Mahnaz Malik

International Law Protections for Foreign Investment in Pakistan

Overseas Investors Chamber of Commerce and Industry

OICCI EST 1860

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FOREWORD

Ameena Saiyid OBE, President, OICCI

The Overseas Investors Chamber of Commerce and Industry (OICCI) is one of the oldest investment chambers of the region; and the voice of foreign investors in Pakistan. OICCI's mission in Pakistan is to facilitate the transfer of the best global practices; to foster a conducive, open, equitable, and transparent business environment; to raise the profile; and protect the interests of overseas investors. In short, we focus on encouraging, increasing, and sustaining FDI in Pakistan. We are also committed to contributing to the development of Pakistan through FDI. OICCI members contribute 22 percent to the national tax revenue, 29 percent to the GDP, employ over 150,000 people and spend c Rs 1 billion on CSR activities annually. As major stakeholders, we are concerned at the decline in Global Foreign Direct Investment (FDI) inflows into Pakistan, and have analysed the reasons for this by conducting perception surveys both of OICCI members and the business community of Pakistan in general. According to OICCI members, the top challenges faced by them are the lack of security, energy, government stability, infrastructure, legislation, human resources, intellectual property rights protection, and the high cost of operations. Similarly, business confidence has plummeted among the general business community which lists inflation, the high cost of operations, poor security, unfriendly government policies, high interest rates, and the lack of credit from banks as their key challenges.

This book, *International Law Protections for Foreign Investment in Pakistan* written by Mahnaz Malik and published by the OICCI, is a manifestation of our efforts to shape a new framework for the progress and development of investment in business and to foster dialogue and consultation with the government to improve the investment environment in Pakistan. It is relevant and helpful to investors as it provides well-researched, factual information and analysis regarding international law protections available to foreign investors in Pakistan, and contributes to improving government policy to harness FDI to achieve the country's development goals. Mahnaz Malik, the founder of MMI Law International (a legal consulting firm) is an internationally recognized expert in international investment law. She was a member of the ICC Commissions on Arbitration and Anti-Corruption. In this book, she has provided a comprehensive account of the international law regime protecting foreign investments applicable to Pakistan, and has also commented on how this regime may be improved to strike a better balance between the protection of investment in Pakistan and the government's ability to exercise regulatory powers. At OICCI we would welcome an improvement in the law and policy formulation and implementation relating to investment, both domestic and foreign, in Pakistan.

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Introduction

Pakistan's Pursuit for Foreign Investment

Global Foreign Direct Investment (FDI) inflows are expected to touch US$1.2 trillion in 2010; rise further to US$1.3–1.5 trillion in 2011; and head towards US$1.6–2 trillion in 2012. Approximately half of these FDI inflows will go into developing and transition economies.

Pakistan receives a miniscule fraction of the world's FDI inflows, and has traditionally performed below its potential to attract much-needed foreign investment that

can be harnessed to translate into development benefits for its 180 million denizens. The potential development benefits of foreign investment—better jobs, technology, and standards—can come with the right quantity and quality of foreign investment.

Over the last three years, FDI inflows into Pakistan have halved; with last year closing at an unimpressive US$2.15 billion.[1] Political instability, high levels of terrorist activity and poor economic performance have made foreign investors shy away from Pakistan. The global economic crisis has not helped matters either, but with recovery afoot, it remains questionable if foreign capital will come to Pakistan in the current circumstances.

Investor Concerns in Relation to the Challenges of doing Business in Pakistan

This lack of significant foreign investment continues despite the fact that the promotion of foreign investment has been a priority for the government in the last two decades. Pakistan continues to be one of the most open economies to foreign investment in Asia. However, foreign investors have often complained that the promises made by the government, whether in promotional brochures or contracts, are not always honoured. Another frequent issue is that of policy implementation being weak and ineffective.[2] Moreover, the legal, political, and increasingly physical insecurity[3] has rendered conducting business in Pakistan a risky affair. The energy deficit and spiralling inflation have raised the costs of operating businesses, squeezing profit margins and competitiveness. Criticism is often directed at the government's policies, with calls by both the domestic and foreign investment community for the government to be more proactive in improving the business environment.

The OICCI Perception Survey Report 2009 identified the key challenges (in order of priority) to current and future businesses in Pakistan as: law and order; energy deficit; government stability; infrastructure; costs of operations; legislation; human resources; copyrights and Intellectual Property Rights (IPR); and changing social values. The OICCI Survey also found that over 40% of the respondents were discontented with the clarity/fairness of the laws and regulations in Pakistan. The Survey also noted that the key concerns affecting businesses in Pakistan were inflation (83%); costs of doing business (75%); security situation (72%); and government policy (68%).

Foreign investors making substantial investments abroad have traditionally feared the impact on their assets from arbitrary or discriminatory interference by a foreign government. In order to assuage investor concerns, countries have often promulgated domestic investment protection laws and concluded investment protection treaties offering international guarantees of protection. This book provides an account of the international law protections available to foreign investments in Pakistan.

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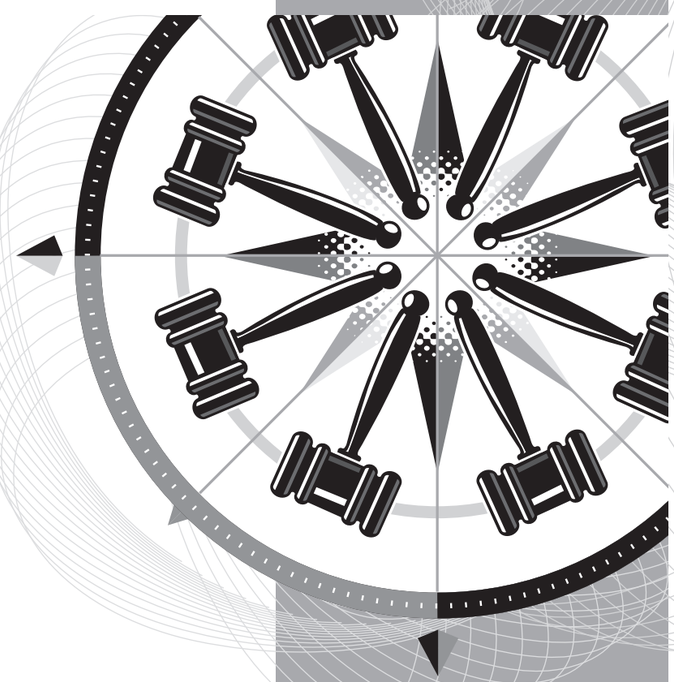
1. Pakistan's FDI inflows have been particularly poor in the last three years. Since 2007, the FDI inflows have fallen from $5,152,000.80 (2007–2008) to $3,179,000.90 in 2008–2009, and ended rather flat at $2,150,000.80 in 2009–10.
(Figures from http://www.pakboi.gov.pk/forign-invest.htm)

2. OICCI Survey (2009) found that 86% of the respondents listed policy implementation a significant concern.

3. The Terrorism Risk Index (TRI) 2010 developed by global risks advisory firm, Maplecroft, rated Pakistan second after Somalia in the list of countries most likely to be at risk from terrorist attacks.

2



Overview of the International Law Regime Protecting Foreign Investments in Pakistan

Introduction to the Phenomenon of Bilateral Investment Treaties

The international law regime protecting foreign investments includes a complex and growing web of over 3000 international investment agreements or treaties (IIAs)[1] signed by at least 179 countries, which include bilateral, regional, sectoral and investment chapters in trade agreements.[2]

The most common type of IIA is a Bilateral Investment Treaty (BIT), which sets out rules for the treatment of foreign investments between two treaty partner countries. The treaty party hosting the investment ('the host state') provides a catalogue of international law guarantees to the investments from the other treaty party ('the home state of the investor'), which typically consist of promises to provide national treatment; most favoured nation treatment; fair and equitable treatment; full protection and security; free transfer of capital flows; and compensation in the event of an expropriation. However, the unique and powerful feature in BITs is the right given to the foreign investor to enforce these international law guarantees directly against a host state in an international arbitration, without first having to go to local courts.[3] Neither is the investor required to involve its home state or to establish a contract with the host state; it can typically sue the host state directly for violations of the BIT itself. In fact, the protections afforded by a BIT are usually in addition to the normal contractual rights that the investor may have against its counterparty or protections available under the domestic legislation.

Pakistan is not new to BITs; in fact, it made history by signing the first BIT in the world with Germany on 29 November 1959.[4] BITs were conceived by western European countries to protect the property of investors in developing countries from arbitrary and unfair government practices in the 1950s, amidst fears of the impacts of decolonization and rise in communism. The Abs-Shawcross Draft Convention on Investments Abroad (1959), whose authors were the Chairperson of Deutsche Bank, Hermann Abs, and the former Attorney General of the United Kingdom, Lord Shawcross, was designed to respond to the investors' desire for security in newly independent countries.[5] Most BITs today reflect this fifty-year template formulated to solely protect investors. However, the recent rise in investor launched arbitrations under BITs have exposed the deficiencies in this model which has been criticized as being imbalanced and outdated for the needs of the twenty-first century. There are no BITs between developed countries[6] largely due to the mutual confidence in each others' legal and political systems. Thus for example, the vast flows of foreign investment between the US and UK are not protected by a BIT.

While over 179 countries have signed BITs, a growing number of governments are questioning their effectiveness as investment promotion tools and are, instead, recognizing their impact as international law controls on the government's regulatory powers. For example, Brazil signed several BITs during the 1990s but has opted not to ratify these treaties. South Africa recently conducted a review of its BIT programme. Ecuador has decided to terminate several of its BITs and has withdrawn its membership of the International Centre for Settlement of Investment Disputes (ICSID), the World Bank's facility which administers investor-state disputes.

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1. IIAs include 2750 BITs.

2. World Investment Report 2010—Overview (UNCTAD/WIR/2010[Overview])—released 22 July 2010, p. 21.

3. The vast majority of BITs provide investors direct course to international arbitration for treaty violations without first going through local courts. However, there are BITs, albeit in the minority, that do not contain an investor-state arbitration clause (for example, the Germany-Pakistan BIT of 1959) or require the investors to attempt or exhaust local court proceedings before bringing an international arbitration claim.

4. The two countries entered into a new BIT on 01 December 2009, whose coming into force will replace the earlier BIT.

5. Proposals for the negotiation of a multilateral agreement to protect private foreign investment have been made from time to time since the end of the First World War. One of the most significant early efforts was launched by groups of European business people, and lawyers, under the leadership of Hermann Abs, Chairperson of the Deutsche Bank in Germany, and Lord Shawcross, former Attorney-General of the United Kingdom. The initiative began in 1957 when the Society to Advance the Protection of Foreign Investments, an organization of German business people, with headquarters in Cologne, published a draft instrument entitled International Convention for the Mutual Protection of Private Property Rights in Foreign Countries. That version was subsequently revised and, in April 1959, a Draft Convention on Investments Abroad was issued. The Draft Convention, which was under consideration by the Organization for European Economic Cooperation, was not adopted. The Draft Convention was accompanied by a commentary by the authors. Source: Intro and text from: UNCTAD, 'International Investment Instruments: A Compendium in United Nations', New York, 2000, Vol. V, p. 395.

6. This does not include regional or sectoral investment agreements such as the Energy Charter Treaty or investment chapters as part of broader economic arrangements, for example NAFTA.

The Rise of Investor Launched Arbitrations under BITs

Although BITs have been around since the late 1950s and early 1960s, the rise in the use of these treaties by investors to challenge host state measures is a phenomenon of this millennium. The first known claim by an investor challenging government measures occurred in 1987. This was *AAPL v. Sri Lanka*,[7] in which the owner of a shrimp farm was successful in its claim that the Sri Lankan military forces' pursuit of Tamil Tiger terrorists, which resulted in damage to its shrimp farm, had violated the guarantee of full protection and security in the UK-Sri Lanka BIT. The arbitral tribunal hearing the dispute ordered Sri Lanka to pay almost half a million dollars to compensate AAPL for the farm's destruction after Sri Lankan forces used combat action against Tamil Tiger separatists allegedly operating around the farm's environs. However, the last decade has seen an exponential growth in the claims and awards against states in investment treaty arbitrations. The overwhelming majority of these 357 known cases[8] were initiated by investors from developed countries, with developing and transition countries most often on the receiving end.[9] In 2009, the number of countries that have faced investment treaty arbitrations grew to eighty-one.

In March 2010, a tribunal found that delays in Ecuadorian courts in hearing certain commercial disputes had resulted in Ecuador's violation of the United States-Ecuador BIT and awarded Chevron and Texaco Petroleum Company approximately US$700 million in principal damages and interest pending further proceedings to determine applicable taxes, compound interest and costs.[10] Equally staggering are the amounts claimed by investors. Recently, Gold Reserve Inc. submitted a US$1.928 billion claim to ICSID arbitration against Venezuela for violation of the Canadian-Venezuela BIT.

