



RESEARCH NOTE

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Recent developments in international investment agreements

The past year saw a further proliferation of international investment agreements (IIAs) at the bilateral, regional, inter-regional, and plurilateral levels. On average, more than three such agreements were signed per week. Several developments are worth noting in this context. First, the universe of bilateral investment treaties (BITs) and bilateral double taxation treaties (DTTs) continued to expand. Second, international investment rules are also increasingly being formulated as part of agreements that encompass a broader range of issues (including notably trade in goods and services, and other factors of production), generally referred to here as Preferential Trade and Investment Agreements (PTIAs). Third, the investment provisions in the new agreements tend to be increasingly sophisticated and complex in content, clarifying in greater detail the meaning of certain standard clauses. Fourth, among the new BITs some are newly re-negotiated treaties that replace earlier BITs between the same partners, either because the original treaty has reached its expiry date or because of changed circumstances. Fifth, South-South cooperation on international investment policy is intensifying. And, sixth, the increasing activity in international investment treaty-making has been paralleled by a rise in investor-State disputes. As a result of these developments, countries -- and firms -- have to operate within an increasingly complicated framework of multi-layered and multi-faceted investment rules with overlapping obligations and commitments, and also with gaps.

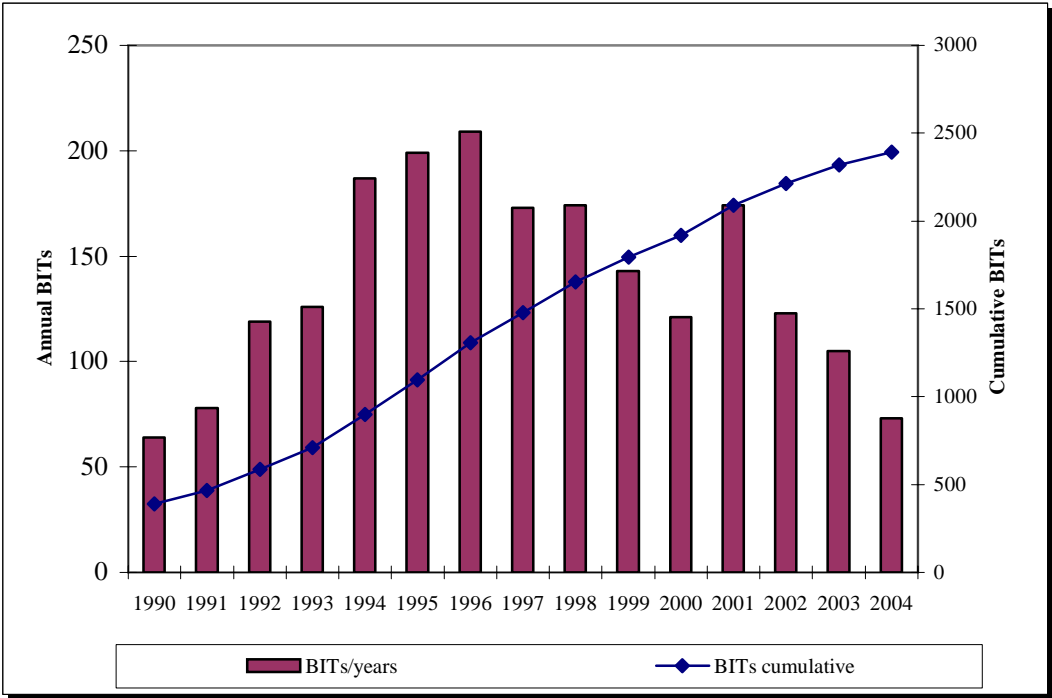
1. Bilateral investment treaties

a. The BITs network continues to increase

The universe of BITs continued to expand over the past year, albeit at a slower pace. During 2004, 73 new BITs were concluded, 10 of which replaced earlier BITs, bringing the total number of BITs to 2,392 (figure 1). This represents, however, a slow down in the conclusion of BITs since 2001. Thirty nine of the 2004 BITs involved developed countries, with Belgium-Luxembourg, Finland, Sweden and Switzerland being the most active (concluding five new BITs each). Only one of these BITs was with another developed country

(i.e. the renegotiated BIT between Poland and the United States). Fifty-five BITs involved developing countries, including 28 that were South-South agreements (figure 2).

Figure 1. Number of BITs concluded, cumulative and year by year, 1990-2004



Source: UNCTAD (www.unctad.org/ia).

Among developing countries, African countries concluded 33 BITs of the total during 2004, involving 22 African countries, 9 developed countries, 4 Asian countries and Barbados and Croatia. This brought the cumulative number of BITs for the region to 615 at the end of 2004.

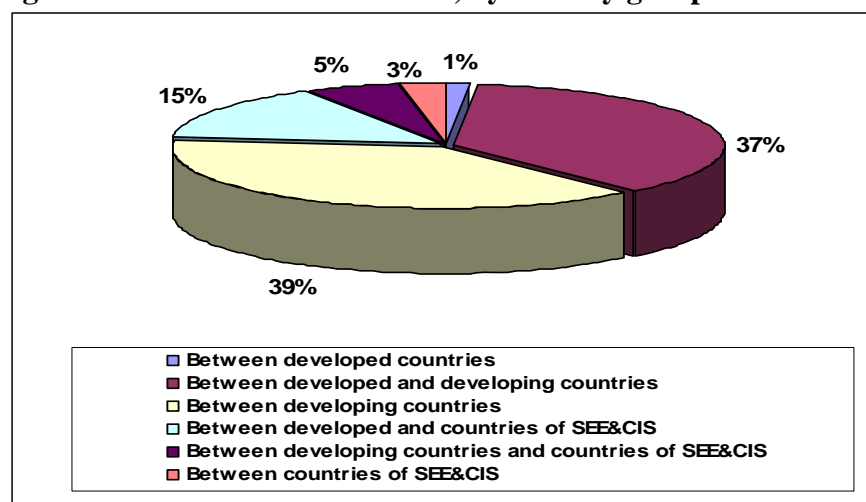
Ethiopia, for example, concluded four BITs with Austria, Germany, Libya and Sweden. Mauritius, Mauritania, South Africa and Libya concluded three BITs each.

Asian countries also concluded 33 BITs in 2004. This brought the total number of BITs concluded by Asia and Oceania countries to 956 at the end of 2004. Afghanistan concluded its first BIT in that year (with Turkey), while China and the Republic of Korea -- two of the oldest BIT signatories -- added six and four new treaties respectively to their already long BIT list. In the case of China, three of the new BITs were concluded with African countries. In the Middle East, Lebanon concluded eight BITs, out of which six were with African countries.

Latin American countries, on the other hand, signed only six BITs during 2004. The Dominican Republic signed BITs with the United States and Switzerland; Argentina signed with Panama, while Guatemala and Nicaragua concluded one BIT each. Uruguay also concluded a BIT with the United States - the first agreement based on the new United States model text. Total Latin American and Caribbean BITs amounted to 451 by end 2004.

Transition economies signed 17 BITs in 2004. Most active here were Croatia and Bosnia and Herzegovina with 3 new BITs each. This brought the total number of BITs concluded by transition economies to 642.

