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Contents at a Glance:

Arbitration Watch:
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1. Tribunal to permit NGO submission in Biwater-Tanzania water arbitration,
By Luke Eric Peterson

In a ruling dated February 2, 2007, an ICSID tribunal has granted permission for a group of five non-governmental organizations to submit a written brief in an ongoing arbitration pitting a UK water services firm, Biwater Gauff (Tanzania) Ltd., against the Tanzanian Government.

The ruling paves the way for the NGOs to submit a joint written submission no later than March 26, 2007, after which the parties to the arbitration will inform the tribunal whether they intend to address or respond to the written submission at a previously-scheduled

substantive hearing slated for April 2007.

Among the intervening NGOs are three Tanzania-based organizations*, as well as the Centre for International Law and the International Institute for Sustainable Development**.

Biwater initiated arbitration at ICSID in 2005, alleging various breaches by Tanzania of the UK-Tanzania bilateral investment treaty. The firm has said that Tanzania breached the terms of a water services contract between a Biwater subsidiary, City Water, and the local water authority of the Tanzanian capital, Dar es Salaam.

The dispute drew headlines in 2005, when Biwater complained that several local managers were "summarily deported" by the Tanzanian Government following termination of the contract.

For its part, Tanzania has accused the Biwater-led consortium of failing to make relevant investments in the local water and sewage infrastructure in Dar es Salaam. A separate contractual arbitration is currently examining allegations and counter-allegations related to the contractual performance of City Water and the local Tanzanian water authority.

As was earlier reported in ITN, a 2006 Procedural Order issued by the arbitral tribunal imposed explicit confidentiality requirements on various documents related to the arbitration proceeding. This Order came at the request of Biwater, which had objected to the release by Tanzania of various documents related to the proceeding. The UK firm expressed concerns that extensive publicity might aggravate the dispute and impact upon the procedural integrity of the arbitration.

In a lengthy Order issued in late September, the ICSID tribunal overseeing the Biwater-Tanzania case imposed varying conditions governing different categories of documents in the proceeding. (For a fuller account see this earlier ITN report: http://www.iisd.org/pdf/2006/itn_oct19_2006.pdf)

Following this Order, the group of aforementioned non-governmental organizations made their move to intervene in the case as amicus curiae – and petitioned the tribunal to release various documents and to permit access to the arbitral hearings.

In a February 2nd Order, the tribunal signaled that it would accept a written submission from the would-be amicus curiae.

In so doing, the tribunal declined to heed the objections of the claimant, Biwater – who had argued that the prospective submission would be "factually and legally irrelevant to the issues to be decided by the Arbitral Tribunal in this arbitration." Biwater had also expressed concerns about the potential disruption posed by an amicus curiae submission at a juncture when an oral hearing was imminent.

For its part, the tribunal held that a written submission by the would-be amicus curiae has

a “reasonable potential to assist the Arbitral Tribunal by bringing a perspective, particular knowledge or insight that is different from that of the disputing parties”.

Moreover, the tribunal expressed agreement with the holding of an earlier arbitration tribunal in the Methanex v. United States arbitration, where the presiding arbitrators in that case had held that the arbitral process could benefit from being seen to be more open and transparent in investor-state arbitrations where matters of “public interest” were at stake.

Notably, however, the tribunal would decline – “at least for the time being” - to release the various categories of documents (including legal pleadings and witness statements) requested by the petitioner NGOs.

The tribunal held that the petitioners appeared well apprised of the “broad policy issues” such as sustainable development, human rights, and the environment, which ought to form the basis of their written submission. Indeed, the tribunal contended that amicus curiae ought to bring some external policy perspective or arguments, rather than an attempt to rebut the arguments of one of the parties to the arbitration or to suggest how the tribunal ought to determine issues of fact or law presented by the parties.

While declining to release the documents sought by the petitioning NGOs, the tribunal did hasten to emphasize that it might revisit this conclusion following the April 2007 oral hearing – after which concerns for the procedural integrity of the process might no longer gravitate against the release of certain documents. However, such a determination could only be made, in the tribunal’s view, after the April hearings.

Finally, the tribunal also addressed a request by the petitioners to open the arbitral proceeding to the public and to permit the amicus curiae to attend those hearings and to respond to any specific questions which the tribunal might raise in relation to their written submission.

Because Biwater objected to the request to open the arbitral proceedings to the public, the tribunal held that it was duty-bound under the ICSID arbitration rules to respect what amounted to the right of either party to veto such a bid.