Similarly, in a recent claim, *Saipem v. Bangladesh*,[11] the failure of the Bangladeshi courts to enforce an international arbitration agreement contained in Saipem's contract with the state-owned energy company Petrobangla, was held in violation of the expropriation provision in the Bangladesh-Italy BIT. The tribunal awarded damages to the investor, Saipem, finding that the Bangladeshi courts had illegally expropriated Saipem's right to have an ICC arbitral tribunal determine the residual value of its contract.

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7. *Asian Agricultural Products Limited v. Democratic Socialist Republic of Sri Lanka* (ICSID Case No. ARB/87/3), available at http://ita.law.uvic.ca/documents/AsianAgriculture-Award.pdf

8. The actual number is likely to be twice or even thrice as high because not all investment treaty arbitration proceedings are in the public domain.

9. World Investment Report 2010—Overview (UNCTAD/WIR/2010[Overview])—released 22 July 2010, p. 21.

10. Award dated 30 March 2010, http://www.chevron.com/news/press/release/?id=2010-03-30.

11. Saipem Spa v. Peoples Republic of Bangladesh, ICSID Arbitration no. ARB/05/7, 20 June 2009.

Pakistan's Experience with Investor-State Arbitrations brought under Bilateral Investment Treaties (BITs)

The above-mentioned cases against Ecuador and Sri Lanka have particular resonance for Pakistan as investors have voiced concerns about the Pakistani government's conduct in relation to combating terrorism as well as complaints about the arduously slow litigation in domestic courts. Today, Pakistan has 48 BITs,[12] of which 26 are in force.[13] Pakistan has faced at least four known investment treaty claims at ICSID. The total value of known claims brought against the Government of Pakistan by investors under BITs totalled nearly a billion US dollars.[14] The former Attorney General for Pakistan estimated that the costs of defending Pakistan in one such case alone would be over $5 million in 2004.[15] As all the obligations under the treaty are borne by the host state with investors only having rights, host states are able to defend the investor's claim, not bring a counter-claim. This is different from a commercial contract arbitration, which typically arises from a contract in which both investor and the state have rights and obligations, and thus a state can both initiate a claim as well as defend and counterclaim.

The odds in investment treaty arbitration are stacked in favour of the investor from the start. 'Winning' an arbitration for a state means that the investor's claim is dismissed on the merits. The best result the state can hope to achieve is recovering all of its costs of defending the arbitration, which, in fact, is rare. In fact, in most cases, states successful in dismissing the investor's claim have not been able to recover their legal costs.[16]

In 2001, the first known claim under a BIT was registered against Pakistan by the Swiss company Société Générale de Surveillance (SGS) under the Swiss-Pakistan BIT in relation to the Government of Pakistan's termination and non-payment of invoices arising out of a pre-shipment inspection agreement between SGS and the Pakistani government.[17] Approximately $112

12. Pakistan has signed 48 BITs with 47 countries. There are presently two signed BITs with Germany, in 1959 and 2009 respectively. However, upon coming into force the 2009 BIT will replace the 1959 agreement. This figure does not reflect any investment chapters in trade or broader economic agreements Pakistan may have concluded.

13. Based on data available from the UNCTAD Investment Treaty database and the Pakistan Board of Investment.

14. Pakistan has been on the receiving end of four known investor claims totalling over US$850 million arising out of BITs: (1) SGS *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13, Registered on 21 November 2001) (Award available) Status: Concluded; (2) *Impregilo SpA. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/02/2, Registered on 12 Feb 2002) (Award unavailable) Status: Concluded; (2) *Impregilo SpA. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3 Registered on 3 March 2003) (Award available) Status: Concluded; and (4) *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29, Registered on 1 December 2003) (Award available) Status: Concluded.

15. Quoted by *Daily Times* in Pakistan dated 18 May 2002, www.dailytimes.com.pk

16. Based on a survey of 54 arbitration awards in 'Cost awards: Are there significant differences between commercial and investment treaty arbitration', Dr Sebastian Seelman-Eggebert presented at the 15th ITF Public International Conference- Recent Developments in Investment Arbitration Procedure, London, September 2010.

17. On 29 September 1994, the Government of Pakistan entered into a pre-shipment inspection agreement ('the PSI Agreement') with SGS pursuant to which SGS agreed to provide pre-shipment inspection services with respect to goods to be exported from certain countries to Pakistan. The objective of the inspection was to ensure that goods were classified properly for duty purposes and to enable Pakistan to increase the efficiency of its customs revenues collection. On 12 December 1996, the Government of Pakistan notified SGS that the PSI Agreement was terminated with effect from 11 March 1997. The PSI Agreement had provided that all disputes relating to the agreement would be settled by arbitration in Pakistan under Pakistani law.

million in damages were claimed by SGS, however, the case was settled before the hearing on the merits, with SGS tendering an apology to the Pakistani government for the impact caused by the breach of SGS's internal controls (there were parallel corruption and bribery proceedings in relation to the contract with Pakistan), and paying Pakistan a certain amount towards the legal costs of defending the SGS arbitration at ICSID.[18]

The SGS episode was followed by the decision in the arbitration claim brought by the Italian company Impregilo for approximately US$450 million plus interest for violations of the Italy-Pakistan BIT.[19] Impregilo alleged that the Government of Pakistan had breached contracts relating to the construction of hydroelectric power facilities (the Ghazi Barotha project). The arbitral tribunal confirmed that it had jurisdiction to hear certain of Impregilo's claims against Pakistan. However, the claim was settled on terms that are not known to the public. It is rumoured that the Government of Pakistan on this occasion did pay Impregilo a substantial sum to settle this case.[20]

The Impregilo settlement was followed by the award in the long running arbitration claim brought by the Turkish investor Bayindir[21] in relation to its contract to build a six-lane motorway between Islamabad and Peshawar with the National Highway Authority (NHA). Bayindir claimed over US$400 million asserting that the termination of its contract by the NHA and its maltreatment by government agencies, including the armed forces, amounted to a violation of the Turkey-Pakistan BIT. The tribunal dismissed Bayindir's claim on the merits, however, both parties were left to cover their own costs. In this instance, even though Pakistan 'won' the case, it was left with substantial legal costs to fight the failed challenge, likely to be over US$5–8 million.

Pakistan has been left out of pocket for several million dollars in relation to the claims brought by foreign investors under BITs. This experience is not as detrimental as some other countries have faced in relation to BIT claims, for example, Argentina has faced 48 known claims from investors under its BITs in relation to the measures taken to contain a financial crisis. However, it reveals the exposure that Pakistan may face in relation to future investor challenges under its BITs.

SGS initiated a claim against Pakistan in the Swiss courts with respect to the termination of the PSI Agreement and non-payment of its invoices. The Swiss proceedings concluded with the Swiss Federal Tribunal's denial of SGS's appeal on 23 November 2000. On 11 September 2000, Pakistan commenced arbitration proceedings (the 'Pakistan Arbitration') in Pakistan enforcing the arbitration agreement in the PSI Agreement. SGS filed preliminary objections in the Pakistan Arbitration and a counter-claim against Pakistan for alleged breaches of the PSI Agreement. On 12 October 2001, SGS filed a Request for Arbitration with ICSID against Pakistan for violations of the Swiss-Pakistan BIT and the PSI Agreement. After commencing the ICSID proceedings SGS sought an injunction against the Pakistan arbitration in the Pakistani courts on 04 January 2002. SGS's application was rejected at various lower court levels until the matter finally reached the Supreme Court of Pakistan. On 03 July 2002, the Supreme Court granted Pakistan's request to proceed with the Pakistani arbitration and restrained SGS from participating in the ICSID arbitration. The Supreme Court of Pakistan noted that the Swiss-Pakistan BIT had no legal effect under Pakistani law as it had not been implemented into municipal law, and the parties' agreement to arbitrate in Pakistan should be enforced. The ICSID tribunal decided to proceed with hearing the matter notwithstanding the decision of Pakistani Supreme Court. On 12 November 2002, the sole-arbitrator in the Pakistan Arbitration agreed to stay proceedings until the ICSID tribunal determined whether it had jurisdiction to consider SGS's claims.

The tribunal found it had jurisdiction to decide SGS's claims of violations of the Switzerland–Pakistan treaty.

18. The SGS Press release in relation to the settlement stated: 'SGS has addressed a letter to the GOP expressing its sincere and profound regrets to the GOP for the breaches of its internal controls in 1994 and the impact that they have had on the GOP. As part of the settlement, SGS has agreed to pay a specified amount towards the legal expenses incurred by the Government of Pakistan in defending and prosecuting the civil cases.' Switzerland—06/05/04, Source: Settlement between SGS and the Government of the Islamic Republic of Pakistan (GOP).
http://www.sgs.com/sgs_and_the_government_of_the_islamic_republic_of_pakistan_gop_have_reached_an_amicable_settlement?viewId=1559

19. *Impregilo SpA v. Pakistan*, Decision on Jurisdiction, ICSID Case No. ARB/03/3.

20. It is rumoured that the Government of Pakistan paid approximately US$60–70 million to settle this case. There is no public statement in relation to the settlement of the claim. The author has relied purely on hearsay in relation to the payment by the Government of Pakistan to settle the claim, and this information should be interpreted in that context.

21. Award, *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan*, (ICSID Case No. ARB/03/29), is available at:
http://ita.law.uvic.ca/documents/Bayandiraward.pdf

This is critical because BITs typically cover all types of government conduct, including acts of the legislature, executive, military and judiciary, and at all levels of government, local, provincial, and federal. The rise in investor challenges under BITs is testing the boundaries of state regulatory powers under the broad and absolute guarantees of protection contained in these treaties. Recently, the types of government conduct challenged by investors have included measures designed to protect the environment, labour rights, public health and safety. Investors have also challenged regulations aimed at protecting human rights (*Glamis v. USA*);[22] redressing social inequalities from the apartheid era (*Foresti v. South Africa*);[23] public health and safety (*Chemtura Corporation v. Canada* the investor challenged measures to phase–out the toxic agro–chemical Lindane);[24] the environment (*Clayton v. Canada*[25] investor challenged environmental assessment process they were required to undergo in respect of their assessment in a basalt mining industry); and cigarette smoking warning controls challenged as an infringement of Intellectual Property Rights (IPRs) (*Philip Morris v. Uruguay*).[26]

The claim by the tobacco company Philip Morris filed in February 2010 against Uruguay is being touted as a test case for deciding the competing interests of defending public health and protecting the investments of a multinational corporation. Phillip Morris is alleging that Uruguay's new anti-tobacco legislation violates the Swiss-Uruguay BIT. Philip Morris claims include that the Uruguay government's measures are unjust and have an expropriatory effect on the company's trademark and market share. Uruguay's anti-smoking measures include stamping-out descriptions such as 'mild' or 'light' from cigarette labelling; limiting each brand to one variant (e.g. only Marlboro Red); and ordering that health warnings cover 80% of pack. Philip Morris is seeking the suspension of government regulatory measures as well as compensation.

The challenge of public regulatory measures before arbitral tribunals under the vague and broad guarantees contained in BITs has revealed defects in the traditional template used in most BITs. As a result, a number of countries are reviewing their BIT programmes to ensure that the protection guarantees for foreign investments are framed in a balanced, predictable manner, which do not impinge upon a state's regulatory powers to protect public interest. Unfortunately, Pakistan's BIT programme remains tied to the old template, characterized by broad guarantees, and there appears to be no news of a review of the BIT programme by the government. This means that Pakistan's current 48 BITs, of which 26 are in force, continue to provide powerful and virtually absolute protection to foreign investments that are covered by a BIT in force.

22. *Glamis Gold Ltd. v. The United States of America*, (UNCITRAL/NAFTA, Final Award, 8 June 2009).

23. *Piero Foresti, Laura de Carli & Others v. The Republic of South Africa*, ICSID Case No. ARB(AF)/07/01, (Final Award, 4 August 2010).

24. *Chemtura Corp. v. Government of Canada* (UNCITRAL, Final Award, 2 August 2010).

25. *Clayton Family & Bilcon of Delaware v. Canada* (pending as of 27 September 2010, http://www.international.gc.ca/trade-agreements-accords-commerciaux/disp-diff/clayton_archive.aspx?lang =en)

26. ARB/10/7 *FTR Holding S.A. (Switzerland), Philip Morris Products S.A. (Switzerland) and Abal Hermanos S.A. (Uruguay) v. Oriental Republic of Uruguay* (pending).