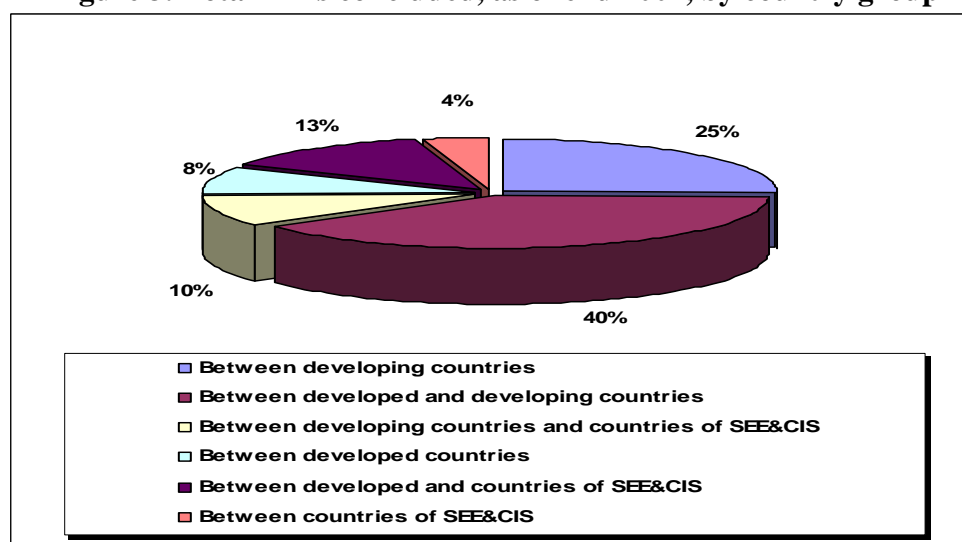
Figure 2. BITs concluded in 2004, by country group



Source: UNCTAD (www.unctad.org/ia).

Within the BITs universe, at the end of 2004, 2 out of 5 BITs were signed between developed and developing countries, and one-fourth were concluded between developing economies (figure 3). BITs are typically not concluded between developed economies as investment relations between these countries are traditionally governed by other international instruments, with few exceptions.¹ Developed countries dominate in the list of the economies with the largest number of BITs. Only two countries within the top ten are developing economies (figure 4).

Figure 3. Total BITs concluded, as of end 2004, by country group

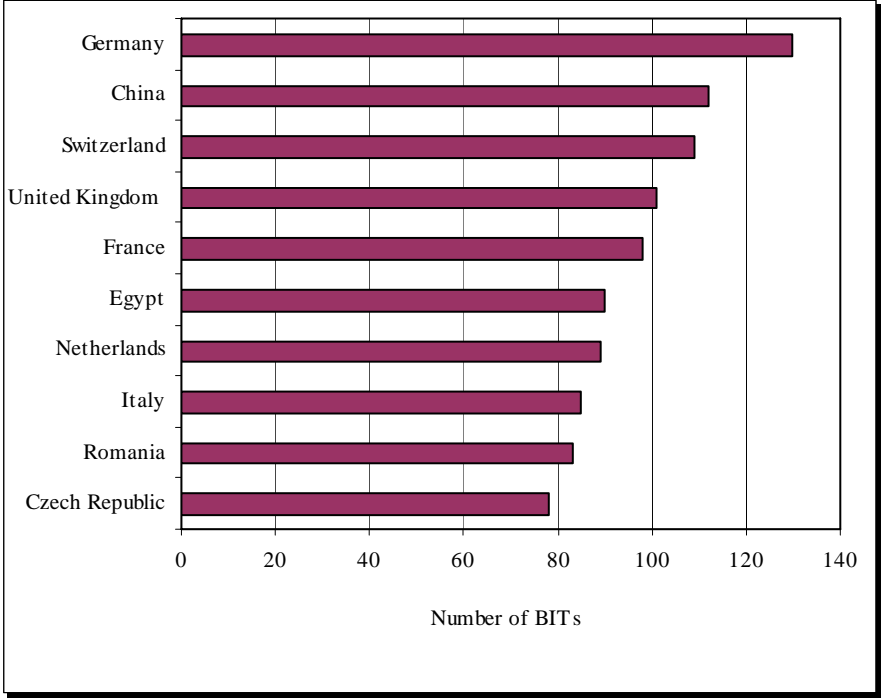


Source: UNCTAD (www.unctad.org/ia).

¹ The sharp increase in developed countries BITs shown for 2004, is explained not because new BITs have been signed between developed countries, but because, upon accession of ten Central European countries to the European Union, the earlier BITs signed by these countries with developed countries are now counted as developed country BITs. For the same reason, the total number of BITs signed between transitional economies and between these and developing countries shows a corresponding reduction, while the total number of BITs signed between developed and developing countries shows a corresponding increase.

Within South-South BITs, China, Egypt, the Republic of Korea, and Malaysia have each signed more than 40 BITs with other developing countries. In fact, each of these four countries has signed more agreements with other developing countries than with developed countries. The recent increase in developing countries BITs reflects a greater emphasis in recent development strategies on South-South cooperation on investment, as well as the emergence of some developing countries firms as global players.

Figure 4. Top ten economies signatories of BITs, as of end 2004



Source: UNCTAD (www.unctad.org/ia).

b. Key substantive features of the new generation of BITs

BITs traditionally cover the following key issues: scope and definition of investment, admission and establishment, national treatment, most-favoured-nation treatment, fair and equitable treatment, compensation in the event of expropriation or damage to the investment, guarantees of free transfers of funds, and dispute settlement mechanisms, both state-state and investor-state (see *WIR 2003*). Most recently, a new generation of BITs is gradually emerging that expands on their content and scope. This new generation of BITs follows the trend set by some of the recent PTIAs that include investment chapters and is exemplified by the new model BITs of the United States, Canada and – to a lesser degree – Japan, all of which show important new features. Several Latin American countries have also embarked on this new generation of treaties in their negotiations with other countries. Within this normative evolution – which to a great extent is the result of the experience in the application and implementation of the NAFTA investment chapter – it is possible to distinguish four main trends:

First, some new generation BITs and BIT models have deviated from the traditional open-ended asset-based definition of investment, attempting to find ways to strike a balance between maintaining a comprehensive investment definition and yet not to cover assets that are not really intended by the Parties to be covered investments. For example, in the new

Canada model BIT, the open asset-based definition of investment was replaced by a comprehensive, but finite, definition of investments. The recently negotiated BIT between the United States and Uruguay, on the other hand, has opted to define the term “investment” in economic terms, that is, in principle covering every asset that an investor owns and controls, but adding the qualification that such assets must have the “characteristics of an investment”, such as “the commitment of capital or as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk”. This approach is complemented by explicit exclusions of several kinds of assets, which are not to fall within the category of covered investments under the agreement (e.g. certain debt instruments).

Second, revisions to the wording of various substantive treaty obligations are emerging as new patterns of BITs formulation. The new Canada and United States model BITs, learning from the technical intricacies surfacing in the implementation of the investment chapter of NAFTA, elaborate the language and clarify the meaning of provisions dealing with absolute standards of protection, in particular, the meaning of minimum standard of treatment in accordance with international law and the concept of indirect expropriation. The new language is geared at ensuring a traditional interpretation of these two investment protection clauses by arbitral tribunals. In particular, it is clarified that both sets of obligations are intended to reflect the level of protection granted by customary international law. In addition, both BIT models include annexes specifying guidelines and criteria to determine whether in a particular situation an indirect expropriation has in fact taken place. In this regard, it is clarified that an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred. It is further stated that, except in rare circumstances, non-discriminatory regulatory actions by a Party aimed at protecting legitimate public welfare objectives, such as public health, safety, and the environment, do not constitute indirect expropriations.

Third, the new generation BITs addresses a broader set of issues including not only specific economic aspects, as investment in financial services, but also other issues where more room for host country regulation is sought. The protection of health, safety, the environment, and the promotion of internationally recognized labor rights are areas on which the new generation of BITs include specific language generally aimed at clarifying that the investment protection and liberalization objectives of investment agreements cannot be pursued at the expense of these other key public policy objectives.