Sources:

Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania, Procedural Order No. 5, February 2, 2007, available on-line at:
http://www.worldbank.org/icsid/cases/pdf/ARB0522_ProceduralOrdNo5.pdf

* The Lawyers’ Environmental Action Team, The Legal and Human Rights Centre, and The Tanzania Gender Networking Programme

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independent of IISD's other activities, and serves as a neutral reporting service offering coverage, and occasional analysis, of developments in the field of international investment law.

2. NGOs to submit arguments in Suez/Vivendi/Aguas Barcelona dispute with Argentina, By Luke Eric Peterson

Following close on the heels of the above-reported developments in the Biwater-Tanzania arbitration, another ICSID tribunal has granted permission to a different group of non-governmental organizations (NGOs) to file an amicus curiae (friend of the court) legal brief in an ongoing arbitration between The Government of Argentina and several multinational water companies.

In so doing, the ICSID tribunal overruled objections by the claimants - Suez, Vivendi Universal and Aguas de Barcelona - who had urged the tribunal to reject the bid by five US and Argentine non-governmental organizations to make legal arguments in the case.

The NGOs* had earlier petitioned the tribunal for the right to make such a submission. In a 2005 ruling the tribunal had signaled that it could approve amicus interventions, but that it would have to assess the "expertise, experience and independence" of the prospective interveners.

Subsequent to this, the five groups made a December 2006 application to the tribunal, seeking leave to file a legal brief in the case.

In an Order dated February 12, 2007, the tribunal gave its blessing – overriding the objections of the investors which have initiated the arbitration at ICSID.

The tribunal pronounced itself satisfied that the applicant NGOs brought to bear the requisite "expertise, experience, and independence" which would render them suitable potential amicus curiae.

Furthermore, the tribunal was also convinced that the subject matter of the dispute – a dispute over a water concession in the municipality of Buenos Aires – was of sufficient public interest to warrant potential intervention by outside groups.

Indeed, the tribunal noted that the high stakes and visibility of the arbitration meant that there was a possibility that "the forthcoming decision may have some influence on how governments and foreign investor operators of the water industry approach concessions and interact when faced with difficulties."

Moreover, the tribunal reiterated an earlier finding (in the 2005 Order paving the way for would-be interveners to apply for leave to intervene in such cases) that this particular arbitration might involve "complex public and international law questions, including

human rights considerations".

The claimants, all investors in the Argentine water firm Aguas Argentina, had urged the tribunal to reject the amicus bid of the five NGOs on multiple grounds. The investors warned that the amicus application came at a late stage of the proceeding – after a decision on jurisdiction had been rendered - and that the application posed a potential to disrupt the arbitral proceedings.

The claimants also expressed doubts as to whether the participation of the would-be amicus curiae would introduce any new factual elements to the proceeding. Indeed, the investors argued that the ICSID arbitration harboured no wider implications for the operation of Buenos Aires' water system, because the local concessionaire, Aguas Argentina, had earlier withdrawn as a claimant in the case.

However, the tribunal dismissed all of these objections. The three ICSID arbitrators noted that the procedural timetable for the arbitration could accommodate written submissions by prospective amicus curiae without disrupting the course of the proceedings.

As for whether the would-be amici had the potential to bring "new factual elements" to the case, the tribunal noted that the purpose of such interventions was broader than this – and included both factual or legal perspectives which the disputing parties in the arbitration might not bring to the case.

Accordingly, the tribunal has provided the five NGOs with a window in which they may submit a joint legal brief - not to exceed 30 double-spaced pages – which will then be forwarded to the parties who may file their own observations and comments.

The tribunal fixed a date of April 4, 2007 as the deadline for the submission of the NGO brief.

Notably, the tribunal declined to grant a request by the would-be interveners which would give them full access to the various documents produced in the course of the arbitration – including the legal pleadings of the parties.

Customarily, such documents are not released to the public, absent the initiative of a party wishing to disseminate those documents on a unilateral basis.

For its part, the tribunal conceded that amicus curiae must have sufficient information on the subject matter of a given dispute so that they might provide relevant "perspectives, expertise and arguments" in their capacity as amicus curiae.

However, the tribunal also noted that the three claimant water companies had vigorously objected to the release of documents to the prospective interveners in the current arbitration.

