
BILATERAL INVESTMENT TREATIES AND A WTO INVESTMENT FRAMEWORK

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BILATERAL INVESTMENT TREATIES AND A WTO INVESTMENT FRAMEWORK¹

1. Introduction

1.1. History of BITs

Initially BITs were usually signed between a developed and a developing country at the initiative of the former in order to secure high standards of legal protection and guarantees for the investments of their firms. The developing countries signed such treaties as one way to provide a favourable climate for foreign investment. Since the late 1980s, however, and especially during the 1990s, developing countries and economies in transition began signing BITs within their own groups and with each other, in great numbers. Today, many BIT partners -- whether developed, developing, or Central and Eastern European countries (CEEC) -- approach these treaties with the dual purpose of protecting their outward investments in, and attracting inward investment from, their co-signatories.²

The high speed at which developing countries have been negotiating BITs in the 1990s is linked to the increasingly widespread recognition by governments of the benefits associated with foreign investment and the need to offer protection to foreign investment in order to encourage investment flows. The decreasing levels of ODA played a role in turning to other sources for development. Since 1994, ODA has declined steadily to below 0.3% of GDP from OECD countries. The World Bank and IMF were instrumental in making the case that foreign investment is needed by developing countries and in opening them up for foreign investment. It is not clear how powerful the role of the World Bank and IMF has been in encouraging developing countries to sign BITs.

Significantly UNCTAD has played an important role in the signing of BITs the last few years. By May 2001, for instance, 80 treaties signed by developing countries have been the result of negotiation rounds organised under the auspices of UNCTAD. For instance in May 2001, 29 more BITs were implemented by 9 least developed countries³ among themselves, with 3 developing countries⁴ and 2

¹ Some elements of this research are based on analysis done by other SOMO researchers e.g. M. Filbri and I. Praagman, *A Sustainable Balance?*, November 1999.

NB: For the easy reference to a potential investment agreement in the WTO, this document below uses the abbreviation MIA (multilateral investment agreement).

² UNCTAD, *Bilateral investment treaties quintupled during the 1990s* - New UNCTAD publication releases latest data on the universe of BITs, press release TAD/INF/PR/077, 15 December 2000

³ The least developed countries were: Benin, Burkina Faso, the Comoros, Cambodia, Mali, Mauritania, Guinea, Chad, Burundi.

developed countries⁵. More treaties are being negotiated under the auspices of UNCTAD.

According to UNCTAD, countries are increasingly implementing BITs "in order to promote and protect foreign direct investments and to foster international economic cooperation. By signing such treaties, developing countries in particular are sending a strong signal to the business community world-wide, as well as to their own investors, of their commitment to providing a predictable and stable legal investment framework."⁶

1.2. Key data on BITs

Recent figures on the number of BITs are difficult to obtain. By the end of 2001, 2096 BITs were concluded. Of the BITs concluded in 2001, 45% were between developing countries themselves, 31% were between developed and developing countries, 12% between developing countries and Central and Eastern European countries (CEECs), 6% between CEECs themselves and 6% between CEECs and developed countries⁷.

Table: Increasing number of BITs

year	number of BITs
end of 1969	72
end of 1979	105
end of the 1989	385
1998	1725
end of 1999 (1)	1857
end of 2001 (2)	2096

Source: UNCTAD press releases and documents

(1) Number of countries involved: 173

(2) Number of countries involved: 174

⁴ Cameroon, Mauritius, Ghana.

⁵ Belgium-Luxembourg Economic Union and Croatia.

⁶ UNCTAD, 29 Bilateral investment treaties signed by least developed countries in Brussels, press release LDCIII/PRESS/08/Rev.1, 18 May 2001

⁷ UNCTAD, Experiences with bilateral and regional approaches to multilateral cooperation in the area of long-term cross-border investment, particularly foreign direct investment, Note by the UNCTAD secretariat, Expert Meeting on Experiences with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-Term Cross-Border Investment, particularly Foreign Direct Investment, Geneva, 12 - 14 June 2002, p. 6.

The number of such BITs implemented between developing countries, between developing countries and countries in Central and Eastern Europe, and between Central and Eastern European countries grew sharply, from 63 at the end of the 1980s, to 833 at the end of the 1990s. According to UNCTAD these data suggest that the role of BITs as an instrument for the international protection of foreign investment has increased over the years, especially in the context of South-South cooperation⁸.

An analysis by UNCTAD of the situation on 1st January 2000, gives the following picture⁹. "Overall, Western European countries have implemented the largest number of BITs (904), representing 49% of the total agreements. Canada, Japan and the United States are relative latecomers to the practice, but that has increased over the past two decades, especially during the 1990s, having implemented 75 BITs in all (24, 8 and 43, respectively). Among developing regions, the countries of Asia and the Pacific lead the way (842 at the end of 1999). African countries have been actively involved in BIT practice since the 1960s, and by the late 1990s had signed 428 treaties. Latin American countries, on the other hand, did not start signing BITs until the late 1980s, when changes in the region's development strategies led to rapid growth (300 treaties in all).

Together with the Caribbean countries (which had actually started signing such treaties much earlier), they have implemented a total of 366 BITs. Central and Eastern European countries have signed 633 bilateral treaties, with most of them occurring during the 1990s.

Germany continues to be the country with the largest number of BITs (124), followed by Switzerland (95), France and the United Kingdom (92 each). Among developing and Central and Eastern European countries, China has concluded the largest number (94), followed by Romania (90) and Egypt (84)".

There are some **important observations** to make relating to which country signed how many treaties with which country:

(a) By January 2000, it was by and large European countries that had signed BITs while the US was lagging behind.

⁸ UNCTAD, Bilateral investment treaties quintupled during the 1990s - New UNCTAD publication releases latest data on the universe of BITs, press release TAD/INF/PR/077, 15 December 2000

⁹ UNCTAD, Bilateral investment treaties quintupled during the 1990s - New UNCTAD publication releases latest data on the universe of BITs, press release TAD/INF/PR/077, 15 December 2000

Table: Comparison between number of BITs signed by European countries and the US on 1st January 2000

Country	Number of BITs signed
Germany	124
Switzerland	95
France	92
United Kingdom	92
Italy	77
Netherlands	72
Belgium/Luxembourg	62
Spain	47
United States	43
Sweden	43
Denmark	43
Finland	39

Source: UNCTAD, Bilateral investment treaties quintupled during the 1990s - New UNCTAD publication releases latest data on the universe of BITs, press release TAD/INF/PR/077, 15 December 2000

The European Union, together with its member states, had also signed 52 bilateral associations as well as cooperation, framework and partnership agreements that included investment-related provisions by end April 2002¹⁰.

(b) Importantly enough no BITs have been signed among the most industrialised countries themselves; there are no US BITs with any of the EU countries, Canada or Japan. A close reading of BITs signed by developed countries, will make clear that they are all with developing countries, ex-USSR states and Central or East European countries.

There are different ways among developed countries to protect and promote investment liberalisation (e.g. NAFTA, TRIMs in WTO, GATS, free trade and cooperation agreements). Among EU members, the rules for creating a single market place do not make it necessary to include BITs among one another.

¹⁰ UNCTAD, Experiences with bilateral and regional approaches to multilateral cooperation in the area of long-term cross-border investment, particularly foreign direct investment, Note by the UNCTAD secretariat, Expert Meeting on Experiences with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-Term Cross-Border Investment, particularly Foreign Direct Investment, Geneva, 12 - 14 June 2002, p.29-30.

Among developed countries, the OECD Code of Liberalisation of Capital Movements is a major instrument to liberalise investments. The code has regularly been updated by the OECD Council, the most recent at the beginning of 2003. Investments covered by the Code include many different sorts of capital movements, including FDI and operations in real estate. The Code is concerned with liberalising investment (entry and pre-establishment) and provides for MFN (not national) treatment, exceptions for balance of payments problems, transparency and exceptions for various other sectors. It does not include an external dispute settlement mechanism or deal with expropriation but relies on peer pressure among the OECD members and the OECD Council.

One hundred and fifty three (153) countries have signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (Washington Convention) that allow binding arbitration under the International Center for Settlement of Investment Disputes (ICSID) (see also 5.1). All EU member states and the US have signed, but Canada, Mexico and Brazil are some of the few countries that have not signed the Washington Convention (as of March 6, 2003)¹¹.

