

# **The 8<sup>th</sup> Meeting of ESCAP FDI Network**

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## **Promoting and Facilitating Foreign Direct Investment for Sustainable Development:**

**An Empirical Study of the Sustainable Development Provisions in BITs of Asian-Pacific LDCs and LLDCs**

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# Outline

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1. A skeletal review of the concept and evolution of sustainable development
2. Major SDPs in IIAs, types and subtypes
3. SDPs in the sample IIAs
4. SDPs in the BITs of Asian-Pacific LDCs and LLDCs
5. The sustainability gap
6. The survey and major findings
7. Recommendations

# Evolution of sustainable development

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1. 1987, **Brundtland Report**, SD entered into the international agenda .
2. 1992, **Rio Declaration**, the United Nations Conference on Environment and Development (UNCED), making SD a leading concept of international environmental policy.
3. 2002, **Johannesburg Declaration**, the World Summit on Sustainable Development (WSSD), three pillars: economic development, social development and environmental protection.
4. 2002, **New Dehli Declaration**, the ILA Committee, several related principles recognized.
5. 2015, the third International Conference on Financing for Development (ICFD), **Addis Ababa Action Agenda (AAAA)** cohesive national sustainable development strategies, supported by integrated national financing frameworks, will be at the heart of the efforts in the pursuit of sustainable development.
6. 2015, UN General Assembly adopted the 17 **SDGs**, universal, integrated and transformative sustainable development agenda.

# Why IIAs and sustainable development?

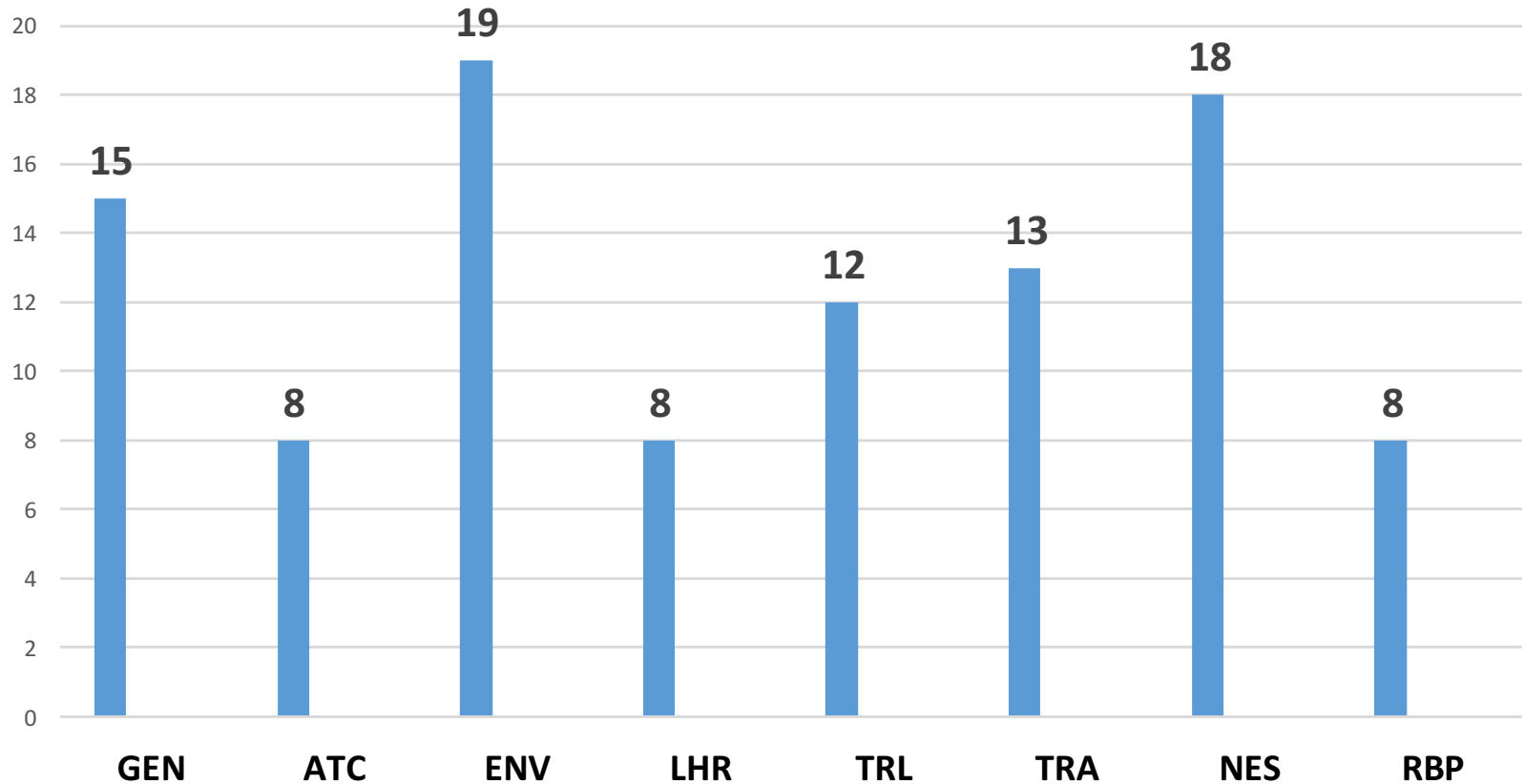
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1. Fragmentation of international law: investment law and other branches of law (environmental, human rights laws) develop along separate tracks.
2. IIAs are concluded for investment protection and promotion. This makes it difficult to regulate SD-related investment activities via IIAs for host states and arbitrators.
3. The regulatory chill of IIAs and recent ISA cases, such as *Vattenfall et al. v. Germany* and *Philip Morris v. Australia*.
4. UNCTAD reveals the recent trend of making SD-oriented IIAs. Structural integration of SD in IIAs. Various types of SD provisions included in IIAs, especially by developed countries.
5. Democratic deficit in IIA-making and insufficient non-state stakeholder engagement (investors, affected groups, civil societies etc.).

