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Developments in international investment agreements in 2005

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The trend from previous years of an expansion and increasing sophistication of international investment rulemaking at the bilateral, regional and interregional level continued in 2005. In 2005 alone, 162 international investment agreements (IIAs)[1] were concluded, bringing the total number of IIAs to almost 5,500. The evolving system of international investment rules contributes further to the enabling framework for FDI. At the same time, the increasingly complex multilayered and multifaceted universe of IIAs becomes more demanding, particularly in order to keep it coherent, and ensure its effective functioning and making it conducive for national development objectives.

1. Bilateral investment treaties

During 2005, 70 new bilateral investment treaties (BITs) were concluded, bringing the total number of BITs to a new peak of 2,495 (figure 1). At the same time, the slowdown in the number of BITs concluded annually continued for the fourth consecutive year. Forty-five of the 70 BITs involved developed countries; Belgium-Luxembourg and Finland were the most active for the second consecutive year with nine new BITs and five new BITs respectively. Germany and Spain concluded four new agreements each.

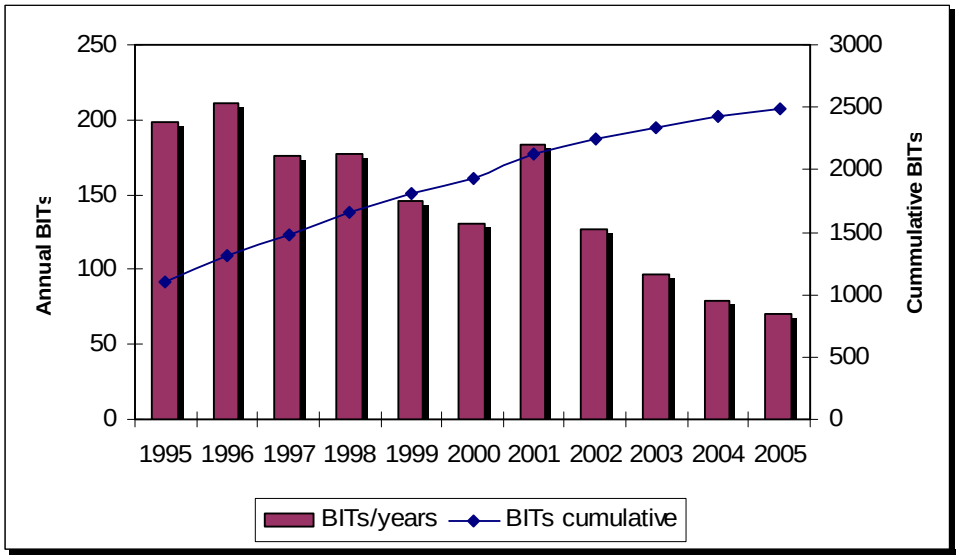
The participation of developing countries in the network of BITs continued to increase, as they were involved in 60 of the 70 new agreements. Twenty of these BITs were concluded between developing countries.

The trend towards the renegotiation of existing treaties has continued with 13 BITs affected in 2005. They include five agreements renegotiated by China with Belgium-Luxembourg, the Czech Republic, Portugal, Slovakia and Spain. Germany renegotiated BITs with Egypt and Yemen. The strong involvement of China confirmed its position as the second country worldwide in terms of the number of BITs concluded. Belgium-Luxembourg is new among the "top ten" BIT signatories (figure 2).

As far as the geographical coverage is concerned, European countries (excluding South East Europe and the Commonwealth of Independent States (SEE & CIS)) concluded the highest number of BITs with 42 new agreements.