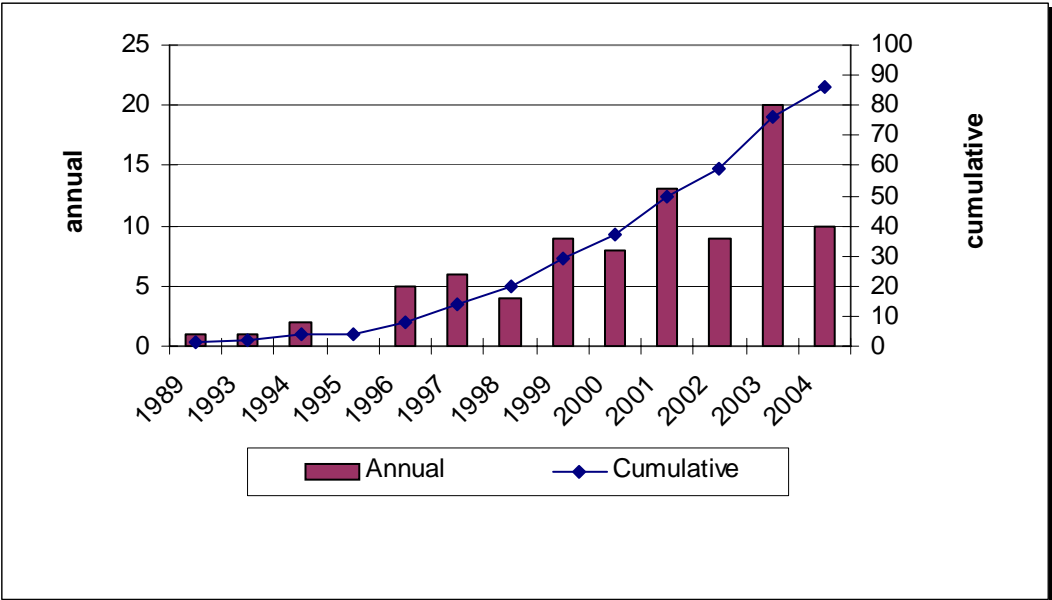
Fourth, new generation BITs make significant innovations regarding investor-State dispute settlement (ISDS) procedures. Greater and substantial transparency in arbitral proceedings, including open hearings, publication of related legal documents, and the possibility for representatives of civil society to submit “*amicus curiae*” briefs to arbitral tribunals is foreseen. In addition, other very detailed provisions on investor-state dispute settlement are included in order to provide for a more legally oriented, predictable and orderly conduct at the different stages of the ISDS process. Thus, for example, the Canadian BIT model includes specific standard waiver forms to facilitate the filing of waivers as required by article 26 of the Agreement for purposes of filing an ISDS claim. The United States-Uruguay BIT, on the other hand, not only provides for a special procedure available at the early stages of the ISDS process aimed at discarding frivolous claims or to seek interim injunctive relief, but also envisages the possibility to set up a mechanism for appellate review, in order to foster a more consistent and rigorous application of international law in arbitral awards.

The four categories of innovations that can be identified in the new generation of BITs are geared at providing increased certainty regarding the scope and extent of the obligations included in the investment agreements and a more transparent and predictable application of the ISDS process.

c. BITs re-negotiation

Another significant trend regarding BITs is that countries are increasingly embarking on the renegotiation of their existing treaties, as these reach their expiration date, or due to changed circumstances. While BITs generally provide for tacit renewal after their expiration, in some cases countries embark on their re-negotiation, usually agreeing to stronger commitments. In such cases, the new BIT either supersedes or substantially amends the earlier one. The renegotiation trend accelerated in the late 1990's and continued in the following years, reaching 34 renegotiated BITs by the year 2000, bringing the accumulated total of renegotiated BITs to 85 by 2004 (figure 5).

Figure 5. Renegotiated BITs, 1989-2004



Source: UNCTAD (www.unctad.org/iaa).

Other renegotiations respond to the need to bring existing BITs in line with the parties' commitments under other investment agreements. Thus, BITs signed by ten Central European countries prior to their accession to the European Union in 2004 have been affected by these countries' European Union membership. In these circumstances, the United States and the European Commission signed a Memorandum of Understanding (MoU) in September 2003, concerning the applicability and the preservation of BITs concluded between the United States and the new EU members, or countries candidates for accession (see UNCTAD 2004, Box II.20). A similar exercise is currently taking place with Canada. In addition, Finland renegotiated its BITs with Ukraine, China and Egypt; the Democratic Republic of the Congo with Belgium-Luxembourg is another example. In 2003, China has also renegotiated its 1983 BIT with Germany with improved levels of protection for the investor including an investor-state dispute settlement provision, which was not included in the previous BIT. Negotiations

are under way between China and several European countries. The trend towards renegotiation of BITs is expected to increase further since many BITs were signed in the 1990s with a 'life-span' ranging from 10-30 years.²

d. BITs in force

During 2004, 78 BITs entered into force, bringing the total number of BITs in force to over 1,718 (according to available information). Hence, about 30 per cent of the total BITs signed had not yet been ratified and, consequently, had not entered into force at the end of 2004. The proportion is even higher for BITs concluded by developing economies and LDCs. Indeed the ratio of non-ratified BITs by developing countries is 50 per cent, while the ratio for BITs concluded by LDCs is 52 per cent.

The formal requirements for the ratification process of BITs varies from country to country according to the constitution and legislative procedures.³ In some countries, for example, the ratification of a treaty may require the enactment of an implementing legislation, which, in turn, may require major adaptations of relevant legislation. Going through these steps may take up to an average of two years if not more. These aspects require coordination among the institutions driving the process, including proper briefing of parliamentarians, relevant ministries and interest groups that may further slow down the process. This may hold particularly true for developing countries and LDCs that often lack the necessary technical expertise and institutional organization due to insufficient financial resources. However, the signing of a BIT (even if it did not enter into force) still has some legal implications for the protection and promotion of foreign investments (box 1).

Ratification is however only the first step of implementing a treaty. It has to be followed by the actual implementation of the provisions of a treaty, including ensuring coherence between treaty commitments and national policies and strategies, as well as adequately informing the main beneficiaries of treaties, i.e. the foreign investors. Many developing economies are lagging behind in these implementation steps, leading, at times, to costly disputes and other effects that run counter to the purposes of entering into international commitments.

2. Double taxation treaties

In 2004, 84 new DTTs were concluded between 80 countries. This represents a sustained growth of DTTs albeit at a slightly slower pace compared to the year 2003. Nevertheless the total number of DTTs increased to reach 2,559 by the end of 2004. Austria set the pace by concluding ten new DTTs, Azerbaijan concluded six, while South Africa and Lithuania concluded five each and Belgium, Canada, Iran and Greece concluded another four DTTs each. Unlike BITs, the top 10 economies in terms of number of DTTs signed are all developed economies (figure 6).

² The most common 'life-span' of a BIT is 10 years. However, some BITs provide for a term of 15, 20 or even 30 years. If a BIT is not terminated at the end of the fixed term, then it continues in force indefinitely subject to the power of either party to terminate the treaty with a written notice. See, for example, the BIT between Armenia and Austria, which states in article 27 that "This Agreement shall remain in force for a period of ten years; it shall be extended thereafter for an indefinite period and may be denounced in writing through diplomatic channels by either Contracting Party giving twelve months' notice". Another approach is that the BIT continues in force for additional fixed terms agreed upon by the parties. The 'life-span' of BITs start upon the fulfillment of the legal requirements for the entry into force of the BIT. This does not apply to BITs that are yet to enter into force.

³ See UNCTAD 1998, p. 28.

Box 1. Legal implications of BITs signed but not yet in force

As far as the legal implications of not ratifying a BIT are concerned, two issues arise that are related to the legal protection of investors in the territory of the host State.

The first issue concerns the applicability of the substantive provisions of a treaty although not ratified. According to article 18 of The Vienna Convention on the Law of Treaties (*Obligations not to defeat the object and purpose of a treaty prior to its entry into force*), there is an obligation to adhere to commitments contained in signed treaties, regardless of whether they have been ratified, unless there is a valid reason not to do so:

"A State is obliged to refrain from acts which would defeat the object and purpose of a treaty when: (a) it has signed the treaty or has exchanged instruments constituting the treaty subject to ratification, acceptance or approval, until it shall have made its intention clear not to become a party to the treaty; or (b) it has expressed its consent to be bound by the treaty, pending the entry into force of the treaty and provided that such entry into force is not unduly delayed."

