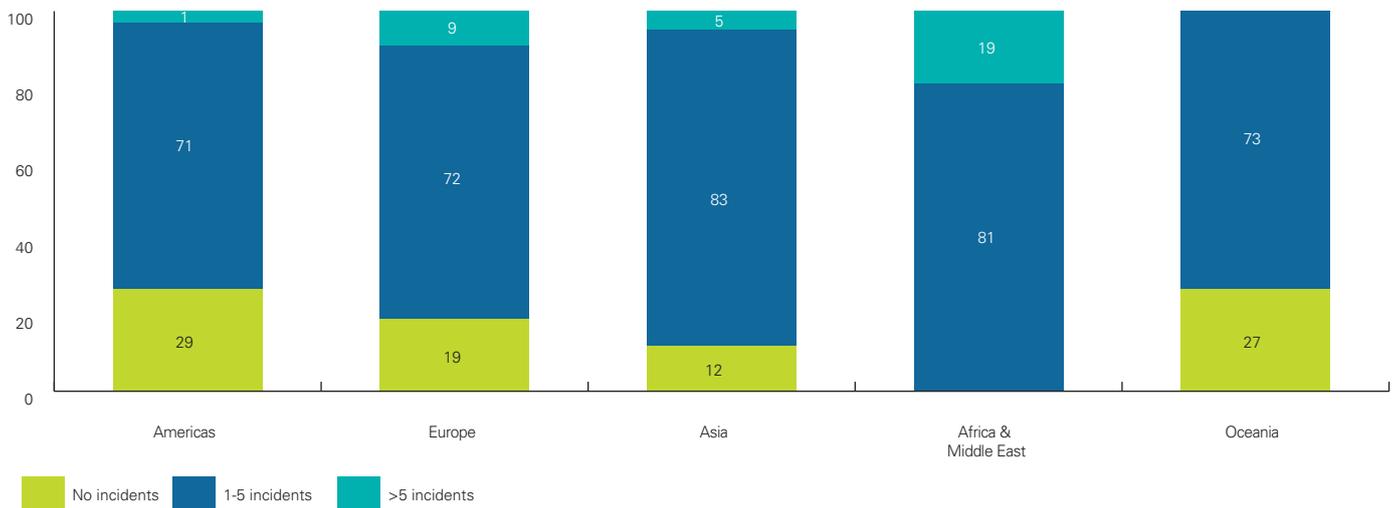
**Table 15 – Number of incidents resulting in withdrawal or reduction of investment by industry sector**



An analysis based on the region in which the respondent’s company is headquartered shows that companies based in the Americas and in Oceania are more resilient to Rule of Law issues, with over a quarter of respondents in each region indicating that no incidents led to their company withdrawing or reducing investments and virtually no respondents stating ‘over

five incidents’. This can be contrasted with the reaction of companies headquartered in Africa and the Middle East, all of which experienced at least one incident which negatively impacted the levels of investment in a given country, with 19% of respondents experiencing six or more such incidents.

**Table 16 - Number of incidents resulting in withdrawal or reduction of investment by HQ region**



### 3. THE ROLE OF INVESTMENT TREATIES IN FOREIGN DIRECT INVESTMENT DECISION-MAKING

#### 3.1 The grand bargain of Bilateral Investment Treaties

For much of the twentieth century, questions about the appropriate standard of treatment owed by domestic sovereigns to foreign nationals (or 'aliens') within their territory were among the most hotly contested issues in international law. While disagreement over the standards of treatment owed by host states to their foreign investors proved irresolvable for the international community as a whole, individual states, working bilaterally, found greater success. Beginning with the 1959 bilateral investment treaty between Germany and Pakistan, states began to negotiate bilateral treaties for the 'promotion and protection' of investment (BITs). From the humble origins of that single treaty,<sup>51</sup> has developed the current regime in which there are estimated to be nearly 3,500 such treaties in force, including free trade agreements containing similar provisions on the treatment of investment.<sup>52</sup>

Investment treaties, whether they stand alone as BITs or form chapters of larger free trade agreements, contain two principal aspects. In the first place, they address substantive guarantees of protection and treatment that each state grants to investors from the other. Common investment treaty provisions guarantee 'fair and equitable' treatment of investors and their investments, prohibit discrimination in favor of national investors, guarantee the 'full protection and security' of investments, as well as the free transfer of investment capital, and prohibit expropriations except upon the payment of 'prompt, adequate, and effective' compensation. Because these guarantees are contained within a treaty, they create international obligations for each state, and their meaning and content is ultimately determined by international law and independent of each state's domestic laws and rules.

To the extent that there is a conflict between an obligation under the treaty and a provision of domestic law, the international treaty obligation prevails and the domestic law must give way.

The second key aspect of investment treaties relates to the resolution of disputes. By their terms, in fact, these treaties empower individual investors to raise claims of treaty violations in their own right before international arbitral tribunals – investor-state arbitration. These arbitral tribunals, whether established ad hoc or pursuant to international arrangements, like the ICSID Convention, are empowered to issue binding awards, potentially requiring respondent states to cease and desist in prohibited conduct and/or to pay compensation to the investor.

The sharp growth in the number of bilateral relationships covered by international investment treaties is one of the most important developments in international political economy over the last 30 years. Coupled with the institutionalized framework for dispute resolution created by the ICSID Convention, this has marked a sea change in the relationships between foreign investors and host states. Instead of contentious and uncertain debates about the norms of international law, which characterized much of the twentieth century, states have agreed to standards of treatment for foreign investors set out in investment treaties.<sup>53</sup> Instead of relying on the espousal of claims on behalf of nationals by states, investors have been empowered to raise their claims directly under the treaties entered into by their states. And instead of ad hoc arbitral arrangements of variable effectiveness, investors have now in most cases been given the right to avail themselves of the facilities of ICSID to provide a framework for the resolution of investment disputes detached from the potential interference of national legal systems.<sup>54</sup> In parallel, the number of investment arbitration claims has increased significantly over the past 15 years.

<sup>51</sup> See Jesawald W. Salacuse, 'BIT by BIT: The Growth of Bilateral Investment Treaties and Their Impact on Foreign Investment in Developing Countries,' (1990) 24 INT'L LAW. 655. See also Francis A. Mann, 'British Treaties for the Promotion and Protection of Investments,' 1981 BRIT. Y.B. INT'L L. 241, 249; Pamela B. Gann, 'The U.S. Bilateral Investment Treaty Program,' (1985) 21 STANFORD J. INT'L L. 373.

<sup>52</sup> Almost every state in the world has entered into at least one agreement addressing the protection of foreign investors. Some of the few states not to have entered into any treaties addressing investment protection include Brazil (which has signed many but ratified none), Ireland and North Korea.

<sup>53</sup> Having said that, it must also be noted that states have struggled to give clear expression to the meaning of the standards set out in their treaties. On this point, see N. Jansen Calamita, 'The Principle of Proportionality and Problem of Indeterminacy in Investment Treaties' in Andrea Bjorklund (ed.), 2013-14 Y.B. INT'L INVESTMENT L. & POLICY (Oxford Univ. Press; forthcoming).

<sup>54</sup> See Ibrahim Shihata, 'Towards a Depoliticization of Investment Disputes: the Roles of ICSID and MIGA' in Ibrahim Shihata, The World Bank in a Changing World 319 (1991).

The exponential growth of the investment treaty regime over the past 30 years has been accompanied by a relatively uniform narrative, neatly captured by Hartley Shawcross:

*The quid pro quo . . . is, in fact, in the English vernacular, the provision of the 'quids', that the capital importing countries in return for agreeing to abide by the generally recognized procedures of international law, will receive more private investment and with the capital, the benefits of the technical and commercial skills which go with them than would otherwise be the case.*<sup>55</sup>

From the perspective of developing states entering into these treaties with developed (or capital-exporting) states, the trade-off for accepting the obligations created under them has been the prospect that adopting internationalized protections and dispute settlement processes will lead to increased investment in the host state. Thus, even though investment treaties create legal obligations for the host state and expose it to potential liability for breach of the agreed standards, the argument has been that acceptance of such contingent liability is offset by the prospect of increased flows of investment. Especially for states in which there are concerns about the Rule of Law, investment treaties, it has been argued, can serve – in effect – as an internationalized Rule of Law guarantee (albeit only in favour of foreign investors).<sup>56</sup>

As noted by Professor Vaughan Lowe:

*BITs are not the only way in which investors can be given reassurance. States can themselves create a legal environment that is stable and attractive to investment. It is, however, much easier to buy into the system of investment guarantees that are provided by BITs than it is to build a reputation as a safe place for investments. A reputation takes many years to build: a BIT can be signed with the stroke of a pen.*<sup>57</sup>

<sup>55</sup> Quoted in Earl Snyder, 'Protection of Private Foreign Investment: Examination and Appraisal,' (1961) 10 INT'L & COMP. L. QUART. 469, 492.

<sup>56</sup> See, e.g., Charles N Brower and Stephan W Schill, 'Is Arbitration a Threat or a Boon to International Investment Law?' (2009) 9 Chicago Journal of International Law 471, 488.

<sup>56</sup> In addition, as global FDI flows have shifted over the past 20 years, with increased flows from the 'developing world' to developed economies, the character of the investment relationships covered under individual treaties has also shifted.

<sup>57</sup> A. Vaughan Lowe, 'Changing Dimensions of International Investment Law,' University of Oxford Faculty of Law Legal Studies Research Paper Series, Working Paper No 4/2007 (2007), p. 52.

### 3.2 Attempts to test the 'BITs-FDI' relationship

#### a. Attempts to test the 'BITs-FDI' relationship through econometric studies

The impact of investment treaties on inward flows of foreign investment has been the subject empirical analysis for more than a decade. In large measure, these studies have taken an econometric approach, analyzing large data sets and looking for correlation between investment treaty adherence and inward flows of FDI. While most of these studies have focused on BITs, some have looked at investment disciplines more generally, including investment provisions in free trade agreements.

The assessment of the effects of BITs on FDI flows is not an easy task. Host state FDI determinants are complex, FDI data is of variable quality, and there are methodological difficulties with accurately capturing and reflecting in econometric models all relevant FDI factors.<sup>58</sup>

<sup>58</sup> See United Nations Conference on Trade and Development, The Role of International Investment Agreements in Attracting Foreign Direct Investment to Developing Countries (2009); United Nations Conference on Trade and Development, IIA Issues Note, Working Draft, 'The Impact of International Investment Agreements on Foreign Direct Investment: An Overview of Empirical Studies 1998-2014' (Sep. 2014).

Moreover, as the investment treaty regime becomes increasingly heterogeneous (as measured by variations in investment treaty texts), large-scale assessment becomes even more challenging as the substantive provisions may vary considerably among different investment treaties. As a consequence of these challenges, perhaps, the results of econometric studies have been mixed and highlighted ongoing differences among researchers about methodology and interpretation of results.<sup>59</sup>

After more than a decade of studies addressing the effects of BITs on flows of FDI, results remain mixed and consensus non-existent. In no small part this is ultimately a consequence of the methodological limitations of econometric studies.<sup>60</sup>

Most studies do not account for differences in the structure and content of investment treaty arrangements (for example, whether the treaty provides for pre- or post-establishment protection); none appear adequately to establish causality (as opposed to simple correlation) between investment treaties and levels of FDI; all struggle to isolate the conclusion of investment treaties as a measurement variable from plausible endogenous causes of increased levels of FDI (such as large markets, broader legislative reforms or the presence of other economic treaties,

for example, free trade agreements or double taxation treaties); and all suffer from the poor quality of available FDI data, whether measured as flows of FDI or existing stocks.<sup>61</sup>

Given these inherent limitations of econometric studies, Lauge Poulsen, among others, has suggested that 'a useful approach for future studies would perhaps be to ask foreign investors themselves whether they take these treaties into account when deciding where, and how, to invest.'<sup>62</sup> That, of course, is precisely what the present study has undertaken to do.

#### **b. Attempts to test the 'BITs-FDI' relationship through surveys and firm-level studies**

The econometric studies discussed above do not explore the degree to which foreign investors actually know about BITs and take them into consideration in their investment decisions. To the extent that these studies demonstrate a correlation between entering into BITs and increases in flows of FDI, it is only by implication that one can draw the further conclusion that BITs and other investment treaties are having a causal effect on the decision-making of investors. Given the limits of econometric methodology, there is reason to query whether correlation really can demonstrate causation in the econometric setting.

An alternative approach to gauging the effects of investment treaties on FDI is to ask the FDI decision-makers themselves. While firm-level inquiry is not necessarily a substitute for econometric approaches, such surveys can serve as a useful complement to this broader empirical research. Firms after all are the entities which are taking the actions whose motivations the econometric studies are attempting to measure. Moreover, firms are the entities in whose favor BITs are concluded.

59 See Mary Hallward-Driemeier, 'Do Bilateral Investment Treaties Attract Foreign Direct Investment?', World Bank Policy Research Working Paper 3131 (2003). Tobin and Rose-Ackerman, adopting a different methodology, reached similar results. Their study looked at the impact of BITs on total FDI flows measured as a share of total global inflows of FDI to developing states averaged over five-year periods (1975-2000), covering 63 states. See Jennifer Tobin & Susan Rose-Ackerman, 'Foreign Direct Investment and the Business Environment in Developing Countries: The Impact of Bilateral Investment Treaties,' Yale Law School Center for Law, Economics and Public Policy Research Paper, No. 293 (2004) (reaching substantially similar conclusions with respect to a sample of 63 states); Eric Neumayer & Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?' (2005) 33 *World Development* 1567; Selen Sarisoy Guerin, 'Do the European Union's Bilateral Investment Treaties Matter?', CEPS Working Document No. 333 (July 2010); Annie Tortian, 'The Impact of Bilateral Investment Treaties and Financial Development on Foreign Direct Investment: Evidence from Eurasia', Paper Delivered at Armenian Economic Association Conference, Yerevan, Armenia (13-14, Oct. 2012) (looking at FDI inflows into 20 Southeast European and Central Asian countries); Jeswald W. Salacuse & Nicholas P. Sullivan, 'Do BITs Really Work?' (2005) 46 *Harvard International Law Journal* 67; Matthias Busse, Jens Königler & Peter Nunnenkamp, 'FDI Promotion through Bilateral Investment Treaties: More Than a Bit?' Kiel Working Paper No. 1403 (2008), p. 10.; Clint Peinhardt and Todd Allee (2012) 'Failure to Deliver: The Investment Effects of US Preferential Economic Agreements' 35 *The World Economy* 757.

60 On this point, see in particular, Lauge Poulsen, 'The Importance of BITs for Foreign Direct Investment and Political Risk Insurance: Revisiting the Evidence' 2009-10 *Yearbook of International Investment Law and Policy* 539.

61 See, e.g., Jason Yackee, 'Conceptual Difficulties in the Empirical Study of Bilateral Investment Treaties' (2008) 33 *Brooklyn Journal of International Law* 405; Emma Aisbett, 'Bilateral Investment Treaties and Foreign Direct Investment: Correlation versus Causation' in Karl Sauvant and Lisa Sachs (eds), *The Effect of Treaties on Foreign Direct Investment* (Oxford University Press, 2009).

62 Lauge Poulsen, 'Book Review: Karl P Sauvant and Lisa E Sachs (eds), *The Effect of Treaties on Foreign Direct Investment: Bilateral Investment Treaties, Double Taxation Treaties, and Investment Flows*' (2009) 20 *EUR. J. INT'L L.* 935, 937.

If BITs indeed are serving the purpose of encouraging increased flows of FDI, one might reasonably expect this to be reflected in the decision-making of firms as they consider new investments. Yet, while surveys of investors' perceptions of the investment climate of host countries are relatively common, and often include questions about political risks, domestic institutional quality and the like,<sup>63</sup> these surveys seldom ask questions about the relevance of investment treaties to investors' FDI decision-making. Moreover, the few surveys of investor attitudes undertaken to date<sup>64</sup> have been limited by small sample sizes and, in some cases, poor methodological construction.

### 3.3 Connecting the Rule of Law and BITs

As noted above, the inclusion of questions regarding BITs in a survey more generally focused on the role of the Rule of Law in FDI decision-making was guided by a number of considerations. A principal driver of the development of investment treaties by capital-exporting states has been the existence of concerns about the adequacy of the Rule of Law and the treatment of foreign investors in host states in the developing world. Further, an open question in the econometric literature has been whether BITs might serve as substitutes for effective domestic Rule of Law institutions. Lastly, from the perspective of states which are eager to attract FDI into their economies there is a growing question as to whether BITs adequately serve this purpose or whether the development of stronger domestic institutions might serve that purpose better.<sup>65</sup>

At the same time, to the extent that investment treaties are designed to internationalize Rule of Law guarantees for foreign investors in host states, it is worth appreciating the particular character and conception of the Rule of Law that is found in investment treaties. Conceptions of the Rule of Law are often differentiated by reference to whether they are formal or substantive, that is to say, whether the particular conception is principally addressed to the formal characteristics of law or whether it also seeks to encompass broader normative substance within its definition.<sup>66</sup> Briefly put, formal conceptions of the Rule of Law tend to identify the Rule of Law as a unique jurisprudential concept, which is distinct from conceptions of justice, democracy, human rights, property, and so on. Accordingly, formal conceptions of the Rule of Law articulate criteria largely aimed at the processes by which legal rules are created and the ability of those persons subject to the law to know what the law is and to plan their lives accordingly. In general terms, then, a formal conception of the Rule of Law is likely to entail a condition in which laws are created through duly authorised processes and thus conform to established criteria for validity; are open, general and clear; are prospective and not retrospective; are relatively stable; are administered by an independent judiciary; and place limits on governmental discretion so as not to undermine the foregoing.<sup>67</sup> Substantive conceptions of the Rule of Law, on the other hand, go beyond formal conceptions and seek to articulate a model of the Rule of Law which includes broader moral and political values. As put by Dworkin, a substantive conception of the Rule of Law "does not distinguish, as the [formal] conception does, between the Rule of Law and substantive justice; on the contrary it requires, as part of the ideal of law, that the [Rule of Law] capture and enforce moral rights."<sup>68</sup>

<sup>63</sup> See section 2, above.

<sup>64</sup> See e.g. Isabelle Sordel, TN SOFRES Consulting, *Survey of the Attitudes of the European Business Community to International Investment Rules – Final Report (April 2000)*; Matthew Shinkman, 'The Investors' View: Economic Opportunities versus Political Risks in 2007-11' in Laza Kekic and Karl P. Sauvant (eds.), *World Investment Prospects to 2011: Foreign Direct Investment and the Challenge of Political Risk* (2007), p. 84; Jason Yackee, 'Do Bilateral Investment Treaties Promote Foreign Direct Investment? Some Hints from Alternative Evidence' (2010) 51 *Virginia Journal of International Law* 397.

<sup>65</sup> See Calamita N J, "The Rule of Law, Investment Treaties, and Economic Growth: Mapping Normative and Empirical Questions" in Jowell J, Thomas C J, and Van Zyl Smit J (eds.), *The Importance of the Rule of Law in Promoting Development* (Singapore Academy of Law, 2015).

<sup>66</sup> See, e.g., Paul Craig, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] PL 467.

<sup>67</sup> Joseph Raz, "The Rule of Law and its Virtue" (1977) 93 *LQR* 195 at 196. For similar approaches, see Robert S Summers, "A Formal Theory of the Rule of Law" (1993) 6 *Ratio Juris* 127; Lon L Fuller, *The Morality of Law* (1969).

<sup>68</sup> Ronald Dworkin, *A Matter of Principle* (1985), 11-12.

The protections afforded in investment treaties raise questions about the kind of Rule of Law that is being protected. For while some of the protections found in investment treaties, such as non-discrimination, appear to rest largely on a formal conception of the Rule of Law, investment treaties by design are based on values extrinsic to a formal conception of the Rule of Law, such as the protection of the right to property (investments) and the granting of protections to foreign but not domestic investors. There are reasons why investment treaties have come to be drafted in this way of course, but it is important to recognize that the conception of the Rule of Law found in investment treaties is an especially substantive and possibly unique one. Thus, in evaluating data regarding attitudes towards investment treaties in the context of a report more specifically about the Rule of Law, it is important to bear in mind that the protections found in BITs may well go beyond conceptions of the Rule of Law as that term is often understood.<sup>69</sup>

The present survey addresses the role of BITs in the FDI decision-making of corporate investors through four questions - six if one includes subparts. The goal of these questions was to measure investor attitudes and practice with respect to investment treaties generally and with regard to specific regions.

Questions 16 and 17 were designed to gauge the knowledge of respondents with respect BITs and the role of BITs in institutional FDI decision-making. In the subparts to question 17, respondents were further asked to identify the principal risks for which they look to BITs and the degree of importance which they attach to these treaties in their FDI decision-making, in particular whether the absence of a BIT had resulted in a decision not to invest in a host state or a decision to restructure an investment in order to come within the protection of a BIT.

Question 18 was designed to gauge respondents' views about the importance of the investment treaties to their decisions to invest in specific geographic regions. In this question, as in question 16, respondents were asked to indicate the degree of importance along a sliding scale of 1 to 5, with 5 indicating 'essential - will not invest without' and 1 indicating 'not at all important.' The reason for providing explanatory notes for the polar ends of the spectrum was to attempt to gauge not only the relative intensity of respondents' views but also to attach a measure of practical meaning about respondents' actual behavior with respect to the highest level of intensity: 'essential – will not invest without.'

