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2nd Annual Forum of Developing Country Investment Negotiators

3 - 4 novembre 2008 - Marrakech - Maroc



Recent Developments in Regional and Bilateral Investment Treaties

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This paper is provided as part of a series as background documents for the *2nd Annual Forum for Developing Country Investment Negotiators*, held in Marrakech, Morocco, 2-4 November 2008. The event was organized by the International Institute for Sustainable Development in partnership with the South Centre and the Moroccan Department of Investment. Support for the Forum has been generously provided by the Danish Ministry of Foreign Affairs, the International Development Research Centre and the Norwegian Agency for Development Corporation.

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The **South Centre** (www.southcentre.org) is an intergovernmental organization of developing countries established by the 1994 Intergovernmental Agreement to Establish the South Centre (deposited with the UN Secretary-General) which came into force on 31 July 1995. The South Centre currently has 50 developing country Member States. It has its headquarters in Geneva. The South Centre seeks to meet the need for analysis of development problems and experience, as well as to provide policy analysis and research support required by developing countries for collective and individual action, particularly in the international arena. The South Centre's primary objectives include the promotion of: developing country (South) solidarity and cooperation on development issues; South-wide collaboration in promoting common interests and coordinated participation by developing countries in international forums dealing with South-South and North-South matters, as well as with other global concerns; convergent views and approaches among countries of the South with respect to global economic, political and strategic issues related to evolving concepts of development, sovereignty and security; and better mutual understanding and cooperation between the South and the North on the basis of equity and justice. To meet its objectives, and within the limits of its capacity and mandate, the South Centre responds to requests for policy advice, and for technical and other support from collective entities of the South such as the Group of 77 and the Non-Aligned Movement. These functions are carried out by means of policy-oriented research and analysis, negotiations support and technical assistance, and capacity-building, and by publishing and disseminating widely the results of its work. The South Centre's main areas of policy expertise include trade, intellectual property, climate change, investment, finance, agriculture and services.

The **Department of Investment** has been in charge of promoting foreign investment in Morocco since 1996. Beyond its mandate to provide information on the country's potential, the Department creates and implements investment promotion strategies targeting specific sectors to promote the realization of projects. Its plan of action revolves around four main axes:

- Identifying different categories of investors and countries initiating foreign investment;
- Promoting priority sectors such as tourism, NTIC, electronic and automobile components, textiles, aeronautics and the agro-alimentary industry;
- Coordinating between national institutions and international organizations in the field of investment; and
- Locating projects according to the opportunities offered in the different regions of Morocco, in collaboration with the Regional Investment Centres.

In order to further the government's investment policy, while carrying out its mission, the Department of Investment is organized along two main poles, namely cross-sectional and sector-oriented:

- Two divisions cover investment promotion, communication and cooperation, research and regulations;
- Two other divisions are dedicated to activities in priority sectors, agriculture and industry on one hand, tourism and services on the other.

To maximize efficiency, these structures benefit from the support of offices in charge of human resources and general affairs. The Department of Investment, along with its initial mandate, also steers the Inter-Ministerial Investment Commission, an appeal and arbitration body presided by the Prime Minister. The Department of Investment plans to establish an independent agency dealing specifically with promotion in early 2009.

Second Annual Forum of Developing Country Investment Negotiators

3-4 November 2008

Marrakech, Morocco

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Mahnaz Malik

1. Introduction

This paper identifies recent developments in regional and bilateral investment treaties. Bilateral investment treaties (BITs)¹ are concluded between pairings of countries focusing exclusively on investment provisions, whereas regional investment treaties (RITs) occur between countries from the same region. Investment provisions also form part of preferential trade and investment agreements (PTIAs), which as the name suggests, cover subjects in addition to investment, such as trade, competition and government procurement. The rise of PTIAs is also discussed in the paper. The term International Investment Agreements (IIAs) encompasses BITs, RITs and PTIAs.