(c) As noted by Hilary Coulby, a few countries do not sign with their main investors, e.g. China did not sign a BIT with its main investor (the US). However, China signed a BIT with Japan (1988), Australia (1988) and Germany (1983). Turkey did not sign a BIT with France -its main investor- but with most other European countries (Germany, the Netherlands, Belgium, Luxembourg, Switzerland, Austria, Denmark, UK, Finland, Spain and Italy) as well as with the US and China.

1.3. Types of BITs

The importance attached by developing countries to attract FDI and sign BITs in order to encourage FDI has put them in a rather weak negotiation position to introduce enough flexibility concerning investment treaties and promote development.

1.3.a. Differences

The lack of negotiation power of developing countries has resulted in the signing of different BITs due to the different power and purpose of the developed country with which it has negotiated.

¹¹ ICSID, "List of Contracting States and other Signatories of the Convention" (see www.worldbank.org/icsid/constate/c-states-en.htm)

An important difference in current BITs is that those of the US and Canada include some entry and pre-establishment rights to investors (for details see under 2.). This differs from most other BITs which are about protecting investment after establishment of ???. BITs signed by the US and Canada provide liberalisation of entry of investment through the granting of national and MFN treatment at entry, subject to agreed exceptions¹². Other differences are explained below (see 2.).

Recent BITs signed by developing countries do not contain many differences that are important for their development. For instance, an analysis of the 2002 model BIT by Benin¹³, a least developed country, shows that it does not incorporate development friendly provisions because the scope of the definition is very broad, including portfolio, intellectual property rights and concessions;

- National treatment and MFN are provided;
- The definition of expropriation includes indirect expropriation by governmental measures;
- Dispute settlement about investments allows state-state and investor-state dispute settlement, depending on the choice of the investor;

Where the Benin model BIT is somewhat more development friendly than in other BITs, it relates to:

- the more limited amount of financial transfers related to investments that can move freely out of the country;
- Entry of investment depends, as in other standard BITs, on national law;
- Some weak provisions to promote investment: each contracting party commits itself to promote investment in one another's territory; the possibility to exchange information about investment opportunities so as to help investors identify investments profitable for both contracting parties.

Recommendation:

The argument by proponents of an MIA that an MIA would be more conducive to developing countries because they would have more bargaining power by negotiating together can also be reversed. If an mia were to be negotiated by

¹² UNCTAD, Experiences with bilateral and regional approaches to multilateral cooperation in the area of long-term cross-border investment, particularly foreign direct investment, Note by the UNCTAD secretariat, Expert Meeting on Experiences with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-Term Cross-Border Investment, particularly Foreign Direct Investment, Geneva, 12 - 14 June 2002, p.8.

¹³ UNCTAD, International Investment Instruments: a Compendium, Volume IX, 2002, p.279 - 285 (text in French). An analysis of the model BIT of Burkina Faso shows it is not at all more development friendly.

the WTO, the developed countries would have more bargaining power by negotiating together opposing a group of developing countries who do not have a coordinated negotiating structure and have a demand for a more development friendly treaty than current BITs. Now, many BITs concluded with countries other than the US and Canada do not deal with investment liberalisation and prohibition of performance requirements. If the US and Canada negotiate in the WTO, their bargaining power would be added to the rest of the developed countries and could result in provisions in their interest, i.e. especially liberalisation of investment (pre-establishment rights) beyond what is now general practice in BITs (high protection standards of established investments). As the US has indicated, it is not interested in negotiating an investment agreement in the WTO which provide for less than the BITs they have signed. The EU is interested in negotiating an investment agreement which gives European investors as many rights as Canadian and American investors which have negotiated fewer but more investor-friendly BITs.

1.3.b. Important changes in the provisions of BITs over time

(for more details, see 2)

The early BITs (until the 1970s) were part of agreements concerned with economic and technical cooperation. The objectives were far more focused on promotion of investment for development than on protection of investment. For instance, in the BIT between the Netherlands and the Ivory Coast of 1965, the contracting parties agreed to cooperate and assist each other to promote development in their countries with a focus on economic and technical aspects.

Some of these "old generation" BITs are included in the high number of BITs that some countries have signed (see table under 1.2. (a.)). For instance, the Netherlands had signed 4 BITs before 1970 and an additional 12 BITs before 1980. Germany had signed 32 BITs before 1970 and an additional 14 before 1980¹⁴. Except neither revoked nor replaced by a new BIT model, most of them are still in place despite the limited amount of years mentioned in the expiring clauses. However, the agreements that include investment-related provisions signed by the European Community and its member states had, for the most part, been signed in the 1990s¹⁵.

¹⁴ Calculations based on UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, 1998, p.177-179, 192-193.

¹⁵ UNCTAD, *Experiences with bilateral and regional approaches to multilateral cooperation in the area of long-term cross-border investment, particularly foreign direct investment*, Note by the UNCTAD secretariat, Expert Meeting on Experiences with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-Term Cross-Border Investment, particularly Foreign Direct Investment, Geneva, 12 - 14 June 2002, p. 29-31.

Over the last decade, BITs have increasingly been regarded as treaties to protect investment as the way to promote investment. In the late BITs there is a strong emphasis on protection of investment while the development cooperation clauses have disappeared. Economic cooperation is accomplished through the protection of investment while the treaties do not mention that they are an instrument leading towards economic development¹⁶. In other words, the OECD has gradually been able to put its interests first in its investment treaties with developing countries while abandoning some particular development friendly aspects of BITs.

In spite of many variations, the principal constituent elements of BITs have become rather uniform over the years. For instance, the model BIT of Germany of February 1991 is hardly different than Germany's model BIT of 1998¹⁷. Essentially, recent BIT practice confirms that most BITs provide for international protection and guarantees the non-discriminatory treatment after investments have been established and dispute settlement resolution mechanisms. Over the years the definition of investment has been broadened and now covers all sectors of the economy. National treatment and MFN standards have unlimited application, standards are specified towards full protection, expropriation extended towards indirect expropriation, and last but not least, the dispute settlement mechanism also covers an investor-to-state dispute settlement mechanism (for a more detailed analysis: see under 2).

Countries change their model treaty (the basis for negotiations) of the BITs periodically. Interestingly, Russia has made proposals to change its model treaty for BITs in 2001¹⁸. The major changes in comparison with BITs that has already been signed by Russia were the removal of national treatment and MFN treatment of investment and the removal of the international legal principle that foreign investments will receive "just and equitable" treatment. The new model Russian BIT retains the international legal standard of compensation of expropriation of an investment and guarantees for monetary transfers. It provides for the possibility of submitting an investment dispute to international arbitration but only if the parties agree to arbitration after the dispute has occurred. The Russian government is apparently concerned that the BITs it has negotiated since 1989 gives too much to foreign investors. Its stated reason for changing the BIT model is that:

¹⁶ M. Filbri and I. Praagman, *A Sustainable Balance?*, November 1999, p. 31-32.

¹⁷ Only a few details changed e.g. inclusion of the standard formulation of "fair and equitable treatment" or regarding the exchange rate for compensation of expropriation: see UNCTAD, *International Investment Instruments: a Compendium*, Volume VII, 2002, p. 297-304, and Volume III, p. 167-176.

¹⁸ M. Luz, *New Model Russian Bilateral Investment Treaty: A Step Backwards for Foreign Investors*, in *Russia/Central Europe Executive Guide*, Volume 11, Number 18, 15th October 2001.

the non-discrimination, national treatment and MFN commitments it made in BITs go beyond that which it will be required to give to foreign investors when Russia joins the WTO! Russia does not want to undermine its bargaining position in accession talks to the WTO by offering foreign investors in a BIT more than that which would be required by the TRIMs agreement. By doing so, Russia is interested in giving less investor protection than in common BITs.

Conclusion:

Some developing countries have some BITS of the "older generation" that are less geared towards protecting investment but contain more measures to promote investment for development or have a more limited definition of investments. In the case that developing countries might sign an MIA, they would give more rights to investors from their BIT-partners as well as to investors from third countries with whom they did not yet sign a BIT .