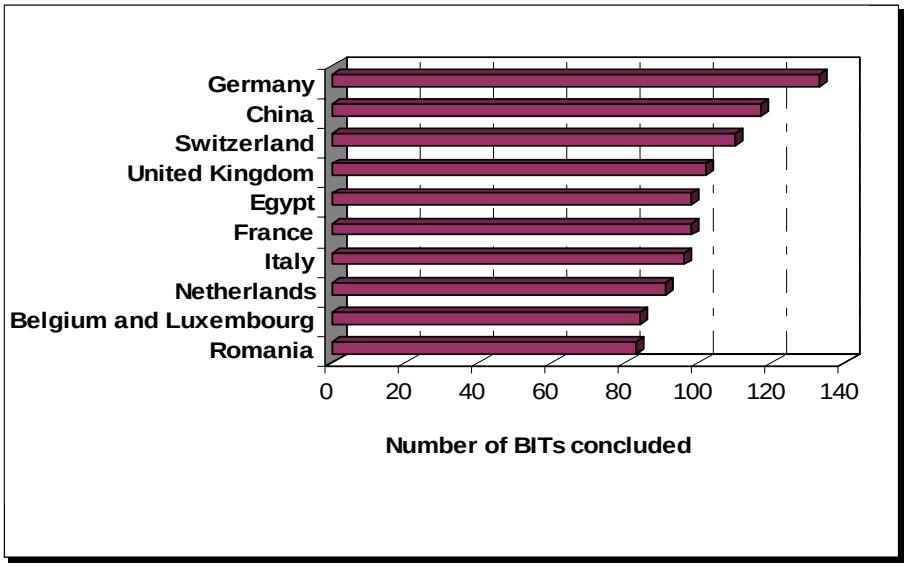
African countries concluded 21 BITs during 2005, bringing the cumulative number of BITs for the region to 660 at the end of 2005 (table 1). Most active among African countries were the Republic of Congo, the Democratic Republic of Congo, Egypt, Sudan and Tunisia, with two new BITs each.

Figure 1. Number of BITs concluded, cumulative and year-by-year, between 1995 and 2005



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

Figure 2. Top ten economies signatories of BITs, as of end 2005



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

Table 1. International investment agreements concluded by regions in 2005, and cumulative

Region	BITs		DTTs		Other IIAs	
	Year 2005	*Cumulative*	*Year 2005*	*Cumulative*	*Year 2005*	*Cumulative*
Asia and Oceania	31	1,003	36	968	12	89
Latin America and Caribbean	13	464	9	322	5	62
Africa	21	660	17	436	2	34
SEE&CIS	15	671	27	576	0	34
Memorandum						
Developed countries	45	1,511	38	2,111	7	127
Developing countries	60	1,878	53	1,604	14	185
South-South	20	644	25	399	7	86
Least developed countries	16	399	5	184	2	35[a/]

Note: The above figures reflect multiple counting (e.g. BITs concluded between countries from Asia and Africa are included in the list of both regions). The net total of each category of IIAs is therefore lower than the sum of the above figures.

a/ This number includes agreements concluded by regional groups that have one or more LDC members.

Source: UNCTAD.

Asian countries concluded 31 BITs in 2005. As a result, the total number of BITs concluded by Asia and Oceania countries increased to 1,003 at the end of 2005 (table 1). Afghanistan concluded its second BIT in that year (with Germany), while China was the most active in the region with nine new BITs. Thailand and the Republic of Korea concluded four new BITs each.

Latin American and Caribbean countries were also active last year with 13 new BITs concluded. Mexico was the most active country in the region, with three new BITs concluded with Australia, Iceland and Panama. Uruguay signed a new BIT with the United States, amending the 2004 agreement, which was the first BIT that the United States had negotiated on the basis of its new model treaty. The total number of Latin American and Caribbean BITs amounted to 464 by end 2005 (table 1).

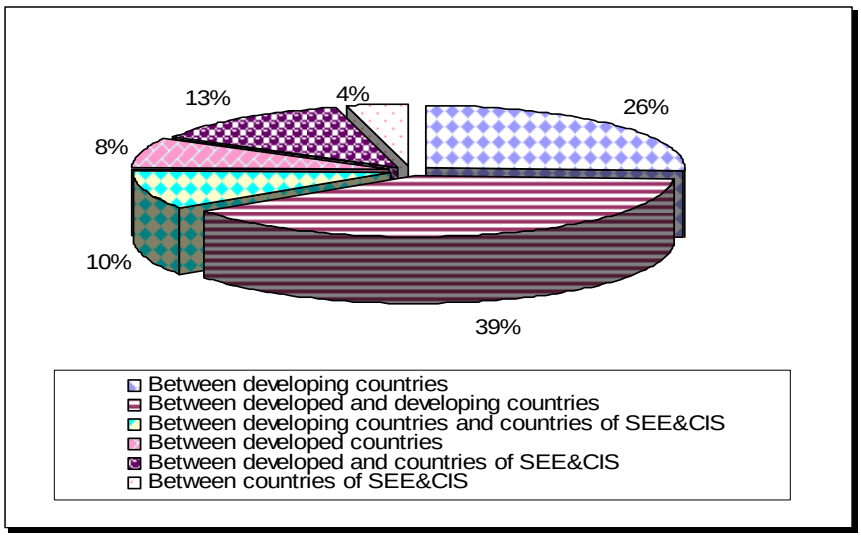
The SEE&CIS countries signed 15 BITs in 2005, the former Serbia and Montenegro[2] set the pace in the region by concluding five new agreements with Cyprus, Libya, Switzerland, Egypt and Lithuania. The total number of BITs concluded by SEE&CIS countries currently stands at 671 (table 1).

