BILATERAL INVESTMENT TREATIES AND THEIR IMPACT ON DEVELOPING COUNTRIES

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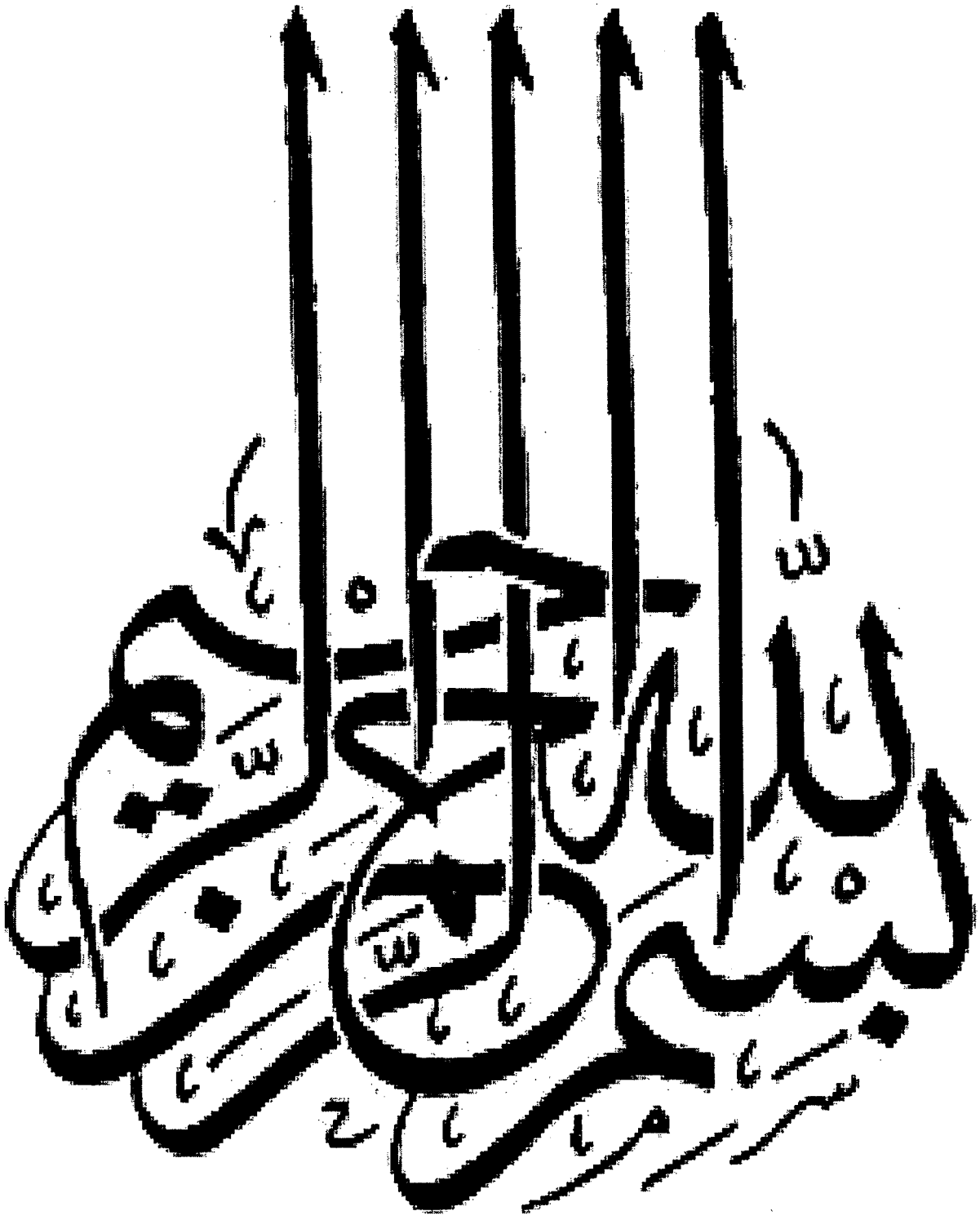

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DEDICATION

Dedicated to my teachers, family and friends.

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LIST OF ABBREVIATIONS

ACP	African, Caribbean and Pacific
BIT	Bilateral Investment Treaty
BOI	Board of Investment
CARICOM	Caribbean Common Market
CIS	Common Wealth of Independent States
DTT	Bilateral Treaty for the Avoidance of Double Taxation
ECC	European Community Countries
EU	European Union
FCN	Treaty of Friendship, Commerce and Navigation
FDI	Foreign Direct Investment
GATS	General Agreement on Trade in Services
GATT	General Agreement on Tariffs and Trade
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
IIA	International Investment Agreements
IFC	International Finance Corporation
ILO	International Labour Organization
IMF	International Monetary Fund
MAI	Multilateral Agreement on Investment
MFN	Most-Favoured-Nation
MIGA	Multilateral Investment Guarantee Agency
NAFTA	North American Free Trade Agreement
NGO	Non-Governmental Organization
NT	National Treatment
OECD	Organization for Economic Cooperation and Development
SEE	South East Europe
TNC	Transnational Corporation
TPA	Trade Promotion Authority

TRIMS	Trade Related Investment Measures
TRIPS	Agreement on Trade Related Aspects of Intellectual Property Rights
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNCTC	United Nations Centre on Transnational Corporations
UNGA	United Nations General Assembly
US	United States
USTR	United States Trade Representatives
WB	World Bank
WIPO	World Intellectual Property Organization
WTO	World Trade Organization

ABSTRACT

This is the age of globalization of world economy. The gradual revolution in the services sector, field of communication and transportation, science, electronics and cyber technology has changed the old concepts of trade and investment. The dream of globalization of national markets, which existed only in the theories of economists, has transformed into reality by shrinking the world to a 'global village'. Nowadays the national markets are merging into a single global market by loosing their individual statuses. In order to get the maximum benefits like cheap labour, taxation and so on; different companies from all over the world are dividing up their productions lines and are distributing their components to many countries.

Trade, investment and finance are three major pillars of world economy. Traditionally, trade and investment were considered as alternative means of exploiting foreign markets. But in the recent years the views have been changed and now they are complements rather than substitutes. This issue is getting more importance; firstly, because of the global and decentralized market. Secondly, countries are competing for investment by offering policy incentives which may lead to distortion in the allocation of investment resources. In addition, services have become a more important part of entire trade, and investment is required where services are provided. Like Double Taxation Treaties (DTTs) and Free Trade Agreements (FTAs); Bilateral Investment Treaties (BITs) are one of the major and important forms of International Investment agreements (IIAs). BIT has become one of the active areas of public international law during last three decades. Bilateral agreements are particularly appropriate for expanding the stock of capital in the host country, for rising exports of machinery and services, for modernization of the national economy, for improving economic growth of the developing countries, for stimulating the technological capacity and even it plays an important role in the manufacturing sector resulting improvement of economics of both capital importing and capital exporting countries.

However, a BIT binds the two signatory countries, but generally its purpose is to establish such a strong relationship between developed countries and developing countries, which appears likely to continue in the years ahead. The demand of capital, lack of financial alternatives, and the desire to accept the foreign investment, from the third world, will definitely persuade it to sign more BITs in the future.

Considering the importance of Bilateral Investment Treaties, many developed and developing countries changed their attitude towards BITs, specially in the last few decades. The urge to tempt investment often expands to the grand level, as various states design their policies and introduce different incentives and strategies to attract the investors.

Pakistan, like all other developing countries, has realized the advantages and contribution of such treaties to the economy. Therefore, it intends to develop the international relations with other states in influential and effectual manner. It has strong desire to strengthen its economy, which can only be attained through concluding different investment agreements with foreign investors, but for it, Pakistan has to introduce a friendly and secure environment.

The topic of this research work is "Bilateral Investment Treaties and their Impact on Developing Countries". The research is an academic one, and therefore, appreciates all the procedures, limitations, restrictions, methodologies and comments related to it.

The main objective of this study is to focus on the different trends, as well as to track down and explain new issues that are introduced in recent BITs by the powerful and strong capital exporting countries like United States, and the consequences faced by the developing countries like Pakistan, after the conclusion of such agreements.

The study contains five chapters. The first chapter is about the general introduction of BITs. After the brief introduction, it focuses on purpose, objectives and the experience of the applications of BITs. Further, the chapter also addresses the historical evolution, recent developments and effect of BITs on International Trade and Investments.

The second chapter revolves around the core fractures of BITs. After the brief introduction, it includes the applicability of them and focuses on legal requirements for investments, different standards of treatments, transfers, functional requirements, security against acquisition, indemnification for losses and resolution of conflicts.

Third chapter is the corner stone of the study, as it deals with emerging trends towards introducing treaty innovations. The first part of the chapter deals with history, developmental progress and goals of US proposed Treaty, and the second part analyzes critically the different terms and provisions as addressed in the proposed treaty, by comparing them with various BITs

of different countries. This part is followed by a brief conclusion reflecting the consequences of such modernism, in case the developing countries agree to implement them.

The fourth chapter depicts the reasons of embarrassment faced by Pakistan in its international affairs, due to few terms and conditions of the BITs which were not in favour of the national interest of the country. The chapter also includes the summary of three cases in which three different companies belonging to different countries filed their cases against Pakistan in ICSID, on the basis of BIT.

Finally in the end, some personal suggestions have been presented, particularly focusing on the measurements which Pakistan should take before concluding the agreements with capital exporting countries, especially United States.

SIGNIFICANCE OF THE RESEARCH

The aim of the research is to provide appropriate literature for studying impact of different BITs on developing countries especially with reference to Pakistan in a broader perspective of global normative developments. Conventional studies on BITs are often conducted in an incomplete way as they do not take into account other important aspects of these treaties. Hopefully, this study would be helpful for the government institutes to adopt the better mechanism for negotiations of different investment agreements, so that the embracing situations can be avoided and to protect Pakistan's interests in this era of modernization.

LITERATURE REVIEW

The research work always require extensive study and to meet the purpose a number of books, articles, research papers and websites were consulted in addition to legal instruments, laws and conventions. Few writers and their research work were really helpful in formulating the structure of the thesis and clarity of the topic. At the same time, databases and websites with updated information were beneficial and supportive research tools.

The book, 'Bilateral Investment Treaties 1995 – 2006', published by United Nations contains a large number of treaties and their classification on the basis of core features of BITs, but it does not compare the proposed treaty of US with different treaties. Therefore, it was required to highlight the different aspect of the treaty and their impact on the economies of developing countries especially Pakistan. But, it is worth mentioning that this book provided the basis of comparison and thus was very supportive and useful. However, it is required to update the book, so it can include current treaties as well.

'Treaties' by Roland R. Foulke is very good for the clarity of the topic. It provides general definitions, contents and classification of different treaties but does not deal specifically with Bilateral Investment Treaties.

'The International Law on Foreign Investment' by Sornarajah discusses the introductory survey on BITs in detail. Moreover, it discusses the features of BITs with more detail.

'Recent Developments in Regional and Bilateral Investment Treaties' by Mahnaz Malik provided the guideline regarding BITs between different regions and countries but the fact and figures provided in this article are not updated and provide data till 2007. The updated data given in thesis is taken from United Nations' publication 'Recent Developments in International Investment Agreements (2008 –June 2009) and also from the sites of UNCTAD and ICSID.

The articles 'Fair and Equitable Treatment' and 'International Investment Agreements' by Mahnaz Malik discuss specifically the key element of investment treaties and the definition of investment which is helpful in drafting investment agreements.

'Bilateral Investment Treaties: The Essentials' by Khawar Qurashi provides very brief background of essential features of BIT and lacks examples. Moreover, instead of providing the detail of cases, it has referred few relevant cases with brief facts and decisions.

'The Bilateral Investment Treaty in ASEAN: A Comparative Analysis' published by Duke University School of Law deals with the prototype treaty of United States and its impact on ASEAN but not with the model treaty of United States. In this thesis, an attempt has been made to present the comparative analysis between the model treaty of US and other different treaties to highlight the innovations introduced by United States.

'BIT by BIT: The growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries' by Salacus is fine and magnificent article on the history, BIT making process and the basic elements of all BITs. However, the examples of treaties quoted in the article are very old.

World Bank Guidelines on the Treatment of Foreign Direct Investment, OECD, MIGA and TRIMs agreement also give a general guideline for protection of the investment and enactment of Laws.

The database available on the website of Board of Investment of Pakistan contains the information for investors, rules and regulations and the list BITs and DTTs signed by Pakistan. However, it requires better formatting and presentation of treaties. The website of US Department of State also provides the investment policy of United States for Pakistan.

The website of UNCTAD contains plenty of research material on trends in BIT negotiations, disputes and a very good database of bilateral investment treaties and detail of 178 economies concluded BITs till 1 June 2009. The site of ICSID provides case list, procedural orders, and detailed decisions on jurisdiction and merits but there is no brief or summarized fact and decision based case law is available. It is also important to mention that treaties in different languages like Spanish, French, German and Arabic should be translated in English language for research and academic purpose.

Therefore, in this research work, an attempt has been made to explain the core features of BIT with new and modern bilateral treaties and a comparative and Critical analysis of the Proposed US – Pakistan BIT.

Chapter No: I

GENERAL INTRODUCTION OF BILATERAL INVESTMENT TREATIES

1.1 INTRODUCTION:

An international legal framework for Foreign Direct Investment (FDI) has started to grow in modern time. In this activity the Bilateral Investment Treaties (BITs) have performed an important function and are to be studied first. They are so far the most familiar form of investment treaty and make up a chief leading segment of the present framework for FDI. Most of the points and specifications considered here are very much similar to multilateral agreements. Moreover, in this chapter an attempt has been made to explain the aim and purpose of BITs, its historical evolution, its relationship with investment law, its merits, its effects on international trade and investment, and the recent developments of BITs. A comprehensive study of all normative doctrines and substantive components taken up by these treaties is surely neither required nor possible for the object of this thesis. Instead, in this study, the stress will be placed on relatively disputed issues and the bilateral investment treaties specifically related to Pakistan.

1.2 WHAT ARE BITS?

BITs are agreements between two States or Countries. They are also known as Contractual Treaties. They bind both Contracting States with an obligation for the corresponding encouragement, promotion and protection of the investment in each other's State by individuals or companies of either State. Most BITs cover the areas: Definition and Scope of Investment, Standards of Treatment, Protection from Expropriation, Guarantees of Free Transfer, Compensation and Dispute Settlement Mechanism.

1.3 PURPOSES AND OBJECTIVE OF BITS

After the Second World War, most of the developing countries around the world became dependent on foreign aid from the developed countries in the form of capital,

technology and managerial skills[1]. Afterwards the foreign investment started to play an important role in the process of development. At that time it was required to introduce BITs for establishing rules and regulations in order to protect and secure the investments.

Generally, it is considered that the purpose of BIT is to motivate the investors for the new investments, but actually it is wrong to think that it is the sole objective of BIT. BITs are established normally in the comprehensive framework of economic collaboration and current treaties clearly indicate that their implication is not only confined to new investments but also it includes a few or all already existing investments[2].

Usually, it is a debatable issue whether the legal rules which protect the foreign investment affect the investor in making his decisions or not. Actually, these rules become less important as viewed in the shortage of economic incentives. It is right to say here that the legal structure and its effects either positive or negative which facilitate a specific project and give assurance of compensation in the case of expropriation will definitely play a significant role in the decision-making of any foreign investor. Thus, in this way, the establishment of a BIT by a host country should give an important indication to the international business community that it would not only welcome the investment but would also safeguard the foreign projects[3].

For some developed countries the establishment of BIT is a *sine qua non* or prerequisite for giving investment assurance to the future investor[4]. Some developed countries like Canada, Japan, Sweden, and US, which have signed few BITs, do not link the existence of investment insurance from national investment guarantee schemes with the availability of a treaty[5]. However, countries like Germany and France, which have signed a large number of BITs, consider a BIT a requirement for providing protection and security under their national insurance schemes. On the

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[1] Shihata, Ibrahim F. I., "Promotion of Foreign Direct Investment – A General Account, with Particular Reference to the Role of the World Bank Group", *6 ICSID Rev. – FILJ* (1991) pg. 486 – 88.
[2] Vandevelde, Kennet, J., "The Bilateral Investment Treaty Programme of the United States", *21 Cornell Int'l. L. J.*, (1988) pg. 212.
[3] Rudolf Dozer & Margrete Stevens, *Bilateral Investment Treaties* (Hague and Boston: Martinus Nijhoff Publishers, 1995) pg. 12.
[4] *Ibid.*, pg.12.
[5] *Ibid.*, pg.13; The US has instead Concluded so-called Investment Guarantee Agreements.

other hand, exceptions also exist where the rules and regulations of the host country provide the adequate treatment to the foreign investor, but case-to-case study of eligibility seems to be less satisfactory.

An agreement that reflects the share understanding of the parties is important for both investor and host country, as in this way the investor finds himself, eligible and protected to invest under the BIT.

1.4 The Experience of the Application of Bilateral Investment Treaties

The practice of getting involved into BITs for developing countries is a comparatively new experience in the domain of International Law. Under these treaties two states make a deal to protect and enhance their investment in each other's state. The rapid growth of these treaties through out the contemporary decades denotes the influence of this system as an extensively accepted device to supply a well balanced legal foundation for the regulation of FDI. As of 2008, over 2500 such treaties have been agreed between developed countries and developing countries as well as between developing countries themselves[6]. Most of the countries have setup their own BITs programme and continue to follow possibilities to talk about new treaties with a view to ease foreign investment and economic coordination. Aside from BITs other treaties that have direct connection to FDI relations consisting of avoidance of double taxation treaties and latterly bilateral agreements for cooperation, notification and information – exchange in the completion policy area.

1.5 Relationship between Bilateral Investment Treaties and International Law

The BITs place international responsibilities on each treaty party with respect to its dealing of investment from the other state. It is demanded that the BITs stabilize the current circumstances and so lead to the foundation of customary international law in the field of FDI as they prove reliable practice of states in relation with the principles of investment protection[7]. The collection of BITs subscribing to the fundamental equivalent standards may give strength to the related rules of international law and gives expression to it. Some analysts are in favour of the view that BITs support

[6] Recent Developments in International Investment Agreements (2008-June 2009). UNCTAD, IIA Monitor No. 3 (2009) Int'l. Investment Agreements, *United Nation*, New York & Geneva (2009).
[7] F. A. Mann, "British Treaties for the Promotion and Protection of Investment", *52 Brit. Y. B. Int'l. L.* (1981) pg. 241-249.

international standards of customary law and some consider them as *lex specialis*; a law governing specific subject matter, created by states in their mutual relations in view of the uncertain state of the existing international law on FDI[8]. In fact, the standard principle found in the BITs practice has steered to the progress of the number of significant regional agreements[9]. It is thus to a large extent accepted that the BITs possibly provide the base on which a future multilateral framework can be constructed. Once a comprehensive structure of BITs is stabilized, standards and principles that are normally approved will become the part of the domain of multilateral agreement[10]. Therefore, it is mandatory now to have a glimpse of current BITs practice in view of the expending task they perform in the field of FDI, specifically, the practice of Pakistan's BITs. In this way it is to be observed particularly that Pakistan is one of the eminent countries to deal with BITs as an important medium to captivate an expending proportion of FDI. More often, the survival of BITs increases its domestic legislation by contributing related rules and regulations to remove weaknesses or deficiencies in this regard.

1.6 HISTORICAL EVOLUTION OF BILATERAL INVESTMENT TREATIES

In 1959, the first modern BIT was established between Pakistan and Germany[11]. But, during 1960s and 1970s, a few treaties were concluded per year[12]. However, in 1980's and 1990's, a large number of BITs were signed between developing and European capital-exporting countries. However, in late 1980s, for the enhancement and legality of foreign investments, the BITs have become the global adopted document. The number of BITs signed in 1990s gradually increased, while at the same time, the fast expanding number of FDI proceeded in the developing countries.

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[8] Sornarajah, M., "State Responsibility and Bilateral Investment Treaties", *20 J. of World Trade L.* (1986) pg. 79. Also see, *Asian Agricultural Products Ltd. (AAPL) v. Republic of Srilanka*, Case No. ARB/87/3, available at: <http://icsid.worldbank.org/ICSID> (last visited: 18.08.09). Presented the issue for discussion; the general thought in their importance among States and the fact they have potential for the creation of customary principles are elements emphasizing the significance of these treaties.

[9] Chapter 11 of NAFTA incorporates many provisions covering most of the same grounds as BITs. Some standards followed by developed countries have been reconstituted into the MAI envisaged by the OECD.

[10] John M. Kline & Rodney D. Ludema, "Building a Multilateral Framework for Investment: Comparing the Development of Trade and Investment Accords", *Transnational Corporations* Vol. 6 No. 3 (1997) ch. 1, pg. 2.

[11] UNCTC, *Bilateral Investment Treaties* (New York: United Nations Publication 1988), pg.7.

[12] WCTC & ICC, Bilateral Investment Treaties: 1959 – 1991 (New York: United Nations Publications. 1992 pg.2. Most of the earliest BITs were between European countries and African countries. Latin American countries, adhering to the Calvo Doctrine, refused to join the trend.

As a matter of fact, more than two-third of BITs were initiated in 1990s were concluded by the end of 1998[13]. The existing network of BITs includes 152 states and territories from all over the world[14].

When developing countries signed BITs between themselves, engaging in a period of South-South Co-operation, it got a new importance. In the end of 1980, the number of BITs between developing countries was 64 which rose-up 508 at the end of 1996. In fact, most of them were between those countries, which were situated in the same zone or region such as Southeast Asia and Latin America.

These treaties are not the first to strengthen foreign Investment. The treaties on Friendship, Commerce and Navigation (FCNs) are predecessors of BITs, which to a greater extent built the structure of BITs. The first step was the FCNs in the developing process providing protection for FDI, by offering common responsibility to secure assets of the nationals of the treaty partners. International economic relation started to increase in 1920s and 1930s and for US the FCNs became the basic treaty instrument to secure its direct investment in other countries. But still, FCNs are not able to satisfy all concerns of capital-exporting countries for their risk-taking investors[15]. Instead of regulating and controlling the foreign investment issues, provisions related to foreign property in the FCNs were mainly interested in promoting trade or shipping. But most of the former characteristics present in the FCNs became unsatisfactory with the birth of some newly independent countries in the post war time. The endless right of entry and absolute national treatment, specifically, were in complete disagreement with requirements of the developing countries to dominate the inward foreign direct investment conforming to their commercial aims in the new political realities[16]. As it is already known, this tendency

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[13] UNCTAD, Bilateral Investment Treaties in the Mid 1990s (New York and Geneva: United Nations Publication Sales No. E.98.II.D.8. 1998)

[14] UNCTAD, World Investment Report (WIR) 1999. Available at: www.unctad.org (last visited: 19.08.09)

[15] The Case regarding *Elettronica Sicula S.p.A. (ELSI) (United States of America v. Italy)* [1989] I.C.J. Rep. 15, reproduced in vol. 28 I.L.M. Vol. 1 at 109 (1989). Available at: http://journals.cambridge.org (last visited: 27.09.09). USA argued before the International Court of Justice (ICJ) that the Italian government's requisition of ELSI's assets violated its obligations under the U.S. – Italy Treaty of Friendship Commerce and Navigation (FCN Treaty). The ICJ dismissed the petition by holding that ELSI's financial situation prior to the Italian government's actions was not stable and that the shareholders were incapable of effectively operating the firm.

[16] Joseph E. Pattison, "The United States – Egypt Bilateral Investment Treaty: A Prototype for Future Negotiation", *16 Cornell Int'l L. J. 305*, (1983) pg.309.

also establishes its expression in various UNGA resolutions[17]. That is why, in 1960s, BITs appeared as a new bilateral resolution to focus on particularly in the matters of foreign investment.

1.7 DOUBLE TAXATION TREATIES (DTTS)

These are the agreements between two countries in which both decide to exclude the double taxes specifically of income or capital gains arising in one State and paid to citizens of another State. DTTs divide the tax rights of the States, and in this way each State claims by referring its own domestic laws about the similar income or gains. The main purpose of DTTs is avoidance of double tax, reflected in the titles and preambles of almost all agreements. For example:

> "Desiring to conclude a Convention for the avoidance of double taxation and the prevention of fiscal evasion with respect to taxes on income and capital gains; Have agreed as follows:"[18]

In the year 2008, 75 new DTTs were signed, raising the total to 2,805. Developed countries are parties to 63 of these new DTTs, and 18 of them were signed between themselves only. Ireland and the Netherlands were the most active in this regard, each having signed six DTTs last year. Developing countries were involved in 39 of the new DTTs, led by Qatar and Viet Nam with four DTTs each. Five of the DTTs signed in 2008 were among developing countries only, rising the total of such DTTs to 447 DTTs (or 16 percent of the DTTs signed up to 2008). For DTTs signed in 2008, those between developed and developing countries account for the largest share that are 27 DTTs, mainly involving European countries (25). The total of such North–South DTTs amounts to 38 per cent of all the DTTs amongst the regions, European countries led with the conclusion of 59 DTTs, followed by countries from South East Europe (SEE) and the Commonwealth of Independent States (CIS) region, who signed 25 new DTTs. Most of their new DTTs were signed with developed countries (16), out of which 15 with European countries. African countries signed eight DTTs, four of which with developed – all European – countries. Latin American and Caribbean countries also signed eight DTTs, seven of which with developed,

[17] UNGA Resolution 1803 (XVII) (1962) and UNGA Resolution 2158 (XXI) (1966) on Permanent Sovereignty over Natural Resources.

[18] "Convention between the United Kingdom of Great Britain and Northern Ireland and the Islamic Republic of Pakistan for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income and Capital Gains", Nov. 24, 1986.

mostly European, countries (six). The first five months of 2009 saw the conclusion of 22 DTTs, out of which eight DTTs involve developing countries and four involve countries in SEE and the CIS.[19] Pakistan has concluded 54 DTTs so far.[20]

1.8 MULTILATERAL INVESTMENT TREATIES

These are the treaties concluded between more than two States or subjects of International Law. These treaties are called Multilateral Agreement on Investment (MAI) and also known as Law Making Treaties, however they do not make law in true sense, but after the World War II much of the international law was codified by multilateral treaties. Organization for Economic Cooperation and Development (OECD) tried to develop a comprehensive legal framework for the protection of foreign investment through MAI[21]. The scope of MAI includes all forms of investment. Following the approach of BITs, the OECD incorporated the definition of investment of MAI by including all non equity arrangements, intangible assets, loan, intellectual property rights, as well as public rights acquired under the law of host country such as concessions, licenses and permits.[22] Multilateral treaties also have chance to yield customary international law, thus they have direct effect on international legal system.[23]

The negotiation of such treaties is very problematic from the perspective of developing countries, as they expend the rights and powers of the foreign investors without imposing any obligations on them; therefore restrict the sovereign legislative power of the host country. Capital exporting countries like United States are eager to conclude MAIs to avoid interference from poor countries, and they consider OECD Council very safe, since only rich countries are the members of the organization.[24]

These treaties are not preferable and flexible because they address different interests of multiple countries, which are not only difficult but impossible to reconcile, from the view of developing countries. Furthermore, these agreements can not solve the problems of the interpretation because they are described in multilingual texts, as to extract a single meaning

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[19] *Supra* note. 6

[20] Board of Investment, Pakistan, http://www.pakboi.gov.pk/intl-agree.htm (last visited: 29-08-2010)

[21] In May 1995, it was an attempt to consolidate the existing consensus by providing a "broad multilateral framework with high standards for the liberalization of investment regimes and investment protection and with effective dispute settlement procedures".

[22] *Infra* note. 30, pg. 72

[23] Zubair Ahmad, *Internalization of Treaty Law: Executive Commitment and Consequent Legal Problems in Pakistan*, (unpublished LL.M thesis submitted to the Dept. of Law, Int'l. Islamic University, Islamabad, 2008) pg. 5.

[24] Multilateral Agreement on Investment, pg. 2, Available at: http://www.nationmaster.com/encyclopidea (late Visited: 14-08-2010)

from multiple texts in different languages is out of the question. Thus, for the success of the multilateral agreements, a common multilingual legal discourse is required.

1.9 THE MERITS OF BILATERAL INVESTMENT TREATIES

Bilateral Investment Treaties became the preferred method as the first step in setting some highly controversial issues in linking with FDI because of the problems in approaching an agreement to produce multilaterally admissible norms, as well as the unpredictable atmosphere about rules and standards of international law[25]. For their part, developed countries tried to conclude BITs to promote the entry of their out ward investments by convincing the host-developing country to eliminate different obstacles with in their national government. From the point of view of the investors, the host-countries' national regulatory framework, especially the developing states, often forcing a large extent of limitations and demands on FDI, may hinder significantly their functioning and profitability. They are also uncertain to depend on the rules and laws of host country for the protection as they have fear that after the investment has been made the host-country government may irrationally amend its law[26]. In this way, it is a need to have a legally enforceable bilateral treaty, which should establish an international obligation for the developing states. Moreover, developed countries also want to setup an effectual dispute settlement and binding mechanism to compensate and provide remedy to the deficiencies and short-comings of customary law.

Bilateral Investment Treaties also play their role in connection with other systems with the aim to reduce non-commercial risk including investment guarantee, insurance and political risk in some cases. Some partial capital-exporting countries, among the most extensive BITs programs, such as Germany and France, for giving security under their national insurance schemes, consider the BIT a pre-condition[27]. This trend can be seen in a study of United Nations Centre on Transnational

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[25] UNCTC, BITs, pg.1.

[26] Jeswald W. Salacuse, "BIT by BIT: The Growth of Bilateral Investment Treaties and their Impact on Foreign Investment in Developing Countries", *24 Int'l. Law.* 655 (1990) pg. 662.

[27] Rudolf Dozer & Margrete Stevens, Bilateral Investment Treaties (Hague and Boston: Martinus Nijhoff Publishers, 1995) pg. 13. In case of US, Overseas Private Investment Corporation (OPIC), a government owned corporation, is authorized under the Foreign Assistance Act to provide to U.S. investors insurance against losses due to expropriation, currency inconvertibility, war, revolution, insurrection and civil strife. As a matter of policy, OPIC generally does not offer any of its programs in states with which there is not any valid BIA or investment guarantee agreement.