Moreover, the tribunal made much of the fact that the five NGOs appear to have gleaned

a great deal of information about the case from other sources. The tribunal also noted that the role of amicus curiae is not to rebut the arguments of the parties, but rather to raise general issues of value to the tribunal:

"The role of the Petitioners in their capacity as amicus curiae is to provide their perspective, expertise and arguments to help the court. The Tribunal believes that, under the circumstances of the present case, the Petitioners can fully carry out that function without access to the record."

One of the amicus curiae petitioners, in comments posted on its website, has hailed the tribunal's grant of permission to make a written submission in the case. At the same time, the Center for International Environmental Law (CIEL) says that it regrets the decision by the tribunal not to release various documents related to the arbitration:

"The denial will inevitably limit the NGO coalition's understanding of the facts and legal issues involved in the case and thus the degree to which the amicus curiae brief can contribute to the proper resolution of the dispute. Furthermore, while the Tribunal's evaluation regards the circumstances of the case and is not a declaration of principle, its denial of access to the record fails to secure the right to access to information, which is central to the proper functioning of a democratic society."

Sources:

Order in Response to a Petition by Five Non-Governmental Organizations for Permission to Make an Amicus Curiae Submission, ICSID Case No. ARB/03/19, February 12, 2007, available on-line at: http://ita.law.uvic.ca/documents/SuezVivendiamici.pdf

CIEL Statement on the tribunal's Order, available on-line at:
http://www.ciel.org/Tae/ICSID_AmicusCuriae_24Feb07.html

3. Investors eye legal options as Venezuela moves to control heavy oil projects,
By Damon Vis-Dunbar and Luke Eric Peterson

Foreign oil companies are eyeing potential international dispute resolution avenues as Venezuela moves to nationalize a majority stake in the country's most expensive heavy oil projects.

On Monday Venezuelan president Hugo Chavez signed a decree giving foreign firms with investments in four heavy oil projects until May 1 to sign up to new joint-venture agreements. The contracts would give the state oil company PDVSA a majority stake in the projects.

This is the latest in a series of steps that Venezuela has taken toward nationalizing key sectors of its economy. Last year Venezuela transformed dozens of service contracts held

by foreign oil companies into less lucrative joint ownership agreements with the state oil company. In the last several months, Chavez has also moved to nationalize the country's telecommunications and electricity companies, also affecting large foreign investors.

Chavez's latest decree orders that PDVSA take a 60% stake in four projects in the Orinoco Oil Belt: Sincor, Petrozuata, Hamaca and Cerro Negro. That affects six foreign companies: Chevron (USA) ConocoPhillips (USA), Exxon Mobil (USA), Total SA (France), Statoil ASA (Norway) and British Petroleum (UK).

At least 5 of the 6 companies are understood to have access to bilateral investment treaties (BITs); in the case of the US companies, Chevron, ConocoPhillips, and Exxon such coverage would come thanks to corporate structures which include Dutch corporate entities.

The prospect of arbitration under the Netherlands-Venezuela BIT would be especially important for the American investors, as there is no investment protection treaty in place between the US and Venezuela. Total, the French energy firm, could pursue arbitration under the France-Venezuela BIT. Likewise, BP could turn to the UK-Venezuela BIT. The position of Norwegian firm Statoil is less clear.

Before foreign investors could turn to investment treaty arbitration, they would need to abide by any mandatory waiting periods in the relevant agreements.

ITN understands that at least two companies with investments in the Orinoco Belt have already put Venezuela on notice that they may have investment treaty protections.

While no company is understood to have filed a formal request for arbitration, the two aforementioned companies may have done enough to set in motion mandatory waiting periods which must elapse before any formal arbitration request could be made. For example, the UK-Venezuela treaty prescribes a 3 month window for amicable settlement prior to any claim being formally submitted to binding arbitration. Some sort of notice would be needed to set that settlement period in motion.

In addition to any treaty protections, foreign oil companies may have access to other international legal protections. Venezuela has a foreign investment law that makes reference to arbitration at the International Centre for the Settlement of Investment Disputes (ICSID). However, there is debate amongst lawyers as to whether the law in question provides for Venezuela's advance consent to ICSID arbitration, or whether some further consent is necessary in every instance before a given case could be submitted to arbitration at ICSID.

Chavez's presidential decree is notably silent on the matter of compensation. Dow Jones quotes an executive from one of the oil companies as saying that a compensation plan is "not defined yet", but that the government is proposing "a kind of paper instrument rather than cash".

Last year Venezuela forced 22 foreign oil companies to switch from operating agreements to joint-venture contracts. The original operating agreements, initiated in the 1990s to stimulate foreign investment, were essentially service contracts with preferential tax rates. Foreign companies were presented with new contracts that gave them a minority share in the oil fields.