The largest number of BITs continues to be concluded between developed and developing countries. While earlier agreements almost exclusively fell into this category, a growing number of BITs now involves two developing countries (figure 3). In the last five years, the share of such agreements almost doubled (from 14 percent to 27 percent).

The overwhelming majority of BITs continues to be those that establish binding obligations for the contracting parties only in respect of the post-establishment phase. However, there has been an increase in treaties providing in principle national treatment and

most-favoured nation treatment with regard to the making of an investment. A similar pattern exists concerning treaty innovations. While most BITs keep on using traditional treaty language, an emerging number of agreements include new elements (UNCTAD 2005a and 2006a). For instance, they emphasize in a stronger manner the public concerns involved (e.g. relating to health, safety or the environment) or seek clarification of individual treaty provisions (e.g. on fair and equitable treatment, indirect expropriation) in response to some uncertainties that arose in the past.

Figure 3. Total BITs concluded, by the end of 2005, by country group



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

2. Double taxation treaties

In 2005, 78 new double taxation treaties (DTTs) were concluded, bringing the total number of DTTs to 2,758 by the end of 2005 (figure 4). Turkey was the most active country, concluding eight new DTTs, while Spain concluded seven such agreements and Slovenia six.

In terms of regional coverage, African countries concluded 17 new DTTs, bringing the total number of DTTs concluded by this region is now 436 (table 1). South Africa was the most active African country for the second consecutive year with five new agreements, while Egypt and Seychelles concluded three new DTTs each in 2005.

Asian countries concluded 36 new DTTs, bringing the cumulative number for Asia to 968 at the end of 2005. Turkey with eight DTTs ranked first in the region, followed by Pakistan with five new DTTs.

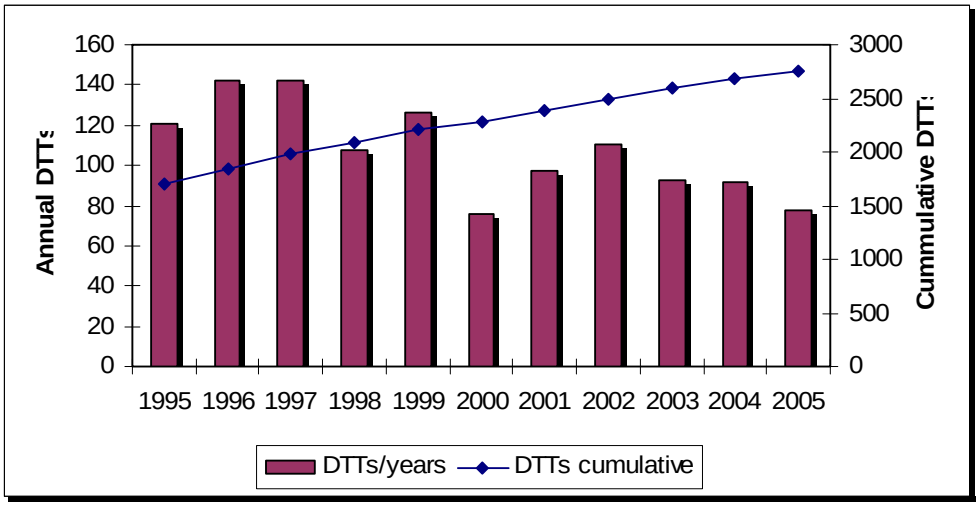
Latin American and Caribbean countries concluded nine new DTTs in 2005. The total number increased to 322 DTTs at the end of 2005. Most active in this region was Chile for the second consecutive year with three new DTTs.