Corporations (UNCTC) which says that if the insurer is sure regarding the legal protection of foreign investment, it is enough assurance in the law of host-country or in another way, for the presence of the treaty, the political risk insurance could be the condition. In fact, the Multilateral Investment Guarantee Agency (MIGA) also guarantees itself to "promote and facilitate the conclusion of agreements, among its members on the promotion and protection of investment"[28].

The basic purpose for developing countries to sign these treaties is to remove the perception of political risk attached with the country previously, so giving strength to the confidence of investors and upgrading the investment environment. It is sufficient to say that the impression of domestic legal framework on giving facilities to specific investment and providing surety to compensate due to expropriation plays surely an important role in making decision of any prospective investor. In this regard, in any specific country, the presence of a BIT is an important factor in producing a well balanced and inevitable investment environment. In fact, the discussion and agreement of BIT by a developing country itself can perform a significant "signaling function", which show to the capital-exporting state as well as international community that the country is not only welcoming FDI but also promoting and securing some foreign companies. The role of BITs can be seen in the Fourth Lome Convention, regarding African, Caribbean and Pacific (ACP) countries, while Article 258 says, "the promoting of private investment requires binding obligations to take measures and actions, which help to create and maintain a predictable and secure investment climate as well as enter into negotiations on agreements which will improve such climate"[29].

As it is already noted, due to the complications and problems of internal economic policies and sensitivities of supremacy, the developing countries do not want to bind themselves in multilateral treaties so, they prefer bilateral treaty. As a matter of fact for the attraction of FDI, some comparatively liberal rules and regulations are required, which are not possible for multilateral treaties[30]. In addition,

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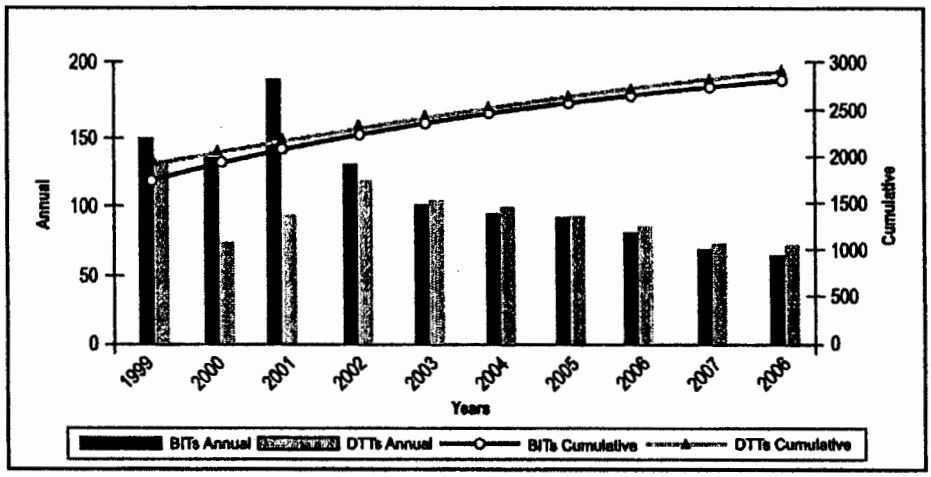
[28] The MIGA Convention, Art. 23.

[29] The Fourth ACP-EEC Convention (Lome IV) was signed on December 15, 1989 by the Africa-Caribbean-Pacific (ACP) and European Community (ECC) countries, reproduced in Vol. 29 1.L.M 783 (1990), Art. 258(c).

[30] In this regard it can be seen that the developing countries were promoting multilateral treaties with the purpose to control over Multinational Enterprises under the umbrella of NIEO. At the same time



Source: Website of UNCTAD

Germany was the first country, which inaugurated the series of BITs, and it is still leading with more than 135 BITs. China is holding second position with more than 120 BITs. Recent Chinese BITs include broader rights for investors than its older BITs. A small group of countries, at the same time, still has reservations on the present policies of BIT. For example, in 1990s, Norway stopped to signing of BITs and after revising the policy it publically disclosed the new draft in 2008. Seventy percent of the signatories of BITs are European countries.

1.10.1 BITs between Developing and Developed Countries

In the beginning, BITs were concluded between developing and developed countries. Many developing countries signed their first BITs with their preceding colonial masters, as India signed the first BIT with United Kingdom[35]. Particularly, in 1990s many countries started signing BITs, but BITs between two developing countries were at the high peak. The failure of multilateral agreements gave motivation to countries to sign more BITs.

The number of BITs between developing countries also continued to grow. In 2008, 13 BITs out of 59 were signed between developing countries, raising their total number to 1112, whereas the total number was 161 before ten years. In 2006,

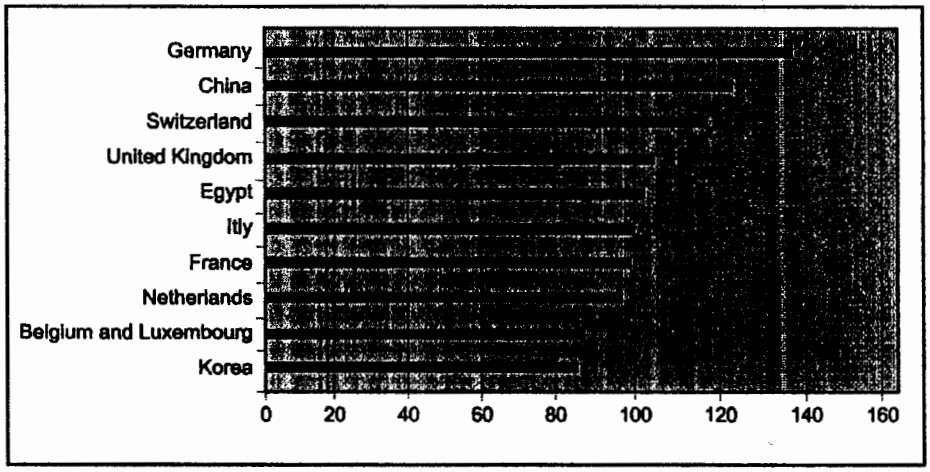
[35] Malik, Mahnaz, "Recent Developments in Regional and Bilateral Investment Treaties", Paper presented in Second Annual Forum of Developing Country Investment Negotiators, 3 – 4 November 2008, Morocco, pg. 4.

31%BITs were signed between developing countries, thus raising the number of south – south agreements to 680 BITs.[36]

In 2008, the south – south cooperation continued. Out of 59 BITs, 13 were signed between developing countries. On the other hand, the role of developed countries in the domain of BIT is still very important. 26 new BITs were signed by developed countries in the year 2008. By the end of 2008, these countries were sharing 63% of all BITs[37]. Asian Developing Countries have concluded 41%, African Countries are now party to 27%, Latin America and Caribbean Countries are comparatively least active and party 18%, and countries of SEE and CIS are party of 23% of all BITs.[38]

In short, the top 10 signatories of BITs are developed states as shown in figure 2.

Figure 2: Top Ten Signatories of BITs up to end 2008



Source: Website of UNCTAD

1.10.2 BITs in Different Regions

In first half of 2008 and in 2007, Asian states remained at top in concluding BITs as compared to 2006. African states also participated in BITs but comparatively at slower rate to the last year. The Latin American states showed very less interest in signing BITs. Even the last year, a few of them withdrew their BIT obligations.

One of the major reasons for showing weak involvement by these countries is the fact that they remained respondents in many disputes which arose between

[36] *Ibid.*, pg. 5.
[37] *Ibid.*, pg. 6.
[38] *Supra* note. 6, pg. 3-5.

investor and the state in bilateral treaties. Argentine holds the first position with 46 registered cases against it. Mexico stands at second position with 18 cases[39].

In 2007, the re-negotiated BITs rose up in number. A few states are not satisfied with the prevailing standard or model of BITs with more investor protection clauses, which is a great hurdle for countries to make policy for national interest and less appropriate development protections. Moreover, the increasing number of complaints against developing countries, and realization of the consequences BITs protection in arbitral awards explaining such clauses, has been an important element for countries to re-negotiate BITs, and make frameworks which regulate the balance between policy space and investor protection. Meanwhile, some countries of Latin America for example Ecuador, Bolivia and Venezuela have taken several sever steps to revoke their existing treaties[40].

1.11 THE EFFECT OF BITS ON INTERNATIONAL TRADE AND INVESTMENT

After studying the history, scope, application of BITs, many questions arise in one's mind. For example: what is the effect of BITs on FDI and international business? Are they playing a significant role to increase investment? Do BITs provide protection to foreign investor? How much the BIT affects the decision making power of the investor? Unluckily, one does not have the practical proof to reply the above mentioned questions but can only guess from presumed data and considering the relationship among international trade, foreign investment and a BIT[41].

The BIT seems to become very important step of the investment process: at the time of investment making, and at the time of expropriation and acquisitions of direct investment by the host state.

1.11.1 Undertaking a Foreign Investment

Generally, it is stated that a bilateral investment treaty encourages investment in the capital importing state by providing guarantees of specific rights to the nationals of the capital exporting state. One of the basic purposes of the treaty is increased

[39] *Supra* note. 28., pg. 9.
[40] *Ibid.*, pg. 13.
[41] *Supra* note 18, pg. 673.

investment of the host country and therefore it is required to give confidence to the investor, which helps him to make any decision regarding investment.

However, there are many factors which affect the decision of investment, and it is hard to find out accurately whether the presence of a BIT is one of them. Many major investments have been made between US and China when there is no BIT between them. From 1978 to 1989, almost 350 companies of USA made investment of $ 3.5 billion in China although BIT negotiations had been carrying on over five years[42]. In spite of it, it is assumed that additional investments would have been made if both countries had concluded a BIT. Likewise, many cases can be seen when the investors made the investments without knowing the existence of a bilateral investment treaty.

It is observed that some capital exporting countries discourage their individuals or companies to make investment in those countries with which they have not signed a treaty. So, the conclusion of a BIT can be a way to persuade the government of a developed country to convince its individuals to make investment in a country with which it has signed a treaty. The existence of BIT may facilitate the foreign investment as the capital importing country re-consider and finally amend its rules and regulations and governmental attitudes to adjust treaty clauses.

Bilateral Investment Treaties are one of the confidence building measures which improves the investment environment of the host country. The conclusion of BIT, at least, by the host country, is an indication to foreign investors that their investments are appreciated. Therefore, it is suggested to investor and trade solicitor to quote and utilize related BITs, with officials of capital importing countries, in the investment negotiations[43]. It can be valuable to note that the BITs made by the possible host state after the US enterprise, through a partly or completely owned foreign subsidiary, can take benefit of a BIT between the prospective host country and the foreign state where the subsidiary is already present.

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[42] *Ibid.*

[43] Malecek, Michael J., "United States Bilateral Non-Tariff Commercial Treaty Practice: A Section Membership Survey", *10 Int'l. Law*, (1976) pg. 561.

1.11.2 Protecting Foreign Investment

Usually documents do not seem to provide protection to BIT provisions, rather courts refer them as friendship, commerce, and navigation treaties, and the decision of court emerge from the judiciary of developed states, instead of capital importing countries. Despite that, provided facts and figures show that those developing countries which have signed a BIT give protection to foreign investor in their countries. So, if a country nationalizes foreign assets in a specific field or business, it seems that it has exempted the foreign investment under a BIT. In governmental negotiations, an investor is in a better position to obtain compensation by a BIT than any other possible way. An obligatory dispute settlement clause of BIT and the eventual prospect of binding arbitration will definitely stop the government of host country to take any action against foreign investment.

The BITs dispute settlement clauses, which contain rules and regulations give the feeling of security to the investors. However, in fact, very few disputes under a BIT are solved by the procedure of arbitration so far. Publicly available information indicates that there are approximately 125 investment treaty cases pending before international tribunals. Yet, it is difficult to know the exact number of cases as there are many disputes in proceeding phase before different tribunals and thus clothed with confidentiality. After the careful reading of few BIT cases, one can conclude that similar pattern, like filing of a claim, delay in the appointing the tribunal and procedural order which is mostly violated, is followed and afterwards, it is very common that tribunal finds its jurisdiction over the claims. But, after many years when the tribunal renders award on merits, the claims are often dismissed as in case of *Bayindir*. Therefore, after the jurisdiction phase, mostly contracting parties agree to with draw the case as in *Impregilo* and *SGS*. So, one can conclude that the role of the arbitration is either unsatisfactory, or it frightens the government of the capital importing country to take any action against any foreign investor. As far as, cases related to Pakistan are concerned, the foreign investors filed their cases in ICSID as claimants and Pakistan defended its position as a respondent. In short, the BIT's definition clauses and other provisions give more security to investors than customary international law. Sometimes the general provisions of bilateral investment treaty give ambiguous meanings, and so, diverse interpretations can be deduced from

them.[44] The broad definition of 'investment' is interpreted in different ways by both foreign investors and host states. In case of *Bayindir*, Pakistan held that the contribution of Turkish investors did not satisfy the criteria of investment, while the claimant rejected the allegations of the respondent and stated that its contribution in terms of 'know-how', 'equipment', and 'personnel' has an economic value and fall with in the meaning of 'every kind of asset of investment'. The ICSID tribunal also favoured *Bayindir* and rejected Pakistan's contention about the role of the claimant as an investor under the BIT. The above mentioned cases are elaborated in detail in Chapter No. 4 of the same study.

[44] UNCTC, Bilateral Investment Treaties, (1988) pg. 74.

Chapter No: II

CORE FEATURES OF BILATERAL INVESTMENT TREATIES

The fundamental provisions of all BITs are same and comparatively less in number[1]. On the other hand the exact character of the rights and liabilities of the host-country can diverge from treaty to treaty. Basically all BITs include the following features:

i- Scope and Applicability of BIT
ii- Legal Requirements for the Entry of Investment
iii- Treatment of Investor and Investment
iv- Umbrella Clause
v- Transfer of Currency
vi- Functional Requirements of the Foreign Investment
vii- Expropriation and Acquisition
viii- Compensation for Losses – Hull Formula
ix- Duration and Time Limit
x- Dispute Resolution

In this chapter an attempt is made to discuss each feature briefly.

2.1 Applicability of Bilateral Investment Treaties

An essential provision in any BIT is its extent of application: the investor and investment which takes advantage from it. The applicability of BIT normally defines the following provisions:

a) Investment
b) Nationals
c) Enterprise or Companies; and
d) Treaty between Contracting Parties.

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[1] For details of various BIT treaty provisions, United Nations Centre on Transnational Corporations, Bilateral Investment Treaties, Available at: http://unctc.unctad.org (last visited: 22.08.09)

Identifying the concept of "investment", it has got no exact meaning and is continually modifying. Currently BITs have provided lists of particular types of investments which define a wide and open-ended definition of it. For example direct investment or portfolio investment and further more, moveable and immoveable, intellectual property, shares and business concession and so on, and yet there is no exclusive list. Some BITs provide a list of items like: shares, stocks, reinvested returns, claims to money, moveable and immoveable property, business concessions, copyrights, industrial and intellectual property rights, good will and know-how and other similar rights; besides mentioning: "every kind of asset in particular, but not exclusively" the rights stated above and also expend it by including words like 'any other form'.[2]

Time dimension is also one of the components in the definition of investment of BIT and usually remains the point of contention during negotiation. Particularly, do the liabilities and treatment upon "investment" cover investments generated during or after, the negotiation of the BIT? Normally, the investing countries wish the treaty to secure all types of investments of their individuals and corporations, irrespective of the time when they invested. For example, the US – model treaty explains that the treaty shall be applicable to all the investments existing at the time of the enforcement or afterwards under the heading of Covered Investment[3] (that is, investments of a national or company of a Party in the territory of the other Party)[4].

On the other hand, sometimes the developing countries try to restrict the BIT to only future investment. They consider BIT a mechanism which has brought a very narrow aim in providing an encouragement for already existing investments in the country. In addition, such earlier investments had authorities but may not have received approval and got the authority considered that the rights and treatment of the investments would be extended by treaty afterwards. For example, if the treaty

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[2] For example, "Agreement between Pakistan and Turkey Concerning the Reciprocal Promotion and Protection of Investment", March 16, 1995, art. 1(2). Available at: http://www.pakboi.gov.pk/pdf/BIT/Turkey.pdf (last visited: 21-07-10)

[3] "Treaty between United States of America and The Government of [country] Concerning the Encouragement and Reciprocal Protection of Investment", 2004 Model BIT, art. 1. Available at: www.ustr.gov/Trade_Sectors/Investment/Model_BIT/section (last visited: 28-12-08)

[4] US Department of State, "Bilateral Investment Treaties and Related Agreements", Available at: http://www.state.gov/e/eeb/ifd/bit/ (last visited: 2-08-2010)

increased the currency transfer of already existing projects, this change would put an unpredicted load on the reserves of the foreign exchange of the host country. In contrast to this point that the prevailing foreign investors are a prospective source of future investment and to refuse their treatments for their "prior" investments may shatter their trust in the investment environment of the host country. In most of the cases, BITs deal with both prevailing and new investments. Despite that, particularly some of them restrict coverage to investments at the time of the negotiation of the treaty. A middle position can be seen specifically in some of the Germany's treaties which say that the BIT will imply on existing investments on the term that the investing country makes a special request, and the host country accepts it. This concept is illustrated in the BIT between Indonesia and Germany, it states:

> "In respect of the Republic of Indonesia the present Agreement shall apply to investments made prior to its entry into force by nationals or companies of the Federal Republic of Germany only if a document of admission is granted on application. The Government of the Republic of Indonesia shall accord sympathetic consideration to such applications".[5]

One of the important features in applicability of BIT is defining the "investors". This provision also discloses the differences in the inter-relation between the capital investing and the host country. Normally, an investing country wants wide coverage involving most of its individuals; on the other hand the host country generally wants the short scope. Particularly, the host countries are usually hesitant to give the advantage of a bilateral investment agreement to those companies and nationals who have only a weak relationship with a partner of treaty. In fact, to permit the treaty to give advantages to those people or companies, which are related with third countries and have got no relationship of treaty would be, to stop its right to negotiate equivalent privileges from contracting parties. Therefore, a primary job of the bilateral investment treaty is to decide that the investor, specifically a company or any legal person, has considerable relation to a treaty country to be included by it. In this regard, three types of investors create such problems:

i- Companies established by nationals of a third country in a treaty country,

ii- Companies established by nationals of a treaty country in a third county, and

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[5] "Agreement between the Federal Republic of Germany and the Republic of Indonesia Concerning the Encouragement and Reciprocal Protection of Investments", Nov. 08, 1968. Available at: http://www.unctad.org/sections/dite/iia/docs/bits/germany_indonesia.pdf (last visited: 02-04-09)

iii- Companies in which third country's nationals have a major interest.

Almost all BITs demand that the treaty partner should have one or more relation for a company to be covered by a treaty as under:

i- Country where the company's registration takes place.
ii- Country where the head office or principal place of business exist.
iii- Country whose individuals have control and obtain sufficient interest by the investment of the company.

Usually the above mentioned requirements are gathered for the investing company which should satisfy two or more of them to sign the BIT[6].

2.2 Legal Requirements for the Entry of Investment

Most of the BITs impose obligations on signatory countries to facilitate and provide favourable circumstances for investments, as the BIT between Finland and Kuwait states:

> "Each Contracting State shall endeavor to take the necessary measures for granting of appropriate facilities, incentives and other forms of encouragement for investments made by investors of the other Contracting States".[7]

However, there does not exist any BIT between a capital exporting and a capital importing country, which allows the total free entry of the capital, rather most of the developing countries monitor the entry of foreign investment through their rules and regulations.[8] In drafting bilateral investment treaties few developed countries have tried to limit the scope of desired approvals for investment negotiates by the treaty. On the other hand, the capital importing countries normally hold the opinion that the treaty only applies to the investments which have been properly approved according to the legislation of host country.

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[6] "Agreement between Japan and China Concerning the Encouragement and Reciprocal Protection of Investment", Aug. 27, 1988, reprinted in 28 I.L.M. (1989) pg. 582.
[7] "Agreement between Netherlands and Philippines for the Promotion and Protection of Investment", Feb. 27, 1985, art. 2, (1985)
[8] Jeswald W. Salacuse, "Host Country Regulation of Joint Ventures and Foreign Investment", Joint Venturing Abroad – A Case Study, *D. Goldweig ed.* (1985) pg. 103.

One more condition proposed by investing countries in their BITs, is to get the same treatment on entry which the capital importing country gives to investments of its own persons or to any other third country, whichever is more favourable.[9]

Now the point is obvious that before giving permission to foreign investor to start his project, the capital importing country must deal him in the same way as it deals with its own national investor or investor of any country. This issue can create problem for those developing countries which are trying to promote the investment of their own nationals. Moreover, the host country may have some major political or strategic causes to block specific areas for the foreign investments. The developing countries also promote their own nationals because they know that national investors do not have courage to become equal to foreign companies because of their huge size and global organization, and at times they are multinational corporations. Therefore, they feel easy to give Most-Favored-Nation (MFN) Treatment to foreign investment as compared to providing it National Treatment (NT).

However, the implication of the ideas of MFN treatment and NT to projects of foreign investment, are not alike in nature rather more difficult than the earlier idea of fungible goods in international trader law. Most of the treaties concluded during the last decade contain a phrase "in like situations", which provides a guideline for the application of different standards of treatment; as the treaty may legally permit different treatment to projects if they themselves are different or the surrounding situation are not same. For example the US – Rwanda BIT states:

> Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.[10]

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[9] For Example, "Treaty between United States and Panama Concerning the Treatment of Protection of Investment", states: "Each party shall permit and treat such investment, and activities associated therewith on a basis no less favorable than that accorded in like situations to investment or associated activities of its own nationals or companies, or of nationals or companies of any third country, whichever is the more favorable...", Oct 27, 1982, art. II, *21 I.L.M.* (1982) pg. 1227 – 1229.

[10] "Treaty between the Government of the United States of America and the Government of the Republic of Rwanda Concerning the Encouragement and Reciprocal Protection of Investment", Feb. 19, 2008, art. 3(1). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/US_Rwanda.pdf (last visited: 20-07-2010)

investments against private as well as public action. In some BITs, the specific standard contains some phrases like 'full protection and security' and 'prohibition of discriminatory measures'. BITs use two standards for the purpose of protecting discriminatory treatment: the National Treatment and the Most-Favoured-Nation Treatment.

b. National Treatment

Most of the BITs, with different conditions and limitations, hold the opinion that capital importing country should give treatment to the investments from the capital exporting countries in the similar manner; it gives treatment to investments of its own companies and nationals. Most foreign countries give much importance to this feature that is called 'national treatment', and their followers always stress on it. The World Bank Guidelines on the Treatment of Foreign Investment explains the point as:

> "... such treatment will, subject to the requirement of fair and equitable treatment mentioned above, be as favo[u]rable as that accorded by the state to national investors in similar circumstances...".[13]

On the other hand, some of the host countries have tried to restrict and extend this national treatment by considering the difference in economical and technological sources between their own foreign multinational firms. Some exceptions have been created by the developing countries to a very small extent: that is for the development of public and private enterprises a host country may reserve some financial areas and privileges to their nationals. Reservations concerning measures relating to public order or national security are the most common exception. Moreover, the development considerations also play the significant role in certain exceptions of the National Treatment Standard.

c. Most-Favoured-Nation Treatment

Most of the BITs hold the notion of 'most-favoured-nation' provisions that means that the host country should protect the investment, and give it a favourable

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[13] Available at: http://ita.law.uvic.ca/documents/WorldBank.pdf (last visited: 30-8-2010)

treatment not less than it gives to the investments of any third country, which is its favourite. This treatment standard prohibits a country from discriminating among the inward investments from different sources. It assures that investments from the other treaty party are not to be treated less favourable than those from a third county. It also means that any favour, advantage or privilege granted to investments from a third country must be extended automatically and unconditionally to investment originated from the other treaty party. A typical *modus operandi* is found in the United Kingdom – Pakistan BIT:

> "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 [...] nationals or companies of any third State"[14].

d. Both National Treatment and Most-Favoured-Nation Treatment

Many investment treaties have joined both terms that is national treatment and most-favoured-nation treatment. In this way foreign investment may get benefit from any of the both treatments which ever is the more suitable. Developed countries, such as US, are specifically in favour of joining of both treatments because it guarantees to provide impartial and fair treatment with national of treaty partner and national of third country. For Example the United States and Jordan BIT includes both treatments as:

> "With respect to the establishment, acquisition, expansion, management, conduct, operation and sale or other disposition of covered investments, each contracting party shall accord treatment no less favo[u]rable than that it accords, in like situations, to investments in its territory of its own nationals or companies (herein after 'nation treatment') or to investments in its territory of nationals or companies of a third country (herein after 'most-favoured-nation treatment'), which ever is more favourable".[15]

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[14] "Agreement between the Government of the Islamic Republic of Pakistan and the Government of the United Kingdom of Great Britain and Northern Ireland For the Promotion and Protection of Investment [herein after: Pakistan – UK BIT]", Nov 30, 1994, art. 3.

[15] "Treaty between the Government of the United States of America and the Government of the Hashemite kingdom of Jordan Concerning the Encouragement and reciprocal Protection of Investment", July 2, 1997, art. 2(1). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/us_jordan.pdf (last visited: 20-07-2010)

2.4 Umbrella Clause

Most of the old BITs, contain an 'Umbrella Clause', through which both contracting states make a 'blanket promise' to maintain and protect the commitments an obligations of the investment, made by the foreign investors. Those BITs which include words or phrases like 'honour', 'observe', 'comply with' or similar language indicate that they have Umbrella clauses in them. In most of the legal disputes, such clauses serve as the basis for the claim, described in the terms of the BIT. But the recent published cases or disputes have not dealt the application and interpretation, or even have not mentioned such clauses in the context of international treaty dispute. The Pakistan – Switzerland BIT incorporate the clause under the heading of 'Observance and Commitments" as:

> "Either Contracting Party shall consistently guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party".[16]

It is estimated that of the almost, 3000 BITs currently in existence, approximately 40% contain such an "Umbrella" or "Respect" Clause, but it has not been a very prominent feature of recent BITs. This clause is in its narrow sense was addressed, for the first time, in the ICSID arbitration, in a jurisdiction phase of the *SGS v. Pakistan* Case[17]. Also its broad sense was discussed in *SGS v. Philippine* Case.

2.5 Transfer of Currency

In the BIT, the clause of currency transfer is very important and significant for both treaty partners. On one side, foreign company or nationals believe the capability to shift capital and profit and to make foreign expanses openly as necessary to handle and get profit from the project of their investment, that is why their own countries stress for un-controlled security to transfer money through BIT.

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[16] "Agreement between the Islamic Republic of Pakistan and the Swiss Confederation on the Promotion and Reciprocal Protection of Investments", July 11, 1995, art. 11.
[17] This concept is further elaborated in *SGS* Case, chapter 4, of this research.

On the other hand constant balance of payments, problems of most of the developing countries and the need of the capital importing countries to preserve foreign exchange to spend for goods and services to a great extent minimizes their capacity and desire to give the uninterrupted right to investors to transfer currency. Because of this fact, to monitor the transformation and shifting of money to foreign countries, many host countries have exchange control laws.

Therefore, the transfer of currency is one of the most difficult issues to settle because of the contradictory opinions of treaty partners. As the investing countries demand for wide unlimited guarantees while on the other hand the host countries request for limited guarantees at the issue of money transfer, by providing various exceptions. For example, the United States Model Treaty, explains that: "Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory..."[18].

The clauses of currency transfer of many BITs explain the following main points:

i- The nature of the rights of investor

ii- The ways of payments

iii- The type of currency which will be used for payments

iv- The suitable exchange rate

v- The time frame to make transfer

The UK – Sierra Leone BIT explains these points as:

> "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".[19]

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[18] *Supra* note 3, art. 7.

[19] "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Republic of Sierra Leone for the Promotion and Protection of Investments",

The word 'returns' explains the extent of the right of currency transfer in many investment treaties, and usually it has got a specific meaning in the definitional clauses of BITs. For example, Article 1(4) of the Pakistan – Germany BIT gives the term a broad, non-exclusive definition: "'Return' means the amount yielded by an investment for a definite period, such as profit, dividends, interest, royalties or fees"[20].

Many developed countries have tried to get rights of transfer without any condition or exception while most of the BITs have granted flexibility to capital importing countries in this provision as mentioned in Netherlands – Philippines BIT[21]. In few cases the application of exception is itself a subject to a restriction. It keeps balance of payments and suggests the power to take exceptional measures. It says:

i- Power should not be used to slowdown the process of profit, transfer, royalties' fee, dividends or interest

ii- Transfer of 20% per year should be guaranteed in case of investment made in any other form[22].

In certain cases a bilateral investment treaty introduces some special clauses for the sending back of capital because of the amount of transfer of currency by permitting the payment to be done in installments or by giving a time period.

2.6 Functional Requirement of the Foreign Investment

In drafting BIT there may be a provision for functional aspect of the investment. It is not enough to export capital and leave it but there is a requirement and need to operate or run the project so that both partners can take advantage in the form of technology transfer, know-how and technical experiences. Here the investor gets the

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Jan. 13, 2000, art. 6, Available at: http://www.unctad.org/sections/dite/iia/docs/bits/uk_sierraleone.pdf (last visited: 24-07-2010)

[20] "Agreement between Islamic Republic of Pakistan and the Federal Republic of Germany on the Encouragement and Reciprocal Protection of Investments", Dec 01, 2009. art. 1(4). Available at: http://www.pakboi.gov.pk/pdf/BIT/Germany.pdf (last visited: 15-7-10)

[21] *Supra* note 5, art. 7.,"...the unrestricted transfer in free convertible currency of their investments ..."

[22] "Agreement between United Kingdom and Jamaica for the Promotion and Protection of Investments", Jan 20, 1987, art.V(1), U.K. Doc.., Jamaica, No. 1, (1987), CMND. No. 89.

right to enter in the country and to hire the employees of foreign nationals a well as from host country for smooth functioning and working of the business. In this way the foreign investors fulfill the instructions as expected by the capital importing country.