All but two of those companies acquiesced and signed on to the joint-venture contracts. France's Total and Italy's Eni were the only ones to refuse. Eni has since initiated arbitration proceedings at ICSID, while Total is still engaged in talks over compensation.

Sources:

ITN interviews

"Venezuela Orinoco Cos Fear Voucher Compensation: Sources", by Peter Millard, Dow Jones Newswires, February 28, 2007

4. Chinese investor launches BIT claim against Peru at ICSID,
By Fernando Cabrera Diaz

Tza Yap Shum has become the first Chinese investor to file a dispute against a state at the Washington-based International Centre for Settlement of Investment Disputes (ICSID). Mr. Tza Yap Shum is suing the Republic of Peru, in an effort to obtain 20 million USD in compensation for the alleged expropriation of his fish flour company, TSG Peru S.A.C.

The claim has been lodged pursuant to the China-Peru Bilateral Investment Treaty (BIT), which was signed in 1994.

According to the claimant's lawyers, TSG Peru is involved in the manufacturing, import, export, and distribution of fish flour intended for the Asian market. Mr. Tza Yap Shum owns 90% of the company, which was listed as being one of the top six fish-product exporters in Peru between 2003 and 2004.

Peru is the world's largest producer of fish flour, which in 2005 accounted for 70% of its fish exports by volume. The substance is a popular component in animal feed due to its high concentration of protein and digestible fats.

The present dispute began in December of 2004 when la Superintendencia Nacional de Administración Tributaria (Sunat) [National Tax Administration Office] charged TSG Peru for an alleged tax debt in the amount of 12 million Peruvian New Sols (currently equivalent to about 4 million USD).

According to the claimant, the Peruvian tax authorities proceeded to confiscate TSG's bank accounts a mere month after the company first received notice of the charge, and

while the company was still trying to challenge the decision within the legally-prescribed time limits for doing so.

The claimant alleges that the confiscation of the company bank accounts paralyzed the company and resulted in an expropriation, for which the company has not been compensated.

An official at Peru's embassy in Washington tells Investment Treaty News that Peru had only recently received the notice of arbitration and did not have an official opinion at this time. The official said the country was in the process of examining the claim and would respond in the next couple of months.

Unusual about this claim is that BITs signed by China have not produced many known investor-estate arbitrations in the past, and none brought by a Chinese investor to ICSID.

As reported previously by ITN, older China BITs tended to have limited dispute resolution provisions that did not offer foreign investors wide latitude to take their host state to international arbitration.

For instance, a China-Finland BIT signed in 1984 only allowed investors to seek international arbitration to dispute the amount of compensation they have been awarded as a result of an expropriation. [see "China-Finland investment treaty points to new trend in Chinese BITs," at http://www.iisd.org/pdf/2007/itn_feb14_2007.pdf]

The China-Peru BIT has a similarly circumscribed dispute resolution provision.

Mr. Tza Yap Shum initiated the mandatory six month consultation period required by the China-Peru BIT in October of 2005 and the claim was registered by ICSID on February 12 of this year.

Carlos Paitán Contreras, Orlando Siu and Omar Cardenas of the Lima, Peru-based law firm Estudio Paitán & Abogados are representing the claimant in the ICSID arbitration.

5. Real estate policy becomes a sticking point in South Korea-US negotiations,
By Damon Vis-Dunbar

American business groups and a high-ranking senator have lashed out at a potential compromise that would see real estate and tax laws carved out of the investor-state dispute resolution provision of the United-States-South Korea Free Trade Agreement.

In mid-February the seventh round of negotiations on the US-South Korea trade and investment deal ended in deadlock on multiple fronts as negotiators failed to resolve conflicting interests, including South Korea's wish to exclude real estate and tax law from a proposed investor-state dispute resolution mechanism.

Republican Senator Richard Lugar, a ranking member of the Senate Foreign Relations Committee, tells US Trade Representative Susan Schwab in a letter that he is concerned "regarding the potential compromise of investor protection in the US-Korea Free Trade Agreement negotiations." In particular, he is worried about Korea seeking concessions in key areas of the agreement. In the letter reprinted in the newsletter Inside US Trade, Lugar also expresses a concern that Korea may reject an investor-state dispute resolution mechanism altogether.

"This FTA should uphold standards at least comparable to the carefully negotiated Model BIT and other investment chapters of the vast majority of our FTAs," writes Senator Lugar, in a letter dated February 21.