SEE&CIS countries concluded 27 DTTs in 2005. This figure brings the total number of DTTs concluded by this region to 576. Croatia was the most active, concluding five new agreements, while Azerbaijan and the former Serbia and Montenegro concluded four new DTTs each.

About 31 percent of all 2005 DTTs were concluded between developing countries, while 21 percent were concluded between developed and developing countries. This represents an important development, as DTTs have in the past predominantly been concluded between developed and developing countries. DTTs among developed countries accounted for 11 percent only.

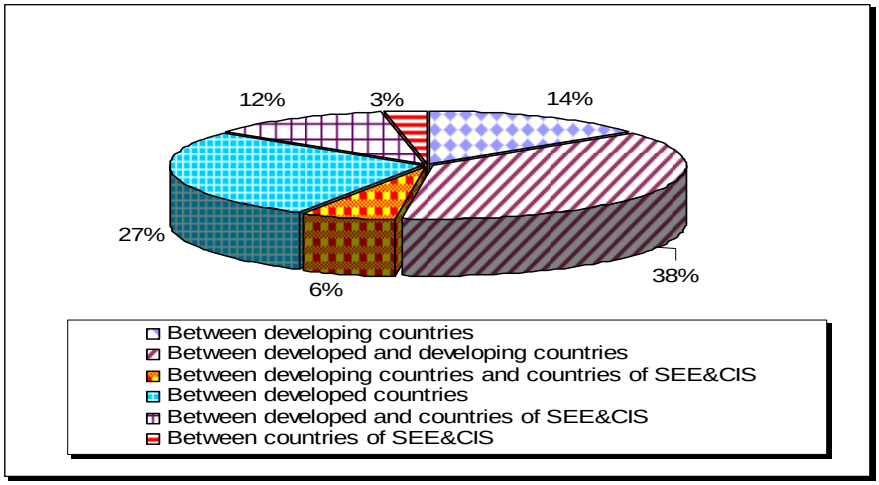
In cumulative terms, almost 40 percent of all DTTs have been concluded between developing and developed countries (figure 5). The share of DTTs between developed countries is significantly higher than in the case of BITs (27 percent compared to 8 percent), which may be explained by the fact that the risk of double-taxation is higher in these countries than political risks.

Figure 4. Number of DTTs concluded, cumulative and year-by-year, between 1995 and 2005



Source: UNCTAD.

Figure 5. Total DTTs concluded, by the end of 2005, by country group



Source: UNCTAD.

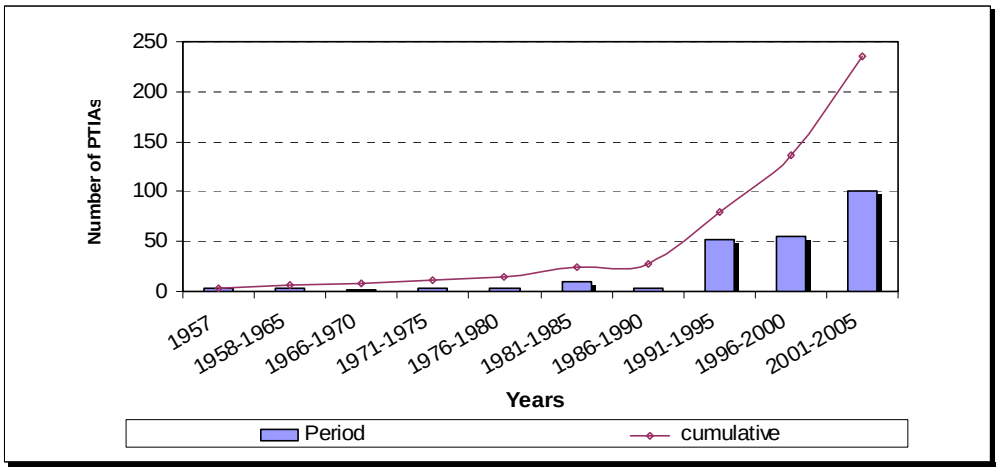
3. Preferential Trade and Investment Agreements (PTIAs)

The trend from previous years to establish international investment rules as part of preferential trade and investment agreements (PTIAs) continued in 2005.[3] The increase in PTIAs partly reflects a political will of a growing number of countries for closer economic cooperation. They may therefore prefer a comprehensive treaty covering trade and investment (and potentially also other areas) simultaneously. From the perspective of investment promotion, potential host countries might also see the protection provisions within a broader legal framework as a way to increase their attractiveness to potential investors.