2.7 Expropriation and Acquisition

Another aim of BIT is to rescue foreign investment and assets from government acquisition, compulsory purchase and attachment or dispossession, eminent domain, modification or any other kind of involvement and interference by authorities or agencies of host country with the rights of property of investors. In spite of status occupied by developing countries, in different multilateral forums, almost all BITs contain a variety of point of view of customary international law; that a country can not take possession of assets or property of a foreigner except:

i- For National Interest;
ii- In non Prejudice Way;
iii- On Payment of Damages in some cases;
iv- Through Court Order;[23]

'National Interest' is a commonly accepted ground for expropriation and nationalization by a state despite its lack of certain and precise meaning. Host governments have been in the light of general government policy considerations, granted a very wide margin to determine what is for its public purpose. The requirement of 'non Prejudice Way' was traditionally directed at the discrimination of foreigners on a racial basis. However, it is now generally more widely applied to avoid any arbitrary non-prejudice act regarding the process of compensation, as well as other procedural measures. Thus it is required that the administrative authority of the host country should review the due process of expropriation or nationalization. But still this requirement is purely dependent on domestic law and therefore, a very little authority concerns the meaning of this term. The BIT between UK and Mexico reflects the concept as:

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[23] For details of various BIT treaty provisions, *Supra* note 1, pg. 30-33

"Investments of investors of either Contracting Party shall not be nationalized or expropriated, either directly or indirectly through measures having effect equivalent to nationalisation or expropriation ("expropriation") in the territory of the other Contracting Party except for a public purpose, on a non-discriminatory basis, in accordance with due process of law and against compensation".[24]

The different provisions of the customary rule have introduced various interpretations in many treaties, providing more or less favourable safety to the interest of investor.

The customary rule regarding 'compensation' is adopted by many BITs as a standard rule and explained in "*Hull Formula*".[25] It states that the compensation should be prompt, adequate and effective; that is a quick and rapid, enough and sufficient, and beneficial and advantageous manner. Nowadays, the *Hull Formula* and its variations are often used and accepted and considered as part of customary international law. Most of the treaties contain this doctrine. It is mentioned in Australia – Pakistan BIT as:

"The expropriation is accompanied by the payment of prompt, adequate and effective compensation"[26]

The UK – Costa Rica Treaty also explains these terms in a way that the compensation must be according to market value, immediately before the expropriation or amending expropriation become known to public with interest at commercial rate, with in no time, realizable, and freely transferable[27]. This bilateral investment treaty reflects the point of view of investor or capital exporting country and it is more favourable and protecting for their investment.

While on the other hand, Japan – China Treaty chooses a formula which is more protective and flexible for host country. Instead of giving 'interest at commercial rate'

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[24] "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments", May 12, 2006, art. 7(1). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/UK_Mexico.pdf (last visited: 28-07-2010)

[25] Articulated for the first time by the United States Secretary of State Cordell Hull in response to Mexico's nationalization of American Petroleum Companies in 1936.

[26] "Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments", Feb. 7, 1998, art. 7(1)c.

[27] "Agreement between United Kingdom and Costa Rica for the Promotion and Protection of Investment", Sept 07, 1982, art. V(1).

it introduces the term 'appropriate interest' when expropriation or any other measures are taken[28].

Developing countries supported the Calvo Doctrine during the 1960s and 1970s. In 1962, The United Nations General Assembly adopted its Resolution on Permanent Sovereignty over Natural resources which affirmed the right to nationalize foreign owned property and required only "appropriate compensation",[29] which was believed to be very helpful in overcoming the differences of both developed and developing countries.

In short, compensation and its specification differ from treaty to treaty. Developed countries focus on their interest while host countries propose their own terms and conditions.

2.8 Compensation for Losses

Many bilateral investment treaties also contain provision for losses caused by violence, anarchy, war or any other disturbance to a foreign investment. In spite of that the bilateral treaties do not propose any definite or exact liability for losses; the customary international law distinguishes between destruction of property due to military or civil strife and expropriation in other natural disasters. Most of the BITs, regarding compensation, assure that the investors will get the same treatment as individual or companies of a host country. The BIT between Egypt and Germany exemplify this approach as:

> "Investors of either Contracting State whose investments suffer losses in the territory of other Contracting State owing to war or other arm conflict, revolution, a state of national emergency, or revolt, shall be accorded treatment no less favourable than by such other Contracting State than that which the later Contracting State accords to its own investors as regard restitution, indemnification, compensation or other valuable consideration. Such payments shall be freely transferable".[30]

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[28] "Agreement between Japan and China Concerning the Encouragement and Reciprocal Protection of Investment", Aug 27, 1988, reprinted in 28 I.L.M, (1989) pg. 575.

[29] OECD, Directorate for Financial and Enterprise Affairs, "Indirect Expropriation and the Right to Regulate in International Investment Law", *Working Papers on International Investment*, Nov. 2004, pg. 2.

[30] "Agreement between the Arab Republic of Egypt and the Federal Republic of Germany Concerning the Encouragement and Reciprocal Protection of Investments", June 16, 2005, art. 4(3).

So, in case of damage, it is obligatory to provide the same treatment to foreign investor, as the host country provides to its own. However, some treaties are in favour of most-favored-nation treatment in their cases. It is mentioned in Australia – Pakistan BIT as:

> "When a Party adopts any measures relating to losses in respect of investments in its territory by citizens or companies of any other country owing to war or other armed conflict, revolution, a state of national emergency, civil disturbance or other similar events, the treatment accorded to investors of the other Party as regards restitution, indemnification, compensation or other settlement shall be no less favourable than that which the first Party accords to citizens or companies of any third country".[31]

Moreover, the loss – causing damage should also be defined in BITs. Some treaties give the specific meanings[32] and interpretations, while others generalize it[33].

2.9 Duration and Time Limit of Enforceability

Usually, BITs specify their minimum enforcement period and the purpose of this provision is to grant the high level of certainty and predictability, to the investor of the contracting party, regarding the international legal framework which is applicable to their investments. Therefore, the specific clause establishes the stable circumstances for the investors to carryout their business.

Some BITs specify the short initial period of enforcement; that is up to five years. The BIT between Netherlands and Philippine can be presented in this regard.

> "The present Agreement shall enter into force on the first day of the second month following the date on which the Contracting Parties have informed each other in writing that the procedures constitutionally required therefor[e] in their respective countries have been complied with and shall remain in force for a period of 5 years". [34]

Most of the BITs state that the initial period for the enforcement of treaty would be ten years. It is mentioned in China – Pakistan Treaty as:

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[31] *Supra* note. 24, art. 8.
[32] "Agreement between Denmark and Indonesia Concerning the Encouragement and Reciprocal Protection of Investment", Jan 30, 1968, art. V, UNTS. pg. 720.
[33] *Supra* note 18, art. VI.
[34] "Agreement between the Kingdom of the Netherlands and the Republic of the Philippines for the Promotion and Protection of Investments", Feb. 27, 1985, art. 12(1).

> "This agreement shall enter into force thirty days after the date on which both contracting parties have notified each other that they have fulfilled their respective internal legal procedures, and shall remain enforce for a period of ten years".[35]

Some BITs provide for a long initial period of application which is up to fifteen years. For example: Thailand – Russia BIT states:

> "This agreement shall remains in force for a period of fifteen years. Upon the expiration of this period, it shall automatically extend for subsequent period of five years unless one of the Contracting Party notifies the other Contracting Party in writing at least twelve months in advance of its intention to terminate this agreement".[36]

Few other BITs do not specify the time limit after the completion of initial phase which means the Treaty would remain in force for indefinite period until one contracting party gives notice to other to terminate it. Article 15(1) of the BIT between Australia – Pakistan demonstrates this approach as:

> "...It shall remain in force for a period of fifteen years and thereafter shall remain in force indefinitely, unless terminated..."

Regardless of fix time period or indefinite approach, a large number of BITs agree to protect different provisions or clauses of investments treaties for a specific time, even after the termination of the treaty. Some Treaties demand for protection for five years, some for ten years or some others for twenty years. The UK – Mexico BIT illustrates the concept as:

> "The provisions shall continue in effect with respect to investments for a period of 15 years after the date of termination and without prejudice to the application thereafter of the rules of general international law". [37]

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[35] "Agreement between the Government of the People's Republic of China and the Government of the Islamic Republic of Pakistan on the Reciprocal Encouragement and Protection of Investments", Feb 12, 1989, art.13(1)

[36] "Agreement between the Government of the Kingdom of Thailand and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments", Oct. 2002, art.11(2)

[37] "Agreement between the Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the United Mexican States for the Promotion and Reciprocal Protection of Investments", May 12, 2006, art. 27.

2.10 Dispute Resolution

One of the major weaknesses of customary international law is that it can not provide an effectual and enforcing system for the settlement of the disputes of foreign investment. An important objective of a BIT is to provide a solution for disputes which arise between the treaty partners or between host country and aggrieved investors.

Many BITs state that in case of disagreement regarding application or interpretation of treaty, between treaty partners; firstly both of them should try to settle their differences by negotiations, and if it fails then through ad-hoc arbitration for the purpose[38].

Nowadays, BITs adopt the procedure which is usually under the supervision of International Centre for Settlement of Investment Disputes[39] to solve the conflicts between the capital importing countries and aggrieved investors. In many cases, both parties agree for disputes arise in future, to existing arbitration rules of ICSID[40], UNCTAD, or UNCTRAL. Some choose to settle their disputes by ICC Arbitration Procedure, but few prefer to resolve in Dubai, Singapore, Cairo or through World Bank Guide lines.

However, the investor should try to solve the dispute by negotiation which eventually refers to compulsory arbitration to get a binding award. This arbitration encourages the individual investor, even without the permission of its home government, to settle down the point of contention, which may affect the diplomatic relationship between the concerned countries, and it is in contradiction of Calvo Doctrine that means the purpose is to deprive the investor to choose the international arbitration for the settlement of dispute, but he is not left with any other choice except

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[38] Visit for text of different Bilateral Investment Treaties, http://www.kluwerarbitration.com/arbitration (last visited: 05-18-09).

[39] An institution of the World Bank Group based in Washington, D.C., was established in 1966 pursuant to the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the ICSID Convention or Washington Convention).

[40] For details: http://icsid.worldbank.org/ICSID (last visited: 10.07.09)

the local courts of the host state.[41] This principle gives final jurisdiction to local courts and precludes any appeal to diplomatic involvement.

[41] "The principle set forth by an Argentine jurist, Carlos Calvo (1824 -1906), that a government has no duty to compensate aliens for losses or injuries that they incur as a result of domestic disturbances or a civil war, in cases where the state is not at fault, and, therefore, no justification exists for foreign nations to intervene to secure the settlements of the claims made by their citizens due to such losses or injuries". The definition is quoted from Law Encyclopedia, *West's Encyclopedia of American Law*, Pub. Thomson Gale.

Chapter No III

PROPOSED US BIT – A SLEEPING GIANT

3.1 HISTORY OF US MODEL BILATERAL INVESTMENT TREATY (BIT)

The Office of the United States Trade Representative (USTR) and the Department of State, working with other agencies of the US government, completed and updated the US Model Bilateral Investment Treaty in November, 2004. The United States developed a first model of BIT in 1982. Its purpose was to serve itself as a prototype for the negotiations of new BIT. The model was updated in 1994. In the year 2002, it became the part of the Trade Promotion Authority (TPA). However, for the protection of the US investment abroad, Congress issued several new ordinances on the negotiations of trade agreements.[1]

With the passage of time, the US government started from some of the standards of protection, contain in the 1994 Model BIT, especially including few provisions which were not the part of the Model Treaty. During 2003 – 04, the US government worked to revise the Model, and thus released a draft of new Model BIT, containing 37 Articles and 5 Annexes.[2]

The new model of BIT includes more detailed provisions on different procedural matters, like investor – state dispute settlement, minimum standards of treatment, compensation for expropriation, foreign investments at the expense of labour laws and environmental protection laws and others. The provisions of new model contain the investment negotiating objectives of the Bipartisan Trade Promotion Authority Act of 2002 included many of the doctrines from already existing US BITs.

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[1] "Proposed New U.S. 'Model' Bilateral Investment Treaty", *The American Journal of International Law*, American Society of International Law, Vol. 98, No. 4 (Oct., 2004) pg. 836. Available at: www.jstor.org/stable/pdfplus/3216711.pdf (last visited: 04-10-08)

[2] 2004 Model BIT, Treaty between the Government of the United States of America and the Government of [.....] Concerning the Encouragement and Reciprocal Protection of Investment. Available at: www.ustr.gov/Trade_sectors/Investment/Model_BIT/section (last visited: 28-12-08)

As a matter of fact, the Model Treaty is quite similar to Free Trade Agreements concluded by the US under the Act 2002. The relevant Congressional Committees consulted the respective advisory committees of the State Department and USTR for the development of the new Model.[3]

3.2 DEVELOPMENTAL PROGRESS ON THE TREATY

The United States has been negotiating these treaties, mostly with developing countries, since the end of the World War – II. BIT played an important role in establishing the friendly environment for the companies which were really interested to invest or to start business in foreign countries. Such treaties were the life blood of the United States economy, and they actually held the US to rebuild its commercial relations with other countries after the war.

The government of US established the BIT program to provide the protection to US foreign investment, in the third world, from discriminatory and unfair treatment. For this purpose, it introduced treatment standards compatible with US principles and policies of International Law. So, such treaties always play an important role in implementation of US policies, specifically, regarding protection of investment and standards of treatment. Usually, such treaties are known as Treaties of Friendship, Commerce and Navigation (FCN).

Most of times, developing countries are unwilling to sign FCN Treaties, because of the fact that they contain clauses which are not commercial in nature. Moreover, its provisions regulate human rights practices or influence the personal and religious rights and customary laws of the host state. Because of such extra commercial conditions, most of the developing countries preferred to enter into the treaty agreements with European Nations instead of the US agreements.

[3] http://www.ustr.gov/Trade_Sectors /Investment/Model_BIT/Section_Index.html (last visited: 15-05-08)

The European BIT Model with the issues of commercial nature and does not deal with the additional controversial matters, as American agreements do. Thus, it seems that US BIT program is next inline to the US FCN Treaty program. Rather, it focuses more than the FCN Treaty program with respect to targeting the host countries, as it goes beyond its predecessors by providing the provision of the settlement of investor – host state dispute through international arbitration instead of settling them in the courts of the host state.

Following the successful conclusion of bilateral investment treaties of European countries, the US BIT program patterned itself after their model by limiting "the scope of the Model – BIT to exclusively investment – related issues".[4]

However, the simplicity and brevity of European BITs made them attractive, but the model lacked to provide sufficient specific guidance. Moreover, the hidden requirement, of European model, to settle the investor – related disputes in arbitrations, is questionable. Because of that, the US Model BIT framed the arbitration provisions, by including all the appropriate subjects of arbitration (which it had been reluctant to view), with respect to jurisdiction of US court.[5]

3.3 THE GOALS OF US BIT

In addition to protecting the investments of its nationals, the US has another objective in negotiating BITs that is to promote the entry and management of its investments, by persuading the host states to remove various obstacles in their regularity systems. Moreover, utilizing BIT program, the US establishes the legal policy to deal with the issues faced by foreign investment in developing countries.

[4] "United States Bilateral Investment Treaties: Comments on their Origin, Purposes, and General Treatment Standards", *4 Int'l Tax & Bus. Law. 105*, Thomson Reuters, (2009). Pg. 2. Available at: www.westlaw.uk (last visited: 3-4-09)
[5] *Ibid.*

The very purpose of the treaty is to establish and promote friendly relationship between both states and between their people, and specially providing security to their nationals in each others territory. Accordingly the Model BIT is intended to provide the applicable legal standards that would improve the political relations between the US and the host country.

In a few specific cases, instead of offering legal protection, the US proposed BITs to strengthen the principles of Customary International Law with the consensus of other developed countries as in Organization for Economic Cooperation and Development (OECD).

Although, the titles and the preambles of most of the BITs refer to protection and encouragement of investments, but actually the BIT Model is not designed to enhance the investment decisions, but practically the BIT program deals with the already existing stocks of the investment.[6] So, at the one end, BIT is known as important tool for investor protection, and at the other end, it is regarded as crucial policy instrument.

Most of the developed countries, like US, believe that BIT liberalizes the economy of the host country, as a whole, by facilitating their investments. Developing countries feel that the investment of developed countries will boost up their economies. Though, apparently BITs do not indicate the underlying demands of market liberalization and other goals of investment, but such demands always remain in the minds of negotiators of developed countries and some times the background documents also reflect them.[7]

Conclusion of a treaty is dependent on an agreement, from which both parties believe to take benefits, in case, when it concludes between two developed countries, and their nationals expect and want mutual cooperation and protection to invest each other's

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[6] *Ibid.* pg. 3.

[7] Salacuse, Sullivan, P. Nicholas, "Do BITs Really Work?: An Evaluation of Bilateral Investment treaties and their Grand Bargain", *46 Harv. Int'l L.J. 67*, (winter 2005), Pg.4. Available at: www.westlaw.uk (last visited: 30-10-08)

territory. On the other hand, such cooperation does not seem to be applicable, when a treaty concludes between a developed country like US and a poor developing country like Pakistan, whose nationals are not having courage to invest abroad. Now the question arises: why developing countries conclude such agreements which constrain their sovereignty by limiting their ability to take actions to protect their national interests?

The simple answer to this question is that the developing countries sign BITs to increase the amount of capital and technology in their territories by promoting foreign investment. Or in other words, BITs between a developed and a developing country seems to be an agreement, in which the developing country makes the promise to protect the capital to get it more in future.[8] But it should be kept in mind that the promotion of capital; objective of developing country, and market liberalization and subsidiary; aim of developed country, are two different and separate goals of BIT.

In short, investment promotion, protection and market liberalization are the fundamental goals of the BIT movement. One may ask whether the treaties negotiated over the past five decades have achieved these goals, and if the answer is yes, then to what extent BIT movements have protected, promoted and liberalized investments.

3.4 STRUCTURE OF THE PROPOSED TREATY

The draft of the proposed BIT was presented on March 03, 2006, to Pakistan to clarify the legal provisions of the treaty and to determine its accuracy, compatibility, and to refine it by seeking review and comments. The title of the treaty as mentioned in the draft is "Treaty between the Government of the United States of America and the Government of Islamic Republic of Pakistan Concerning the Encouragement and Reciprocal Protection of Investment"[9](herein after "The Proposed Treaty"). This draft consists of the

[8] *Ibid*, pg. 5.

[9] This document contains: Pakistan/U.S. Confidential Information to be treated as U.S. confidential – modified handling authorized. The document is obtained from the Board of Investment, Government of Pakistan; for academic purpose. (herein after "The Draft")

preamble, three sections containing thirty seven articles and five annexes, spreading over forty seven pages.

3.5 COMPARATIVE AND CRITICAL ANALYSIS OF THE PROPOSED US BIT

Like all the investment treaties, the proposed treaty tries to define few specific terms used in the treaty and the definitions contained in it contributes to the understanding of the terms and their appropriate interpretation. The definitional section of the BIT heavily impacts the effectiveness of the treaty especially the broad explanation of 'investment'. Besides it, a few more provisions are equally important, problematic and debatable like, Treatment Standards, Compensation for Expropriation, Currency Transfer, Performance Requirement and Dispute Settlement. In this chapter, an attempt has made to analyze these areas by comparing with the provisions of other BITs and International Instruments, but before proceeding towards different terms and provisions of the BIT, let us have a look at the preamble of the Proposed Treaty, which also seems to be different as compared to others.

I- Preamble

Almost all the BITs are prefaced with a preamble, through which the contracting states express their objectives and aims at the conclusion of the agreement. Most of the time, the preambles do not capture the attention at a glance as the different provisions of the BIT do, because unlike provisions, they do not establish legal binding, obligations and rights. However, it does not mean that the words of preambles are worthless. Article 31 of the *Vienna Convention* reflects the importance of the preamble as:

> "The context for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its preamble and annexes...".[10]

[10] Vienna Convention on the Law of Treaties, Vienna, 23 March, 1969, entered into force on 27 January 1980, United Nations, *Treaty Series*, vol. 1155, pg. 331. Available at: http://untreaty.un.org/ilc/texts/instruments/english/conventions/1_1_1969.pdf (last visited: 04-03-09)

Therefore, the contracting parties should give importance to the preamble along with substantive provisions of the BIT, for the interpretation of the treaty, as it may play an important role in settlement of investor – state disputes.

The preamble states key messages of States, from a political point of view, for both national and international representatives. With the passage of time, a large number of countries started including the specific wording in their BITs, to clarify that objective of investment protection and promotion should not be pursued at behalf of other public policies like health, safety, internationally recognized labour lights and the environment. This trend has been reflective both in the preambles and substantive provisions of the BITs.

There are two broad categories of preambles: the first category, which is more numerous, includes the language that focuses on the importance of economic cooperation between the contracting states, encouraging favourable circumstances for corresponding investments and acknowledging the impact of each investment to establish prosperity in the host states. An example is the Preamble of the Pakistan – China BIT. It says:

> "... Desiring to encourage, protect and create favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party based on the principles of mutual respect for sovereignty, equality and mutual benefit and for the purpose of the development of economic co-operation between both states.
> Have agreed as follows:".[11]

Some other BITs belonging to same category includes few other elements like technical cooperation or development of human resources. The Australia – Pakistan BIT, can be presented in this regard:

> "...RECOGNISING the importance of promoting the flow of capital for economic activity and development and aware of its role in expanding economic relations and technical co-operation between them, particularly with respect to investment by investors of one Party in the territory of the other Party;
>
> CONSIDERING that investment relations should be promoted and economic co-operation strengthened in accordance with the internationally accepted principles of mutual respect for sovereignty, equality, mutual benefit, non-discrimination and mutual confidence;

[11] "Agreement between the Government of the Peoples Republic of China and the Government of Islamic Republic of Pakistan the Reciprocal Encouragement and Protection of Investments", Feb 12, 1989. Available at: http://www.pakboi.gov.pk/pdf/BIT/china.pdf (last visited: 25-07-10).

ACKNOWLEDGING that investments of investors of one Party in the territory of the other Party would be made within the framework of the laws of that other Party; and

RECOGNISING that pursuit of these objectives would be facilitated by a clear statement of principles relating to the protection of investments, combined with rules designed to render more effective the application of these principles within the territories of the Parties,

HAVE AGREED as follows:".[12]

The other category of preambles emphasizes on the point that protection and promotion of an investment is linked with the respect of other public policy objectives including the environment and consumers, safety, labour rights and health. The US proposed treaty belongs to the same category which states:

"...*Desiring* to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;
Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;
Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;
Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;
Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of consumer protection and internationally recognized labor rights;
Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;
Have agreed as follows:".[13]

Despite of the contents, it is always recommended that countries should pay attention to specific language of the preambles to avoid investor – state disputes. Moreover, the broad and extensive preambles suggest that BITs do not intend to protect or promote investments at the behalf of other public policy obligations such as health, environment, safety or labour rights.[14]

II- Investment

Most of the treaties usually define the term investment as broad as possible. Many early treaties included the idea that the intangible property of a foreign investor was dependent

[12] "Agreement between Australia and the Islamic Republic of Pakistan on the Promotion and Protection of Investments", Feb 07, 1998.
[13] *Supra* note. 9, "The Draft", Preamble.
[14] UNCTAD, "Bilateral Investment Treaties 1995-2006: Trends in Investment Rulemaking", *United Nations*, New York and Geneva, (2007). Retrieved September 2009, Pg. 4.

on the laws of the host state, and not to be protected by international law. As it can be seen in China – Pakistan BIT:

> "Every kind of asset made as investment in accordance with the laws and regulations of the Contracting Party accepting the investment in its territory...".[15]

Rights to intellectual property like know-how, copyright and patents, regarded as the intangible assets, were vested to the investor only to the proportion that the domestic law would sanction such rights or in other words, the host state had absolute control over intangible property and such rights were dependent on the laws of the host state.

With the passage of time, many countries came to recognize that the protection of intangible rights was the corner stone to the investment as intangible assets were more valuable than physical assets. They included intangible assets such as technology, know-how, licensing agreements, management contracts and consultancy contracts with in the definition of investment through bilateral investment treaties, yet the original idea that the rights in property related to physical property, was difficult to shake off. In that phase, treaties included limited rights of intangible property to be protected. Perhaps the term "investment" as defined the Article 1(1) Pakistan – UK BIT is the best example in this regard, which includes:

> "[...]
>
> i- movable and immovable property and any other property rights such as mortgage, lien 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, good will, technical process and know-how;
> v- business concessions conferred by law or under contract, including concessions to search for, cultivate extracts or exploit natural resources".[16]

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[15] *Supra* note. 11, art. 1(a)

[16] "Agreement between the Government Islamic Republic of Pakistan and United Kingdom of Great Britain", November 30, 1994, Available at: http://www.pakboi.gov.pk/pdf/BIT/United%20Kingdom.pdf (last visited: 2-08-2010)

Gradually, the definition became more refined and included the instruments which were linked with the process of making the investment and thus broaden the term. The US Proposed BIT includes a longer list and defines 'investment' as follows:

> "Every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:
>
> a) an enterprise;
> b) shares, stock, and other forms of equity participation in an enterprise;
> c) bonds, debentures, other debt instruments, and loans;
> d) futures, options, and other derivatives;
> e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;
> f) intellectual property rights;
> g) licenses, authorization, permits, and similar rights conferred pursuant to domestic law; and
> h) other tangible and intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges".[17]

These additions do not only indicate the excessive cautions, but are also a recognition of the fact that most of the rights obtained by the foreign investor, in the host state, are administrative law rights, which are dependent on the willingness of the host country and thus the foreign investment is based on the public law rights.

The task of the proposed US BIT is to protect rights and privileges of its investor, by extending the definition of investment and thus limiting or restricting the role of host state's law. On the other hand, it is well known fact that the administrative rules and regulations are made, by keeping the public interests in mind, by the state and the idea to lessen the regulatory power of a state is objectionable.

Most of the countries over power this problem by limiting the investments which are protected by the treaty to investments which are made in the agreement with their rules and regulations on it. On the other side, the capital exporting countries, like US, adopt the position to safeguard the interests of their nationals and investments, by

[17] *Supra* note 9, art. 1.

screening the administrative mechanisms of the host states. But, the developing countries are unwilling to include such advantages, which they have to grant to the foreign investors, under the rights protected by the international treaty. Moreover, after the conclusion of such treaty, the host country would not be able to change or alter the rights granted to the investor. This overcomes the purpose of the public law rights because they do not entertain the interests of the public in this way.

It is a well accepted fact that any right which falls with in the sphere of the host state can be brought under the sphere of international law by making it the part of the treaty. But, it is really difficult for the host state to surrender its public rights to the rules and regulations of the foreign investment. So, by surrendering the public rights means the rights which are granted to foreign investor through investment treaty can not be with drawn until and even the host state violates the treaty.

The BIT agreement takes the authority, of making decisions and interference through public law, from the granting state during the life cycle of the treaty. The treaty can truly be regarded as imposing device as through it the capital exporting country enforces its sovereignty over the poor developing country.

A little doubt exists about the contribution of bilateral investment treaties whether they really enhance and broaden the concept of property in international law. The recognition and incorporation of different types of intangible property is a significant step to formulate the concept. As compared to intangible property, the protection of tangible property is easy and uncomplicated because most of the time the foreign investor takes care of it by himself. But, in the case of intangible property, the complications always exist because of the reasons that the right of such property is dependent upon the domestic law. Once the foreigner acquires the rights to intangible property under the domestic law of the developing state, the rights can be converted into rights protected by international law through BIT, yet, the philosophical bases of the concept of the property differ from treaty to treaty.

The treaties proposed by the US give supreme, infinite, and unconditional rights to the notion of property. This characteristic is consistent with the United States, and transported to it through 'Locke Labour Theory of Property'[18]. This concept is the corner stone of the US policies of the investment protection which have influenced international law, but such concept does not exist in English Law or legal systems of common wealth based on the English Law. It recognizes that the right to property is always linked with public interest and the same concept is reflected in the BITs of European Countries. Furthermore, the awards make by the arbitral tribunals also depend upon the concept of property included in bilateral investment treaties.

Additionally, the ambiguity exists with the definition of the 'nationals'[19], 'enterprise'[20] and 'enterprise of a party'[21] of the United States Proposed BIT. According to US, the jurisdiction of the legal personality of the enterprise is dependent on the nationality, where it is incorporated.[22] Despite that, any of the contracting parties (acting as host party) may refuse to provide protection to investments made by enterprises, which are legally established under the laws of the other party, but controlled by the nations of any other country (third country) with which the host state has not established the formal economic relationship or does not carry business activities in the domain of the other party.

Unfortunately, the terms 'controlled' or 'owned' in the definition of "enterprise" and 'business activities' in the 'enterprise of a party' are not well explained and thus need

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[18] Black's Law Dictionary, ed. 8th, (2004) pg. 958. "The philosopher John Locke's justification of private property, based on the natural right of one's ownership of one's own labour, and the right to nature's common property to the extent that one's labour can make use of it".

[19] *Supra* note 9, art. 1., means: "for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act; and for Pakistan, [____] language to be provided".

[20] *Ibid.*, means: "any entity constituted or organized under the law of a Party, profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise".

[21] *Ibid.*, means: "an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

[22] Reading, Michael R., "The Bilateral Investment Treaty in ASEAN: A Comparative Analysis", *Duke Law Journal*, vol. 42, No. 3, pub. Duke University School of Law, (Dec. 1992), Pg. 698. Available at: www.jstor.org/stable/1372842 (last visited: 18-10-08).

further elaboration and clarification before the conclusion of the treaty to avoid confusion and vagueness.

III- Standards of Treatment

A verity of standards of treatment is provided in bilateral investment treaties. Most of time they include one Article on the standards of treatment, but that article identifies a few more different standards of treatment including Minimum Standards of Treatment, Essential Security, National Treatment, and Most-Favoured-Nation Treatment. Moreover, many issues are associated with each of these treatment standards.

a) Minimum Standards of Treatment

Usually, BITs include one or more provisions, individually or together, through which the judgment could be made regarding the treatment granted by the host country to the foreign investments or investors. One of these general provisions is the provision of fair and equitable treatment. This treatment is non-specific and thus open to different interpretations.