An MIA might consolidate the trend towards more protection of investors' rights and might even go beyond current practice of BITs. However, history tells us that changes in BITs provisions and objectives have periodically and regularly occurred. Will a multilateral investment agreement in the WTO have a "chilling" effect and prevent new investment agreements (BITS or other agreements) to adopt innovative measures geared towards economic development of developing countries and sustainable development? If innovative measures would undermine MFN and National Treatment and/or be trade restrictive, the existence of an MIA could scare off the adoption of such measures.

2. General description of provisions in BITs¹⁹

2.1. What is, in general, the type of provisions in a BIT?

2.1.o. Purpose or objective of the agreement in relation to promotion of investment and development

It is expected that providing strong protection standards will create a favourable investment regime and therefore promote investment. Investment promotion aspects are weak in BITS and many new BITs have not addressed the possibility of strengthening the promotion provisions with concrete commitments.

In some "old generation" BITs promotional measures are included such as holding economic and commercial fairs or the establishment of mixed commissions to promote economic development. There are however, no provisions to support the efforts to promote private investment in the host countries or to encourage the dissemination of information that is of importance for developing countries.

None of the BITs studied so far make any distinction between the rights and obligations applicable to developed or developing countries regardless of the asymmetry in economic development.

2.1.a. Definition of investment

The more recent BITs use in general an asset-based definition of investment that is broad and open-ended, covering tangible and intangible assets which include portfolio investment, shares and bonds, intellectual property rights, licences and concessions (e.g. the right to exploit natural resources). This applies to all sectors and to existing as well as new investments.

A few BITs have a narrower definition focussing on FDI, e.g. in the BIT between Denmark and Lithuania, operational from 1993 onwards, defines investment as "every kind of asset connected with economic activities acquired for the purpose of establishing lasting economic relations between an investor and an enterprise"²⁰. Some "older generation" BITs (before the 1980s) define investment that is in

¹⁹ The main sources have been: M. Filbri and I. Praagman, *A Sustainable Balance?*, November 1999, p. 31-35; UNCTAD, *Experiences with bilateral and regional approaches to multilateral cooperation in the area of long-term cross-border investment, particularly foreign direct investment*, Note by the UNCTAD secretariat, Expert Meeting on Experiences with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-Term Cross-Border Investment, particularly Foreign Direct Investment, Geneva, 12 - 14 June 2002; UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, 1998.

²⁰ UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, 1998, p. 33:

accordance {SANDER} with the laws of the country about investment, e.g. in the BITs between the Netherlands with Tanzania (1972)²¹. This gives a developing country the possibility to define investments which it is willing to protect for development purposes. An open-ended definition leaves it open to interpretation and expansion of coverage.

2.1.b. Coverage of pre- and post-establishment investment

In most BITs, entry and pre-establishment are subject to the national law of the host country although entry of investments is encouraged. BITs signed with Canada and the US go beyond the practice of most BITs by granting MFN and national treatment related to the entry and pre-establishment of investments. This practice was already the case in the BIT signed in December 1983 between the US and Senegal, and which entered into force in October 1990. This pre-establishment right is limited by a list of exceptions (top down approach) which allows countries to treat potential investors (in sectors of the exception list) in the same way as national investors or those from other countries. This means that BITs signed with Canada and the US include investment liberalisation provisions except where exceptions are made.

2.1.c. Performance requirements

Most BITs, including the most recent ones, do not include a clause that prohibits host countries to impose certain performance requirements, with the exception of the US and Canada. Other countries might use other instruments than BITs to limit performance requirements such as the TRIMs agreement under the WTO, which sets out several limitations for the use of performance requirements.

If the performance requirements are imposed following the admission of an investment, they may violate a BITs guarantee of national treatment when national companies are not subject to performance requirements. Performance requirements imposed as a condition for the entry of an investment escape the national treatment restriction of most BITs.

Prohibition of performance requirements does not normally preclude the granting of some specific types of incentives to obtain a certain performance by foreign investors.

²¹ Tractatenblad van het Koninkrijk der Nederlanden, 1970, nr 77, p. 10 (publication of Dutch text of BIT with Tanzania, signed in april 1970; own translation into English): ‘The agreement applies to: [...] investments in Tanzania only if the enterprise was approved by the Ministry of Finance under the law on investments.’ For investments done by Tanzanians in the Netherlands, no specification of investment is made.

2.1.d. Investor-to-state dispute settlement and state-to-state dispute settlement

BITs include provisions for the resolution of disputes between a particular state and investors of the other state, and between the state parties to the treaty. With regard to disputes between a host country and investors, many BITs provide for recourse to agreed international dispute-settlement mechanisms.

While there are several variations in current practise, the general trend is to give investors the choice of arbitral mechanisms through institutions such as the International Centre for Settlement of Investment Disputes (ICSID) and the affiliated Additional Facility, the International Chamber of Commerce or various regional arbitration centres. The methods and procedures for resolving disputes between state parties to BITs involving the application of the treaty are spelled out in a rather elaborate set of provisions.

Some "old generation" BITs only had a state-to-state dispute settlement mechanism. Although in recent BITs the investor-to-state mechanism is currently the rule, some BITs make the availability of an investor state dispute settlement conditional upon the prior exhaustion of local remedies.

2.1.e. Application of 'national treatment' principles and the Most-Favoured Nation principle:

Most BITs prohibit measures which foreign investors consider discriminatory once an investment has been established. Recent BITs provide treatment no less favourable than that which includes national and MFN treatment. There are also a number of standardised exceptions to the treatments relating to taxation instruments and to special privileges granted by reason of the countries' membership of free trade areas and regional integration frameworks.

National treatment

Most BITs include standard national treatment of foreign investors but not all BITs do, e.g. the BITs which China concluded before the 1990s did not include national treatment²². The coverage of national treatment obligations may also vary depending on exceptions relating to public order and national security. Specific exceptions to national treatment may also be granted to allow for special treatment (e.g. incentives) to be provided to local companies or on a sectoral basis.

²² UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, 1998, p. 60.

In "older generation" BITs, e.g. between the Netherlands and Kenya (signed in 1970), the application of national treatment was limited to certain areas; the payment of taxes, the enjoyment of fiscal deductions or to the protection of intellectual property.

In some "older generation" BITs, national treatment has been defined as "equal to, and the same treatment as" that given to local investors. This implies that foreign investors cannot be favoured over domestic industries. The definition of national treatment in later BITs as "not less favorable than" gives the home country the ability to favour foreign industries above home industries.

National treatment can have far reaching consequences for economic development policy because national companies cannot be favoured over foreign companies e.g. for incentives, subsidies, etc.

Most Favoured Nation clause (MFN)

The application of the MFN standard has also been broadened through the years. Because most BITs include a MFN provision, any form of favorable treatment given to foreign investors by a host country should be extended, in principle, to investors of every other country with which the host country has concluded a BIT containing a MFN clause.

This means that if national treatment provisions have been included in later BITs, such treatment should also be given to investors from countries with which earlier BITs even if these earlier BITs have no national treatment provisions. In general, many differences regarding post-establishment treatment between BITs implemented by a country may become irrelevant, except if the BIT includes exceptions about MFN status²³.

2.1.f. Expropriation rules and compensation

In most current BITs, the terms "expropriation" and "nationalization" include, explicitly or implicitly, measures tantamount or equivalent to expropriation (also called "indirect" expropriations or "creeping" expropriations). Most BITs adopt the traditional rule of international law that a state may not expropriate the property of another state except for public purpose in a non-discriminatory manner in accordance with due process of law and payment of compensation. All BITs require the compensation for expropriation, which is an important aspect of the BITs and their provisions relating to expropriation. However, the standards

²³ Ibidem, p. 61.

for determining the amount of compensation have been much debated and differ among BITs.

Some "old generation" BITs did not cover indirect expropriation. Also, the standards used for compensation have been broadened and specified through the years. Initially it was "adequate, justified or fair", but recent agreements refer to just compensation that represents the genuine value of the investment affected. A more development-friendly wording would be that the transfer should be made without undue delay, transferable and convertible.

However, because of MFN treatment provisions are included in most BITs, most investor friendly provisions in a BIT have to be applied to all investors from countries with whom a country has signed a BIT²⁴.

2.1.g. Minimum standards of treatment rules:

Common in current BIT practice are standards of:

- fair and equitable treatment,
- full protection and security, and
- prohibition of arbitrary and discriminatory measures by the host country.