¹ BITs are signed agreements between two countries exclusively focused on the reciprocal promotion and protection of investments in the territory of one country (“the host state”) by nationals and companies based in the other country party (“the home state”) to the agreement. BITs usually contain broad commitments by the host state to protect investors from the home state, which can range from an assurance to provide compensation for expropriation; fair, equitable and non-discriminatory treatment; and undertakings to observe investment contracts and other investment-related obligations. Critically, in the vast majority of cases, the extensive international law guarantees contained in IIAs, are enforceable by investors directly against the host state through international arbitration, without the requirement of proceeding first before local courts.

2. Bilateral Investment Treaties (BITs)

2.1 The numbers

At the end of 2007, the total stock of BITs in the world was 2608² and involved 179 countries. The story of BITs began in 1959 when Pakistan and Germany signed the first such agreement, and other countries followed suit with similar pacts. However, it was the last couple of decades that saw the tremendous growth in the number of BITs between states. There were approximately 385 BITs in 1989, however a decade later in 1999, their number grew to 1,857.

The total number of BITs in the world continues to grow; however, the last few years have shown that this is taking place at a much slower rate than before. In 2007, UNCTAD noted that 44 new BITs were signed. This is a significant drop from the previous two years, as there were 73 and 70 new BITs in 2006 and 2005 respectively³.

A preliminary survey in the first half of 2008 indicates that only 11 BITs were signed. This could indicate that there is a further slowing in BIT signing activity as 15 new BITs were signed in the same period last year. UNCTAD's preliminary survey for the first half of 2007 had noted that 15 new BITs were signed, while at the end of that year the total

2 Recent developments in international investment agreements (2007–June 2008)
UNCTAD IIA MONITOR No. 2 (2008) International Investment Agreements

3 At the end of 2006, 73 new BITs were concluded bringing the total number of BITs to 2573. During 2005, 70 new bilateral investment treaties (BITs) were concluded, bringing the total number of BITs to a total of 2,495 that year.

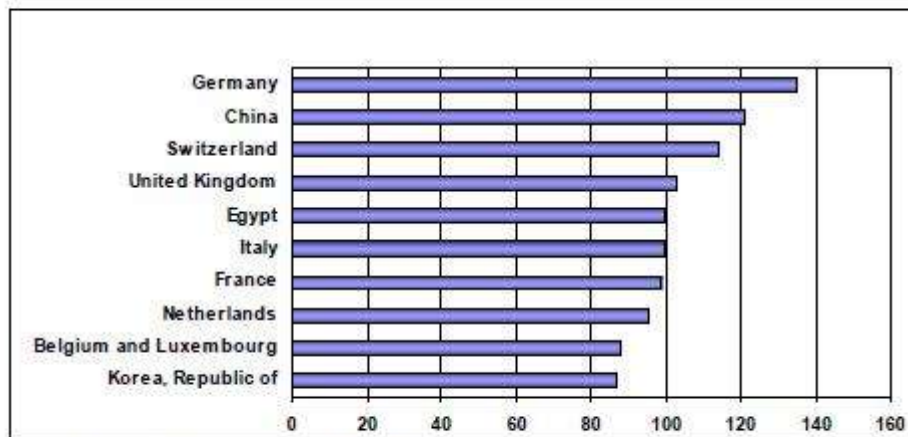
number was 44. If the pattern repeats itself, we can expect to see fewer BITs at the end of 2008 than were signed in 2007.

Key Trend: While the total number of BITs continues to increase, there is a slowdown in activity in comparison with previous years.

2.2 The countries

Germany, the country to sign the world's first BIT, maintains its lead with 135 BITs, however it is closely followed by China's growing number of over 120 BITs. The top 10 signatories of BITs by the end of 2007 are illustrated in the table below. The rankings of the top ten signatories of BITs remained unchanged from 2006.