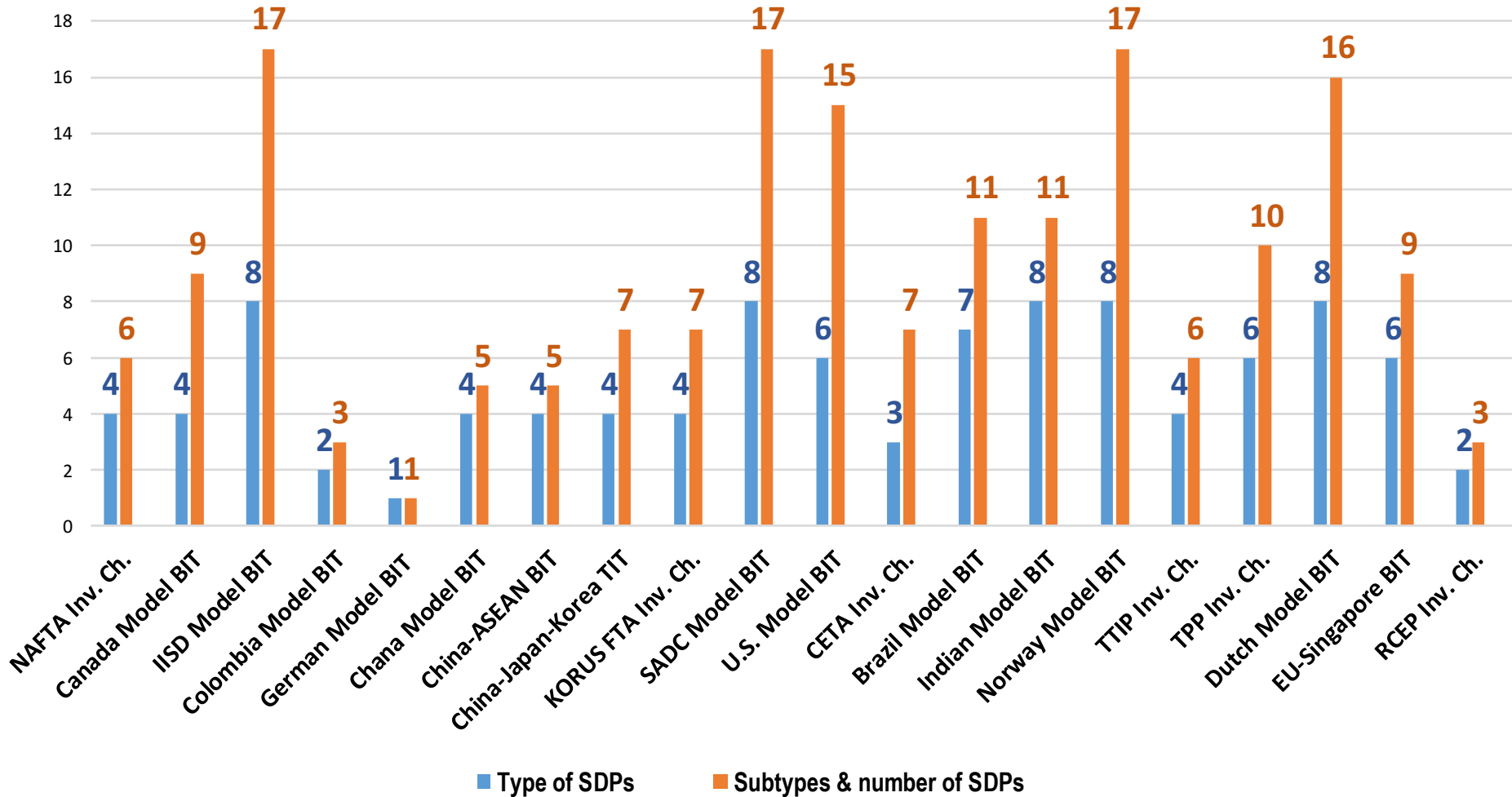
# The major types and subtypes of SDPs

	<b>G E N</b>	<b>ATC</b>			<b>ENV</b>			<b>LHR</b>				<b>TRL</b>			<b>TRA</b>				<b>N E S</b>	<b>RBP</b>		
	<b>D E C</b>	<b>D E C</b>	<b>A O S</b>	<b>A O I</b>	<b>N D G</b>	<b>C O N</b>	<b>E X P</b>	<b>R E F</b>	<b>N D G</b>	<b>C O N</b>	<b>E X P</b>	<b>P U B</b>	<b>C O M</b>	<b>E N G</b>	<b>P U B</b>	<b>H E R</b>	<b>T E C H</b>	<b>U T I L</b>	<b>E X P</b>	<b>R E F</b>	<b>R E F</b>	<b>R E F</b>
<b>Declaratory</b>	X	X				X		X		X										X		
<b>Obligatory</b>			X	X	X							X	X	X	X	X	X	X			X	X
<b>Exceptive</b>							X			X									X			