TABLE 1

INVESTOR-STATE DISPUTES AGAINST PAKISTAN AT ICSID

Concluded	Pending	Total
5	0	5

Date Registered	Case	Subject	Status	Award
07 October 1987	*Occidental of Pakistan, Inc. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/87/4)[27]	Petroleum concession	Outcome of Proceeding: Settlement agreed by the parties and proceeding discontinued at the request of the Claimant (Order taking note of the discontinuance issued by the Tribunal on 27 January 1989 pursuant to Arbitration Rule 44).	Unavailable
21 November 2001	SGS *Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/01/13) under the Switzerland-Pakistan BIT	Service agreement	Outcome of Proceeding: Settlement agreed by the parties and proceeding discontinued at their request (Order taking note of the discontinuance issued by the Tribunal on 23 May 2004 pursuant to Arbitration Rule 43(1)).	Available
12 February 2002	*Impregilo SpA. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/02/2) under the Italy-Pakistan BIT	Construction project	Outcome of Proceeding: The Secretary-General issues an order taking note of the discontinuance of the proceeding pursuant to Arbitration Rule 44 on 11 June 2002.	Unavailable
03 March 2003	*Impregilo SpA. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/3) under the Italy-Pakistan BIT	Hydropower project	Settlement agreed by the parties and proceeding discontinued (Order taking note of the discontinuance issued by the Tribunal on 26 September 2005 pursuant to Arbitration Rule 44).	Available
01 December 2003	*Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan* (ICSID Case No. ARB/03/29) under the Turkey-Pakistan BIT	Highway construction contract	Concluded: Award rendered on 27 August 2009. Decision on Jurisdiction (14 November 2005) English (Original)	Available

Source: Data from www.worldbank.org/icsid as at 21 October 2010

27. It is not known if this claim was based on investment treaty or a contract between the investor and the Government of Pakistan.

3

Pakistan's BIT Programme

Pakistan has signed 48 BITs with 47 countries, of which at least 26 treaties are in force. The majority of Pakistan's BITs were signed in 1990s. However, it was not until 2006 that Pakistan created its own model BIT, although, a text of a model is not publicly available, and it is not known if it has had any impact on negotiations. Further, Pakistan's BITs have been signed by different government representatives and departments over the years, suggesting a lack of central control over the process.

This appears to support the former Attorney General of Pakistan's statement that BITs may have been signed in the past as ceremonial gestures accompanied by

unsophisticated negotiations, '…*without knowledge of their implications. And when you are hit by the first investor-state arbitration you realise what these words mean*.'[1]

According to the Pakistani Board of Investment, the top five investors in Pakistan during the 2009–10 fiscal year (in order of priority) were the United States of America (USA), UK, Switzerland, UAE, and Hong Kong SAR. Pakistan has BITs with the UK, Switzerland, China, and the UAE, although, it is unconfirmed if the BIT with UAE is in force. Negotiations for a BIT with Pakistan's largest investor, the USA commenced in 2004. United States officials have often voiced their concerns about the inadequate protection of American investors in Pakistan, particularly in the context of weak contractual enforcement within the legal system. The much-publicised *Siemens Westinghouse* dispute,[2] in which the Pakistani courts did not enforce an arbitration award in favour of the US party, raised a red flag for existing US investors,[3] who were lobbying for strong international guarantees in a BIT with Pakistan based on the US Model BIT (2004). However, the broad scope of the US Model BIT (2004), the basis on which negotiations were to be conducted, included market access provisions, as well as the traditional post-establishment protections found in Pakistan's BITs. The US-Pakistan BIT negotiations were conducted in the aftermath of the four known BIT claims, resulting in the then Attorney General's office adopting a cautious approach to BITs. The suspension in US-Pakistan BIT negotiations is also due to the review process underway in the United States of its model BIT.

There appears to be a deliberate pause in Pakistan's BIT policy in 2004 until 2009. However, on 01 December 2009, Germany was successful in inking a BIT with a new government in Pakistan just before the Lisbon Treaty transferred competence on FDI from EU member states to the European Union. Germany's earlier BIT with Pakistan did not contain the investor-state arbitration mechanism which gives BITs their famous 'bite' and prowess. It is not known if the Pakistani government is negotiating more BITs, or whether the German one was an exception.

TABLE 2

PAKISTAN'S BILATERAL INVESTMENT TREATIES[4]

No.	Partner Country	Signing Date	Date of Entry into Force
1	Germany*	25-Nov-59	28-Apr-62
2	Sweden	12-Mar-81	14-Jun-81
3	Kuwait	17-Mar-83	15-Mar-86
4	France	01-Jun-83	14-Dec-84
5	Korea Rep	25-May-88	15-Apr-90
6	Netherlands	04-Oct-88	01-Oct-89
7	China	12-Feb-89	30-Sep-90
8	Uzbekistan	13-Aug-92	~
9	Spain	15-Sep-94	26-Apr-96
10	Turkmenistan	26-Oct-94	~
11	United Kingdom	30-Nov-94	30-Nov-94
12	Singapore	08-Mar-95	04-May-95
13	Turkey	16-Mar-95	03-Sep-97
14	Portugal	17-Apr-95	14-Dec-96
15	Romania	10-Jul-95	08-Aug-96
16	Switzerland	11-Jul-95	06-May-96
17	Malaysia	17-Jul-95	30-Nov-95
18	Kyrgyzstan	25-Aug-95	~
19	Azerbaijan	09-Oct-95	~
20	Bangladesh	24-Oct-95	~
21	UAE	05-Nov-95	~
22	Iran	08-Nov-95	27-Jun-98
23	Czech Republic	17-Dec-95	~
24	Indonesia	08-Mar-96	03-Dec-96
25	Tunisia	18-Apr-96	~
26	Syrian Arab	25-Apr-96	04-Nov-97
27	Denmark	18-Jul-96	25-Sep-96
28	Belarus	22-Jan-97	~
29	Mauritius	03-Apr-97	03-Apr-97
30	Italy	19-Jul-97	27-Jun-01
31	Oman	09-Nov-97	14-May-98
32	Sri Lanka	20-Dec-97	05-Jan-00
33	Australia	07-Feb-98	14-Oct-98
34	Japan	10-Mar-98	29-May-02
35	Belgium	23-Apr-98	~
36	Qatar	06-Apr-99	~
37	Philippines	23-Apr-99	~
38	Yemen	11-May-99	~
39	Egypt	16-Apr-00	~
40	Lebanon	09-Jan-01	28-Mar-03
41	Morocco	16-Apr-01	~
42	Bosnia	04-Sep-01	~
43	Bulgaria	12-Feb-02	~
44	Kazakhstan	08-Dec-03	~
45	Laos	23-Apr-04	~
46	Cambodia	27-Apr-04	~
47	Tajikistan	13-May-04	~
48	Germany	01-Dec-09	~

*This will be replaced when the Germany-Pakistan BIT dated 01 December 2009 comes into force

TABLE 3

DIFFERENT GOVERNMENT AGENCIES AND DEPARTMENTS INVOLVED IN SIGNING PAKISTANI BITS

No.	Authority	No. of BITs Signed	Countries & Signed Dates
1	President of Pakistan delegation	01	France (01-01-1983)
2	Prime Minister of Pakistan	01	United Kingdom (30-11-1994)
3	Minister of Foreign Affairs	04	Spain (15-09-1994), UAE (05-11-1995, Denmark(18-07-1996), Mauritius(03-03-1997)
4	Minister for Commerce	01	Egypt (16-04-2000)
5	Minister for Investment & Privatization	03	Kazakhstan (08-12-2003), Cambodia (27-04-2004) Laos (08-12-2004), Germany (01-12-2009)
6	Ambassador of Pakistan in Kuwait	01	Kuwait (17-03-1983)
7	Ambassador of Pakistan in Bosnia	01	Bosnia (04-09-2001)
8	Ambassador of Pakistan in Belarus	01	Belarus (22-01-1997)
9	Secretary Foreign Affairs	01	Germany (25-11-1959)
10	Special Secretary to Prime Minister for Economic Sector	02	Syrian Arab (25-04-1996), Indonesia (08-03-1996)
11	Secretary Ministry of Industries and Production	03	Italy (19-07-1997), Switzerland (11-07-1995), Singapore (08-03-1995)
12	Secretary Economic Affairs Division	01	Tunisia (18-04-1996)
13	Secretary General Finance and Economic Coordination	01	Romania (21-01-1978)

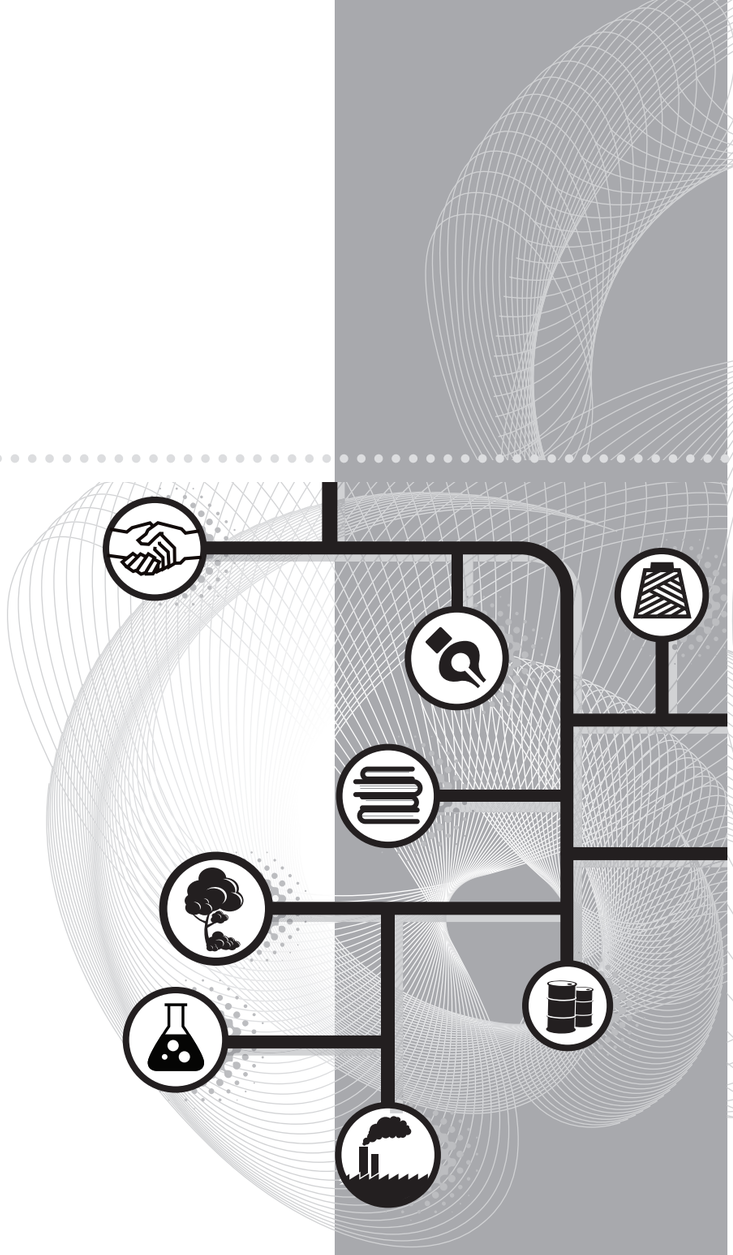
1. Pakistani Attorney General Advises States to Scrutinise Investment Treaties Carefully, Investment Treaty News, 01 December 2007.

2. *Wak Orient Power and Light Limited v. Westinghouse Electric Corporation and others* (2002 SCMR 1954 Supreme Court of Pakistan).

3. The Country Commercial Guide for Pakistan 2003 released by the US and Foreign Commercial Service and the US State Department described the *Siemens Westinghouse* case as:'a longstanding investment dispute between a major US multinational and local partner over a contractual obligation has raised concerns about the sanctity of contractual international arbitration clause between private parties. Despite a clear ruling by the International Chamber of Commerce in favour of the US investors a number of years ago, the local parties continue to actively litigate the matter in Pakistani courts.'

4. The table has been prepared using data from the Pakistan Board of Investment and the UNTCAD Investment Treaty Database.

4



The International Law Guarantees Contained in Pakistan's BITs

Pakistan's BITs typically contain broad and extensive protections for the investments of investors from the other treaty party.[1] However, the language of each treaty should be considered carefully to confirm the legal rights it provides to investors, as even subtle differences in language can have implications on the scope of protection offered.

Although the obligations in BITs are reciprocal, Pakistan is likely to be the state hosting the investment, and thus giving the guarantees; as it is a capital importer in most cases. The guarantees in Pakistan's BITs are broader than the limited protections provided in the Foreign Private Investment (Promotion & Protection) Act 1976 (which is

set out in Annex 1). This book provides a brief introduction to the guarantees using the provisions of the UK-Pakistan BIT as an example.[2] The texts of the UK-Pakistan and Germany-Pakistan BITs are set out in Annexes 2 and 3.[3]

Who Can Claim the Guarantees under a BIT?