Figure 2. Top 10 signatories of BITs by end 2007



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

7 out of the top 10 signatories of BITs are European countries. The Asian economies of China⁴ and the Republic of Korea have entered the list as the two countries continue to amass a large collection of BITs. The last couple of years have also seen countries making a conscious decision to change their BIT policies. For example, Norway suspended the signing of BITs in the mid 1990s after concerns about the compatibility of such agreements with its constitution, however, it publicly revealed its new draft model earlier this year. Ireland continues to only have one BIT (with the Czech Republic). However, a more radical challenge to BITs is found in Latin America, namely by Bolivia, Venezuela and Ecuador, which have retreated from their existing obligations as is discussed further below.

***Key Trend:** Germany retains its lead with the largest number of BITs; however, other countries such as China appear to be catching up rapidly. At the same time, a small, but growing group of countries, is questioning existing BIT policies*

a) *Developing and developed countries*

Initially, BITs were signed between developed countries and developing countries, the latter mainly being former colonies of the former⁵. The world's first BIT was signed between a developed and a developing country, Germany and Pakistan, in 1959.

⁴ Recent Chinese BITs include broader rights for investors than its older BITs

⁵ A large number of developing countries signed their first BITs with their former colonial masters, for example, India signed its first BIT with the UK

However, in the 1990s in particular, not only did more countries start signing BITs, but BITs between two developing countries gained momentum. The failure of multilateral attempts for an investment agreement in the 1990s gave further impetus to the signing of bilateral and regional pacts between countries.

Over the last few years, the number of BITs between developing countries has grown. For example, in 2005, 20 of the 70 new BITs were concluded between developing countries, bringing their total number to 644, whereas ten years before only 161 had existed. Similarly, in 2006, 23 of the 73 new BITs that year were between developing countries, making the total of south-south agreements rise to 680 BITs. This development partially reflects the stronger role of some developing countries as capital exporters, such as India and China, which makes them actively seek the conclusion of BITs. For example, China now has the second largest number of BITs in the world. Some IIAs signed by developing countries have also shown innovative trends. For example, the investment chapter in the India-Singapore CEC⁶ does not include any provisions for Most Favoured Nation nor provisions for “Fair and Equitable Treatment” or “Full Protection and Security” – a notable omission at a time when an increasing number of investment treaty disputes are hinging on the host state’s duty to provide “Fair and Equitable Treatment” in particular. This is a marked departure of India’s previous BITs.

The trend between South-South cooperation also continued in 2007. Of the 44 new BITs signed in 2007, 13 were between developing countries, which now represent more than

⁶ India - Singapore Comprehensive Economic Cooperation Agreement (CEC) signed on 29 June 2005. The Agreement encompasses trade in goods, trade in services, investment protections and other features

26 per cent of the total number of BITs. China alone accounted for a large share of those South–South agreements. In 2007, it concluded four new BITs with other developing countries (Costa Rica, Cuba, Republic of Korea and Seychelles). About 60 per cent of the Chinese BITs concluded from 2002 to 2007 were with other developing countries, mainly in Africa

At the same time, the role of developed countries in the realm of BITs continues to be significant. In 2007, developed countries were involved in 25 of the new BITs. The Netherlands (5), Finland, Germany and Spain (3 each) together accounted for the majority of the new BITs. At the end of 2007, developed countries were party to 60 per cent of all BITs. Despite an already large number of BITs, Germany (135), Switzerland (114), France (99), the Netherlands (95) and Belgium–Luxembourg (88) continued to sign new agreements in 2007. The majority of the top ten BIT signatories are developed countries.

***Key Trend:** While the number of South-South BITs continues to increase, the conclusion of North-South BITs remains a significant feature*

b) *Regions*

2007 also showed interesting differences across regions in the conclusion of BITs. Asian countries remained the most active by their conclusion of 29 of the total of 44 new BITs last year. China, Oman and Qatar concluded the largest number of new agreements, with five BITs each in 2007. Asia and Oceania are now party to 41 per cent of all BITs,

whereas in 2006 they were party to 24% of all BITs. Asia's share of the new BITs also increased from 2006 as they concluded 33 BITs out of 73 new BITs that year.