Some scholars believe that the commitment to give fair and equitable treatment to the foreign treatments is very much similar to the treatment granted in an agreement with the international minimum standards to the foreign investments or investors. Others hold the opinion that fair and equitable treatment is different from international minimum standard and its interpretation is based on the 'plain meaning' of the term.

Considering the fair and equitable treatment similar to international minimum standards, the judgment whether the host country has breached the provision or not would require an objective test, while opting the other opinion would require a subjective test or in other words the decisions of the arbitral tribunals would vary as there does not exist any case law which could give the plain meaning of the term.

Controversies related to the context to the term can be minimized by providing the specific text. There are seven categories of the BITs, depending upon the different interpretations of 'fair and equitable treatment'[23].

A large number of BITs belong to first group which grant fair and equitable treatment to covered investments, without referring it to any criteria including international law, and thus the context remains open for discussion. The BIT between Cambodia – Cuba can be presented as an example. It says:

> "Investments of investors of either Contracting Party shall at all times be accorded fair and equitable treatment and shall enjoy adequate protection and security in the territory of the other Contracting Party".[24]

A second group of BITs holds the opinion that fair and equitable treatment granted to foreign investors should not be less favourable than National Treatment or MFN Treatment. Usually a single provision containing different standards of treatment, presents fair and equitable treatment as an absolute standard, and National Treatment and MFN Treatment as relative standards of treatment. BITs belonging to this group indicate that they do not want the international minimum standards for treatment to have check over fair and equitable standard of treatment. The Bangladesh – Iran BIT illustrates this approach:

> "Investments of natural and legal persons of either Contracting Party effected within the territory of the other Contracting Party, shall receive the host Contracting Party's full legal protection and fair treatment not less favourable than that accorded to its own investors or to investors of any third State, whichever is more favourable".[25]

BITs belonging to third group believe that fair and equitable treatment imposes an obligation on the host countries to avoid discriminatory measures to protect the foreign investments. This frequently used approach is demonstrated in the Lebanon – Hungary BIT:

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[23] *Supra* note. 14, pg. 30-32.

[24] "Agreement between the Government of the Kingdom of Cambodia and the Government of the Republic of Cuba Concerning the Promotion and Protection of Investments", May 28, 2001, art. II (2). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/cuba_cambodia.pdf (last visited: 06-08-10)

[25] "Agreement on Reciprocal Promotion and Protection of Investment between the Government of the People's Republic of Bangladesh and the Government of Islamic Republic of Iran", April 29, 2001, art. 4. Available at: http://www.unctad.org/sections/dite/iia/docs/bits/bangladesh_iran.pdf (last visited: 07-8-10)

> "Investments and returns of investors of either 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. Each Contracting Party shall refrain from impairing by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale or liquidation of such investments".[26]

The fourth category of BITs associates the principles of international law to fair and equitable standard and removes the option of interpretations based on 'plain meaning'. In addition, such association suggests that the standard of fair and equitable treatment can not be carried out separately. The France – Mexico BIT follows this category:

> "Either Contracting Party shall extend and ensure fair and equitable treatment in accordance with the principles of International Law to investments made by investors of the other Contracting Party in its territory or in its maritime area, and ensure that the exercise of the right thus recognized shall not be hindered by law or in practice".[27]

BITs of fifth category also bind the principles of International Law to the standards of fair and equitable treatment, but they also include additional wording and it seems that the standards of fair and equitable treatment has surpassed the international minimum standards of treatment. The France – Uganda BIT exemplifies this category:

> "Either Contracting Party shall extend fair and equitable treatment in accordance with the principles of International Law to investments made by nationals and companies of the other Contracting Party on its territory or in its maritime area, and shall ensure that the exercise of the right thus recognized shall not be hindered by law or in practice. In particular though not exclusively, shall be considered as de jure or de facto impediments to fair and equitable treatment any restriction to free mo[u]vment, purchase and sale of goods and services, as well as any other measures that have a similar effect".[28]

The sixth category stresses on the point that fair and equitable standard should provide guarantee determine by the national law of the host state. The BIT concluded

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[26] "Agreement between the Republic of Lebanon and the Republic of Hungary for the Promotion and Reciprocal Protection of Investments", June 22, 2001, art. 2(2).
Available at: http://www.unctad.org/sections/dite/iia/docs/bits/hungary_lebanon.pdf (last visited: 07-08-10)

[27] "Agreement between the Government of the Republic of France and the Government of the United Mexican States on the Reciprocal Promotion ad Protection of Investments", 1998, art. 4(1). Available on: http://www.unctad.org/sections/dite/iia/docs/bits/france_mexique_fr.pdf (last visited: 07-08-10)

[28] "Agreement between the Government of the Republic of France and the Government of the Republic of Uganda on the Reciprocal Promotion and Protection of Investments", 2002, art. 3. Available on: http://www.unctad.org/sections/dite/iia/docs/bits/france_uganda.pdf (last visited: 07-08-10)

between the countries of the Caribbean Common Market and Cuba demonstrates the case:

> "Each party shall ensure fair and equitable treatment of investments of investors of the other party under and subject to national laws and regulations".[29]

BITs of seventh group entitled 'a minimum standard of treatment', including the obligation of the contracting states to grant treatment to foreign investments in accordance with customary international law, fair and equitable treatment, and full protection and security. Moreover, these terms are explained with in the same article. The US proposed BIT belongs to the same category. It states:

> "1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.
> 2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:
> (a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and
> (b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.
> 3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article".[30]

The explanation of Customary International Law is provided in Annex A of the same Proposed Treaty[31].

The language of this provision is broad enough to be dependent upon by a foreign investor to claim under the investor – state dispute settlement proceedings. Therefore, the fair and equitable treatment standard is the crucial point of dispute in international investment law.

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[29] *Supra* note 14, pg. 31
[30] *Supra* note 9, art. 5.
[31] Annex A: Customary International Law means: "The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 and Annex B results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5, the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens".

b) National Treatment

A considerable disagreement exists between states at the question of responsibility of the host country for damages to foreigners. Many capital importing countries have demanded for the National Treatment but the capital exporting countries have argued that foreign investors should be treated pursuing international minimum standards.

In case, the National Treatment Standard becomes acceptable, the host country is supposed to apply it uniformly to all investments, irrespective of nationality, and thus the foreigner would not be able to get any remedy in International Law. The capital exporting countries rejected this view by demanding for the minimum standard of treatment for aliens, as through it the foreign investor would be able to come under the international security of treatment by the host country[32].

In the past, the National Treatment was rejected altogether by capital exporting countries because such treatment, in case of some developing countries, was lower than the minimum standards demanded by them. Australia – Pakistan treaty can be presented in this regard[33]. It contains general protection standards to fair and equitable treatment and MNF treatment, in this way the contracting parties are allowed to grant more favourable treatment to their own nationals.

With the passage of time the National Treatment became an important right as it granted the foreign investors the right of entry and promotion of its investment in the host states. The treaties which emphasize on the liberalization include pre-entry rights of establishment. After the entry of investment, the national treatment granted to the foreign investors may confer advantages and the same privileges, which nationals of the host state enjoy. For the same reasons, it is very common amongst developed countries to regard national treatment as a relevant standard, and raise the issue of international

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[32] Sornarajah, M., "The International Law on Foreign Investment", 2nd ed. *West Nyack, NY, USA: Cambridge University Press*, (2004) pg. 234. Available at: http://site.ebrary.com/lib/uclan/docPrint.action?encrypted=c1dabf594a1a92bd5881fd771e5... (last visited: 24-7-09)

[33] *Supra* note. 12.

responsibility of the host countries to grant national treatment to the foreign investors, which they usually failed to provide. In other words, the violation of national treatment seems to be a significance cause of investment disputes.

The presence of National Treatment Standard could be regarded a cause for the dispute that Performance Requirements like local inputs, quotas or export quotas should not be enforced on foreign investors, especially after entry of investment has been made[34]. Local investors are also not imposed by such conditions, therefore, it is also expected that the foreign investors would enjoy the same relaxation, due to inclusion of National Treatment Standard, yet, most of the treaties referring national treatment, specify the kinds of Performance Requirements that are to be excluded.

Two different concepts are linked with national treatment namely 'pre-admission national treatment' and 'post-admission national treatment'. Pre-admission national treatment means the imposition of any requirement on the incoming investments as a pre-condition for entry into the host country. Such conditions include restrictions on investing in specific sectors, use of labour, local ownership or export requirements. On the other hand, post-admission national treatment means the imposition of any requirement on investments, after it had been established, including taxation, health or safety laws[35].

Some BITs grant the national treatment to the foreign investments, only after it has entered in the host country. Almost all BITs belonging to the same category include the MFN treatment principle as another relative protection standard. Few BITs falling within the same category, apply the national treatment standard to the investments only. The BIT between Mauritius – Zimbabwe can be presented in this regard. It states:

> "1) [...]
> 2) Each Contracting Party shall accord to the investments of investors of the other Contracting Party made in its territory a treatment which is no less favourable than that accorded to investments of its own investors or of investors of any third country, if the latter is more favourable.
> 3) The provisions of paragraph (2) shall not be construed so as to oblige either Contracting Party to extend to the investors of the other

[34] *Supra* note. 22, pg. 699.
[35] *ibid.*

Contracting Party..."[36].

Few other BITs of the same group, grant national treatment not only to investment but also to the foreign investors. An example is the BIT between Thailand and Russia. It states:

> "1) Each Contracting Party shall accord in its territory to investments made in accordance with its laws by investors of the other Contracting Party treatment not less favourable than that it accord to investments of its own investors or to investments of investors of any third State, whichever is more favourable.
> 2) Each Contracting Party shall in its territory accord investors of the other Contracting Party, as regards management, maintenance, use, enjoyment or disposal of their investments, treatment not less favourable than that which it accords to its own investors or investors of any third State, whichever is more favourable".[37]

Another category of BITs deals the provision of the National Treatment, in a different way and conditions it to domestic law and regulation in the post establishment phase. This approach can be demonstrated in the BIT between Indonesia and India. It states:

> "Each Contracting Party shall, subject to its laws and regulations, accord to investment of investors of the other Contracting Party treatment no less favourable than that which is accorded to investments of its investors".[38]

The US Proposed Treaty demands for the batter of National Treatment or Most-Favoured-Nation Treatment when it pursues to establish investments as well as through out the life cycle of the investment.[39] Its Article 3 and Article 4 describe the pre-admission phase by using the words 'establishment' and 'acquisition' and post-admission phase by mentioning 'expansion', 'management', 'conduct', 'operation' and 'sale and other dispositions'.

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[36] "Agreement between the Government of the Republic of Mauritius and the Government of the Republic of Zimbabwe for the Promotion and Reciprocal Protection of Investments", May 17, 2000, art. 4(2)(3). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/zimbabwe_mauritius.pdf (last visited: 11-08-10)

[37] "Agreement between the Government of the Kingdom of Thailand and the Government of Russian Federation on the Promotion and Reciprocal Protection of Investments", Oct. 2002, art. 3(1)(2). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/russia_thailand.pdf (last visited: 13-08-2010)

[38] "Agreement between the Government of the Republic of Indonesia and the Government of the Republic of India for the Promotion and Protection of Investments", Feb. 8, 1999, art. 4(3). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/indonesia_india.pdf (last visited: 13-08-2010)

[39] U.S. Bilateral Investment Treaty Program, Available at: http://www.jordaneb.org/pdf/BIT_Factsheet.pdf (last visited: 29-04-2009)

It is always difficult to judge the nature of the term 'in like circumstances' referred as requirement of the National Treatment Standard. A foreign investor as a multinational corporation can never be compared to the local investor in like circumstances because of its huge size and global organization.

In case, the host country provides different treatment to the foreign investors as compared to local investors in unlike or dissimilar circumstances, means it has not violated or breached the provision of National Treatment. The US Proposed Treaty also holds the same opinion by including the phrase 'in like circumstances' in Article 3.

The inclusion of the term 'in like circumstances' plays a significant role in dispute settlements, as before determining whether the host country has violated the National Treatment Standard or not, the tribunal has to adopt a 'two-step' approach. Firstly, it has to observe whether there actually existed the difference in treatment between foreign and local investor, and if it is so, then it has to verify whether investors were in like situations or not[40].

According to *Vienna Convention*, BITs are enforceable in the whole territory of the contacting states, without taking in account of the political structure prevailing in the concerned state[41]. Therefore, if the host country has agreed to grant national treatment to the investing country, it would not only apply at the national level, but also to regional jurisdictions. The problems arise for those countries which have federal systems, because of the fact that regional jurisdictions may make rules and regulations awarding special treatment to investors of that specific country. Such discrimination raises the question whether the application of the National Treatment involves best-in-state treatment or best-out of-state treatments[42].

Most of the states do not explain the term party's "own" investment used in provisions of national treatment in their investment treaties; however a few explain it one

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[40] *Supra* note. 14, pg. 36

[41] *Vienna Convention*, Art. 29, Territorial Scope of Treaties: "Unless a different intention appears from the treaty or is otherwise established, a treaty is binding upon each party in respect of its entire territory".

[42] *Supra* note. 14, pg. 37

way or the other like the Proposed US Treaty provides that the national treatment standard would be applicable to only best out-of-state treatment. Its Article 3(3) explains the situation as:

> "The treatment ... means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments".[43]

Countries having federal system of government should pay attention regarding the extent of the National Treatment; especially in the case the other contracting party has only a national jurisdiction. In other way, it would be great risk to have a national treatment provision with an unsymmetrical scope of application.

c) Most-Favored-Nation Treatment

Almost all BITs include MFN clause which means the foreign investors or investments of the Contracting Party will receive the treatment no less favourable the treatment granted the host country to the investors or investments of any third country. During the last decade, at least 52 BITs[44] were concluded by different countries, which did not the clause of the National Treatment and relied on standards of 'Fair and Equitable' treatment and on MFN treatment for the protection of their investments.[45] Most of the BITs contain both clauses of National Treatment and MFN treatment, and demand better of the two. The US Proposed Treaty belongs to the same group.

MFN standard establishes level among all foreign investments under BITs. Like national treatment standard an MFN standard also deals with same kind of issues regarding its scope and application. There are two main group of BITs on the basis of scope of the prevision. The fist group grants MFN treatment only in post-establishment phase of the investment. The Argentine – New Zealand BIT can be presented in this regard:

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[43] *Supra* note. 9, "The Draft".
[44] *Supra* note. 14, fn. 44, pg. 133
[45] For example, Australia – Pakistan BIT, 7 Feb, 1998, does not contain the clause of National Treatment.

> "For the avoidance of doubt ... this Article shall apply to investments and returns of investors only after the establishment of the investment".[46]

The other group of BITs, grant MFN treatment both in the pre-establishment and post-establishment phases of the investment. The US Proposed BIT belongs to the same group like Canadian, Russian and Japanese BITs.

There are a few BITs, which have extended the scope and application of MFN treatment to dispute settlement and have broadened the clause in a very unusual manner as in the *Maffizzine* Case[47]. The Austria – Saudi Arabia BIT demonstrates this approach:

> "Each Contracting Party shall accord the investors of the other Contracting Party in connection with the management, operations, maintenance, use, enjoyment or disposal of investments or with the means to assure their rights to such investments like transfers and indemnification or with any other activity associated with this in its territory, treatment not less favourable than the treatment it accords to its investors or to the investors of a third State, whichever is more favourable".[48]

On the other hand, if the contracting states wish to limit the scope of the MFN standard, it is better to express it in their BITs. The US Proposed Treaty does not want to extend the scope an MFN treatment to dispute settlement and has also expressed as:

> "The Most-Favored-Nation Treatment Article of this Treaty is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section B of this Treaty, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case".[49]

IV- Expropriation

The clause of "Expropriation" always holds a high rank in BITs. Mostly BITs permit host countries to expropriate the foreign investments, for a public purpose, on a non-discriminatory basis, and against the 'prompt', 'adequate' and 'effective' compensation.

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[46] "Agreement between the Government of the Argentine Republic and the Government of New Zealand for the Promotion and Reciprocal Protection of Investments", August 27, 1999, art. 4(2). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/argentina_newzealand.pdf (last visited: 2-08-10)

[47] *Emilio Agustin Maffezini and The Kingdom Of Spain*, Case No. ARB/97/7. Available at: http://icsid.worldbank.org/ICSID/FrontServlet?requestType=CasesRH&actionVal=showDoc&docId=DC565_En&caseId=C163 (last visited: 2-08-10)

[48] "Agreement between the Kingdom of Saudi Arabia and the Republic of Austria concerning the Encouragement and Reciprocal Protection of Investments", June 30, 2001, art. 3(3). Available on: http://www.unctad.org/sections/dite/iia/docs/bits/saudi_austria.pdf (Last visited: 03-08-2010)

[49] *Supra* note. 9, "The Draft", art. 4, foot note 8.

But, most of the BITs do not clearly define the terms 'expropriation' and 'nationalization', moreover, they do not propose also any methodology through which 'measures having an equivalent effect' can be identified. The Pakistan – UK BIT is a typical example of an expropriation clause included in most of the investment agreements. Its Article 5 says:

> **"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...".[50]**

Due to lack of clarity, these clauses generate controversies regarding the acts constituting an indirect expropriation and the rights of ownership. The capital exporting countries may demand compensation by affecting the host country's routine regulatory acts by broadening the concept of indirect expropriation. The treaties indicate that foreign investment can not only be expropriated wholly, but expropriation can also occur through slow erosion of the rights of ownership of the alien, and in that case it becomes almost impossible to determine when expropriation has taken place and how to compensate such expropriation.[51]

The wording used in expropriation clauses also creates ambiguity as most of countries try to present the expropriation provision as broad as possible, and it seems that every act or measure taken by the host country could be challenged as an indirect expropriation. Usually, BITs contain a phrase "any measure or measures having equivalent effect", in their expropriation clauses and the same phrase creates confusion and doubts as it does not define or provide the guidance regarding the measures which should not be taken by the host country to avoid expropriation.

On the other hand, the language of a few BITs provide guidance regarding measures relating to direct or indirect expropriation they use words like "dispassion" or "deprivation" to explain the "measures" which should not be taken by the host state to avoid direct or indirect expropriation. The BIT between France – Uganda explains this concept:

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[50] *Supra* note. 16, art. 5(1)
[51] *Supra* note. 14, pg. 45.

> "Neither Contracting Party shall take any measures of expropriation or nationalization or any other measures having the effect of dispossession, direct or indirect, of nationals or companies of the other Contracting Party of their investments on its territory and in its maritime area, except in the public interest and provided that these measures are neither discriminatory nor contrary to a specific commitment".[52]

The Canadian Model BIT and recent United States' BITs including the Proposed BIT include the expropriation clause by considering the issues related to context of investment disputes and believe that the particular measures related to expropriation differ from case-to-case. Annex B of the Proposed Treaty demonstrates this approach.

> "The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors".[53]

V- Compensation

In case of expropriation, what kind of compensation is required is always debate able issue between developed and developing states. Now a days, almost all BITs proposed by capital exporting countries require 'prompt, adequate and effective' compensation, while poor developing countries advocate other standards included in their domestic legislation. In other words, the developed countries are in favour of *Hull Formula*, while developing countries desire to follow C*alvo Doctrine*.

Most of the time, the compensation clauses specify the currency through which it is to be paid as well as the duration of payment, but there does not exist the uniform standard, as few capital exporting countries have drafted the clauses with more additional issues and have proposed an inflexible criteria, thus not permitting the poor developing country to have any "drafting variation"[54].

It is an understood fact that the process of expropriation involves other administrative procedures and consumes some time to be completed. On the other hand, BITs emphasize on the prompt and adequate compensation, so there may exist time lag between both processes. This situation raises a number of issues like whether compensation, based on market value, includes interest or not? In case, the interest is

[52] *Supra* note 28. art. 5(2)
[53] *Supra* note. 9, Annex B, para 4(a).
[54] *Supra* note. 32, pg. 242.

included, what should be the time limit during which it has to be paid? And what rate would be applicable to it? In which currency, the compensation should be paid? And which country is supposed to bear the risk of devaluation?

Different BITs deal such questions in their own way. Some of them discuss the issue of inclusion of interest, and some deal with kind of currency which should be paid as compensation, and a few others discuss the risk of devaluation. Some of them believe that interest should be at appropriate rate and few of them stress that it should be calculated at the market rate.

Most of the BITs contain similar provisions regarding requirements for expropriation and the process of compensation, with some variations in language. However, the difference appears only at the point of specifications like calculation of payment or interest. The emergence of newly issues of indirect expropriation and recent investment disputes has urged few countries, especially United States, to re-draft its Model BIT. For the same reason, the Proposed US BIT discusses almost all the issues in more specific form.

> "3) If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.
> 4) If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:
> (a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus
> (b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment".[55]

Most of the BITs contain separate clauses dealing the issue of treatment to be awarded to foreign investment in case it is damaged as a result of civil conflicts or war. Majority of such BITs link the violent events to the actions of human beings, but a few extend them to natural disasters. Numerous BITs contain clauses whose application and scope remain unclear. Similarly, the standards of protection, in the case of damages

[55] *Supra* note. 9, art. 6(3)(4)

caused by civil disturbance or war, also vary. A few countries do not discuss the issue at all in their BITs, some link such damages to MFN treatment, and a few others are in favour of National Treatment. However, in any case the host country is supposed to select absolute or any of the relative standards, on a non-discrimanary basis. United States clarifies the same point in its Proposed BIT as:

> "..., each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife".[56]

VI- Transfers

The transfer provision holds the significant position in BITs, as two different objects are linked with it. On the one hand, the foreign investor wishes to have freedom of transfer of profits, capital, funds and other payments, and on the other hand, the host country wants to follow the proper financial and monetary policies. A large number of BITs containing transfer provisions have granted the investors the right of capital transfer related to their investments "without delay" and "in a freely usable currency at the specified rate of exchange". But, there are also many BITs which have included exceptions to such obligations.

Some BITs contain the clause which covers the transfers of funds only out of the host country. The Hong Kong and Belgium-Luxembourg BIT exemplifies this approach.

> "Each Contracting Party shall in respect of investments guarantee to investors of the other Contracting Party the unrestricted right to transfer their investments and returns abroad [...]".[57]

Most of the BITs contain the transfer clauses which not only apply to both in bound and out bound transfers, but also emphasize on "all" transfers related to covered investments. However, the word "all" raises the issue whether the specific transfer provision is applied to all firms linked to investment or only to those which are agreed by

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[56] *Ibid*, art. 5(4).

[57] "Agreement between the Government of Hong Kong and Belgo-Luxembourg Economic Union for the Promotion and Protection of Investments", October 07, 1996, Art. 6(1). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/belg_lux_hongkong.pdf (last visited: 07-08-10)

the parties. Mostly, the language used in the specific article is very broad and general, thus includes almost all kinds of transfers the investors want to have. The US Proposed Treaty belongs to the same category. It states:

> "Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:
> (a) contributions to capital;
> (b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;
> (c) interest, royalty payments, management fees, and technical assistance and other fees;
> (d) payments made under a contract, including a loan agreement;
> (e) payments made pursuant to Article 5 [Minimum Standard of Treatment](4) and (5) and Article 6 [Expropriation and Compensation]; and
> (f) payments arising out of a dispute".[58]

Another issue related to the specific clause is the type of currency. Some BITs provide that transfer should be made in the currency in which the investment was made. The Brunei Darussalam and China BIT states this mode.

> "Transfers of currency shall be made without delay in the convertible currency in which the capital was originally invested or in any other convertible currency agreed by the relevant investors of one Contracting Party and the other Contracting Party. [...]".[59]

Another group of BITs holds that transfers should be made in any freely convertible currency. This widely used concept can be depicted in the Greece and Mexico BIT.

> "Each Contracting Party shall guarantee the right that payments relating to an investment may be transferred. The transfers shall be effected without delay, in a freely convertible currency, at the market rate of exchange applicable on the date of transfer [...]".[60]

Another category of BITs permits the transfer in any freely useable currency that is the currency recognized by International Monetary Fund (IMF) and widely traded in

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[58] *Supra* note. 9, art 7(1).

[59] "Agreement between the Government of the People's Republic of China and the Government of His Majesty the Sultan and Yang Di-Pertuan of Brunei Darussalam Concerning the Encouragement and Reciprocal Protection of Investment", Nov 11, 2000, art. 6(2). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/china_brunei.pdf (last visited: 07-08-2010)

[60] "Agreement between the Government of the United Mexican States and the Government of the Hellenic Republic on the Promotion and Reciprocal Protection of Investments", Nov. 30, 2000, Art. 7(1). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/mexico_greece.pdf (last visited: 08-08-2010)

international markets. Like many other BITs, the US Proposed Treaty also demands the same.

> "Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer".[61]

As far as, the issue of exchange rate is concerned, a very limited number of BITs does not discuss the issue at all. While a few BITs which address the issue, do not specify the official basis on which the transfers should be made. A large number of BITs, including US proposed Treaty, state that the transfers should be made "at the market rate of exchange prevailing at the time of transfer".

A specific exception can also be observed in the transfer provision of the Proposed Treaty. Through it, the contracting party or state may prevent transfer if unfair measures like 'criminal offenses', 'bankruptcy' or 'resolution of tribunals' are associated with it. Few other countries like Australia, Canada, Mexico and Japan are also using this concept in their recent BITs. The Proposed Treaty explains the point as:

> "[...] a Party 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, futures, options, or derivatives;
> (c) criminal or penal offenses;
> (d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or
> (e) ensuring compliance with orders or judgments in judicial or administrative proceedings".[62]

VII- Performance Requirements

The terms and conditions imposed by the host states on the foreign investors in accordance with establishment an operation of their investments or awarding the investor with a specific advantage is usually discussed under the heading of "Performance Requirements". The host country, through the provision of performance requirement induces certain conditions with the objective to have check on the character of investor, particularly on its costs and benefits.

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[61] *Supra* note. 9, art 7(2).
[62] *Supra* note. 9, art 7(4).

Most of the countries regard the performance requirement as a significant "policy tool", through which they can direct the foreign investor in to the required direction to get the maximum advantage. Few other countries link some incentives with this provision to make it attractive in such a way that it becomes acceptable for the foreign investors[63].

The most common conditions are the increase in export and the hiring of the nationals of host country, which become some times unacceptable especially for the foreign investor, who is willing to manage the investment or business in a free manner. The majority of BITs concluded in last few years, do not contain the provision of "performance requirement" and thus it is assumed that the host county would apply the conditions at the time of establishment of investment or afterwards, in a non-discriminatory manner.

There exist several BITs which contain the provision of performance requirement. Some of them apply restrictions on the use of performance requirements, but also ensure that the obligations are not suppose to go beyond the context of TRIMs agreement. The BIT between Canada and Costa Rica is a case in point.

> "Neither Contracting Party may impose, in connection with permitting the establishment or acquisition of an investment, or enforce in connection with the subsequent regulation of that investment, any of the requirements set forth in the World Trade Organization Agreement on Trade- Related Investment Measures contained in the Final Act Embodying the Results of the Uruguay Round of Multilateral Trade Negotiations, done at Marrakech on April 15, 1994".[64]

Few other BITs usually contain general restrictions which are mandatory on the use of performance requirements and are applied only after the establishment of the investment. Those restrictions which are imposed at the time of establishment are not discussed and restricted by such BITs. Moreover, such BITs discuss those issues which

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[63] *Supra* note. 14, pg. 64.

[64] "Agreement between the Government of Canada and the Republic of Costa Rica for the Promotion and the Protection of Investments", March 18, 1998, art. VI.
Available at: http://www.unctad.org/sections/dite/iia/docs/bits/canada_costarica.pdf (last visited: 08-08-2010)

are not covered by the TRIMs Agreement. The BIT Azerbaijan and Finland can be presented in this regard.

> "Each Contracting Party shall not impose mandatory measures on investments by investors of the other Contracting Party concerning purchase of materials, means of production, operation, transport, marketing of its products or similar orders having unreasonable or discriminatory effects".[65]

Some more BITs put restrictions on the use of performance requirement both on pre and post-establishment phase of investments. Further, they provide an "exhaustive list" as a guide line for the contracting parties, so that they can restrict the use of performance requirement on the basis of that list, which usually contains compulsory requirement. In this way, the Parties may impose other conditions not only to investment in goods but also to services. The Bahrain and United States BIT embodies this case.

> "Neither Party shall mandate or enforce, as a condition for the establishment, acquisition, expansion, management, conduct or operation of a covered investment, any requirement (including but not limited to, any commitment or undertaking in connection with the receipt of a governmental permission or authorization):
> (a) to achieve a particular level or percentage of local content, or to purchase, use or otherwise give a preference to products or services of domestic origin or from any domestic source;
> (b) to limit imports by the investment of products or services in relation to a particular volume or value of production, exports or foreign exchange earnings;
> (c) to export a particular type, level or percentage of products or services, either generally or to a specific market region;
> (d) to limit sales by the investment of products or services in the Party's territory in relation to a particular volume or value of production, exports or foreign exchange earnings;
> (e) to transfer technology, a production process or other proprietary knowledge to a national or company in the Party's territory, except pursuant to an order, commitment or undertaking that is enforced by a court, administrative tribunal or competition authority to remedy an alleged or adjudicated violation of competition laws; or
> (f) to carry out a particular type, level or percentage of research and development in the Party's territory. Such requirements do not include conditions for the receipt or continued receipt of an advantage".[66]

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[65] "Agreement between the Government of the Republic of Azerbaijan and the Government of the Republic of Finland on the Promotion and Protection of Investments", 2003, art. 2(4). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/finland_azerbaijan.pdf (last visited: 08-08-2010)

[66] "Treaty between the Government of the United States of America and the Government of the State of Bahrain Concerning the Encouragement and Reciprocal Protection of Investment", September 29, 1999, art. 6. Available at: http://www.unctad.org/sections/dite/iia/docs/bits/us_bahrein.pdf (last visited: 08-08-2010)

Another group of BITs, takes one step further, and along with provided list containing restrictions on performance requirements and their application on both pre and post establishment phase, include few more restrictions in accordance with the TRIMs Agreement, an permit the parties, at the time of negotiation, to make reservations. The BIT between Japan and Korea besides the list also includes:

> "1) [...]
>
> 2) The provisions of paragraph 1 of this Article do not preclude either Contracting Party from conditioning the receipt or continued receipt of an advantage, in connection with investment and business activities in its territory [...].
>
> 3) Nothing in this Article shall be construed so as to derogate from the rights and obligations of the Contracting Parties under the Agreement on Trade-Related Investment Measures, ...".[67]

The US Proposed treaty has presented the very broad concept of the provision as it wants both Contracting Parties to restrict performance requirements not only to each others requirements, but also on investments of any third state. It also provides a very long list of compulsory requirements which are to be avoided by both parties at establishment and operation (pre and post) phases of an investment. It states:

> "Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:
>
> (a) to export a given level or percentage of goods or services;
> (b) to achieve a given level or percentage of domestic content;
> (c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;
> (d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;
> (e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;
> (f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or
> (g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market".[68]

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[67] "Agreement between the Government of the Republic of Korea and the Government of Japan for the Liberalisation, Promotion and Protection of Investment", March 22, 2002, art. 9(2)(3). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/korea_japan.pdf (last visited: 08-08-2010)

[68] *Supra* note. 9, art. 8(1).