The second legal issue concerns the availability for the investor of recourse to investor-State dispute settlement mechanisms, and, more specifically, the availability of the consent to arbitration given by the countries signatories to bilateral investment treaties. As there is only limited case law on this issue,^{1/} it appears that it could be difficult for an investor to invoke the consent under a treaty that has not been ratified.^{2/} Consent to arbitration may however be afforded to the investor through other instruments or the national laws.

Source: UNCTAD.

^{1/} See the case of *Ceskoslovenska Obchodni Banka, A.S. v. the Slovak Republic*, Decision on jurisdiction, 24 May 1999, available at (<http://www.worldbank.org/icsid/cases/awards.htm>)

^{2/} This may be so even under the broadest interpretation of Article 18 of the Vienna Convention. It would be difficult to justify such a significant derogation from State sovereignty, absent ratification, or the inclusion of a specific provision mandating "provisional application" of the treaty, including its dispute resolution provisions, subject to the constitution, laws or regulations of the Signatory State, as is the case in Article 45 of the Energy Charter Treaty.

In terms of regional coverage, African countries concluded 15 new DTTs, bringing the total number of DTTs concluded by this region to 404. South Africa was the most active with 5 new DTTs concluded in 2004. Ethiopia, Ghana, Sudan and Uganda have concluded two new DTTs each in 2004.

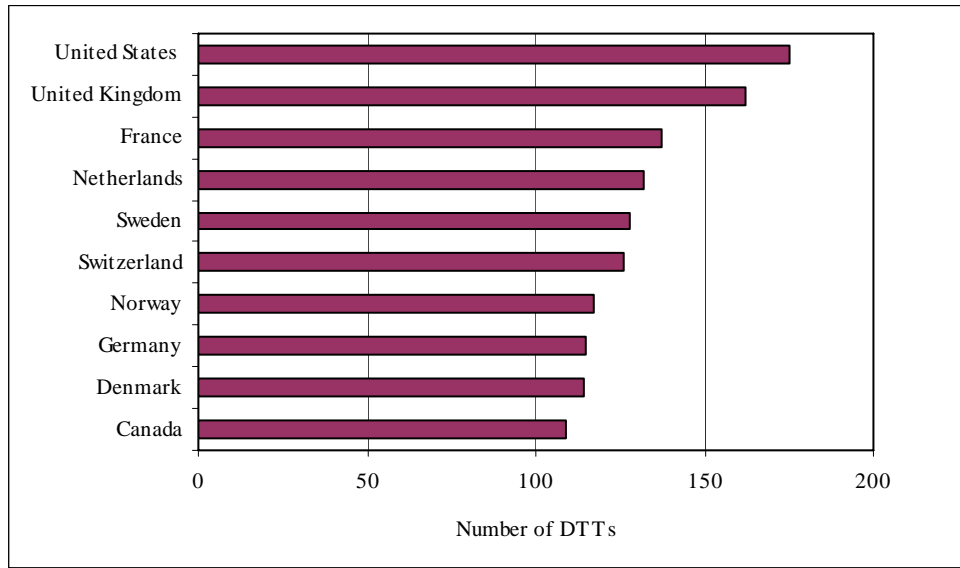
In Asia, 26 new DTTs were concluded, bringing the cumulative number for Asia to 840 at the end of 2004. Iran concluded 4 new DTTs in 2004, while the Republic of Korea and Kuwait concluded 3 new treaties each.

Latin American and Caribbean countries concluded 12 new DTTs in 2004; bring the total number to 306 DTTs at the end of 2004. Most active in this year were Chile and Mexico with four and three new DTTs respectively in 2004.

The economies in transition concluded 29 DTTs in 2004, up from 20 in the year 2003. This is however still lower than the peak registered in 1996 (48 new DTTs). This figure brings the total number of DTTs concluded by this region to 494. Azerbaijan was most active in the region by concluding six new DTTs in 2004.

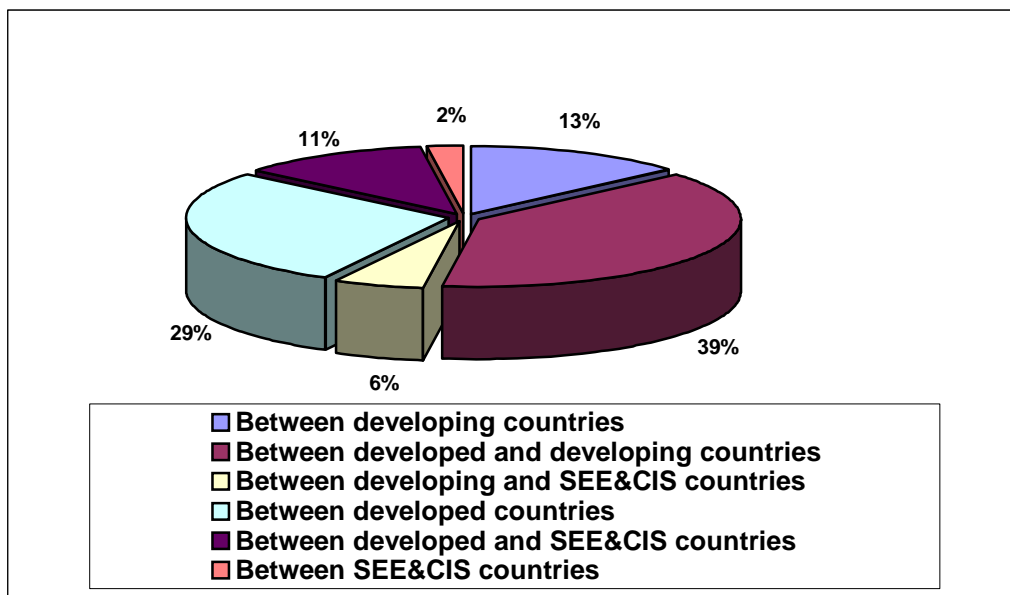
As of end-2004, about 39% of all DTTs were concluded between developed and developing countries. DTTs among developed countries accounted for 29%. Another 19 % involved transition economies, the remaining 13% are between developing economies (figure 7).

Figure 6. Top ten economies in terms of DTTs, as of end 2004



Source: UNCTAD (www.unctad.org/iaa)

Figure 7. Total DTTs concluded, as of end 2004, by country group



Source: UNCTAD

In as far as developing country DTTs are concerned, a similar but less pronounced trend (as in the case of BITs) of increasing South-South investment cooperation can be observed. After the first South-South DTT was concluded in 1948 (by Argentina and Peru), DTTs proliferated during the second half of the 1990s. During the 1990s, 156 new DTTs were signed between 69 developing countries, bringing the total number of treaties to 256 by the end of 1999. Growth persisted until 2004, with the number of South-South DTTs reaching 345 treaties between 90 countries.