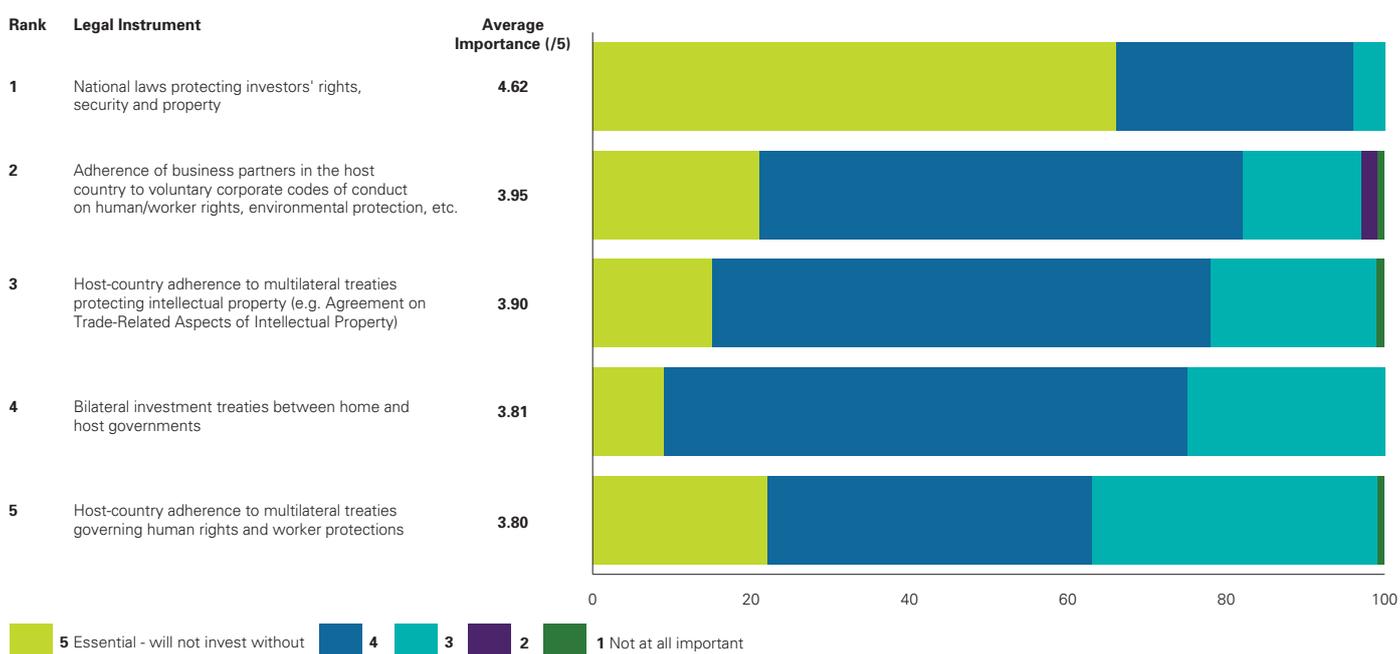
Question 19 attempted to measure respondents' views about the effectiveness of BITs in achieving protection of foreign investment. Here again the question was constructed not only to gather an aggregate measure of effectiveness but also to measure perceptions of effectiveness in individual regions.

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<sup>69</sup> As noted above, there is a wealth of econometric analysis of the relationship between economic growth and 'the Rule of Law.' A fundamental problem which has emerged in these studies has been conceptualizing the Rule of Law. As Tamanaha has observed, in these studies 'the Rule of Law is usually identified with property rights, contract enforcement, low crime rates, minimal corruption, independent judiciaries, legal formalism, and legal limits on government officials, while broader versions include democracy, human rights, and welfare rights.' Brian Z Tamanaha, 'The Primacy of Society and the Failures of Law and Development' (2011) 44 *Cornell International Law Journal* 209, 228. In light of the wide variations of conceptualizations across studies, a recent analysis of eleven leading cross-country 'Rule of Law' datasets (collected on the basis of different conceptualisations of the Rule of Law), came to the conclusion that 'findings with respect to the Rule of Law and economic growth are likely to be highly sensitive to the use of indicator.' Stephan Haggard and Lydia Tiede, 'The Rule of Law and Economic Growth: Where are We?' (2011) 39 *World Development* 673, 677.

**Table 17 – Importance of various legal instruments to FDI decisions**

**On a scale of 1 to 5, indicate the degree of importance to your FDI decisions of each of the following types of legal instruments:**



### 3.4 The importance of BITs

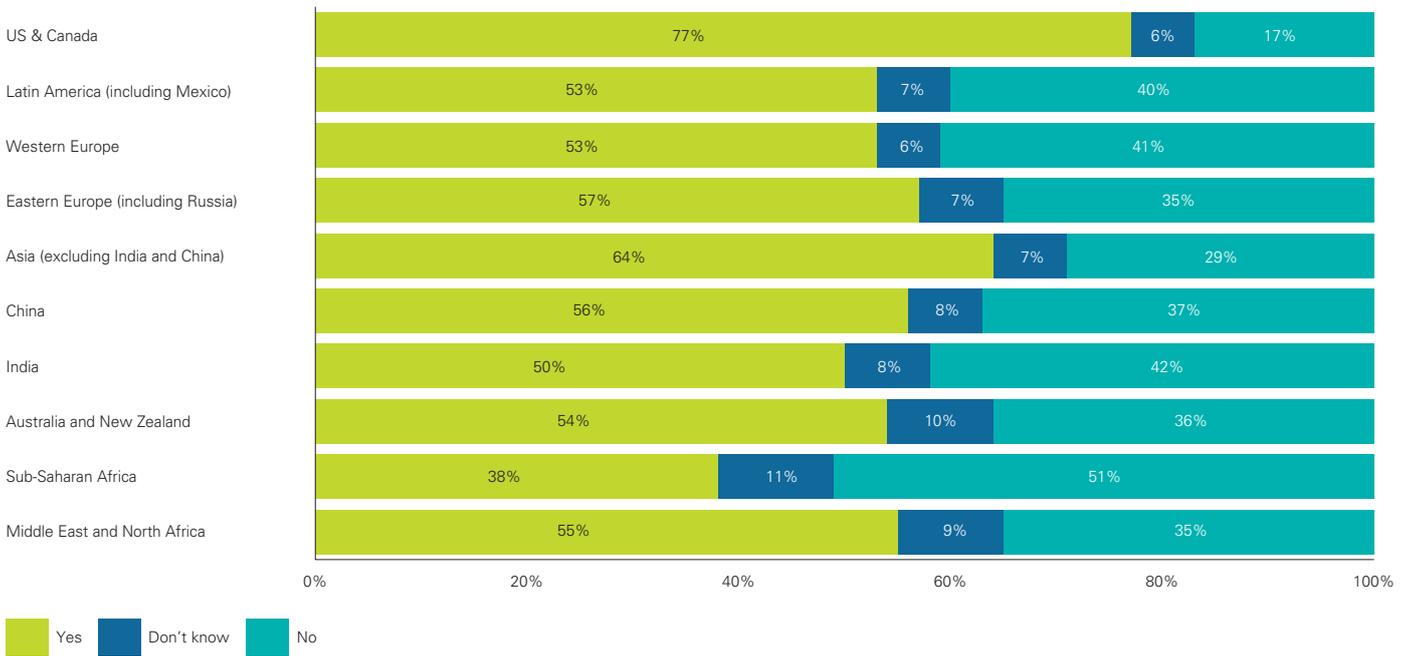
Survey responses clarified that, while the existence of investment treaty protection with the host country is a factor generally taken into account in FDI decisions, other applicable legal regimes are frequently regarded as more important factor.<sup>69</sup> Respondents were asked to indicate, on a scale of 1 to 5, the degree of importance to their FDI decisions of five types of legal instruments, with 5 being 'essential – will not invest without' and 1 being 'not important at all'.

National laws protecting investors' rights, security and property were identified as the single most important factor by far in this context (being attributed, on average, a score of 4.62/5), followed by the adherence of business partners in the host countries to voluntary corporate codes of conduct (3.95/5) and the host-country ratification of multilateral treaties protecting intellectual property rights (3.90/5). The existence of BITs was regarded as less important (3.81/5), ranking just above the host country's adherence to multilateral treaties protecting human and workers' rights (3.80/5).

<sup>69</sup> Risk and Return Survey, Question 16.

**Table 18 – Research as to existence of treaty protection**

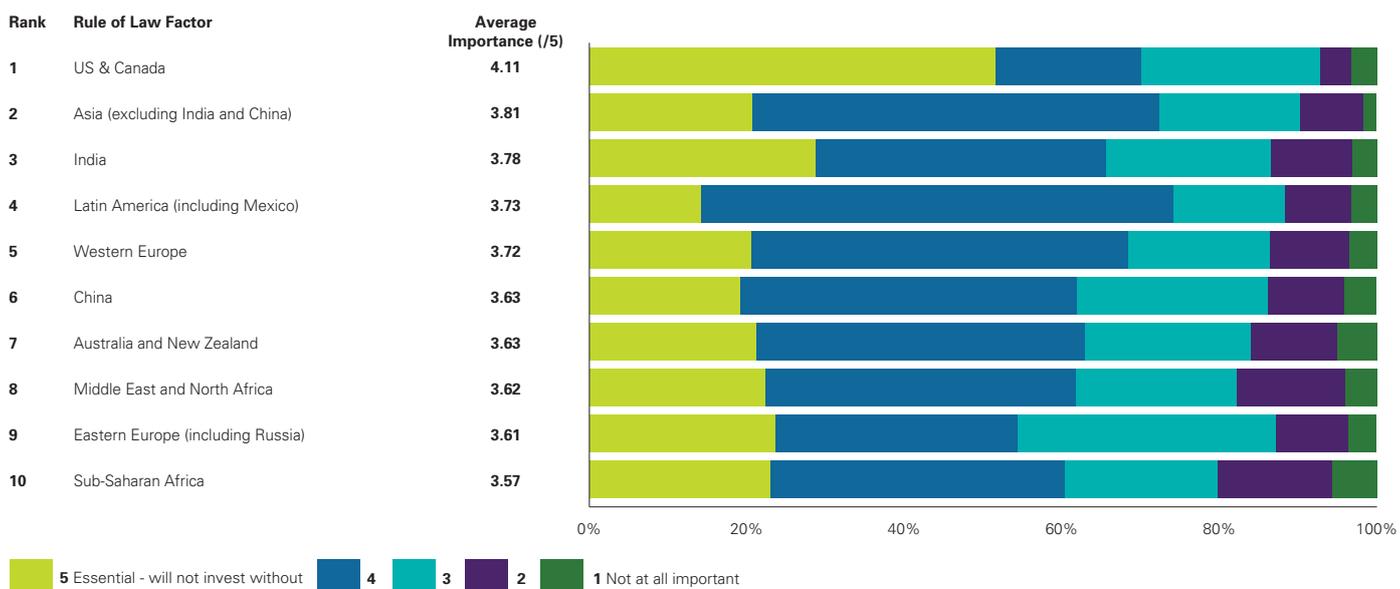
**Has your company researched whether a bilateral investment protection treaty providing for investor-state arbitration of disputes is in force between your home country and a potential host country, before making an investment in any of the following regions?**



Consistent with the situation profiled above, many respondents indicated that their company did not research whether a bilateral investment protection treaty providing for investor-state arbitration of dispute was in force with a given country before making an investment there.<sup>70</sup> This was particularly the case in respect of investment in Sub-Saharan Africa, where only 38% of respondents indicated that their companies had researched the issue. This figure was almost doubled in respect of investment in the US and Canada (where 77% of respondents researched the existence of treaty protection) and Asia (excluding China and India) (64%).

<sup>70</sup> Risk and Return Survey, Question 17.

**Table 19 – Importance of BITs to FDI decision-making in each region**



Respondents were also asked about the importance of the existence of investment protection treaties to their companies’ decision to invest in specific regions.<sup>71</sup> Replies indicated that the existence of investment protection appears to be regarded as most important in connection with investment in the US and Canada (4.11/5), followed by Asia (excluding India and China) (3.81/5) and India (3.78/5). The responses also indicated that such protection was deemed relatively unimportant to FDI decision-making relating to Sub-Saharan Africa (3.57/5), Eastern Europe (including Russia) (3.61/5) and the Middle East and North Africa region (3.62/5).

<sup>71</sup> Risk and Return Survey, Question 18.

That investors regard BIT protection as more important in the US and Canada than in Eastern Europe or Sub-Saharan Africa was probably one of the most striking results of the survey. Looking behind these figures, however, one piece of data appears particularly remarkable: of the 155 respondents who stated that the existence of a BIT with the US and Canada was ‘essential’ and that they would not invest in the region without it, 96 indicated (in response to a separate question) that they actually hold investments in the US and Canada. And of those 96 respondents, 35 were respondents from companies headquartered in Western European states that have not concluded any bilateral or multilateral investment treaties with either the US or Canada. How then to explain this apparent contradiction? We see respondents on the one hand stating that a BIT with the US or Canada is ‘essential’ and that they ‘would not invest without’ such a treaty, and evidence on the other hand that many of those respondents had in fact already made an investment in the US or Canada, ostensibly without the protection of a BIT.

Respondent confusion is, of course, always a possibility. In this instance, however, it seems unlikely. The questions were clearly phrased and the highest possible response on the 1 to 5 scale was expressly (and repeatedly) defined as denoting ‘essential – will not invest without.’ A second possibility is that respondents have intentionally not answered the question as it was asked. In the absence of qualitative follow-up interviews with respondents, which were not possible under the structure of the European Intelligence Unit’s survey, one can only speculate. A reasonable possibility, however, may be that certain respondents, particularly those located in Europe, answered this question in a way that might be described as ‘aspirational.’

The survey was fielded in September-October 2014, at a time of increasingly polarized and public debate in Europe about the possibility of the European Union concluding treaties containing investment disciplines with both the United States and Canada.<sup>73</sup> One may speculate that some European respondents answered this question in a way which reflected their preferences, rather than their actual behaviour. In the alternative, it remains possible that respondents sincerely believed that BITs with the US and Canada are in existence when, in fact, they are not.

Responses to other questions indicated that the importance attributed by investors to the existence of BITs also appears to vary depending on the industry sector in which they operate. For instance, financial services companies attributed highest importance to the existence of BITs with host countries than companies in any other sector, followed by respondents operating in the energy and natural resources sector. The industry sectors in which BITs were regarded, on average, as least important were the healthcare, pharmaceutical and biotechnology sector, the transport and logistics sector and the information industries and telecoms sector. The attitudes of respondents in the financial sector are particularly interesting. Unique among all other sectors of investment, in many BITs and investment chapters of free trade agreements, investments in financial services are often subject to specialized rules with respect to standards of protection and mechanisms for dispute resolution.<sup>74</sup>

<sup>73</sup> For example, between 27 March and 13 July 2014 the European Commission held an unprecedented public consultation on a prospective Transatlantic Trade and Investment Partnership (TTIP) with the United States. In response, the European Commission received comments from over 150,000 individuals and bodies. See European Commission Staff Working Document, Report, Online public consultation on investment protection and investor-to-state dispute settlement (ISDS) in the Transatlantic Trade and Investment Partnership Agreement (TTIP), SWD(2015) 3 final (13 Jan. 2015).

<sup>74</sup> There is, of course, also the Energy Charter Treaty, which specifically addresses, among other things, investments in the energy sector. This is a relatively limited agreement, however, largely confined to application among European states.

**Table 20 – Importance of BITs by industry sector**

Industry Sector (No. of Respondents)	Average Importance of BITs (/5)										Average all regions
	US & Canada	Latin America	Western Europe	Eastern Europe	Asia	China	India	Oceania	Sub-Saharan Africa	Middle East & North Africa	
<b>Financial Services (53)</b>	4.7	4.1	4.1	3.8	4.1	4.0	4.1	4.2	3.9	4.0	<b>4.1</b>
<b>Energy &amp; Natural Resources (45)</b>	4.3	3.8	3.8	3.8	3.9	3.8	3.8	3.8	3.9	3.8	<b>3.9</b>
<b>Consumer Goods &amp; Retailing (20)</b>	4.1	3.9	3.7	3.6	3.8	3.9	4.0	3.6	3.6	3.7	<b>3.8</b>
<b>Automotive, Chemical &amp; Manufacturing (34)</b>	3.6	3.8	3.6	3.7	3.8	3.7	3.9	3.4	3.5	3.6	<b>3.7</b>
<b>Construction &amp; Real Estate (12)</b>	4.1	3.5	3.8	3.6	3.7	3.1	3.7	3.5	3.7	3.8	<b>3.7</b>
<b>Information Industries &amp; Telecoms (48)</b>	4.1	3.5	3.6	3.6	3.9	3.4	3.5	3.5	3.6	3.6	<b>3.6</b>
<b>Transportation &amp; Logistics (21)</b>	3.8	4.0	3.5	3.4	3.8	3.8	3.7	3.4	3.5	3.3	<b>3.6</b>
<b>Healthcare, Pharma &amp; Biotechnology (45)</b>	4.0	3.3	3.6	3.3	3.6	3.3	3.5	3.3	3.0	3.1	<b>3.4</b>
<b>Other (9)</b>	3.1	3.8	3.3	3.4	3.1	3.4	3.4	3.1	3.4	3.3	<b>3.3</b>

Finally, the survey sought to ascertain which Rule of Law concerns in host states respondents look for BITs to address.<sup>75</sup> Most respondents referred to lack of transparency of the regulatory and legal rule-making process (42.9%), arbitrary or discriminatory treatment by the host state governments (38.5%) and lack of independent and impartial courts (35.9%). At the bottom end, only 8.6% of respondents indicated that they looked to BITs for protection from uncompensated expropriations.<sup>76</sup>

<sup>75</sup> Risk and Return Survey, Question 17a.

<sup>76</sup> Concerns about uncompensated expropriations were a principal driver of the development of BITs by capital-exporting states in 1960s. In the modern BIT era, however, incidents of outright expropriation by states have become rare and BIT protection for so-called 'indirect expropriation' has been sharply limited in arbitral jurisprudence.

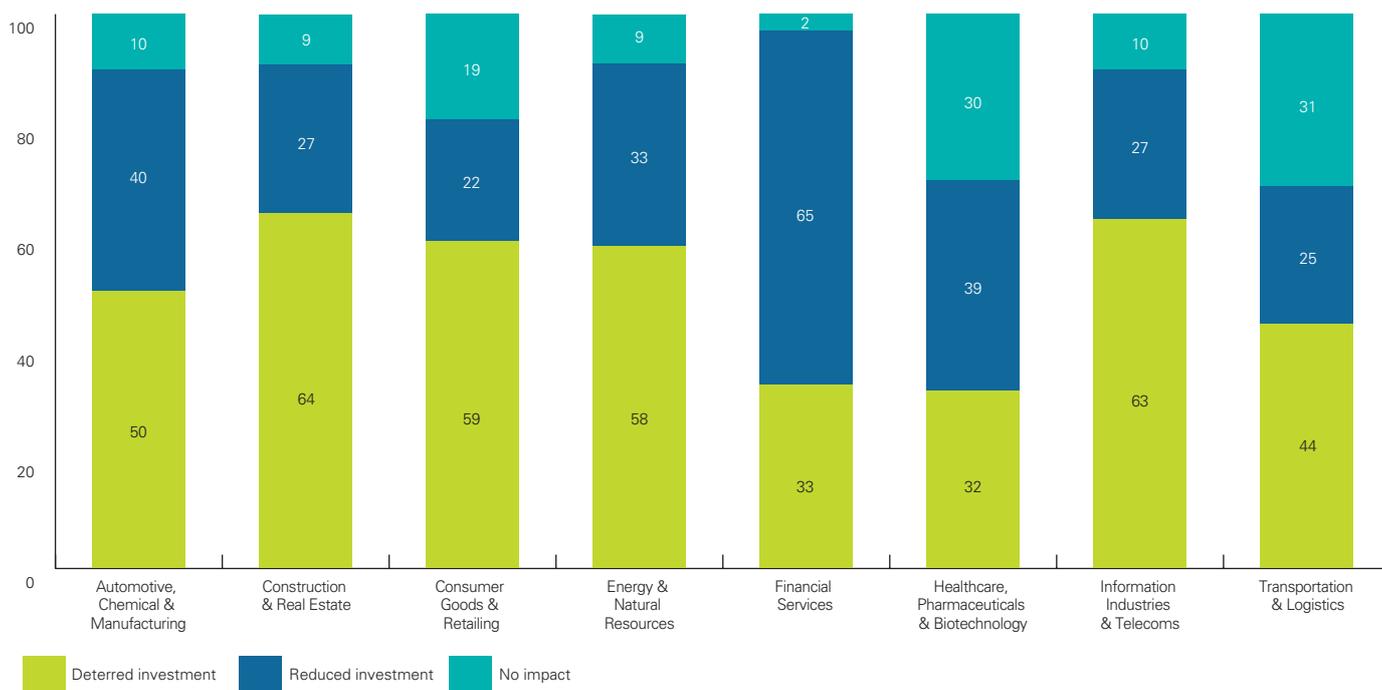
Breaking down this data based on the respondent company's HQ region, we note that companies from the Americas, Europe and Asia look to BITs to address lack of transparency of regulatory and legal rule-making processes in host states, which as we saw earlier were the most prevalent Rule of Law issues faced in those regions, but Asian companies also refer to the lack of

recognition of IP rights. Companies from Africa and the Middle East seem particularly concerned with the risk of arbitrary or discriminatory treatment by host state governments, while companies headquartered in Oceania look to BITs to address political and social instability as well as the lack of recognition of IP rights.