A preliminary survey during the first half of 2008 by UNCTAD indicates that most of the 11 new BITs concluded during this period also involved Asian countries, in particular those from South East Asia. India and Japan signed three and two BITs, respectively, with least developed countries in Asia. The Japanese BITs with Vietnam and Cambodia contained not just investment protection but also investment liberalization provisions. Furthermore, the conclusion of a BIT between Myanmar and Thailand continued the trend of more intraregional integration among South-East Asian countries in the framework of South–South economic cooperation.

In 2007, countries in South-East Europe and the Commonwealth of Independent States signed 11 new BITs. Azerbaijan and the Russian Federation led the group with two new BITs each. With a total of 581 BITs concluded by the end of 2007, countries in this region were involved in 22 per cent of all BITs. In 2006, this region had the highest share of the world-wide total of BITs at 31%.

The increasing involvement of countries in Africa over the last few years is an interesting trend. African countries concluded 11 new BITs, and were party to 27 per cent of all BITs, at the end of 2007. However, their involvement is weaker when compared with 2006, when African countries concluded 21 new BITs. In the first half of 2008, African countries were party to two new BITs. An interesting development was the conclusion of

a BIT between the United States and Rwanda. The agreement stands as the first such treaty of the United States in sub-Saharan Africa in nearly a decade. Since the unveiling of the US Model BIT in 2004, only Uruguay and Rwanda have signed BITs with the US based on this model.

Perhaps, the boldest trend is found in Latin America. Latin American and Caribbean countries appeared to be the least active in concluding BITs, with only four new BITs in 2007. This is a significant drop from the 13 new BITs signed by these countries in 2006. Countries in this region were party to only 19 per cent of all BITs by end of 2007. Latin American and Caribbean countries did not sign any BITs in the first half of 2008.

While BIT activity in Latin America has declined, countries such as Bolivia, Ecuador and the Bolivarian Republic of Venezuela have made announcements to retreat from their existing BITs. In May 2007, Bolivia declared its withdrawal from the International Centre for Settlement of Investment Disputes (ICSID), and was reported reviewing the ‘termination’ of its existing BITs. Last year, Ecuador announced that its consent to ICSID arbitration was no longer available for any disputes arising from mining and oil contracts. This was followed by an announcement by Ecuador that it will denounce at least 9 of its BITs which it considers as not having brought any noticeable benefits to its economy. It is reported that Ecuador has denounced nine of its 25 BITs, with Cuba, the Dominican Republic, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Romania and Uruguay and has reportedly launched renegotiations with the remaining 16 countries.

It has recently been reported⁷ in the Official Register No. 452, dated October 23, 2008, that the Government of Ecuador has published copies of the formal letters that it has sent to Cuba, El Salvador, Guatemala, Honduras, Nicaragua, Paraguay, Dominican Republic and Uruguay stating its decision to denounce the BITs that it had previously signed with these countries. Ecuador reportedly states that it is in the process of reviewing “*its legal system and its domestic as well as international policies in the matter of investments.*” And that “*in this sense, it has evaluated the impact of the BITs on the national economy, and it has reached the conclusion that the agreement*” with the particular country (e.g. Cuba, etc.), “*has not reached its fundamental objective, that is, to motivate the attraction of capitals ...*”.

The Bolivarian Republic of Venezuela has also made public similar concerns, but has not issued a formal withdrawal from ICSID as yet. The Bolivarian Republic of Venezuela reportedly denounced its BIT with the Netherlands in April 2008.