During 2005, 14 new PTIAs were concluded involving 28 countries, bringing the total number of these agreements to 232 as of end 2005 (figure 6, table 1 and annex table 1). Among the developing regions, Asian countries were the most active with 38 percent of the total PTIAs concluded at the end of 2005, followed by Latin America with 26 percent. Africa and SEE&CIS countries account for 14 percent each. Altogether, developing countries were parties to 79 percent of the PTIA network, while developed countries were involved in 54 percent of the agreements. South-South PTIAs have also increased to reach 86 agreements at the end of 2005 (table 1) (UNCTAD 2005b).

While the total number of PTIAs is still small compared to the number of BITs (less than 10 percent), they almost doubled during the past five years. In addition, as of 1 July 2006, at least 67 agreements were under negotiation involving 106 countries (see annex table 2). This suggests an even more pronounced increase in such treaties in the near future. At least five PTIAs were concluded from January to July 2006.

Figure 6. The growth of PTIAs, 1957 – 2005
(Number)



Source: UNCTAD.

Besides trade and investment, PTIAs may also cover services, intellectual property, competition, labour, environment, government procurement, the temporary entry for business persons, and transparency issues, amongst others. This broad coverage demonstrates a trend towards an integrated approach in dealing with interrelated issues in international investment rulemaking.

Among the noteworthy PTIAs concluded in 2005 are the Free Trade Agreement between the Republic of Korea and Singapore, the Economic Partnership Agreement between Japan and Malaysia and the Comprehensive Economic Cooperation Agreement between India and Singapore. These treaties establish, *inter alia*, binding obligations of the contracting parties concerning the admission and protection of foreign investment. The scope of the protection commitments is comparable to those found in BITs, including with regard to dispute settlement.

Other PTIAs that were signed in 2005 establish a framework for cooperation between the contracting parties. One example is the Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the Republic of Korea. It provides for specific forms and areas of cooperation to promote investment, sets up an institutional framework to follow up on investment issues, and establishes timeframes for the launching of future negotiations on investment liberalization and/or protection.

These various treaty types offer countries a wide range of options for the promotion and protection of international investment flows and for reflecting their specific level of economic development.

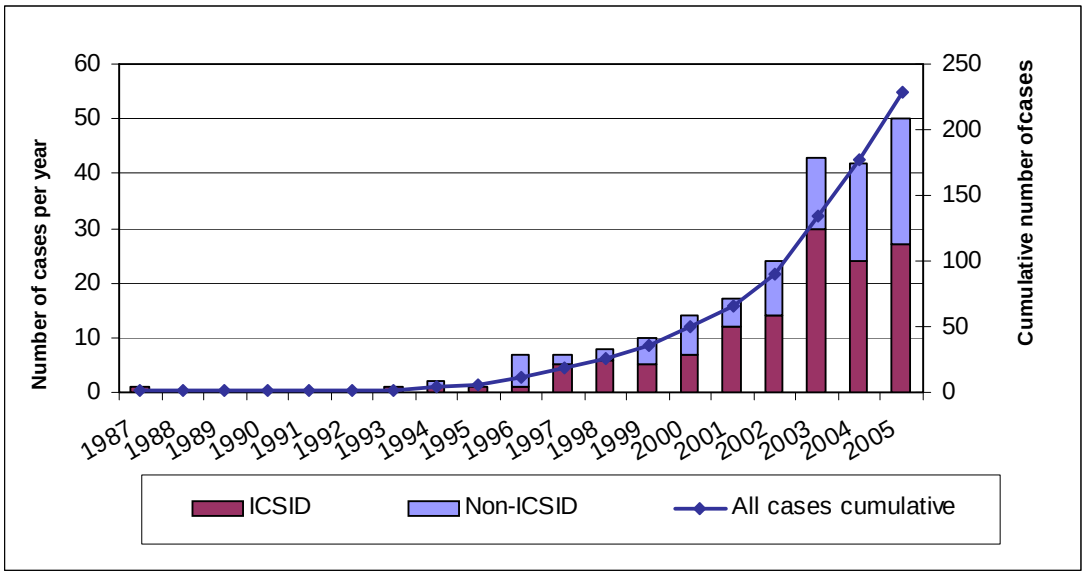
4. Investor-State disputes

In 2005, at least 50 new investor-State dispute settlement (ISDS) cases were filed, bringing the total number of treaty-based arbitration to a new peak of at least 226 by the end of 2005 (figure 7). These cases involve 62 countries. This is the highest annual increase ever recorded. 136 out of the total of 226 cases were filed with ICSID. Other disputes were initiated under the UNCITRAL Arbitration Rules (67), the Stockholm Chamber of Commerce