**Table 21 – Concerns sought to be address by BITs by HQ region**

Concern to be addressed	HQ Region	Americas (126)	Europe (101)	Asia (43)	Africa & Middle East (16)	Oceania (15)	Total (301)
<b>Lack of transparency of regulatory/legal rule-making processes</b>		42.1%	46.5%	46.5%	31.3%	26.7%	<b>42.9%</b>
<b>Arbitrary or discriminatory treatment by host country government</b>		38.1%	34.7%	44.2%	50.0%	40.0%	<b>38.5%</b>
<b>Lack of independent and impartial courts in host country</b>		38.1%	37.6%	27.9%	37.5%	26.7%	<b>35.9%</b>
<b>Political or social instability</b>		34.9%	29.7%	16.3%	37.5%	53.3%	<b>31.6%</b>
<b>Lack of recognition of intellectual property rights</b>		30.2%	20.8%	48.8%	25.0%	53.3%	<b>30.6%</b>
<b>Lack of recognition of contract rights</b>		31.7%	28.7%	27.9%	18.8%	26.7%	<b>29.2%</b>
<b>Unexpected and/or retrospective changes to regulatory/legal measures</b>		28.6%	21.8%	27.9%	6.3%	26.7%	<b>24.9%</b>
<b>Risk of physical security of in-country personnel</b>		13.5%	11.9%	20.9%	31.3%	26.7%	<b>15.6%</b>
<b>Corruption (public or private)</b>		8.7%	14.9%	2.3%	12.5%	6.7%	<b>10.0%</b>
<b>Risk of expropriation of investment without adequate compensation</b>		9.5%	10.9%	4.7%	0.0%	6.7%	<b>8.6%</b>
<b>Poor human rights conditions in host country</b>		4.0%	3.0%	2.3%	0.0%	0.0%	<b>3.0%</b>
<b>Non-democratic character of host country government</b>		1.6%	0.0%	2.3%	6.3%	0.0%	<b>1.3%</b>
<b>None of these concerns</b>		1.6%	2.0%	2.3%	0.0%	0.0%	<b>1.7%</b>

**Table 22 – Effect of absence of investment treaty protection by industry sector**



**3.5 Impact of absence of BITs on investment**

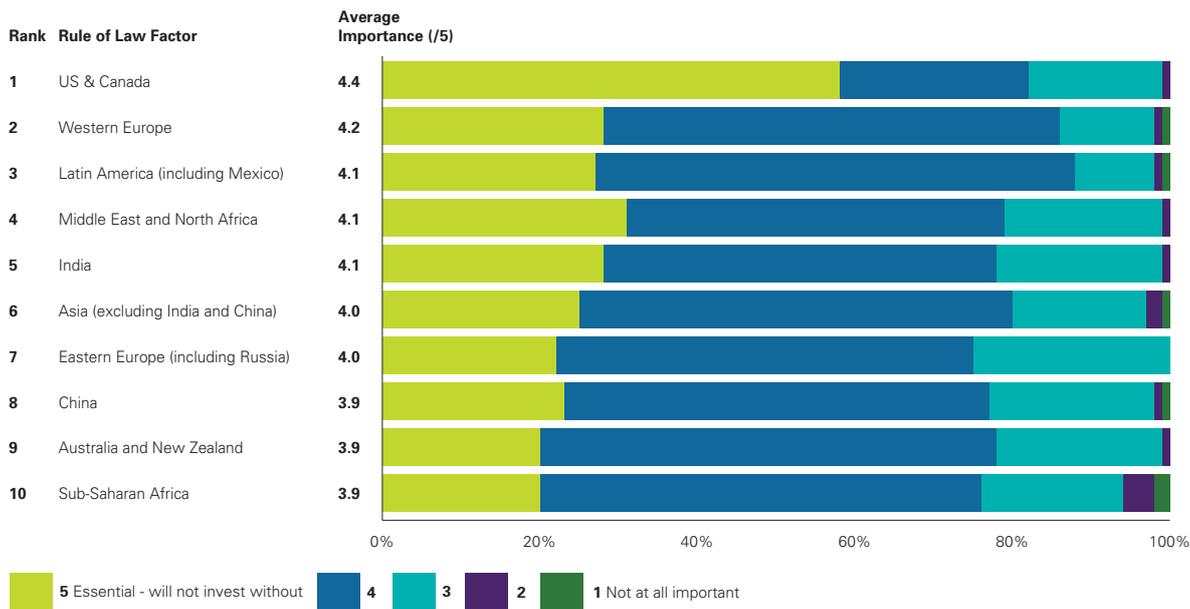
Survey respondents were asked how, if at all, the absence of any investment protection treaty in force between their home state and a state in which they were considering investing affected their decision to make that investment.<sup>77</sup> 83% of respondents confirmed that this did affect their decision: for 47% of them, the absence of a treaty deterred an investment they were considering, while the remaining 36% were prompted to reduce the size of the existing or planned investment. Only 14% of respondents stated that the absence of an investment treaty had no impact on their investment decision, while 3% indicated that the issue was ‘not applicable’, either because they found BITs in all the host states they considered for investment or because they structured their investment in such a way as to be covered by an investment treaty between the host state and another state.

These responses are of particular interest, especially to states which are considering changes to their investment treaty policies. At the same time, however, the contradictory answers received in response to Question 18 (see 3.4 above) cast a long shadow. In that instance, cross-tabulation of respondents’ answers indicated that while many respondents claimed that BITs were “essential” for them to consider investing in particular regions, in fact their answers to other questions showed that they had indeed made investments in those regions even though no BITs were present. This contradiction raises an issue generally about respondent motivation and accuracy in answering these questions about BITs and their role in FDI decision-making. Ideally, this uncertainty would have been addressed by follow-up interviews; unfortunately, however, due to the structure of the administration of the survey, no such interviews were possible. It remains a point for further inquiry and investigation.

77 Risk and Return Survey, Question 17b.

**Table 23 – Effectiveness of BITs to FDI decision-making in each region**

**On a scale of 1 to 5, please indicate how effective bilateral investment protection agreements are in addressing your company’s concern about the Rule of Law in the following regions:**



Regardless of these concerns about the motivation and accuracy of respondents’ answers to these questions, once again it seems that respondents’ reaction varied depending on their industry sector. Companies in the healthcare, pharmaceuticals and biotechnology sector and the transportation and logistics sector appeared to be less concerned by the absence of investment treaty protection, with 30% and 31% of respondents in those sectors (respectively) stating that this did not affect their decision to invest in a given state. By contrast, only 2% of the financial services respondents indicated that the absence of BITs had ‘no effect’. Respondents in the construction and real estate sector and the information industry and telecoms sector reacted more strongly to the absence of protection, with 64% and 63% of respondents respectively stating that this deterred them from investing in the relevant state.

**3.6 Perceived effectiveness of BITs**

Respondents were asked to indicate how effective they considered bilateral investment protection agreements were in addressing their companies’ concerns about the Rule of Law in each region, by assigning a grade of 1 to 5 with 5 meaning ‘very effective’ and 1 meaning ‘not at all effective’.<sup>78</sup> In only one region did a majority of respondents indicate that they believed a BIT would be ‘very effective’ in addressing Rule of Law concerns: the US and Canada (57%). While respondents indicated that BITs were effective in other regions, the strength of response with respect to the US and Canada is noteworthy. The United States and Canada have been respondents in over two dozen investor-state claims brought under the investment chapter of the North American Free Trade Agreement. While the United States has not lost any of the cases brought against it, Canada has. In all of those lost cases, however, Canada has paid the compensation ordered by the arbitral tribunal, which, to the extent that respondents will have had this information, would suggest reasons to be confident about Canada’s likely future conduct.

<sup>78</sup> Risk and Return Survey, Question 19.

## 4. ADDITIONAL ASPECTS OF RULE OF LAW RISK MITIGATION

### 4.1 International instruments of Rule of Law mitigation other than BITs

#### a. Other treaties relevant to investment decisions

In addition to BITs, many states are also parties to international treaties addressing human rights and labor rights. In addition to the treaties comprising what has come to be known as the International Bill of Human Rights (which consists of the Universal Declaration of Human Rights, the International Covenant on Economic, Social and Cultural Rights, and the International Covenant on Civil and Political Rights, together with its two Optional Protocols), there are currently seven further core international human rights treaties at the UN level.<sup>79</sup> Beyond these treaties, a variety of other international human rights instruments have been concluded by states, such as the conventions of the International Labor Organization covering matters fundamental to the rights of human beings at work,<sup>80</sup> as well as regional human rights conventions.

These treaties impose obligations on states with respect to their treatment of persons within their jurisdiction (and, in some cases, beyond). Previous attempts to place comparable, binding obligations on corporate actors have been unsuccessful. In 2004, for example, the Sub-commission of the then UN Commission on Human Rights produced a set of 'Draft Norms on the Responsibilities of Transnational Corporations and Other Business Enterprises with Regard to Human Rights'. The Norms essentially sought to impose obligations under international human rights law directly on companies. The Commission on Human Rights declined, however, to adopt the document, but requested the UN Secretary-General appoint a Special Representative with the goal of clarifying the roles and responsibilities of states, companies and other social actors in relation to human rights in the business context.

In 2005, then UN Secretary-General Kofi Annan appointed Harvard Professor John Ruggie as his Special Representative on Business and Human Rights. In June 2008, Ruggie presented the 'Protect, Respect and Remedy' Framework, which rests on three pillars: the state duty to protect against human rights abuses by third parties, including business, through appropriate policies, regulation, and adjudication; the corporate responsibility to respect human rights, which means to act with due diligence to avoid infringing on the rights of others and to address adverse impacts that occur; and greater access by victims to effective remedies, both judicial and non-judicial. The framework was unanimously welcomed by the Human Rights Council, which also extended the Special Representative's mandate until 2011 with the task of 'operationalizing' and 'promoting' it. On 15 June 2011, the Council endorsed the United Nations Guiding Principles on Business and Human Rights (the UNGPs). Promotion of the Rule of Law underpins the UNGPs and has been identified by the United Nations as a key objective for UN policy.

#### b. Relationship between these instruments and FDI

The relationship between FDI and human rights has been explored in literature but remains uncertain.<sup>81</sup> According to one school of thought, the 'conventional wisdom' has been that human rights repression can make a country more attractive to foreign investors.<sup>82</sup>

<sup>79</sup> International Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Elimination of All Forms of Discrimination against Women, Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Convention on the Rights of the Child, International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, Convention on the Rights of Persons with Disabilities and International Convention for the Protection of All Persons from Enforced Disappearance.

<sup>80</sup> See ILO Declaration on Fundamental Principles and Rights at Work and its Follow-up, adopted by the International Labor Conference at its Eighty-sixth Session, Geneva, 18 June 1998 (Annex revised 15 June 2010).

<sup>81</sup> See for example H.A. Khan and K.C. Vadlamannati, 'FDI and Human Rights: Is there a connection? A Panel Analysis of US FDI in Africa' (2010), p.2 (describing the relationship as 'controversial').

<sup>82</sup> For a discussion of the conventional wisdom see 'What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment', Blanton and Blanton 2006, page 144.

Others, however, have taken a different view. Building upon the economic theory of key commercial FDI drivers – using ownership of a specific advantage (e.g. a technology) to produce abroad; securing access to a specific advantage located abroad (e.g. a natural resource, a new market or cheaper labor); and internalizing production or services which take place overseas<sup>83</sup> – some have posited that the human rights performance of host countries can be considered as an important location factor.<sup>84</sup> The potential risk of a poor human rights regime is political instability and political risk. This can lead to uncertainty in the minds of potential foreign investors and can ultimately increase expropriation risk.<sup>85</sup> Certain econometric studies also suggest that states that wish to attract FDI should adhere to human rights treaties, in particular to ensure that sufficient human capital is available. For countries with a (actual or perceived) unsatisfactory human rights records, their participation in the treaties will help lower the reputational risk linked to investment for multinational enterprises and encourage FDI.<sup>86</sup> Indeed, a study carried out by Blanton and Blanton in 2006 found that developing countries that respect human rights are more successful in attracting foreign direct investment than those characterized by abusive human rights practices.<sup>87</sup>

In addition to exploring the link between FDI and human rights, the literature also has considered the impact of labor or employment rights on FDI, although here the results are mixed. On the one hand, Kucera's research indicates that countries in which the workforce is protected according to international standards experience 'improvements in productivity and economic performance'.<sup>88</sup> Other studies, however, that examine the effects of hiring, firing and work hour regulations on FDI find that more stringent employment regulations have negatively impacted FDI. For example, studies of OECD-member countries<sup>89</sup> suggest that strong labor protection discourages FDI. This brief overview of the literature suggests that while the relationship between FDI and human rights is complex, the 'conventional wisdom' does not necessarily stand: multinationals do not necessarily seek to invest in countries with poor human rights records. Put more broadly, as our survey indicates, there is a clear connection between Rule of Law (including human rights conditions in the host country) and FDI.

## 4.2 Nature and scope of Voluntary Codes of Conduct

Over the last 20 years or so, voluntary codes of conduct have emerged in close connection with the increasing globalization of the world economy and the simultaneous development of the concept of corporate social responsibility. Corporate responsibility standards have emerged in three principal ways: first, via voluntary codes of conduct adopted by companies themselves; second, via collective industry initiatives, such as the International Council for Mining and Metals or the Kimberly Process; and, finally, via multi-lateral initiatives via the UN or regional bodies such as the OECD.

83 J Dunning, 'Explaining International Production', 1988 (London: Unwin Hyman) ch. 12; J Dunning, 'Multinational enterprises and the global economy', 1993 (Wokingham: Addison Wesley) 79-80. Although the ownership, location, and internalization (OLI) model developed by John Dunning in the late 1980s has been subsequently complemented and refined by other studies (see for example P J Buckley and M Casson, 'The future of the Multinational Enterprise', 1991 (London: Macmillan, revised 2nd edition with new introduction) 2; M Y Yoshino and U Srinivasa Rangan, 'Strategic Alliances: An entrepreneurial Approach to globalization', 1995 (Harvard: Harvard Business School Press); J Dunning, 'Alliance Capitalism and global Business', 1997 (London and New York: Routledge) ch. 3), it still provides a good paradigmatic explanation of why firms invest abroad.

84 See FDI and Human Rights: Is there a connection? A Panel Analysis of US FDI in Africa' (2010), Haider A. Khan and Krishna Chaitanya Vadlamannati, page 4.

85 Henisz, Witold J, 2000. 'The Institutional Environment for Multinational Investment,' *Journal of Law, Economics and Organization*, Oxford University Press, vol. 16(2), pages 334-64, October.

86 See for example, S. Blanton and R. Blanton. 'Human Rights and Foreign Direct Investment: A Two-Stage Analysis.' *Business and Society*, Vol. 45, No. 4 (2006); S. Blanton and R. Blanton. 'What Attracts Foreign Investors? An Examination of Human Rights and Foreign Direct Investment.' *Journal of Politics*, Vol., 69, No. 1 (2007); and A. C. Garriga, 'Do Human Rights Regimes Affect FDI in Developing Countries' (2013).

87 'S. Blanton and R. Blanton. 'Human Rights and Foreign Direct Investment: A Two-Stage Analysis.' *Business and Society*, Vol. 45, No. 4 (2006). This study examines FDI inflows to all non-OECD countries during 1980-2003. To measure human rights repression, the authors used a scale that measures a country's respect for personal integrity rights (detention, imprisonment, torture, and political murder). The authors found that countries that respect human rights receive higher FDI inflows.

88 ILO, The benefits of International Labor Standards, retrieved from <http://www.ilo.org/global/standards/introduction-to-international-labor-standards/the-benefits-of-international-labor-standards/lang-en/index.htm> on 13 February 2015. See also D. Kucera: 'Core labor standards and foreign direct investment', in *International Labor Review*, Vol. 141, No. 1-2 (2002), p.63

89 W. Olney, 'A race to the bottom? Employment protection and foreign direct investment.' *Journal of International Economics* 91 (2013). This study examines FDI inflows to 26 OECD countries during 1985-2007. The author used the OECD's composite index of employment protection rules to measure hiring and firing standards and U.S. affiliates' sales within those OECD countries to measure FDI. The author acknowledged that by using the OECD index, he can't extrapolate the results to developing countries.

With respect to company-driven instruments, US companies began adopting their own corporate codes of conduct in the early 1990s, and the practice spread to Europe and the United Kingdom in the mid-1990s. A survey in September 2006 found that:

*The leading global companies report having core elements of human rights policies or management practices in place. They encompass a spectrum of rights, are generally informed by international human rights instruments, exhibit relatively systematic patterns across countries and regions, and include several basic voluntary accountability mechanisms.*<sup>90</sup>

A further study in December 2006<sup>91</sup> found that labor rights enjoy greater business recognition than any other human right,<sup>92</sup> while non-labor rights were less recognized.<sup>93</sup> The study also addressed collective initiatives by business organisations, such as the International Council for Mining and Metals, and found that those examined initiatives placed a greater emphasis on freedom of movement and minority rights to culture.

Both these studies were conducted as part of the mandate leading to the UNGPs, which constitute the most comprehensive and authoritative global standard in the area of business and human rights. Since their adoption, the UNGPs have been implemented through various networks, including the OECD Guidelines for Multinational Enterprises.

The OECD Guidelines are recommendations addressed by governments to multinational corporations operating in or from OECD-member countries. They set 'non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards'. Their latest update (dating 2011) includes a section dedicated to business and human rights issues, which is presented as drawing upon the UN Framework 'Protect, Respect and Remedy' and being aligned with the UNGPs. The Guidelines remain of relevance to multinationals alongside the UNGPs.

In addition to the above, in connection with labor rights, the International Labor Organization Declaration on Rights at Work was adopted early in 1998. It is presented by ILO as an 'expression of commitment by governments, employers' and workers' organizations to uphold basic human values'. This declaration contains four fundamental policies that are deemed universally applicable (including the end of forced and compulsory labor and the abolition of child labor).

### 4.3 Subscription to Codes of Conduct

The vast majority of respondents indicated that their company subscribed to one or more of the voluntary corporate codes of conduct on labor and human rights practices described above. At least 85% of the surveyed companies signed up to the 2000 OECD Guidelines for Multinational Enterprises, 47% to the 1998 ILO Declaration on Rights at Work and 73% to the 2011 UN Guiding Principles on Business or Ruggie Principles. Over 90% of respondents indicated that their company had subscribed to at least one such instrument. Given the level of activity at the international level since the adoption of the UNGPs this is not entirely unexpected data. But it does serve to emphasize the impact of both the international standards as well as the wider risks, reputational and otherwise, that corporations have faced in recent years as a result of various social compliance mechanisms in relation to human rights, including NGO-led campaigns, lawsuits and other forms of pressure.

<sup>90</sup> Human Rights Policies and Management Practices Offortune Global 500 Firms: Results of a Survey Conducted by John G. Ruggie, Harvard University and UN Secretary-General's Special Representative for Business & Human Rights, 1 September 2006 <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Ruggie-survey-Fortune-Global-500.pdf>

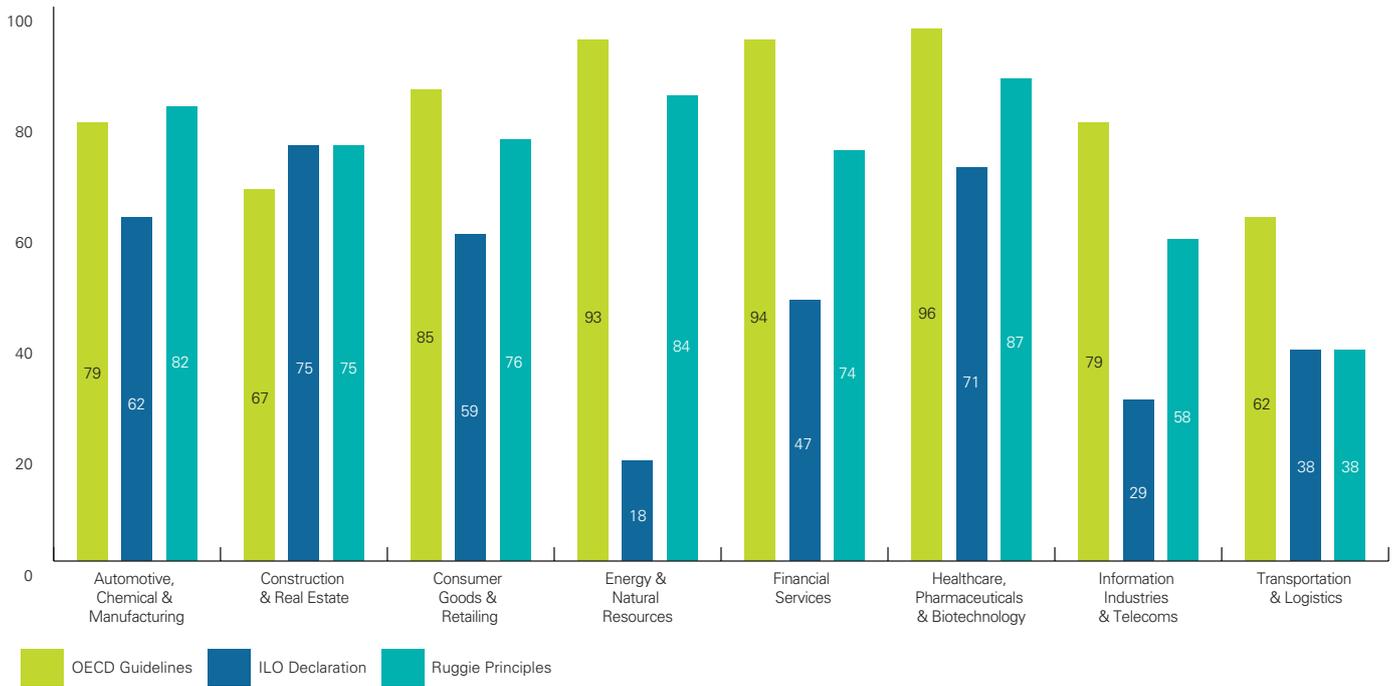
<sup>91</sup> Business Recognition of Human Rights: Global Patterns, Regional and Sectoral Variations a study conducted under the direction of John G. Ruggie Harvard University and UN Secretary-General's Special Representative for Business and Human Rights by Michael Wright & Amy Lehr <http://www.reports-and-materials.org/sites/default/files/reports-and-materials/Business-Recognition-of-Human-Rights-12-Dec-2006.pdf>

<sup>92</sup> Id, 40% of European companies referenced the ILO, North America comes second, referencing the ILO at a rate of 25 percent. In contrast, only 7 percent of companies from Latin America, and 6 percent from Asia and the Pacific mention ILO standards. Three of the five African companies in the sample also reference the ILO.

<sup>93</sup> Id, 'At just under 20 percent, the right to privacy receives the widest support by companies, followed by security of the person, including freedom from torture and cruel, inhuman, or degrading treatment.'

<sup>94</sup> <http://www.oecd.org/daf/inv/mne/48004323.pdf>.

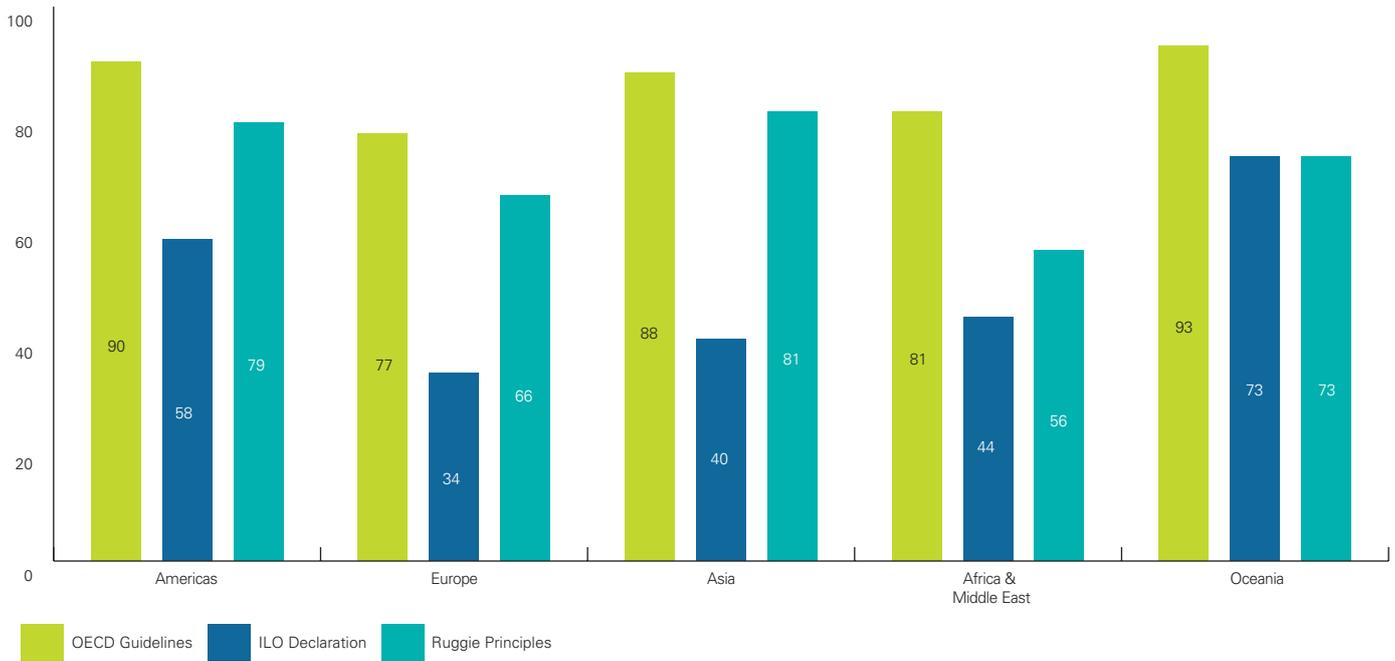
**Table 24 – Adherence to voluntary corporate codes of conduct by sector**



The OECD Guidelines was the instrument to which most companies subscribed in all industry sectors, except the automotive, chemical and manufacturing sector and the construction and real estate sector.<sup>95</sup> Looking at variances from a sectorial perspective, the low levels of adherence to the ILO Declaration on Rights at Work in the energy and natural resources sector (18%) and the information, industries and telecoms sector (29%) is particularly striking. This should be considered in context of UNGPs, which have been more widely accepted by survey respondents in the energy and natural resources sector, and whose Principle 12 states that the responsibility of business enterprises to respect human rights refers to internationally recognized human rights - understood, at a minimum, as those expressed in the International Bill of Human Rights and the principles concerning fundamental rights set out in the International Labor Organization’s Declaration on Fundamental Principles and Rights at Work.