IX- Transparency

The inclusion of the provision transparency is often regarded as an obligation imposed on Contractual Parties to share information regarding investment. Different concepts are associated with the specific provision. One of the approaches deals with the information of investment opportunities for foreign investors which they can avail in the host state. The China and Jordan BIT follows this approach.

> "In order to encourage mutual investment flows, each Contracting Party shall endeavour to inform the other Contracting Party, at the request of either Contracting Party on the investment opportunities in its territory".[69]

Most of the other BITs focus on administrative practices or rule and regulations applicable to investment in host state rather than opportunities. Some BITs, belonging to the same group emphasize on publication of such measures, while some BITs propose mechanisms to share information between the contracting states[70].

The significant qualitative progress regarding the content of the transparency provision can be observed in the US Proposed Treaty, which not only stresses to publish the laws, procedures and other administrative rulings, but also emphasizes to involve all interested people to comment on them. In this way, it proposes to provide the opportunity to comment on draft legislation not only to the investors of the Contracting Party, but also to own nationals and to the investors of any third party.

Thus, the Proposed Treaty has broadened the concept of transparency by enhancing the rights of investor and the third party to participate in judicial and administrative proceedings:

> "[...]each Party shall:
> (a) publish in advance any measure referred to in Article 10(1)(a) that it proposes to adopt; and

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[69] "Agreement between the Government of the Hashemite Kingdom of Jordan and the Government of the People's Republic of China on the Reciprocal Promotion and Protection of Investments", Nov 5, 2001, art. 2(2). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/china_jordan.pdf (last visited: 08-08-2010)

[70] *Supra* note. 14, pg. 77.

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures".[71]

X- Health and Environment

Several BITs adopt different approaches about the specific issue of health and environment. Numerous BITs permit the contracting parties to take any required measure to protect and safeguard the policy objectives like health, natural resources or environment. While some BITs allow the contracting parties to adopt any measure on a non-consistent and non-discriminatory basis. Moreover, they also focus on the point that the adopted measures should be less harmful for investment in protecting the policy objectives. The Argentina and New Zealand BIT can be presented in this regard.

> "[...] the protection of natural and physical resources or human health provided such measures are not applied in a manner which would constitute a means of arbitrary or unjustified discrimination".[72]

The US Proposed Treaty not only allows the Contracting Parties, but also grants them sovereign authority to take any measure which they consider important and appropriate for the betterment of environment; however, they should not breach or violate any other obligation or provision of the BIT.

> "Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns".[73]

The objective needs further elaboration as the risk of incompatibility exists between protection of public objectives and investment. Therefore, in this case, the host country should remain careful before taking any measure, because it could be challenged by the investor by regarding it an indirect expropriation.

XI- Dispute Resolution

The provision of dispute resolution usually deals with two types of disputes namely Investor – State Disputes and State – State Disputes. Several BITs suggest different

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[71] *Supra* note. 9, art. 11(2)

[72] "Agreement between the Government of the Argentine Republic the Government of New Zealand for the Promotion and Reciprocal Protection of Investments", Aug 27, 1999, Art. 5(3). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/argentina_newzealand.pdf (last visited: 08-08-2010)

[73] *Supra* note. 9, art. 12(3).

mechanisms for the settlement of disputes. Most of the BITs stress to settle the investor – state disputes through "amicable negotiations". BITs following this approach apply this mechanism to "any dispute" between Contracting Parties. The New Zealand - Chile BIT is an example of this approach:

> "Any dispute between a Contracting Party and an investor of the other Contracting Party shall, as far as possible, be settled amicably through negotiations between the parties to the dispute".[74]

Some other BITs provide that the provision includes the disputes related to a covered investment, and some others by not including much differences, used the word investment only. The Ethiopia – Russia BIT states this mode as:

> "Disputes which might arise between one of the Contracting Parties and an Investor of the other Contracting Party concerning an investment of that Investor in the territory of the former Contracting Party, shall upon a written notification by the Investor to the dispute, be settled amicably between the parties concerned. [...]".[75]

Another group of BITs connect the mechanism of Investor – State Dispute to the provisions of the investment agreement and believe that the disputes are aroused because of the difference of interpretation or application of a specific provision of the BITs or by granting the additional rights to the investors. The Chile - Peru BIT depicts this approach:

> "[...] the disputes between the Contracting Parties relating to the interpretation or application of the Agreement".[76]

Few BITs hold that the dispute settlement mechanism would be applicable to only those disputes which are created "with in the terms" of the investment agreement. The Chile – South Africa BIT advocates the concept as:

> "[...] any disputes which arise within the terms of this Agreement, between a Party and an investor of the other Party".[77]

Another kind of BITs limits the scope of the dispute mechanism by associating it to one or a few obligations of the BIT, thus it only permits the investor to adopt the

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[74] "Agreement between the Government of New Zealand and the Government of the Republic of Chile the Promotion and Protection of Investment", 1999, art. 10. Available at: http://www.unctad.org/sections/dite/iia/docs/bits/chile_newzealand.pdf (last visited: 08-08-2010)

[75] "Agreement between the Government of the Federal Democratic Republic of Ethiopia and the Government of the Russian Federation on the Promotion and Reciprocal Protection of Investments", 1999, art. 8(1). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/ethiopia_russia.pdf (last visited: 09-08-2010)

[76] *Supra* note. 14, pg. 103

[77] *Ibid.*

mechanism, to seek the compensation, in case the investment has been expropriated or nationalized by the host state. This approach does not allow the investor to adopt the mechanism, in case the dispute is associated with any other obligation of the agreement. So, the investor should settle all other disputes through negotiations or by submitting them to the court of the host country, in case negotiations fail. The Mauritius – Swaziland BIT presents the point as:

> "If a dispute involving the amount of compensation resulting from expropriation, nationaliation, or other measures having effect equivalent to nationalisation or expropriation, mentioned in Article 6 cannot be settled within six months after resort to negotiation as specified in paragraph (1) of this Article by the investor concerned, it may be submitted to an international arbitral tribunal established by both parties".[78]

One more group of BITs includes the narrower scope of the mechanism and specifies the disputes to investment authorization or to investment agreement. The typical example of the case is the US prototype treaty (1994). The US – Jordan Treaty can be presented in this regard:

> "For purposes of this Treaty, an investment dispute is between a Contracting Party and a national or company of the other Contracting Party arising out of or relating to an investment authorization, and investment agreement or an alleged breach of any right conferred, created or recognized by this Treaty with respect to a covered investment. [...]".[79]

During the last decade, the new approach emerged requiring the three steps to follow the dispute settlement mechanism: firstly, the dispute should qualify the breach of an obligation, secondly, it should involve the damage or loss of the investor, and finally, there should be the link between the above stated conditions. This approach mainly deals with the disputes related to property rights and stresses on damage or loss, so the dispute settlement procedure can compensate it. The US Proposed Treaty follows the same approach.

> "[...] the claimant, [...], may submit to arbitration under this Section a claim:

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[78] "Agreement between the Government of the Republic of Mauritius and the Government of the Kingdom of Swaziland for the Promotion and Reciprocal Protection of Investments" May, 2000, art. 8(3). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/mauritius_swaziland.pdf (last visited: 09-08-2010)

[79] "Treaty between the Government of the United States of America and the Government of the Hashemite Kingdom of Jordan concerning the Encouragement and Reciprocal Protection of Investment", July 2, 1997, art. IX(1). Available at: http://www.unctad.org/sections/dite/iia/docs/bits/us_jordan.pdf (last visited: 09-08-2010)

i) that the respondent has breached
   (A) an obligation under Articles 3 through 10,
   (B) an investment authorization, or
   (C) an investment agreement; and
ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and[...]".[80]

The control over the arbitration procedures by the Contracting Parties is one of the innovations in investor - state settlement mechanism. Few BITs specify the list of disputes relating to proceedings and some others follow the North American Free Trade Agreement (NAFTA) model, which have addressed many issues not discussed in BITs like selection of the place of the arbitration, procedure for appointment of expert review group and arbitrators, and conduct of proceedings. By adopting such regulations, the Contracting Parties can have control over the arbitration proceedings.

The US Proposed Treaty includes the provision which provides the possibility to interpret certain matters like Financial Services and Taxation by the specialized authorities of the Contracting Parties. It states:

"Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:
(a) the claimant has first referred to the competent tax authorities of both Parties in writing the issue of whether that taxation measure involves an expropriation; and
(b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation".[81]

According to this provision, the authorities of the Contracting Parties but not the arbitral tribunals have to decide whether a specific taxation measure is in reality an expropriation or not, and in case of negative decision, the investor is not allowed to proceed in the arbitration under the specific provision. Moreover, the Proposed Treaty is also in a favour of a mechanism which could prevent "frivolous claims" in investment related disputes. According to it, at the request of respondent, the tribunal will decide at the preliminary stage, whether the claim has sound legal basis or not, for which an award may be made in favour of the claimant.

[80] *Supra* note. 9, art. 24(1)a.
[81] *Supra* note. 9, art. 21(3)

The objective of inclusion of such mechanism is to avoid the wastage of time and resources on those claims which lack a sound legal foundation. This intention is described by the Proposed Treaty as:

> "In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence.[...]".[82]

The Proposed Treaty introduces the "Appellate Mechanism" which states that with in the three years after the enforcement of the investment agreement, the Contacting Parties will examine the possibility to appoint the "Bilateral Appellate Body" to assess the award. The "Annex D" of the Treaty can be presented in this regard.[83] However, the inclusion of such mechanism has raised the question, as it is still not clear, that how it would interact with the already existing arbitration conventions[84].

b) *State – State Disputes*

Most of the treaties are in favour of negotiations or consultations before invoking formal arbitration proceedings. Here the disputes between the parties which are not settled through negotiation or mediation regarding the interpretation or application of this Treaty will submit for binding award of the arbitral tribunal by applying the rules of international law or any other rules as agreed by the parties, and in case of no agreement the UNCITRAL Arbitration Rules shall govern the procedure. This mechanism will not entertain the issues regarding environment and labour. It also prescribes the time period for discussion. As compared to innovations in investor – state dispute settlement, the novelties in state – state dispute settlement are much less and modest.

The Treaty stresses on greater transparency and on the participation of the civil society in arbitration. In addition, it is also in favour of availability of specific documents like notice of arbitration, transcripts of hearing and awards to the general public.

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[82] *Ibid,* art. 28(5)

[83] Annex D: Possibility of a Bilateral Appellate Mechanism: "Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism".

[84] For example, ICC, ICSID, UNCITRAL, etc.

Furthermore, it also requires opening the hearings of the proceedings to the public, though have also proposed provisions for the protection of confidential information.

Another innovation is about the financial services which focus that the Competent Financial Authorities should have discussion before the arbitration proceedings. This mechanism provides the opportunity to the Competent Financial Authorities to settle the disputes before submitting it to arbitration tribunal. In case, the contracting parties fail to reach the solution, the authorities should make a report which can serve as a guideline for tribunal. It describes the procedure as:

> "Where a dispute arises under Section C and the competent financial authorities of one Party provide written notice to the competent financial authorities of the other Party that the dispute involves financial services, Section C shall apply except as modified by this paragraph and paragraph 5.
> (a) The competent financial authorities of both Parties shall make themselves available for consultations with each other regarding the dispute, and shall have 180 days from the date such notice is received to transmit a report on their consultations to the Parties. A Party may submit the dispute to arbitration under Section C only after the expiration of that 180-day period".[85]

3.6 CONCLUSION FROM THE ANALYSIS

In sum, BITs signed during the last decade had structure similar to the earlier BITs, but with the passage of time, a great variety of approaches with regard to different aspects of their content, changed their structure as well as underlying rationale. Different innovations in BITs have their benefits but most of them raise concerns about the policy coherence, especially of poor developing countries.

One of the consequences, related to acceptance of such variations, faced by the developing countries, is to improve their capacity building for the implication of different policies before entering in to the new agreement, along with other vital risks such as policy analysis and international consensus on development related issues. Similarly the Proposed Treaty of United States has included many innovations in investment rule

[85] *Supra* note. 9. art. 20(4)a.

making. They have focused the areas like to explain different provisions, to provide and improve the transparency especially of dispute settlement.

The term investment defined in the Proposed Treaty covers every asset that belongs and controls by the investor, and also includes that such assets should possess the "characteristics of an investment". Moreover, it excludes some assets which are not covered under the investment agreement, and thus strikes the balance between establishing a comprehensive definition of the investment and excluding the assets which the contracting parties do not want to be covered.

The Proposed Treaty has also used very detailed and elaborated language to describe the absolute standards of protection, particularly the minimum standard of treatment and indirect expropriation. It has also included the annexes to provide the guideline to determine whether the indirect expropriation has taken place on a case to case basis.

It has also introduced a very different concept of transparency, as it can extend not only to the process of host country's rule making, but also allows investors and other interested persons to comment on it. It is also in favour of the greater transparency in arbitral proceedings, publication of legal documents, open hearings as well as the participation of civil society to brief the tribunals. It wants to eliminate the frivolous claims and also introduces the appellate mechanism to foster the arbitral procedures.

Many of the recent innovations, introduce in the Proposed Treaty, especially about MFN principle, protection of Public Policy and dispute settlement, reflect the arbitration experience of the United States. The growing diversity of the Proposed BIT had posed new challenges and has introduced the risk of incoherence for developing countries specially Pakistan, as it lacks bargaining power and expertise in investment rule making.

Pakistan has already concluded different kinds of BITs, in the past, directed by the policies of developed treaty partners. But, the Proposed Treaty is fully packed with much complex innovations and would introduce an additional layer of potential incoherence among domestic policies and international law, in case Pakistan concludes it as it is.

Chapter No: IV

CASES OF PAKISTAN WITH REFERENCE TO THE CORE FEATURES OF BIT

4.1 REALITY OF BIT

Every bilateral investment treaty starts with the statement to highlight the objective of the treaty, which is usually regarded as corresponding to the protection and encouragement of investments. The statement covers up the significant fact that the proposed flow of investment, in reality is a one way flow between capital exporting country and a poor developing country. Basically the process of making a treaty between giver and receiver is not balanced. Whenever an investor considers making a new foreign investment, the host country holds its position to offer the best investment package to him. However, the dynamic inconsistency problem exists, as once the deal is finalized, the host country can not abide by any commitment or promise may during the negotiation period.[1]

Most of the time, the host country does not get benefits but it has to fulfill the duty by treating the investor well, to keep the investment in its territory. The consistency of the promise of the host country is as important as the authenticity of the final agreement in the investing decision. So, if the bilateral treaties can not offer reliability, they will not have legitimacy and lack of it creates problems which are very obvious now a days.

Before 1995, a very few disputes arose, but from 2000 on, a great number of cases exploded and by 2009, almost 300 treaties have been referred to arbitrations. The BITs themselves contain, for setting disputes, the provisions of arbitration.[2]

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[1] Sornarajah, M., "The International Law on Foreign Investment", 2nd ed. *West Nyack, NY, USA: Cambridge University Press*, (2004) pg. 218. Available at: http://site.ebrary.com/lib/uclan/docPrint.action?encrypted=c1dabf594a1a92bd5881fd771e5... (last visited: 24-7-09)

[2] Connolly Kelley, "Say What you Mean: Improved Drafting Resources as a Means for Increasing the Consistency of Interpretation of Bilateral Investment Treaties", *40 Vand. J. Transnat'l L.* 1579, Thomson Reuters, (2009).

Usually, two kinds of disputes arise: a) Disputes between the Two Contracting Parties (Inter-Governmental Disputes) and b) Disputes between the Investor and the Host States (Investment Disputes). Mostly, the inter-governmental disputes are referred to ad hoc arbitration, which is governed by rules expressed in the text to the treaty. On the other hand, investment disputes are resolved through institutional or already existing arbitrations, referred in the treaty.

In both cases, the tribunal decision is dependent on interpretation of different clauses, and verity in interpretations causes inconsistency in the arbitral process. So, it should be kept in the mind that while drafting a BIT, countries should consider all the relevant interpretation of different clauses. As the Vienna Convention on the Law of Treaties says:

> **"A treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its objects and purpose"[3].**

Though the general guide line exists on the issue of interpretation, still there different terms, in the treaties, which require batter interpretation and evaluation to avoid disputes, which usually lead to expropriation and thus lessen the value of the investment. Moreover, the provided language of the treaties itself communicates in a poor manner and so increases the difficulties to make judgment. Another problem arises when BITs are written in two or three different languages, which results in inconsistent interpretation and reducing the legitimacy and creditability of the agreement.

4.2 THE IMPACT OF CONFLICT OF INCONSISTENCY ON DEVELOPING COUNTRIES

Inconsistent interpretations disparately influence developing countries, as they are under privileged, from the beginning of the negotiating a BIT, by having less bargaining power. In addition, the bilateral investment treaties depend on the extent of fair and equitable treatment, provided by the host state, to foreign investment. Developing countries have to accept such tough terms and conditions as they are heavily dependent upon the developed

[3] "*Vienna Convention on the Law of Treaties, 1969*", art. 31.

states for aid. Thus, they willingly conclude the model treaties of developed countries to get maximum aid and capital.

Most of the time, the model treaties of the developed countries include the provision which contradict the principles of the *Calvo Doctrine*[4]. They insist to settle the disputes with in their boarders and want their control over compensation for acts of expropriation or nationalization. Such provisions are not acceptable for the developing nations, but they have to accept them to promote investment in their territory.

Tension exists between the host state and the investor on an MFN provision, because the developing countries fear that the foreign investment may not be good and beneficial to their interests, so want to include the provision of Performance Requirement.

Performance Requirement, for the developing countries, is a way to protect national policies in market competition, foreign trade, employment pricing, regional development and keeping the balance of trade and growth in local industries. They want the documentation of this provision, but lacking bargaining power proves to be a major hurdle along with provided language and its translation.

The opportunity should be given to developing countries to advocate their point of view, during drafting of BIT. Developing countries should unite together to pressurize the international community to provide some reliability and security to the host countries by permitting more predictable interpretations of the provisions included in BITs.

4.3 DISPUTES FACED BY PAKISTAN AND ROLE OF BITS

As the topic of this chapter indicates that Pakistan has faced problems with regard to BITs signed by her; it is necessary to mention here some specific provisions, seems to be problematic for Pakistan, which were raised in arbitration and Pakistan felt inconvenient and some time embracing and in some points its convinced the Tribunals while defending

[4] *See* ch.2, last para. Fn.25.

its claim and arising objections, specially with reference to the jurisdiction, definition of investment, provision of expropriation and nationalization, enforcement, retroactive and non-retroactive effect of the treaty, breach of contract or treaty, scope and extent of the treaty, performance requirement and above all dispute settlement mechanism were controversial between the parties. All issues are considered as the core features of BITs. Therefore, it is necessary to know about the detail facts of disputes between investors and Pakistan, so that Pakistan can protect itself from dispute arising situation in future. To disclose all factual and legal issues on which claimants claimed and Pakistan, in all cases, presented as respondent, a summarized and brief over view of some cases which were specifically related to Pakistan and challenged raised by the giant investor(s), stated here under:

4.3.1 Case: SGS v. Pakistan[5]

Background

In this case, the claimant Société Générale de Surveillance (SGS), a Swiss Company, concluded the agreement with the respondent the Islamic Republic of Pakistan to provide the Pre-Shipment Inspection (PSI) in 1994. Through the agreement, SGS agreed to provide its inspection services on those goods which are to be exported from other countries to Pakistan. The objective of the inspection was to enhance the efficiency of custom revenue collection to contribute to the domestic treasury.

SGS was required to inspect the good and afterwards to make report containing information for recommendation for a tariff rate on specific items, thus Pakistan was depended on the report for the collection of taxes and the duties on imports. Pakistan had also permitted SGS to open coordination offices in its territory to carry out the work. SGS got necessary immigration and working permits, but on the other hand it was not allowed to carry out the trading or commercial activities. SGS established two offices, one in Karachi and the other in Lahore, authorized by the Pakistan's Board of Investment.

[5] SGS Société Générale de Surveillance S.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/01/13) Available at: http://icsid.worldbank.org/ICSID/FrontServlet (last visited: 20-08-2010)

The dispute arose over the inadequate performance of the both parties under the contractual obligation. The government of Pakistan terminated the PSI Contract and initiated arbitration in Islamabad on the basis of the Dispute Settlement Clause of the Contract. Side by side, SGS claimed in the courts of Switzerland for seeking relief against Pakistan's termination of the Contract.

Legal Proceeding of the Swiss Courts

SGS claim that it was performing its job perfectly from 1st January, 1995 to 11th March, 1997. During the said period, the government of Pakistan was satisfied with the performance of SGS and never intended to terminate the contract, it also claimed that Pakistan had partially paid the invoiced issued before the date of termination, and still owed a large amount for services performed by SGS. Pakistan challenged the claims of SGS on various grounds, but specifically on the basis that arbitration had to proceed in Pakistan, under the clause of the Contract. The Swiss court rejected SGS claims on the basis asserted by Pakistan. Then SGS appealed to the Court of Appeal of Geneva, and after dismissal of its appeal, it again appealed to the Swiss Federal Tribunal, but it was again dismiss on the basis of sovereign immunity. So, SGS was left with no any right to appeal in the Swiss courts after the decision of the tribunal.

Legal Proceedings in Pakistan

Pakistan had already invoked to commence arbitration in Islamabad under clause of PSI agreement, before the decision of the Swiss Federal Tribunal. SGS appeared before the court and filed its preliminary objection to the PSI Agreement arbitration on 7th April, 2001.

According to SGS, the respondent had terminated the PSI Agreement in an unlawful and ineffective manner: and thus had breached not only the agreement, but it

also violated the BIT[6]. SGS also claimed a very large amount of capital as compensation. It dispatched a request for arbitration to the ICSID on 12th October, 2001.

In early 2002, SGS file an application against the PSI Agreement arbitration to the Senior Civil Judge, on the basis that it was entitled to settle the disputes through ICSID arbitration under the BIT, and it also requested for the stay of arbitration proceedings till the decision of ICSID tribunal. SGS application was rejected by the Senior Civil Judge, and then the appeal of SGS was also dismissed by the Lahore High Court. Finally, the Supreme Court of Pakistan also dismissed the claimant's appeal and ordered the respondent to proceed with the PSI Agreement arbitration and restrained SGS from pursuing in the ICSID arbitration.

Legal Proceedings in ICSID

In reply to SGS's claims in ICSID, Pakistan argued that the tribunal had no jurisdiction over any of the SGS's claims as the disputes were about the breach of contract and were to be settled through PSI Agreement arbitration. In SGS's view, the tribunal had jurisdiction over its claims under Article 9(2) of the BIT, and it had the right to invoke the jurisdiction of the tribunal. It further submitted that the tribunal's jurisdiction was broader than that of the PSI Agreement, thus it had jurisdiction not only over treaty claims, but also over the claims of alleged breaches of the PSI Agreement. SGS held that Pakistan had violated Article 3(1) and 4(1) of the BIT. Moreover, it had failed to ensure the fair and equitable treatment to SGS's investment and so had breached Article 4(2) as well. It had also violated Article 6(1) of the BIT, by taking measures which had similar effect of expropriation and had not provided effective and adequate compensation. It also referred Article 11 of the BIT and claimed that Pakistan had failed to provide guarantee to the contractual "commitments" under the PSI Agreement.[7]

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[6] "Agreement between the Islamic Republic of Pakistan and the Swiss Confederation on Promotion and Reciprocal Protection of Investments", July 11, 1995.
Available at: http://www.pakboi.gov.pk/pdf/BIT/Switzerland.pdf (last visited: 16-2-10)
[7] *Ibid, see* annex.

Pakistan argued that the essential basis of the treaty claims were contractual as for four years SGS made no claim of expropriation, or of unfair and inequitable treatment or failure of protection and promotion under the BIT. Furthermore, SGS filed contractual claims in PSI arbitration as well as in Swiss Courts. Thus, SGS had "relabeled" its claims as treaty claims, Pakistan asserted. Therefore, the tribunal should dismiss the SGS's claims by referring them to PSI arbitration, as it lacked jurisdiction over such claims.

On the other hand, SGS alleged before the tribunal that Pakistan had violated a number of provisions of the BIT, including the "Umbrella Clause" at Article 11. in SGS's view, the tribunal had jurisdiction over the disputes under Article 25(1) of the ICSID Convention, as the dispute had a legal foundation and arose out of an investment, and it was between the Contracting State and the national of another Contracting State. Over and above, the parties had given their consent in writing for submission of any dispute to the Centre, under Article 9 of BIT. It also submitted that the Forum Selection Clause in the PSI Agreement could not diminish the jurisdiction of the tribunal. At the vary most, the Islamabad Arbitration might have *prima facie* jurisdiction over the disputes related to performance and interpretation of the PSI agreement, still the tribunal's jurisdiction would prevail over both Contractual and Treaty Claims. SGS also pointed out that its claims were not 'defamation' of Contract Claims, but they were purely Treaty Claims and for the same reason they were brought before the ICSID Tribunal.

After the careful consideration of all claims of SGS and objections to the jurisdiction, the tribunal concluded that the expenditure made by SGS constituted an investment, and it was the investor with in the meaning of BIT. Moreover, the dispute arose directly out of an 'investment' and had legal basis. Furthermore, the existence of jurisdiction clause in a PSI Agreement could not be operated as a bar to the existence of jurisdiction of the treaty. So, the tribunal had jurisdiction over the Treaty Claims raised by the SGS, but it had no jurisdiction over the Contract Claims based on alleged breaches of PSI Agreement and they did not amount to the violation of standards of BIT.

The tribunal also rejected the claimant's claims based on Article 11 of the BIT, by suggesting that the word "commitment" should not be open to indefinite expansion, which could elevate to the level of violations of treaty law. The tribunal's decision of rejection of Article 11 raised the question about the function of the Article. SGS argued that it was useless to have "Umbrella Clause", if it could not be used in the manner it contended for. The tribunal rejected the statement of the SGS by explaining the point that the breach of each and every contractual obligation could not automatically elevate to the level of the breach of the treaty, as the violation of the contract under the international law could not be regarded as violation of the International Law itself.

Moreover, the tribunal rejected the Pakistan's request for pending the arbitration; however, it withdrew its second recommendation in its Procedural Order No. 2, which was about the pending of the PSI Agreement arbitration. The tribunal decided to go on to the merit stage of the proceedings and stated that the request of awards by both parties would be discussed in the same phase. It made its decision on 6th August, 2003.

Present Situation of the Case

At the request of both parties discontinued its proceedings and issued the discontinuance note on 23rd May, 2004, pursuant to Arbitration Rule 43(1)[8], without proceeding in the merit phase[9].

[8] Rules of Procedure for Arbitration Proceedings: "Settlement and Discontinuance: (1) If, before the award is rendered, the parties agree on a settlement of the dispute or otherwise to discontinue the proceeding, the Tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall, at their written request, in an order take note of the discontinuance of the proceeding". Available at: http://icsid.worldbank.org/ICSID/ICSID/RulesMain.jsp (last visited: 21-08-2010)

[9] http://icsid.worldbank.org/ICSID/FrontServlet?requestType=GenCaseDtlsRH&actionVal=ListConcluded (last visited: [illegible])

4.3.2 Case: Impregilo v. Pakistan[10]

History of the Case

The International Centre for Settlement of Investment Disputes (ICSID) received an arbitration request on 21st January, 2003 from *Impregilo*, the claimant against Pakistan, the respondent. In the request, *Impregilo* referred the BIT signed on 19th July, 1997 between Italy and Pakistan, and some previous decisions of ICSID to support its arguments. The Acting Secretary General of ICSID registered the request on 3rd March, 2003 and on the same date gave notices to parties for registration of the request and invited them to constitute the tribunal to proceed the arbitration as soon as possible.

Background Facts

On 27 April, 1995, according to the *Impregilo,* a joint venture called Ghazi Barotha Contractors (GBC), was formed under the laws of Switzerland. A joint venture agreement was concluded between five joint venture partners to establish GBC. *Impregilo* was the leader of the joint venture.

Pakistan Water and Power Development Authority (WAPDA) concluded two contracts with GBC on 19th December, 1995. First contract was to build a barrage downstream of the *Tarbela* Dam, and the second was to construct a channel, 47 bridges, 01 Railway Bridge and 30 drainage structures. *Impregilo* signed the project and GBC started the work in early 1996. The project was about US$ 500 million and had to be completed till March 2000. The project was supposed to be supervised by an Engineer and WAPDA appointed Pakistan Hydro Consultants (PHC) for the purpose.

Cause of Dispute

According to *Impregilo*, the work was delayed due to obstructions and interference by Pakistan and due to unexpected circumstances during the work. In addition, GBC's

[10] Impregilo S.p.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3). Available at: http://icsid.worldbank.org/ICSID/FrontServlet (last visited: 22-08-2010)

requests for extension of time and for payment were not entertained by the Engineer and WAPDA and all such problems led to a series of dispute.