One of the factors responsible for the decline in the Latin American appetite for BITs could be the fact that countries in the region have been the respondents in a large number of investor-state disputes arising under BITs. The Argentine Republic has the largest number of known investor-state arbitrations, with at least 46 claims lodged against it, 44 of which relate at least in part to that country’s financial crisis early in this decade. Mexico continues to have the second highest number of known claims (18), but there were no new cases against it in 2007. Further, Ecuador and Venezuela have 9 and 7 cases

⁷ OGEMID Posting, Ecuador denunciation of several BITs, by Hernán Pérez Loose. Coronel & Pérez Abogados, www.coronelyperez.com

each against them. Two of the six countries that faced arbitration proceedings for the first time in 2007, were from Latin America (Costa Rica and Guatemala).

***Key Trends:** Asian countries were the most active in signing BITs in 2007 and in the first half of 2008. The share of African countries in the world-wide number of BITs continued to grow but at a slower rate in comparison with the previous year. Latin American countries had the weakest involvement in concluding BITs; the last year also saw a few Latin American countries retreating from their existing BIT commitments.*

2.3 The Agreements

a) *Renegotiations and Denouncements*

In 2007, 10 of the 44 new BITs (23 per cent) replaced earlier treaties. This brought the total number of renegotiated BITs to 121 at the end of 2007. Compared to the total number of existing BITs (2,608), the share of renegotiated agreements is minor – less than 5 percent. To date, Germany has renegotiated the largest number of BITs (16), followed by China (15), Morocco (12) and Egypt (11). This number is expected to rise further since a growing number of BITs are nearing the expiry of their initial period of validity as the 1990s in particular saw a large number of BITs being signed, and more countries are revising their model BITs to reflect new concerns related to environmental and social issues, including the host country's right to regulate. Norway, for example, has

drafted a new model BIT that aims to integrate the state's ability to regulate in the public interest with investor protection obligations.

The recent rise in investor-state claims under BITs has raised concerns about the ability of countries to regulate in the public interest due without incurring liability to investors under the traditionally drafted BIT models. In 2007, at least 35 new investor-state cases were filed under IIAs. This is a marked increase over 2006, where only 26 new cases were reported. Since the only arbitration facility to maintain a public record of claims is ICSID, the total number of actual treaty-based cases is likely to be still higher. 17 of the new cases were filed against developing countries, seven against transitional economies in South-Eastern Europe and the Commonwealth of Independent States, and 11 against developed countries.

According to UNCTAD, the total cumulative number of known treaty-based cases reached 290 in 2007, although other estimates indicate that this number has crossed 300. At least 73 governments – 44 of them in the developing world, 15 in developed countries and 14 in South-Eastern Europe and the Commonwealth of Independent States – have faced investment treaty arbitration. The overwhelming majority of these cases were initiated on grounds of violating a bilateral investment treaty (BIT) provision (78 per cent), followed by the North American Free Trade Agreement (NAFTA) (13 per cent) and the Energy Charter Treaty (6 per cent). 2007 also saw the first two cases initiated on the grounds of alleged violations of the Central America-Dominican Republic-United States Free Trade Agreement (CAFTA-DR).

The increasing use of BITs by investors, and the interpretations of often broadly drafted investment protection obligations, appear to have prompted the conclusion of BITs based on newer models which feature environmental considerations, often absent from the vast majority of BITs. For example, in BIT negotiations between Canada and China, Canada released an environmental impact analysis of the agreement, and announced that the treaty will not have an impact on Canada's ability to implement its environmental policy. Canada made amendments to its investment treaty template in 2003, which included attempts to provide greater comfort for legitimate public policy measures without breaching investor obligations in the treaty. Canada has been named respondent in a number of investor-state arbitrations with environmental undertones.

While developed countries, for example Canada and Norway, have sought to feature environmental considerations in the investment treaty templates, a rising trend among developing countries is a greater questioning- and at times even a rejection- of existing BIT models. For example, South Africa and Pakistan both refused to sign BITs based on the US Model. Bolivia has withdrawn from ICSID. Venezuela and Ecuador have denounced their BITs as discussed above.