<sup>95</sup> Risk and Return Survey, Question 13.

**Table 25 – Adherence to voluntary corporate codes of conduct by HQ region**

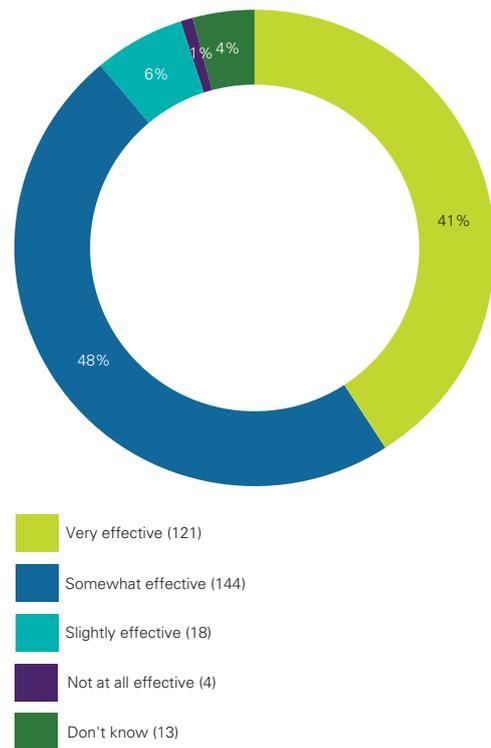


As to the different attitude to corporate codes of conduct in various geographical regions, the 2000 OECD Guidelines proved the most popular instrument across the board. Companies headquartered in Oceania and in the Americas had the highest level of adherence to the three above-mentioned codes of conduct, whereas Europe (which includes both Western and Eastern European states, including Russia), Africa and the Middle East had lower subscription rates. In particular, only 34% of European, 40% of Asian and 44% of African and Middle Eastern companies adopted the ILO declaration (against 73% of respondents with headquarters in Oceania).

**4.4 Perceived effectiveness of Codes of Conduct**

Respondents were also asked to indicate how effective they considered corporate codes of conduct in improving the Rule of Law conditions in host countries, by assigning a grade of 1 to 5 with 5 meaning 'very effective' and 1 meaning 'not at all effective'.<sup>96</sup> An overwhelming majority of respondents indicated that such codes were either 'very effective' (41%) or 'somewhat effective' (48%), while 6% regarded them as 'slightly effective' and 1% as 'not at all effective'.

**Table 26 – Effectiveness of Codes of Conduct**



The survey findings in relation to voluntary codes of conduct reflect the post-UNGPs context in which our clients operate. In particular, not only does a responsible corporate citizen subscribe to them itself, but it increasingly looks to its partners and suppliers to do so too – a trend that will continue.

*Julianne Hughes-Jennett, Partner  
Hogan Lovells, London*

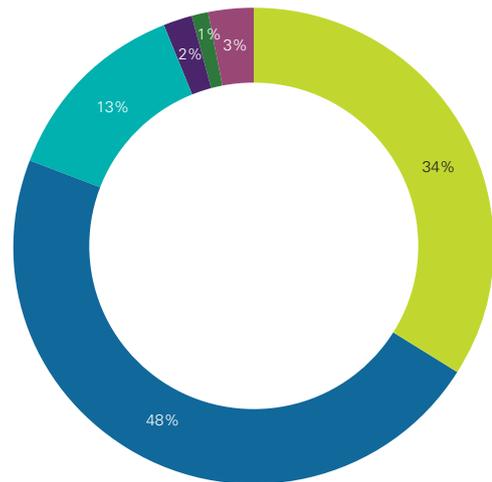


### 4.5 Importance of adherence to Codes of Conduct by suppliers or business partners

One of our questions focused on the impact of voluntary corporate codes of conduct in the selection of business partners and suppliers in host countries. In particular, it asked respondents to indicate how important the potential partner’s or supplier’s subscription to codes of conduct was in that selection process.

Some 48% of respondents stated that this was a ‘somewhat important’ factor, while 34% regarded it as ‘very important’. The remaining respondents indicated that it was either ‘slightly important’ (13%) or ‘not a factor’ (2%).

**Table 27 – Importance of adherence to codes of conduct by business partners**



- Very important (101)
- Somewhat important (143)
- Slightly important (38)
- Not a factor (5)
- Not applicable (4)
- Don't know (10)

## 5. CONCLUSION: STRATEGIES FOR STATES AND INVESTORS

### 5.1 The way forward

The survey outcomes confirm that a strong Rule of Law framework is key for host countries maintaining FDI in their territories, and encouraging further investment. Survey respondents were asked to identify the most important steps to improve Rule of Law conditions to be taken by countries in which they operate.<sup>97</sup> Across all respondents, the adoption of stronger domestic laws for the enforcement of investor rights (including IP rights) and laws guarding against expropriation was selected more often than any other potential step (52% of respondents). Running a close second (45%) was better training for members of the judiciary, legal profession, and security services. With respect to other potential steps, some proved especially popular with respondents from particular geographical regions. For instance, respondents headquartered in Asia referred to increased political and social stability far more often (49%) than respondents located elsewhere. Likewise, respondents from Africa and the Middle East placed greater importance on adherence to international agreements and standards on human rights and corruption (56%), than respondents for other regions. For respondents headquartered in Oceania, improved transparency of the legal and administrative rule-making process was the most often cited step (53%), although generally speaking improved transparency found significant support across respondents globally. Lastly, the adoption of bilateral investment treaties fell just above the median response level, with 34% of respondents globally indicating their preference that states adopt additional BITs.

“

Judicial training is a critical factor for the promotion of the Rule of Law and is essential for the development of a legal/regulatory framework that complements FDI.

*Dr Victoria Jennett,  
Judicial Integrity and Corruption Expert*

”

<sup>97</sup> Risk and Return Survey, Question 12.

Table 28 – Steps to improve Rule of Law situation by HQ region

Step	HQ Region	Americas (126)	Europe (101)	Asia (43)	Africa & Middle East (16)	Oceania (15)	Total (301)
<b>Stronger laws for the enforcement of investor rights, including IP rights, and laws guarding against expropriation</b>		52%	51%	56%	63%	33%	<b>52%</b>
<b>Better trained judiciary, police/security forces, and legal profession</b>		48%	45%	47%	38%	33%	<b>45%</b>
<b>Improved transparency in legal/administrative rule-making</b>		36%	44%	40%	19%	53%	<b>39%</b>
<b>Adoption of bilateral investment protection treaties</b>		37%	30%	33%	31%	40%	<b>34%</b>
<b>Adherence to international agreements and standards on human rights, controlling corruption, etc.</b>		29%	28%	30%	56%	40%	<b>31%</b>
<b>Increased political/social stability</b>		33%	22%	49%	31%	20%	<b>31%</b>
<b>Greater independence of the police/security forces</b>		29%	27%	21%	31%	33%	<b>28%</b>
<b>Greater independence of the judiciary</b>		16%	25%	14%	13%	13%	<b>18%</b>
<b>Adoption of democratic systems of government</b>		8%	14%	7%	6%	27%	<b>11%</b>
<b>Adherence of local business partners to internationally recognized corporate codes of conduct</b>		4%	7%	2%	13%	7%	<b>5%</b>
<b>Other</b>		2%	2%	0%	0%	0%	<b>1%</b>

## 5.2 Strategies for States and Investors

The survey findings make clear that Rule of Law conditions in host states generally matter to companies making FDI decisions, although this may vary depending on the host state, the industry sector and the location of the investor. Multinational firms engaging in FDI not only consider potential Rule of Law risks to their investments, but also have opinions regarding how private business actors and states can best address Rule of Law matters.

On the basis of the survey findings, this report suggests a number of strategies for states and investors to consider in addressing both the risks and returns relating to the Rule of Law and FDI.

### a. Strategies for States

#### i. Taking note of investor perceptions about the Rule of Law

For states seeking to attract FDI, and investors considering making it, the Rule of Law matters. The findings of this survey show that Rule of Law conditions in host states can act not only to 'pull' investment in but can also act to 'push' it away. Investor perceptions matter in this regard, and the survey responses reflect concerns from investors about particular aspects of the Rule of Law across all regions. For states in the Americas and Asia the relative frequency with which investors identified problems with lack of transparency in regulatory and legal rule-making should be a cause for reflection, as should the relatively high number of incidents reported by respondents concerning the lack of judicial independence and impartiality in the Middle East and North Africa.<sup>98</sup> Moreover, even for a state in which a relatively small number of Rule of Law incidents was reported, such as China, questions are raised because respondents identified it as the country where their most significant Rule of Law issues occurred.<sup>99</sup> No state is exempt from the need to consider the Rule of Law and to monitor investor perceptions.

#### ii. Undertaking meaningful steps for strengthening the Rule of Law in principle and person

The survey results reinforce the conclusion that there is a continuing need for states to take steps to improve their domestic Rule of Law institutions. This can be done in a number of ways, and there are lessons to be learned from the experiences of other states. For example, while the survey outcomes confirmed the importance of maintaining judicial independence and impartiality, there are multiple ways in which states can achieve this, including by ensuring that judges have adequate financial and human resources at their disposal, that they are appointed based on merit and on a permanent basis, that there are clear and transparent procedures prescribed by law for their removal, that there is sufficient oversight of judicial activities by higher courts or other public bodies, or others. Seldom does one size fit all.

Having said that, the survey results also reinforce the conclusion that adhering to the Rule of Law requires more than just establishing rules and policies. Unless state officials have the knowledge and training to carry out their duties and exercise their official discretion in a way that is cognizant of the requirements of the Rule of Law, formal rules and policies have little effect. As was noted by 45% of respondents globally, ensuring and improving the training for members of the judiciary, the legal profession, and police and security forces, is a concrete and essential step for states to take in order to implement and strengthen the Rule of Law. Beyond that specific recommendation by respondents to the survey, states need to consider the development of Rule of Law capacity more generally across their domestic institutions.

<sup>98</sup> Risk and Return Survey, Question 2.

<sup>99</sup> Risk and Return Survey, Question 6.

### iii. Considering investment treaties seriously

The survey shows that, for many respondents, investment treaties matter. At the same time, the results leave open important questions about whether investment treaties serve to attract FDI into host states or whether the absence of investment treaties deters it. For states, the issue of whether to enter into investment treaties, revise the ones to which they are already parties, or terminate existing treaties altogether is an open question of currency and importance. In the 20 to 30 years since the vast majority of investment treaties were concluded, state treaty-making has evolved. Investment treaties have become more complex and more detailed, reflecting the wide scope of application of these instruments and the cumulative experience of states in defending themselves against claims brought by investors under them.

It is beyond the scope of this report to offer states guidance on how to manage their investment treaty portfolios or to take a view on whether and how states should participate in the investment treaty regime going forward. What is beyond doubt is that states need to take ownership of these issues and develop policies with respect to international investment treaties that seem best to reflect the totality of their economic, social and political interests. While in the past many states may have rightly said that the import and effect of these treaties was not well known because of their novelty, this is no longer the case. When addressing the issues raised by investment treaties, whether in negotiation, implementation, litigation or termination, requires expertise, such expertise is available to states either through consultations with the private bar, international organizations or specialist non-governmental organizations. Simply put, the issues raised by these treaties are too important for states to ignore.

### b. Strategies for Investors

#### i. Ongoing corporate review of Rule of Law conditions in host states.

Rule of Law problems in host states can, and often do, lead to withdrawals or reductions of investments in host states.<sup>100</sup> Implementing procedures for assessing Rule of Law conditions in host states, both at the establishment stage and on a regular basis throughout the life of an investment, must be seen as best practice for investors. For a significant number of investors, this does not yet appear to reflect corporate practice. While 52% of respondents indicated that they systematically review the legal environment in host states on a continuing basis, for the remaining 48% of respondents that kind of review remains incomplete across investment portfolios.<sup>101</sup> Given the significant impact that Rule of Law problems can have for investors, the wisdom of anything less than total review-coverage must be doubted.

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<sup>100</sup> See section 2.6 above.

<sup>101</sup> Risk and Return Survey, Question 16.

## ii. Maximizing investment protection through investment treaty coverage

With respect to measures that investors can take to address Rule of Law concerns in host states, the results of the survey points in a number of directions. While only 9% of respondents indicated generally that the presence of a BIT between their home state and the host state is 'essential' for their investment decision, the potential utility of these treaties for foreign investors should not be underestimated.<sup>102</sup>

Investment treaties provide substantive and procedural rights for foreign investors that are not available either to domestic investors or to foreign investors who do not come within their scope. While there are some questions about the responses to the survey's questions regarding investor practice versus investor preference with respect to the presence of BITs,<sup>103</sup> in terms of wise investment strategies it is clear that taking advantage of investment treaty protections wherever possible should be considered best practice for foreign direct investors.

Given the extensive global web of treaties, often investors will find treaties already in place between the state from which the investment is to originate and the host state into which the investment is to be made. But even where investment treaties are not already in place, the possibilities created by astute investment structuring and the generous scope of application of many BITs may render investment protection a legally and commercially viable possibility nonetheless.

## iii. Investing in host states beyond dollars and cents

For most investors a positive view of the domestic laws in the host state is central to FDI decision-making.<sup>104</sup> Moreover, for all respondents, the adoption of stronger domestic laws for the enforcement of investor rights and better training for members of the judiciary, legal profession, and police and security services were seen as the two most important steps that host states could take to improve their Rule of Law framework. While these responses might seem to put the ball back into the state's court, that is not a necessary conclusion. Given the long timelines of many foreign direct investments and the strategic roles they increasingly play in corporate global value chains, investors also need to consider whether investment in the host state should or can stop at the 'factory doors'. As the Ruggie process of the past 10 years has demonstrated, investors need not only be aware of their own responsibilities in host states, but also to consider more broadly how they can partner with or support host state governments and other stakeholders in developing and improving the Rule of Law. Working with local partners who agree to adopt and abide by corporate codes of conduct is just one way in which this can be achieved, and as the survey results indicate, 34% of respondents considered this to be 'very important', a trend that is expected to continue.<sup>105</sup>

<sup>102</sup> Risk and Return Survey, Question Q16.

<sup>103</sup> Risk and Return Survey, Question Q18.

<sup>104</sup> Risk and Return Survey, Question Q16.

<sup>105</sup> Risk and Return Survey, Question Q14.

## Appendix A: Survey methodology and questionnaire

### Methodology

The sample for this survey was drawn on the basis of meeting certain specified demographic criteria and passing certain screener questions. As a result of the targeted approach to inviting and selecting survey respondents, the sample is better described as a cluster sample than a random sample, and cannot be understood as reflecting the views of any particular population.

The results give an indication of tendencies in the views of the 301 individuals sampled. The degree to which these views are likely to reflect the views of executives of large multinationals selecting host countries for direct foreign investment cannot be quantified with a degree of confidence (usually required to be a level of probability of 95% or 99%) that can be regarded as statistically 'robust'. We do not know what the notional population size is. Our sample has not been chosen at random, as is required mathematically for calculating margins of error and confidence levels for sample data.

## Questionnaire

Question No	Background Questions	
S1	<p>Do you have responsibility for or familiarity with your company's foreign direct investment (FDI) decisions? (Please choose one: yes, no)</p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p><b>(If yes – continue; if no, exit survey)</b></p>	
S2	<p>Has your company made a FDI in the past five years? (Please choose one: yes, no)</p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p><b>(If "yes", go to S-2-a. If no, go to S-3)</b></p>	
S2a	<p>In which region(s) were these investments made? (Please choose all that apply)</p> <p><input type="checkbox"/> US and Canada  <input type="checkbox"/> Latin America (including Mexico)  <input type="checkbox"/> Western Europe  <input type="checkbox"/> Eastern Europe (including Russia)  <input type="checkbox"/> Asia (excluding India and China)  <input type="checkbox"/> China  <input type="checkbox"/> India  <input type="checkbox"/> Australia and New Zealand  <input type="checkbox"/> Sub-Saharan Africa  <input type="checkbox"/> Middle East and North Africa</p>	
S3	<p>In how many countries worldwide does your company currently have direct investments (Please choose one)</p>	
	We do not have direct investments abroad	<b>Go to S-3a</b>
	Between 1 and 5	<b>Go to S-4</b>
	Between 5 and 10	<b>Go to S-4</b>
	Between 10 and 20	<b>Go to S-4</b>
More than 20	<b>Go to S-4</b>	

<b>S3a</b>	<p>Was your company deterred from investing abroad because of concerns about any of the following?</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Corruption (public or private)</li> <li><input type="checkbox"/> Political or social instability</li> <li><input type="checkbox"/> Lack of transparency of regulatory/legal rule-making processes</li> <li><input type="checkbox"/> Unexpected and/or retrospective changes to regulatory/legal measures</li> <li><input type="checkbox"/> Arbitrary or discriminatory treatment by host country government</li> <li><input type="checkbox"/> Lack of recognition of contract rights</li> <li><input type="checkbox"/> Lack of recognition of intellectual property rights</li> <li><input type="checkbox"/> Lack of independent and impartial courts in host country</li> <li><input type="checkbox"/> Risk of physical security of in-country personnel</li> <li><input type="checkbox"/> Risk of expropriation of investment without adequate compensation</li> <li><input type="checkbox"/> Poor human rights conditions in host country</li> <li><input type="checkbox"/> Non-democratic character of host country government</li> <li><input type="checkbox"/> None of the above ((If "none of the above", exit survey))</li> </ul>
<b>S4</b>	<p>Separate to completing this survey: Would you be willing to respond to a two-question follow-up query several weeks from now to comment on the survey results and themes emerging from the research?</p> <p>(Please choose one: yes or no)</p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p> <p><b>(Continue in either case; If "yes", request respondents' contact details)</b></p>
<b>Experience Abroad</b>	
<b>Q1</b>	<p>Has your company experienced any incidents in any of your host countries related to any of the following within the past five years?</p> <p><b>(Please choose up to three of the most significant instances.)</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Corruption (public or private)</li> <li><input type="checkbox"/> Political or social instability</li> <li><input type="checkbox"/> Lack of transparency of regulatory/legal rule-making processes</li> <li><input type="checkbox"/> Unexpected and/or retrospective changes to regulatory/legal measures</li> <li><input type="checkbox"/> Arbitrary or discriminatory treatment by host country government</li> <li><input type="checkbox"/> Lack of recognition of contract rights</li> <li><input type="checkbox"/> Lack of recognition of intellectual property rights</li> <li><input type="checkbox"/> Lack of independent and impartial courts in host country</li> <li><input type="checkbox"/> Risk of physical security of in-country personnel</li> <li><input type="checkbox"/> Risk of expropriation of investment without adequate compensation</li> <li><input type="checkbox"/> Poor human rights conditions in host country</li> <li><input type="checkbox"/> Non-democratic character of host country government</li> <li><input type="checkbox"/> None of the above</li> </ul>

<p><b>Q2</b></p>	<p>Please tick region(s) in which [incident a, b, c] occurred.</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> US and Canada</li> <li><input type="checkbox"/> Latin America (including Mexico)</li> <li><input type="checkbox"/> Western Europe</li> <li><input type="checkbox"/> Eastern Europe (including Russia)</li> <li><input type="checkbox"/> Asia (excluding India and China)</li> <li><input type="checkbox"/> China</li> <li><input type="checkbox"/> India</li> <li><input type="checkbox"/> Australia and New Zealand</li> <li><input type="checkbox"/> Sub-Saharan Africa</li> <li><input type="checkbox"/> Middle East and North Africa</li> <li><input type="checkbox"/> Prefer not to say</li> </ul>
<p><b>Q3</b></p>	<p>With respect to [incident a,b,c], please indicate whether your company pursued any of the following to resolve the incident: <b>(Please choose all measures that apply)</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Negotiation</li> <li><input type="checkbox"/> Host country judicial or administrative processes</li> <li><input type="checkbox"/> Contractual arbitration</li> <li><input type="checkbox"/> Investment treaty-based arbitration</li> <li><input type="checkbox"/> Home country diplomatic efforts</li> <li><input type="checkbox"/> Insurance coverage</li> <li><input type="checkbox"/> Did not take action</li> <li><input type="checkbox"/> Other, please specify</li> </ul>
<p><b>Q4</b></p>	<p>With respect to [incident a,b,c], please indicate whether the incident had any effect on the levels of your investment in the host country: <b>(Please choose all that apply)</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> No effect (maintained investment at pre-incident levels)</li> <li><input type="checkbox"/> Reduced investment</li> <li><input type="checkbox"/> Withdrew investment</li> <li><input type="checkbox"/> Increased investment</li> <li><input type="checkbox"/> Resolution of incident is ongoing</li> <li><input type="checkbox"/> Other effect – please specify</li> </ul>
<p><b>Q5</b></p>	<p>Approximately how many incidents of all the types listed in Q1 have resulted in your company reducing or withdrawing its investment over the past five years? <b>(Please choose one.)</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> None</li> <li><input type="checkbox"/> 1-5 incidents</li> <li><input type="checkbox"/> 6-10 incidents</li> <li><input type="checkbox"/> 11-15 incidents</li> <li><input type="checkbox"/> 16-20 incidents</li> <li><input type="checkbox"/> More than 20 incidents</li> </ul>

Q6

Please indicate the country in which the most significant incident(s) occurred.