First, a BIT must be signed and in force between the two treaty parties. BITs are only available to foreign investors, not to domestic investors against their own government. The entity or person claiming rights under the BIT must meet the criteria of an 'investor' in the treaty, who is defined typically to cover natural persons that are citizens of the home state and business concerns registered or organized under the laws of the home state. The range of business entities covered often stretches to, for profit; not for profit and government-owned bodies; and can include partnerships, sole proprietorships and companies. Often, the mere fact of registration of a business entity in a country is sufficient without the need to establish actual or substantial business operations in the country. However, there are some BITs that do require 'real' or actual business operations in the home state in addition to registration.[4] There is also generally no requirement to show that the nationals or citizens of the country own or control the business entity in the country in which it is established. This has led to the practice of 'treaty shopping' where citizens of a third country, and at times even those from the host state, establish shell companies in another country to benefit from a BIT between that country and the host state.

The UK-Pakistan BIT protections for both 'nationals' and 'companies' are as follows:

(c) 'nationals' means:
- (i) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;
- (ii) in respect of Pakistan: physical persons deriving their status as Pakistan nationals from the law in force in Pakistan;

(d) 'companies' means:
- (i) in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12.

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1. Based on information obtained from a review of 32 BITs signed by Pakistan with the following countries:
Germany, Sweden, Kuwait, Korea, Netherlands, China, Turkmenistan, United Kingdom, Singapore, Turkey, Romania, Kyrgyzstan, Azerbaijan, Indonesia, Tunisia, Syrian Arab, Denmark, Portugal, Belarus, Mauritius, Italy, Oman, Sri Lanka, Australia, Japan, Belgium, Philippines, Yemen, Egypt, Lebanon, and Morocco (together termed as 'the Pakistani BITs').

2. This is not intended to provide an exhaustive review of the protections in BITs but to introduce some of the key guarantees therein. References are also made to other Pakistani BITs at times.

3. The annex contains typed text from the treaties, and therefore the accuracy is not guaranteed and should not be relied upon. The actual text of the treaties may be obtained from the UNCTAD investment treaty database, www.unctadxi.org

4. For example, the Switzerland-Pakistan BIT requires real economic activities in the home state of the registered or constituted entity.

What Types of Assets or Property are Protected by a BIT?

The international law guarantees in a BIT are given to the 'investments' of an investor. The definition of an 'investment', protected by a BIT, usually extends well beyond what is traditionally considered 'foreign direct investment', and is broader than the guarantees available in the Pakistani legislation protecting foreign investment, the Foreign Private Investment (Promotion & Protection) Act 1976 ('1976 Act'). Article 2 of the 1976 Act states:

> *Foreign Private Investment means an industry, undertaking, or establishment engaged in the production, distribution or processing of any goods, the providing of services specified in this behalf by the Federal Government or the development and extraction of such mineral resources and products as may be specified in this behalf by the Federal Government.*

In contrast, and although the precise language might vary, Pakistani BITs typically define investment to mean 'every kind of asset', and explicitly include cover for the following categories of assets:

- Movable and immovable property as well as any other rights in *rem*, such as mortgages, liens, and pledges
- Shares of companies and other kinds of interest in companies
- Claims to money which have been used to create an economic value or claims to any performance having an economic value
- Intellectual property rights
- Business concessions under public law, including concessions to search for, extract, and exploit natural resources

For example, the South Korea-Pakistan BIT provides:

> (3) the term 'investment' shall mean every kind of asset, including, in particular, but not exclusively:
>
> a. movable and immovable property and any other property rights such as mortgages, liens or pledges;
> b. shares, stock and debentures of companies wherever incorporated or interests in the property of such companies;
> c. claims to money or to any performance under contract having a financial value;
> d. intellectual property rights;
> e. business concessions conferred by law or under contract, including concluding concessions to search for, cultivate, extract or exploit natural resources.

This is virtually identical to the definition in the UK-Pakistan BIT:

> For the purposes of this Agreement:
>
> a) 'investment' means every kind of asset acquired in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:
>
> (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
>
> (ii) shares in and stock and debentures of a company and any other form of participation in a company;
> (iii) claims to money or to any performance under contract having a financial value;
> (iv) intellectual property rights, goodwill, technical processes and know-how;
> (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

> A change in the form in which assets are invested does not affect their character as investments and the term 'investment' includes all investments, whether made before or after the date of entry into force of this Agreement.

The broad definition of investment in BITs covers a range of assets, including commercial contracts and transactions, which are not commonly associated with FDI. Pakistani BITs also cover intellectual property rights *per se*, without any requirement that these intellectual property rights be connected to an investment operating in the host state. The availability of BIT protections for intellectual property rights has come under increasing criticism as they are seen as imposing a WTO TRIPs-Plus standard.[5] At present, copyright enforcement in Pakistan is weak. According to the US State Department, Pakistan is one of the world's leading producers and exporters of pirated optical discs. Further, a license, authorisation, permit and similar rights conferred under domestic law in itself could be an investment under the BIT if it creates rights under domestic law.

In case the investor is bringing the claim to ICSID arbitration, then the investment must also meet the criteria of an investment under the ICSID Convention. However, the ICSID Convention does not define 'investment', leaving it to arbitral tribunals to do so on a case-by-case basis. ICSID tribunals have defined 'investment' broadly to include a diverse selection of economic activity ranging from the provision of loans to construction, mining, production, exploration and distribution ventures.

The following ventures have all been held to constitute investments within the meaning of the ICSID Convention:

- Acceptance of promissory notes where a State issues them as an acknowledgment of its debt to a company but fails to make repayments (Fedax NV *v.* Republic of Venezuela);
- The construction and operation of hotels where a State fails to provide promised financing or seizes control of the enterprise (Holiday Inns SA *v.* Morocco & Amco Asia Corporation *v.* Republic of Indonesia);
- The cultivation of crops and the construction of a textile factory where a State fails to pay for materials invoiced in accordance with the project agreement (Adriano Gardella SpA *v.* Cote d'Ivoire);
- The construction and management of a fertiliser factory where a State has, in breach of contract, failed to pay construction costs (KlocknerIndustrie-Anlagen GmbH *v.* United Republic of Cameroon);
- The mining of bauxite where a State raises a production levy in breach of a 'no further tax' agreement (Alcoa Minerals of Jamaica Inc. *v.* Jamaica);
- An oil distribution venture where a State fails to comply with the terms of a share purchase agreement (Agip SpA *v.* The People's Republic of Congo);
- A bottle manufacturing and mineral water production venture where a State fails to meet its obligation to contribute share capital and subsequently expropriates the investor's property (SARL Benvenutti and Bonfant *v.* The People's Republic of Congo).

5. Bilateral investment agreement: Agents of new global standards for the protection of intellectual property rights? By Carlos M. Corra, August 2004, www.grain.org

Closer to home, in the SGS claim against Pakistan, the ICSID tribunal held that the pre-inspection customs services agreement constituted an investment. The tribunal noted that the definition of investment in the Switzerland-Pakistan BIT is broad, including 'every kind of asset', and in particular covers 'claims to money or any performance having economic value' and concessions under public law as well as 'all other rights given by law, by contract, or by decisions of the authority in accordance with the law.' The tribunal found that SGS made certain expenditures in the territory of Pakistan to carry out its obligations under the PSI Agreement which constituted an investment under the Switzerland-Pakistan BIT. Further, that the PSI Agreement amounted to a concession under public law within the BIT's definition of investment.

The tribunal's finding indicates the importance of defining 'investment' in investment treaties. As is clear from the present case, a broad definition can be interpreted to cover a broad range of activities and expenditures made by investors, including in this instance, a contract for services under which Pakistan had hired SGS's services for a period of time. Pakistan has attempted to exclude services contracts from the definition of investment under the 2009 Pakistan-Germany BIT. BITs typically cover both existing investments made prior to the BIT coming into force as well future ones.

What Type of Government Conduct Can Investors Challenge under a BIT?

Bilateral Investment Treaties (BITs) do not usually define what acts are to be attributed to the host state. As a result, there is sometimes argument over whether the acts of state governments of a federal state, or entities such as nationalised corporations, are the responsibility of the national government. However, the International Law Commission's (ILC) articles on state responsibility state that:

> The conduct of an organ of an entity which is not part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.

For example, in a recent ICSID case relating to Argentina, the tribunal's finding was consistent with the ILC articles. It held that:

> Under international law, and for the purposes of jurisdiction of this Tribunal, it is well established that actions of a political subdivision of a federal state, such as the Province of Tucuman in the federal state of the Argentine Republic, are attributable to the central government. It is equally clear that the internal constitutional structure of a country cannot alter these obligations.[6]

6. *Compana de Aguas v. Argentine Republic* 40 ILM (2001) 457.

What Are the International Law Guarantees Available under Bilateral Investment Treaties (BITs)?

Although certain rights are common to most treaties, it is always necessary to check the wording of any particular treaty since, often, there are important differences. Typically, BITs provide broader protections for the investor than are available under customary international law as well as domestic laws. Some common protections are set out below:

- Protection against breach of the investment contract
- Full protection and security for the investment
- Fair and equitable treatment
- Most favoured nation treatment for the investment
- National treatment for the investment
- Compensation for losses due to war or riot
- Protection against expropriation or nationalisation
- Rights to repatriate investment and returns
- Right to international arbitration for violation of the treaty provisions

This broad menu of rights in BITs is becoming increasingly controversial because foreign investors will often have better rights than domestic investors. Essentially, although BITs were designed to remove discrimination against foreigners, they appear to have overstretched themselves in giving more powerful rights and guarantees to foreigners over nationals. For example, the 1976 Act offers a very limited range of rights, including the repatriation of the original capital and profits subject to the Foreign Exchange Regulation Act, 1947; equal treatment to foreign nationals in relation to the application of laws, rules and regulation, relating to importation and exportation of goods; and 'adequate compensation' if the foreign investment is acquired under the due process of law. The rights under the 1976 Act can be enforced through the domestic courts, and do not provide for access to international tribunals. The rights under the 1976 are much narrower than the ones available under Pakistan's BITs.

The 'Fair and Equitable' Treatment Guarantee

The majority of Pakistani BITs include a guarantee by the host state to provide fair and equitable treatment.[7] Fair and Equitable Treatment (FET) clauses are common features in BITs, however, this apparently simple, commonly used phrase has emerged as a broad 'catch up' provision to capture a broad range of state conduct, and hence its scope is highly controversial. Tribunals have interpreted the FET provision in treaties to go beyond the customary international law minimum standard of treatment for aliens. Thus, not only has it been interpreted to oblige host states not to take any arbitrary, grossly unfair or discriminatory measures against foreign investments, but also to provide a transparent and predictable regulatory and legal framework for the investment and respect the legitimate expectations upon which the investors relied when they made their investment. The FET standard is applied to both executive conduct as well as judicial decisions. Denial of justice can arise from a failure to entertain suit;

7. Based on a sample of 25 out of 31 BITs reviewed by the author.

undue delay; inadequate administration of justice; or a clear and malicious misapplication of the law.[8]

In the Pakistani context acute delays or lack of due process in executive or judicial decision-making could expose the country to a violation of this guarantee.

A range of executive measures, including revocation of a licence or permit and a sharp change in regulations, have been held to trigger a breach of the FET provision. For example, In *Occidental v. Ecuador* (2004), the tribunal found that Ecuador had breached the standard when its tax agency decided that Occidental Exploration and Production Company was not entitled to claim reimbursement for VAT on oil exports, despite the fact that it had been so entitled when it originally made its investment. The tribunal found that Ecuador's failure to provide a stable and predictable regulatory framework violated both the general international law and treaty standard.

The Switzerland-Pakistan BIT provides:

Article 4: Protection, Treatment

(2) Each Contracting Party shall ensure fair and equitable treatment within its territory of the investments of the investors of the other Contracting Party. This treatment shall not be less favourable than that granted by each Contracting Party to investments made within its territory by its own investors, or than that granted by each Contracting Party to the investments made within its territory by investors of the most favoured nation, if this latter treatment is more favourable.

The UK-Pakistan BIT provides:

Article 2: Promotion and Protection of Investment

(2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory of nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

Full Protection and Security Guarantee

The majority of the Pakistani BITs contain the protection and security guarantee.[9] This obligation concerns failures by the host state to protect the investor's property from actual damage caused by either miscreant state officials, or by the actions of non-state actors, where the state has failed to exercise due diligence. Violation of the standard is found where a host state fails to take reasonably expected protective measures to prevent damage. There is no express reference to the minimum customary international law standard regarding full protection and security in the Pakistani BITs, leaving tribunals the discretion to impose a much higher standard. In the *AAPL v. Sri Lanka* case, damage to a shrimp farm in combat action involving Sri Lankan military forces and terrorists in the environs resulted in a violation of the guarantee, as the tribunal

8. *Azinian, Davitian & Baca v. United Mexican States* (Award) 5, ICSID, Rep. 269 (NAFTA, 1998, Paulsson P. Civiletti & von Wobeser).