A number of recent BITs include general exceptions (e.g. cultural exceptions, sectoral exceptions or exclusion of certain types of investments, such as portfolio transactions) which limit the substantive scope of the treaty.

2.1.h. Capital controls

The great majority of BITs has a provision concerning the transfer of payments which is an important element of BITs. Current BITs guarantee the free transfer of payments related to, or in connection with, an investment. They often include a list of the types of payments covered by the transfer provisions. In some instances, BITs include an exception on a temporal basis for balance-of-payments (BoP) problems (which can result from sudden repatriation of large profits or the proceeds from sale or liquidation) and stipulate the conditions when this exception can be invoked.

Some BITs leave room for interpretation, which are important in case of a BoP crisis e.g. the provision to guarantee transfer without *undue* delay.

2.1.i. Duration of the BIT

²⁴ See *ibidem*.

In recent BITs the roll back clause, it has generally been agreed that protection is provided to investments which had been established prior to the entry into force of the treaty. Host countries are often reluctant to provide this provision but they want to emphasize their commitment to protect investors in the hope that this will attract new investors. A BIT text can include provisions that this does not automatically mean that prior investors can resort to the dispute settlement mechanisms allowed for in the BIT.

The withdrawal clauses have also changed over time. Dutch treaties concluded in the 1960s with the Ivory Coast and Cameroon remained in force for one year; but those in the 1970s with Uganda, Tanzania, Sudan and Kenya remained in force for five years; the BITs agreed to in the 1980s with Ghana and Nigeria remained in force for ten years; while those in the 1990s, with South Africa and Zimbabwe will remain in force for fifteen years. The longer the BIT remains in force the more stable the legal environment is, which should obviously be attractive to foreign investors.

The most common minimum term is 10 years but some BITs provide for 20 years or more.

After the fixed term has ended, the treaty may be terminated by either party, usually with one year's notice but if it is not terminated, it still remains in force. Many BITs specify the additional fixed terms which stipulates that the treaty continues to be in force, which tends to give more stability to investors. In some cases, the treaty protection continues for the life of an investment, even if the treaty is terminated.

2.1.j. Regulations

A few recent BITs include a provision allowing for national measures aimed at protecting the environment.

2.1.k. Transparency

Most BITs do not explicitly address the problem of transparency. A few BITs, including those signed by the United States, provide for making public those laws, regulations and administrative practices that affect investments. Some BITs have a provision that obliges each party to provide information about investment regulation. Other means of promoting transparency in some BITs are consultative mechanisms such as the requirement that two parties meet periodically. Some developing countries included transparency clauses in BITs to

demonstrate the credibility of their commitment to provide a favourable investment climate.

CONCLUSIONS²⁵

*** Are the current proposals for an investment agreement in the WTO going beyond what is already available in BITs?**

- Entry and pre-establishment: Recent practice of BITs confirms that BITs provide for international protection and guarantees of national and MFN treatment *after* investments have been established. This allows host countries to select investments at entry in accordance with their needs, level of development and their development priorities. Provisions as regards the entry and pre-establishment phase of investments i.e., to liberalise investment, are only included in BITs by the US and Canada.

Proposals (e.g. by Canada) to have entry and pre-establishment covered by national treatment and MFN in the MIA, even from a bottom-up approach as proposed by the EU and Korea, would mean investment liberalisation that goes beyond most current BIT practice and is development un-friendly.

- Not all BITs include national treatment (NT) of investments after its establishment. This means that NT in a potential MIA, even if made conditional as under the GATS (bottom-up) proposed by Korea, could go beyond some BITs.

Several BITs provide for exceptions to NT. The level of possible exceptions proposed by the EU should be compared to those possibilities under certain BITs and assessed if the potential MIA would take precedence over BITs. Almost all BITs provide for most favoured nation treatment (MFN). Thus, if a country has provided NT to one country, it has to provide this treatment to all other countries with which it has signed BITs containing MFN.

The issue of national treatment is important from a development perspective and developing countries have sought limitations to it e.g. to avoid negative effects of international competition for local companies. Although MFN status is of less concern to developing countries, it can have wide implications such as undoing the limitations for providing investor protection in previous BITs. If unconditional

²⁵ The proposals for an mia in the WTO to which to conclusions refer to are those included in the matrix made by the WTO “Proposals Presented at the Working Group on the Relationship between Trade and Investment”, 2002

MFN is included in an MIA as proposed by Korea, this would extend MFN-status to all WTO members and not only to countries with which a country has signed a BIT.

- Transparency: the transparency measures in many BITs are non-existent and the ones that exist do not go as far as the proposal by Taiwan or the EU is to establish enquiry points and notify new investment regulations. The latter reflects the transparency provisions of the GATS.

Note that no measures are being mentioned to provide more transparency to governments about investors. This should be given high priority due to the complexity of many transnational investors.

- Dispute settlement: if an MIA includes the possibility for an investor-to-state mechanism, as proposed by Taiwan, this would go beyond some "old generation" BITs that only had a state-to-state dispute settlement mechanism. By bringing an investor-to-state mechanism into the WTO it should be recognised that the current investor-to-state dispute settlement system is under a lot of strain resulting from the increasing number of cases and the far reaching interpretations of investors used to bring a country before a tribunal (see below under NR. 5). Even if a potential MIA could only cover state-to-state dispute settlement, the possibility to use investor-state dispute settlements under existing BITs would still be possible. Hence, the investors could either invoke a bilateral treaty, a regional treaty, or put pressure on the home country to take the conflict to the WTO. In principle, these systems can co-exist.

- Balance-of-payments (BoP) provisions to limit transfer of payments: the possibility not to allow transfer of payments because of BoP problems is included in a few BITs. Proposals to do the same in an mia might be positive (see the proposal of Taiwan and the EU) provided that conditions set to apply the BoP exemption are not too stringent (as is the case for conditions proposed by the EU, Japan, Korea and in Art. XII of GATS which recognises the role of the IMF.)

- Period of application: After a fixed period of time, a BIT allows for the termination of the treaty (except when protection applies for the life of an investment). If the MIA would become part of the single undertaking, can countries opt out of an MIA after having become part of it? Even if an MIA would be part of the multilateral agreements under the WTO would a country that has been part of it be able to terminate its participation in the MIA?

-Transition periods such as proposed by Taiwan are not a BIT practice.

-Not many BITs provide for investment protection for the life of an investment, even after a BIT has been terminated. The proposal of Canada that the definition of investor would apply to 'the life of the investment' would go further than practices in several BITs.

- Prohibition of performance requirements upon entry of investment would go further than current practice of many BITs which do not prohibit performance requirements as a condition to enter a country, or indirectly forbid performance requirements after establishment based on the principle of national treatment.

Conclusion: current proposals for an mia would not so much result in replacing existing BITs and extending them to all WTO members, but would further strengthen investor protection and freedom of operation.

*** To what extent are controversial elements included in BITs that might also become part of a WTO-investment regime?**

- The open-ended definition of investment in BITs covers a wide range of "assets", some of which are already covered by WTO agreements (e.g. TRIPs, GATS), leaving it open to interpretation and a wider coverage of the WTO. There is a need to clarify the relationship with the GATS and TRIPs provisions.

- If a broad definition of investment would be used in the potential MIA, including portfolio investment as is proposed by some countries, and an mia would include pre-establishment national treatment to investment, this would raise a number of important issues, e.g. a country would not be able to be selective in the sectors and companies of which foreigners can buy shares and bonds.

Also, some BITs contain unexpected elements in the definition of investment which must be avoided in the MIA. The BIT between the United States and Bolivia, signed in 1998, covers plant varieties, which means that American firms have the same rights to exploit Bolivian plants as local firms or farmers.

- The definition of national treatment in later BITs as "not less favorable than" gives the home country the ability to favor foreign industries above home industries and thus forego equal treatment between national and foreign companies.

- Recent practice of BITs has shown that developed countries are not prepared to put substantial development and promotion friendly provisions in BITs. Will they in a potential MIA?

-The roll back clause is a less well known but dangerous article of BITs. It provides protection to investments that is granted to investments established prior to the entry into force of the treaty. It does not automatically mean that the dispute settlement mechanism can be used for such investors. Protection of investment would be much expanded if the roll back clause would be included in an MIA, especially if it would include the use of the dispute settlement mechanism for investments established prior to the MIA.