Particularly, the claimant submitted that the timely performance was delayed due to late issuance of instructions by the Engineer. Moreover, the instructions were incomplete and unsatisfactory, demanding extra and complex work as compared to provided drawings in tender. Further, it asserted that WAPDA failed to hand over the land in time to carry out the work properly. The concrete lining for the channel damaged because of the defects in the designs of the Engineer. Over and above, WAPDA supplied the equipments many months later than required. The Engineer rejected the requests of GBC, for extension of time and also refused to compensate for the costs.

Impregilo argued that it tried to settle down the dispute through discussion, but failed. It also tried to opt the dispute settlement clauses, but due to partial attitude of Engineer and Disputes Review Board (DRB), it could not proceed to arbitration in Lahore. For the same reason, *Impregilo* filed a Request for Arbitration in ICSID in January 2002, but it withdrew its request after the discussion with Pakistani Authorities in May 2002. Unfortunately, the disputes did not settle and therefore, it filed a new request for arbitration.

Issues Raised on the Basis of BIT

Impregilo claimed that it had jurisdiction over the dispute by referring an Article of the ICSID[11] and Article 9 of the BIT between Italy and Pakistan.[12] It presented itself the national of Italy, and it added that it had the right to present the GBC being the leader of joint venture, and considered WAPDA the part of Pakistan, so the Islamic Republic of

[11] ICSID Convention, Ch 11, art. 25(1): Jurisdiction of the Centre: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally".

[12] **"Agreement between the Government of Islamic Republic of Pakistan and the Government of the Italian** Republic on the Promotion and Protection of Investments", July 19, 1997. Available at: http://www.unctad.org/sections/dite/iia/docs/bits/pakistan_italy.pdf (last visited: 18-11-2009)

Pakistan was the respondent of the case. Thus, it had the jurisdiction '*Ratione Personae*' (personal immunity), by the reason of its personality.

Impregilo further claimed the jurisdiction *Ratione Materiae* (functional immunity), on the basis that the dispute arose out of an 'investment' under Article 1(1) of the BIT and also Article 25(1) of the ICSID, and Pakistan had breached both contract and some provisions of the BIT.

With respect to its claim about the jurisdiction *Ratione Temporis*, Impregilo submitted that breaches occurred after the date of enforcement of the BIT and were continuous in nature. In short, the tribunal had jurisdiction over the dispute both under the BIT and the ICSID.

As far as merits are concerned, the claimant alleged that the respondent did not provide "fair and equitable" treatment to investment under the Article 2(2) of the BIT;[13] furthermore, it violated Article 5(1) of the BIT by limiting the right of ownership or possession and breached Article 5(2) by expropriating investment.[14] Besides it, Pakistan had also breached the few clauses of the Contract.

As a result, *Impregilo* sought compensation for the caused damages, approximately US$ 450 million. In case, the tribunal could not award *Impregilo* damages in excess, then in the alternative the tribunal should award 57.80% of the total damages plus interest, as *Impregilo's* share.

Pakistan's Objections to Jurisdiction

Pakistan rejected the *Impregilo's* claims of 'expropriation' and denial of 'fair and equitable treatment'. It stressed that *Impregilo's* claims related to extension of time and additional costs were actually the contractual claims and all such claims based on the

[13] *See* annex.
[14] *Ibid.*

events which came into existence before BIT. Moreover, it added that WAPDA was not responsible for frustration in dispute resolution mechanisms. It submitted that it was not WAPDA, but actually GBC which attempted to side-step the dispute resolution process.

Pakistan held the opinion, regarding objection *Ratione Personae*, that the *Impregilo* had not the right to claim on behalf of GBC, as GBC had no legal personality under Pakistani Law, Swiss Law, as well as Article 25(1) of the ICSID Convention. So, neither *Impregilo* had right to claim on the behalf of GBC, nor it could justify the process of bringing separate claims.

Further, Pakistan proceeded that the tribunal lacked the jurisdiction *Ratione Materiae*, as the contractual claims could not be submitted to the tribunal. In addition, WAPDA possessed a separate legal personality and distinct from the Islamic Republic of Pakistan, so the tribunal could not have jurisdiction over the State of Pakistan, as well as over WAPDA under Article 25(1) of the ICSID Convention. Thus, the dispute settlement mechanism incorporated in the contract should be adopted as for the case; there were no treaty claims separated from Contract claims.

Similarly, with respect to the jurisdiction *Ratione Temporis*, Pakistan submitted that the BIT between Pakistan and Italy came into force on 22 June, 2001, and had no retroactive effect. Thus, *Impregilo* could not rely on an event which took place before that time. Furthermore, the character of breaches was neither continuing in nature, nor uninterrupted.

Pakistan requested the tribunal to declare that it had no jurisdiction over *Impregilo's* claims and it should dismiss the proceedings, but in case the proceedings could not be dismissed, the tribunal should not proceed further till the judgment of Lahore Arbitration tribunal.

***Impregilo's* Reply on Jurisdiction**

Impregilo noted that Pakistan did not have the objection on the point that the claimant was an "investor" of Italy under the BIT and a "national of other contracting party" under the ICSID Convention, but only had objections on the claims regarded as treaty claims by *Impregilo*. It added that it felt the responsibility to prove the jurisdiction on the *Prima facie* basis as required by ICSID tribunal.

Impregilo claimed that the tribunal had the jurisdiction *Ratione Materiae*, as WAPDA and PHC were the organs of the State as they were own and controlled by Pakistan. It also mentioned that it had already asserted the claims in its request and in limited memorial on the basis of Article 2(2) and 5 of the BIT[15]. It also described that both sets to Treaty and Contract claims were based on similar facts, but breach of BIT went beyond the breach of Contract. In addition, it asserted that the tribunal had jurisdiction over the contract claims as well, and the existence of dispute settlement mechanism could not deprive the tribunal of its jurisdiction over the Contract claims. *Impregilo* stated that the dispute settlement mechanism was unavailable to it because of the partial attitude of the Engineer and DRB. It further emphasized that Pakistan itself had breached the Most-Favoured-Nation Clause of the BIT.

Regarding the Jurisdiction *Ratione Personae*, *Impregilo* asserted that it could present on behalf of GBC as the leader of joint venture and majority stake holder. So, it requested the tribunal to permit it to proceed on behalf of GBC. In the alternative, *Impregilo* had the right to present itself as a proper claimant in its own right, and in that case it could affect the quantum of damages, but the jurisdiction of *Ratione Personae*. With regard to *Ratione Temporis*, *Impregilo* claimed that it had asserted a single existing dispute arose from continuing breaches of the BIT and of the contract. It mentioned that

[15] *Ibid.*

the provision of the BIT is compatible with an article of the *Vienna Convention* related to non-retroactivity[16]. It requested the tribunal to decide about the jurisdiction of the dispute.

Pakistan's View

Pakistan again rejected *Impregilo*'s claims and stated that the claimant's Treaty Claims however skillfully re-packed were actually the Contract Claims. Moreover, the dispute arose out of two contracts, concluded by WAPDA, but not by the Government of Pakistan. So, the tribunal had no jurisdiction to take into consideration the contract claims against Pakistan. In case, Pakistan was a Party, the tribunal did not have jurisdiction as Contract Claims should be submitted to Contractual Dispute Mechanisms under clause 67 of the Contract.[17]

Firstly, the dispute should be submitted to the Engineer, and in case any of the parties was not satisfied with the decision of the Engineer, the dispute should be referred to DRB, if the DRB could not decide during 56 days, the aggrieved party could commence arbitration under Pakistani Law. Furthermore, *Impregilo* had not the right to rely on the Italy – Pakistan BIT or on the Umbrella Clauses of the Swiss – Pakistan BIT.

Additionally, the Italy – Pakistan BIT entered into force on 22 June, 2001 and had no retroactive effect, and the dispute arose before that date. Thus, the tribunal had no jurisdiction *Ratione Temporis*. Lastly, the tribunal had no jurisdiction *Ratione Personae* because GBC had no legal personality. That is why neither all the joint ventures, nor the *Impregilo* could bring a claim to ICSID. Pakistan raised three objections regarding *Ratione Personae* to the tribunals Jurisdiction;

a) *Impregilo* had not the right to claim on behalf of GBC or other partners of the joint venture.

b) *Impregilo* could not claim for its own share.

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[16] *Supra* note. 3, art. 28, "Non-retroactivity of treaties: Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".

[17] *Supra* note. 10.

c) *Impregilo* was not authorized to bring this arbitration and had not observed the Rule 2(1)(f) of the ICSID in this regard.[18]

In response to these charges, *Impregilo* argued that it could represent itself on behalf of GBC as it was the leader of joint venture, and only signatory on behalf of GBC to Contracts. To support arguments, *Impregilo* also referred few ICC Arbitration Cases.[19]

Decision Regarding *Ratione Personae*

According to Article 25(1) of the ICSID Convention the jurisdiction *Ratione Personae* could extent to disputes between the Contracting State and national of other Contracting State. The term "national" as defined in the Article 25(2)(b) of the Convention, means "any juridical person", or in other words the "legal personality" is a requirement of this Article.[20]

Considering the position of GBC, the tribunal held that it was not a juridical person under Article 25(2)(b) of the Convention and was just the contractual relationship between different parties. The tribunal further stated that *Impregilo* did not have the right to claim particularly at that forum, on behalf of other participants in GBC because two out the three parties were not the national of the other Contracting State and moreover, those parties could not be regarded as "investor" with in the scope of the BIT.

However, *Impregilo* had got the "legal Personality" but it could not claim in the arbitration proceedings on behalf of GBC because Pakistan had given consent, in the BIT, to only Italian nationals to approach ICSID for the resolution of disputes arising out

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[18] Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules): "state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request".

[19] a) *Imprest-Girola-Lodigiani & Impregilo Iran Construction Company v. Tehran Regional Water Board(Iran)*, (Feb. 1982), b) *McHarg, Reborts, Wallace, Todd v. Iran*, (Dec. 1986)

[20] ICSID Convention: art. 25(2)b: "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention".

of investments. So, *Impregilo* being an Italian national could not claim for a third State h the consent of the host State. Therefore, the tribunal had no jurisdiction on behalf of GBC or any of *Impregilo*'s joint partners.

In reply, *Impregilo* stated that the tribunal had jurisdiction over claims of its own right it had the legal personality with in the scope of the BIT and the ICSID Convention. On the other hand, Pakistan asserted that *Impregilo* could not stand to its own claims because *Impregilo* and its partners had acted consistently in all matters related to implementation of the Contracts. To support its arguments, Pakistan relied on *Impregilo*'s own limited memorial, in which *Impregilo* itself stated that on no occasion it had acted alone.

The tribunal rejected the Pakistan's objections by holding the opinion that the act in which partner had worked constantly and consistently did not make any rule or law that they were bound to do so in future. In the end, the tribunal concluded that *Impregilo* was not prevented to stand to its own claims for breach of the BIT on the basis, it was proceeding alone.

Pakistan also raised objections regarding *Impregilo*'s lack of authorization to bring the claims at that forum, but the tribunal again rejected them by holding the opinion that *Impregilo* had fulfilled the requirement of Rule 2(1) and (2) of the Institution Rule and so was authorized to pursue the arbitration proceedings[21]. Thus, the tribunal had jurisdiction *Ratione Personae* over *Impregilo*'s own claims.

Decision Regarding *Ratione Materiae*

Impregilo claimed that under Article 9 and 3 of the BIT, the tribunal had jurisdiction over both Contract and Treaty Claims. It emphasized that the tribunal had jurisdiction over claims against Pakistan as WAPDA was an organ of the Government of Pakistan. It again mentioned that the contractual dispute settlement mechanism was unavailable to it due to Pakistan's conduct.

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[21] *Supra* note. 18.

Pakistan again objected the claims of *Impregilo* by stressing on the point that WAPDA was the party to the Contracts, but not Pakistan, so, it was not responsible for breach of the Contracts. Furthermore, it added that the tribunal should order to stay the proceedings as it lacked jurisdiction over the Contract Claims and should refer the Claims to the forum mentioned in Contractual Clauses.

The tribunal agreed to the opinion of Pakistan that the Contracts were concluded between GBC and WAPDA and not between GBC and Pakistan. Additionally, WAPDA had a legal status distinct from the State of Pakistan, and Article 9 of the BIT did not deal with the breach of Contract. So, the tribunal had no jurisdiction under the BIT to deal with the claims of *Impregilo* based on breaches of the Contract, even its reliance upon MFN Clause of the BIT did not take the matter further.

As far as treaty claims were concerned, in *Impregilo*'s view, some claims did not coincide with contract claims because they were based on the conduct of other governmental authorities of Pakistan which were not involved in Contracts, but few others corresponded with Contract Claims. In both cases, *Impregilo*'s stressed that the tribunal had jurisdiction over treaty claims. It further asserted that Pakistan had failed to provide "fair and equitable" treatment to its investments, and thus had violated Article 2(2) of the BIT. Moreover, Pakistan's attitude and behavior was equivalent to "expropriation" within the Article 5(2) of the BIT.

In reply Pakistan argued, that firstly the issues raised by the claimant under one or two provisions of the BIT and thus insufficient to establish the jurisdiction. Secondly, the Treaty Claims were not different and separate from the Contract Claims. In addition, the charge of unfair and inequitable treatment was directly linked to the treatment provided by WAPDA, and thus related to the breach of the Contractual Obligations but not the Treaty. Similarly, the treaty claim of expropriation was actually the Contract Claims tactfully dress-up as Treaty Claims, because refusal to pay did not mean "expropriation" where as unresolved dispute of performance requirement was linked with that. In the end,

Pakistan requested the tribunal to stay the proceedings, so the contractual resolution mechanism could resolve the disputes.

The tribunal observed that the Treaty Claims could coincide with Contract Claims and that fact could not prevent the jurisdiction of the tribunal, but it would not entertain the claims related to the unavoidable geological conditions which were recommended to DRB and to the Lahore Arbitration as they did not fall under the scope of the BIT. Regarding other claims, the tribunal held the opinion that it was not in the position to decide whether they could be considered as breaches of the Treaty or not, in the absence of detailed information. It also observed that the particular case did not concern a traditional situation of "expropriation" and could be regarded as "indirect expropriation" and it would determine the jurisdiction while considering the dispute on merits.

Decision Regarding *Ratione Temporis*

According to Pakistan, the tribunal could not have the jurisdiction with respect to alleged breaches concerning acts prior to the date of the enforcement of the BIT, and breaches were not also "continuing in nature".

Impregilo replied that its claims rose out of the same subject matter and therefore, "continuing in nature". Thus, the tribunal had jurisdiction over the dispute as the provisions of the BIT were consistent with the basic rule of non-retroactivity of treaties.

After the careful observation, the tribunal concluded that the jurisdiction *Ratione Temporis* was limited as the applications of the BIT did not bind Pakistan in relation to any situation existed before 22 June, 2001. The tribunal made its decision on 22 April, 2005.

Present Situation of the Case[22]

At the request of *Impregilo*, on 26 September, 2005, the proceedings discontinued after the settlement agreed between the parties, pursuant to ICSID Arbitration Rule 44[23].

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[22] *Supra* note. 9

4.3.3 Case: Bayindir v. Pakistan[24]

Background

For the purpose, to construct a six lane motorway known as Pakistan Islamabad – Peshawar Motorway, National Highway Authority (NHA)[25] signed an agreement with Bayindir[26], on 18 March, 1993[27]. Due to political changes in Pakistan, the agreement was renewed in 1997 which incorporated the 1993 contract as a whole with some overriding clauses. It was decided that the contract would be governed by the laws of Pakistan.

There was a condition in the agreement that NHA would pay 30% in advance to Bayindir as "Mobilization Advance", and in return, Bayindir would provide a bank guarantee equivalent to the amount of the advance. Both parties set-out the disputes settlement mechanism[28].

Cause of Dispute

The engineer ordered Bayindir to complete the project in time, but Bayindir submitted several claims between September 1999 and April, 2001, for the Extension of Time

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[23] *Supra* note. 8, "Discontinuance at Request of a Party: If a party requests the discontinuance of the proceeding, the tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue".

[24] "Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan" (ICSID Case No. ARB/03/29) Available at: http://icsid.worldbank.org/ICSID/FrontServlet (last visited: 20-08-2010)

[25] NHA: "A public corporation, and responsible for the planning, developing, maintenance of Pakistani national highways and roads. However, it has right to sue and to be sued in its own name, yet governed by the Government of Pakistan".

[26] "Bayindir Insaant Turizm Ticaret Ve Sanayi A.S., is a Turkish Company; which is engaged in the business of the construction of motorway and other large infrastructures in Turkey and abroad".

[27] This agreement consisted of two parts including General Specification of FIDIC 1987 edition, conditions of contract, special provisions negotiated by the parties, drawings, priced Bill of Quantities (BoQ) and Bid.

[28] "i) The performance of the contract would be supervised by an engineer, and in case of any dispute the matter would be referred to him in writing, in the first place.
ii) The dispute could be referred to arbitration, in case of dissatisfaction, by either of the parties, with the decision of the engineer, by giving the notification.
iii) In the first attempt, the parties would try to settle down the dispute with discussion.
iv) In case of failure of settlement, the dispute would be settled under the provisions and rules of the Arbitration Act 1940".

(EOT) and payment. Moreover, it also mentioned that NHA or Pakistan was responsible for delays in construction work due to late handing over of the land.

On 18 February 2000, the meeting was held between the parties and first two EOT claims were settled by extending the "Contract Completion Date" to 31 December, 2002. In addition, it was decided that NHA would handover the remaining land as early as possible, but not later than four months. It was also decided in the meeting that Bayindir had to complete two "Priority Sections" before 23 March, 2001.

As, NHA failed to give "Possession of Site", decided in the meeting, so Bayindir again submitted its third EOT claim on 15 January 2001, for completion of two "Priority Section" by October, 2001. In response to it, the representative of the engineer granted a very limited extension of time.

On 19 April 2001, NHA informed Bayindir that it had to go into liquidation for late completion of two "Priority Sections", by the end of limited extension. On the same day, Bayindir suggested NHA to refer the issue of liquidation to the engineer on the ground that third EOT was "still pending". It further explained that it could not complete the "Priority Sections" due to reasons beyond its control.

Before the decision of the engineer, NHA gave a "Notice of Termination of Contract" to Bayindir, demanding to hand over the site possessed by later, within 14 days. Afterwards Bayindir's personnel were vacated from the site by Pakistani Army.

NHA, on 23 December 2002, signed a contract with "M/s Pakistan Motorway Contractors Joint Venture" (PMC JV) to complete M1 project within 1460 days.

4.3.2 Case: Impregilo v. Pakistan[10]

History of the Case

The International Centre for Settlement of Investment Disputes (ICSID) received an arbitration request on 21st January, 2003 from *Impregilo*, the claimant against Pakistan, the respondent. In the request, *Impregilo* referred the BIT signed on 19th July, 1997 between Italy and Pakistan, and some previous decisions of ICSID to support its arguments. The Acting Secretary General of ICSID registered the request on 3rd March, 2003 and on the same date gave notices to parties for registration of the request and invited them to constitute the tribunal to proceed the arbitration as soon as possible.

Background Facts

On 27 April, 1995, according to the *Impregilo,* a joint venture called Ghazi Barotha Contractors (GBC), was formed under the laws of Switzerland. A joint venture agreement was concluded between five joint venture partners to establish GBC. *Impregilo* was the leader of the joint venture.

Pakistan Water and Power Development Authority (WAPDA) concluded two contracts with GBC on 19th December, 1995. First contract was to build a barrage downstream of the *Tarbela* Dam, and the second was to construct a channel, 47 bridges, 01 Railway Bridge and 30 drainage structures. *Impregilo* signed the project and GBC started the work in early 1996. The project was about US$ 500 million and had to be completed till March 2000. The project was supposed to be supervised by an Engineer and WAPDA appointed Pakistan Hydro Consultants (PHC) for the purpose.

Cause of Dispute

According to *Impregilo*, the work was delayed due to obstructions and interference by Pakistan and due to unexpected circumstances during the work. In addition, GBC's

[10] Impregilo S.p.A. v. Islamic Republic of Pakistan (ICSID Case No. ARB/03/3). Available at: http://icsid.worldbank.org/ICSID/FrontServlet (last visited: 22-08-2010)

requests for extension of time and for payment were not entertained by the Engineer and WAPDA and all such problems led to a series of dispute.

Particularly, the claimant submitted that the timely performance was delayed due to late issuance of instructions by the Engineer. Moreover, the instructions were incomplete and unsatisfactory, demanding extra and complex work as compared to provided drawings in tender. Further, it asserted that WAPDA failed to hand over the land in time to carry out the work properly. The concrete lining for the channel damaged because of the defects in the designs of the Engineer. Over and above, WAPDA supplied the equipments many months later than required. The Engineer rejected the requests of GBC, for extension of time and also refused to compensate for the costs.

Impregilo argued that it tried to settle down the dispute through discussion, but failed. It also tried to opt the dispute settlement clauses, but due to partial attitude of Engineer and Disputes Review Board (DRB), it could not proceed to arbitration in Lahore. For the same reason, *Impregilo* filed a Request for Arbitration in ICSID in January 2002, but it withdrew its request after the discussion with Pakistani Authorities in May 2002. Unfortunately, the disputes did not settle and therefore, it filed a new request for arbitration.

Issues Raised on the Basis of BIT

Impregilo claimed that it had jurisdiction over the dispute by referring an Article of the ICSID[11] and Article 9 of the BIT between Italy and Pakistan.[12] It presented itself the national of Italy, and it added that it had the right to present the GBC being the leader of joint venture, and considered WAPDA the part of Pakistan, so the Islamic Republic of

[11] ICSID Convention, Ch 11, art. 25(1): Jurisdiction of the Centre: "The jurisdiction of the Centre shall extend to any legal dispute arising directly out of an investment, between a Contracting State (or any constituent subdivision or agency of a Contracting State designated to the Centre by that State) and a national of another Contracting State, which the parties to the dispute consent in writing to submit to the Centre. When the parties have given their consent, no party may withdraw its consent unilaterally".

[12] "Agreement between the Government of Islamic Republic of Pakistan and the Government of the Italian Republic on the Promotion and Protection of Investments", July 19, 1997. Available at: http://www.unctad.org/sections/dite/iia/docs/bits/pakistan_italy.pdf (last visited: 18-11-2009)

Pakistan was the respondent of the case. Thus, it had the jurisdiction '*Ratione Personae*' (personal immunity), by the reason of its personality.

Impregilo further claimed the jurisdiction *Ratione Materiae* (functional immunity), on the basis that the dispute arose out of an 'investment' under Article 1(1) of the BIT and also Article 25(1) of the ICSID, and Pakistan had breached both contract and some provisions of the BIT.

With respect to its claim about the jurisdiction *Ratione Temporis*, Impregilo submitted that breaches occurred after the date of enforcement of the BIT and were continuous in nature. In short, the tribunal had jurisdiction over the dispute both under the BIT and the ICSID.

As far as merits are concerned, the claimant alleged that the respondent did not provide "fair and equitable" treatment to investment under the Article 2(2) of the BIT;[13] furthermore, it violated Article 5(1) of the BIT by limiting the right of ownership or possession and breached Article 5(2) by expropriating investment.[14] Besides it, Pakistan had also breached the few clauses of the Contract.

As a result, *Impregilo* sought compensation for the caused damages, approximately US$ 450 million. In case, the tribunal could not award *Impregilo* damages in excess, then in the alternative the tribunal should award 57.80% of the total damages plus interest, as *Impregilo's* share.

Pakistan's Objections to Jurisdiction

Pakistan rejected the *Impregilo's* claims of 'expropriation' and denial of 'fair and equitable treatment'. It stressed that *Impregilo's* claims related to extension of time and additional costs were actually the contractual claims and all such claims based on the

[13] *See* annex.
[14] *Ibid.*

events which came into existence before BIT. Moreover, it added that WAPDA was not responsible for frustration in dispute resolution mechanisms. It submitted that it was not WAPDA, but actually GBC which attempted to side-step the dispute resolution process.

Pakistan held the opinion, regarding objection *Ratione Personae*, that the *Impregilo* had not the right to claim on behalf of GBC, as GBC had no legal personality under Pakistani Law, Swiss Law, as well as Article 25(1) of the ICSID Convention. So, neither *Impregilo* had right to claim on the behalf of GBC, nor it could justify the process of bringing separate claims.

Further, Pakistan proceeded that the tribunal lacked the jurisdiction *Ratione Materiae*, as the contractual claims could not be submitted to the tribunal. In addition, WAPDA possessed a separate legal personality and distinct from the Islamic Republic of Pakistan, so the tribunal could not have jurisdiction over the State of Pakistan, as well as over WAPDA under Article 25(1) of the ICSID Convention. Thus, the dispute settlement mechanism incorporated in the contract should be adopted as for the case; there were no treaty claims separated from Contract claims.

Similarly, with respect to the jurisdiction *Ratione Temporis*, Pakistan submitted that the BIT between Pakistan and Italy came into force on 22 June, 2001, and had no retroactive effect. Thus, *Impregilo* could not rely on an event which took place before that time. Furthermore, the character of breaches was neither continuing in nature, nor uninterrupted.

Pakistan requested the tribunal to declare that it had no jurisdiction over *Impregilo's* claims and it should dismiss the proceedings, but in case the proceedings could not be dismissed, the tribunal should not proceed further till the judgment of Lahore Arbitration tribunal.

Impregilo's Reply on Jurisdiction

Impregilo noted that Pakistan did not have the objection on the point that the claimant was an "investor" of Italy under the BIT and a "national of other contracting party" under the ICSID Convention, but only had objections on the claims regarded as treaty claims by *Impregilo*. It added that it felt the responsibility to prove the jurisdiction on the *Prima facie* basis as required by ICSID tribunal.

Impregilo claimed that the tribunal had the jurisdiction *Ratione Materiae*, as WAPDA and PHC were the organs of the State as they were own and controlled by Pakistan. It also mentioned that it had already asserted the claims in its request and in limited memorial on the basis of Article 2(2) and 5 of the BIT[15]. It also described that both sets to Treaty and Contract claims were based on similar facts, but breach of BIT went beyond the breach of Contract. In addition, it asserted that the tribunal had jurisdiction over the contract claims as well, and the existence of dispute settlement mechanism could not deprive the tribunal of its jurisdiction over the Contract claims. *Impregilo* stated that the dispute settlement mechanism was unavailable to it because of the partial attitude of the Engineer and DRB. It further emphasized that Pakistan itself had breached the Most-Favoured-Nation Clause of the BIT.

Regarding the Jurisdiction *Ratione Personae*, *Impregilo* asserted that it could present on behalf of GBC as the leader of joint venture and majority stake holder. So, it requested the tribunal to permit it to proceed on behalf of GBC. In the alternative, *Impregilo* had the right to present itself as a proper claimant in its own right, and in that case it could affect the quantum of damages, but the jurisdiction of *Ratione Personae*. With regard to *Ratione Temporis*, *Impregilo* claimed that it had asserted a single existing dispute arose from continuing breaches of the BIT and of the contract. It mentioned that

[15] *Ibid.*

the provision of the BIT is compatible with an article of the *Vienna Convention* related to non-retroactivity[16]. It requested the tribunal to decide about the jurisdiction of the dispute.

Pakistan's View

Pakistan again rejected *Impregilo*'s claims and stated that the claimant's Treaty Claims however skillfully re-packed were actually the Contract Claims. Moreover, the dispute arose out of two contracts, concluded by WAPDA, but not by the Government of Pakistan. So, the tribunal had no jurisdiction to take into consideration the contract claims against Pakistan. In case, Pakistan was a Party, the tribunal did not have jurisdiction as Contract Claims should be submitted to Contractual Dispute Mechanisms under clause 67 of the Contract.[17]

Firstly, the dispute should be submitted to the Engineer, and in case any of the parties was not satisfied with the decision of the Engineer, the dispute should be referred to DRB, if the DRB could not decide during 56 days, the aggrieved party could commence arbitration under Pakistani Law. Furthermore, *Impregilo* had not the right to rely on the Italy – Pakistan BIT or on the Umbrella Clauses of the Swiss – Pakistan BIT.

Additionally, the Italy – Pakistan BIT entered into force on 22 June, 2001 and had no retroactive effect, and the dispute arose before that date. Thus, the tribunal had no jurisdiction *Ratione Temporis*. Lastly, the tribunal had no jurisdiction *Ratione Personae* because GBC had no legal personality. That is why neither all the joint ventures, nor the *Impregilo* could bring a claim to ICSID. Pakistan raised three objections regarding *Ratione Personae* to the tribunals Jurisdiction;

a) *Impregilo* had not the right to claim on behalf of GBC or other partners of the joint venture.

b) *Impregilo* could not claim for its own share.

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[16] *Supra* note. 3, art. 28, "Non-retroactivity of treaties: Unless a different intention appears from the treaty or is otherwise established, its provisions do not bind a party in relation to any act or fact which took place or any situation which ceased to exist before the date of the entry into force of the treaty with respect to that party".

[17] *Supra* note. 10.

c) *Impregilo* was not authorized to bring this arbitration and had not observed the Rule 2(1)(f) of the ICSID in this regard.[18]

In response to these charges, *Impregilo* argued that it could represent itself on behalf of GBC as it was the leader of joint venture, and only signatory on behalf of GBC to Contracts. To support arguments, *Impregilo* also referred few ICC Arbitration Cases.[19]

Decision Regarding *Ratione Personae*

According to Article 25(1) of the ICSID Convention the jurisdiction *Ratione Personae* could extent to disputes between the Contracting State and national of other Contracting State. The term "national" as defined in the Article 25(2)(b) of the Convention, means "any juridical person", or in other words the "legal personality" is a requirement of this Article.[20]

Considering the position of GBC, the tribunal held that it was not a juridical person under Article 25(2)(b) of the Convention and was just the contractual relationship between different parties. The tribunal further stated that *Impregilo* did not have the right to claim particularly at that forum, on behalf of other participants in GBC because two out the three parties were not the national of the other Contracting State and moreover, those parties could not be regarded as "investor" with in the scope of the BIT.

However, *Impregilo* had got the "legal Personality" but it could not claim in the arbitration proceedings on behalf of GBC because Pakistan had given consent, in the BIT, to only Italian nationals to approach ICSID for the resolution of disputes arising out

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[18] Rules of Procedure for the Institution of Conciliation and Arbitration Proceedings (Institution Rules): "state, if the requesting party is a juridical person, that it has taken all necessary internal actions to authorize the request".