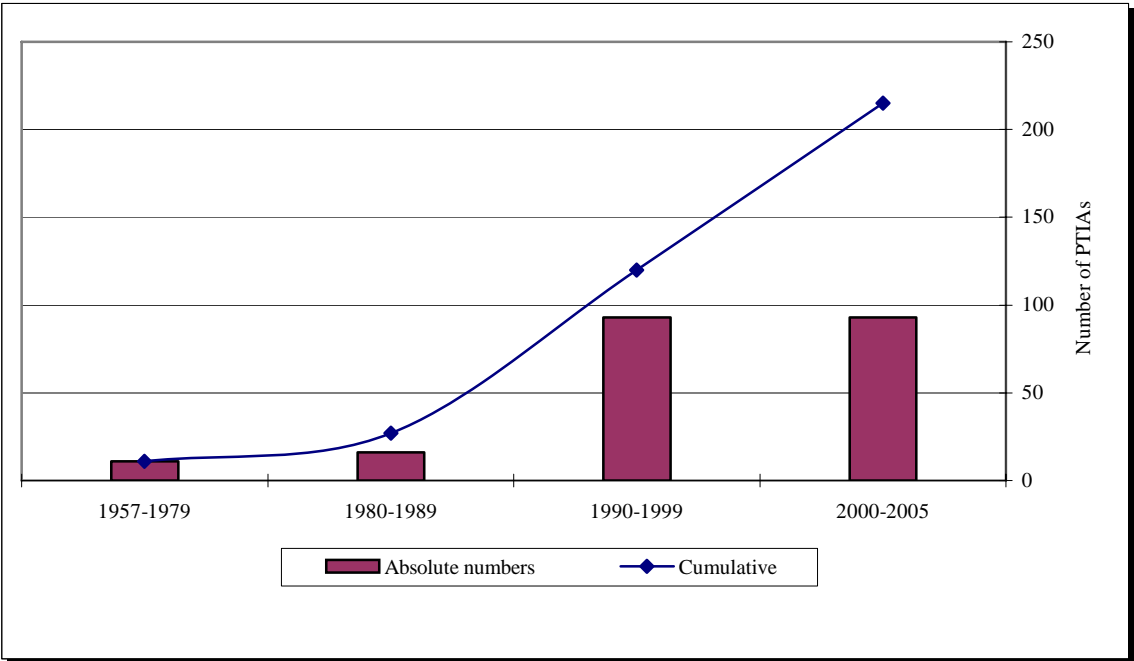
3. Preferential Trade and Investment Agreements

Besides BITs and DTTs, international investment rules are increasingly being adopted as part of bilateral, regional, interregional, and plurilateral agreements that address, and seek to facilitate, trade and investment transactions. These agreements, generally referred to here as Preferential Trade and Investment Agreements (PTIAs), contain, in addition to a variable range of trade liberalization and promotion provisions, commitments to either liberalize, protect and/or promote investment flows between the parties.⁴

a. The network of PTIAs

The number of PTIAs has been growing steadily and, by June 2005, it exceeded 215 (209 at the end of 2004). The large majority of these agreements, about 87%, were concluded since the 1990s (figure 8). In 2004 and early 2005 alone, at least 32 PTIAs were concluded, and about 66 others were under negotiation or consultation (annex tables 1 and 2). Initially, most PTIAs were between countries in the same region, until the late 1980s, trade and investment facilitation through PTIAs remained confined mainly to intra-regional processes, albeit with some exceptions (e.g. early PTIAs between the European Community and developing countries). Since 1990, however, countries and groups located in different regions began to adopt PTIAs with one another, with the result that interregional agreements now account for more than half of the total, and for about 49% of the 182 concluded since 1990.

Figure 8. The growth of PTIAs, 1957-June 2005
(Number)



Source: UNCTAD.

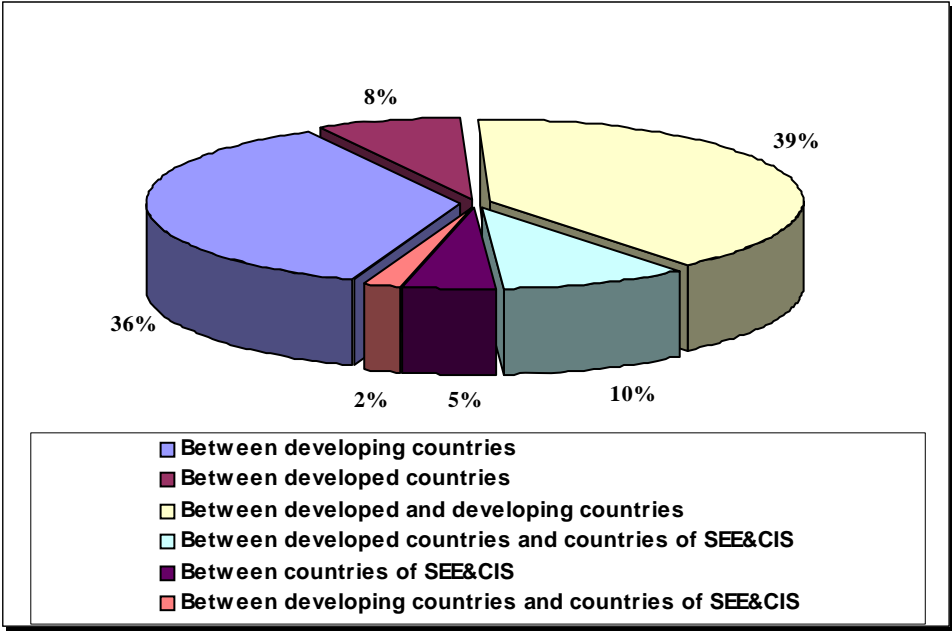
⁴ PTIAs discussed here encompass only those agreements that contain a commitment either to liberalize, protect and/or promote investment. PTIAs have a variety of names, including free trade agreement, regional trade agreement, economic partnership agreement, new-age partnership agreement, economic complementation agreement, agreement for establishing a free trade area, closer economic partnership arrangement. For a detailed analysis, including the definition of these agreements see UNCTAD, (forthcoming) Economic Integration Investment Agreements.

The proliferation of PTIAs is one of the key developments in international economic relations in recent years in response to the increasing global competition facing national economies for resources and markets. Of course the choice of PTIA partners within and between regions responds not only to a variety of economic and political motivations but also to the characteristics of the countries involved.

The growth of PTIAs in all parts of the world is partially the result of two important qualitative changes that took place during the 1990s. First, PTIAs that previously had been reserved only for countries in similar levels of development, started to be concluded between developed and developing countries. By June 2005, over 80 such agreements had been signed (77 since 1990) and 39 were under negotiation (annex table 2). Second, PTIAs between developing countries also experienced a dramatic increase since the 1990s. By June 2005, at least 73 PTIAs between developing countries had been signed (59 since 1990) and another 24 PTIAs were under negotiation. As this suggests, developing countries are increasingly pursuing development strategies based on South-South cooperation on trade and investment (figure 9).

Figure 9. Total PTIAs concluded, as of end 2004, by country group

(Percentage)



Source: UNCTAD.

b. Main features of recent PTIAs

As noted earlier, a main objective of PTIAs is to facilitate trade and investment flows. To achieve this goal, the investment provisions of PTIAs focus principally on liberalizing investment flows and, to a lesser extent, on protecting and promoting investment. They also often address investment-related issues such as intellectual property protection and competition. Thus, compared to BITs, PTIAs reflect far more variation in their scope, approach and content, though some recent PTIAs address relatively few investment issues. Moreover, recent PTIAs increasingly tend to encompass a broader range of economic transactions, including notably trade in goods and services, investment and capital, and

labour. The approach of a PTIA to investment issues, however, does not necessarily parallel its approach to trade or other issues. Thus, the more issues they address, the more complex the agreement and the greater the likelihood that their texts reflect the special circumstances of countries at different levels of economic development and in different regions.

As in the case of BITs, the structure and approach to investment in recent PTIAs have been influenced by previous PTIAs and by other investment agreements, notably the BITs themselves and WTO agreements, and build on the experience gained with the application of their predecessors. As a result, a number of patterns have emerged concerning the investment provisions in recent PTIAs, albeit with many significant variations.

With respect to investment liberalization, PTIAs have typically followed two main approaches. One is to provide for actual liberalization subject to a list of country exceptions (negative list approach). This approach is typical of, for example, most PTIAs signed between American countries following the model of NAFTA. The second approach is to provide for the progressive abolition of restrictions to the entry, establishment and operation of investment. This pattern has been followed by, among others, the agreements between the European Community and third countries, as well as the Framework Agreement on the ASEAN Investment Area and several PTIAs signed by ASEAN with third countries. With respect to this second approach, the level of liberalization sought varies considerably amongst different types of PTIAs. Thus, while some PTIAs commit to achieving full liberalization of investment by a particular date (e.g. the ASEAN Investment Area), others foresee to complete the process of investment liberalization in several stages (e.g. the Europe Association Agreements signed by the European Community with Central European countries). Still others establish a framework for future negotiations to liberalize investment (e.g. the Euro-Mediterranean Agreements signed between the European Community with countries in Northern Africa and the Middle East, the African Economic Community, the ASEAN Agreement with China).