9. Approximately 68% (21 out of 31 Pakistani BITs reviewed by the author).

found that Sri Lanka had failed to exercise the due diligence required by this international law guarantee to ensure investments were not harmed. Neither party could prove whether insurgents or security forces caused the damage. On the basis of the full protection and security clause in the UK-Sri Lanka BIT, the tribunal held that Sri Lanka had violated this obligation by not taking all possible measures to prevent the killings and destruction of investment, including appropriate precautionary measures. The tribunal held the full protection and security term must be given its 'natural and obvious' meaning.

In *AMT v. Zaire,* the investor incurred losses as a result of looting and destruction of its property caused by Zairian soldiers during riots and acts of violence in Kinshasa. The tribunal found that Zaire had taken no action whatsoever to protect the claimant's property. Therefore, it was of little or no consequence whether the acts complained of were committed by a member of the Zairian armed forces or a common burglar. Zaire had an 'obligation of vigilance' and accordingly, its responsibility was invoked for a failure to provide full protection and security and for losses owing to riots or acts of violence.

In the current security atmosphere in Pakistan, where foreign concerns are often targeted by terrorists and mobs, the adequacy of the Pakistani security forces' conduct with respect to precautionary measures to prevent such damage can be challenged by investors under the full protection and security guarantee in BITs.

The China-Pakistan BIT provides:

Article 3:

(1) Investments and activities associated with investments of investors of either Contracting Party shall be accorded equitable treatment and shall enjoy protection in the territory of the other Contracting Party.

The Japan-Pakistan BIT provides:

Article 5:

Investments and returns of investors of either Contracting Party shall receive the most constant protection and security within the territory of the other Contracting Party.

The UK-Pakistan BIT provides:

Article 2: Promotion and Protection of Investment

(2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, or disposal of investments in its territory of nationals or companies of the other Contracting Party.

Compensation for Losses due to War or Riot

If an investor suffers losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection, riot, or by military requisition, most BITs provide that the investor's compensation should be no less favourable than the host state accords to its own nationals or companies of any third state. Further, in the event that the armed forces' conduct results in the requisition or destruction of the investment, the investor may be entitled to compensation irrespective of how local or third country investors are treated. For example, Article 4 of the UK-Pakistan BIT provides:

Article 4: Compensation for Losses

(1) National or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection of riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State. Resulting payments shall be freely transferable.

(2) Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from:

a) requisitioning of their property by its forces or authorities, or;
b) destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

Protection Against Breach of a Contract by the State

Approximately a third[10] of Pakistani BITs include a guarantee by the host state to observe any legal obligation it has entered into with foreign investors or in relation to their investments. While they remain controversial, a number of tribunals have confirmed that the effect of these so-called "umbrella" clauses is that a breach by the State of a contract or licence entered into with a foreign investor may also amount to a breach of treaty, attracting international law remedies and procedures.

The UK-Pakistan BIT provides:

Article 2: Promotion and Protection of Investment

Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

National Treatment Guarantee for the Investment

This provision guarantees the investor treatment no less favourable than that which a Host State accords to its nationals in relation to their respective investments. Foreign investors must be treated equally with local competitors. Host states cannot offer more favourable conditions to their own nationals or companies, or place more onerous conditions on foreign investors. This means if domestic investors are given a benefit by the government, foreign investors need to be provided the same, for example a bail-out package or tax relief. Similarly, the government cannot impose more onerous measures on foreign investors, for example, higher taxes or regulatory requirements.

10. Ten out of thirty-one Pakistani BITs reviewed.

The Japan-Pakistan BIT provides:

Article 3:

Investors of either Contracting Party shall within the territory of the other Contracting Party be accorded treatment no less favourable than that accorded to investors of such other Contracting Party in respect of investments, returns and business activities in connection with the investment.

Most Favoured Nation (MFN) Treatment Guarantee for the Investment

Host states often promise not to treat investors of any third state any better than investors of the home state. The practical effect of this is that investors may be able to rely upon more favourable commitments in other treaties entered into by the host state. In *Bayindir v. Pakistan*, the investor was successful in importing a fair and equitable clause from the Switzerland-Pakistan BIT as this was missing in the Turkey-Pakistan BIT. Investors may also be able to benefit from more favourable dispute settlement procedures in other treaties (although this is highly controversial). The effect of such a provision is to increase the level of protection to the best provided by the host state to nationals of any other state. This makes it critical for the government to be careful in negotiating guarantees in each treaty negotiation as investors from third countries may be able to benefit from these if the treaties with their home countries have a MFN clause.

Pakistani BITs usually exclude privileges granted to investors of third states due to a customs union, a regional integration treaty or an FTA or pursuant to a double taxation convention or other agreements regarding matters of taxation from the guarantee to provide most favoured nation treatment.

The UK-Pakistan BIT provides:

Article 3: National Treatment and Most-favoured-Nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns of nationals or companies of any third state.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third state.

Compensation for Expropriation Guarantee

All of the Pakistani BITs contain a guarantee that compensation will be provided in the event the government expropriates the investment. This is also reflected in the 1976 Act. A core concern for foreign investors is the redress available to them in the event that their property is '*nationalized*' or '*expropriated*' by the government of the state hosting their investment. Pakistani BITs state that 'expropriation' and 'measures tantamount to expropriation' may only take place for public benefit and against compensation.

This provision guarantees protection from expropriation or nationalisation without compensation. It is a common feature of BITs to promise investors market or genuine value compensation in the event of an expropriation or nationalisation of their investment. Generally, expropriation is not prohibited, provided that it is:

1. for a public purpose;
2. non-discriminatory;
3. in accordance with due process; and
4. subject to prompt, adequate and effective compensation.

The expropriation guarantee has also been interpreted to protect against 'indirect' forms such as 'regulatory' expropriation without appropriate compensation. This is a highly controversial area of law, as its tests whether regulatory measures of general application taken in the public interest that erode the value of a foreign investment are an expropriation and therefore compensable, or whether they are outside the scope of this provision.

In the case of *Metalclad Corporation v. United Mexican States*,[11] a case brought pursuant to the NAFTA, an ICSID tribunal adopted a very broad definition of expropriation. Metalclad had been granted approvals to construct and operate a hazardous waste landfill by the federal authorities in Mexico. The local authorities, however, refused to grant a construction permit and then obtained an injunction to prevent operation of the landfill. Metalclad claimed that the actions of the Mexican state and its municipal authorities breached, among other things, the expropriation provisions of the NAFTA (Article 1110). The tribunal took the view that expropriation includes:

> Covert or incidental interference with the use of property which has the effect of depriving the owner, in whole or in significant part, of the use or reasonably-to-be-expected economic benefit of property even if not necessarily to the obvious benefit of the Host State.

Metalclad espoused the so-called sole effects doctrine which looks at the impact of the host state measure on the investment rather than the motivation behind the regulatory measure. Recent treaties increasingly specify that regulatory measures of general application are not within the scope of the expropriation provision.[12]

The ICSID tribunal in *Goetz v. Burundi*,[13] the tribunal held that the revocation of Mr Goetz's licence to operate a precious metals business in a Free Trade Zone meant that Burundi had deprived the investor of a property right. Burundi, therefore, had to give back the licence or provide compensation.

Pakistani BITs also provide for the valuation of the compensation payable upon expropriation and precise terms vary, for example, 'prompt adequate and effective' and 'fair and just' compensation standards. However, they do not contain any carve-out for regulatory measures to the expropriation guarantee, and therefore the risk of expansive interpretations by tribunals remains under Pakistan's BITs.

The UK-Pakistan BIT provides:

> **Article 5: Expropriation**
>
> (1) Investments of nationals or companies of either Contracting Party shall not be nationalised, expropriated or subjected to measures having effect equivalent to nationalisation or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of that Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

11. Award of 30 August 2000, ICSID Case no. ARB (AF)/97/1.

12. For example, the ASEAN Comprehensive Investment Agreement.

13. 15 FILJ 2000.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.

Rights to Repatriate Investment and Returns

Bilateral Investment Treaties typically contain a provision guaranteeing the right of investors to transfer the investment and the returns on the investment into freely convertible currency. All of the Pakistani BITs reviewed contain a provision for the repatriation of funds relating to investments. This is independent of domestic law regulations. The limited right to repatriate capital and profits is subject to the foreign exchange regulations under the 1976 Act. The Pakistani BITs typically do not provide an exception to this obligation in a difficult balance of payments situation, which means that if the government does exercise controls in a financial crisis it may have to pay investors compensation for any loss caused due to the delays.

The Pakistan-Switzerland BIT provides:

Article 5: Free Transfer

Each Contracting Party in whose territory investments have been made by investors of the other Contracting Party shall grant those investors the free transfer of the payments relating to these investments, particularly of:

(a) interests, dividends, benefits and other current returns;
(b) repayments of loans;

(c) amounts assigned to cover expenses relating to the management of the investment;
(d) royalties and other payments deriving from rights enumerated in Article 1, Paragraph (2), letters (c), (d) and (e) of this Agreement;
(e) additional contributions of capital necessary for the maintenance or development of the investment;
(f) the proceeds of the sale or of the partial or total liquidation of the investment, including possible increment values.

Right of Investors to Bring an International Arbitration Claim Against Host State

Nearly all of the Pakistani BITs contain investor-state dispute resolution clauses. The investor-state dispute resolution clauses in the Pakistani BITs typically provide an investor the option to choose between ICSID or UNCITRAL arbitration to bring claims. BITs usually provide that disputes concerning the investment between the investor and host state will be referred to independent binding arbitration (often ICSID or UNCITRAL arbitration). The right to go to arbitration may only arise after attempts have been made to reach an amicable resolution or to pursue local remedies. This will depend on the wording of the treaty. It is generally accepted that, unless otherwise provided in the treaty, arbitration proceedings can be commenced without exhausting local remedies.

The Switzerland-Pakistan BIT provides:

Article 9: Disputes between a Contracting Party and an investor of the other Contracting Party

(1) For the purpose of solving disputes with respect to investments between a Contracting Party and an investor

of the other Contracting Party and without prejudice to of this Agreement (Disputes between Contracting Parties), consultations will take place between the parties concerned.

(2) If these consultations do not result in a solution within twelve months and if the investor concerned gives a written consent, the dispute shall be submitted to the arbitration of the International Centre for Settlement of Investment Disputes, instituted by the Convention of Washington of March 18, 1965, for the settlement of disputes regarding investments between States and nationals of other States.
Each party may start the procedure by addressing a request to that effect to the Secretary-General of the Centre as foreseen by Article 28 and 36 of the above-mentioned Convention. Should the parties disagree on whether the conciliation or arbitration is the most appropriate procedure, the investor concerned shall have the choice. The Contracting Party which is party to the dispute can, at no time whatsoever during the settlement procedure or the execution of the sentence, allege the fact that the investor has received, by virtue of an insurance contract, a compensation covering the whole or part of the incurred damage.

(3) A company which has been incorporated or constituted according to the laws in force on the territory of the Contracting Party and which, prior to the origin of the dispute, was under the control of nationals or companies of the other Contracting Party, is considered, in the sense of the Convention of Washington and according to its Article 25 (2) (b), as a company of the latter.

(4) Neither Contracting Party shall pursue through diplomatic channels a dispute submitted to the arbitration of the Centre, unless:
(a) the Secretary-General of the Centre or a commission of conciliation or an arbitral tribunal decides that the dispute is beyond the jurisdiction of the latter; or
(b) the other Contracting Party does not abide by and comply with the award rendered by an arbitral tribunal.

Recognition and enforcement of an ICSID award in the host state or in any other ICSID Contracting State should be easier than enforcement of other types of arbitration awards under the New York Convention. ICSID Contracting

States are not able to challenge awards in their courts and must enforce the pecuniary obligations of awards as if they were a final judgment of their own highest court. However, the ICSID Convention does not derogate from the laws in any Contracting State relating to sovereign immunity from execution of awards.

Duration and Termination Clause in Pakistan's BITs

All of the Pakistani BITs contain a duration and termination clause. The typical duration of most of the BITs is 10 years (although some extend to 15 or 20 years), with the term automatically extending thereafter until and unless one party terminates the BIT by giving notice. The standard notice period for termination is 1 year (although some BITs note 6 months). However, existing investments enjoy protection ranging from 10 to 20 years after the date of termination.

The UK-Pakistan BIT provides:

Article 14: Duration and Termination

The Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

5

Relationship between National Law and International Law Guarantees in BITs

The international law guarantees in BITs are in addition to and independent of domestic laws and courts.