[19] a) *Imprest-Girola-Lodigiani & Impregilo Iran Construction Company v. Tehran Regional Water Board(Iran)*, (Feb. 1982), b) *McHarg, Reborts, Wallace, Todd v. Iran*, (Dec. 1986)

[20] ICSID Convention: art. 25(2)b: "any juridical person which had the nationality of a Contracting State other than the State party to the dispute on the date on which the parties consented to submit such dispute to conciliation or arbitration and any juridical person which had the nationality of the Contracting State party to the dispute on that date and which, because of foreign control, the parties have agreed should be treated as a national of another Contracting State for the purposes of this Convention".

of investments. So, *Impregilo* being an Italian national could not claim for a third State h the consent of the host State. Therefore, the tribunal had no jurisdiction on behalf of GBC or any of *Impregilo*'s joint partners.

In reply, *Impregilo* stated that the tribunal had jurisdiction over claims of its own right it had the legal personality with in the scope of the BIT and the ICSID Convention. On the other hand, Pakistan asserted that *Impregilo* could not stand to its own claims because *Impregilo* and its partners had acted consistently in all matters related to implementation of the Contracts. To support its arguments, Pakistan relied on *Impregilo*'s own limited memorial, in which *Impregilo* itself stated that on no occasion it had acted alone.

The tribunal rejected the Pakistan's objections by holding the opinion that the act in which partner had worked constantly and consistently did not make any rule or law that they were bound to do so in future. In the end, the tribunal concluded that *Impregilo* was not prevented to stand to its own claims for breach of the BIT on the basis, it was proceeding alone.

Pakistan also raised objections regarding *Impregilo*'s lack of authorization to bring the claims at that forum, but the tribunal again rejected them by holding the opinion that *Impregilo* had fulfilled the requirement of Rule 2(1) and (2) of the Institution Rule and so was authorized to pursue the arbitration proceedings[21]. Thus, the tribunal had jurisdiction *Ratione Personae* over *Impregilo*'s own claims.

Decision Regarding *Ratione Materiae*

Impregilo claimed that under Article 9 and 3 of the BIT, the tribunal had jurisdiction over both Contract and Treaty Claims. It emphasized that the tribunal had jurisdiction over claims against Pakistan as WAPDA was an organ of the Government of Pakistan. It again mentioned that the contractual dispute settlement mechanism was unavailable to it due to Pakistan's conduct.

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[21] *Supra* note. 18.

Pakistan again objected the claims of *Impregilo* by stressing on the point that WAPDA was the party to the Contracts, but not Pakistan, so, it was not responsible for breach of the Contracts. Furthermore, it added that the tribunal should order to stay the proceedings as it lacked jurisdiction over the Contract Claims and should refer the Claims to the forum mentioned in Contractual Clauses.

The tribunal agreed to the opinion of Pakistan that the Contracts were concluded between GBC and WAPDA and not between GBC and Pakistan. Additionally, WAPDA had a legal status distinct from the State of Pakistan, and Article 9 of the BIT did not deal with the breach of Contract. So, the tribunal had no jurisdiction under the BIT to deal with the claims of *Impregilo* based on breaches of the Contract, even its reliance upon MFN Clause of the BIT did not take the matter further.

As far as treaty claims were concerned, in *Impregilo*'s view, some claims did not coincide with contract claims because they were based on the conduct of other governmental authorities of Pakistan which were not involved in Contracts, but few others corresponded with Contract Claims. In both cases, *Impregilo*'s stressed that the tribunal had jurisdiction over treaty claims. It further asserted that Pakistan had failed to provide "fair and equitable" treatment to its investments, and thus had violated Article 2(2) of the BIT. Moreover, Pakistan's attitude and behavior was equivalent to "expropriation" within the Article 5(2) of the BIT.

In reply Pakistan argued, that firstly the issues raised by the claimant under one or two provisions of the BIT and thus insufficient to establish the jurisdiction. Secondly, the Treaty Claims were not different and separate from the Contract Claims. In addition, the charge of unfair and inequitable treatment was directly linked to the treatment provided by WAPDA, and thus related to the breach of the Contractual Obligations but not the Treaty. Similarly, the treaty claim of expropriation was actually the Contract Claims tactfully dress-up as Treaty Claims, because refusal to pay did not mean "expropriation" where as unresolved dispute of performance requirement was linked with that. In the end,

Pakistan requested the tribunal to stay the proceedings, so the contractual resolution mechanism could resolve the disputes.

The tribunal observed that the Treaty Claims could coincide with Contract Claims and that fact could not prevent the jurisdiction of the tribunal, but it would not entertain the claims related to the unavoidable geological conditions which were recommended to DRB and to the Lahore Arbitration as they did not fall under the scope of the BIT. Regarding other claims, the tribunal held the opinion that it was not in the position to decide whether they could be considered as breaches of the Treaty or not, in the absence of detailed information. It also observed that the particular case did not concern a traditional situation of "expropriation" and could be regarded as "indirect expropriation" and it would determine the jurisdiction while considering the dispute on merits.

Decision Regarding *Ratione Temporis*

According to Pakistan, the tribunal could not have the jurisdiction with respect to alleged breaches concerning acts prior to the date of the enforcement of the BIT, and breaches were not also "continuing in nature".

Impregilo replied that its claims rose out of the same subject matter and therefore, "continuing in nature". Thus, the tribunal had jurisdiction over the dispute as the provisions of the BIT were consistent with the basic rule of non-retroactivity of treaties.

After the careful observation, the tribunal concluded that the jurisdiction *Ratione Temporis* was limited as the applications of the BIT did not bind Pakistan in relation to any situation existed before 22 June, 2001. The tribunal made its decision on 22 April, 2005.

Present Situation of the Case[22]

At the request of *Impregilo*, on 26 September, 2005, the proceedings discontinued after the settlement agreed between the parties, pursuant to ICSID Arbitration Rule 44[23].

[22] *Supra* note. 9

4.3.3 Case: Bayindir v. Pakistan[24]

Background

For the purpose, to construct a six lane motorway known as Pakistan Islamabad – Peshawar Motorway, National Highway Authority (NHA)[25] signed an agreement with Bayindir[26], on 18 March, 1993[27]. Due to political changes in Pakistan, the agreement was renewed in 1997 which incorporated the 1993 contract as a whole with some overriding clauses. It was decided that the contract would be governed by the laws of Pakistan.

There was a condition in the agreement that NHA would pay 30% in advance to Bayindir as "Mobilization Advance", and in return, Bayindir would provide a bank guarantee equivalent to the amount of the advance. Both parties set-out the disputes settlement mechanism[28].

Cause of Dispute

The engineer ordered Bayindir to complete the project in time, but Bayindir submitted several claims between September 1999 and April, 2001, for the Extension of Time

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[23] *Supra* note. 8, "Discontinuance at Request of a Party: If a party requests the discontinuance of the proceeding, the tribunal, or the Secretary-General if the Tribunal has not yet been constituted, shall in an order fix a time limit within which the other party may state whether it opposes the discontinuance. If no objection is made in writing within the time limit, the other party shall be deemed to have acquiesced in the discontinuance and the Tribunal, or if appropriate the Secretary-General, shall in an order take note of the discontinuance of the proceeding. If objection is made, the proceeding shall continue".

[24] "Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v. Islamic Republic of Pakistan" (ICSID Case No. ARB/03/29) Available at: http://icsid.worldbank.org/ICSID/FrontServlet (last visited: 20-08-2010)

[25] NHA: "A public corporation, and responsible for the planning, developing, maintenance of Pakistani national highways and roads. However, it has right to sue and to be sued in its own name, yet governed by the Government of Pakistan".

[26] "Bayindir Insaant Turizm Ticaret Ve Sanayi A.S., is a Turkish Company; which is engaged in the business of the construction of motorway and other large infrastructures in Turkey and abroad".

[27] This agreement consisted of two parts including General Specification of FIDIC 1987 edition, conditions of contract, special provisions negotiated by the parties, drawings, priced Bill of Quantities (BoQ) and Bid.

[28] "i) The performance of the contract would be supervised by an engineer, and in case of any dispute the matter would be referred to him in writing, in the first place.
ii) The dispute could be referred to arbitration, in case of dissatisfaction, by either of the parties, with the decision of the engineer, by giving the notification.
iii) In the first attempt, the parties would try to settle down the dispute with discussion.
iv) In case of failure of settlement, the dispute would be settled under the provisions and rules of the Arbitration Act 1940".

(EOT) and payment. Moreover, it also mentioned that NHA or Pakistan was responsible for delays in construction work due to late handing over of the land.

On 18 February 2000, the meeting was held between the parties and first two EOT claims were settled by extending the "Contract Completion Date" to 31 December, 2002. In addition, it was decided that NHA would handover the remaining land as early as possible, but not later than four months. It was also decided in the meeting that Bayindir had to complete two "Priority Sections" before 23 March, 2001.

As, NHA failed to give "Possession of Site", decided in the meeting, so Bayindir again submitted its third EOT claim on 15 January 2001, for completion of two "Priority Section" by October, 2001. In response to it, the representative of the engineer granted a very limited extension of time.

On 19 April 2001, NHA informed Bayindir that it had to go into liquidation for late completion of two "Priority Sections", by the end of limited extension. On the same day, Bayindir suggested NHA to refer the issue of liquidation to the engineer on the ground that third EOT was "still pending". It further explained that it could not complete the "Priority Sections" due to reasons beyond its control.

Before the decision of the engineer, NHA gave a "Notice of Termination of Contract" to Bayindir, demanding to hand over the site possessed by later, within 14 days. Afterwards Bayindir's personnel were vacated from the site by Pakistani Army.

NHA, on 23 December 2002, signed a contract with "M/s Pakistan Motorway Contractors Joint Venture" (PMC JV) to complete M1 project within 1460 days.

The Bilateral Investment Treaty

The dispute was based on the BIT[29]. The dispute settlement provisions regarding investments between one party and investors of the other party was mentioned in Article VII of the BIT.

History of Proceedings

Bayindir gave many notices of intention to "Commence Arbitration" to NHA, from January to July, 2001. Though the arbitration was not pursued, but, on 30 April 2001, Bayindir challenged the notice of termination given by NHA, before the Lahore High Court. The Lahore High Court dismissed the Bayindir's petition by holding the opinion that the contract specially had an Arbitration Clause.

On the other hand, during the period 2001 and 2003, NHA raised several objections against Bayindir, and also gave a 'Notice of Arbitration'. It also requested Bayindir to nominate a sole arbitrator to solve the issue. At this point, on 10 April 2003, Bayindir wrote to NHA that it had already referred the dispute to International Center for Settlement of Investment Disputes (ICSID) and suggested to wait for its decision. In the mean time, NHA demanded approximately US$ 100,000,000 as "Mobilization Advance Guarantees". Bayindir got a stay order from the Turkish Courts, prohibiting the banks from paying.

Bayindir submitted a request for arbitration to ICSID, on 15 April, 2002. In this arbitration Bayindir was the claimant and Islamic Republic of Pakistan was the respondent. In its request, by referring the provisions of the BIT and demanded the huge relief[30].

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[29] "Agreement between the Republic of Turkey and the Islamic Republic of Pakistan Concerning the Reciprocal Promotion and Protection of Investments", 16 March, 1995, entered into force on 3 September 1997. Available at: http://www.unctad.org/sections/dite/iia/docs/bits/TurkeyPakistan.pdf (last visited: 03-11-2009)

[30] "i) US$ 62,514,554,00 for payment of outstanding interim Payment Certificates.
ii) US$ 27,000,000,00 for payment of additional financial claims related to the works completed by Bayindir.
iii) US$ 19,071,449,00 for reimbursement of all costs incurred in anticipation of completing the project by Bayindir.
iv) US$ 43,050,619,00 for payment against all fixed and moveable assets expropriated by Pakistan.

After a long debate between Pakistan, Bayindir, NHA and ICSID, Bayindir's 'Request for Arbitration' was registered by the Secretary-General of the ICSID, on 01 December 2003. On the same day the Secretary-General called the parties for making an Arbitral Tribunal to start the proceedings. The first hearing was held on 24 September 2004, by the Arbitral Tribunal, at the Offices of the World Bank in Paris. At the preliminary hearing, the parties were satisfied with the constitution of the Tribunal and its procedure for the present proceedings.

The jurisdictional hearing was held on 25, 26 and 27 July 2005. At the end of the jurisdictional hearing, it was decided that first of all the Tribunal would give decision about the question of jurisdiction and admissibility. In case of negative decision, the Tribunal would terminate the arbitration; and in case of affirmative decision, the Tribunal would continue the proceedings.

Before the decision on the question on jurisdiction, it is very important to know the point of views of both parties.

Bayindir's Point of View:

According to Bayindir, it had made an "investment" under the BIT and ICSID Convention, and claimed that Pakistan breached the BIT by breaching treaty provisions on "National Treatment" and "Most-Favorable Treatment", "Fair and Equitable Treatment" and "Expropriation without Compensation". It also pointed out that treaty claims were different from those claims which arose from the contract.

However, it also claimed that tribunal had jurisdiction over the Contract Claims, but at the beginning of the hearing, it withdrew its claim by holding the opinion that it

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v) US$ 7,444,854,00 for compensation of mobilization and demobilization costs.
vi) US$ 107,154,634,00 for compensation of profits lost through unlawful acts and omissions of Pakistan.
vii) Compensation and costs regarding resolution of claims through arbitration, fee of arbitrators, legal counsel, experts; compounded interest on all amounts awarded; compensation for loss of opportunities, loses and damages suffered by Bayindir in Turkey as a result of the actions and omissions of Pakistan.
viii) Any other relief that the Arbitral Tribunal may deem fit and appropriate".

was not necessary for it "to turn to alternative and fall-back mechanism to pursue" its claims.

Pakistan's Point of View:

According to Pakistan's view, Bayindir did not make an investment under Article I (2) of the BIT. So, Bayindir's claims which were based on breach of the BIT were totally artificial. It also held the opinion that Bayindir's claims were dependent on the breach of the Contract, so, it was not the appropriate forum to settle the dispute, or in other words, the Tribunal could not exercise jurisdiction over such claims which had "no colourable basis". In addition, the Contract was governed by the laws of Pakistan, according to which, NHA was separate legal entity and Bayindir's claims were not associated to Pakistan, thus the Tribunal had no jurisdiction.

Pakistan also pointed out the Bayindir's change of position at the beginning of jurisdictional hearing, and requested the Tribunal "to award the Government of Pakistan its costs and expenses incurred as a result of these proceedings".

Tribunal's Consideration

The Tribunal acknowledged the efforts of both parties, as they supported their claims with rules of international law, arbitral tribunals and opinion of learned authors. It further added that it would consider the relevancy of the arguments of parties before making any decision. It also addressed a few preliminary issues before discussing the actual case.

Following are the issues discussed by the Tribunal:

a) Related previous decisions of ICSID
b) Undisputed issues
c) Relevant Laws to determine the Tribunal's jurisdiction
a) Related previous decisions of ICSID

Both parties relied on previous awards or decisions of ICSID to support their point of view. Either they emphasized to conclude the same previous solution for the present case or put efforts to convince the Tribunal to depart from the previous solution for it.

Bayindir submitted that the Tribunal was not bound to follow the decisions of the other tribunals, yet, it should carefully consider the decision of *Impregilo*[31] to know the flaws in arguments of Pakistan. Though, the Tribunal stated that it was not bound to previous decisions, but it would surely consider them wherever required.

b) Un-Disputed Issues

Pakistan explained to the Tribunal that the jurisdictional claims and objections raised by it were associated to the nature of the dispute but not to any person or to the Tribunal itself.

c) Relevant Laws to Determine the Tribunal's Jurisdiction

The jurisdiction of the tribunal was dependent upon the clause of the BIT and rules of ICSID Convention. Article VII of the BIT explained the dispute settlement procedure in detail. According to it, the disputes should be notified in writing, containing all the relevant information and both parties (the investor and the concerned party) should try to solve the issues through negotiations. In case, they failed to settle the disputes with in six months, the dispute could be referred to ICSID[32] or UNCITRAL[33] or to the Court of Arbitration of the Paris, depending upon the choice of the investor.
Article 25(1) of the ICSID Convention also contained the Dispute Settlement Clause. According to it, the Center could extend the jurisdiction to any legal dispute from an investment, and for it the parties had to submit the consent in writing. In case, the parties had submitted their consent, no party could withdraw its consent unilaterally.

The Tribunal noted that Pakistan did not object the jurisdiction of the Tribunal on the basis that the dispute was not legal, rather it objected to the jurisdiction and admissibility of the Tribunal on the basis of Bayindir's claims. As, it was of the view that Bayindir did not make an investment under Article I(2) of BIT and so Bayindir's claims regarding breaching of BIT were not "sustainable" and had "no colourable basis".

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[31] *Supra* note. 10.
[32] International Centre for Settlement of Investment Disputes.
[33] United Nations Commission on International Trade Law.

The Tribunal decided to start proceedings with objections of Pakistan that:

i- Bayindir did not follow the pre-conditions to arbitration, as it submitted the claims without giving official notice to Pakistan.

ii- Bayindir had not the right to submit any claim to arbitration under Article VII (2) of the 1995 Treaty.

Pakistan supported its objections by quoting the relevant part of the BIT, which says:

> Disputes between one of the parties and an investor of the other party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient party of the investment. As far as possible, the investor and the concerned party shall endeavor[u]r to settle these disputes by consultations and negotiations in good faith[34].

In reply to the objection of Pakistan, Bayindir held the opinion that it fulfilled the requirement of notice "by disputing the validity of various decisions of the Engineer", and it also serve the Government of Pakistan with the "Constitutional Petition" in 2001. Though, Bayindir claimed that it had fulfilled its duty under Article VII of the BIT, yet it admitted that "the notice could be framed more perfectly".

At the hearing on jurisdiction, Pakistan said that the Constitutional Petition did not refer to the BIT, and so it could not served itself as notification in writing of a dispute under the BIT. Moreover, the Petition could hardly rely on the BIT, as the BIT was not the part of Pakistani's Law.

Both parties quoted Article VII of the BIT and gave different interpretations to support their arguments. Pakistan emphasized that the notice requirement was the pre-condition to the jurisdiction to the Tribunal, while, Bayindir submitted that the notice requirement should not serve as a "bar" to the Tribunal's jurisdiction. However, if at that time, Bayindir had to file a new request for arbitration, the whole proceeding would restart, which would waste the time of the Tribunal as well as of both parties.

In the Tribunal's view, the purpose of the notice was to allow negotiations between the parties and to settle the issue through discussion; furthermore the notice requirement did not "constitute a pre-requisite to jurisdiction".

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[34] *Supra* note. 29, Article VII,

The Opinion of Both Parties Regarding Investment

One of the Pakistan's objections was that the Bayindir did not make an investment under the Article I(2) of the BIT and Article 25 of ICSID. It further claims that Bayindir got the authorization by the Board of Investment of Pakistan to start the construction but not for making an investment. For this purpose, Bayindir also gave the written statement to the Board of Investment.

In response of this objection from Pakistan, Bayindir quoted the definition of an investment from Article I(2) of the BIT, which says: "that investment includes every kind of asset". According to Bayindir, the term 'every kind of asset' meant every thing of economic value. It submitted that it had made investment in terms of a) Know-how, equipment and personnel, b) Financing; and its contributions qualified as "Treaty Investment" under its broad definition.

The Tribunal agreed with Bayindir's interpretation about the term investment and considered the phrase 'every kind of asset' the broadest among other definitions in BITs. Whereas, Pakistan's objections were mainly about the financial contribution of Bayindir.

Bayindir's Investment in terms of Know-how, Equipment and Personnel

Bayindir asserted that it trained almost 63 engineers, and provided equipment and personnel to the Motorways and its contributions in terms of know-how, equipment, and personnel had got economic value and fell within the meaning of every kind of asset.

Bayindir's Financial Contribution

Bayindir made no significant financial contribution as an investment, rather it received almost one third of the Contract, which covered more than Mobilization Costs, and it kept approximately US$ 10 Million until the end of the Contract, according to Pakistan.

Bayindir replied to this objection, that it provided bank guarantees equal to the amount of the Mobilization Advance to NHA, at its first demand.

The Tribunal's Conclusion with Reference to the BIT

The Tribunal concluded that Bayindir made the investment both in terms of know-how, equipment, personnel and finance, and it also considered that Bayindir did contribute "assets" within the definition of investment in Article I(2) of the BIT.

Article 25 of ICSID and Investment

The Tribunal noted that the Bayindir claimed against Pakistan that it had breached different Provisions of the BIT with respect to investment. As the current dispute was a dispute with Pakistan, as required by the Article 25(1) of the ICSID Convention.

Pakistan admitted that the dispute was a legal contractual dispute between Bayindir and NHA, but it was not a dispute about breach of the Treaty. A highway construction did not make up an investment under Article 25 of ICSID.

The Tribunal was not satisfied with the arguments of Pakistan, as for it the construction of the motorway was more than the construction in the traditional sense. Moreover, it also considered *Impregilo* Case, referred by Bayindir, in which Pakistan did not challenge the construction of the Dam under Article 25 of the ICSID Convention.

Reference from Previous Decisions of ICSID

Both parties quoted the previous decisions of ICSID Tribunals and particularly relied on the decision in *Salini* Case[35] to explain the term investment, containing four elements in it:

a) Contribution
b) Duration
c) Risks
d) Development to the host state

[35] http://vi.unctad.org/files/wksp/iiawksp08/docs/wednesday/Exercise%20Materials/salininote.doc (Last Visited: 20-07-2010)

As far as contribution was concerned, in this case, the Tribunal agreed to Bayindir's opinion that it made a significant contribution both in terms of know-how, equipment, personnel and in finance.

Considering duration of the project, Bayindir pointed out that the project had primary duration of three years followed by a defect liability period of one year and four years maintenance period against payment. Other than that, Bayindir was also granted an extension of one year. So, such periods of time should be considered to satisfy the duration test. The Tribunal also met the said requirement.

While discussing the third point related to the risk, Pakistan argued that "the risk engaged was minimum because Bayindir had received such a substantial Mobilization Advance, which it was to retain (proportionally reduced) until the end of the Contract".[36]

On the other hand, Bayindir rejected the argument of Pakistan on the basis that it was at the high risk after fulfilling the demand of Bank Guarantees. Moreover, the existence of defect liability period of one year and four years maintenance period against payment, created considerable risk for it.

Lastly, regarding a major contribution to the State, Bayindir referred many declarations of Pakistani authorities highlighting the significance of the M1 Project for the progress and development of the country.

After the careful consideration of all arguments from both parties the Tribunal concluded that Bayindir made an investment both under Article I(2) of the BIT and Article 25 of the ICSID Convention.

Bayindir's Claims were Treaty Claims or Not

At the start of the hearing, Pakistan submitted that the claims from Bayindir were actually the Contract claims, however, they were re-packed skillfully, still bounded up with the Contract, thus not sufficient for the jurisdiction of the Tribunal.

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[36] *Supra* note. 29.

On the other hand, Bayindir asserted that Pakistan had violated four separate provisions of the BIT which are as under:

i- Pakistan had failed to protect and promote Bayindir's investment, based on Article II of the BIT.
ii- Pakistan had failed to provide fair and equitable treatment to the investment, based on preamble of the BIT and indirectly on Article II(2) of the BIT.
iii- Pakistan had violated the obligation to provide the most-favorable-nation treatment, based on Article II(2) of the BIT.
iv- Pakistan had taken measures of expropriation against Bayindir's investment, based on Article III(1) of the BIT.[37]

It was very obvious from Bayindir's claim that they were stated by reference to Pakistan's obligations under the BIT. On the other hand, Pakistan emphasized on its point that the Treaty claims were in reality the Contractual claims because of the "ingredients" of Bayindir's claim and the amount of the Contract claims corresponded to the amount of the Treaty claims.

Pakistan, in support of its view, argued that "the right not to be the victim of unfair and inequitable treatment, the right not to be the victim of expropriation"[38], both specifically the rights of investor, and one could ask which investment was treated unfairly an inequitable and what had been expropriated.

The expropriation claim of Bayindir was based on its dismissal from the site, which could only be assessed in the terms of the Contract, considering the progress of Bayindir at work, and the decisions taken by the engineer. Moreover, the amount claimed by Bayindir (in its request for arbitration) was the same that claimed to the Engineer under clause 53 of the Contract.

Bayindir acknowledged that the case was based on the contractual relationship but insisted that the claims were based on the breach of the BIT, and once it would be proved, the relief claimed "would provide complete relief with respect to all matters"[39].

The Tribunal was of the view that Pakistan wanted to exercise a contractual right or remedy but the possibility of a treaty was still there. While concluding it considered

[37] *Ibid.*
[38] *Ibid.*
[39] *Ibid.*

that in the case, the essential basis of the claims was not purely contractual, and the investor had the right under both contract and the treaty. However, the amount claimed by Bayindir, under the Treaty was the same as it demanded under the contract, still it could not affect the self standing right to pursue the remedy accorded by the Treaty.

After concluding that the treaty claims were independent from the Contract claims, the Tribunal reviewed Pakistan's objections to its jurisdiction to hear the Treaty claims.

They are:

i- Abuse of the process

ii- Conflict of the conventions

i- Abuse of the Process

Pakistan certified Bayindir's claim as an "abuse of the process" under the law of the BIT and ICSID Convention. According to Pakistan, Bayindir treated all its disputes, against NHA, as contractual disputes, before it requested for arbitration in ICSID in 2002. Secondly, Bayindir wanted to change the dispute settlement mechanism, which it signed voluntarily at the time of the Contract with NHA, and wanted to re-write the Contract, and substituted the current Tribunal for the tribunal that was recognized as the competent tribunal.

So, it was the duty of the Tribunal, asserted Pakistan, to take action against the "abuse of process". On the other hand, the Tribunal held the opinion that on the basis of tactical choosing of treaty claims and abandoning the contract claims by Bayindir, the process could not be regarded as abusive.

Moreover, in the Tribunal's view, Bayindir could have claimed that it did not submit any contract claim in arbitration or in legal proceedings in Pakistan, under the law of Pakistan during the set limitation period, and at time the claims could not be maintained because Bayindir was out of time.

The Tribunal could regret that the submission of the Treaty claims was made very late by Bayindir, and thus a significant amount of useless work was produced from the

Tribunal and Pakistan, and definitely wasted the time. The withdrawal of the Contract claims and its consequences would be discussed on the allocation of costs. Hence, the Tribunal dismissed the claim of Pakistan challenging its jurisdiction based on an "abuse of process".

ii- Conflict of Conventions

Pakistan again challenged the jurisdiction of the Tribunal by putting a new argument about its ratification of the 1958 New York Convention, which brought with it "Pakistan's obligations to respect and to enforce a private arbitration agreement", under Article II.

Pakistan compared New York Convention 1958 to Washington Convention 1965, and found New York Convention better, both historically and in terms.

Pakistan suggested that the Tribunal should consider Article II of the New York Convention to avoid the circumstances where private arbitral process was not recommended. In addition, Pakistan claimed that potential conflict was existing between both conventions.

The Tribunal was surprised to listen to the argument of Pakistan, and considered it worthless. The point about a potential conflict based on Article II of the New York Convention, might exist if ICSID Tribunal were to order, a state or a party, not to obey or follow the local arbitration agreement. So, just stay of Islamabad Arbitration, under any situation or rules, could not be regarded as violation of Article II of the New York Convention.

In addition, ratification of New York Convention by Pakistan could not object the jurisdiction of the Tribunal, as it was established like other international tribunals and had started its proceedings, and so there was no question of "retrospective effect". Hence, the Tribunal rejected the Pakistan's argument based on conflict of Conventions.

Bayindir's Claims Substantiated or Not

In the present case, Bayindir pursued Treaty claims, abandoning the Contract claims, negating the fact that all the allegations, which made up its claims, were concerned with the conduct of NHA; which could not be exercised as sovereign, according to Pakistan. In response to it, Bayindir argued that the expropriation and expulsion of the contract was directly linked to the element of national interest, and all the decisions were taken by the authorities of the State.

Before analyzing the kinds of actions taken against Bayindir and the role of the State, Bayindir had to prove that its claims were substantiated for jurisdictional purpose or not, and for it Bayindir had to qualify "the relevant standard" of the Tribunal. Then it would be applied on different Treaty Claims, such as; (a) The Most-Favored-Nation Treatment Claim, (b) The Fair and Equitable Treatment Claim, and (c) Expropriation Claim.

Bayindir accepted the challenge to demonstrate the jurisdiction of the Tribunal and the claims it needed were sustainable on a "*prima facie*" basis.

Prima Facie Standard

At the jurisdictional hearing, Bayindir submitted that Pakistan should have waited, until the memorial on the merits before claiming its jurisdictional objects under ICSID Arbitral Rule 41.

In response to it Pakistan replied that Bayindir was satisfied with the way the proceedings were carried out, and was well aware of the fact that the pleadings on jurisdiction were prior to the memorial on the merits, so the question of jurisdiction should be cleared at early stage.

Bayindir was well aware of the challenges and objections forwarded by Pakistan, so replied that the Tribunal should analyze the claims pleaded by it in the jurisdiction phase on the basis of *prima facie.*

Therefore, the Tribunal applied a *prima facie* standard to determine the scope and meaning of BIT, and to assess the claims constituting breach, but existence of breaches to be judge on merit.

The Most-Favoured-Nation Claim

Bayindir submitted that the treatment given to its investment was not equivalent to the treatment provided to Pakistani or any other third country's investment, under Article II(2) of the BIT.

It further accused that:

a) It was dismissed allegedly and unlawfully to favour the local investor and to save the costs.

b) Favourable time table were given to other contractors.

c) Other contractors were not dismissed even though they were very far behind their set schedule as compared to Bayindir.

Pakistan opposed the claim and argued that first of all Bayindir did not plead the MFN claim in its Request of Arbitration. Secondly, Bayindir's arguments were baseless and worthless, so, could not meet the standards of an MFN Treatment *prima facie.* Moreover, the claims were about the regulatory action, were an investor, local or foreigner, was offered better investment, which was not the case of Bayindir.