Regarding PTIAs that provide for investment protection and liberalization, a small group of countries (e.g., Chile, Japan, Singapore, Mexico, Morocco, the United States) are concluding agreements that are more comprehensive, detailed and for the most part, rigorous, than prior NAFTA-style PTIAs. While these agreements address many of the same topics, they have built upon a core contained in the NAFTA and covered additional issues or modified the approach to these issues taken in the NAFTA. Moreover, they deal very extensively with trade in services, while separate chapters appear on topics such as competition policy, government procurement, intellectual property rights, labour, environment, trade in special sectors, temporary entry for business persons, and transparency.

Other recent PTIAs have been narrower in their coverage of investment issues. They establish a framework for cooperation on promotion of investments. Recent examples include the free trade agreements signed between the EFTA countries and Central European countries, bilateral agreements between Canada and countries in various regions, and a number of framework agreements on trade and investment relations between the United States and countries in Africa and the Middle East. The cooperation provided for in these agreements is typically aimed at creating favourable conditions for encouraging investment, through, for example, exchange of information. It is also common for these agreements to set up a consultative committee or a similar institutional arrangement between the parties to follow up on the implementation of their commitments. Some agreements accord to discuss and study possible obstacles to market access for trade and investment.

In short, while it is possible to identify a number of patterns with respect to the content and structure of the main investment components of recent PTIAs, even similar types of PTIAs exhibit important differences. New PTIAs are emerging every day featuring yet a different structure and approach to investment issues not found in earlier agreements. In many cases the differences respond to a need to correct some deficiencies detected in the application of previous PTIAs. Thus the elaboration of investment rules through PTIAs is advancing through a process that builds on previous experience while experimenting with innovative approaches to address new challenges.

At the same time, the interactions between an expansive set of rules within a PTIA addressing investment as well as other economic transactions, raises the incidence of overlaps and inconsistencies. This complicates the task of gauging the full legal and policy implications of any such agreement and increases the risk of investment disputes.

4. International investment disputes

IAs continue to be important instruments that contribute towards establishing a predictable environment for the promotion, protection and treatment of FDI, including also as a means of South-South cooperation. The bilateral and regional initiatives described above are meant to increase investors' confidence in the reliability of legal and regulatory changes. An important pillar of this equation has been provisions on investor-State dispute settlement.

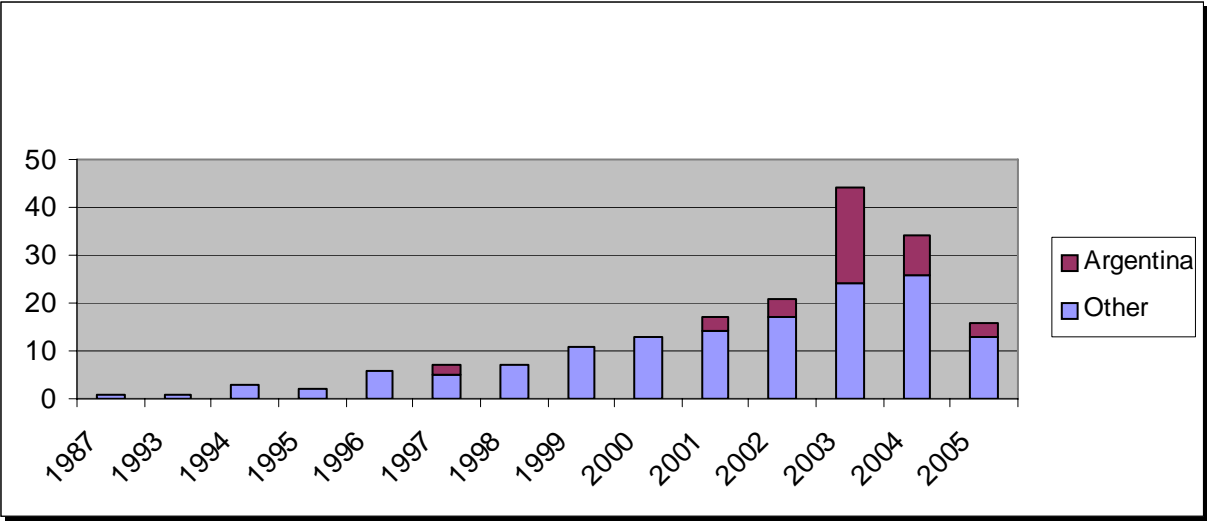
These treaty provisions are increasingly being used by investors, with serious development implications. The proliferation of IAs at the bilateral, regional and inter-regional levels is part of the efforts exerted by countries to attract FDI by creating a more stable, transparent and predictable environment for foreign investors. However, more IAs also mean more legal protection for the investor, which represent an increased risk of investment dispute cases.

The cumulative number of treaty-based cases brought before the World Bank Group's International Centre for Settlement of Investment Disputes (ICSID) and other arbitration fora has been rising dramatically over the past five years, reaching at least 183 known claims by June 2005 (figure 10). This development poses a particular challenge for developing countries. At least 57 governments – 36 of them in the developing world, 12 in developed countries and nine in Southeast Europe and the CIS – have faced investment treaty arbitration. Argentina leads them all with 40 claims, 37 of which relate at least in part to that country's financial crisis. Mexico has the second highest number of known claims (15), most of them falling under NAFTA, and a handful under various bilateral investment treaties (BITs). The United States has also faced a sizeable number (10), all of them pursuant to NAFTA and not to the BITs concluded by that country. Poland (seven claims), Egypt (six) and the Russian Federation (six) also figure prominently, along with nine countries that have each faced four claims: Canada, Chile, Democratic Republic of Congo, Czech Republic, Ecuador, India, Kazakhstan, Ukraine and Venezuela.

Under several arbitration systems, the existence of a dispute and its final decisions are never made public. Even under the ICSID arbitration system, the decisions of the tribunals have not all been made public. While this situation is gradually changing, it means that it is not possible to know the actual number of the cases to date, nor is it possible to learn about the legal issues or factual circumstances they encompassed. The ICSID arbitration facility is

the only facility that maintains a public registry of claims. A number of claims are known to be proceeding outside of ICSID, however (figure 11).

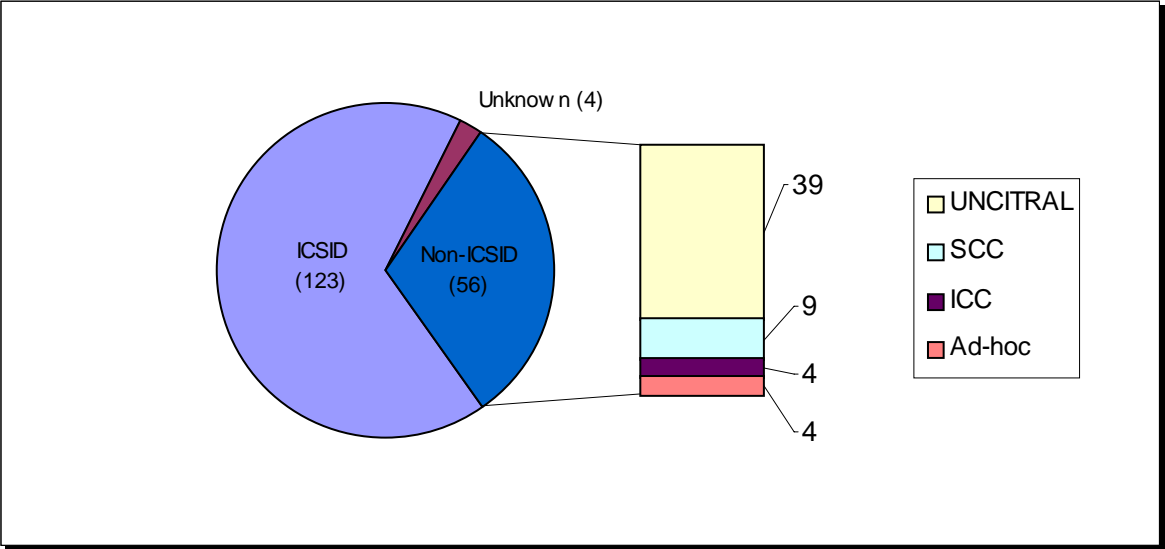
Figure 10. Known investment treaty arbitrations, June 2005



Source: UNCTAD.