(14), the International Chamber of Commerce (4), and ad-hoc arbitration (4). The remaining case was filed with the Cairo Regional Centre for International Commercial Arbitration. At least 32 awards were rendered in 2005. While arbitration awards in general have helped to clarify the meaning and content of individual treaty provisions, some inconsistent decisions in recent years have also created uncertainty. For example, arbitration tribunals arrived at different conclusions with regard to the scope of investor-State dispute settlement procedures, the legal implications of the so-called "umbrella clause", the observance of so-called cooling-off periods and the scope of the MFN clause (UNCTAD 2005c).[4]

A number of important awards and decisions were rendered in 2005 (UNCTAD 2005d). They interpret key elements of investment protection, such as the principle of fair and equitable treatment,[5] the minimum standard of treatment under international law,[6] the standard of full protection and security,[7] the scope of the MFN principle,[8] and the meaning of "in like circumstances" in connection with the non-discrimination principle.[9] Other awards concern the issue of regulatory taking,[10] the effect of the so-called "umbrella clause",[11] the notion of "effective control" and the meaning of an admission clause according to which foreign investment is permitted subject to the laws of the host country.[12] Some awards rendered in 2005 dealt with the definition of "investment" and the "cooling-off" period before initiating arbitration.[13]

Figure 7. Known investment treaty arbitrations (cumulative and newly instituted cases, 1987 - 2005)



Source: UNCTAD.

* * *

The greater number and diversity of IIAs in terms of their scope, structure and content reflects the flexibility that countries would like to have in choosing the partners to enter into an agreement, and to tailor individual agreements to their specific situations, development objectives and public concerns. Furthermore, more elaborate rules may enhance legal clarity on the rights and obligations. Multiple coverage under more than one IIA may also contribute

to improving the investment climate in the host countries for FDI by creating a synergetic effect and filling possible gaps in the overall treatment of foreign investment.

On the other hand, the growing diversity of the IIA universe poses new challenges for keeping it coherent. One potential risk in this respect is the emergence of BITs with more detailed provisions on certain protection clauses. Although these clauses are only meant to clarify the content of the treaties and do not therefore intend to introduce substantive amendments, they nevertheless may have a decisive impact on the interpretation of these provisions by arbitration tribunals. As a result, courts might arrive at different conclusions with regard to basically the same legal issues, depending on whether the BIT contains an interpretative statement or not. The risk of incoherence is especially high for developing countries that lack expertise and bargaining power in investment rulemaking. They may have to conduct negotiations on the basis of divergent model agreements of their negotiating partners (UNCTAD 2006c).

Coherence may also be at stake between the more protection-oriented BITs, on the one hand, and the more liberalization-oriented PTIAs, on the other hand. While both types of agreements ideally complement each other, they often overlap, resulting in the risk of inconsistencies. There is also the broader question of how the relationship between BITs and PTIAs will develop in the long run.

One consequence of the evolving IIA patchwork is the growing need for capacity-building to help developing countries in assessing the implications of different policy options before entering into new agreements, identifying the potential obligations deriving thereof and implementing commitments made. Rigorous policy analysis of the evolution of the IIA universe and international consensus building on key development-related issues are other vital tasks. International organizations can lend a helpful hand in this regard.

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NOTES

[1] The term (IIA) includes bilateral investment treaties (BITs), double taxation treaties (DTTs) and other preferential trade and investment agreements (PTIAs) as explained in section 3.

[2] The state union of Serbia and Montenegro effectively came to an end after Montenegro's formal declaration of independence on June 3, 2006 and Serbia's formal declaration of independence on June 5.

[3] These agreements appear under a variety of names, for example free trade agreements (FTAs), closer economic partnership agreements (EPAs), regional economic integration agreements or framework agreements on economic cooperation. For a detailed analysis, see (UNCTAD 2006b).