*** Important development aspects in BITS (and RIAs) that should at a minimum be maintained in an MIA:**

A host country maintains wide discretion to control the establishment of foreign investment in its territory via:

- The definition of investment employed by using the qualification “in accordance with the law in the host country” permits a country to refuse treaty protection to investment that it considers unworthy of such protection.
- Leaving the matter of entry and establishment subject to national law. Under most BITs, the host country has the sole discretion to decide whether investment shall be permitted in its territory. Entry into the Host State is not subject to the MFN.
- Not explicitly restricting performance requirements.
- The structure of BITs provides developing countries with certain opportunities to address specific development concerns by way of, for example, subject-specific and country-specific exceptions either within the treaty itself or in protocols.

2.2. How do BITs relate to other investment regimes?

2.2.A. BITs offer investment protection while regional investment regimes offer investment liberalisation²⁶

Regional agreements addressing investment issues (RIAs) are not as widespread as BITs, but their importance is increasing. RIAs that are growing the quickest in terms of numbers are those generally referred to as free trade agreements (including bilateral FTAs) and regional integration frameworks. By 2000, the number of such agreements had already exceeded 170 (NAFTA, the MERCOSUR

²⁶ Sources: UNCTAD, Experiences with bilateral and regional approaches to multilateral cooperation in the area of long-term cross-border investment, particularly foreign direct investment, Note by the UNCTAD secretariat, Expert Meeting on Experiences with Bilateral and Regional Approaches to Multilateral Cooperation in the Area of Long-Term Cross-Border Investment, particularly Foreign Direct Investment, Geneva, 12 - 14 June 2002

Protocols and the COMESA Treaty are examples²⁷). An increasing number of these agreements include investment provisions, as do several other regional agreements that do not aim specifically at regional integration. Many commentators even refer to NAFTA as an investment agreement, not as a trade agreement. Only a few instruments are exclusively devoted to investment, such as the Framework Agreement on ASEAN Investment Area, and the Andean Community's Decision 291 (adopted in 1991).

The main aim of these agreements is typically to liberalise investment transactions and avoid discriminatory treatment among the countries participating in the regional scheme. Increasingly, they also include legal protection standards and promotional measures.

In addition, some regional groups have also developed common regimes for investments

with other groups of countries. For example, the Cotonou Agreement between the European Union and the group of African, Caribbean and Pacific (ACP) countries contains investment principles aimed at promoting European investment in the ACP countries.

Definition of investment: Some older agreements, such as the OECD Codes of Liberalisation of Capital Movements and Current Invisible Transactions, used a narrow enterprise-based type of definition. The new generation of agreements aimed at the liberalisation of investment tend to use broad and inclusive definitions, although they often exclude certain transactions (e.g. the ASEAN Investment Area excludes portfolio transactions).

Entry and pre-establishment of investment: RIAs address this in a variety of ways. A number of recent RIAs granting national and MFN treatment upon entry are often subjected to sectoral and other exceptions. Some RIAs go even further to provide right of establishment and some RIAs include a system of reporting existing regulations and changes to ensure transparency of measures. Some also include provisions to monitor compliance.

Investment promotion: Provisions on investment promotion can be found in several RIAs but the treatment is varied: some instruments address a wide array of promotional measures, while other instruments remain silent on the matter.

²⁷ NAFTA: Northern American Free Trade Agreement; MERCOSUR: association between Brazil, Argentina, Paraguay and Uruguay, joined later by Chile and Bolivia, to create a common market and common political structures; ECOWAS: Economic Community Of West African States (16 countries)

Investment protection: A number of RIAs include protection standards which follow the BIT provisions in this area.

Transfer of funds or payments: A large number of RIAs include provisions concerning the free transfer of funds related to investments. Similarly, exceptions for balance-of-payments considerations are included in a growing number of RIAs.

Dispute resolution: Some RIAs provide for the possibility of settling disputes by means of consultation and negotiation, whereas others provide for consultation through the body (e.g. the cooperation or association council) entrusted with the monitoring and implementation of the specific agreement. A number of RIAs contain detailed rules that provide for international arbitration of disputes between a party and an investor of another party.

Performance requirements: RIAs tend to differ in their provisions relating to performance requirements, with some addressing them in detail. There are also differences with regard to the types of requirements covered and their treatment.

Other investment related provisions: The range of investment-related issues covered at this level varies considerably among agreements. In addition to agreements devoted solely to one issue (e.g. illicit payments, competition), an increasing number of RIAs include provisions on investment-related issues such as environmental protection, competition, transfer of technology, employment, incentives and conflicting requirements.

Conclusions: comparisons with BITs and RIAs

RIAs have multiplied in number and are increasingly addressing investment issues. They have created an intricate web of commitments. While BITs focus on investment protection while generally prohibiting “discriminatory” treatment, RIAs are generally geared towards liberalisation, even though a substantial number of them also address protection and treatment.

A new issue that appears to be emerging (and that is largely absent from BITs) concerns provisions for monitoring mechanisms. They typically include correspondence obligations between parties about information on legal requirements. Proposals for the MIA tend to include investment liberalisation and are often in agreements that address trade liberalisation; it seems that the MIA is more a RIA than a BIT.

2.2.B. BITs between US and the European accession countries

The BITs that the US has signed with several countries that want to become members of the EU cause problems because they are not compatible with EU laws for the following reasons:

- The US BITs deal with liberalisation of entry and pre-establishment of investments that does not coincide with existing EU laws;
- The US BITs also cover opening the market for audio-visual services and investments which do not coincide with EU rules in the audio-visual sector (which is protective of quota's broadcasting EU audio-visual products).

This issue also demonstrates how the MIA could establish relationships with the GATS. The WTO agreement on trade in services (which include investments in the services sector), except if the MIA would deal with pre-establishment while the most of the GATS deals mostly with post-establishment treatment.

2.2.C. Double tax treaties

Parallel with many BITs, yet more double tax treaties have been signed. By the end of 2000, 2,118 agreements were implemented to avoid double taxation. Such treaties address the allocation of taxable income with a view to reduce the incidence of double taxation²⁸.

→ The question is: is there a need for a double tax treaty covering all members of the potential MIA? Would this be to the advantage of developing countries? Should it be brought under the WTO if the MIA would become part of the WTO?

²⁸ Ibidem, p. 5.

EU-US Discuss Changes to BITs negotiated between US and EU Accession Candidates, By Luke Eric Peterson, INVEST-SD News Bulletin, Jan.31,

United States and European Union (EU) officials have set a deadline of 1st May 2003 to reach an agreement in an ongoing dispute over BITs signed between the US and several countries that are candidates for accession to the EU. The European Commission claims that US BITs signed with several candidates for EU accession including Poland, Slovakia and the Czech Republic are not consistent with European Union Law, and could allow American investors to circumvent EU investment rules.

Controversy over the treaties first arose in early 2002, when the EU demanded that candidates for EU accession would have to terminate or modify their BITs with the US as a condition of accession to the EU. The European Commission had initially suggested that cancelling the agreements would be the simplest way of ensuring that they did not conflict with EU law, but subsequently backed away from this demand, in hopes of reaching an accommodation with the US

While the US has been reluctant to amend the treaties "a move which would draw heat from business groups and also require the approval of the US Senate" talks are now underway between the US and the EU to identify possible changes to these BITs.

The European Commission has expressed specific concerns about BITs provisions prohibiting local content requirements; guaranteeing protections for capital transfers; and liberalising trade and investment in some sectors (such as audio-visual services, air and road transport services, and the marketing of air transport services). These latter services were carved out of the EU's commitments in the WTO General Agreement on Trade and Services (GATS). Accordingly, EU officials worry that any BITs obligations entered into by new EU member countries with the United States, would expose these sensitive EU industries to further liberalisation.

Sources also express concern that some EU programs, including those in the agricultural sector, could come into conflict with the BITs ban on local content requirements. US BITs also protect the rights of investors to transfer capital related to their investments, but the EU retains the right to restrict capital flows under certain circumstances. Provisions providing for the transfer of capital have also proven controversial in recent US investment negotiations with Singapore and Chile.