A person close to the Korean negotiations tells ITN that Korea has agreed to an investor-state dispute resolution mechanism in the proposed US-Korea FTA. However, Korean negotiators aim to use an annex to the investment chapter in order to exclude certain sensitive areas from the reach of the investor-state arbitration mechanism.

In February, Korean non-governmental organizations released a report detailing the reasons why South Korea's real estate policies could be vulnerable to claims by US investors. According to that report, South Korea provides lower levels of compensation when land is expropriated than in the United States, due to when and how the market price is calculated. Policies are also in place to curb the type of property speculation which led to spiraling real estate prices in the 1990s.

"The request to remove real estate policies from the investor-state claim (ISC) clause reflects the South Korean government's effort to make housing more accessible and affordable in line with the public interest," says a separate draft paper prepared by a coalition of Korean and American NGOs, which they plan to present to the US Congress next month.

A copy of that draft paper, seen by ITN, warns that "(u)nder the ISC clause, however, investors can challenge such policies, inevitably restricting protective social measures and overlooking public rights."

NGOs have also raised alarms that the USTR's proposals on intellectual property will deliver a financial blow to South Koreas universal health care system. "It is clear that health policies that are beneficial to the people can be challenged by pharmaceutical companies through the investor-state claim clause," says the NGO paper prepared for the US Congress.

Since the US-SK FTA talks formally got underway in early 2006, they have been carefully monitored by South Korean activists, who see the potential trade deal as a threat to healthcare, domestic agriculture, education and cultural industries. These groups have slammed their government for what they see a lack of transparency in the negotiations.

In their draft report being prepared for presentation to the US Congress, activists complain that Korea has not done enough to consult concerned groups, such as industrial associations and agricultural and labour organizations.

South Korean and American officials are slated to meet for an eighth round of negotiations on March 8-12. Negotiators are under deadline to wrap-up talks before the US administration losses its so-called fast-track negotiating authority in June 2007.

Sources:

ITN interviews

"U.S., Korea Announce Eighth FTA Round; Major Issues Unresolved", Inside U.S. Trade, February 16, 2007

"S.K.-U.S. FTA Will Undermine Korea's Real Estate Policies", The Hankyoreh, February 3, 2007

6. U.S. District Court rejects Thunderbird petition to vacate NAFTA tribunal ruling, By Fernando Cabrera Diaz

The United States District Court for the District of Columbia has rejected a petition by the Canadian firm International Thunderbird Gaming Corporation seeking to set aside a NAFTA arbitration tribunal's award. In its decision, handed down on February 14 of this year, the District Court found that the Tribunal's award was not rendered in manifest disregard of the law, and could therefore not be overturned.

Thunderbird had sued the Mexican Government, pursuant to NAFTA Chapter 11, alleging expropriation of its investments in the Mexican gaming industry. The company had claimed that it established gaming facilities after obtaining a positive opinion from Mexican authorities regarding their legality.

However, shortly after Thunderbird began to operate its gaming facilities, they were closed by Mexican officials. The company responded by filing for arbitration under the North American Free Trade Agreement's Chapter 11.

As reported previously by Investment Treaty News, Thunderbird lost that arbitration. Furthermore, a majority of the tribunal ordered that Thunderbird, should bear the larger proportion of the costs of the arbitration, as well as three-quarters of Mexico's legal costs. (see earlier ITN reporting at: http://www.iisd.org/pdf/2006/itn_jan27_2006.pdf)

It its request to the District Court, Thunderbird had argued that the NAFTA panel acted in manifest disregard of the law in applying the burden-of-proof standard it adopted. The court rejected this argument and held that the NAFTA tribunal did not act with manifest regard of the law in applying that standard. The District Court similarly found that the

tribunal did not act with manifest disregard of the law in awarding certain costs to Mexico.

Not all investment treaty arbitration awards are challengeable in domestic courts. For instance, those arbitrated under the standard ICSID arbitration rules are reviewable only for a limited number of reasons, and via internal ICSID processes of annulment or revision. However, awards rendered under commercial arbitration rules (e.g. ICC, UNCITRAL, etc.) as well as under the so-called Additional Facility rules of ICSID (a separate process available where one of the two parties does not hail from an ICSID Convention signatory country) may be challenged in the domestic courts of the place of arbitration – usually on a narrow range of grounds.

Because the Thunderbird-Mexico dispute was arbitrated under the UNCITRAL rules of procedure, the claimant was able to bring a subsequent challenge to the award in the courts of the place of arbitration (the United States).