***Key Trends:** The number of renegotiated BITs continues to increase in 2007. A small but growing number of countries are questioning the existing prototype of BITs with broadly drafted investor protections, which reduce the policy space for states to regulate in the public interest and lack adequate development safeguards. Further, the growing number*

of claims against developing states, and increasing awareness of the implications of treaty protections in arbitral awards interpreting such provisions, has been a significant factor for states to renegotiate their BITs, and create models aimed to strike a balance between investor protection and the policy space for states to regulate. At the same time, a few countries in Latin America, namely Bolivia, Venezuela and Ecuador have taken more drastic measures to withdraw from their existing commitments.

3. RITs and PTIAs

The trend towards regional investment treaties particularly among African countries appears to have strengthened in the last couple of years. For example, 2007 saw the conclusion of the COMESA Investment Agreement (CCIA) and the SADC Finance and Investment Protocol (FIP). The importance of the CCIA also stems from the fact that its provisions are carefully drafted to take account of the recent investor reliance on broad language found in provisions traditionally contained in BITs which have resulted in expansive interpretations from some arbitral tribunals. The SADC FIP includes an investment annex with a limited number of investment protection provisions and an investor-state dispute resolution clause.

The slowdown in the rate at which the countries have signed BITs over the last few years is contrasted by the surge in free trade agreements and other treaties on economic cooperation containing investment provisions. These treaties are not limited to investment issues per se as in the case of BITs, but also deal with related matters such as trade, services, competition, intellectual property and industrial policy (UNCTAD

2006c). Whereas only 80 such treaties existed at the beginning of 1995, their number stood at 232 at the end of 2005 (UNCTAD 2006a, 2006b). During 2006, 18 new PTIAs were concluded, compared with 14 in the previous year, bringing the total number of these agreements to 241 at the end of 2006. While the total number of PTIAs is still small compared to the number of BITs, they have almost doubled during the past five years marking a trend for the growth of such agreements in the future.

In 2007, 12 new IIAs other than BITs were concluded, bringing the total of such agreements to 254. Again, as in the case of BITs, most of the treaty-making activity in 2007 involved Asian countries. Japan was particularly active with the conclusion of economic partnership agreements (EPAs) with Brunei Darussalam, Chile, Indonesia and Thailand. The Republic of Korea concluded an important free trade agreement (FTA) with the United States and an agreement on free trade in services with the Association of South-East Asian Nations (ASEAN) which covers FDI through commercial presence.

Outside Asia, the European Free Trade Association (EFTA) signed an FTA with Egypt that includes detailed provisions on investment promotion, as well as a fair and equitable treatment clause. In Latin America, Costa Rica and Panama concluded a comprehensive FTA with substantive investment protection provisions. At least 70 new IIAs other than BITs were under negotiation at the end of 2007, involving 108 countries

During the first half of 2008, five new IIAs other than BITs were concluded, bringing the total number of such treaties to 259. Canada was most active with the conclusion of three

new FTAs. In January 2008, Canada and the EFTA States concluded an FTA that includes general investment provisions recognizing the importance of creating favourable conditions for expanding investment and agreeing to review issues related to investment in a joint committee. In May 2008, the FTA between Canada and Peru was signed with substantive investment protection provisions. In addition, FTA negotiations with Colombia were concluded in June 2008.

The ASEAN member States and Japan concluded a comprehensive (EPA) covering trade in goods, trade in services and investment. The interaction and possible overlap between the new ASEAN–Japan EPA and previous EPAs between Japan and individual ASEAN member states should be noted. China concluded an important FTA with New Zealand in April 2008. It includes a chapter on investment protection, and brought an end to a negotiation process that spanned 15 rounds over three years.

The inclusion of investment issues has also recently been in focus with respect to the Economic Partnership Agreement (EPA) negotiations between the African, Pacific and Caribbean (ACP) countries and the European Union (EU). The EPA negotiations commenced in 2002 pursuant to the Cotonou Agreement between ACP countries⁸ and the EU with the objective of delivering trade agreements by 31 December 2007.