It is a well establishment principle of international law that domestic law is not an excuse for breach of an international law commitment. For example, Pakistan cannot justify the breach of a guarantee in a BIT on the grounds that domestic law requires it to act in a manner contrary to the obligation under the treaty. This is to prevent states from amending domestic law to find a way out of their international law obligations. Neither are tribunals bound by orders of the domestic courts. This was clearly illustrated in the *SGS v. Pakistan* ICSID arbitration. The Supreme Court of Pakistan held that the neither the ICSID Convention nor the Swiss-Pakistan BIT had been implemented into national law and therefore were unenforceable. The ICSID tribunal hearing the SGS claim under the Swiss-Pakistan BIT continued with the arbitration proceedings regardless of the Pakistani Supreme Court Judgment.

The obligations that arise under BITs are subject to international law. Thus, Pakistan will not be able to rely on its national law to defend conduct that breaches the terms of a BIT, which will be governed by international law. International arbitral tribunals will decide whether Pakistan has violated a BIT. The obligations in a BIT apply to the executive legislative and judicial branches of the government at the provincial, national and local levels. They also extend to 'a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that [State] Party.'

6

Future Directions for Pakistan's BIT Programme: Balance between Investment Protection and State Policy Space?

The lessons that came to Pakistan in the form of expensive investment treaty claims early in this decade resulted in a temporary pause in negotiating BITs from 2004 to 2009.

However, with a newly elected government in 2008, the Germany-Pakistan BIT was signed amidst the pomp and flair of the Pakistani prime minister's visit to Germany on 01 December 2009 (not currently in force). Pakistan's abandonment of the previous government's policy to pause BIT negotiations, raises the question of whether the precious and expensive lessons learnt in defending the investment treaty arbitrations are now lost? While Pakistan has attempted to make some modifications to the guarantees in the 2009 Germany-Pakistan BIT in the light of its experience with investor-state disputes at ICSID, these changes have limited effect, and the traditional approach continues to dominate the substantive provisions.

However, this raises the critical question of whether Pakistan's ability to reformulate these provisions more effectively were due to a negotiating imbalance with Germany or the lack of international investment treaty drafting expertise within the government. At a time when a number of countries, for example South Africa, are questioning the investment treaty arbitration regime, and reviewing the rationale of their BIT programmes, there appears to be no similar activity within the Pakistani government. This is even more surprising as the majority of the studies analysing the links between investment inflows and conclusion of BITs is weak at best. So the trade off between government regulatory space in the hope of attracting greater investment remains unsupported by evidence. The largest investor in Pakistan is the United States of America, and yet these investment flows continue to come to Pakistan in the absence of a US-Pakistan BIT.

7

Conclusion

While the Pakistani BITs provide broad and powerful protections to foreign investors, they also provide significant restrictions on government policy space to regulate foreign investments, and create an uneven playing field between domestic and foreign investments, with the latter getting stronger rights than the former.

Pakistan has faced four known investment treaty claims, however, the exposure in view of the current economic and political conditions to BIT claims is significant. The government has been fortunate so far that more investors have not used BITs to negotiate the enforcement of guarantees therein. This does not mean that the government should wait for more claims before reviewing its BIT policy, instead, it should: (a) consider the scope of its obligations under BITs, and bear in mind that acts of the judiciary, legislature, executive and even

armed forces can violate the guarantees under BITs; and (b) strengthen the domestic legal system and ensure that investor concerns are responded to in the domestic legal system adequately and fairly to avoid expensive recourse to international arbitration.

Despite the widely held perception that BITs can lead to increased levels of FDI and thus support a host state's development aims, evidence to support this nexus is weak. The majority of econometric studies do not conclude that there is a strong link between the signing of BITs and an increase in FDI. This is a natural conclusion since FDI flows are determined by a variety of economic, institutional and political factors, including the size and growth rate of the host country market, the availability of raw materials or labour, the nature of the physical or legal infrastructure and political and economic stability. It would, therefore, be unreasonable to expect that a single factor, let alone a BIT, can be isolated and credited with a decisive impact on FDI flows. Similarly, evidence supporting links between sustainable development, FDI and BITs is weak. In fact, provisions in BITs, originally designed to prevent abusive and egregious treatment of foreign investors by host governments, have been seen to over-reach and place significant controls on a host state's ability to take public interest measures. The claim by the tobacco company Philip Morris against Uruguay under the Swiss-Uruguay BIT challenging the anti-smoking measures restricting the labelling of cigarette boxes, can serve as a warning for other developing countries whose regulatory systems are evolving. A large number of investor-state claims arising out of BITs have challenged government measures designed to promote public interest.

The development benefits that can arise from FDI can only be utilised through effective regulation and management of that investment by host states. Therefore, the provisions in a BIT should be drafted to allow for legitimate regulation of FDI by host states as required by their particular development policies.

Despite the 'open door policy' to foreign investment, the deterrents to foreign investment in the form of domestic and regional political instability and a worsening security situation prevent Pakistan from realising its FDI potential. Creating an idyllic legal regime that protects investment on the face of the BIT, but that is unsupported by actual domestic reform to meet the protection guarantees in the BIT, will not miraculously improve the political and legal environment in Pakistan, and remove these deterrents to foreign investment. In fact, if Pakistan's legal and political governance structures do not meet the promises made in the BIT, this will expose Pakistan to claims by aggrieved foreign investors. The growing number of BIT claims by investors against states at and other forums, and the uncertainty surrounding key treaty provisions has led some states to question their negotiation of BITs. A BIT creates an international control on a state's conduct which can be challenged by a private investor before an international tribunal. The highly publicised NAFTA claims against Canada show that the strong protections provided to investors in BITs can even leave developed economies in breach of investment treaties before international tribunals.

Thus, Pakistan may be exposed to the risk of claims by foreign investors under BITs concluded by their home state (provided they are in force) in view of: (i) the general trend of rising BIT claims; (ii) increased awareness of investors in pursuing BIT claims; and (iii) the existing legal, political and legislative environment in Pakistan at the national, local and regional levels may not meet the high standards of investor protection set out in the Pakistani BIT.

If Pakistan decides to continue negotiating BITs, it should enhance its negotiating capacity, and undertake a review of its existing BITs and its model to ensure this allows it to regulate investment in its national interests, and to achieve the development benefits for its people that it is hoping to obtain from foreign investment.

ANNEXURES

The texts set out in the annexure section are a reproduction of the BITs between Pakistan-UK and Pakistan-Germany and may contain inaccuracies and therefore no representations in relation to authenticity or accuracy of the texts are made. The original texts of the treaty be used for reference and may be obtained from the UNCTAD investment treaty database, www.unctadxi.org.

ANNEXURE 1

Pakistan Investment Law

Foreign Private Investment (Promotion & Protection) Act 1976

An Act to provide for the promotion and protection of foreign private investment in Pakistan. Whereas, it is expedient to provide for the promotion and protection of foreign private investment in Pakistan, and for matters ancillary thereto. It is hereby enacted as follows:

1 Short Title Commencement and Application

- This Act may be called the Foreign Private Investment (Promotion and Protection) Act, 1976.
- It shall come into force at once.
- It shall apply to all industrial undertakings in Pakistan having foreign private investment established with the approval of the Federal Government after the first day of September, 1954.

Provided that nothing in this Act shall be in derogation of any facilities or protection specifically sanctioned by the Federal Government to foreign private investment in the case of particular industrial undertaking or a class of industrial undertakings or such facilities or protection as may be available to foreign private investment under a bilateral investment treaty:

2 Definitions

- In this Act, unless there is anything repugnant in the subject or context;
- 'foreign capital' means investment made by a foreigner in an industrial undertaking in Pakistan;
- in the form of foreign exchange, imported machinery and equipment; or
- in any other form which the Federal Government may approve for the purpose;
- 'Foreign Private Investment' means an industry, undertaking or establishment engaged in the production, distribution or processing of any goods, the providing of services specified in this behalf by the Federal Government or the development and extraction of such mineral resources and products as may be specified in this behalf by the Federal Government.
- Words and expressions used but not defined in this Act shall have the same meanings as in the Companies Act, 1913 (VI of 1913).

3 Fields for Foreign Private Investment

The Federal Government may, consistent with the national interest, for the promotion of foreign private investment, authorize such investment in any industrial undertaking:

- Which does not exist in Pakistan and the establishment whereof, in the opinion of the Federal Government, is desirable; or
- Which is not being carried on in Pakistan on a scale adequate to the economic and social needs of the country; or
- Which will contribute to;
- Resources of Pakistan;
- The discovery, mobilization or better utilization of the national resources;
- The strengthening of the balance of payments of Pakistan;
- The economic development of the country in any other manner.

4 Approval of Foreign Private Investment

Where the Federal Government sanctions an industrial undertaking having foreign private investment, it may do so subject to such conditions as it may specify in this behalf.

5 Protection of Agreements

- Where the Federal Government considers it necessary in the public interest to take over the management of an industrial undertaking having foreign private investment or to acquire the ownership of the shares of citizen of Pakistan in the capital of such industrial undertaking, any agreement approved by the Federal Government relating to such undertakings entered into between a foreign investor or creditor and any person in Pakistan shall not be affected by such taking over or acquisition.
- Foreign capital or foreign private investment in an industrial undertaking shall not be acquired except under the due process of law which provides for adequate compensation, therefore, to be settled in the currency of the country of origin of the capital or investment and specifies the principles on and the manner in which compensation is to be determined and given.

6 Repatriation Facilities

Subject to the provision of the Foreign Exchange Regulation Act, 1947:

- A foreign investor in an industrial undertaking established after the 1st day of September, 1954, and approved by the Federal Government may at any time repatriate in the currency of the country from which the investment was originated;
- Foreign private investment to the extent of original investment;
- Profits earned on such investment; and
- Any additional amount resulting from the reinvested profits or appreciation of capital investment; and
- A creditor of an industrial undertaking referred to in clause (a) may repatriate foreign currency loans approved by the Federal Government and interest thereon in accordance with the terms and conditions of the said loan; and
- Provided that nothing in this section shall affect the terms of the permission to make such investment granted to a foreign investor before the commencement of this Act.

7 Remittances by Foreign Employees

Foreign nationals employed with the approval of the Federal Government in any industrial undertaking having foreign private investment may make remittances for the maintenance of their dependents in accordance with the rules, regulations or orders issued by the Federal Government or the State Bank of Pakistan.

8 Tax Concession and Avoidance of Double Taxation

- The Federal Government may allow such concessions to industrial undertaking having foreign private investment as may be admissible under any law for the time being in force.
- Foreign private investment shall not be subject to other or more burdensome taxes on income than those applicable to investments made in similar circumstances by the citizens of Pakistan.
- Foreign private investment shall be allowed, all the tax concessions admissible on the basis of any agreement (for avoidance of double taxation which the Government of Pakistan may have entered into with the government of the country of origin of such investment.

9 Equal Treatment

Industrial undertakings having foreign private investment shall be accorded the same treatment as accorded to similar industrial undertakings, having no such investment in the application of laws, rules and regulation, relating to importation and exportation of goods.

10 Removal of Difficulties

If any difficulty arises in giving effect to any provision of this Act, the Federal Government may make such order, not inconsistent with provisions of this Act, as it may appear to be necessary for the purpose of removing the difficulty.

Provided that no such power shall be exercised after the expiry of one year from the commencement of this Act.

11 Power to Make Rules

The Federal Government may be notified in the Official Gazette, make rules for carrying out the purposes of this Act, and such rules may, among other matters, provide for the employment of Pakistani and foreign nationals in industrial undertakings, having foreign private investment.

Source: Board of Investment, Government of Pakistan, http://www.pakboi.gov.pk/invest-acts.htm#1992

ANNEXURE 2 AGREEMENT

Between the Government of the
United Kingdom of Great Britain and Northern Ireland
and the Government of the Islamic Republic of Pakistan
for the Promotion and Protection of Investments

London, 30 November 1994
[The Agreement entered into force on
30 November 1994]

Presented to Parliament
by the Secretary for State of Foreign and Commonwealth Affairs
by Command of Her Majesty
April 1995

The Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Islamic Republic of Pakistan;

Desiring to create favourable conditions for greater investment by nationals and companies of one State in the territory of the other State;

Recognising that the encouragement and reciprocal protection under international agreement of such investments will be conducive to the stimulation of individual business initiative and will increase prosperity in both States;

Have agreed as follows:

ARTICLE 1 Definitions

For the purposes of this Agreement:

a) "investment" means every kind of asset acquired in accordance with the laws and regulations of the Contracting Party in whose territory the investment is made and in particular, though not exclusively, includes:
   (i) movable and immovable property and any other property rights such as mortgages, liens or pledges;
   (ii) shares in and stock and debentures of a company and any other form of participation in a company;
   (iii) claims to money or to any performance under contract having a financial value;
   (iv) intellectual property rights, goodwill, technical processes and know-how;
   (v) business concessions conferred by law or under contract, including concessions to search for, cultivate, extract or exploit natural resources.