The US had argued that Poland, Slovakia and the Czech Republic should not be forced to modify the existing treaties simply because their investor protections are stronger than those accorded under EU law. US officials also argued that the demand for modification represented a double standard, because some current member states had a 'friendship, commerce, and navigation agreements', commercial agreements that were precursors to BITs with the US, and did not have to change these in order to join the EU. An initial suggestion by the US, that a written understanding be agreed with the EU regarding the appropriate interpretation of the controversial BITs provisions, had been rejected by the European Commission on the grounds that it would not provide for sufficient legal certainty.

Both parties now appear determined that the treaties can be altered to meet some of the EU demands. However, the two sides have set a deadline of May 1 - one year before the date of accession of Poland, Slovakia, and the Czech Republic; under the terms of the relevant BITs, a minimum of one year's notice would be necessary if the Eastern European nations were required by the EU to abrogate their BITs with the United States.

See: www.iisd.org/investment/invest-sd

3. The importance of BITs for attracting international investment by developing countries.

3.1. Is there a (strong) correlation between BITs and the attraction of FDI?

Different studies about the link between BITs and FDI indicate that BITs appear to play a minor and secondary role in influencing FDI flows. Other determinants, e.g. the size of a host country's market, are more important to attract FDI. A detailed study²⁹ of UNCTAD in 1998 using information on BITs (without making distinction between the various contents of BITs) and statistics on investment inflows of the countries having signed a BIT showed that the influence of BITs on FDI is weak. The UNCTAD study found that BITs with African countries appeared to have more effects on FDI inflow than BITs in other countries but had no proof that BITs might be more significant for host countries which investors consider to have high risks. In the case of South, East and South-East Asia, BITs may to a limited extent be instrumental in redirecting the share of FDI outflows from home countries. Business, however, seems to be interested in BITs before making large investments³⁰. But in general, the direct link between BITs and the attraction of investments has never been proven, which undermines an important argument for signing BITs and an MIA.

→ A potential MIA might further erode the marginal influence of BITs to oblige a country signing a BIT more attractive to investors than others not signing a BIT. An MIA might increase the current tendency of investment agreements being considered a normal feature by investors of the institutional infrastructure that a country has introduced.

3.2. What type of FDI have BITs attracted and for which sectors?

Since the effects of BITs on FDI are considered to be small, not much information is available about this issue and it was not found useful to do more research for this research project.

3.3. Can conclusions be drawn on the effect of BITs on national economies?

The positive effect of BITs can be that countries can attract those investments which they consider favourable for their development. An MIA would eliminate this option. National treatment and MFN clauses make it difficult for a country to provide incentives to develop companies from their own country.

²⁹ UNCTAD, *Bilateral Investment Treaties in the Mid-1990s*, p. 105-122.

³⁰ *Ibidem*, p. 122.

One negative effect on a BIT is that when a country stops providing protection to investors or breaches contracts with investors for social reasons (e.g. Cochabamba) or in times of serious financial crisis (e.g. Argentina: see below under 5), it can become subject to lawsuits by investors and perhaps payments of compensation at times that it would need funds to deal with urgent social and economic problems. The costs for settlement of disputes, especially when brought before a tribunal with ill-defined responsibilities, with compensation to be paid by the party in question, can have a serious effect on the finances of a country (see below under nr 5: the dispute settlement case of ECM v Czech Republic).

An other effect BITs and their dispute mechanisms have is that governments are careful not to introduce regulations or to take measures that might be considered as direct or indirect expropriation of investors or non-equitable treatment even if the regulations are in the public interest (see under 5 e.g. Vacuum Salt Products v Ghana case).

In general, the BITs did not result in making FDI more widespread to the less developed countries although many of them signed one or more BITs.

4. Dispute settlement

4.1. General description of the process of dispute settlement in BITs

There are several variations in current practice, the general trend is to give investors a choice of arbitral mechanisms through institutions such as:

- the International Centre for Settlement of Investment Disputes, and
- the affiliated Additional Facility (e.g. for countries which did not sign the Convention for settlement under the ICSID),
- the International Chamber of Commerce, or
- various regional arbitration centres.

The methods and procedures for resolving disputes between parties to BITs involving the application of the treaty are typically spelled out in a rather elaborate set of provisions.

The submission of disputes to the ICSID can be dependent on both countries having signed the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signatures in 1965, 153 signatory countries by 6th March 2003). If countries have not signed that Convention, the dispute may be submitted to the Additional Facility for Administration of Conciliation, Arbitration and Fact-finding Proceedings which is also under the auspices of the World Bank as well as the ICSID. Under BITs, the jurisdiction of the Centre, as well as of the competence of tribunals, must be established under both the ICSID Convention (or the ICSID Additional Facility Rules), and the bilateral or multilateral treaty concerned.

Some "old generation" BITs only allowed for a state-to-state dispute settlement mechanism. Although in recent BITs the investor-to-state mechanism is currently the rule, some BITs make the availability of investor - state dispute settlement conditional upon the prior exhaustion of local remedies.

BIT expert Luke Eric Peterson³¹ has identified different problems with the BITs dispute settlement provisions and implementation:

- the lack of transparency of the cases and the proceedings - which also made it difficult for this research project to easily have access to information about the conclusions and pending cases; it is especially difficult to find information about state to state dispute settlements;

³¹ L. Peterson "All Roads lead out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties", Nautilus Institute for Security and Sustainable Development (International Sustainable and Ethical Investment Rules Project), November 2002.

- the procedures to select arbitrators: each party can choose one of their own arbitrators and rules do not require special expertise when sensitive health, environmental or human rights issues are implicated;
- there are obstacles for the participation of other parties (e.g. local inhabitants affected by the case);
- Accountability: inconsistent decisions on issues relating to government obligations.

Other problems identified with the ICSID dispute settlements are³²:

- Increased uses of juridical manoeuvres questioning the jurisdiction of the ICSID;
- The imprecise definition of expropriation and especially "creeping expropriation" which includes public policy and policy measures.
- BITs are signed by national states but investors challenge countries for actions of provinces, municipalities etc., as well as for breach of contracts by the latter rather than breach of BITs obligations;
- Awards by the arbitrators have become very legalistic and longwinded so that they lose the swiftness of dispute settlements which was originally sought; it also makes this procedure more costly.

The International Chamber of Commerce (ICC) offers an international court of arbitration with arbitration places in 42 different countries (in 2001). It offers different mechanisms to reach amicable settlement. One of the mechanisms is the ICC ADR Rules. According to the ICC, "Arbitral awards enjoy much greater international recognition than judgments of national courts. Over 130 countries have signed the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, known as the "New York Convention".

The Convention facilitates enforcement of awards in all contracting states. There are several other multilateral and bilateral arbitration conventions that may also help enforcement". In 2001, 566 requests for arbitration were filed with the ICC court of which over 8% involved at least a state or a parastatal entity³³.

³² E. Obadia, ICSID , Art. Investment Treaties and Arbitration: Current and Emerging Issues", in ICSID News, Volume 8, nr 2; W. Rogers, speech at the Inter-American Development Bank Conference on Commercial alternative Dispute Resolution in the XXI Century: the Road Ahead for Latin America and the Caribbean, 26-27 October 2002.

³³ see different pages on the ICC website on arbitration (<http://www.iccwbo.org/court/english/arbitration>)

4.2. Key figures on dispute settlement ³⁴

ICSID has emerged as the most significant forum for the submission of BIT disputes. During the first 30 years of its existence since 1965, the ICSID only had to deal with an average of one or two cases a year. Since the proliferation of the BITs, the dispute settlement system of the ICSID has been much more frequently used (a challenging “explosion”). Between 1998 and the beginning of 2002, the ICSID has been registering on average one case a month. Of the 14 cases in 2001, 11 were brought on the basis for the dispute settlement provisions of BITs.

By the end of March 2003, the ICSID announced 72 concluded cases and 46 pending cases.

In 2001, 566 requests for arbitration were filed with the ICC court of which over 8% involved at least a state or a parastatal entity³⁵.

4.3. Identification of three controversial cases where local livelihoods are at stake or the (local) right to regulate is being confined

Cases before ICSID

The problem with researching ICSID cases arises from the fact that many of the legal proceedings are not open to the public and that their decisions are often only published in specialist journals.