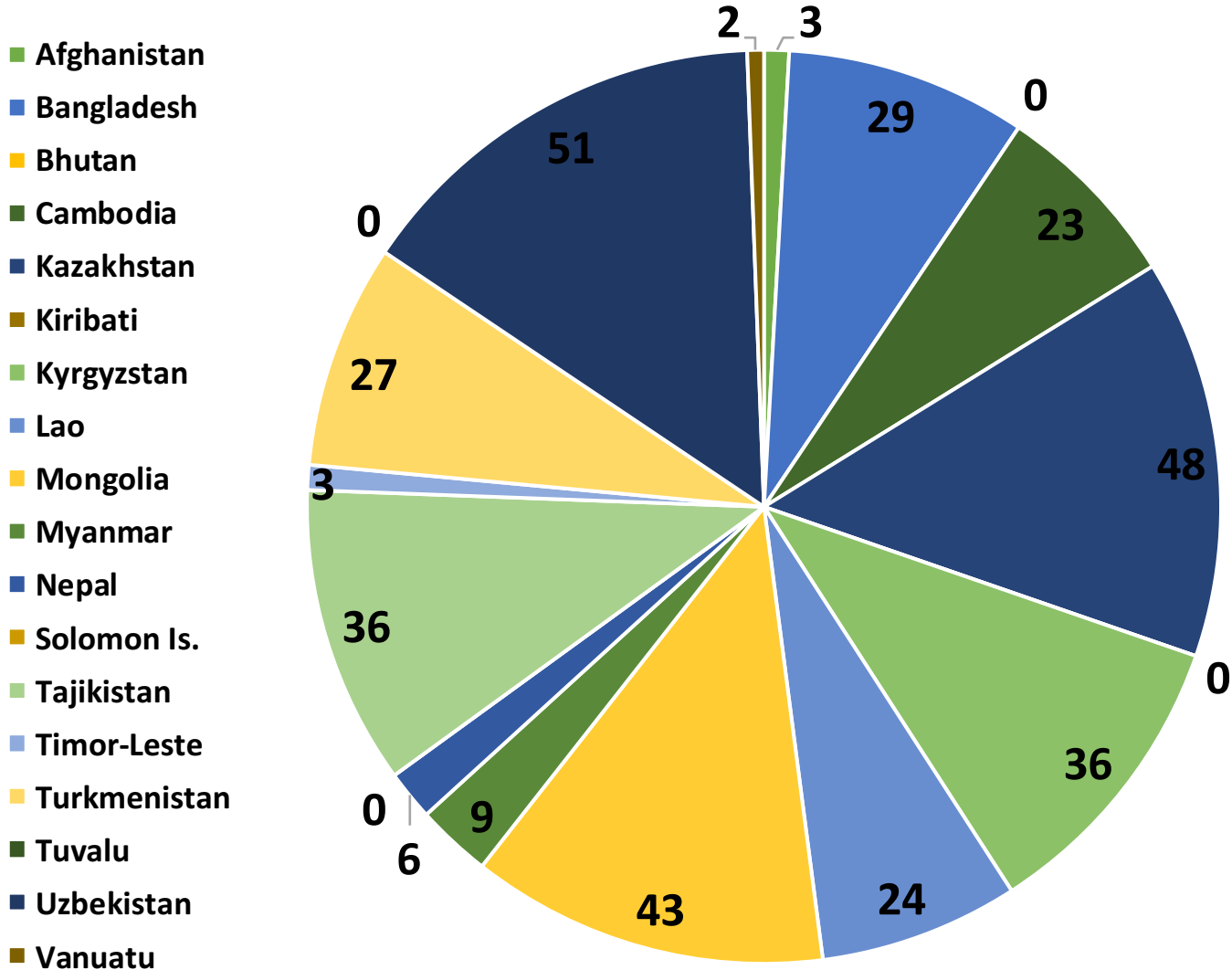
# Types of SDPs in the sample IIAs



# The distribution of SDPs in the sample IIAs

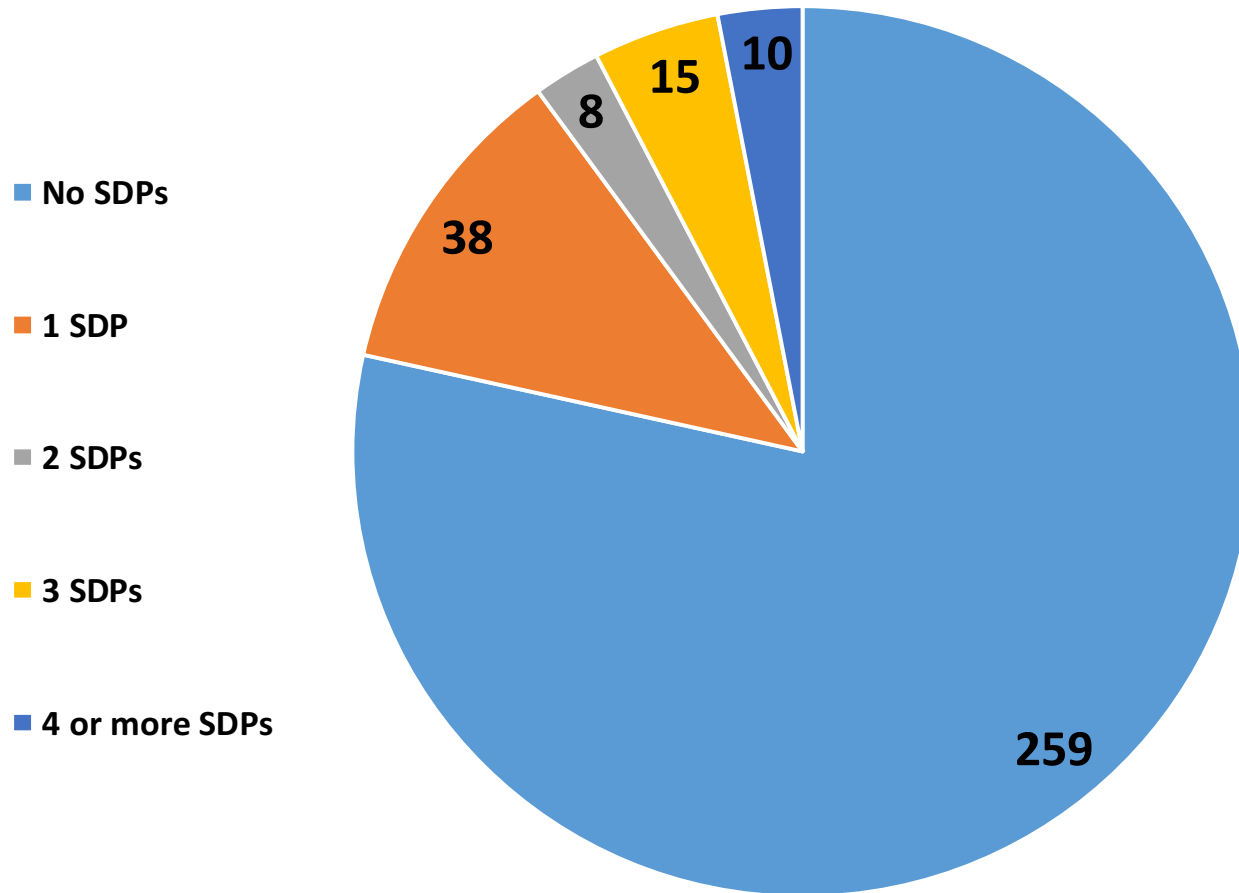


# Number of BITs of Asian-Pacific LDCs and LLDCs

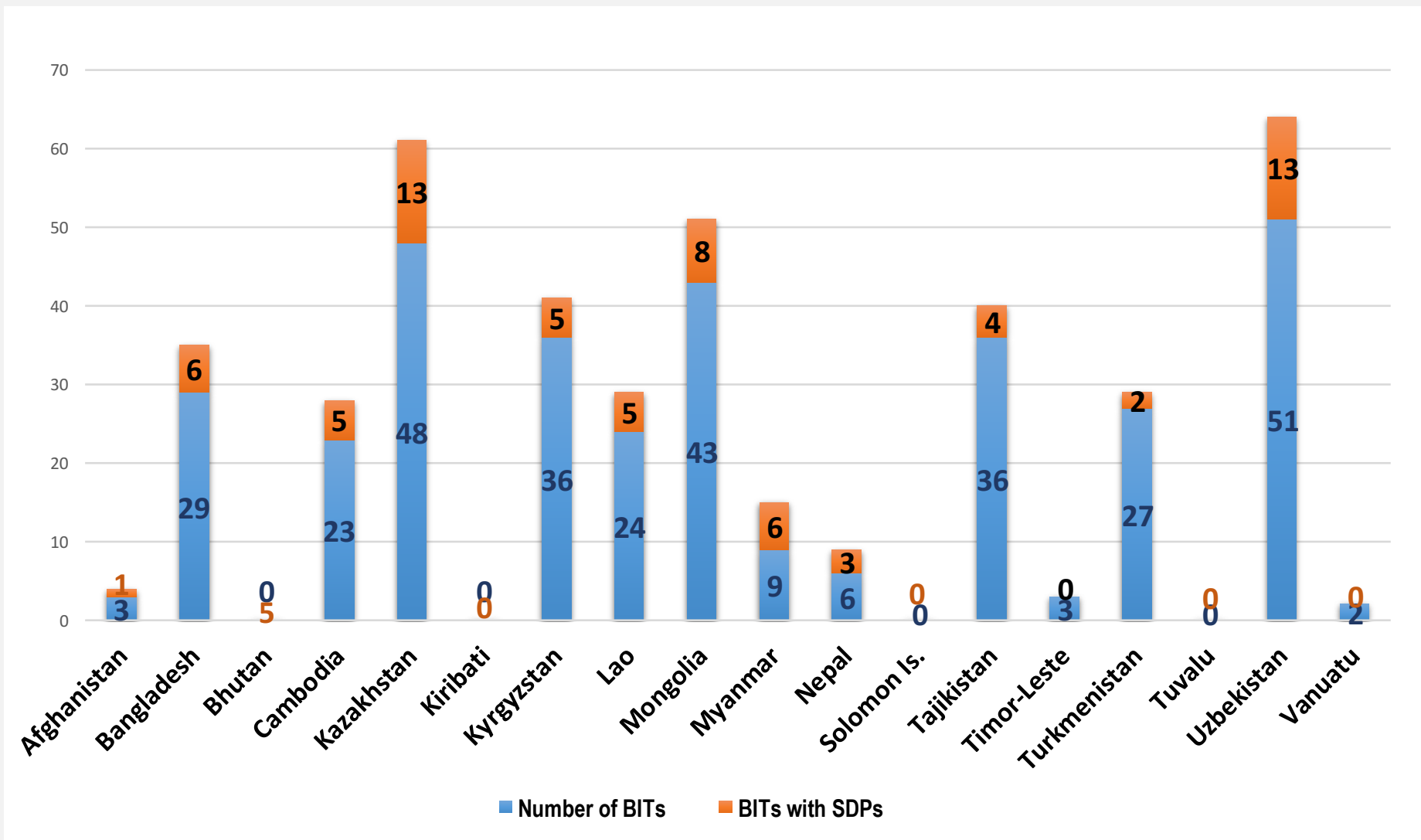




# Distribution of SDPs in BITs of Asian-Pacific LDCs and LLDCs



# Country distribution of SDPs in BITs of Asian-Pacific LDCs and LLDCs



# Number of SDPs in BITs of Asian-Pacific LDCs and LLDCs

Afghanistan

Bangladesh

Cambodia

Kazakhstan

Lao

Mongolia

Myanmar

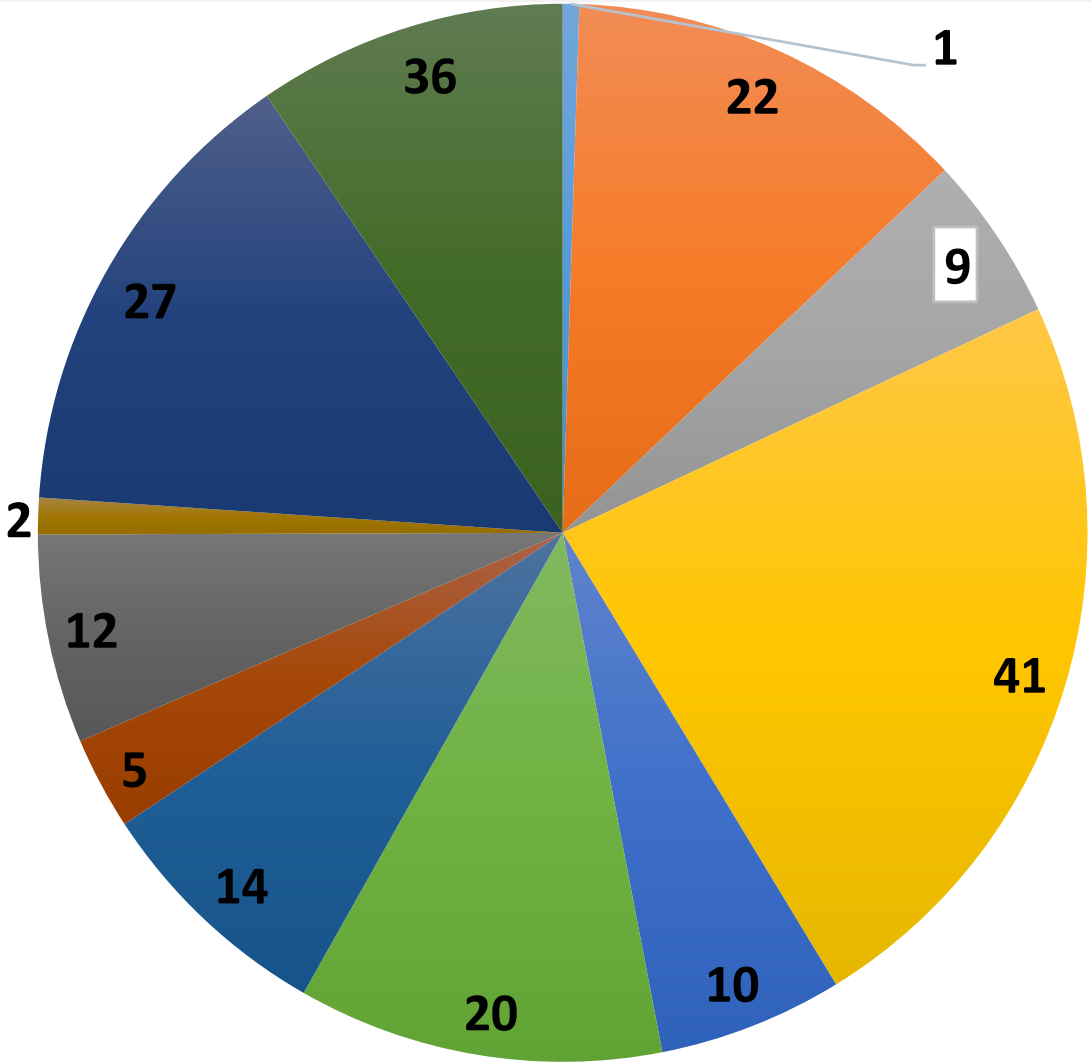
Nepal

Tajikistan