**Africa/Middle East**

- Algeria
- Angola
- Bahrain
- Benin
- Botswana
- Burkina Faso
- Burundi
- Cabo Verde
- Cameroon
- Central African Republic
- Chad
- Comoros
- Congo (Brazzaville)
- Congo (Democratic Republic)
- Côte d'Ivoire
- Djibouti
- Egypt
- Equatorial Guinea
- Eritrea
- Ethiopia
- Gabon
- Gambia
- Ghana
- Guinea
- Guinea-Bissau
- Iran
- Iraq
- Israel
- Jordan
- Kenya
- Kuwait
- Lebanon
- Lesotho
- Liberia
- Libya
- Madagascar
- Malawi
- Mali
- Mauritania
- Mauritius
- Morocco
- Mozambique
- Namibia
- Niger
- Nigeria
- Oman
- Palestinian Territories
- Qatar
- Rwanda
- São Tomé and Príncipe
- Saudi Arabia
- Senegal
- Seychelles
- Sierra Leone
- Somalia

- South Africa
- Sudan
- Swaziland
- Syria
- Tanzania
- Togo
- Tunisia
- Uganda
- United Arab Emirates
- Yemen
- Zambia
- Zimbabwe

**Americas**

- Argentina
- Aruba
- Bahamas
- Barbados
- Belize
- Bermuda
- Bolivia
- Brazil
- Canada
- Cayman Islands
- Chile
- Colombia
- Costa Rica
- Cuba
- Curaçao
- Dominican Republic
- Ecuador
- El Salvador
- Guatemala
- Guyana
- Haiti
- Honduras
- Jamaica
- Mexico
- Netherlands Antilles
- Nicaragua
- Panama
- Paraguay
- Peru
- Puerto Rico
- Saint Maarten
- Suriname
- Trinidad and Tobago
- Turks and Caicos Islands
- United States
- Uruguay
- Venezuela
- Virgin Islands (British)

**Asia**

- Afghanistan
- Australia
- Bangladesh
- Bhutan
- Brunei
- Cambodia
- China
- Fiji
- Hong Kong
- India
- Indonesia
- Japan
- Laos
- Macau
- Malaysia
- Mongolia
- Myanmar
- Nepal
- New Caledonia
- New Zealand
- North Korea
- Pakistan
- Papua New Guinea
- Philippines
- Samoa
- Singapore
- Solomon Islands
- South Korea
- Sri Lanka
- Taiwan
- Thailand
- Timor-Leste
- Tonga
- Vanuatu
- Vietnam

**Europe**

- Albania
- Armenia
- Austria
- Azerbaijan
- Belarus
- Belgium
- Bosnia and Herzegovina
- Bulgaria
- Croatia
- Cyprus
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Georgia
- Germany
- Greece
- Hungary
- Iceland
- Ireland
- Italy
- Kazakhstan
- Kyrgyz Republic
- Latvia
- Lithuania
- Luxembourg
- Macedonia
- Malta
- Moldova
- Montenegro
- Netherlands
- Norway
- Poland
- Portugal
- Romania
- Russia
- Serbia
- Slovakia
- Slovenia
- Spain
- Sweden
- Switzerland
- Tajikistan
- Turkey
- Turkmenistan
- Ukraine
- United Kingdom
- Uzbekistan

### Country-Selection Criteria

**Q7**

On a scale of 1 to 5, with 5 indicating “essential – will not invest without” and 1 indicating “not at all important”, please indicate the degree of importance to your FDI decision-making in your main foreign investment markets of each of the following host-country conditions:

- Ease of doing business
- Stable political environment
- Strong Rule of Law
- Low cost of doing business
- Reliable infrastructure and other utilities
- Low levels of corruption (public and private)
- Stable macroeconomic environment
- Regulatory and/or tax incentives for investors
- Access to natural resources/raw materials
- Access to skilled labour and other key staff
- Access to national/regional markets
- Access to innovation or R&D in the host country
- Access to capital markets (finance)
- Other, please specify

### Aspects of the Rule of Law

**Q8**

On a scale of 1 to 5, with 5 indicating “essential – will not invest” and 1 indicating “not at all important”, please indicate the degree of importance to your FDI decision-making in your main foreign investment markets of each of the following host-country Rule of Law factors:

- Corruption (public or private)
- Political or social instability
- Lack of transparency of regulatory/legal rule-making processes
- Unexpected and/or retrospective changes to regulatory/legal measures
- Arbitrary or discriminatory treatment by host country government
- Lack of recognition of contract rights
- Lack of recognition of intellectual property rights
- Lack of independent and impartial courts in host country
- Risk of physical security of in-country personnel
- Risk of expropriation of investment without adequate compensation
- Poor human rights conditions in host country
- Non-democratic character of host country government

### The corporate process for reviewing legal environments

**Q9**

With respect to the Rule of Law factors listed in the previous question, what are your company's three most important sources of information in the various countries in which you invest?

**(Please choose the top three)**

- Our in-house legal team
- Investment committee or task-force
- Our trade association(s)
- Our external legal advisors
- Our external financial management advisors
- Our previous experience in the region
- Host state investment promotion agencies
- Insurers
- Home government agencies
- Non-governmental organizations and similar bodies
- Press reports and general knowledge
- None/no particular information sources
- Other, please specify

**Q10**

Does your company systematically review the legal environment in its host countries on an ongoing basis?

**(Please choose one)**

- Yes, in all cases
- Yes, in most cases
- Yes, in some cases
- Rarely
- Never
- Don't know

**Following only for those giving one of the "yes" answers to the previous question**

**Q11**

Where is the main locus of corporate responsibility for those reviews?

**(Please choose one)**

- Board level
- Investment committee or task-force
- In-house legal counsel
- External legal counsel
- External financial/ management advisors
- Other, please specify

<b>Promoting the Rule of Law</b>	
<b>Q12</b>	<p>In countries in which you operate and in which you have the most serious concerns about the Rule of Law, what in your view are the three most important steps for these countries to take to improve the situation?</p> <p><b>(Please choose the top three amongst the following)</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Greater independence of the judiciary</li> <li><input type="checkbox"/> Greater independence of the police/security forces</li> <li><input type="checkbox"/> Better trained judiciary, police/security forces, and legal profession</li> <li><input type="checkbox"/> Improved transparency in legal/administrative rule-making</li> <li><input type="checkbox"/> Stronger laws for the enforcement of investor rights, including intellectual property rights, and laws guarding against expropriation</li> <li><input type="checkbox"/> Adoption of bilateral investment protection treaties</li> <li><input type="checkbox"/> Adherence to international agreements and standards on human rights, controlling corruption, etc.</li> <li><input type="checkbox"/> Increased political/social stability</li> <li><input type="checkbox"/> Adoption of democratic systems of government</li> <li><input type="checkbox"/> Adherence of local business partners to internationally recognised corporate codes of conduct</li> <li><input type="checkbox"/> Other—please specify</li> </ul>
<b>Q13</b>	<p>Does your company subscribe to any of the following voluntary corporate codes of conduct on labour and human rights practices?</p> <p><b>(For each code of conduct, please choose one of the following):</b></p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No    <input type="checkbox"/> Don't know</p>
<b>Q13a</b>	<p>OECD Guidelines for Multinational Enterprises (2000)</p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No    <input type="checkbox"/> Don't know</p>
<b>Q13b</b>	<p>International Labour Organisation's 1998 Declaration on Rights at Work</p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No    <input type="checkbox"/> Don't know</p>
<b>Q13c</b>	<p>United Nations 2011 Guiding Principles on Business (the "Ruggie Principles")</p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No    <input type="checkbox"/> Don't know</p>
<b>Q14</b>	<p>How effective do you believe such codes of conduct are in improving the legal environment in host countries?</p> <p><b>(Please choose one)</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Very effective</li> <li><input type="checkbox"/> Somewhat effective</li> <li><input type="checkbox"/> Slightly effective</li> <li><input type="checkbox"/> Not at all effective</li> <li><input type="checkbox"/> Don't know</li> </ul>

<b>Q15</b>	<p>When selecting suppliers or business partners in host countries, how important is it to your company that they subscribe to voluntary corporate codes of conduct?</p> <p><b>(Please choose one)</b></p> <p><input type="checkbox"/> Very effective</p> <p><input type="checkbox"/> Somewhat effective</p> <p><input type="checkbox"/> Slightly effective</p> <p><input type="checkbox"/> Not at all effective</p> <p><input type="checkbox"/> Don't know</p>																																								
<b>Specific Investor Protections</b>																																									
<b>Q16</b>	<p>On a scale of 1 to 5, with 5 indicating "essential – will not invest without" and 1 indicating "not at all important", please indicate the degree of importance to your FDI decisions of each of the following types of legal instruments:)</p> <p><input type="checkbox"/> National laws protecting investors' rights, security and property</p> <p><input type="checkbox"/> Bilateral investment treaties between home and host governments</p> <p><input type="checkbox"/> Host-country adherence to multilateral treaties protecting intellectual property (e.g., the Agreement on Trade-Related Aspects of Intellectual Property)</p> <p><input type="checkbox"/> Host-country adherence to multilateral treaties governing human rights and worker protections</p> <p><input type="checkbox"/> Adherence of business partners in the host country to voluntary corporate codes of conduct on human/worker rights, environmental protection, etc.</p> <p>Other, please specify</p>																																								
<b>Q17</b>	<p>Thinking about bilateral investment protection treaties providing for investor-state arbitration of disputes, has your company researched whether such a treaty is in force between your home country and a potential host country before making an investment in any of the following regions?</p> <p><b>(If respondent says "yes" for one or more regions, proceed to 17a and 17b)</b></p> <table border="0"> <tr> <td>US and Canada</td> <td><input type="checkbox"/> Yes</td> <td><input type="checkbox"/> No</td> <td><input type="checkbox"/> Don't know</td> </tr> <tr> <td>Latin America (including Mexico)</td> <td><input type="checkbox"/> Yes</td> <td><input type="checkbox"/> No</td> <td><input type="checkbox"/> Don't know</td> </tr> <tr> <td>Western Europe</td> <td><input type="checkbox"/> Yes</td> <td><input type="checkbox"/> No</td> <td><input type="checkbox"/> Don't know</td> </tr> <tr> <td>Eastern Europe (including Russia)</td> <td><input type="checkbox"/> Yes</td> <td><input type="checkbox"/> No</td> <td><input type="checkbox"/> Don't know</td> </tr> <tr> <td>Asia (excluding India and China)</td> <td><input type="checkbox"/> Yes</td> <td><input type="checkbox"/> No</td> <td><input type="checkbox"/> Don't know</td> </tr> <tr> <td>China</td> <td><input type="checkbox"/> Yes</td> <td><input type="checkbox"/> No</td> <td><input type="checkbox"/> Don't know</td> </tr> <tr> <td>India</td> <td><input type="checkbox"/> Yes</td> <td><input type="checkbox"/> No</td> <td><input type="checkbox"/> Don't know</td> </tr> <tr> <td>Australia and New Zealand</td> <td><input type="checkbox"/> Yes</td> <td><input type="checkbox"/> No</td> <td><input type="checkbox"/> Don't know</td> </tr> <tr> <td>Sub-Saharan Africa</td> <td><input type="checkbox"/> Yes</td> <td><input type="checkbox"/> No</td> <td><input type="checkbox"/> Don't know</td> </tr> <tr> <td>Middle East and North Africa</td> <td><input type="checkbox"/> Yes</td> <td><input type="checkbox"/> No</td> <td><input type="checkbox"/> Don't know</td> </tr> </table>	US and Canada	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Don't know	Latin America (including Mexico)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Don't know	Western Europe	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Don't know	Eastern Europe (including Russia)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Don't know	Asia (excluding India and China)	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Don't know	China	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Don't know	India	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Don't know	Australia and New Zealand	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Don't know	Sub-Saharan Africa	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Don't know	Middle East and North Africa	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Don't know
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India	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Don't know																																						
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Middle East and North Africa	<input type="checkbox"/> Yes	<input type="checkbox"/> No	<input type="checkbox"/> Don't know																																						

<p><b>Q17a</b></p>	<p>Where you have conducted such research, which of the following concerns in the host-country legal environment were you looking for a bilateral investment treaty to address?</p> <p><b>(Please select the top three)</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Corruption (public or private)</li> <li><input type="checkbox"/> Political or social instability</li> <li><input type="checkbox"/> Lack of transparency of regulatory/legal rule-making processes</li> <li><input type="checkbox"/> Unexpected and/or retrospective changes to regulatory/legal measures</li> <li><input type="checkbox"/> Arbitrary or discriminatory treatment by host country government</li> <li><input type="checkbox"/> Lack of recognition of contract rights</li> <li><input type="checkbox"/> Lack of recognition of intellectual property rights</li> <li><input type="checkbox"/> Lack of independent and impartial courts in host country</li> <li><input type="checkbox"/> Risk of physical security of in-country personnel</li> <li><input type="checkbox"/> Risk of expropriation of investment without adequate compensation</li> <li><input type="checkbox"/> Poor human rights conditions in host country</li> <li><input type="checkbox"/> Non-democratic character of host country government</li> <li><input type="checkbox"/> None of the above</li> </ul>
<p><b>Q17b</b></p>	<p>If there was no investment protection treaty in force between your home country and a country in which you were considering investing, did this affect your decision to invest there?</p> <p><b>(Please choose one)</b></p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Yes, the absence of a treaty deterred an investment that we were considering</li> <li><input type="checkbox"/> Yes, the absence of a treaty caused us to reduce the size of an existing or planned investment</li> <li><input type="checkbox"/> No, the absence of a treaty had no impact on our investment decision</li> <li><input type="checkbox"/> Not applicable; we found bilateral investment protection treaties in all the host countries that we considered</li> <li><input type="checkbox"/> Not applicable, we structured our investments so that they were covered by an investment treaty between the host state and another state</li> </ul>
<p><b>Q18</b></p>	<p>On a scale of 1 to 5, with 5 indicating “essential – will not invest without” and 1 indicating “not at all important”, please indicate how important the presence or absence of a bilateral investment protection treaty is to your company’s decision to invest in each of the following regions?</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> US and Canada</li> <li><input type="checkbox"/> Latin America (including Mexico)</li> <li><input type="checkbox"/> Western Europe</li> <li><input type="checkbox"/> Eastern Europe (including Russia)</li> <li><input type="checkbox"/> Asia (excluding India and China)</li> <li><input type="checkbox"/> China</li> <li><input type="checkbox"/> India</li> <li><input type="checkbox"/> Australia and New Zealand</li> <li><input type="checkbox"/> Sub-Saharan Africa</li> <li><input type="checkbox"/> Middle East and North Africa</li> </ul>

**Q19**

On a scale of 1 to 5, with 5 indicating “very effective” and 1 indicating “not at all effective”, please indicate how effective bilateral investment protection agreements are in addressing your company’s concerns about the Rule of Law?

**Ask separately for each region for which respondent answered “yes” in Q17**

## About You

AY1

In which country are you personally located?

**Africa/Middle East**

- Algeria  
 Angola  
 Bahrain  
 Benin  
 Botswana  
 Burkina Faso  
 Burundi  
 Cabo Verde  
 Cameroon  
 Central African Republic  
 Chad  
 Comoros  
 Congo (Brazzaville)  
 Congo (Democratic Republic)  
 Côte d'Ivoire  
 Djibouti  
 Egypt  
 Equatorial Guinea  
 Eritrea  
 Ethiopia  
 Gabon  
 Gambia  
 Ghana  
 Guinea  
 Guinea-Bissau  
 Iran  
 Iraq  
 Israel  
 Jordan  
 Kenya  
 Kuwait  
 Lebanon  
 Lesotho  
 Liberia  
 Libya  
 Madagascar  
 Malawi  
 Mali  
 Mauritania  
 Mauritius  
 Morocco  
 Mozambique  
 Namibia  
 Niger  
 Nigeria  
 Oman  
 Palestinian Territories  
 Qatar  
 Rwanda  
 São Tomé and Príncipe  
 Saudi Arabia  
 Senegal

- Seychelles  
 Sierra Leone  
 Somalia  
 South Africa  
 Sudan  
 Swaziland  
 Syria  
 Tanzania  
 Togo  
 Tunisia  
 Uganda  
 United Arab Emirates  
 Yemen  
 Zambia  
 Zimbabwe

**Americas**

- Argentina  
 Aruba  
 Bahamas  
 Barbados  
 Belize  
 Bermuda  
 Bolivia  
 Brazil  
 Canada  
 Cayman Islands  
 Chile  
 Colombia  
 Costa Rica  
 Cuba  
 Curaçao  
 Dominican Republic  
 Ecuador  
 El Salvador  
 Guatemala  
 Guyana  
 Haiti  
 Honduras  
 Jamaica  
 Mexico  
 Netherlands Antilles  
 Nicaragua  
 Panama  
 Paraguay  
 Peru  
 Puerto Rico  
 Saint Maarten  
 Suriname  
 Trinidad and Tobago  
 Turks and Caicos Islands  
 United States  
 Uruguay  
 Venezuela  
 Virgin Islands (British)

**Asia**

- Afghanistan  
 Australia  
 Bangladesh  
 Bhutan  
 Brunei  
 Cambodia  
 China  
 Fiji  
 Hong Kong  
 India  
 Indonesia  
 Japan  
 Laos  
 Macau  
 Malaysia  
 Mongolia  
 Myanmar  
 Nepal  
 New Caledonia  
 New Zealand  
 North Korea  
 Pakistan  
 Papua New Guinea  
 Philippines  
 Samoa  
 Singapore  
 Solomon Islands  
 South Korea  
 Sri Lanka  
 Taiwan  
 Thailand  
 Timor-Leste  
 Tonga  
 Vanuatu  
 Vietnam

**Europe**

- Albania  
 Armenia  
 Austria  
 Azerbaijan  
 Belarus  
 Belgium  
 Bosnia and Herzegovina  
 Bulgaria  
 Croatia  
 Cyprus  
 Czech Republic  
 Denmark  
 Estonia  
 Finland  
 France  
 Georgia  
 Germany  
 Greece  
 Hungary  
 Iceland  
 Ireland  
 Italy  
 Kazakhstan  
 Kyrgyz Republic  
 Latvia  
 Lithuania  
 Luxembourg  
 Macedonia  
 Malta  
 Moldova  
 Montenegro  
 Netherlands  
 Norway  
 Poland  
 Portugal  
 Romania  
 Russia  
 Serbia  
 Slovakia  
 Slovenia  
 Spain  
 Sweden  
 Switzerland  
 Tajikistan  
 Turkey  
 Turkmenistan  
 Ukraine  
 United Kingdom  
 Uzbekistan

AY2	In which country are your global headquarters based?			
	<p><b>Africa/Middle East</b></p> <input type="checkbox"/> Algeria <input type="checkbox"/> Angola <input type="checkbox"/> Bahrain <input type="checkbox"/> Benin <input type="checkbox"/> Botswana <input type="checkbox"/> Burkina Faso <input type="checkbox"/> Burundi <input type="checkbox"/> Cabo Verde <input type="checkbox"/> Cameroon <input type="checkbox"/> Central African Republic <input type="checkbox"/> Chad <input type="checkbox"/> Comoros <input type="checkbox"/> Congo (Brazzaville) <input type="checkbox"/> Congo (Democratic Republic) <input type="checkbox"/> Côte d'Ivoire <input type="checkbox"/> Djibouti <input type="checkbox"/> Egypt <input type="checkbox"/> Equatorial Guinea <input type="checkbox"/> Eritrea <input type="checkbox"/> Ethiopia <input type="checkbox"/> Gabon <input type="checkbox"/> Gambia <input type="checkbox"/> Ghana <input type="checkbox"/> Guinea <input type="checkbox"/> Guinea-Bissau <input type="checkbox"/> Iran <input type="checkbox"/> Iraq <input type="checkbox"/> Israel <input type="checkbox"/> Jordan <input type="checkbox"/> Kenya <input type="checkbox"/> Kuwait <input type="checkbox"/> Lebanon <input type="checkbox"/> Lesotho <input type="checkbox"/> Liberia <input type="checkbox"/> Libya <input type="checkbox"/> Madagascar <input type="checkbox"/> Malawi <input type="checkbox"/> Mali <input type="checkbox"/> Mauritania <input type="checkbox"/> Mauritius <input type="checkbox"/> Morocco <input type="checkbox"/> Mozambique <input type="checkbox"/> Namibia <input type="checkbox"/> Niger <input type="checkbox"/> Nigeria <input type="checkbox"/> Oman <input type="checkbox"/> Palestinian Territories <input type="checkbox"/> Qatar <input type="checkbox"/> Rwanda <input type="checkbox"/> São Tomé and Príncipe <input type="checkbox"/> Saudi Arabia <input type="checkbox"/> Senegal	<input type="checkbox"/> Seychelles <input type="checkbox"/> Sierra Leone <input type="checkbox"/> Somalia <input type="checkbox"/> South Africa <input type="checkbox"/> Sudan <input type="checkbox"/> Swaziland <input type="checkbox"/> Syria <input type="checkbox"/> Tanzania <input type="checkbox"/> Togo <input type="checkbox"/> Tunisia <input type="checkbox"/> Uganda <input type="checkbox"/> United Arab Emirates <input type="checkbox"/> Yemen <input type="checkbox"/> Zambia <input type="checkbox"/> Zimbabwe <p><b>Americas</b></p> <input type="checkbox"/> Argentina <input type="checkbox"/> Aruba <input type="checkbox"/> Bahamas <input type="checkbox"/> Barbados <input type="checkbox"/> Belize <input type="checkbox"/> Bermuda <input type="checkbox"/> Bolivia <input type="checkbox"/> Brazil <input type="checkbox"/> Canada <input type="checkbox"/> Cayman Islands <input type="checkbox"/> Chile <input type="checkbox"/> Colombia <input type="checkbox"/> Costa Rica <input type="checkbox"/> Cuba <input type="checkbox"/> Curaçao <input type="checkbox"/> Dominican Republic <input type="checkbox"/> Ecuador <input type="checkbox"/> El Salvador <input type="checkbox"/> Guatemala <input type="checkbox"/> Guyana <input type="checkbox"/> Haiti <input type="checkbox"/> Honduras <input type="checkbox"/> Jamaica <input type="checkbox"/> Mexico <input type="checkbox"/> Netherlands Antilles <input type="checkbox"/> Nicaragua <input type="checkbox"/> Panama <input type="checkbox"/> Paraguay <input type="checkbox"/> Peru <input type="checkbox"/> Puerto Rico <input type="checkbox"/> Saint Maarten <input type="checkbox"/> Suriname <input type="checkbox"/> Trinidad and Tobago <input type="checkbox"/> Turks and Caicos Islands <input type="checkbox"/> United States <input type="checkbox"/> Uruguay <input type="checkbox"/> Venezuela <input type="checkbox"/> Virgin Islands (British)	<p><b>Asia</b></p> <input type="checkbox"/> Afghanistan <input type="checkbox"/> Australia <input type="checkbox"/> Bangladesh <input type="checkbox"/> Bhutan <input type="checkbox"/> Brunei <input type="checkbox"/> Cambodia <input type="checkbox"/> China <input type="checkbox"/> Fiji <input type="checkbox"/> Hong Kong <input type="checkbox"/> India <input type="checkbox"/> Indonesia <input type="checkbox"/> Japan <input type="checkbox"/> Laos <input type="checkbox"/> Macau <input type="checkbox"/> Malaysia <input type="checkbox"/> Mongolia <input type="checkbox"/> Myanmar <input type="checkbox"/> Nepal <input type="checkbox"/> New Caledonia <input type="checkbox"/> New Zealand <input type="checkbox"/> North Korea <input type="checkbox"/> Pakistan <input type="checkbox"/> Papua New Guinea <input type="checkbox"/> Philippines <input type="checkbox"/> Samoa <input type="checkbox"/> Singapore <input type="checkbox"/> Solomon Islands <input type="checkbox"/> South Korea <input type="checkbox"/> Sri Lanka <input type="checkbox"/> Taiwan <input type="checkbox"/> Thailand <input type="checkbox"/> Timor-Leste <input type="checkbox"/> Tonga <input type="checkbox"/> Vanuatu <input type="checkbox"/> Vietnam	<p><b>Europe</b></p> <input type="checkbox"/> Albania <input type="checkbox"/> Armenia <input type="checkbox"/> Austria <input type="checkbox"/> Azerbaijan <input type="checkbox"/> Belarus <input type="checkbox"/> Belgium <input type="checkbox"/> Bosnia and Herzegovina <input type="checkbox"/> Bulgaria <input type="checkbox"/> Croatia <input type="checkbox"/> Cyprus <input type="checkbox"/> Czech Republic <input type="checkbox"/> Denmark <input type="checkbox"/> Estonia <input type="checkbox"/> Finland <input type="checkbox"/> France <input type="checkbox"/> Georgia <input type="checkbox"/> Germany <input type="checkbox"/> Greece <input type="checkbox"/> Hungary <input type="checkbox"/> Iceland <input type="checkbox"/> Ireland <input type="checkbox"/> Italy <input type="checkbox"/> Kazakhstan <input type="checkbox"/> Kyrgyz Republic <input type="checkbox"/> Latvia <input type="checkbox"/> Lithuania <input type="checkbox"/> Luxembourg <input type="checkbox"/> Macedonia <input type="checkbox"/> Malta <input type="checkbox"/> Moldova <input type="checkbox"/> Montenegro <input type="checkbox"/> Netherlands <input type="checkbox"/> Norway <input type="checkbox"/> Poland <input type="checkbox"/> Portugal <input type="checkbox"/> Romania <input type="checkbox"/> Russia <input type="checkbox"/> Serbia <input type="checkbox"/> Slovakia <input type="checkbox"/> Slovenia <input type="checkbox"/> Spain <input type="checkbox"/> Sweden <input type="checkbox"/> Switzerland <input type="checkbox"/> Tajikistan <input type="checkbox"/> Turkey <input type="checkbox"/> Turkmenistan <input type="checkbox"/> Ukraine <input type="checkbox"/> United Kingdom <input type="checkbox"/> Uzbekistan