Investment dispute cases cover the whole range of investment activities. They relate to all kinds of investments, including privatization contracts and state concessions. They apply to a diversity of industries and activities, including construction, water and sewage services, brewing, telecommunications concessions, banking and financial services, hotel management, television and radio broadcasting, hazardous waste management, textile production, gas and oil production, and various forms of mining.

Figure 11. Disputes by rules of arbitration, June 2005



Source: UNCTAD.

The financial implications of the investor-State dispute settlement process can be substantial, both from the point-of-view of the costs of the arbitration proceedings and the awards rendered. Information about the level of damages being sought by investors tends to

be sporadic and unreliable. Moreover, claimants are not obliged to quantify their claims until after the jurisdictional stage has been completed. Claims proceeding under other rules of arbitration may also not be quantified at an early stage, and even when they are, counsel and investors tend to be reticent about disclosing such information. It is nonetheless clear that some claims involve large sums (e.g. the Czech Republic's award of some \$270 million plus substantial interest in the *Lauder* case; the recent award in *CSOB v Slovakia* (29 December 2004) of \$824 million plus an additional \$10 million as partial contribution to CSOB's costs; or Occidental's 2002 award against Ecuador of \$71 million plus interest). But not all claims lead to the requested awards being granted. The amount awarded for a claim is not necessarily an indication of the real financial magnitude of a case, since there are no penalties for claimants filing particularly high claims. Very large claims often end up yielding very small awards. The *Metalclad vs. Mexico* claim for \$43 million, for example, led to an award of less than \$17 million, and *S.D. Myers*, in its \$70-to-\$80 million claim against Canada, was awarded \$6 million, i.e. less than 10% of the amount sought. Nor do all claims brought by businesses succeed. Indeed, a number of cases are won by States.⁵

However, even defending oneself against claims costs money. Investment treaty arbitration proceedings are not inexpensive to mount. The *Metalclad* Corporation is reported to have spent some \$4 million on lawyers' and arbitrators' fees in an arbitration against Mexico.⁶ The Czech Republic reportedly spent \$10 million on its defense against two major claims brought by a European-based broadcasting firm and one of its major shareholders (Peterson 2003). More recently, the Czech government announced expected legal fees of \$3.3 million in 2004, and \$13.8 million next year, to fight off similar claims (Peterson 2004). A cursory review of cost decisions in recent awards suggests that the average legal costs incurred by governments are \$1-to-\$2 million, including lawyers' fees; the costs for the tribunal, about \$400,000 or more; and the costs for the claimant about the same as for the defendant.⁷

The surge in investment disputes arising from IIAs, and the costs incurred from these disputes, signify that governments that decide to enter into IIAs need to be judicious in negotiating such agreements. They also need to follow the developments of disputes in order to be sensitive to actions that could trigger litigation. Furthermore, it is important to review experiences in implementing international commitments in IIAs and to draw lessons therefrom.

* * *

International investment rule making is likely to further intensify in the years to come. Indeed, a large number of IIAs are currently under negotiation and/or re-negotiation, suggesting an even more pronounced increase in the coming years. Hence, the international framework of investment rules continues to expand at the bilateral, sub-regional, regional and inter-regional levels. This suggests that the present system of multifaceted and multilayered investment agreements will become even more complex in the future, raising further the

⁵ For the vast majority of the 183 known cases, the outcome is not known – either because a decision was never made public or the cases are still pending. Out of the 41 cases that led to an award that was made public by the time of writing this report, 19 cases were won by the State (i.e. 46%).

⁶ See Thomas (2002). This case was also reviewed by a Canadian court, the cost of which is not included in this figure.

⁷ Preliminary results of a CEPMLP/Dundee research project on economic analysis of transnational dispute management.

likelihood of conflicting rules and investment disputes, as well as costs of compliance for both governments and business of the parties to the agreements.

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Annex table 1
Preferential trade and investment agreements concluded, 2004-June 2005

Agreement	Year of conclusion	Geographical scope
Framework Agreement on the BIMSTEC Free Trade Area	2004	Regional (1group)
Free Trade Agreement between the EFTA States and Republic of Tunisia	2004	Inter-regional (1 group + 1 country)
Free Trade Agreement between the Government of the United Mexican States and the Republic of Uruguay	2004	Regional (bilateral)
Framework Agreement on the South Asia Free Trade Area (SAARC)	2004	Regional (1group)
Free Trade Agreement between the Kingdom of Morocco and the United States of America	2004	Inter-Regional (bilateral)
Free Trade Agreement between Australia and Thailand	2004	Regional (bilateral)
Free Trade Agreement between Australia and the United States of America	2004	Inter-Regional (bilateral)
Agreement Concerning the Development of Trade and Investment Relations between the Government of the United States of America and the Government of the State of Qatar	2004	Inter-Regional (bilateral)
Agreement Concerning the Development of Trade and Investment Relations between the Government of the United States of America and the Government of the United Arab Emirates	2004	Inter-Regional (bilateral)
Agreement Concerning the Development of Trade and Investment Relations between Mongolia and the United States of America	2004	Inter-Regional (bilateral)
Agreement Concerning the Development of Trade and Investment Relations between the Government of the United States of America and the Government of the State of Kuwait	2004	Inter-Regional (bilateral)
Agreement Concerning the Development of Trade and Investment Relations between Malaysia and the United States of America	2004	Inter-Regional (bilateral)
Agreement Concerning the Development of Trade and Investment Relations between the Government of the United States of America and Government of the Republic of Yemen	2004	Inter-Regional (bilateral)
Free Trade Agreement between the Kingdom of Bahrain and the United States of America	2004	Inter-Regional (bilateral)
Free Trade Agreement between the Republic of Albania and the Republic of Romania	2004	Regional (bilateral)
Free Trade Agreement between the Republic of Albania and the Republic of Serbia and Montenegro	2004	Regional (bilateral)
Free Trade Agreement between the Hashemite Kingdom Jordan and the Republic of Singapore	2004	Inter-Regional (bilateral)
Cooperation Agreement between the European Community and Pakistan	(1985) 2004	Inter-regional (1 group + 1 country)
Free Trade Agreement between the EFTA States and Lebanon	2004	Inter-regional (1 group + 1 country)
Free Trade Agreement between the Republic of Bosnia Herzegovina and the Republic of Moldova	2004	Regional (bilateral)
Free Trade Agreement between the Republic of Bosnia Herzegovina and the Republic of Romania	2004	Regional (bilateral)