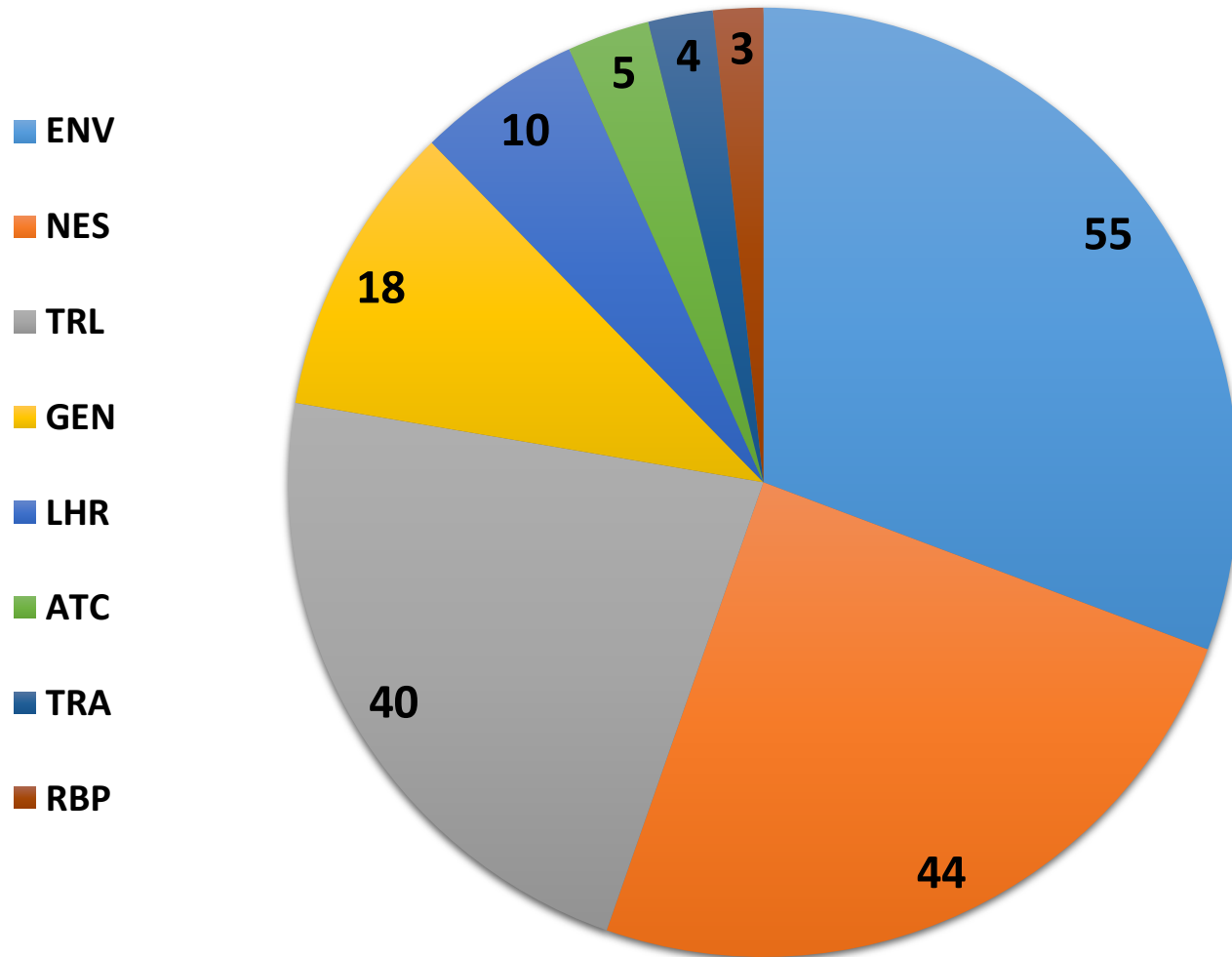
Turkmenistan

Uzbekistan

Kyrgyzstan



# Types of SDPs in BITs of Asian-Pacific LDCs and LLDCs



# The “sustainability gap”

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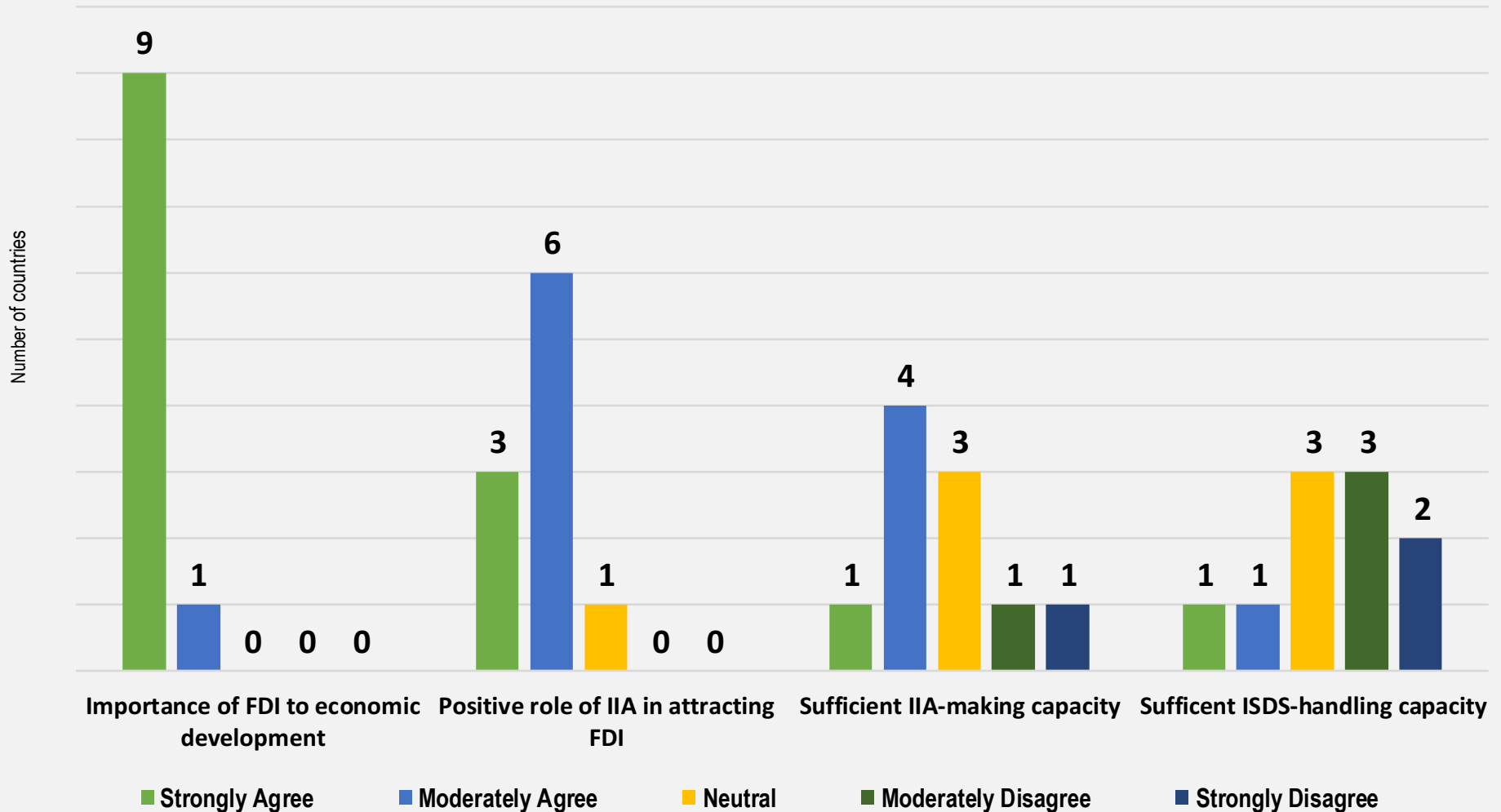
1. The gap of availability and practical effectiveness of SDPs. BITs of Asian-Pacific LDCs and LLDCs contain, in average, a much smaller number of SDPs than sample IIAs. Even to BITs of Asian-Pacific LDCs and LLDCs that contain SDPs, limited in number though, SDPs in these BITs are of less types and subtypes.
2. The gap of socialization of SDPs. Many IIAs begin to incorporate SDPs that could help address social concerns. Social SDPs routinely included in the sample IIAs after 2012. In total 12 ATCs, 21 LHRs and 14 RBPs contained in the sample IIAs. It remains a rare occurrence for BITs of Asian-Pacific LDCs and LLDCs to incorporate social SDPs.
3. The gap of governance-orientation of SDPs. (1) third party participation in ISA; (2) obligations on investors; (3) reference to non-binding external standards; (4) opportunities for the general public to take part in the making of standards. These SDPs are less seen in BITs of Asian-Pacific LDCs and LLDCs.