[4] See also Schreuer 2006 (with further reference to the pertinent awards).

[5] *Eureko B.V. v. Poland*, Partial Award, 19 August 2005; *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005.

[6] *Methanex v. United States*, UNCITRAL, Final Award, 3 August 2005.

[7] *Eureko B.V. v. Poland*, Partial Award, 19 August 2005.

[8] *Plama Consortium Limited v. Bulgaria*, ICSID Case No. ARB/03/24, Decision on Jurisdiction, 8 February 2005.

[9] *Methanex v. United States*, UNCITRAL, Final Award, 3 August 2005.

[10] *Methanex v. United States*, UNCITRAL, Final Award, 3 August 2005.

[11] *Impreglio S.p.A. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, 22 April 2005; *Eureko B.V. v. Poland*, Partial Award, 19 August 2005; *Noble Ventures Inc. v. Romania*, ICSID Case No. ARB/01/11, Award, 12 October 2005.

[12] See *Aguas del Tunari v. Republic of Bolivia*, ICSID Case No. ARB/02/3, Decision on Jurisdiction, 21 October 2005.

[13] *Consorzio Groupement L.E.S.I. v. Algeria*, ICSID Case No. ARB/03/8, Award, 10 January 2005; *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, 14 November 2005.

REFERENCES

Schreuer, Christoph (2006). "Diversity and Harmonization of Treaty Interpretation in Investment Arbitration", in *Transnational Dispute Management*, Vol. 3, No. 2 (April), pp. 1-23.

United Nations Conference on Trade and Development (UNCTAD) (forthcoming). *Bilateral Investment Treaties 1995-2005: Trends in Investment Rulemaking* (New York and Geneva: United Nations), United Nations publications, forthcoming.

_____ (2006a). *International Investment Arrangements: Trends and Emerging Issues*. UNCTAD Series on International Investment Policies for Development (New York and Geneva: United Nations), United Nations publication, Sales No. E.06.II.D.3.

_____ (2006b). *Investment Provisions in Economic Integration Agreements* (New York and Geneva: United Nations), United Nations publication, Sales No. UNCTAD/ITE/IIT/2005/10.

_____ (2006c). "Systemic issues in international investment agreements", *IIA Monitor No. 1* (http://www.unctad.org/en/docs/webiteiia20062_en.pdf)

_____ (2005a). "Recent developments in international investment agreements", *IIA Monitor No. 2* (http://www.unctad.org/sections/dite_dir/docs//webiteiit20051_en.pdf).

_____ (2005b). *South-South Cooperation in International Investment Arrangements*. UNCTAD Series on International Investment Policies for Development (New York and Geneva: United Nations), United Nations publication, Sales No. E.05.II.D.26.

_____ (2005c). *Investor-State Disputes Arising from Investment Treaties: A Review*. UNCTAD Series on International Investment Policies for Development (New York and Geneva: United Nations), United Nations publication, Sales No. E.06.II.D.1.

_____(2005d). "Latest developments in investor-State dispute settlement", *IIA Monitor No. 4* (http://www.unctad.org/en/docs/webiteiit20052_en.pdf).

Annex table 1
PTIAs concluded in 2005

Agreement	Scope of the investment provisions
Framework Agreement to Promote Economic Cooperation between India and Chile	Framework
Agreement on Closer Economic Partnership between New Zealand and Thailand	Substantive
Comprehensive Economic Cooperation Agreement between India and Singapore	Substantive
Trade and Investment Framework Agreement between Iraq and the United States	Framework
Free Trade Agreement between the Republic of Korea and Singapore	Substantive
Free Trade Agreement between China and Chile	Investment promotion, more substantive investment disciplines agreed in the future work programme (article 120)
Free Trade Agreement between the United States and Peru	Substantive
Framework Agreement on Comprehensive Economic Cooperation between ASEAN and the Republic of Korea	Framework
Trans-Pacific Strategic Economic Partnership Agreement (Brunei, Chile, Singapore, New Zealand)	Substantive
Free Trade Agreement between Taiwan (Province of China) and Guatemala	Substantive
Free Trade Agreement between Egypt and Turkey	Investment promotion (article 28)
Free Trade Agreement between the European Free Trade Association (EFTA) States and the Republic of Korea	Substantive
Trade and Investment Framework Agreement between Mozambique and the United States	Framework
Free Trade Agreement between the United States and Oman*	Substantive

Source: UNCTAD.
* Negotiations concluded in 2005, agreement signed in January 2006.