⁸ The African, Caribbean and Pacific Group of States (ACP) is an organisation created by the Georgetown Agreement in 1975. The ACP Group was originally created with the aim of coordinating cooperation between its members and the European Union. The ACP Group consists of 79 Member-States, all of them, save Cuba, are signatories to the Cotonou Agreement with the European Union: 48 countries from Sub-Saharan Africa, 16 from the Caribbean and 15 from the Pacific. Source: www.acpsec.org

However, to date, the only ‘full’ EPA is CARIFORUM-EC EPA initialled on 16 December 2007, with the signing ceremony expected this year. 2008 is expected to lead to an intensification of EPA negotiations with the remaining ACP countries towards full EPAs.

The European Commission (EC) is keen to push the so-called new issues in the EPA negotiations, including investment, competition and public procurement, which have attracted controversy among the ACP states as developing countries had previously provided a stiff opposition to these issues in the WTO.

The CARIFORUM-EC EPA contains a comprehensive section on Investment and Services as well as rules on E-commerce. It includes provisions providing for national and most favoured nation treatment for ‘commercial presences’ on a positive list basis in accordance with sectors listed in Annex 4 of the agreement. The rules on investment provide for market access in both service and non-service sectors. The EPA also contains rules to safeguard the environment and maintenance of labour and occupational health and safety standards, as well as anti-corruption provisions.

The extent to which the full EPAs, if any, concluded by the African and Pacific countries will resemble the terms of the CARIFORUM-EC EPA, particularly with respect to investment provisions, remains to be seen.

Key Trends: Regional Investment Treaties featured prominently in Africa with two major regional groupings, COMESA and SADC, concluding such pacts. Countries also continued to sign TIPAs continued in 2007 and 2008.

4. Conclusions

First, IIAs continue to increase, however the rate at which new BITs are being signed slowed in 2007 and the first half of 2008. At the same time, countries continued to enter into PTIAs, and economic integration treaties that combine trade and investment liberalisation appear, at least on the surface, to be increasing. What is less clear is whether the scope of liberalization is increasing significantly under these agreements.

Second, Asia has emerged as the region with the most intense IIA activity. At the other end of the spectrum, there has been a decline- and in some cases a retreat-with respect to BITs in Latin America.

Third, countries are increasingly questioning the current template of BITs, with attempts to design models that strike a balance between investment protection and legitimate policy space for public interest regulation. The number of BIT renegotiations also continued to increase. One of the factors prompting this is the rise of investor-state disputes against at least 73 governments, most of which are from the developing world. The rate of investor-state disputes accelerated in 2007 over the previous year. There is increasing awareness of the implications of the broadly drafted terms in older BIT models which have influenced some developing and developed countries to modify their BIT

templates. The recent Norwegian draft Model BIT and the COMESA CCIA are examples of treaties that take into account the expansive interpretations of tribunals. Some developing countries, such as India, have also omitted key “stock” provisions such as fair and equitable treatment and most favoured nation treatment from some of their IIAs⁹. At the same time, the recent Japanese BITs with Vietnam and Laos indicate that the models of the comparatively more developed treaty partner, in this case Japan, also continue to influence negotiations in such scenarios¹⁰. Thus, there is evidence of changing approaches today, but still an entrenchment in many cases of developed country models as well. IIAs signed in the coming years will determine the extent of the shift from the older investor-centric models to innovative new texts containing a balance between investor protection and host state policy space.

⁹ For example India-Singapore CEC

¹⁰ For example, US-Rwanda BIT (2004), Japan-Vietnam and Japan-Laos BITs

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UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, Geneva

Investment Promotion Provisions In International Investment Agreements

UNCTAD Series on International Investment Policies for Development

UNCTAD World Investment Report 2008

Transnational Corporations and the Infrastructure Challenge

Investment Treaty News (ITN), 1 September, 2008

Published by the International Institute for Sustainable Development

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Investment Treaty News (ITN), March 27, 2008

Published by the International Institute for Sustainable Development

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