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Bilateral Investment Treaties:

The same old story?

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1.0 Introduction

The breadth of international investment treaties continues to grow in both numbers and geographical coverage. Today, this phenomenon, which started with a bilateral investment treaty (BIT) between Germany and Pakistan in 1959, comprises over 3,000 treaties concluded by 179 countries. The early BITs were typically between European countries and developing countries in Asia and Africa, often former colonies. These agreements were aimed at securing protection for the assets of European (and later, North American) nationals abroad, and were inspired by the Abs-Shawcross draft Convention of 1959. Having said that, BITs were marketed to developing countries as "tools that promote investment flows," and not as legal instruments that are solely designed to guarantee the protection of both existing and future investments from the other treaty party.

It is therefore no surprise that the first BIT between two developing countries was signed as early as 1964. By 1990, their number had reached 44, and it has more than quadrupled since then, rising to 653 by July 2004, or 28 per cent of the total number of BITs then worldwide.[1] Of these, half have been ratified and thus entered into force. Today, BITs between developing countries account for approximately 26 per cent of the total number of BITs. Over the last few years, the share of BITs between developing countries has ranged from 22 per cent to 30 per cent of the total number of new BITs signed annually.[2]

The trend for enhanced South-South economic cooperation was particularly strong in 2007. Of the 44 new BITs signed in 2007, 13 were between developing countries. China alone accounted for a large share of those South-South agreements. In 2007, it concluded four new BITs with other developing countries (Costa Rica, Cuba, Republic of Korea and Seychelles). About 60 per cent of the Chinese BITs concluded from 2002 to 2007 were with other developing countries, mainly in Africa.

BITs between developing countries were also a feature in 2008. Out of the 59 new BITs concluded that year, 13 were among developing countries.[3] Asian countries—in particular, India with five, followed by China and Cambodia with two each—were responsible for a large number of these BITs.

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[1] UNCTAD (2006). *South-South Investment agreements proliferating.* IIA Monitor No. 1 (2005) International Investment Agreements. New York: United Nations. Retrieved from: http://www.unctad.org/en/docs/webiteiit20061_en.pdf

[2] In 2005, 20 out of the 70 new BITs concluded were between developing countries. In 2006, 23 out of the 73 new BITs were concluded between developing countries (UNCTAD).

[3] UNCTAD. (2009). *Recent developments in International Investment Agreements (2008–June 2009).* IIA Monitor No. 3 (2009) International Investment Agreements. New York: United Nations.

Investment agreements between "developing countries" are likely to intensify with greater regional integration and as more such countries become capital exporters. For example, while Singapore's earlier BITs were with developed states such as the Netherlands, Germany, United Kingdom, France, Switzerland and Belgium, in more recent years it has signed BITs with Sri Lanka, Pakistan, Cambodia, Laos and Mongolia. Countries with the largest and fastest-growing foreign direct investment (FDI) outflows are also those with the highest number of BITs (for example, China, Malaysia, the Republic of Korea and, more recently, India).

The trend of South-South BITs results in exotic relationships between Latin American, Asian and African countries. However, despite the destinations involved, do they actually result in agreements that are different? Or do we find a repetition of the old North-South template typified by the European BITs?

2.0 Are South-South BITs Different from North-South BITs?

In 2005 UNCTAD concluded that that "few specifically South-South features are discernible within the universe of South-South IIAs." This can be explained in part by the fact that the dynamic of the comparatively more developed Southern country versus the lesser-developed Southern treaty partner mirrors that of the North-South dynamic and, therefore, it is no surprise that the North-South European template is used. Further, Southern countries have traditionally had limited capacity and knowledge to negotiate these specialist legal instruments and therefore have relied on models based on their treaties with Northern partners. For example, South Africa used the South Africa–UK BIT as its template for future treaty negotiations, not fully understanding, at the time, the consequences of the UK Model or its suitability for South Africa.[4]

On the other hand, it is surprising to find that Southern countries have not taken advantage of the more "equal" negotiating space, free of traditional political pressures associated with North-South, post-colonial relationships, to design more bespoke provisions in their treaties. This is also reflected in agreements between Southern partners (for example, in the Ethiopia-Eritrea, Pakistan-Laos and Cambodia-Laos BITs). However, while the norm in South-South BITs is the repetition of the traditional North-South template, we do find exceptions to this in a minority of agreements, which have attempted to introduce more policy space elements into their treaties.