A change in the form in which assets are invested does not affect their character as investments and the term "investment" includes all investments, whether made before or after the date of entry into force of this Agreement;

b) "returns" means the amounts yielded by an investment and in particular, though not exclusively, includes profit, interests, capital gains, dividends, royalties and fees;

c) "nationals" means:
   (i) in respect of the United Kingdom: physical persons deriving their status as United Kingdom nationals from the law in force in the United Kingdom;
   (ii) in respect of Pakistan: physical persons deriving their status as Pakistan nationals from the law in force in Pakistan;

d) "companies" means:
   (i) in respect of the United Kingdom: corporations, firms and associations incorporated or constituted under the law in force in any part of the United Kingdom or in any territory to which this Agreement is extended in accordance with the provisions of Article 12;
   (ii) in respect of Pakistan: corporations, firms or associations incorporated or constituted under the law in force in Pakistan;

e) "territory" means:
   (i) in respect of the United Kingdom: Great Britain and Northern Ireland, including the territorial sea and any maritime area situated beyond the territorial sea of the United Kingdom which has been or might in the future be designated under the national law of the United Kingdom in accordance with international law as an area within which the United Kingdom may exercise rights with regard to the sea-bed and subsoil and the natural resources and any territory to which this Agreement is extended in accordance with the provisions of Article 12;
   (ii) in respect of Pakistan: the territories as defined in Article 1(2) of the Constitution of the Islamic Republic of Pakistan.

ARTICLE 2 Promotion and Protection of Investment

(1) Each Contracting Party shall encourage and create favourable conditions for nationals or companies of the other Contracting Party to invest capital in its territory, and, subject to its right to exercise powers conferred by its laws, shall admit such capital.

(2) Investments of nationals or companies of each Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy full protection and security in the territory of the other Contracting Party. Neither Contracting Party shall in any way impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment or disposal of investments in its territory or nationals or companies of the other Contracting Party. Each Contracting Party shall observe any obligation it may have entered into with regard to investments of nationals or companies of the other Contracting Party.

ARTICLE 3 National Treatment and Most-favoured-nation Provisions

(1) Neither Contracting Party shall in its territory subject investments or returns of nationals or companies of the other Contracting Party to treatment less favourable than that which it accords to investments or returns of its own nationals or companies or to investments or returns or nationals or companies of any third State.

(2) Neither Contracting Party shall in its territory subject nationals or companies of the other Contracting Party, as regards their management, maintenance, use, enjoyment or disposal of their investments, to treatment less favourable than that which it accords to its own nationals or companies or to nationals or companies of any third State.

(3) For the avoidance of doubt it is confirmed that the treatment provided for in paragraphs (1) and (2) above shall apply to the provisions of Article 1 to 11 of this Agreement.

ARTICLE 4 Compensation for Losses

(1) National or companies of one Contracting Party whose investments in the territory of the other Contracting Party suffer losses owing to war or other armed conflict, revolution, a state of national emergency, revolt, insurrection of riot in the territory of the latter Contracting Party shall be accorded by the latter Contracting Party treatment, as regards restitution, indemnification, compensation or other settlement, no less favourable than that which the latter Contracting Party accords to its own nationals or companies or to nationals or companies of any third State. Resulting payments shall be freely transferable.

(2) Without prejudice to paragraph (1) of this Article, nationals and companies of one Contracting Party who in any of the situations referred to in that paragraph suffer losses in the territory of the other Contracting Party resulting from:
   (a) requisitioning of their property by its forces or authorities, or
   (b) destruction of their property by its forces or authorities, which was not caused in combat action or was not required by the necessity of the situation,

shall be accorded restitution or adequate compensation. Resulting payments shall be freely transferable.

ARTICLE 5 Expropriation

(1) Investments of nationals or companies of either Contracting Party shall not be nationalized, expropriated or subjected to measures having effect equivalent to nationalization or expropriation (hereinafter referred to as "expropriation") in the territory of the other Contracting Party except for a public purpose related to the internal needs of that Party on a non-discriminatory basis and against prompt, adequate and effective compensation. Such compensation shall amount to the genuine value of the investment expropriated immediately before the expropriation or before the impending expropriation became public knowledge, whichever is the earlier, shall include interest at a normal commercial rate until the date of payment, shall be made without delay, be effectively realizable and be freely transferable. The national or company affected shall have a right, under the law of the Contracting Party making the expropriation, to prompt review, by a judicial or other independent authority of the Party, of his or its case and of the valuation of his or its investment in accordance with the principles set out in this paragraph.

(2) Where a Contracting Party expropriates the assets of a company which is incorporated or constituted under the law in force in any part of its own territory, and in which nationals or companies of the other. Contracting Party own shares, it shall ensure that the provisions of paragraph (1) of this Article are applied to the extent necessary to guarantee prompt, adequate and effective compensation in respect of their investment to such nationals or companies of the other Contracting Party who are owners of those shares.

ARTICLE 6 Repatriation of Investment and Returns

Each Contracting Party shall in respect of investments guarantee to nationals or companies of the other Contracting Party the unrestricted transfer of their investments and returns. Transfers shall be effected without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the investor and the Contracting Party concerned. Unless otherwise agreed by the investor transfers shall be made at the rate of exchange applicable on the date of transfer pursuant to the exchange regulations in force.

ARTICLE 7 Exceptions

The provisions of this Agreement relative to the grant of treatment not less favourable than that accorded to the nationals of companies of either Contracting Party or of any third State shall not be construed so as to oblige one Contracting Party to extend to the nationals of companies of the other the benefit of any treatment, preference or privilege resulting form:

(a) any existing or future customs union or similar international agreement to which either of the Contracting Parties is or may become a party, or
(b) any international agreement or arrangement relating wholly or mainly to taxation or any domestic legislation relating wholly or mainly to taxation.

ARTICLE 8 Settlement of Disputes between an Investor and a Host State

(1) Disputes between a national or company of one Contracting Party and the other Contracting Party concerning an obligation of the latter under this Agreement in relation to an investment of the former which have not been amicably settled shall, after a period of three months from written notification of a claim, be submitted to international arbitration if the national or company concerned so wishes.

(2) Where the dispute is referred to international arbitration, the national or company and the Contracting Party concerned in the dispute may agree to refer the dispute either to:

(a) the International Centre for the Settlement of Investment Disputes (having regard to the provisions, where applicable, of the Convention on the Settlement of Investment Disputes between States Nationals of other States, opened for signature at Washington DC on 18 March 1965 and the Additional Facility for the Administration of Conciliation, Arbitration and Fact-Finding Proceedings); or
(b) the Court of Arbitration of the International Chamber of Commerce; or
(c) an international arbitrator or ad hoc arbitration tribunal to be appointed by a special agreement or established under the Arbitration Rules of the United Nations Commission on International Trade Law.

If after a period of three months from written notification of the claim there is no agreement to one of the above alternative procedures, the dispute shall at the request in writing of the national or company concerned be submitted to arbitration under the Arbitration Rules of the United Nations Commission on International Trade Law as then in force. The parties to the dispute may agree in writing to modify these Rules.

ARTICLE 9 Disputes between the Contracting Parties

(1) Disputes between the Contracting Parties concerning the interpretation or application of this Agreement should, if possible, be settled through the diplomatic channel.

(2) If a dispute between the Contracting Parties cannot thus be settled, it shall upon the request of either Contracting Party be submitted to an arbitral tribunal.

(3) Such an arbitral tribunal shall be constituted for each individual case in the following way. Within two months of the receipt of the request for arbitration, each Contracting Party shall appoint one member of the tribunal. Those two members shall then select a national of a third State who on approval by the two Contracting Parties shall be appointed Chairman of the tribunal. The Chairman shall be appointed within two months from the date of appointment of the other two members.

(4) If within the periods specific in paragraph (3) of this Article the necessary appointments have not been made, either Contracting Party may, in the absence of any other agreement, invite the President of the International Court of Justice to make any necessary appointments. If the President is a national of either Contracting Party of if he is otherwise prevented from discharging the said function, the Vice-President shall be invited to make the necessary appointments. If the Vice-President is a national of either Contracting Party or if he too is prevented from discharging the said function, the Member of the International Court of Justice next in seniority who is not a national of either Contracting Party shall be invited to make the necessary appointments.

(5) The arbitral tribunal shall reach its decision by a majority of votes. Such decision shall be binding on both Contracting Parties. Each Contracting Party shall bear the cost of its own member of the tribunal and of its representation in the arbitral proceeding; the cost of the Chairman and the remaining costs shall be borne in equal parts by the Contracting Parties. The tribunal may, however, in its decision direct that a higher proportion of costs shall be borne by one of the two Contracting Parties, and this award shall be binding on both Contracting Parties. The tribunal shall determine its own procedure.

ARTICLE 10 Subrogation

(1) If one Contracting Party or its designated Agency ("the first Contracting Party") makes a payment under an indemnity given in respect of an investment in the territory of the other Contracting Party, ("the second Contracting Party"), the second Contracting Party shall recognize:

(a) the assignment to the first Contracting Party by law or by legal transaction of all the rights and claims of the party indemnified, and
(b) that the first Contracting Party is entitled to exercise such rights and enforce such claims by virtue of subrogation, to the same extent as the Party indemnified.

(2) The first Contracting Party shall be entitled in all circumstances to the same treatment in respect of:

(a) the rights and claims acquired by it by virtue of the assignment, and
(b) any payments received in pursuance of those rights and claims,

as the party indemnified was entitled to receive by virtue of this Agreement in respect of the investment concerned and its related returns.

(3) Any payments received in non-convertible currency by the first Contracting Party in pursuance of the rights and claims acquired shall be freely available to the first Contracting Party for the purpose of meeting any expenditure incurred in the territory of the second Contracting Party.

ARTICLE 11 Application of other Rules

If the provisions of law either Contracting Party or obligations under international law existing at present or established hereafter between the Contracting Parties in addition to the present Agreement contain rules, whether general or specific, entitling investments by nationals or companies of the other Contracting Party to a treatment more favourable than is provided for by the present Agreement, such rules shall to the extent that they are more favourable prevail over the present Agreement.

ARTICLE 12 Territorial Extension

At the time of signature of this Agreement, or at any time thereafter, the provisions of this Agreement may be extended to such territories for whose international relations the Government of the United Kingdom is responsible as may be agreed between the Contracting Parties in an Exchange of Notes.

ARTICLE 13 Entry into Force

This Agreement shall enter into force on the day of signature.

ARTICLE 14 Duration and Termination

This Agreement shall remain in force for a period of ten years. Thereafter it shall continue in force until the expiration of twelve months from the date on which either Contracting Party shall have given written notice of termination to the other. Provided that in respect of investments made whilst the Agreement is in force, its provisions shall continue in effect with respect to such investments for a period of twenty years after the date of termination and without prejudice to the application thereafter of the rules of general international law.

In witness whereof the undersigned, duly authorized thereto by their respective Governments, have signed this Agreement.

Done in duplicate at London this 30th day of November 1994.

For the Government of the United Kingdom of Great Britain and Northern Ireland:
JOHN MAJOR

For the Government of The Islamic Republic of Pakistan:
BENAZIR BHUTTO

ANNEXURE 3 AGREEMENT

Between the Islamic Republic of Pakistan And the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments

Hereinafter referred to individually as "Contracting State" and collectively as "Contracting States",
Desiring to intensify economic co-operation between both States,

Intending to create favorable conditions for investments by investors of either State in the territory of the other State,

Recognizing that the encouragement and protection of such investments can stimulate private business initiative and increase the prosperity of both Contracting States,

Have agreed as follows:

ARTICLE I Definitions

For the purposes of this Agreement

(1) the term "investments" comprises every kind of asset, established or acquired by an investor of one Contracting State in the territory of the other contracting State in accordance with the laws and regulations of the latter Contracting State, in particular:

(a) movable and immovable property, as well as other rights in term, such as mortgages, liens and pledges;
(b) shares of companies and other kinds of interest in companies;
(c) claims to money or to any other performance having an economic value associated with an investment;
(d) intellectual property rights, in particular copyrights, patents, utility model patents, industrial designs, trade marks, trade names, trade and business secrets, technical processes, know how, and good will;
(e) business concessions under public law, including concessions to search for, extract and exploit natural resources;

Any alteration of the form in which assets are invested shall not affect their classification as investment;

Mere construction and service contracts that do not include an investment component do not fall under the definition of investment under this Agreement;

(2) the term "investor" means

(a) in respect of the Federal Republic of Germany:
- Germans within the meaning of the Basic Law of the Federal Republic of Germany,
- any juridical person as well as any commercial or other company or association with or without legal personality having its seat in the territory of the Federal Republic of Germany, irrespective of whether or not its activities are directed at profit,

(b) in respect of the Islamic Republic of Pakistan:
- Pakistanis within the meaning of the laws of the Islamic Republic of Pakistan,
- any juridical person or any company or association, incorporated in the territory of the Islamic Republic of Pakistan and lawfully existing in accordance with its legislation;

(3) the term "company or companies" of a Contracting State means corporations, firms and associations incorporated or constituted or established under the law in force in the territory of a Contracting State whether privately or state owned;

without prejudice to any other method of determining nationality, in particular any person in possession of a national passport issued by the competent authorities of the Contracting State concerned shall be deemed to be a national of that Contracting State;

(4) the term "returns" means the amount yielded by an investment for a definite period, such as profit, dividends, interest, royalties or fees;

(5) the term "territory" means the land and territorial sea as well as the exclusive economic zone and the continental shelf where a Contracting State exercises sovereign rights or jurisdiction in accordance with the provisions of international law and its domestic law.