<b>AY3</b>	<p>What is your title?</p> <p><input type="checkbox"/> Board member</p> <p><input type="checkbox"/> CEO/President/Managing director</p> <p><input type="checkbox"/> CFO/Treasurer/Comptroller</p> <p><input type="checkbox"/> CRO/Chief risk officer</p> <p><input type="checkbox"/> Chief compliance officer</p> <p><input type="checkbox"/> Other C-level executive</p> <p><input type="checkbox"/> SVP/VP/Director</p> <p><input type="checkbox"/> Head of business unit</p> <p><input type="checkbox"/> Head of legal</p> <p><input type="checkbox"/> Head of department</p> <p><input type="checkbox"/> Manager</p> <p><input type="checkbox"/> Other, please specify</p>
<b>AY4</b>	<p>What is your organisation's global annual revenue in US dollars?</p> <p><input type="checkbox"/> Under \$250m</p> <p><input type="checkbox"/> \$250m to \$500m</p> <p><input type="checkbox"/> \$500m to \$1bn</p> <p><input type="checkbox"/> \$1bn to \$5bn</p> <p><input type="checkbox"/> \$5bn to \$10bn</p> <p><input type="checkbox"/> \$10bn or more</p>
<b>AY5</b>	<p>Is your company listed on at least one stock market?</p> <p><input type="checkbox"/> Yes    <input type="checkbox"/> No</p>
<b>AY6</b>	<p>What are your main functional roles?</p> <p><b>Please choose no more than three functions.</b></p> <p><input type="checkbox"/> Customer service</p> <p><input type="checkbox"/> Finance</p> <p><input type="checkbox"/> General management</p> <p><input type="checkbox"/> Human resources</p> <p><input type="checkbox"/> Information and research</p> <p><input type="checkbox"/> IT</p> <p><input type="checkbox"/> Legal</p> <p><input type="checkbox"/> Marketing and sales</p> <p><input type="checkbox"/> Operations and production</p> <p><input type="checkbox"/> Procurement</p> <p><input type="checkbox"/> Risk</p> <p><input type="checkbox"/> R&amp;D</p> <p><input type="checkbox"/> Supply-chain management</p> <p><input type="checkbox"/> Strategy and business development</p> <p><input type="checkbox"/> Other</p>

<b>AY7</b>	<p>What is your primary industry?</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Agriculture and agribusiness</li> <li><input type="checkbox"/> Automotive</li> <li><input type="checkbox"/> Chemicals</li> <li><input type="checkbox"/> Construction and real estate</li> <li><input type="checkbox"/> Consumer goods</li> <li><input type="checkbox"/> Education</li> <li><input type="checkbox"/> Energy and natural resources</li> <li><input type="checkbox"/> Entertainment, media and publishing</li> <li><input type="checkbox"/> Financial services</li> <li><input type="checkbox"/> Government/Public sector</li> <li><input type="checkbox"/> Healthcare, pharmaceuticals and biotechnology</li> <li><input type="checkbox"/> IT and Technology</li> <li><input type="checkbox"/> Logistics and distribution</li> <li><input type="checkbox"/> Manufacturing</li> <li><input type="checkbox"/> Professional services</li> <li><input type="checkbox"/> Retailing</li> <li><input type="checkbox"/> Telecoms</li> <li><input type="checkbox"/> Transportation, travel and tourism</li> </ul>
<b>AY8</b>	<p>What types of FDI has your company undertaken? (Please choose all that apply.)</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Expansion of existing investments</li> <li><input type="checkbox"/> Mergers and acquisitions</li> <li><input type="checkbox"/> Greenfield investments (build or lease facilities)</li> <li><input type="checkbox"/> Joint venture with a host country entity</li> <li><input type="checkbox"/> Establishment of a local subsidiary</li> <li><input type="checkbox"/> Other, please specify</li> </ul>
<b>AY9</b>	<p>What is your main commercial reason for FDI? (Please choose one)</p> <ul style="list-style-type: none"> <li><input type="checkbox"/> Access to new markets through local production or service provision, replacing importation</li> <li><input type="checkbox"/> Access to locally sourced natural resources</li> <li><input type="checkbox"/> Reduction of operating costs through cross-border integration of production or provision of services</li> <li><input type="checkbox"/> Access to knowledge-based assets of the investment location, e.g., access to local innovation and/or R&amp;D</li> <li><input type="checkbox"/> Other, please specify</li> </ul>

## Appendix B: Tables and survey outcomes

Table 1 – Type of FDI undertaken by industry sector

	Automotive, Chemical & Manufacturing	Construction & Real Estate	Consumer Goods & Retailing	Energy & Natural Resources	Financial Services	Healthcare, Pharmaceuticals & Biotechnology	Information Industries & Telecoms	Transportation & Logistics	Other	Total
<b>Expansion of existing investments</b>	82.4%	58.3%	73.5%	71.1%	64.2%	77.8%	62.5%	66.7%	55.6%	<b>69.8%</b>
<b>Mergers and acquisitions</b>	47.1%	50.0%	50.0%	51.1%	66.0%	51.1%	62.5%	57.1%	55.6%	<b>55.5%</b>
<b>Greenfield investments</b>	47.1%	33.3%	29.4%	55.6%	71.7%	31.1%	35.4%	38.1%	33.3%	<b>44.9%</b>
<b>Joint venture with host country entity</b>	47.1%	33.3%	32.4%	57.8%	60.4%	24.4%	47.9%	42.9%	33.3%	<b>44.9%</b>
<b>Establishment of local subsidiary</b>	50.0%	41.7%	38.2%	28.9%	34.0%	48.9%	45.8%	28.6%	66.7%	<b>40.5%</b>

Table 2 – Main commercial reason for FDI by HQ Region

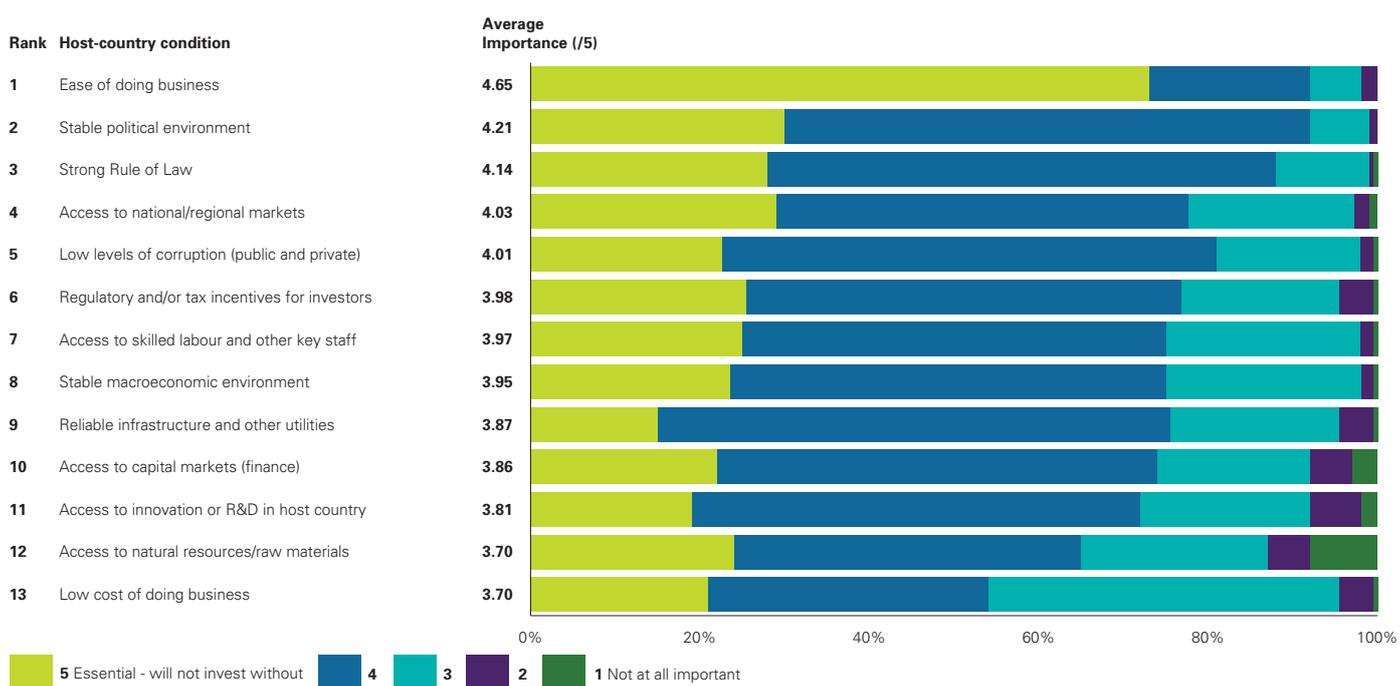
Main commercial reason for FDI	HQ Region					Total
	Africa and Middle East	Americas	Asia	Europe	Oceania	
<b>Access to knowledge-based assets of the investment location (e.g. access to local innovation and/or R&amp;D)</b>	18.8%	4.0%	4.7%	8.9%	0.0%	<b>6.3%</b>
<b>Access to locally sourced natural resources</b>	18.8%	31.0%	18.6%	16.8%	33.3%	<b>23.9%</b>
<b>Access to new markets through local production or service provision, replacing importation</b>	62.5%	49.2%	69.8%	64.4%	66.7%	<b>58.8%</b>
<b>Reduction of operating costs through cross-border integration of production or provision of services</b>	0.0%	13.5%	7.0%	8.9%	0.0%	<b>9.6%</b>
<b>Other</b>	0.0%	2.4%	0.0%	1.0%	0.0%	<b>1.3%</b>

**Table 3 – Direction of FDI by HQ region in the past five years**

HQ Region	Region of Investment									
	US & Canada	Latin America (inc. Mexico)	Western Europe	Eastern Europe (inc. Russia)	China	India	Asia (exc. India and China)	Middle East & North Africa	Sub-Saharan Africa	Australia and New Zealand
<b>Americas</b>	80.6%	62.2%	71.4%	56.1%	46.9%	42.9%	64.3%	53.1%	26.5%	52.0%
<b>Europe</b>	58.3%	63.1%	67.9%	64.3%	45.2%	39.3%	50.0%	50.0%	26.2%	45.2%
<b>Asia</b>	57.1%	54.3%	65.7%	31.4%	20.0%	31.4%	85.7%	40.0%	20.0%	57.1%
<b>Africa and Middle East</b>	84.6%	53.8%	46.2%	53.8%	53.8%	46.2%	38.5%	76.9%	46.2%	23.1%
<b>Oceania</b>	38.5%	23.1%	53.8%	46.2%	30.8%	7.7%	69.2%	7.7%	7.7%	53.8%
<b>Total</b>	<b>67.5%</b>	<b>58.8%</b>	<b>67.1%</b>	<b>54.7%</b>	<b>42.0%</b>	<b>38.3%</b>	<b>61.3%</b>	<b>49.0%</b>	<b>25.5%</b>	<b>49.0%</b>

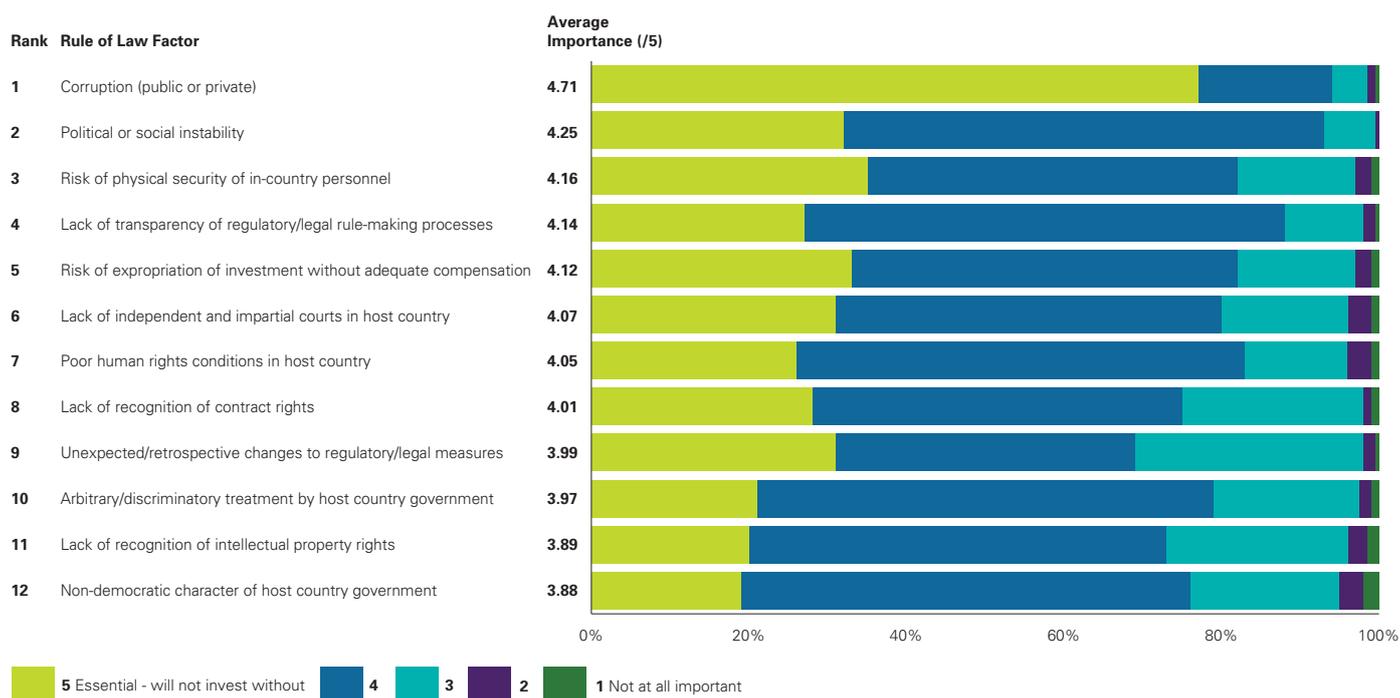
**Table 4 – Importance of each host-country condition to investment decision-making**

On a scale of 1 to 5, please indicate the degree of importance to your FDI decision-making in your main foreign investment markets of the following host-country conditions:



**Table 5 – Importance of each host-country condition to investment decision-making**

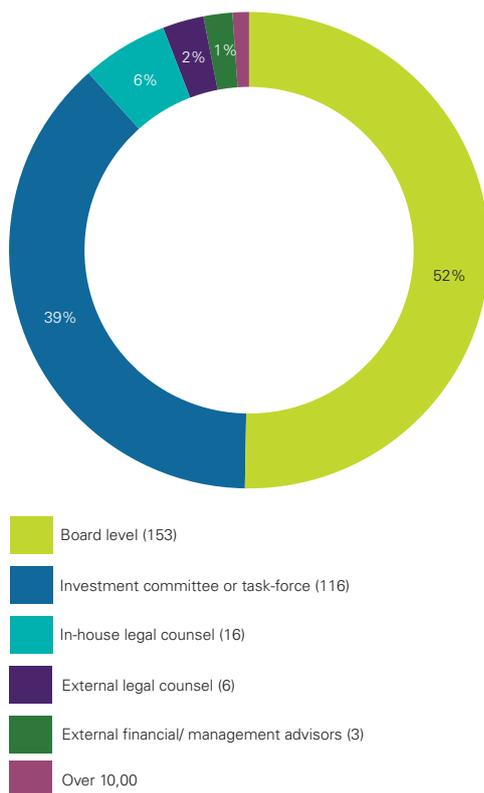
On a scale of 1 to 5, please indicate the degree of importance to your FDI decision-making in your main foreign investment markets of the following host-country Rule of Law factors:

**Table 6 – Sources of information on Rule of Law factors**

Source		
1	Our external financial management advisors	43%
2	Investment committee / task force / internal analytics team	42%
3	Our trade association(s)	42%
4	Our external legal advisors	39%
5	Our previous experience in the region	36%
6	Host state investment promotion agencies	29%
7	Our in-house legal team	21%
8	Insurers	21%
9	Home government agencies	14%
10	Press reports and general knowledge	3%
11	Non-governmental organizations and similar bodies	2%
12	None /no particular information sources	0%

**Table 7 – Systematic nature of review of legal environment in host countries**

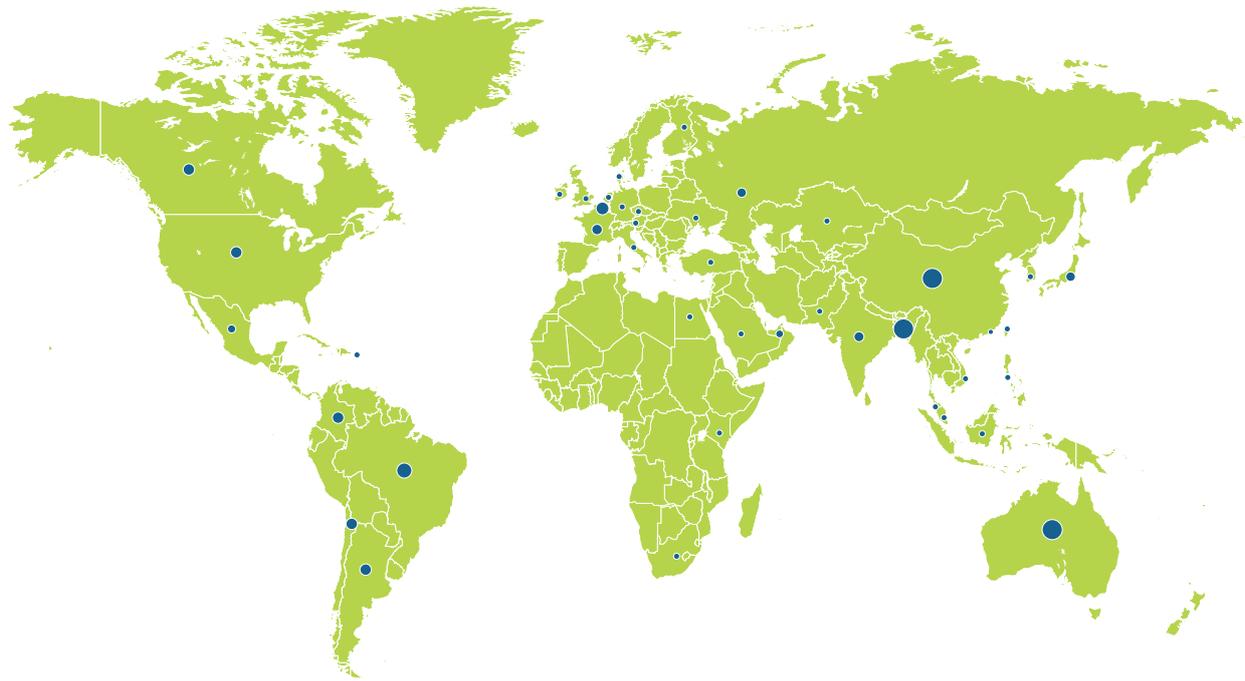
<b>Does your company systematically review the legal environment in its host countries on an ongoing basis?</b>	<b>Yes, in all cases</b>	<b>Yes, in most cases</b>	<b>Yes, in some cases</b>	<b>Rarely</b>	<b>Never</b>
All Respondents	<b>52.3%</b>	<b>41.3%</b>	<b>4.7%</b>	<b>1.7%</b>	<b>0.0%</b>
<b>By industry Sector</b>					
Automotive, Chemical & Manufacturing	48.5%	48.5%	3.0%	0.0%	0.0%
Construction & Real Estate	58.3%	41.7%	0.0%	0.0%	0.0%
Consumer Goods & Retailing	35.3%	61.8%	2.9%	0.0%	0.0%
Energy & Natural Resources	71.1%	28.9%	0.0%	0.0%	0.0%
Financial Services	75.5%	18.9%	3.8%	1.9%	0.0%
Healthcare, Pharmaceuticals & Biotechnology	24.4%	71.1%	2.2%	2.2%	0.0%
Information Industries & Telecoms	54.2%	37.5%	6.3%	2.1%	0.0%
Transportation & Logistics	52.4%	14.3%	28.6%	4.8%	0.0%
Other	22.2%	66.7%	0.0%	11.1%	0.0%
<b>By HQ Region</b>					
Africa and Middle East	87.5%	0.0%	12.5%	0.0%	0.0%
Americas	38.4%	59.2%	0.8%	1.6%	0.0%
Asia	67.4%	23.3%	9.3%	0.0%	0.0%
Europe	55.4%	35.6%	5.9%	3.0%	0.0%
Oceania	66.7%	26.7%	6.7%	0.0%	0.0%