Most cases involve developing countries, including least developed countries. Some cases also relate to actions undertaken by the government beyond pure expropriation and to protest actions by the local population. Some examples of the cases are described below:

*** Six Belgian investors in AFFIMET lead by Mr Antoine Goetz challenged the Republic of Burundi because the country withdrew a certificate of free zone in 1995 two years after having granted the tax and customs exemptions.**

The case was brought to ICSID on a basis of consent under the Burundi-Belgium Luxembourg BIT which referred to the ICSID Convention. Burundi's BIT with

³⁴ see amongst others: E. Obadia, ICSID, Art. Investment Treaties and Arbitration: Current and Emerging Issues”, in ICSID News, Volume 8, nr 2; W. Rogers, speech at the Inter-American Development Bank Conference on Commercial alternative Dispute Resolution in the XXI Century: the Road Ahead for Latin America and the Caribbean, 26-27 October 2002.

³⁵ see different pages on the ICC website on arbitration (<http://www.iccwbo.org/court/english/arbitration>)

Belgium Luxembourg came into force on 12 September 1993 and had been signed in September 1989.

Burundi did not appear at the session of the Arbitral Tribunal nor did they file any petitions. But settlement negotiations among the parties did take place. According its rules the Tribunal could make the decision that the withdrawal of the free zone certificate was a measure tantamount to expropriation.

On 10 February 1999, the Arbitral Tribunal incorporated a settlement between the parties in an award whereby Burundi was to reimburse AFFIMET the taxes and custom duties it had had to pay, amounting to almost US\$ 3 million, and to create a new free zone regime. The Tribunal decided that the parties should share the costs incurred by the ICSID³⁶.

By March 2003, a new case brought Mr Goetz and other parties against Burundi relating to mining, banking and service enterprises was still pending³⁷.

*** The case³⁸ of Técnicas Medioambientales Tecmed, S.A. against the United Mexican States was launched under ICSID Additional Facility rules using the Spain-Mexico BIT in the autumn of 2000. It was still pending as of March 2003.**

Tecmed is seeking undisclosed damages as a result of a decision by the Mexican Government's National Ecology Institute to refuse Tecmed a renewal of its annual permit to operate the Cytrar hazardous waste confinement facility in Hermosillo.

According to news reports, the Cytrar facility was plagued by sit-ins by local residents protesting the site's technical viability and lack of public participation in decisions regarding the hazardous waste confinement, as well as legal questions regarding Cytrar's proximity to Hermosillo. Tecmed counters that its Cytrar facility was the target of organised protests designed to achieve a protectionist end: protecting Mexico's only other hazardous waste storage facility in Mina, near Monterrey.

Whatever, the facts and the merits of the complaint, the dispute is being heard on-camera before an ICSID arbitration tribunal, as opposed to a public forum. Furthermore, the existence of the ICSID investor-state arbitration that lead the

³⁶ see ICSID website: online decisions and awards

³⁷ see ICSID website: pending cases.

³⁸ L. Peterson "All Roads lead out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties", Nautilus Institute for Security and Sustainable Development (International Sustainable and Ethical Investment Rules Project), November 2002, p.22-23.

Mexican government to request that a separate inquiry, launched by a citizen's submission for environmental enforcement with the NAFTA Commission for Environmental Cooperation (CEC), be terminated. This raises difficult issues concerning the priority of NAFTA's so-called environmental side-agreements and the investment provisions of NAFTA.

*** In March 2003, a Stockholm-based arbitral Tribunal awarded³⁹ record damages of approximately 350 million US Dollars to Central European Media (CME) in its investment treaty dispute under the Czech Republic - the Netherlands BIT.**

The damages overshadow by at least tenfold those in any other known investment treaty arbitration, and were based upon the Tribunal's estimate of the losses incurred by CME in 1989 when it was deprived of its stake in TV Nova, a popular English language television station in Prague. For an administration already running a record budget deficit of some 360 million dollars (US), the Tribunal's decision threatens to double the Czech Republic's budget shortfall this year. As the government scrambles for solutions, one proposal mooted by some officials is an increase in value-added tax on goods and services which would see all taxpayers absorbing the cost of the investment treaty arbitration.

CME's multi-pronged legal strategy has thus far proved successful in its long-running battle with the Czech Republic. A separate arbitration brought under the US-Czech Republic bilateral investment treaty (BIT) had come up empty, when a London-based arbitral Tribunal ruled that the Czech Republic had not violated most of the key commitments made in that agreement. CME managed to convince a second Tribunal, this one based in Stockholm, that the same actions by the Czech Republic had constituted multiple violations of a BIT concluded with the Netherlands.

The Czech Republic now hopes that the Stockholm Tribunal's ruling on the merits of the case (which paved the way for last week's damages award) will be overturned on appeal. A challenge is currently pending before a Stockholm Court.

The Czech Government has spent more than 10 million US dollars on legal fees in its defence of the two BIT arbitrations mounted against it.

³⁹ L. Peterson, Art "Czech Republic Hit With Massive Compensation Bill in Investment Treaty Dispute" in Investment Law and Policy Weekly News Bulletin, March 21, 2003.

The Czech media report that most Czech politicians accept that any damages owed will need to be paid. Foreign Minister Cyril Svoboda has said that prompt payment is a must in order to safeguard the nation's "reputation abroad". In recent years, CME shareholder Ronald Lauder, a former US ambassador to Austria and heir to the Estée Lauder fortune, had conducted a very public campaign to discredit the Czech Republic for its treatment of CME, running full-page advertisements in major US newspapers alleging that the Czech Republic was a dangerous place in which to invest.

*** Old cases whose history continues⁴⁰: Vacuum Salt Products Ltd challenging the Republic of Ghana.**

The case was registered in June 1992 and the award/decision was made in February 1994 to disclaim the jurisdiction over the dispute. The outcome of the decision is only available in specialised legal reviews which have not been studied. It does not seem that the case is based on a BIT but rather between Greek investors and the state of Ghana. Ghana and Greece have not concluded a BIT but are both signatories of the Convention on the Settlement of Investment Disputes between States and Nationals of Other States which allow for dispute settlement at the ICSID.

The case involves a salt mining operation in the Ada Songor Lagoon in Ghana. There have been longstanding disputes between the inhabitants who were engaged in traditional salt mining in the area and the salt mining operations.

In 1974, the government acquired the Songhor Lagoon and the surrounding lands and executed two leases for separate areas in the Lagoon to two companies, apparently one of them being Vacuum Salt Products, to carry on the salt mining. The local population tried also to win salt from areas occupied by the Vacuum Salt Products, resulting in the conflicts that later led to the death of Margaret Kuwornu, a pregnant woman shot by the security forces in 1985.

In 1992, through the Ada-Songor Lagoon vesting law, the government interfered with (ended?) the lease interests of Vacuum Salt Products which seems to have been originally in Greek hands but in 2002 only a small part of the company still remains in Greek hands.

This seems to be the action challenged by Vacuum Salt Products before the ICSID.

⁴⁰ sources: www.newsinghana.com, 2-3 June 2002; Art. "Ada Sits On Time bomb", in Africa News, 29 January 2003

Until 2002, according to news available on the Internet, there is still a dispute going on between the people living in the area and the government that wants to develop the salt mining and repeal the confiscation law. However, by 2002, the government still had not returned the land to the local people and Vacuum Salt Products was still had leasehold interests and running its company. The government is careful not to scare away investors by returning the land to the local population e.g. by compensating the lease holders' assets or by future litigations about land ownership.

ARGENTINA FACES MANY BITs DISPUTES

(A.) Some decisions have already been made in controversial cases against Argentina:

*** In November 2000, the ICSID rendered an award, much commented by NGOs, on the dispute between Vivendi, the French water utility multinational, and Argentina in relation to the Compania de Aguas del Aconquija belonging to Vivendi which handled the privatised water and sewage services of the province of Tucuman.**

The population of Tucuman⁴¹ had protested and organised against the company which had raised the prices of water 104% in 1995 when it took over. One way of protesting was a payment boycott of the water bills.

Also, the provincial government had found that tap water was contaminated in 1996. Vivendi challenged Argentina for not doing enough according to the Argentina-France BIT to force the province of Tucuman to take actions to restore the situation.