For example, the Singapore-China, Singapore-Vietnam, Singapore-Pakistan, Singapore–Czech Republic, Singapore-Mongolia, Singapore-Egypt, Singapore-Mauritius and Singapore-Cambodia BITs provide that the provisions of the treaty shall not in any way limit the right of a state to apply prohibitions or restrictions of any kind or take any other action that is directed to the protection of its essential security interests or to the protection or public health or the prevention of diseases and pests in animals and plants. Singapore's recent BIT with Jordan (2004) develops the exception further. However, it is interesting to note that Singapore's BITs with the Netherlands (1972), United Kingdom (1975) and Germany (1973) contain no such "general exceptions." This could be interpreted to mean that Singapore developed sophisticated BIT negotiation capabilities after 1985 or that it did not have enough negotiating clout with the older group of EU states, or a combination of both factors.

More generally, South-South BITs do not, as a norm, create rights of market access and establishment for investments as found in certain North-South BITs, typically those based on

[4] Randall Williams. (2009, November 8–11). Nothing sacred: Developing countries and the future of International Investment Treaties. In *Report On The Third Annual Forum of Developing Country Investment Negotiators*. Keynote speech presented at Developing Countries and New Directions in International Investment Law, Quito, Ecuador. Retrieved from: http://www.iisd.org/pdf/2010/dci_2009_report.pdf

Canadian, Japanese and U.S. models. Similarly, South-South BITs typically refrain from expressly prohibiting performance requirements.[5] Exceptions to this norm are the growing number of regional investment agreements. However, even these are more nuanced than those promoted by Northern countries, which include broad pre-establishment rights and market access. For example, the COMESA Investment Agreement provides for market access but in a qualified and staged manner and does not expressly prohibit performance requirements. The Southern African Development Community (SADC) protocol[6] does not contain market access.

Some countries have used the South-South negotiating space to leave out certain investment treaty protection guarantees. For example, the SADC protocol has a limited range of post-establishment protection guarantees than are found traditionally in European BIT models. The SADC protocol does not contain national treatment and protection and security provisions. The ASEAN Investment Agreement contains both pre-establishment and post-establishment rights but contains limitations and exceptions to these guarantees. Some of the BITs signed by Southeast Asian countries and older BITs by Eastern European nations omit national treatment provisions. For example, a number of Indonesian BITs omit the national treatment guarantee.

A more recent example is the investment chapter of the India-Singapore CECA, which omits FET and MFN treatment, even though the Singapore-U.S. FTA includes these provisions in its investment chapter.[7]

"Exceptions" are also more likely to be present in South-South BITs. Countries may feel that they are more able to introduce an exception or a qualification to a guarantee in a South-South BIT than in a North-South BIT. For example, among South Africa's BITs, the Chile–South Africa BIT (1998) contains an exception for government measures to redress racial differences and promote disadvantaged groups, whereas South African's BITs with other European countries, including Italy and the U.K., do not.

Despite the above examples, overall South-South BITs remain tied to the old BIT template developed by Northern countries in the 1950s and 1960s to protect their investments, with its broad definition of investment and investor, and traditionally broad guarantees of fair and equitable treatment, full protection and security, national treatment, MFN treatment, compensation for expropriation and, most importantly, broad offers to arbitrate all disputes with investors. For the most part, there is little new or exotic in the South-South dynamic. They appear to tell the same old

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[5] UNCTAD (2006). *South-South Investment agreements proliferating.* IIA Monitor No. 1 (2005) International Investment Agreements. New York: United Nations. Retrieved from: http://www.unctad.org/en/docs/webiteiit20061_en.pdf

[6] Annex 1, SADC FIP

[7] Article 15, Section B, Singapore-United States of America FTA (2003), www.ustr.gov

story. However, as Southern countries develop more capacity, as seen in the case of the India-Singapore agreement, we may see newer and more interesting scripts in the future.