**Table 8 – Locus of corporate responsibility for review****Table 9 – Incidence of Rule of Law issues among investors**

	Type of Rule of Law issue	Incidence <sup>43</sup>
1	Lack of transparency of regulatory/ legal rule-making processes	41.6%
2	Arbitrary or discriminatory treatment by host country government	32.1%
3	Lack of recognition of intellectual property rights	30.5%
4	Lack of recognition of contract rights	30.5%
5	Unexpected and/or retrospective changes to regulatory/legal measures	30.0%
6	Lack of independent and impartial courts in host country	29.6%
7	Political or social instability	22.6%
8	Risk of physical security of in-country personnel	18.5%
9	Corruption (public or private)	11.1%
10	Risk of expropriation of investment without adequate compensation	6.6%
11	Non-democratic character of host country government	1.6%
12	Poor human rights conditions in host country	1.2%

Table 10 – Incidence of Rule of Law issues by region of investment

Region of Investment	Corruption (public or private)	Political or social instability	Lack of transparency of regulatory/legal rule-making processes	Unexpected and/or retrospective changes to regulatory/legal measures	Arbitrary or discriminatory treatment by host country government	Lack of recognition of contract rights	Lack of recognition of intellectual property rights	Lack of independent and impartial courts in host country	Risk of physical security of in-country personnel	Risk of expropriation of investment without adequate compensation	Poor human rights conditions in host country	Non-democratic character of host country government	Did not report encountering any Rule of Law issue in that region
<b>US &amp; Canada</b>	1%	4%	13%	12%	7%	3%	3%	2%	1%	1%	0%	0%	54%
<b>Latin America</b>	2%	4%	13%	6%	7%	8%	7%	2%	1%	1%	0%	1%	50%
<b>Western Europe</b>	2%	1%	4%	5%	6%	5%	1%	2%	1%	1%	0%	0%	71%
<b>Eastern Europe</b>	1%	5%	4%	2%	3%	4%	2%	2%	2%	0%	0%	1%	79%
<b>China</b>	0%	1%	4%	1%	2%	0%	2%	1%	2%	0%	0%	0%	87%
<b>India</b>	6%	0%	3%	1%	4%	1%	3%	2%	0%	0%	0%	0%	80%
<b>Rest of Asia</b>	3%	9%	12%	9%	9%	9%	9%	7%	7%	2%	1%	0%	33%
<b>Oceania</b>	0%	0%	1%	4%	4%	3%	4%	5%	2%	2%	0%	0%	75%
<b>Sub-Saharan Africa</b>	2%	5%	2%	3%	2%	2%	3%	2%	2%	0%	0%	0%	81%
<b>MENA</b>	1%	6%	7%	4%	5%	5%	10%	17%	10%	3%	0%	0%	36%

**Table 11 – Country where most significant incident(s) occurred**

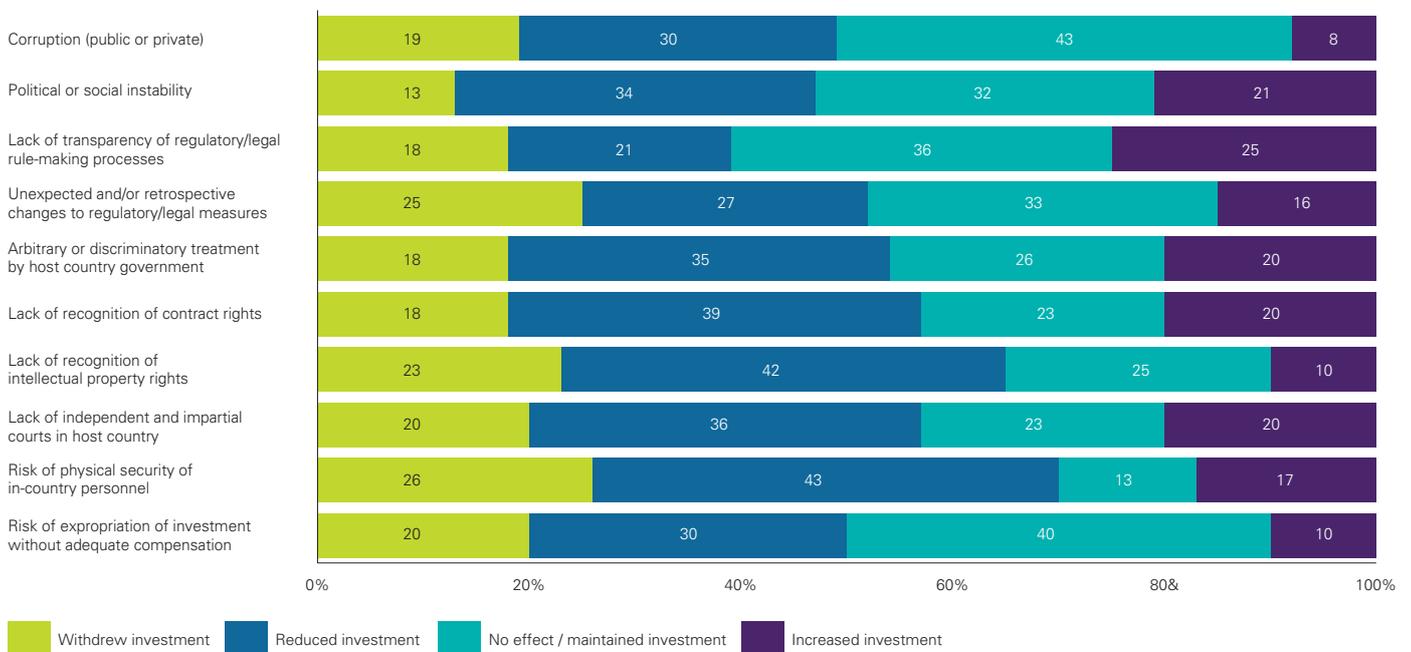
<b>1</b>	China	25	<b>11%</b>	<b>23</b>	Vietnam	3	<b>1%</b>
<b>2</b>	Australia	20	<b>9%</b>	<b>24</b>	Italy	3	<b>1%</b>
<b>3</b>	Bangladesh	16	<b>7%</b>	<b>25</b>	Germany	3	<b>1%</b>
<b>4</b>	Brazil	15	<b>7%</b>	<b>26</b>	Mexico	3	<b>1%</b>
<b>5</b>	Belgium	12	<b>5%</b>	<b>27</b>	Hong Kong	3	<b>1%</b>
<b>6</b>	Chile	8	<b>3%</b>	<b>28</b>	Kenya	2	<b>1%</b>
<b>7</b>	USA	7	<b>3%</b>	<b>29</b>	Ireland	2	<b>1%</b>
<b>8</b>	Argentina	7	<b>3%</b>	<b>30</b>	Puerto Rico	2	<b>1%</b>
<b>9</b>	Colombia	7	<b>3%</b>	<b>31</b>	Singapore	2	<b>1%</b>
<b>10</b>	India	6	<b>3%</b>	<b>32</b>	Austria	2	<b>1%</b>
<b>11</b>	Japan	6	<b>3%</b>	<b>33</b>	Ukraine	2	<b>1%</b>
<b>12</b>	Philippines	6	<b>3%</b>	<b>34</b>	Malaysia	2	<b>1%</b>
<b>13</b>	Canada	6	<b>3%</b>	<b>35</b>	South Africa	2	<b>1%</b>
<b>14</b>	Taiwan	6	<b>3%</b>	<b>36</b>	South Korea	2	<b>1%</b>
<b>15</b>	France	6	<b>3%</b>	<b>37</b>	Turkey	2	<b>1%</b>
<b>16</b>	Denmark	6	<b>3%</b>	<b>38</b>	Czech Republic	2	<b>1%</b>
<b>17</b>	UAE	5	<b>2%</b>	<b>39</b>	Dominican Rep.	1	<b>0%</b>
<b>18</b>	Finland	5	<b>2%</b>	<b>40</b>	Pakistan	1	<b>0%</b>
<b>19</b>	Indonesia	4	<b>2%</b>	<b>41</b>	Egypt	1	<b>0%</b>
<b>20</b>	Russia	4	<b>2%</b>	<b>42</b>	Kazakhstan	1	<b>0%</b>
<b>21</b>	UK	4	<b>2%</b>	<b>43</b>	Saudi Arabia	1	<b>0%</b>
<b>22</b>	Netherlands	3	<b>1%</b>		Would rather not say	4	<b>2%</b>

Table 12 – Incidence of Rule of Law issues by industry sector

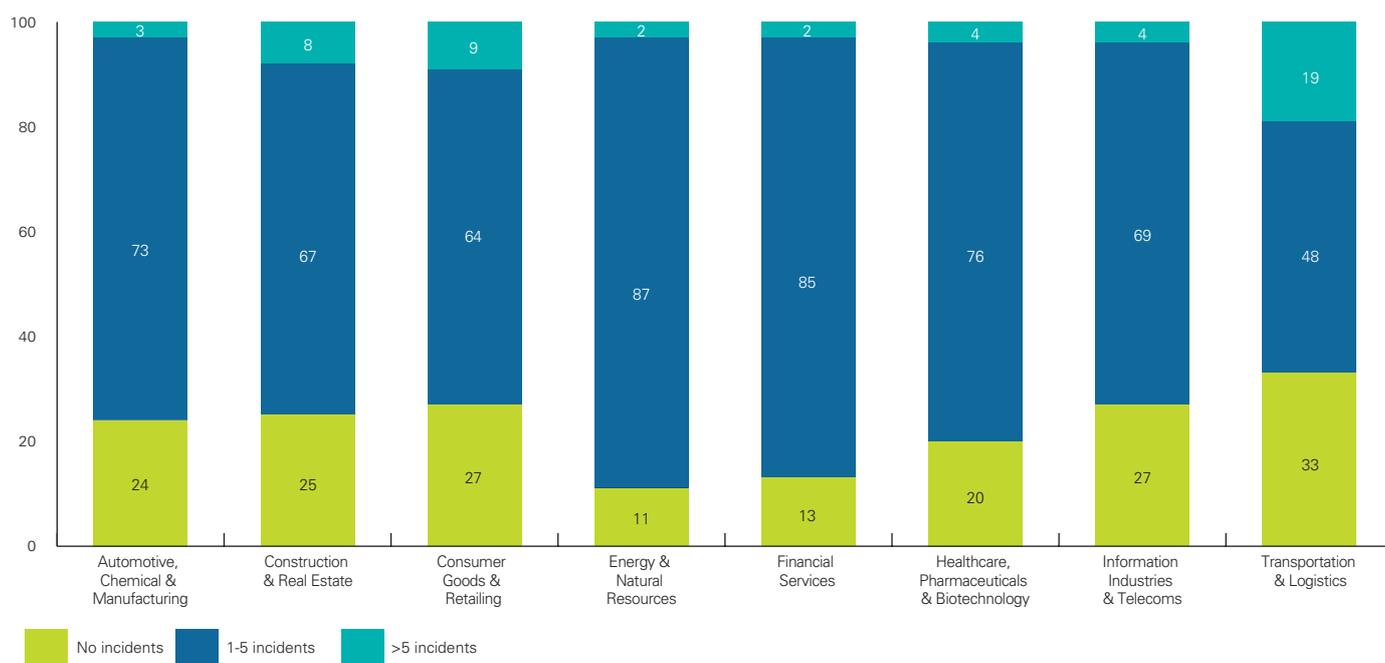
Industry Sector	Corruption (public or private)	Political or social instability	Lack of transparency of regulatory/legal rule-making processes	Unexpected and/or retrospective changes to regulatory/legal measures	Arbitrary or discriminatory treatment by host country government	Lack of recognition of contract rights	Lack of recognition of intellectual property rights	Lack of independent and impartial courts in host country	Risk of physical security of in-country personnel	Risk of expropriation of investment without adequate compensation	Poor human rights conditions in host country	Non-democratic character of host country government	Did not report encountering any Rule of Law issue in that region
<b>Automotive, Chemical &amp; Manufacturing</b>	24%	15%	41%	26%	35%	32%	24%	21%	18%	0%	0%	6%	9%
<b>Construction &amp; Real Estate</b>	25%	25%	42%	8%	50%	8%	25%	8%	0%	0%	8%	0%	17%
<b>Consumer Goods &amp; Retailing</b>	9%	18%	41%	29%	29%	26%	32%	24%	21%	6%	0%	0%	12%
<b>Energy &amp; Natural Resources</b>	9%	22%	38%	33%	33%	31%	29%	38%	31%	2%	0%	0%	0%
<b>Financial Services</b>	2%	17%	43%	34%	28%	34%	38%	32%	28%	11%	2%	0%	6%
<b>Healthcare, Pharma &amp; Biotechnology</b>	2%	22%	44%	33%	27%	27%	27%	27%	9%	9%	0%	0%	7%
<b>Information Industries &amp; Telecoms</b>	10%	29%	35%	23%	25%	31%	29%	21%	8%	4%	2%	0%	17%
<b>Transportation &amp; Logistics</b>	14%	19%	29%	10%	19%	14%	14%	29%	14%	0%	0%	14%	24%

**Table 13 – Methods of resolution adopted for Rule of Law incidents**

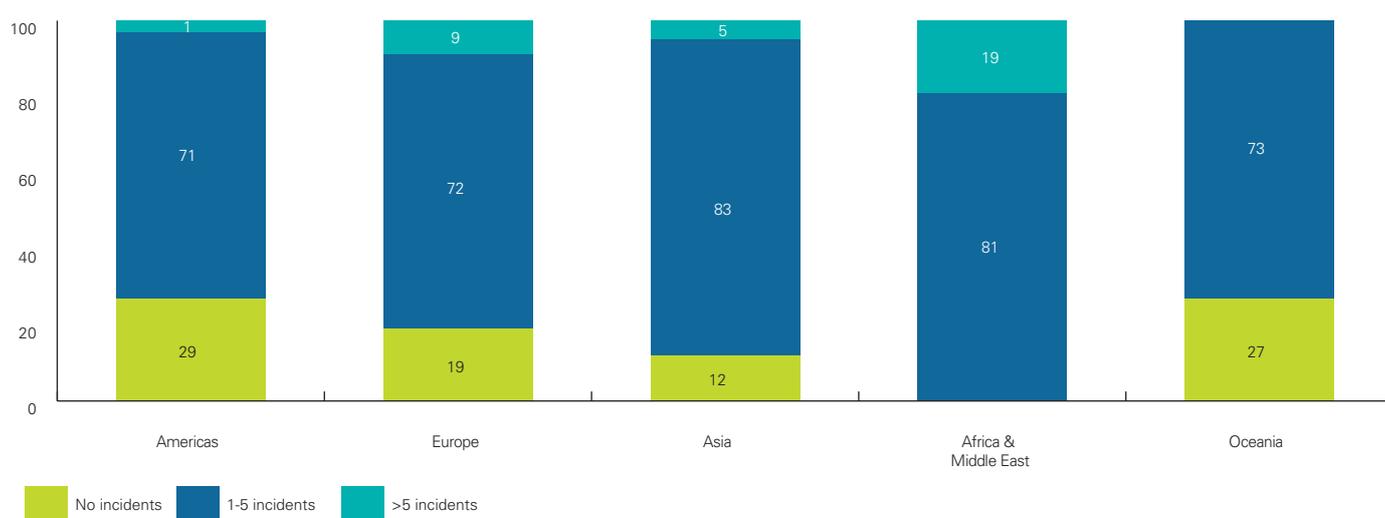
Method of resolution	Incidence <sup>47</sup>
1 Host country judicial or administrative processes	69.8%
2 Contractual arbitration	67.4%
3 Investment treaty-based arbitration	66.1%
4 Negotiation	65.8%
5 Home country diplomatic efforts	65.4%
6 Insurance coverage	62.8%
7 Opted for a different method of market entry	58.1%

**Table 14 – Impact of Rule of Law incidents on levels of investment**

**Table 15 – Number of incidents resulting in withdrawal or reduction of investment by industry sector**

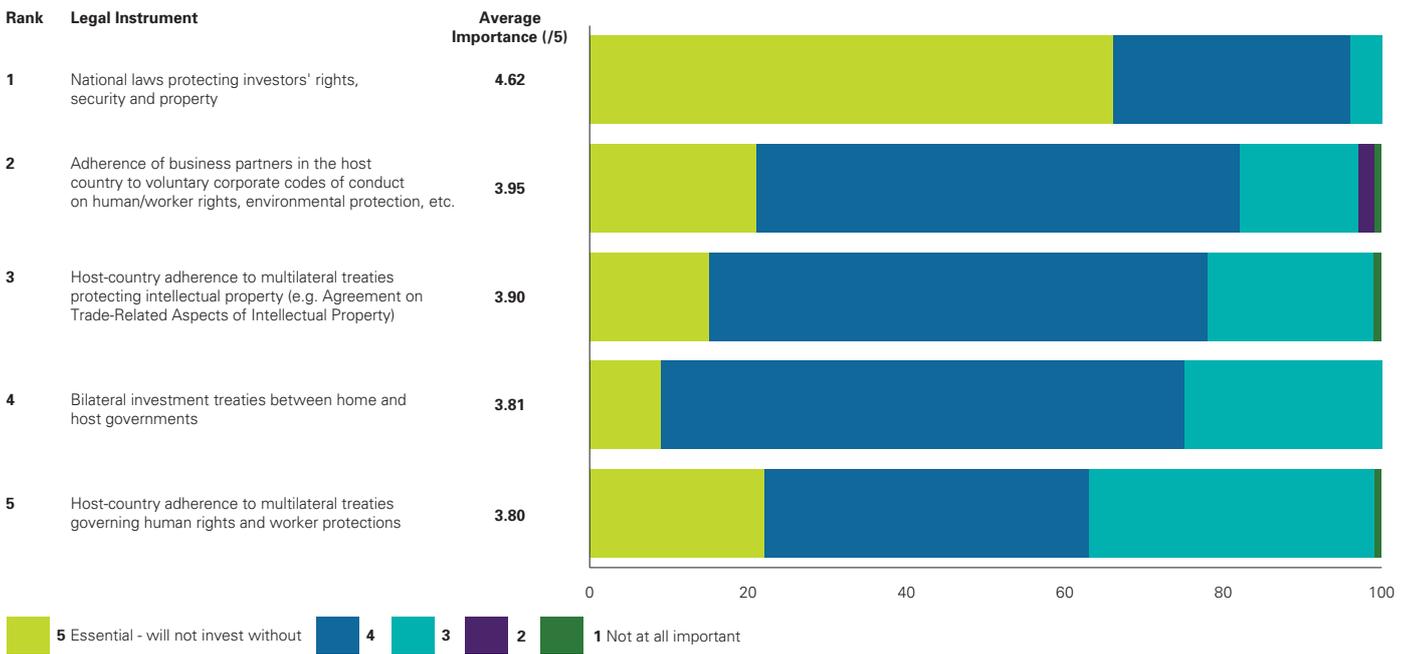


**Table 16 - Number of incidents resulting in withdrawal or reduction of investment by HQ region**



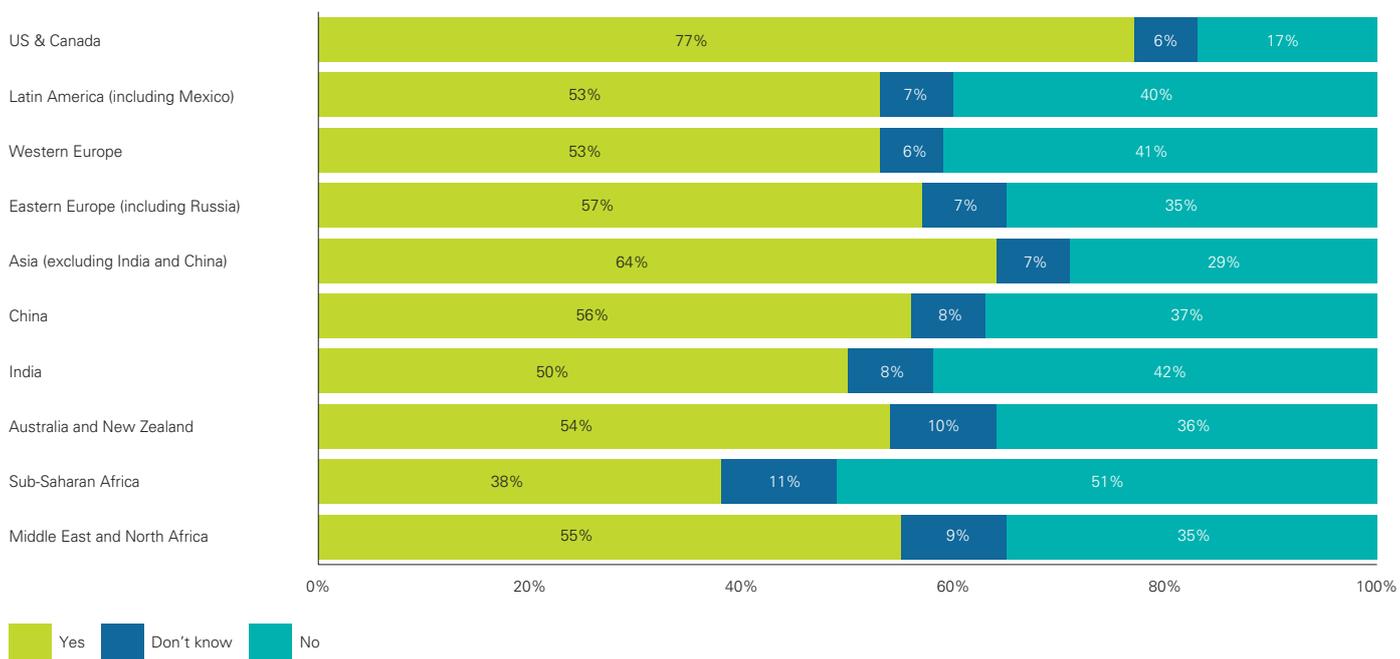
**Table 17 – Importance of various legal instruments to FDI decisions**