Annex table 2
PTIAs under negotiation (as of 1 July 2006)

Agreement
Closer Economic Partnership Agreement between Hong Kong (China) and New Zealand
Comprehensive Economic Cooperation Agreement between China and India
Comprehensive Economic Cooperation Agreement between India and Mauritius
Economic Partnership Agreement between India and Sri Lanka
Economic Partnership Agreement between Japan and Thailand
Economic Partnership Agreement between Japan and the Philippines
Free Trade Agreement between Japan and the Republic of Chile
Free Trade Agreement between Japan and Indonesia
Comprehensive Economic Cooperation Agreement between Japan and India
Economic Framework Agreement between Canada and Japan
Free Trade Agreement between Canada and Central America
Free Trade Agreement between Canada and the Republic of Korea
Free Trade Agreement between Canada and Singapore
Free Trade Agreement between Canada and the Dominican Republic
Free Trade Agreement between Singapore and Egypt
Free Trade Agreement between Singapore and Bahrain
Free Trade Agreement between Singapore and of Kuwait
Free Trade Agreement between Singapore and Qatar
Free Trade Agreement between Singapore and Sri Lanka
Free Trade Agreement between Singapore and Mexico
Free Trade Agreement between Singapore and Pakistan
Free Trade Agreement between Singapore and Peru
Free Trade Agreement between Singapore and the United Arab Emirates
Free Trade Agreement between the European Union and the Gulf Cooperation Council (GCC)
Economic Partnership Agreement between the European Union and the Economic and Monetary Community of Central Africa (CEMAC)
Economic Partnership Agreement between the European Union and Eastern and Southern Africa (ESA)
Economic Partnership Agreement between the European Union and the Caribbean Community and Common Market (CARICOM)
Economic Partnership Agreement between the European Union and the Economic Community of West African States (ECOWAS)
Association Agreement between the European Union and MERCOSUR
Economic Partnership Agreement between the European Union and the Southern African Development Community (SADC)
Trade and Investment Enhancement Agreement between the European Union and Canada
Trans-Regional Trade Initiative between the European Union and ASEAN
Free Trade Agreement between ASEAN, Australia and New Zealand

Free Trade Agreement between ASEAN and the Republic of Korea
Free Trade Agreement between Australia and China
Free Trade Agreement between CARICOM and Canada
Free Trade Agreement between CARICOM and the United States
Free Trade Agreement between CARICOM and EFTA
Free Trade Agreement between China and New Zealand
Free Trade Agreement between EFTA and Canada
Free Trade Agreement between EFTA and the Southern African Customs Union (SACU)
Free Trade Agreement between EFTA and Thailand
Free Trade Agreement between EFTA and Egypt
Economic Complementation Agreement between Mexico and the Republic of Korea
Free Trade Agreement between the ANDEAN Community and Canada
Free Trade Agreement between the ANDEAN Community and the United States
Free Trade Agreement between the Gulf Cooperation Council (GCC) and MERCOSUR
Free Trade Agreement between the Gulf Cooperation Council (GCC) and China
Free Trade Agreement between Chile and Ecuador
Free Trade Agreement between Chile and Peru
Free Trade Agreement between Costa Rica and Panama
Free Trade Agreement between Guatemala and Taiwan (Province of China)
Free Trade Agreement between Nicaragua and Taiwan (Province of China)
Free Trade Agreement between Peru and Thailand
Free Trade Agreement between the United States and the Republic of Korea
Free Trade Agreement between the United States and Thailand
Free Trade Agreement between the United States and Ecuador
Free Trade Agreement between the United States and Panama
Free Trade Agreement between the United States and the United Arab Emirates
Free Trade Agreement between the United States and Uruguay
Free Trade Agreement between the United States and SACU
Free Trade Agreement between the United States and Switzerland
Free Trade Area of the Americas (FTAA)
Partial Scope Trade Agreement between Belize and Guatemala
South Asian Association for Regional Cooperation (SAARC) agreement for the promotion and protection of investment
Free Trade Agreement between Peru and Thailand (*negotiations on investment and services continue*)
Free Trade Agreement between MERCOSUR and Israel

Source: UNCTAD.