# The survey and observations

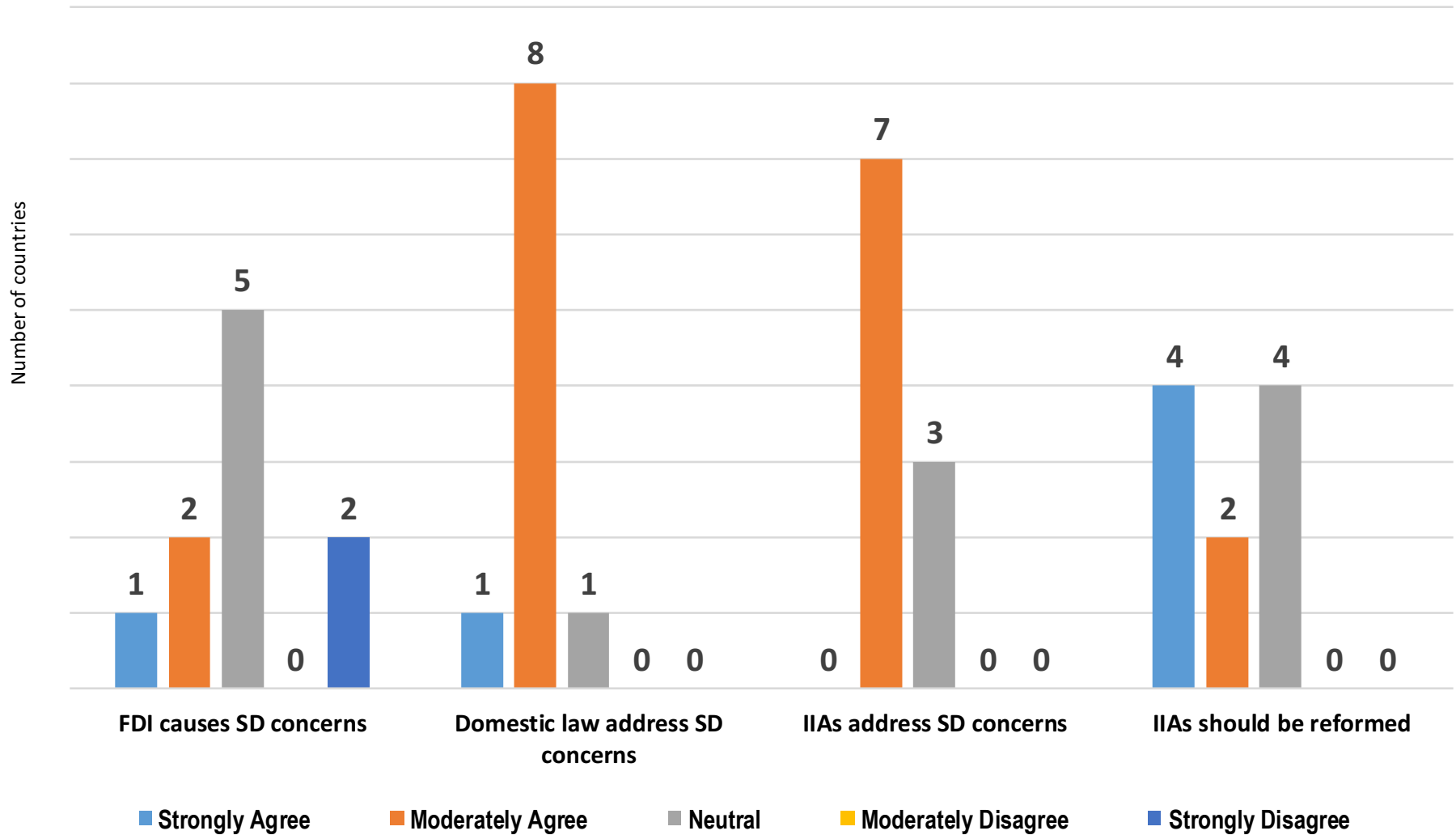
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- The questionnaire was sent to all Asian-Pacific countries. Ten valid replies were received by the extended deadline.
- These ten countries are Armenia, Bangladesh, Bhutan, Cambodia, Iran, Mongolia, Myanmar, Nepal, New Caledonia and Turkey.
- The ten countries are not entirely identical to Asian-Pacific LDCs and LLDCs whose BITs are investigated in this study. Specifically, there are six overlaps, i.e. Bangladesh, Bhutan, Cambodia, Mongolia, Myanmar and Nepal. While the other four Asian-Pacific countries are not investigated for their BITs. Despite such discrepancy, it remains helpful to take the replies of all ten countries into consideration without drawing further distinctions.
- Appendix E for questionnaires.