ARTICLE 2 Admission, Promotion and Protection of Investments

(1) Each Contracting State shall in its territory promote as far as possible investments by investors of the other Contracting State and admit such investments in accordance with its legislation.

(2) Each Contracting State shall in is territory in any case accord investments by investors of the other Contracting State, fair and equitable treatment as well as full protection and security in accordance with customary international law. Returns from the investment and, in the event of their re-investment, the returns there from shall enjoy the same protection as the investment.

(3) Neither Contracting State shall in any way impair by arbitrary or discriminatory measures the measures the management, maintenance, use, enjoyment, sale or other disposal of investments in its territory of investors of the other Contracting State.

(4) Each Contracting State shall, in its territory, respect and protect intellectual property rights, as defined and referred to in the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS), of the investors of the other Contracting State, in accordance with its national legislation, rules and regulations.

ARTICLE 3 National Treatment and Most-Favored-Nation Treatment

(1) Each Contracting State shall accord to investors of the other Contracting State and their investments owned or controlled by them treatment no less favorable than that it accords to its own investors and their investments or to investors and their investments of any third State.

(2) The following shall, in particular, be deemed "treatment less favorable": unequal treatment in the case of restrictions on the purchase of raw or auxiliary materials, of energy or fuel or of means of production or operation of any kind, unequal treatment in the case of impeding the marketing of products inside or outside the country, as well as any other measures having similar effects. Measures that have to be taken for reasons of public security and order, public health or morality shall not be deemed "treatment less favorable".

(3) Such treatment shall not relate to privileges which either Contracting State accords to investors of third States on account of its membership of, or association with, a customs or economic union, a common market or a free trade area or by virtue of a double taxation agreement or other agreements regarding matters of taxation.

(4) The provisions of this Article do not oblige a Contracting State to extend to investors resident in the territory of the other Contracting State tax privileges, tax exemptions and tax reductions which according to its tax laws are granted only to investors resident in its territory.

(5) The Contracting States shall within the framework of their national legislation give sympathetic consideration to applications for the entry and sojourn of persons of either Contracting State who wish to enter the territory of the other Contracting State in connection with an investment; the same shall apply to employed persons of either Contracting State who in connection with an investment wish to enter the territory of the other Contracting State and sojourn there to take up employment. Applications for work permits shall also be given sympathetic consideration.

(6) The investors of either Contracting State are free to choose international means of transport of persons or capital goods connected with an investment within the meaning of this Agreement without prejudice to relevant bilateral or international agreements binding on either Contracting State.

ARTICLE 4 Compensation in Case of Expropriation

(1) Investments by investors of either Contracting State shall not be expropriated, nationalized or subjected to any other measure the effects of which would be tantamount to expropriation or nationalization in the territory of the other Contracting State except for the public benefit and against compensation. Such compensation shall be equivalent to the value of the expropriated investment immediately before the date on which the actual or threatened expropriation, nationalization or comparable measure has become publicly known. The compensation shall be paid without delay and shall carry the usual bank interest until the time of payment; it shall be effectively realizable and freely transferable. Provision shall have been made in an appropriate manner at or prior to the time of expropriation, nationalization or comparable measure for the determination and payment of such compensation. The legality of any such expropriation, nationalization or comparable measure and the amount of compensation shall be subject to review by due process of law.

(2) Investors of either Contracting State whose investments suffer losses in the territory of the other Contracting State owing to war or other armed conflict, revolution, a state of national emergency, or revolt, shall be accorded treatment no less favorable by such other Contracting State than that which the latter Contracting State accords to its own investors as regards restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable.

(3) Investors of either Contracting State shall enjoy most-favored-nation treatment in the territory of the other Contracting State in respect of the matters provided for in this Article.

ARTICLE 5 Free Transfer

(1) Each Contracting State shall guarantee all transfers relating to an investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) the principal and additional amounts to maintain or increase the investment;
(b) the returns;
(c) the repayment of loans;
(d) the proceeds from the liquidation or the sale of the whole or any part of the investment;
(e) the compensation provided for in Article 4.

(2) Transfers under this Article, Article 4 (1) or (2) or Article 6 shall be made at the applicable rate of exchange on the day of transfer.

(3) Should there be no foreign exchange market the cross rate obtained from those rates which would be applied by the International Monetary Fund on the date of payment for conversions of the currencies concerned into Special Drawing Rights shall apply.

(4) Subject to the provision of Article 5 (1) a transfer shall be deemed to have been made "without delay" within the meaning of this Article if effected within such period as is normally required for the completion of transfer formalities. The said period shall commence on the day on which the relevant request has been submitted and may on no account exceed two months.

(5) Notwithstanding the foregoing paragraphs, a Contracting State may prevent a transfer through the equitable, non-discriminatory and good faith application of its laws relating to:

(a) bankruptcy, insolvency or the protection of the rights of creditors;
(b) issuing, trading or dealing in securities;
(c) criminal or penal offences;
(d) financial reporting or record keeping of transfers when necessary to assist the financial regulatory authorities or the law enforcement initiated by these authorities;
(e) ensuring compliance with orders or judgments in judicial proceedings; or
(f) in compliance with tax obligations in case of a final liquidation an investment.

(6) Notwithstanding the provisions of this Article either Contracting State may take safeguard measures in the event of a macro economic imbalance seriously affecting the balance of payments or a threat thereof or where, in exceptional circumstances, movements of capital cause, or threaten to cause, anxious difficulties for the operation of its monetary policy or the financial stability. The safeguard measures shall be

(a) consistent with the Articles of the Agreement of the Monetary Fund;
(b) adopted or maintained only if such measures are strictly necessary;
(c) implemented in an equitable, non-discriminatory and bona manner;
(d) temporary for a period not exceeding six months and eliminated soon as possible;
(e) promptly notified to the other Contracting State.

(7) The provisions of this Article shall not be so construed as to prevent a Contracting State from fulfilling in good faith its obligations as a member of an economic and monetary union.

ARTICLE 6 Subrogation

If either Contracting State makes a payment to any of its investors under its scheme of guarantees it has assumed in respect of an investment in the territory of the other Contracting State, the latter Contracting State shall, without prejudice to the rights of the former Contracting State under Article 9, recognize the assignment, whether under a law or pursuant to a legal transaction, of any right or claim of such investor to the former Contracting State.

ARTICLE 7 Application of other Rules

(1) If the legislation of either Contracting State or obligations under international law existing at present or established hereafter between the Contracting States in addition to this Agreement contain a regulation, whether general or specific, entitling investments by investors of the other Contracting State to a treatment more favorable than is provided for by this Agreement, such regulation shall to the extent that it is more favorable prevail over this Agreement.

(2) Each Contracting State shall observe any other obligation it has assumed with regard to investments in its territory by investors of the other Contracting State, with disputes arising from such obligations being redressed under the terms of the contracts underlying the obligations in accordance with Article 10 (5).

(3) With regard to the treatment of income and assets for the purpose of taxation, precedence shall be given to the application of the agreements in force at the time between the Federal Republic of Germany and the Islamic Republic of Pakistan for the avoidance of double taxation in the field of taxes on income and assets.

ARTICLE 8 Scope of Application

This Agreement shall also apply to investments made prior to its entry into force by investors of either Contracting State in the territory of the other Contracting State consistent with the latter legislation. However, it shall not apply to any dispute or any claim concerning an investment which was already under judicial or arbitral process.

ARTICLE 9 Settlement of Disputes between the Contracting States

(1) Any dispute between the Contracting States concerning the interpretation or application of this Agreement should as far as possible be settled by the government of the two Contracting States.

(2) If the dispute cannot thus be settled, it shall upon the request of either Contracting State be submitted to an arbitration tribunal.

(3) Such arbitration tribunal shall be constituted ad hoc as follows: each Contracting State shall appoint one member, and these two members shall agree upon a national of a third State as their chairman to be appointed by the governments of the two Contracting States. Such members shall be appointed within two months, and such chairman within three months from the date on which either Contacting State has informed the other Contracting State that it intends to submit the dispute to an arbitration tribunal.

(2) If the periods specified in paragraph 3 above have not been observed, either Contracting State may, in the absence of any other arrangement, invite the President of the International Court of Justice to make the necessary appointments. If the President is a national of either Contracting State or if he is otherwise prevented from discharging the said function, the Vice President should make the necessary appointments. If the Vice-President is a national of either Contracting State or if he, too, is prevented from discharging the said function, the member of the Court next in seniority who is not a national of either Contracting State should make the necessary appointments.

(a) The arbitration tribunal shall reach its decisions by a majority of votes. Such decisions shall be binding. Each Contracting State shall bear the cost of its own member and of its representatives in the arbitration proceedings. The cost of the chairman and the remaining costs shall be borne in equal parts by the Contracting States. The arbitration tribunal may make a different regulation concerning cost. In all other respects, the arbitration tribunal shall determine its own procedure.

ARTICLE 10 Settlement of Disputes between a Contracting State and an Investor of the other Contracting State

(1) Disputes arising from an investment between a Contracting State and an investor of the other Contracting State which concern an alleged breach of an obligation of a Contracting State under this Agreement should as far as possible be settled amicably between the parties in dispute.

(b) If the dispute cannot be settled within six months of the date when it has been raised in writing by one of the parties in dispute, it shall, at the request of the investor be submitted to:
(c) the competent court in the Contracting State in whose territory the investment has been made; or
(b) international arbitration under either:

- the Convention of 18 March 1965 on the Settlement of Investment Disputes between States and Nations of Other States (ICSID), or
- the rules of arbitration of the United Nations Commission on International Trade Law (UNCITRAL), or
- the rules of arbitration of the International Chamber of Commerce (ICC), or
- any other form of dispute settlement agreed upon by the parties to the dispute.

Each Contracting State herewith declares its acceptance of such international arbitral procedures.

(3) The award shall be binding and shall not be subject to any appeal or remedy other than those provided for in the said Convention. The award shall be enforced in accordance with domestic law.

(4) During arbitration proceedings on the enforcement of an award, the Contracting State involved in the dispute shall not raise the objection that the investor of the other Contracting State has received compensation under an insurance contract in respect of all or part of the damage.

(5) If a contract between an investor and a Contracting State provides a dispute resolution mechanism, the investor can invoke only that dispute resolution mechanism concerning the issues arising under that contract. However, in case of issues arising under this Agreement including Article 7 (2), he is entitled to utilize the dispute settlement procedures provided under this Article.

ARTICLE 11 Relations between the Contracting States

This Agreement shall be in force irrespective of whether or not diplomatic or consular relations exist between the Contracting States.

ARTICLE 12 Registration clause

Registration of this Agreement with the Secretariat of the United Nations, in accordance with Article 102 of the United Nations Charter, shall be initiated immediately following its entry into force by the Contracting State in which the signing took place. The other Contracting State shall be informed of registration, and of the United Nations registration number, as soon as this has been confirmed by the Secretariat of the United Nations.

ARTICLE 13 Entry into Force, Duration and Termination

(1) This Agreement shall be subject to ratification; the instruments of ratification shall be exchanged as soon as possible.

(2) This Agreement shall enter into force one month after the date of exchange of the instruments of ratification. It shall remain in force for a period of ten years and shall be extended thereafter for an unlimited period unless denounced in writing through diplomatic channels by either Contracting State twelve months before its expiration. After the expiry of the period of ten years this Agreement may be denounced at any time by either Contracting State giving twelve months' notice.

(3) In respect of investments made prior to the date of termination of this Agreement, the provisions of the preceding Articles shall continue to be effective for further period of fifteen years from the date of termination of this Agreement.

(4) Upon entry into force of this Agreement the Treaty of 25 November 1959 between Pakistan and the Federal Republic of Germany for the Promotion and Protection of Investment shall be terminated.

Done at Berlin on 1 December 2009 in duplicate in the English and German languages, both texts being equally authentic.

For the
Islamic Republic of Pakistan
WAQAR A. KHAN
MINISTER FOR INVESTMENT

For the
Federal Republic of Germany