The US District Court's decision in the Thunderbird case is available online at the University of Victoria's Investment Treaty Arbitration website at: http://ita.law.uvic.ca/documents/Thunderbird-setaside.pdf

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Briefly Noted:

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7. Investor challenges Ecuadorian windfall tax as breach of oil participation contract, By Fernando Cabrera Diaz

Panamanian oil company City Oriente has filed an arbitration claim against Ecuador at the International Center for Settlement of Investment Disputes (ICSID). The claim does not allege breach of an investment treaty, but rather asserts breaches of a participation contract with the Ecuadorian state oil company Petroecuador.

The claim arises following the introduction by Ecuador last year of a so-called 'windfall tax' on oil profits.

City Oriente operates Oil Block 27 in Ecuador's oil-rich province of Sucumbios. Prior to the dispute the company had been extracting as many as 4,000 barrels of oil per day from the Block. The company has been operating under a contract it signed with Ecuador in the early nineties.

As reported previously by Investment Treaty News, the windfall tax was introduced by previous Ecuadorian President Alfredo Palacios in response to strong domestic pressure to exact greater concessions from foreign firms at a time of soaring oil prices.

The tax, part of a new hydrocarbons law passed last April, requires that oil companies

give Ecuador 50% of profits when oil prices surpass benchmark levels set in the oil contracts signed during the early 1990s. (see earlier ITN reporting at: http://www.iisd.org/pdf/2006/itn_may16_2006.pdf)

With its filing, City Oriente becomes the first oil company known to have taken Ecuador to arbitration over the windfall tax. At press time, an arbitral tribunal had not yet been selected to hear the case.

8. Two new studies explore relationship between BITs and FDI

A pair of recent studies explore whether bilateral investment treaties serve to stimulate additional flows of FDI for the countries which sign them. Details and abstracts are below.

- "Do Investment Agreements Attract Investment? Evidence from Latin America"
Kevin P Gallagher and Melisa Birch, Journal of World Investment and Trade, Dec, 2006

http://www.ase.tufts.edu/gdae/policy_research/BITs.html

From the Author's website:
"GDAE's Kevin P. Gallagher and Melissa Birch find that signing a BIT with the United States does not have an independent effect on attracting foreign direct investment from the United States.
Their paper is the first to look exclusively at the determinants of foreign investment in Latin America. It draws on an extensive dataset of U.S. foreign investment in the region between 1980 and 2002. The most significant determinants of foreign investment are the degree to which a nation has a large or growing economy, and whether the nation has achieved macroeconomic and political stability. Their findings are consistent with the majority of studies on the determinants of foreign investment in developing countries.
Though a small handful of studies have found some evidence of a BIT-investment link, recent studies by the World Bank and Yale University have found that BITs on their own do not attract investment.
In an interesting twist, the authors do find that there is a correlation between the number of total BITs signed and the amount of foreign investment that flows to Latin American countries. In other words, countries that are signing BITs with countries besides the United States are attracting more foreign investment.
If the findings in this study and the others on investment treaties and FDI are correct, they suggest that developing country governments should think twice before signing an investment treaty with the United States. The treaty may stimulate little investment, and such treaties carry costs, most notably limitations on the policy instruments governments can use to promote national development."

- "When BITs Have Some Bite"
Susan Rose-Ackerman and Jennifer Tobin

Yale Law School Draft Working Paper, November 2006
http://www.law.yale.edu/documents/pdf/When_BITs_Have_Some_Bite.doc

From the Authors' Abstract:

"Past empirical work on the growing number of BITs in force around the world has produced conflicting findings concerning their impact on FDI. This study takes an important step towards resolving some of these conflicting results. We show both theoretically and empirically that BITs cannot be judged in isolation. Their impact on host country FDI flows must be studied within the context of the political, economic and institutional features of the host country that is signing the BIT and in the light of the worldwide BITs regime. We find that BITs do indeed have a positive impact on FDI flows to developing countries. Importantly, however, we show that this general positive impact is highly dependent on the political and economic environment surrounding both FDI and BITs. Our statistical results demonstrate that, as the coverage of BITs increases, overall FDI flows to developing countries may increase, but the marginal effect of a country's own BITs on its FDI will fall. Additionally, a stronger political environment for investment and a better local economic environment are complements to BITs. Our results demonstrate that we can only understand the impact of BIT programs on FDI with a broader understanding of the political-economic environment surrounding investment."

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