# Relevance of IIAs to economic development in Asian-Pacific countries

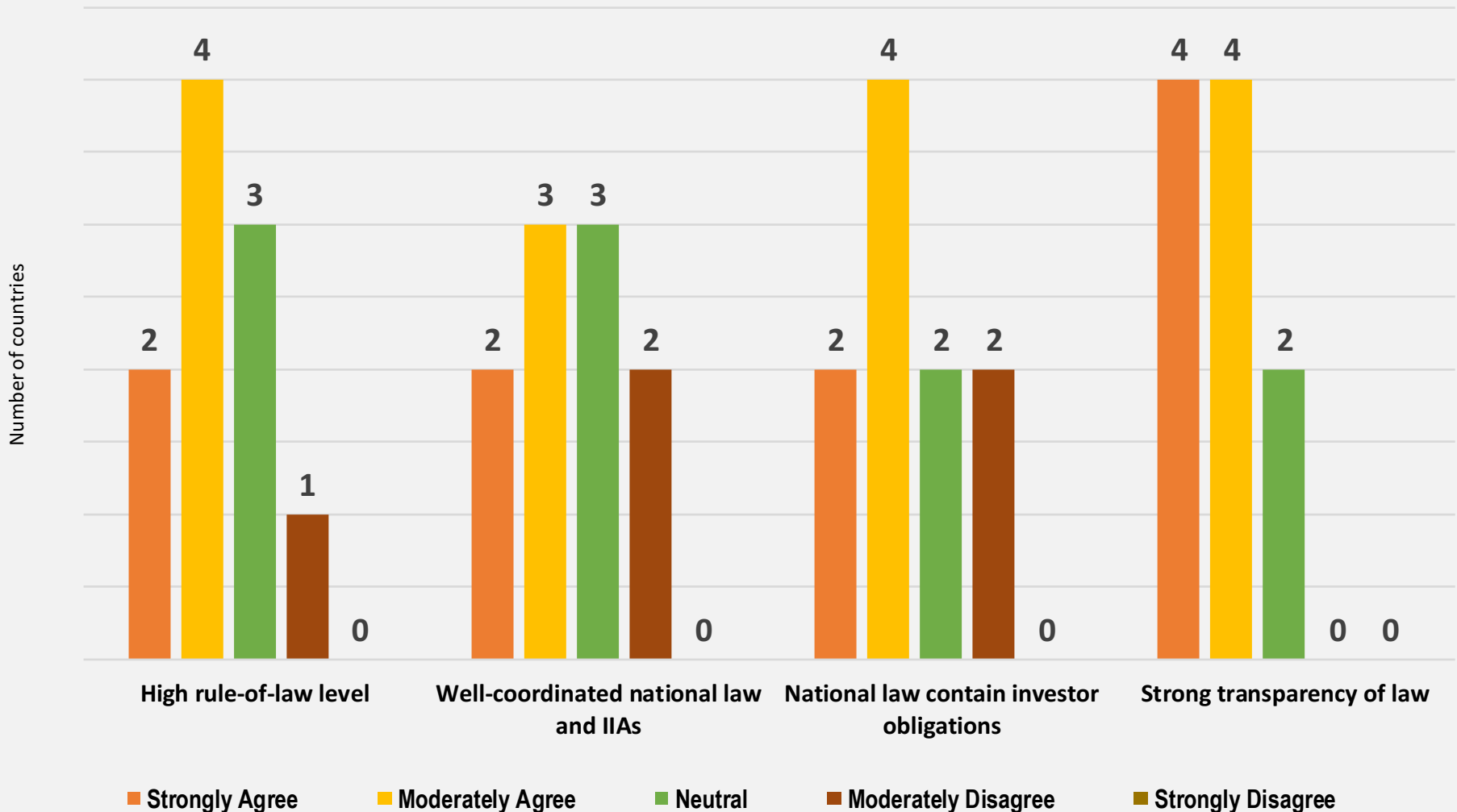


# IIAs and sustainable development in Asian-Pacific countries





# The rule of law of FDI in Asian-Pacific countries



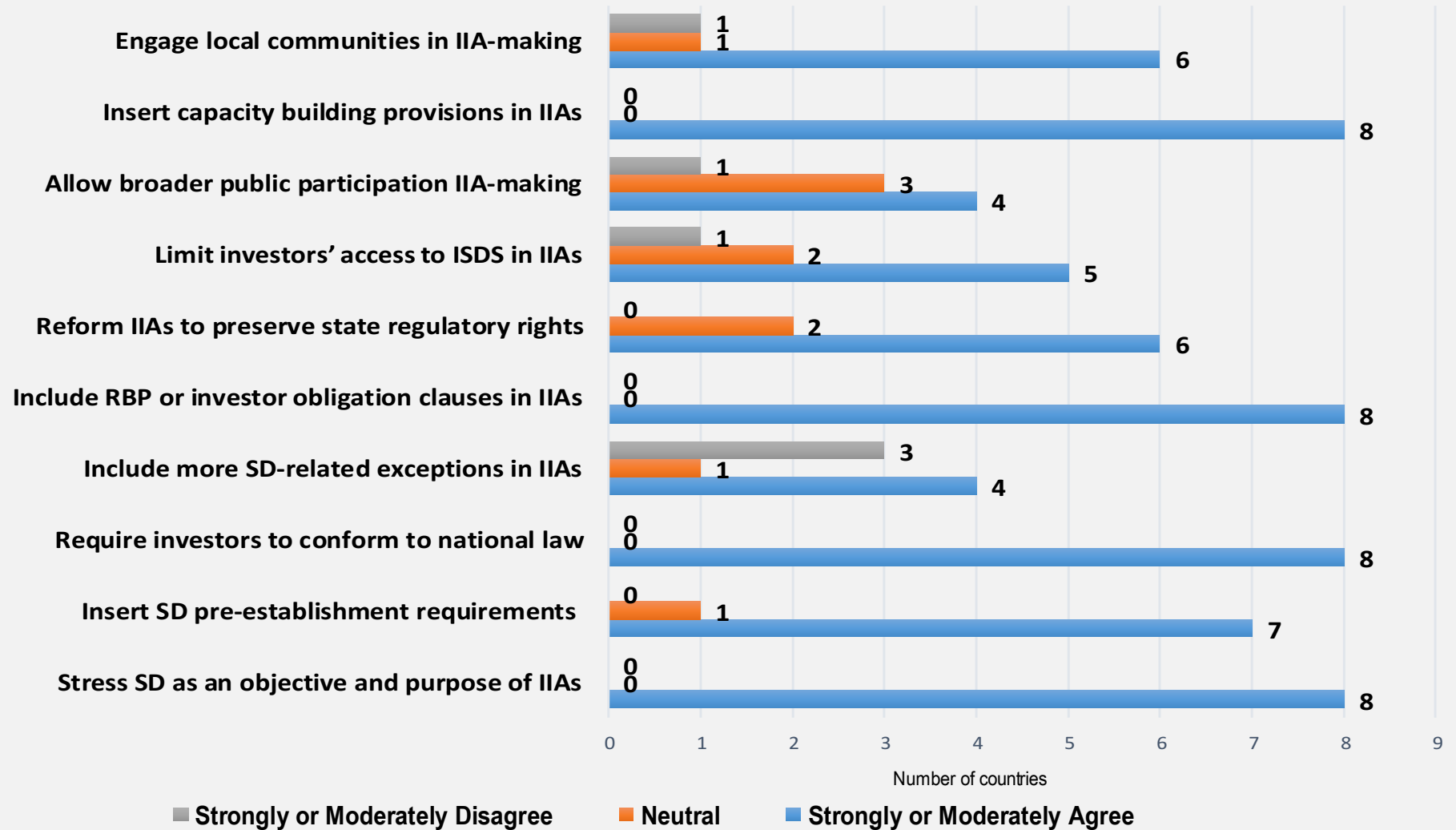
# Sustainable development concerns of Asian-Pacific countries

Types of SD Challenge	High	Moderate	Low	No	No Comments
Environmental	1	3	2	0	1
Labor/human rights	1	1	4	0	1
Public health & safety	1	2	2	1	1
State regulatory rights	1	2	2	1	1
National security	1	1	4	0	1
Irresponsible investor conducts	0	2	3	1	1