The ICSID arbitration decided in November 2002 that Argentina could not be held responsible under the BIT and that Vivendi had the duty to pursue its rights in the administrative courts of Tucuman as required by the concession contract. In 2002, Argentina challenged the neutrality of the chair of the ad hoc Committee to reconcile the conflict. The case is still pending on a request for supplementary decision and rectification⁴².

⁴¹ N. Giarocca, Art. "The social protest for water in Tucuman" in *Defend the Global Commons*, Vol 1 nr 1, February 2002, p. 9-11, at <http://www.citizen.org/documents/ACFC0.pdf>

⁴² See ICSID: pending cases and online decisions and awards; PSI, art. "World Bank arbitration court dismisses Vivendi's claims in Tucuman" (news item 4436 at the www.PSIRU.org/corruption/)

*** The Azurix Corporation challenged the Argentine Republic under the US - Argentina BIT, starting in October 2001.**

Azurix is a spin off water company of Enron and obtained a 30-year concession to run the privatised water system of Buenos Aires. After many complaints of low water pressure, and an outbreak of toxic bacteria in the local water supply, Azurix terminated its concession contract with the government of Buenos Aires on 5 October 2001. Azurix seeks more than US \$550 million in compensation because it argues that the province had failed to deliver infrastructure as agreed to under the contract with Argentina, and its political subdivisions had failed to provide security and protection, fair and equitable treatment and guarantees against expropriation as provided in the BIT⁴³. In March 2003, Argentina will make an objection to the jurisdiction of the ICSID.

(B.) Since the financial crisis, Argentina has met with many challenges before the ICSID tribunal for measures it has taken.

A major law firm has hailed the BITs as “a most powerful weapon” for foreign investors in the context of the Argentine crisis, particularly in public services such as oil and gas, electricity, water, transport and telecommunications⁴⁴.

It may be a problem that inconsistencies in the findings if the Centre receives several requests for arbitration against the same host State⁴⁵.

The following is a short description⁴⁶ of the situation:

The pesofication by the Argentine government, recently found illegal by the Argentine Supreme court⁴⁷, has led to numerous disputes between foreign investors and the Argentine government, particularly firms that signed contracts to supply services such as gas, electricity or water. Many of these contracts are stipulated dollar-denominated prices and investors who have been hindered from raising tariffs are sufferers of revenue shortfalls. The number of BITs claims faced by Argentina at the ICSID (date of registration mentioned) except those mentioned above are:

⁴³ Ibidem, p. 22; see also ICSID website on pending cases.

⁴⁴ L. Peterson “All Roads lead out of Rome: Divergent Paths of Dispute Settlement in Bilateral Investment Treaties”, Nautilus Institute for Security and Sustainable Development (International Sustainable and Ethical Investment Rules Project), November 2002, p.6.

⁴⁵ E. Obadia, ICSID , Art. Investment Treaties and Arbitration: Current and Emerging Issues”, in ICSID News, Volume 8, nr 2.

⁴⁶ Art. Latest Arbitration Against Argentine Emergency financial Measures, in INVEST-SD Weekly News Bulletin, 7th March 2003, p. 1; added are pending cases at the ICSID website.

⁴⁷ The illegality relates to the fact that the state failed to protect citizen’s property rights and disadvantaged some citizens against the richest citizens; see E. Aleman, Art. “Has economic justice been serviced in Argentina?”, on www.globalinsight.com/perspectives/perspectivedetail319.htm

1. by Enron regarding a Natural Gas transportation company (Ponderosa Assets), registered in April 2001;
2. CMG Gas Transmission Company, registered in August 2001
3. LG& E Energy Corp., LG&E Capital Corp. and LG&E International Inc. related to gas distribution, registered in January 2002
4. Siemens regarding an informatic services contract, registered in December 2002;
5. Sempra Energy International related to the Gas supply and distribution company, registered in December 2002;
6. Camuzzi International, a gas supply and distribution enterprise, registered in February 2003.

Because many BITs allow investors recourse to arbitral avenues other than ICSID, further arbitrations may have been launched without public notice. Moreover, a number of other foreign investors are on record as threatening to bring BITs claims if current efforts at amicable settlement with the Argentine authorities do not bear fruit: among others including Total-Final Elf, Suez, PSEG and Electricité de France (EDF).

The cost for Argentina to defend these cases is huge because the world's leading lawyers are involved in these cases. If the tribunal concludes that the prices had been increased or that Argentina has indirectly expropriated investors, the costs can become enormous for a country in financial crisis.

SOME RESEARCHED CASES WERE INTERESTING BUT DID NOT RELATE TO A BIT, BUT THE CONVENTION BRINGING DISPUTES BEFORE THE ICSID:

*** The Compania del Desarrollo de Santa Elena S.A., belonging to US citizens, sued the Republic of Costa Rica in March 1996 at the ICSID for the valuation of a land holding in relation to expropriation in 1978 of the property for the purposes of environmental conservation.**

A tribunal decision was taken in February 2000 and rectified on 8th June 2000. In the end, Costa Rica had to pay US\$ 16 million in compensation for the expropriation⁴⁸.

⁴⁸ Sources: ICSID website on concluded cases; International Legal Material, , Volume 39, nr 6, November 2000; information in the C.V. of Abby Cohen Smutny on the website of White and Case (Limited Liability Partnership).

Sources: ICSID website on concluded cases; C.V. of Abby Cohen Smutny on the website of White and Case (Limited Liability Partnership).

5. Conclusion

* BITs have changed over time from an investment promotion instrument for development in developing countries to an instrument for the protection of investment in the interest of the Northern investor. The argument that BITs are attracting foreign investment, which is assumed to be needed for development, cannot be substantiated by research evidence. This means that the argument that an MIA is needed to attract foreign direct investment is not valid.

* An MIA might consolidate the current tendency of investment agreements which could be geared towards the protection of the investor and leave out promotion instruments for development-friendly investment and forego a better balance between rights and obligations of investors and home countries. It seems unlikely that industrialised nations which have been so unwilling the last 10 years to put development at the heart of investment agreements, will do so when they are negotiating together in the WTO. This changes the argument from proponents of an MIA negotiation in the WTO that an eventual coalition of developing countries will be able to get better terms for development than when negotiating BITs with one Northern country.

- A potential MIA would go beyond BIT practice in different ways:
- Proposals to have entry and pre-establishment covered by national treatment and MFN in the MIA goes further than current practice of most BITs, even from a bottom-up approach as proposed by the EU and Korea. This would mean investment liberalization goes beyond most current BIT practice. Except for BITs by the US and Canada, BITs provide investment protection after establishment, not at entry. Pre-establishment protection would be development un-friendly because it does not allow countries to be selective in the investment except if they could have been able to make exceptions in an MIA that has a bottom-up approach; MFN and national treatment could prevent performance requirements to some investors at entry.
- There are many differences among existing BITs that could be further eroded by an MIA depending on the scope of the definition of investment, the possibility of exceptions to national treatment, etc. 'Older generation' BITs have more development friendly provisions such as a limited definition of investment. National treatment is not included in all BITs because some

countries want to limit the more negative effects of international companies for local companies.

- The most favoured nation (MFN) treatment would have far reaching implications if an MIA would cover pre-establishment rights and have a broad definition of investment. Most of all, the many countries that do not as yet have a BIT with many other WTO members would see their obligations towards investors greatly expanded.
- Most BITs do not include transparency measures and the ones that do exist do not go as far as the proposal by Taiwan or the EU.
- Proposals to provide the signatories of an MIA the possibility to prohibit transfer of payments because of balance of payment (BoP) problems would go further than most BITs. This might be positive (see proposal Taiwan and the EU) provided that conditions that apply to the BoP exemption are not too stringent.
- After a fixed period of time, a BIT allows for the termination of the agreement. Would a country that is a signatory of an MIA in the WTO be able to terminate its participation?
- Bringing an investment dispute settlement system in the WTO would give investors an other instrument to seek compensation alongside those that already exist. Current practice in the investor-to-state dispute demonstrate that investors are bringing more and more cases for dispute settlement. This might be very costly for developing countries. If an MIA would include the possibility for an investor-to-state mechanism, as proposed by Taiwan, this would go beyond some "old generation" BITs that only had a state-to-state dispute settlement mechanism.