**On a scale of 1 to 5, indicate the degree of importance to your FDI decisions of each of the following types of legal instruments:**



**Table 18 – Research as to existence of treaty protection**

**Has your company researched whether a bilateral investment protection treaty providing for investor-state arbitration of disputes is in force between your home country and a potential host country, before making an investment in any of the following regions?**



**Table 19 – Importance of BITs to FDI decision-making in each region**

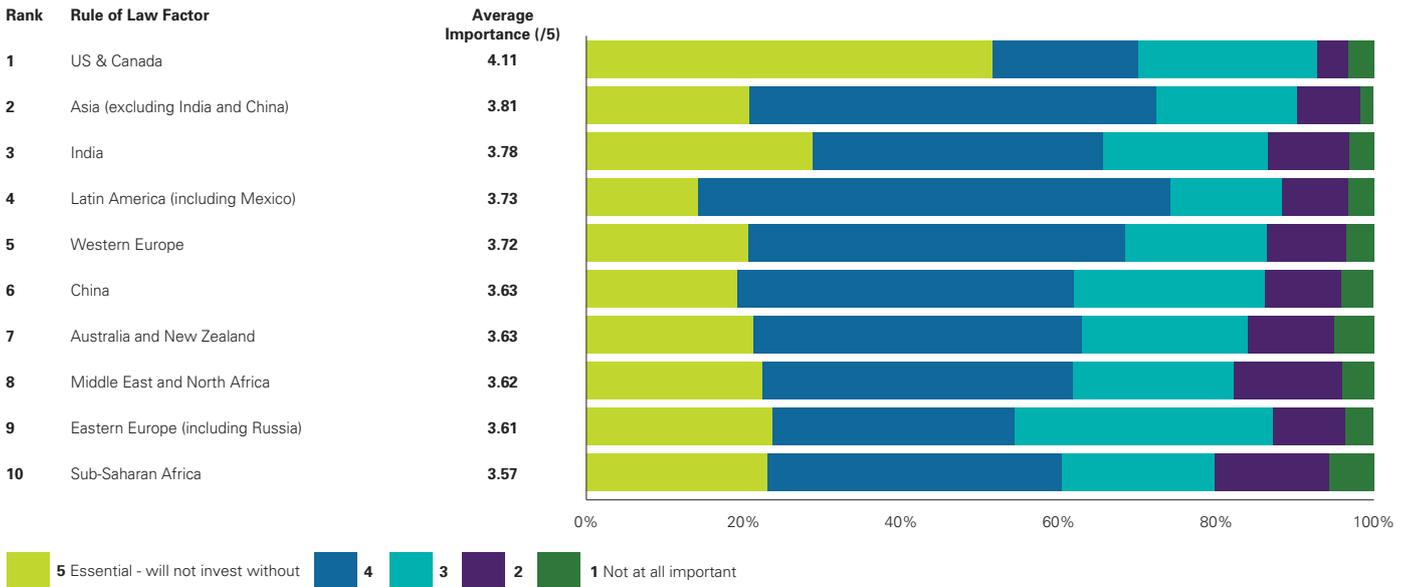


Table 20 – Importance of BITs by industry sector

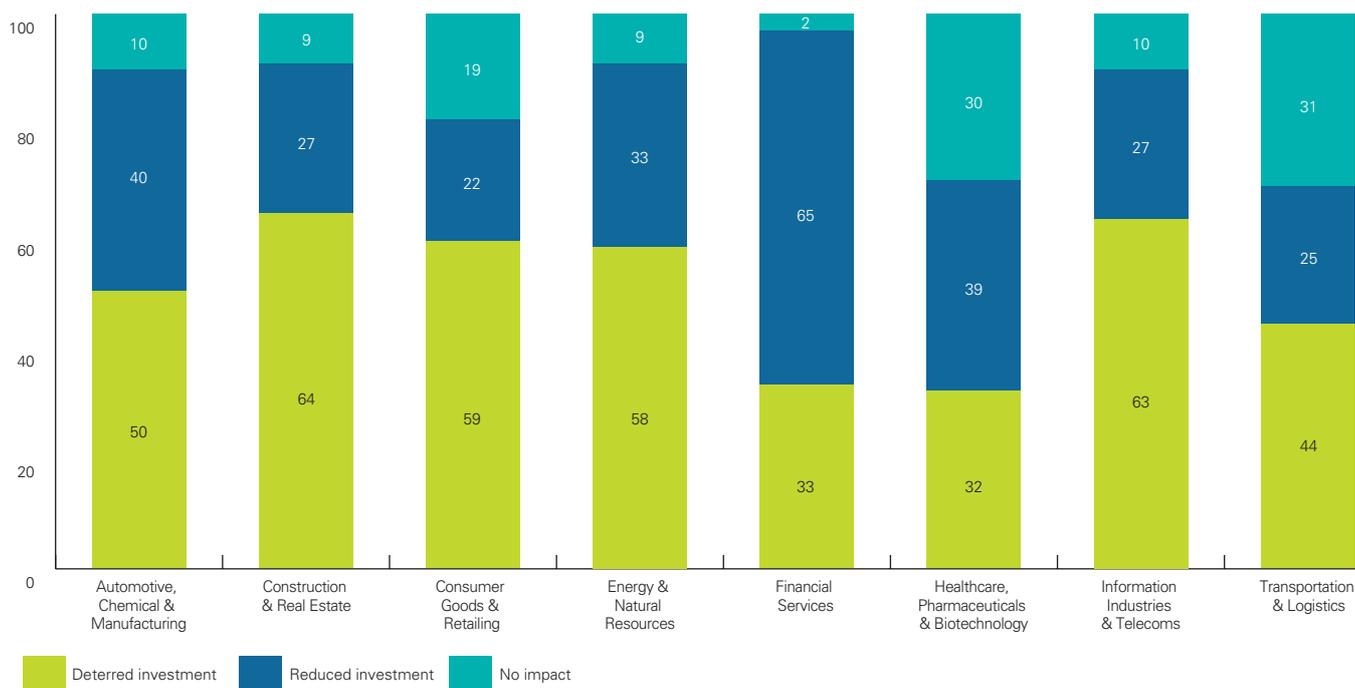
## Average Importance of BITs (/5)

Industry Sector (No. of Respondents)	US & Canada	Latin America	Western Europe	Eastern Europe	Asia	China	India	Oceania	Sub-Saharan Africa	Middle East & North Africa	Average all regions
Financial Services (53)	4.7	4.1	4.1	3.8	4.1	4.0	4.1	4.2	3.9	4.0	4.1
Energy & Natural Resources (45)	4.3	3.8	3.8	3.8	3.9	3.8	3.8	3.8	3.9	3.8	3.9
Consumer Goods & Retailing (20)	4.1	3.9	3.7	3.6	3.8	3.9	4.0	3.6	3.6	3.7	3.8
Automotive, Chemical & Manufacturing (34)	3.6	3.8	3.6	3.7	3.8	3.7	3.9	3.4	3.5	3.6	3.7
Construction & Real Estate (12)	4.1	3.5	3.8	3.6	3.7	3.1	3.7	3.5	3.7	3.8	3.7
Information Industries & Telecoms (48)	4.1	3.5	3.6	3.6	3.9	3.4	3.5	3.5	3.6	3.6	3.6
Transportation & Logistics (21)	3.8	4.0	3.5	3.4	3.8	3.8	3.7	3.4	3.5	3.3	3.6
Healthcare, Pharma & Biotechnology (45)	4.0	3.3	3.6	3.3	3.6	3.3	3.5	3.3	3.0	3.1	3.4
Other (9)	3.1	3.8	3.3	3.4	3.1	3.4	3.4	3.1	3.4	3.3	3.3

Table 21 – Concerns sought to be address by BITs by HQ region

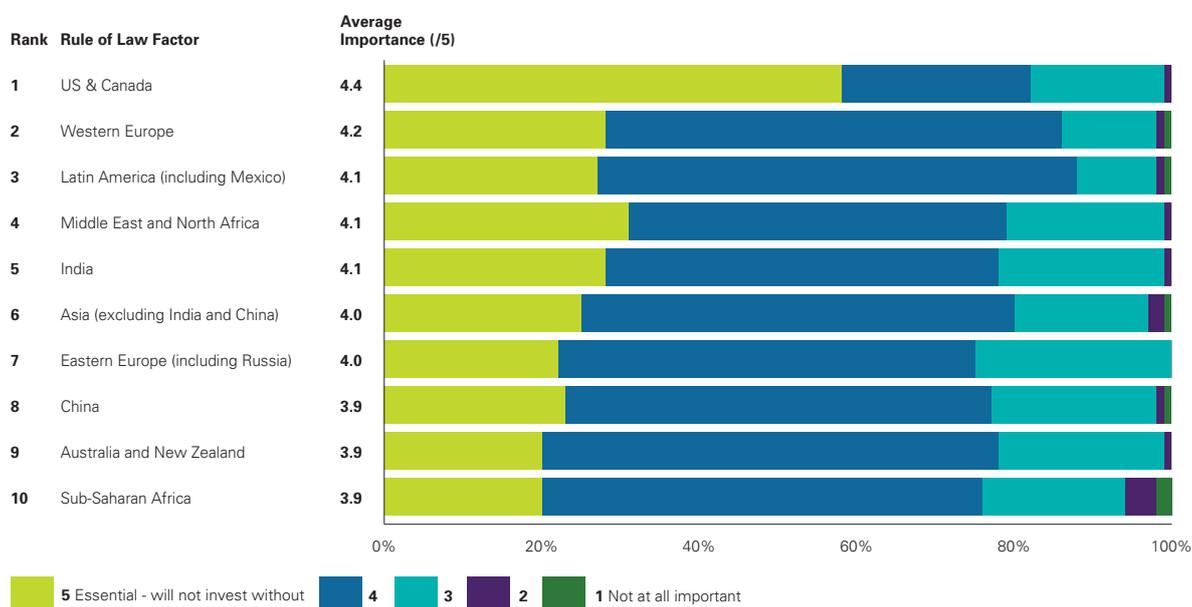
Concern to be addressed	HQ Region	Americas (126)	Europe (101)	Asia (43)	Africa & Middle East (16)	Oceania (15)	Total (301)
<b>Lack of transparency of regulatory/legal rule-making processes</b>		42.1%	46.5%	46.5%	31.3%	26.7%	<b>42.9%</b>
<b>Arbitrary or discriminatory treatment by host country government</b>		38.1%	34.7%	44.2%	50.0%	40.0%	<b>38.5%</b>
<b>Lack of independent and impartial courts in host country</b>		38.1%	37.6%	27.9%	37.5%	26.7%	<b>35.9%</b>
<b>Political or social instability</b>		34.9%	29.7%	16.3%	37.5%	53.3%	<b>31.6%</b>
<b>Lack of recognition of intellectual property rights</b>		30.2%	20.8%	48.8%	25.0%	53.3%	<b>30.6%</b>
<b>Lack of recognition of contract rights</b>		31.7%	28.7%	27.9%	18.8%	26.7%	<b>29.2%</b>
<b>Unexpected and/or retrospective changes to regulatory/legal measures</b>		28.6%	21.8%	27.9%	6.3%	26.7%	<b>24.9%</b>
<b>Risk of physical security of in-country personnel</b>		13.5%	11.9%	20.9%	31.3%	26.7%	<b>15.6%</b>
<b>Corruption (public or private)</b>		8.7%	14.9%	2.3%	12.5%	6.7%	<b>10.0%</b>
<b>Risk of expropriation of investment without adequate compensation</b>		9.5%	10.9%	4.7%	0.0%	6.7%	<b>8.6%</b>
<b>Poor human rights conditions in host country</b>		4.0%	3.0%	2.3%	0.0%	0.0%	<b>3.0%</b>
<b>Non-democratic character of host country government</b>		1.6%	0.0%	2.3%	6.3%	0.0%	<b>1.3%</b>
<b>None of these concerns</b>		1.6%	2.0%	2.3%	0.0%	0.0%	<b>1.7%</b>

**Table 22 – Effect of absence of investment treaty protection by industry sector**

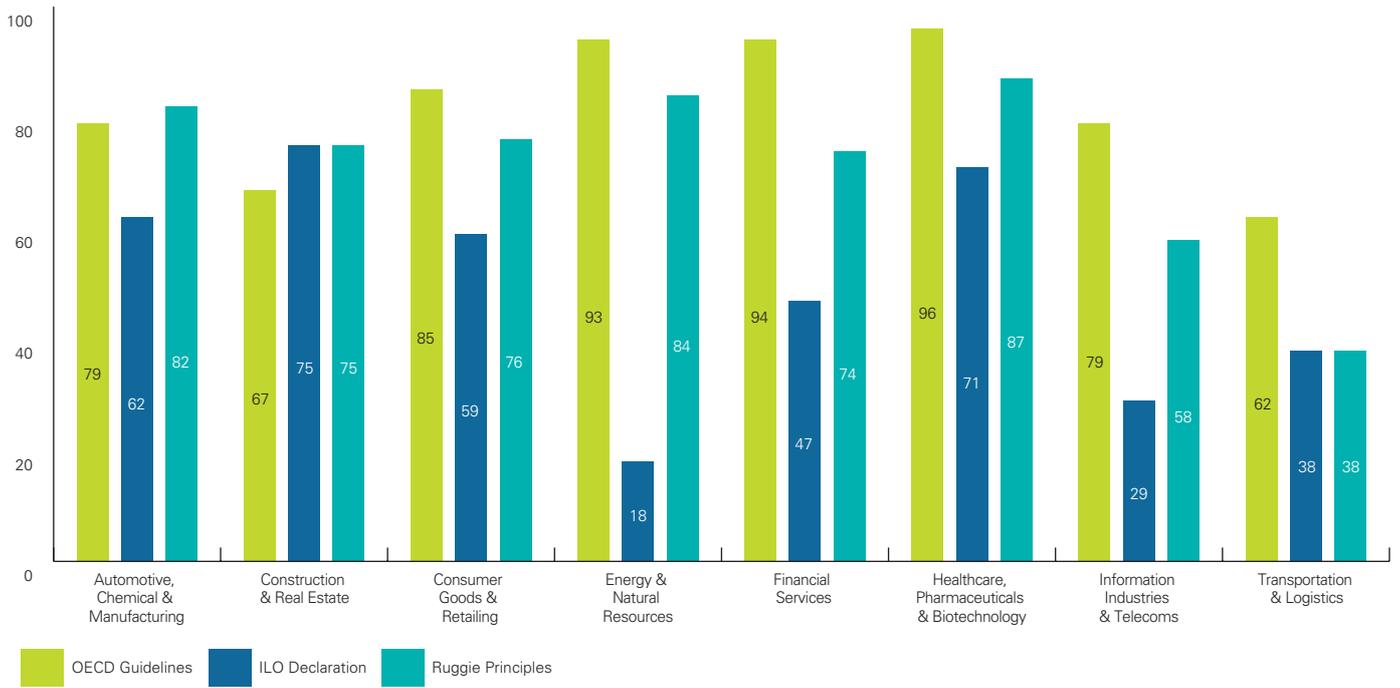


**Table 23 – Effectiveness of BITs to FDI decision-making in each region**

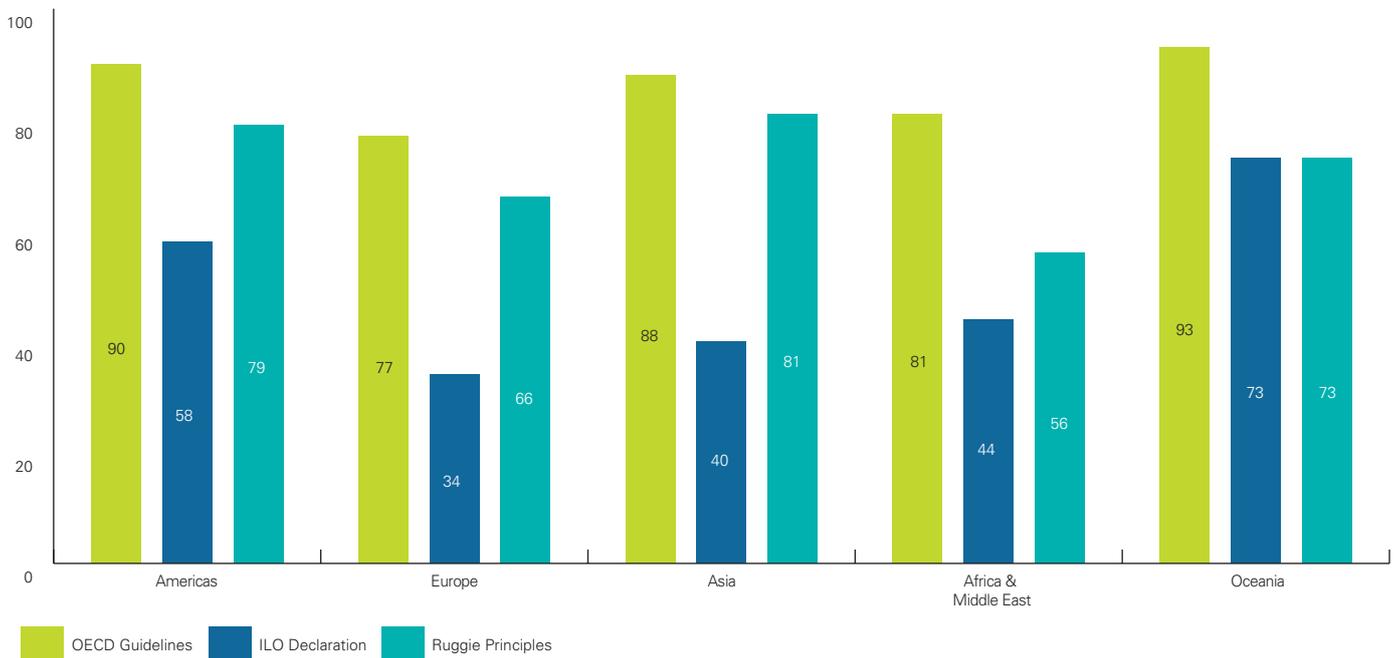
On a scale of 1 to 5, please indicate how effective bilateral investment protection agreements are in addressing your company’s concern about the Rule of Law in the following regions:



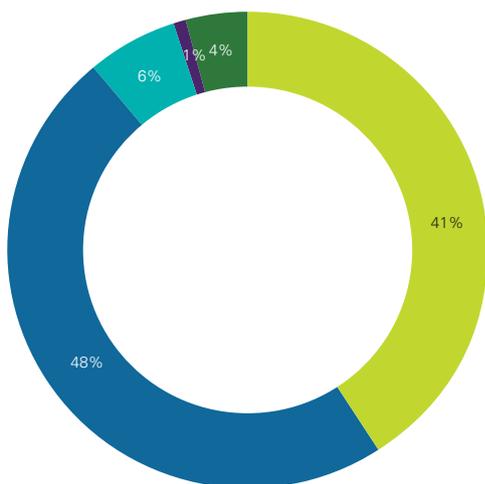
**Table 24 – Adherence to voluntary corporate codes of conduct by sector**



**Table 25 – Adherence to voluntary corporate codes of conduct by HQ region**

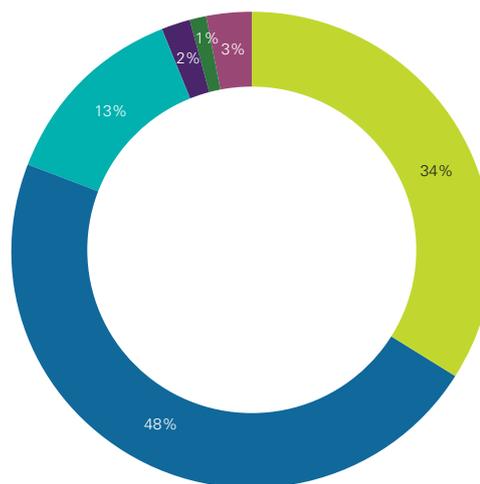


**Table 26 – Effectiveness of Codes of Conduct**



- Very effective (121)
- Somewhat effective (144)
- Slightly effective (18)
- Not at all effective (4)
- Don't know (13)

**Table 27 – Importance of adherence to codes of conduct by business partners**



- Very important (101)
- Somewhat important (143)
- Slightly important (38)
- Not a factor (5)
- Not applicable (4)
- Don't know (10)

Table 28 – Steps to improve Rule of Law situation by HQ region

Step	HQ Region	Americas (126)	Europe (101)	Asia (43)	Africa & Middle East (16)	Oceania (15)	Total (301)
<b>Stronger laws for the enforcement of investor rights, including IP rights, and laws guarding against expropriation</b>		52%	51%	56%	63%	33%	<b>52%</b>
<b>Better trained judiciary, police/security forces, and legal profession</b>		48%	45%	47%	38%	33%	<b>45%</b>
<b>Improved transparency in legal/administrative rule-making</b>		36%	44%	40%	19%	53%	<b>39%</b>
<b>Adoption of bilateral investment protection treaties</b>		37%	30%	33%	31%	40%	<b>34%</b>
<b>Adherence to international agreements and standards on human rights, controlling corruption, etc.</b>		29%	28%	30%	56%	40%	<b>31%</b>
<b>Increased political/social stability</b>		33%	22%	49%	31%	20%	<b>31%</b>
<b>Greater independence of the police/security forces</b>		29%	27%	21%	31%	33%	<b>28%</b>
<b>Greater independence of the judiciary</b>		16%	25%	14%	13%	13%	<b>18%</b>
<b>Adoption of democratic systems of government</b>		8%	14%	7%	6%	27%	<b>11%</b>
<b>Adherence of local business partners to internationally recognized corporate codes of conduct</b>		4%	7%	2%	13%	7%	<b>5%</b>
<b>Other</b>		2%	2%	0%	0%	0%	<b>1%</b>

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