Free Trade Agreement between Central America, the Dominican Republic and the United States of America (CAFTA)	2004	Regional (1 group + 2 country)
Partial Reach Agreement for Economic, Trade and Investment Promotion between the Republic of Argentina and the Republic of Bolivia	2004	Regional (bilateral)
Economic Complementation General Agreement on Integration, Economic and Social Cooperation for the Establishment of a Common Market between the Republic of Bolivia and the Republic of Peru	2004	Regional (bilateral)
Framework Agreement Between the Government of the United States of America, the Government of the Republic of Kazakhstan, The Government of the Kyrgyz Republic, the Government of the Republic of Tajikistan, the Government of Turkmenistan, and the Government of the Republic of Uzbekistan Concerning the Development of Trade and Investment Relations	2004	Inter-regional (1 group + 1 country)
Free Trade Agreement between the Caribbean Community (CARICOM) and Costa Rica	2004	Regional (1 group + 1 country)
Interim Free Trade Agreement between the Republic of Turkey and the Palestinian Authority	2004	Regional (bilateral)
Framework Agreement between MERCOSUR and the Arab Republic of Egypt	2004	Inter-regional (1 group + 1 country)
Trade and Investment Framework Agreement between Afghanistan and the United States of America	2004	Inter-regional (bilateral)
Framework Agreement on Economic Cooperation Agreement between the Gulf Cooperation Council (GCC) and India	2004	Regional (1 group + 1 country)
Agreement for the Establishment of a Free Trade Area between the Gulf Cooperation Council and Lebanon	2004	Regional (1 group + 1 country)
Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Chile	2005	Inter-regional (bilateral)
Agreement between Japan and the United Mexican States for the Strengthening of Economic Partnership	2005	Inter-regional (bilateral)
Comprehensive Economic Cooperation Agreement between India and Singapore	2005	Regional (bilateral)
Agreement on Closer Economic Partnership between New Zealand and Thailand	2005	Regional (bilateral)
Trade and Investment Framework Agreement between Mozambique and the United States of America	2005	Inter-regional (bilateral)
Trade and Investment Framework Agreement between Iraq and the United States of America	2005	Inter-regional (bilateral)
Free Trade Agreement between the Republic of Korea and the Republic of Singapore	2005	Regional (bilateral)

Source: UNCTAD.

Annex table 2.
Preferential trade and investment agreements under negotiation or consultation

Agreement	Geographical scope
Agreement Establishing an Association between the European Communities and Their Member States, of the One Part, and Syria, of the Other Part ¹	Inter-regional (1 group + 1 country)
Closer Economic Partnership Agreement between Hong Kong and New Zealand	Regional (bilateral)
Comprehensive Economic Cooperation Agreement between China and the Republic of India	Inter-regional (bilateral)
Comprehensive Economic Cooperation Agreement between the Republic of India and the Republic of Mauritius	Inter-regional (bilateral)
Economic Framework Agreement between Canada and Japan	Inter-regional (bilateral)
Economic Partnership Agreement between CARICOM and the European Union	Inter-regional (2 groups)
Economic Partnership Agreement between India and Sri Lanka Comprehensive	Regional (bilateral)
Economic Partnership Agreement between Japan and the Kingdom of Thailand	Regional (bilateral)
Economic Partnership Agreement between Japan and the Philippines	Regional (bilateral)
Economic Partnership Agreement between the European Union and CEMAC	Inter-regional (2 groups)
Economic Partnership Agreement between the European Union and Eastern and Southern Africa (ESA)	Inter-regional (2 groups)
Economic Partnership Agreement between the European Union and ECOWAS	Inter-regional (2 groups)
Economic Partnership Agreement between the European Union and SADC	Inter-regional (2 groups)
Free Trade Agreement between ASEAN, Australia, New Zealand	Regional (1 group + 2 country)
Free Trade Agreement between Australia and China	Regional (bilateral)
Free Trade Agreement between Canada and Central America	Inter-regional (1 group + 1 country)
Free Trade Agreement between Canada and the Republic of Korea	Inter-regional (bilateral)
Free Trade Agreement between Canada and the Republic of Singapore	Inter-regional (bilateral)
Free Trade Agreement between Canada the Dominican Republic	Inter-regional (bilateral)
Free Trade Agreement between CARICOM and Canada	Inter-regional (1 group + 1 country)
Free Trade Agreement between CARICOM and the United States of America	Inter-regional (1 group + 1 country)
Free Trade Agreement between China and New Zealand	Regional (bilateral)
Free Trade Agreement between China and the Republic of Chile	Inter-regional (bilateral)
Free Trade Agreement between EFTA and Canada	Inter-regional (1 group + 1 country)
Free Trade Agreement between EFTA and CARICOM	Inter-regional (2 groups)
Free Trade Agreement between EFTA and SACU	Inter-regional (2 groups)

Free Trade Agreement between EFTA and the Kingdom of Thailand	Inter-regional (1 group + 1 country)
Free Trade Agreement between EFTA and the Republic of Korea	Inter-regional (1 group + 1 country)
Free Trade Agreement between Japan and the Republic of Korea	Regional (bilateral)
Free Trade Agreement between Japan and the Republic of Malaysia	Regional (bilateral)
Free Trade Agreement between SACU and the United States of America	Inter-regional (1 group + 1 country)
Free Trade Agreement between the ANDEAN Community and Canada	Inter-regional (1 group + 1 country)
Free Trade Agreement between the ANDEAN Community and the United States of America	Inter-regional (1 group + 1 country)
Free Trade Agreement between the Arab Republic of Egypt and the Republic of Singapore	Inter-regional (bilateral)
Free Trade Agreement between the Gulf Cooperation Council (GCC) and China	Regional (1 group + 1 country)
Free Trade Agreement between the Kingdom of Bahrain and the Republic of Singapore	Regional (bilateral)
Free Trade Agreement between the Kingdom of Kuwait and the Republic of Singapore	Regional (bilateral)
Free Trade Agreement between the Republic of Chile and Japan	Regional (bilateral)
Free Trade Agreement between the Republic of Chile and the Republic of Ecuador	Regional (bilateral)
Free Trade Agreement between the Republic of Chile and the Republic of Peru	Regional (bilateral)
Free Trade Agreement between the Republic of Costa Rica and the Republic of Panama	Regional (bilateral)
Free Trade Agreement between the Republic of Guatemala and Taiwan (Province of China)	Inter-regional (bilateral)
Free Trade Agreement between the Republic of Korea and the United States of America	Inter-regional (bilateral)
Free Trade Agreement between the Republic of Nicaragua and Taiwan (Province of China)	Inter-regional (bilateral)
Free Trade Agreement between the Republic of Panama and the Republic of Singapore	Inter-regional (bilateral)
Free Trade Agreement between the Republic of Peru and the Kingdom of Thailand	Inter-regional (bilateral)
Free Trade Agreement between the Republic of Singapore and Qatar	Regional (bilateral)
Free Trade Agreement between the Republic of Sri Lanka and the Republic of Singapore	Regional (bilateral)
Free Trade Agreement between the Republic of Thailand and the United States of America	Inter-regional (bilateral)
Free Trade Agreement between the United Mexican States and the Republic of Singapore	Inter-regional (bilateral)
Free Trade Agreement between the United States of America and Colombia	Regional (bilateral)
Free Trade Agreement between the United States of America and Ecuador	Regional (bilateral)
Free Trade Agreement between the United States of America and Oman	Inter-regional (bilateral)
Free Trade Agreement between the United States of America and Panama	Regional (bilateral)
Free Trade Agreement between the United States of America and Peru	Regional (bilateral)
Free Trade Agreement between the United States of America and the United Arab Emirates	Inter-regional (bilateral)
Free Trade Agreement between the United States of America and Uruguay	Inter-regional (bilateral)
Free Trade Area between ASEAN and the Republic of Korea	Regional (1 group + 1 country)
Free Trade Area of the Americas (FTAA)	Regional (1 group)
Inter-Regional Association Agreement between the European Union and MERCOSUR	Inter-regional (2 groups)

Pacific Three Free Trade Agreement between Chile, New Zealand, and Singapore	Regional (3 countries)
Partial Scope Trade Agreement between Belize and the Republic of Guatemala	Regional (bilateral)
SAARC agreement for the promotion and protection of investment	Regional (1 group)
Trade and Investment Enhancement Agreement between Canada and the European Union	Inter-regional (1 group + 1 country)
Trans-Regional EU-ASEAN Trade Initiative	Inter-regional (2 groups)

ⁱ Negotiations on the EC-Syria association agreement are formally completed

Source: UNCTAD.