

**UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT
Geneva**

The Entry into Force of Bilateral Investment Treaties (BITs)

**IIA MONITOR No. 3 (2006)
International Investment Agreements**



**UNITED NATIONS
New York and Geneva, 2006**

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I. Introduction

The number of bilateral investment treaties (BITs) has increased substantially throughout the years to reach almost 2,500 agreements at the end of 2005. While much research and analysis has been undertaken with regard to the development, content and effects of such treaties, the issue of the entry into force of BITs has received much less attention. However, without entering into force, BITs cannot fulfill their intended role as legally binding instruments for the promotion and protection of foreign investment. On the basis of the most recent UNCTAD survey of BITs conducted in April 2006 and the existing database, more light can be shed on the number of BITs that have entered into force.¹

An agreement enters into force when the terms for entry into force as specified in the treaty are met. BITs usually enter into force when both parties agree to be bound as of a certain date. The vast majority of BITs condition the entry into force of the agreement to the completion of the domestic requirements for such entry into force (which often means ratification by the national parliaments). In most cases, the treaty becomes effective after the contracting parties have notified each other that these requirements have been met.² Some BITs, however, provide that the agreement already enters into force upon signature.

II. Main findings

Out of the 2,495 BITs concluded until the end of 2005, 1,891 (i.e. 75.8 %) had entered into force (table 1). This rate increases almost constantly with the age of the agreement. Among the BITs concluded in 2002 and earlier, more than 80 % had become effective by the end of 2005. This ratio increased to over 90 % for BITs concluded in 1996 and earlier.

Table 1 also shows how many BITs concluded annually have entered into force. It confirms the above trend of an increasing share of ratified agreements over time. While more than 90 % of the BITs concluded in the first half of the 1990s have entered into force, this rate decreases significantly with regard to more recent agreements, reflecting the time required by the parties of an agreement to ratify it.

¹ The UNCTAD Secretariat does not have the possibility to check the accuracy of all information received from member States, in particular its completeness.

² Notification usually takes place through diplomatic channels. Sometimes, there may be uncertainties on what date the two parties have notified each other, in particular, on what day such notification was received by the other contracting party. UNCTAD is aware of several cases where BITs contracting parties came to different conclusions concerning the date of entry into force of the same agreement.

Table 1. BITs signed and entered into force, 1990 - 2005, annual and cumulative

	Number of BITs	1990	1992	1994	1996	1998	2000	2001	2002	2003	2004	2005
<i>Annual</i>	Signed	64	117	189	211	177	131	183	127	97	79	70
	In force	60	111	171	192	129	77	102	74	49	26	6
	Per cent	93.7	94.8	90.5	90.9	72.8	58.7	55.7	58.3	50.5	32.9	8.6
<i>Cumulative</i>	Signed	385	582	898	1308	1662	1939	2122	2249	2346	2425	2495
	In force	355	543	832	1193	1470	1633	1736	1810	1859	1885	1891
	Per cent	92.2	93.3	92.6	91.2	88.4	84.2	81.8	80.5	79.2	77.7	75.8

Source: UNCTAD database on IIAs (www.unctad.org/iaa).

Out of the 604 BITs that had not entered into force at the end of 2005, 165 (6.6 % of total BITs) were only concluded after 1 January 2003 and another 70 (2.8 %) that were concluded before that date had so far been ratified by only one of the parties to a BIT. The exact ratification status for the remaining 369 treaties (14 %) is uncertain, as this number includes both treaties that have not been enacted by either of the parties as a matter of policy³ and treaties whose status has not been revealed through UNCTAD's surveys.⁴

The first ever BIT was concluded on 25 November 1959 between Germany and Pakistan and entered into force on 28 April 1962, i.e. 2 years and 5 months after the signing of the treaty. The vast majority of BITs followed this precedent: more than four fifths (81.5 %) of the 1,891 BITs that had entered into force until the end of 2005 became effective within the first three years after signature (table 2). Within 5 years after signature, this share increases to 94 %. Few BITs took more than 5 years or even longer for entering into force.

Table 2. Distribution of ratified BITs by the number of years between signature and heentry into force, 1959-2005

Years	0 - 1	1 - 2	2 - 3	3 - 4	4 - 5	5 - 10	>10	Total
BITs in force	611	607	323	161	75	100	14	1,891
Percent of total	32.3	32.1	17.1	8.5	4.0	5.2	0.7	100
Cumulative percent	32.3	64.4	81.5	90.0	94.0	99.2	100	

Source: UNCTAD database on IIAs (www.unctad.org/iaa).

The time lag between signature and entering into force of a BIT is a reflection of the more or less complicated process of national ratification that is required to enact an

³ For example, Brazil has for political reasons not ratified any of its 14 BITs.

⁴ UNCTAD's surveys are conducted annually. The average response rates over the 2001-2006 period were 17 % for African countries that were party to a BIT, 29 % for Latin American and Caribbean countries, 37 % for countries in East and South-East Europe and the CIS, 43 % for countries in Asia and Oceania, 61 % for countries in Europe and 50 % for other developed countries. In light of these different reporting averages it is not possible to ascertain regional and/or development related differences in the ratification situation, except to say that the higher the response rate, the higher the reported rate of ratified BITs.

international agreement. This process varies considerably from country to country.⁵ Furthermore, whether a BIT enters into force depends on its ratification by the *two* contracting parties (i.e. the time requirement of the slower country is decisive).

III. Conclusions and implications

The UNCTAD survey illustrates that the large majority of BITs concluded between 1959 and 2005 (75.8 %) has in the meantime entered into force, thereby providing foreign investors with enforceable rights in their host countries. This shows that contracting parties are serious about their commitments when concluding a BIT. The percentage rate of ratified BITs increases constantly with the time since signature, reaching – on average – 90 % and more after ten years. The time required for the domestic ratification process may vary from a few months to several years, depending on the countries involved and the concrete issues at stake.

The distinction between the conclusion of an agreement and its entry into force is important. This is most obvious with regard to the legal rights and obligations deriving from it. They usually do not become effective before the treaty has entered into force. The time lag between the conclusion of a BIT and its entry into force may therefore have important implications, both for foreign investors and their respective host countries. Foreign investors may not be able to claim protection under the BIT if a dispute arises with the host country in the period between conclusion and entry into force of the agreement. Although the conclusion of the BIT already entails some legal consequences for the host country under international law,⁶ they do not go so far as to establish legally binding obligations of the latter vis-à-vis the foreign investors. For host countries, the length of the time lag between conclusion and entry into force of a BIT can become an issue, as it may undermine the positive signaling effect of signing the BIT in the first place. The longer foreign investors have to wait until an agreement becomes effective, the more they might lose interest in investing in the particular country, and look for alternative destinations.

⁵ For example, in the United States, negotiation of treaties and international agreements is the responsibility of the Executive Branch. The general procedures for negotiation, signature, publication, and registration of treaties and international agreements is as follows: (1) the Secretary of State authorizes negotiation; (2) a United States representative negotiates; (3) agreement on terms, and upon authorization of the Secretary of State, signature of the treaty; (4) the President submits the treaty to the Senate; (5) the Senate Foreign Relations Committee considers the treaty and reports to the Senate; (6) the Senate considers and approves the treaty with a two-thirds majority; and (7) the President proclaims entry into force.

⁶ Before a treaty enters into force, contracting parties have a general obligation to refrain from acts that would defeat the object and purpose of the agreement. See Article 18 of the Vienna Convention on the Law of Treaties.