# Sectorial Sustainable development concerns of Asian-Pacific countries

Types of SD Challenge	High	Moderate	Low	No	No Comments
Mining and mineral processing	2	2	1	0	2
Natural resource processing	1	2	2	0	2
Agriculture and food processing	0	4	2	0	1
High-technology industry	1	1	2	1	2
Chemical processing	0	3	2	1	1
Services industry	1	3	1	1	1
Textile and clothing industry	1	1	3	1	1
Light industry	0	2	3	1	1
Heavy machinery industry	0	3	3	0	1

# Preference of IIA reform options for Asian-Pacific countries



# Policy recommendations - Major

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- There is no one-size-for-all model of sustainable development-oriented IIA. Asian-Pacific LDCs and LLDCs should carefully assess their specific national situations and needs in IIA-making.
- Sustainable development-oriented IIAs should strike a proper balance among economic growth, environmental protection and social development. It is necessary for Asian-Pacific LDCs and LLDCs to adopt a broad and updated understanding of sustainable development, and conduct a country-specific benefit-cost analysis to decide whether and how social SDPs should be incorporated in IIAs.
- IIAs are becoming increasingly governance-oriented. Asian-Pacific LDCs and LLDCs need to consider this emerging trend in IIA-making. Especially, they need to consider the role of non-state stakeholders and soft law rules in the existing IIA system.
- The practical effectiveness of SDPs in IIAs not only relies on the SDPs themselves, but also depends on the national law standards and the rule-of-law situation of a country. Thus, the SDPs in IIAs could be harnessed if Asian-Pacific LDCs and LLDCs also improve sustainable development standards at national and regional levels.
- Capacity building, inter-state cooperation and stakeholder engagement are getting growingly important in making sustainable development-oriented IIAs. Asian-Pacific LDCs and LLDCs should carefully consider these factors in light of their specific national situations and needs.

# Policy recommendations - Further

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In addition, it is also suggested that Asian-Pacific LDCs and LLDCs consider the following further recommendations in future IIA-making:

- As FTAs also address sustainable development concerns, Asian-Pacific LDCs and LLDCs need to properly deal with the interrelations between BITs and FTAs in IIA-making, especially with regard to the application of FTA chapters on investment issues.
- Despite the fact that many ISDS cases provoke sustainable development concerns, SDPs in IIAs are seldom applied in practice. Asian-Pacific LDCs and LLDCs need to keep observing the development with regard to the interpretation and application of SDPs in IIAs.

# SDPs in sample IIAs

Sample IIAs	Year	GEN	ATC			ENV			LHR				TRL			TRA				NES	RBP		
			DEC	AOS	AOI	NDG	CON	EXP	REF	NDG	CON	EXP	PUB	COM	ENG	PUB	HER	TPB	UTR		REF	ROS	ROI
NAFTA Inv. Ch. *	1994	X				X		X							X		X		X				
Canada Model BIT	2004	X				X		X				X	X		X	X	X		X				
IISD Model BIT	2005	X		X	X	X	X	X	X	X	X				X	X	X		X	X	X		
Colombia Model BIT	2008						X	X											X				
German Model BIT	2008																		X				
Ghana Model BIT	2008	X					X	X											X			X	
China-ASEAN Inv. Agt	2009	X						X				X	X						X				
China-Japan-Korea TIT	2012	X					X	X				X	X	X					X				
KORUS FTA Inv. Ch. *	2012	X				X		X							X	X	X		X				
SADC Model BIT	2012	X		X	X	X	X	X	X	X	X	X			X	X	X		X	X	X	X	
U.S. Model BIT	2012	X				X	X	X	X	X	X	X	X	X	X	X	X		X				
CETA Inv. Ch. *	2014				X		X	X							X	X	X	X					
Brazil Model BIT	2015	X		X		X	X	X		X	X		X	X					X			X	
India Model BIT	2015	X			X			X			X		X	X	X	X	X		X			X	
Norway Model BIT	2015	X	X	X		X	X	X	X	X	X		X	X	X	X	X		X	X	X		
TTIP Inv. Ch. (leaked) *	2015				X		X	X									X	X	X				
TPP Inv. Ch. *	2016	X					X	X				X	X		X	X	X		X		X		
Dutch Model BIT	2018	X		X	X	X	X	X	X	X	X	X					X	X	X	X	X	X	
EU-Singapore BIT	2018	X					X	X	X			X			X	X	X		X				
RCEP Inv. Ch. (leaked) *	2018							X							X			X					
<b>Sub Total</b>		<b>15</b>	<b>1</b>	<b>5</b>	<b>6</b>	<b>10</b>	<b>13</b>	<b>19</b>	<b>6</b>	<b>6</b>	<b>7</b>	<b>2</b>	<b>12</b>	<b>8</b>	<b>2</b>	<b>12</b>	<b>10</b>	<b>13</b>	<b>4</b>	<b>18</b>	<b>4</b>	<b>5</b>	<b>5</b>
<b>Total &amp; Subtype</b>	<b>182</b>	<b>15</b>	<b>12</b>			<b>42</b>			<b>21</b>				<b>22</b>			<b>39</b>				<b>18</b>	<b>14</b>		

# SDPs in BITs of Asia Pacific LDCs and LLDCs

Country	No. of BIT	No. of SDPs	GEN	ATC			ENV			LHR				TRL			TRA				NES	RBP						
				D E C	A O S	A O I	N D G	C O N	E X P	R E F	N D G	C O N	E X P	P U B	C O M	E N G	P U B	H E R	T P B	U T R		R E F	R O S	R O I				
Afghanistan	3	1							1																			
Bangladesh	29	22	1				2	3	3					3	2								8					
Bhutan	0	0																										
Cambodia	23	9		1			1	1	1				1	2									2					
Kazakhstan	48	41	2		1		3	10	4		1	2		7					1				10					
Kiribati	0	0																										
Kyrgyzstan	36	17	2	1			2	1	1		1	1		4							1		3					
Lao	24	10	1		1		1		2					2									3					
Mongolia	43	20	2				2		2					3	1		1	1					7		1			
Myanmar	9	14			1		1	1	4					2									5					
Nepal	6	5	2				1							1									1					
Solomon Island	0	0																										
Tajikistan	36	12	1				2	2	1	1	1			1									2	1				
Timor-Leste	3	0																										
Turkmenistan	27	2												2														
Tuvalu	0	0																										
Uzbekistan	51	27	7				3	1			2			2	8								3		1			
Vanuatu	2	0																										
Subtotal	340	179	18	2	3	0	18	19	18	1	5	3	1	29	11	0	1	1	1	1		44	1	2	0			
Total & Subtype			18		5			55				10				40			4				44	24	3			



**The End**  
**Thank you for your attention.**

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