The Tribunal observed that the claim of Most-Favored-Nation was brought forward in Bayindir's Counter Memorial on Jurisdiction, but in its request of Arbitration. The tribunal disagreed with the Pakistan's opinion that Bayindir had been the subject to regulatory framework and was treated in the same way as local or foreign investor was treated.

Moreover, the treatment offered to the foreign investor was not limited to the regularity treatment under Article – II(2) of the BIT. So, the Tribunal would verify whether the claims of Bayindir were really sustainable and could lie under the clause of the Most-Favored-Nation Treatment.

Dismissal for Reasons of Local Favoritism and Costs

Bayindir quoted from three articles, published by the Pakistani news paper 'Dawn', to support its claims. The first article, which was published on 26 April 2002, just after the three days of Bayindir's expulsion, quoted the statement of spokesman for the NHA. According to the statement, the project (construction of M1) would be completed by the construction companies of Pakistan by 31 December 2002.

Another article, which was published on 07 May 2001, stated that the contract between Bayindir and NHA put Pakistan in a "difficult position in respect to foreign reserves". Furthermore, it suggested that the Prime Minister should take personal interest to complete the Project in time.

A third article was published on 17 June 2001; it quoted the information from the official source that "Islamabad was hoping to save many hundred million dollars by completing the M1 project through Pakistani construction firms".

At that Pakistan strongly objected the allegations presented by Bayindir and called them false and unsubstantiated. However, Pakistan did not tell to what extend the information published was untrue, but stressed that press reports were not the sufficient basis to prove the jurisdiction of the Tribunal.

Pakistan claimed that the contract was highly in favour of Bayindir and very much against the social and economical interest of Pakistan. Additionally, the expulsion of Bayindir was decided after the reports by the World Bank, which suggested stopping M1 project for the betterment of the economics of Pakistan.

Considering the press reports, the Tribunal submitted that they were the sufficient basis for the purpose of establishing jurisdiction.

Favourable Time Tables were Granted to other Contractors

Bayindir asserted that Pakistan replaced Bayindir and awarded Pakistani Motorway Contractors Joint Venture, a four year extra time while it expelled it due to request of

EOT for a short period, so it breached MFN Clause. Besides that, the project was still not completed and the investor was enjoying leniency from Pakistan.

Hence, the MFN clause was not limited to the regulatory treatment, an extension of time table to the local investor could fall in Article II(2) of the BIT.

Pakistan objected the Bayindir's claims by holding the opinion that extension of time period or the problems of the employers, another questions like that were related to contract, as such issues were nothing to do with the Treaty. In addition, the extended time table was setup by mutual agreement between NHA and PMC JV, considering the condition of cash flow of NHA. Pakistan also mentioned that Bayindir was responsible for the financial problems of NHA, as it had already paid the considerable advance mobilization payment to Bayindir.

Over and above, Bayindir's claims were 'untenable', according to Pakistan. It also requested the Tribunal to examine other projects considering the contractual and factual context, as 29 out of 35 projects were delayed due to same problems which were faced to complete M1 project, but Bayindir was only the contractor which was expelled. Furthermore, the Contract was awarded to PMC JV to complete the remaining work on the project.

The Tribunal that Pakistan could not justify the reasons of extended time table with local contractor, so Bayindir's argument could not be considered as untenable under the *prima facie* standard.

Bayindir again accused that Pakistan awarded PMC JV without following the proper procedure of the bid to complete the remaining work. It supported its claim by relying on press reports. It submitted that after the signing on the memorandum of understanding with PMC JV, Pakistan organized a 'selective tendering' including two governmental organizations at a latter stage to cover up the situation. It also submitted that before its expulsion, Pakistan had intended to grant the Project to the local investor. Therefore, NHA informed the press just, after the expulsion of Bayindir, that a local company would complete the remaining work.

Pakistan strongly opposed Bayindir's claims and challenged it to provide proof that NHA had already arranged a replacement prior to Bayindir's expulsion.

The Tribunal submitted that Bayindir's claim in respect of the expulsion due to local favoritism by Pakistan, 'selective tendering' and longer completion time table were sufficient to conclude that it had jurisdiction to hear Bayindir's Most-Favoured-Nation claims on merit.

Claim of Fair and Equitable Treatment

Bayindir alleged in its request for arbitration that Pakistan violated Article II of the BIT, as it did not protect and promote Bayindir's investment, and thus did not give 'fair and equitable' treatment to its investment. It further added that violation of fair and equitable treatment was based on two factors:

a) Pakistan did not provide a stable framework to Bayindir's investment.

b) Bayindir's dismissal was illegal, inequitable and unfair.

In reply to it, Pakistan pointed out that there was no obligation of fair and equitable treatment in Article II(2) of the BIT, and if there were, Pakistan had not violated it. Further it added that Bayindir's arguments were based on the most-favour-nation provision. Besides it, Bayindir's attitude, performance and violation of the Contract agreement led to its expulsion from the site, but not the illegal and unfair treatment of the Government of Pakistan.

On the other hand, Bayindir provided the legal basis of the fair and equitable treatment by referring the Preamble of the BIT and the Most-Favour-Nation clause. In the Preamble, both States agreed to have fair and equitable treatment for maintaining the stable framework for investment. Moreover, Bayindir claimed that being an investor, it had the right to rely on Pakistan's obligation to act in fair and equitable manner through the Most-Favour-Nation clause.

Furthermore, Bayindir asserted that Pakistan had failed to provide a stable framework to its investment because of the lack of management continuity, malpractice,

Claim of Expropriation

Bayindir's expropriation claim was based on its forced expulsion from the site, resulting in withdrawal of interim payments of several months, certificates and works in progress. The reason behind its expulsion was to transfer the land and interest to Government before awarding the project to PMC JV.

Moreover, within the limit set by the Pakistani regulation, Bayindir did not re-export the equipments, but Pakistan's Customs service secured unpaid import customs duties by en-cashing bank guarantees issued by Standard Chartered Bank, on behalf of the Bayindir. Thus, the Government of Pakistan directly influenced Bayindir's rights resulting in expropriation.

Again, Pakistan rejected the claim of the influence of the Government, and regarded the whole claim as 'Contractual Termination'. But, in the Tribunal's view, the claim regarding involvement of the State could not be ruled out as Bayindir had presented some unchallenged facts, including retention of Bayindir's equipment on site during the expulsion. Bayindir also demanded for compensation of investment as well as of equipment.

In response to it, Pakistan referred the clause 63.3 of the conditions of contract, which stated that the amount would be calculated considering the value of equipment and would be paid after the completion of the Project, and again Pakistan negated the possibility of the Treaty by offering compensation through the clause of the Contract.

In the Tribunal's view, such payment should be prompt, adequate and effective to qualify the meaning of compensation under Article III of the BIT.

Conclusion

After listening to all the arguments, the Tribunal concluded that it had jurisdiction over the treaty claims on the *prima facie* basis, but at the same time it cleared that the decision would not be applicable on the merits of claims, under the Rule 41(4) of the ICSID

Arbitration Rule[40]. The claimant had to rely on different standards to prove the actual Treaty breach.

In the end, Pakistan requested the Tribunal to order the stay for the proceedings for the breach of the Treaty, because of the contractual nature of the claims, until the arbitral tribunal resolved the issue. According to Pakistan, the Tribunal had the power to stay the proceedings, and the same approach was adopted in *SGS* case[41]. Furthermore, there were compelling reasons to stay the proceedings.

In Tribunal's view, it could have allowed the State, but for it Pakistan had to prove that any contract issue had to be resolved before the current proceedings. It further proceeded that it had the power to stay the present proceedings if there were any compelling reasons, and for the present case the Tribunal could not find any compelling reason. In addition, the decision to stay the proceeding would mean that the tribunal had jurisdiction over "an empty shell".

Considering the requests and parties' positions, with respect to costs, the Tribunal decided to deal the issue at the merit stage. It also asserted that it would also consider the consequences of the late decision to abandon the contract claims by Bayindir.

Decision of the Tribunal

Firstly, the Tribunal decided that it had jurisdiction over the dispute submitted in its arbitration. Secondly, it dropped the respondent's application to suspend the proceedings. In addition, the Tribunal would make necessary measures to continue the proceedings on the merit. Lastly, the issue of costs would be deal with the second phase of the arbitration on merit. It made its decision on 14 November, 2005.

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[40] *Supra* note. 8, "The Tribunal shall decide whether or not the further procedures relating to the objection made pursuant to paragraph (1) shall be oral. It may deal with the objection as a preliminary question or join it to the merits of the dispute. If the Tribunal overrules the objection or joins it to the merits, it shall once more fix time limits for the further procedures".

[41] *Supra* note. 5

Present Situation of the Case[42]

In August 2009, the tribunal rendered the award on merits, but before its final verdict, the tribunal had observed all the circumstances including the withdrawal of Contract Claims by the claimant. The decision on jurisdiction was in favour of Bayindir but the decision on merit was in favour of Pakistan. However, the tribunal stated that Bayindir's claim did not gain right on the merits, but they had genuine legitimacy to be presented before the tribunal as an investment claims. In the end the tribunal made the conclusion that Pakistan had not breached the 'fair and equitable treatment' and 'National Treatment' under Article 2(2) of the BIT, and had not 'expropriated' the claimant under Article 3 of the Treaty.

Dealing with the issue of costs, the tribunal concluded that both parties, in equal shares, would bear the costs of Arbitration, and each party had to bear its own expenditures related with the arbitration. It dismissed all other claims by notifying the award.

4.4 Conclusion of the Cases

In the light of above stated cases, it has been often suggested that in order to not only attract, but also keep foreign investment, Pakistan must improve its political, economical and legal systems. Like many other developing countries, Pakistan also wants to keep balance between promotion and control of foreign investment. On the legitimate grounds it has to protect its national sovereignty, as well as, to make policies for the enhancement of the economical conditions. The major legal and regularity challenges for Pakistan are to unwind extensive state involvement in the economy by granting the authority to the institutions, so that they can improve their efficiency and reputation. It is also advisable that Pakistan should make policies to discourage corruption by enhancing transparency and discouraging legislative uncertainty. In case of *Impregilo* and Bayindir, both claimants made serious allegations about the involvement of the Government of Pakistan, therefore they filed their disputes in ICSID by referring their treaties instead of seeking

[42] Award, Available at: http://ita.law.uvic.ca/documents/Bayandiraward.pdf (last visited: 26-08-2010)

justice in local courts. They also regarded WAPDA and NHA as organ of the state but not the authoritative entities.

However, the recent investment policies have encouraged foreign investors in almost all economical sectors, but its image as an extremely corrupt country, with political and military strife, Pakistan needs to ensure that all its policies will be implemented smoothly to encourage and facilitate the foreign investment.

Moreover, Pakistan has to adopt a very well determent system for implementation of treaty obligations. It also ensures that it agrees only to those terms and provisions, which are well consulted with different department of government, legal experts, academicians, and other major industrial and commercial groups, and are in the favour of national interest. As far as the SGS case is concerned, the claimant supported its claims by referring umbrella clause of BIT, and stressed on the point that the respondent did not fulfill its 'commitments' and thus breached the clause. Therefore, Pakistan should remain careful before agreeing to any provision of an agreement; otherwise, it will always have to face an embarrassment in its international affairs.

Chapter No: V

CONCLUSION AND RECOMMENDATIONS

5.1 CONCLUSION

Pakistan and the U.S. are allies, strategic partners and long standing friends. After Pakistan's independence, both countries tried to establish good bilateral relations. In 1980s, the mutual cooperation between both countries against the Soviet occupation resulted in the end of cold war and victory of free world.

Now a days, both countries have extended cooperation beyond the war on terrorism. Both sides are firm to strengthen the foundation for an enduring, stable and strong relationship. Both countries are engaged to promote bilateral economy, trade, investment, education, energy, science, health and technology.

In bilateral economics, the U.S. has committed to provide US$ 3 billion over a period of five years (2005 to 2009).[1] Pakistani investment companies consider the US markets very important for export. U.S. is our largest trading partner, and to strengthen the economic relationship the bilateral trade and investment agreement was signed by the trade and investment framework in 2003. The U.S. is also the largest foreign investor in Pakistan. Foreign Direct Investment (FDI), from the US, reached to $3.4 billion during 1989 to 2005. Pakistan in seeking to have a broad-based, long-term relationship with the United States, desires to sign Free Trade Agreements (FTAs) and to negotiate the Bilateral Investment Treaty (BIT).

The BIT was delayed as Pakistan has number of reservations on the Treaty because its terms are heavily in the favour of the U.S. Bilateral Trade and Investment Agreements, more significantly, prove to be effective in promoting the US's foreign policy goals. It is very important to know that how Bilateral Investment Treaties (BITs)

[1] "Economic Ties Between Pakistan & US at a Glance", *The News*, March, 04, 2006

and FTAs, which have specific investment provisions reflect economic and geopolitical objectives.

It is predictable that most serious concern of the US is the effective implementation of the Intellectual Property Rights (IPRs) laws in Pakistan. It is also to be observed that how these particular agreements redefine privileges and rights for transnational corporations, especially commercial control over bio-diversity through IPRs which are also treated as form of investment.

IPR, services, performance requirement, agriculture, competition policy, transfers and so on; all influence one another in these treaties. Other terms and conditions and pressures are linked with bilateral and multilateral aid and development assistance.

In the 1980s, the U.S. broadened the definition of trade law by including the intellectual property and for its protection; she called it an investment and linked it to BIT. Most of the time, BITs do not contain extension sections of IPR; instead they rely on different standards set in different agreements.

The U.S. ensures to overcome the deficiencies – with regard to WTO's TRIPS Agreements, by securing commitments through its bilateral agreements. The minimum standards for IPRs are set by TRIPS, than through the back door the bilateral agreements impose their strict standards on poor developing countries. However, the terms and conditions vary from agreement to agreement, but most of the BITs contain very broad definition of investment giving unjustified authority to one of the signatory countries to take a dispute against the other into an Arbitral Tribunal.

Whenever, the bilateral investment negotiation starts between the US and a WTO country, the standard set by TRIPS, investment and IPRs "become the new minimum standards" on which the future trade and agreements will have to proceed.

Another objective of the "US BIT program" is to promote and support the standards of International Law, as many BITs, pushed by US, contain "the highest standards of International Law", but it is very interesting to note that such standards do not exist in International Law, and so the US standards become the world's standards.

According to UNCTAD, BITs are the very significant and important "protection of international foreign investment", while on the other hand, the victims of BITs call them "arms of massive destruction" to international and national law and public law.

Usually, the bilateral agreements limit the rights of a signatory government by including clauses like performance requirements and technology transfer of the investments of the other country, and thus protect the foreign investor from 'indirect expropriation', or in other words the investor gets the authority to target the policies of the host State.

The establishment of a Trade and Investment Facilitation Agreement (TIFA) is stipulated by U.S. policy, before the negotiations on BIT, in order to remove the barriers to trade and foreign investment. Most of the time, the developing countries after signing the BITs, face trading supremacy on their economies. BITs are also known as meaningful commitment device, because they grant a very significant authority to foreign investors. The host country's foreign policy and reputation is at high risk, in case of violation of any provision or clause of BIT. Moreover, it has to pay a lot by giving up a wide range of policies like capital restrictions, taxation and currency regulation, which it may use for economical, social and political purposes.

Mostly, in many BITs, a dispute does not settle through negotiation with in a specific time period, and is referred to International Center for Settlement of Investment Dispute (ICSID) or to the United Nations Commission on International Trade Law (UNCITRAL), depending upon the choice of the investor, who usually complains about the discriminatory treatment by the host State or about the misguided macroeconomics, and feels delighted to have the opportunity to threaten the host government with an

expensive arbitration. So, such investment treaties always produce a chilling effect on governments as they have to undergo the policy amendments or new legislation.

One more thing which really upsets the balance is negotiation fatigue, faced at negotiation table, which usually creates trouble for the poor government, when it comes across the powerful countries like U.S. Such developed countries carry out negotiations in a very mysterious, technical, complex and strict manner to keep the poor governments under stress, and to hold the supremacy over them. The U.S. pursuit of bilateral negotiations is a classic example of divide and rule tactics; and a strategy to weaken the potential and actual resistance to the U.S. position by engaging the host government in different issues at different level.

The U.S. is using free trade and bilateral investments to set tougher standards for investment negotiations and future trade. It always tries to get maximum concessions from developing countries, because in this way, it will become harder for the governments to oppose U.S. demands at WTO. Similarly, in case of Pakistan, it is insisting to resolve both the intellectual property laws and out standing investment disputes, and want their batter enforcement, before negotiating a BIT.

In the draft of U.S. – Pakistan BIT, the U.S. is insisting that in case of the violation of IPR and cancellation of licenses by Pakistan it should pay damages to U.S. companies for their future business. U.S. investors are also demanding that any investment, under a treaty, made in Pakistan by U.S., should be secured by a penalty, which would be payable to the World Bank as a loan repayment.[2] This provision would give the authority to American investors to claim compensation from Pakistan through the World Bank, by requesting it to credit the investor's account by deducting the amount of the penalty from loans given to Pakistan.

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[2] Choudry, Aziz, "Corporate Conquest Global Geopolitics: Intellectual Property Rights and Bilateral Investment Agreements", *Seedling*, (2005), pg. 11, Also available at: http://www.grain.org/seedling_files/seed-05-01-2.pd (last visited: 23-09-2009)

One of the demands of the U.S., is to allow its investor to get 100% equity stack in insurance companies as well as in Pakistani banks, which is against the rules and regulations of the domestic law. Under Pakistani law the foreign investor can get up to 51% equity in insurance companies and up to 49% in banks.[3]

Moreover, the U.S. wants to bind Pakistan, to seek approval from her before finalizing policies on export, import, taxation and others. In addition, exposition status of already existing covered investment, does not give security that it would be helpful to attract the future investments[4].

The supporters and advocators of Bilateral Investment Treaty hold the opinion that it would be the gigantic step towards finalizing the free trade agreements between both countries, but as a matter of fact the chances are very dim.

The example of the Pakistan – U.S. Trade and Investment Framework Agreement, signed in 2003, is informative in this regard. It is very obvious that there have been very little progress towards setting a formal structure required to expand bilateral economic ties between both countries and promotion of U.S. investment in Pakistan.

The government officials and ministers, at that time hoped that Trade and Investment Framework agreement would lead to free trade agreement between both of them, and would be a very positive signal to domestic and foreign investment. But, neither at that time, nor since then has there been any promise from the U.S. side to sign on an agreement. Even, it is still not clear that how Trade and Investment Framework Agreement will work, is it going to promote Pakistani textile goods in the U.S. markets, or promises would remain promises like past, and nothing would happened.

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[3] Omer, Kalim, "Pakistan – US Bilateral Investment Treaty is Heavily Skewed in the US's Favour", Business & Finance Review, *The News*, March 06, 2006.
[4] Khan, Hassan, Mahmood, "Economic Implications of Bush's Visit", *The News*, March, 2006.

The stated purpose of the agreement signed in 2003, was to promote the provisions related to U.S. interest, but not to strengthen and enhance economics, trade and investment cooperation between both the countries. All such kinds of agreements and treaties progressively liberalize and promote trade in services and goods, as well as create a liberal facilitative and transparent investment regime. Do such agreements provide the opportunity to explore new areas and to develop suitable measures to promote economic cooperation between both countries? In case of YES, what would be the criteria to judge the cooperation and how it would be measured?

Will it be measured by an increase in Pakistani exports to the U.S. or only an increase in the United States exports to Pakistan? Is U.S. going to give more concession in duty and batter market access to support economy of Pakistan in a significant manner? Is the U.S. going to remove the "bottle necks" in bilateral investment treaty? Are the American firms ready to invest here on various grounds? Is U.S. government satisfied with the security conditions of Pakistan? Will U.S. give green signal to its investors to invest in Pakistan? It is heart breaking exercise to write all this, but unless we open our eyes and slip in to the real world, we will not be able to change any thing. The fact is that it makes no sense to cry over the attitude of the super powers, when we are digging our own grave by signing the treaty with out proposing any changes in terms and conditions, because it is approved by the U.S. Congress.

Some provisions of the Proposed Treaty are highly objectionable and thus unacceptable and should be renegotiated by US and Pakistan. However, it is really difficult for developing countries to hold talks with powerful capital exporting countries like US, as through complex and technical legalistic negotiations, it can keep, the government like ours, under a great strain. Our government has very little access to information which is necessary and required to make any deal and thus easily be pressurized. Moreover, the final text of the proposed BIT has been duly approved by the different departments of the United States, so it is insisting that it should be accepted without any amendment by the Government of Pakistan. But, if Pakistan grants those concessions which are demanded by the United States, it will have to grant the same to

5.2 RECOMMENDATIONS

Some suggestions are presented here with respect to this research, which should be taken by the Government of Pakistan to safeguard its national economic interest before singing the Proposed Treaty of United States.

i. Pakistan should work for the stability of its economical and political system and for the improvement in rule of law, as foreign investors are very much sensitive to the circumstances that facilitate trade. Therefore, governmental investment friendly policies can play an important role for attracting the investors.

ii. Pakistan should improve the infrastructural facilities such as electricity, roads, telecommunications and rail linkages to meet the expectations of the foreign investors. However, Pakistan has improved its road linkages by constructing motorways but its geographical location demands much more.

iii. Pakistan should invite Non-Government Organizations (NGOs), legal experts and all interested industrial groups for consultation.

iv. Pakistan should upload the draft of the Proposed Treaty on the website of the Board of Investment and Ministry of Commerce, where any interested person belonging to any field of life can comment or propose his suggestions.

v. The draft of the Treaty should be presented before National and Provisional Assemblies, and Senate for open discussion.

vi. Pakistan is always placed on top of the ranking list by most of the surveys regarding corruption conducted by various organizations. Therefore, many

countries including US emphasize on "transparency", rather it had broaden the concept by enhancing the right of foreign investors in judicial and administrative proceedings. However, it is suggested to improve policies and reputation, instead of accepting the interference of other countries. Pakistan has already improved its reputation by replacing Monopoly Control Authority to Competition Commission and by implementing National Accountability Ordinance. It has also become a member of Transparency International and pays attention to its obligations.

vii. Courts of Pakistan lack jurisdiction to entertain cases under treaties and particularly under International Law. This situation is alarming for Pakistan and should be cured in near future by improving the legal system; otherwise it would be left far behind the rest of the world. If Pakistan wants the foreign investors including Americans to seek remedies in local courts it should improve its legal system because it is the only way to offer Alternative Dispute Resolution. The situation is a little bit batter now, as higher judiciary is becoming powerful and independent because of the public demand and the role of Chief Justice.

viii. Pakistan should discuss the different terms, in detail, used in the text, especially application and scope of investment and standards of treatment. The "pre-establishment phase" of an investment seems to be problematic as if any dispute arises for the investor or investment, even at that time of establishment, Pakistan had to compensate it. Pakistan should not accept this condition as it is quite in just to compensate such investment which has not been set up.

ix. Another issue that is negotiable is the implementation of Intellectual Property Rights (IPRs). US wants to set higher standards through World Trade Organization (WTO) and World Intellectual Property Organization (WIPO) and is willing to enforce IPR for the resolution of investments

disputes, particularly in energy sector. Moreover, the United States also insist that Pakistan should pay damages for the future investment to US companies, in case there is violation of IPRs.[7] It seems to be a very greedy attempt on the part of United States, as it wants to extract maximum concession from Pakistan through bilateral agreement. Therefore, it is recommended not to accept such harsh conditions, rather Pakistan should impress the US authorities and US copyright industry by improving the role of Intellectual Property Rights Organization of Pakistan.

x. Covered Investment is defined as investment made before and after the conclusion of agreement, but the investments made before the conclusion should be excluded from the scope and extent of BIT to avoid retrospective effect.

xi. In case of MFN treatment, Pakistan should stress that through an 'Umbrella Clause', the dispute settlement mechanism provided in other BITs, would not be imported into the Proposed Treaty.

xii. Pakistan also considers it inappropriate to promote bilateral investment by reducing or weakening the public policy objectives. However, the other alternative clauses can be proposed in replacement of the provision reflecting public objectives, for example, the labour laws ratified by International Labour Organization (ILO) Conventions can be presented in replacement of Article 13 of the Treaty.

xiii. Pakistan should insist that the Proposed Treaty be made flexible and US should avoid proposing unilateral clauses, which are only in its favour. Therefore, United States should reassess its BIT Program to adjust the Draft Treaty, as well as the fundamental purpose of the treaty programme.

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[7] Bokhari, Ashfak, "Pitfalls in Signing BIT with US", *Dawn*, April 24, 2006. Available at: http//www.dawn.com/2006/04/24/ebr16.htm (lat visited: 15-05-2008)

I would also like to comment that Pakistan should not sign the Proposed BIT at the gunpoint, rather it should consider all the aspects of the provisions, and through negotiations both United States and Pakistan should establish appropriate mechanism for the purpose of effective implementation of the treaty.

In the end, it is appropriate to note that most of the countries have similar concepts regarding the basic structure and context of BITs, but a very few countries catch the eye with reference to new innovation and United States belong to the same group. However, it is too early to comment on these innovations and to say whether this trend will develop into a general rule in near future. Moreover, this fact is notable that only two countries namely Uruguay and Rwanda have concluded a new Model BIT of the United States, but most of the developing countries including Pakistan are really concerned and want to establish policy coherence. Furthermore, capacity building is the growing need of today especially for developing countries like ours, as it would help them to assess the implication of different BITs, before they conclude them. This requires more research on different trends and their contribution in investment rule making.

LIST OF ANNEXURES

Bilateral Investment Treaties

List of Countries with which Pakistan has Bilateral Investment Agreements

S. No.	Name of Country	Signing Date	S. No.	Name of Country	Signing Date
1	Australia	07.02.1998	24	Malaysia	07.07.1995
2	erbaijan	09.10.1995	25	Mauritius	03.04.1997
3	Bangladesh	24.10.1995	26	Morocco	16.04.2001
4	Belarus	22.01.1997	27	Netherlands	04.10.1988
5	Belgo-Luxemburg Economic Union	23.04.1998	28	Oman	09.11.1997
			29	Philippines	11.05.1999
6	Bosnia	04.09.2001	30	Portugal	17.04.1995
7	Bulgeria		31	Qatar	06.04.1999
8	Cambodia	27.04..2004	32	Romania	10.07.1995
9	China	12.02.1989	33	Singapore	08.03.1995
10	Czech Republic	07.05.1999	34	South Korea	25.05.1988
11	Denmark	18.7.1996	35	Spain	15.09.1994
12	Egypt	16.04.2000	36	Sri Lanka	20.12.1997
13	France	01.06.1983	37	Sweden	12.03.1981
14	Germany	01.12.2009	38	Switzerland	11.07.1995
15	Indonesia	08.03.1996	39	Syria	25.04.1996
16	Iran	08.11.1995	40	Tajikistan	13.05.2004
17	Italy	19.07.1997	41	Tunisia	18.04.1996
18	Japan	10.03.1998	42	Turkey	15.03.1995
19	Kazakhstan	08.12.2003	43	Turkmenistan	26.10.1994
20	Kuwait	17.03.1983	44	U.A.E.	05.11.1995
21	Kyrgyz Republic	23.08.1995	45	United Kingdom	30.11.1994
22	Lebanon	09.01.2001	46	Uzbekistan	13.08.1992
23	Loas	23.04.2004	47	Yemen	11.05.1999

Source: Website: Board of Investment, Government of Pakistan. www.boi.gov.pk

Avoidance of Double Taxation

Countries having Agreement with Pakistan for Avoidance of Double Taxation

S.No.	Name of Country	S.No.	Name of Country
1	Austria	27.	Malta
2.	Bangladesh	28.	Mauritius
3.	Belarus	29.	Netherlands
4.	Belgium	30.	Nigeria
5.	Canada	31.	Norway
6.	China	32.	Oman
7.	Denmark	33.	Philippines
8.	Finland	34.	Poland
9.	France	35.	Qatar
10.	Germany	36.	Romania
11.	Greece	37.	Saudi Arabia
12.	Hungary	38.	Singapore
13.	India	39.	South Africa
14.	Indonesia	40.	Sri Lanka
15.	Iran	41.	Sweden
16.	Ireland	42.	Switzerland
17.	Italy	43.	Syria
18.	Japan	44.	Thailand
19.	Jordan	45.	Tunisia
20.	Kazakhistan	46.	Turkey
21.	Kenya	47.	Turkmenistan
22.	Republic of Korea	48.	U.A.E.
23.	Kuwait	49.	U.K.
24.	Lebanon	50.	U.S.A.
25.	Libyan Arab Republic	51.	Uzbekistan
26.	Malaysia	52.	Azerbaijan

Source: Website: Board of Investment, Government of Pakistan. www.boi.gov.pk

Total number of Bilateral Investment Treaties concluded, 1 June 2010

Reporter: UNITED STATES

Sr.No.	Partner	Date of Signature	Date of Entry into Force
1.	Albania	11-Jan-95	4-Jan-98
2.	Argentina	14-Nov-91	20-Oct-94
3.	Armenia	23-Sep-92	29-Mar-96
4.	Azerbaijan	1-Aug-97	2-Aug-01
5.	Bahrain	29-Sep-99	30-May-01
6.	Bangladesh	12-Mar-86	25-Jul-89
7.	Belarus	15-Jan-94	----
8.	Bolivia	17-Apr-98	6-Jun-01
9.	Bulgaria	23-Sep-92	2-Jun-94
10.	Cameroon	26-Feb-86	6-Apr-89
11.	Congo	12-Feb-90	13-Aug-94
12.	Congo, DR	3-Aug-84	28-Jul-89
13.	Croatia	13-Jul-96	20-Jun-01
14.	Czech Republic	22-Oct-91	19-Dec-92
15.	Ecuador	27-Aug-93	11-May-97
16.	Egypt	11-Mar-86	27-Jun-92
17.	El Salvador	10-Mar-99	----
18.	Estonia	19-Apr-94	16-Feb-97
19.	Georgia	7-Mar-94	10-Aug-99
20.	Grenada	2-May-86	3-Mar-89
21.	Haiti	13-Dec-83	----
22.	Honduras	1-Jul-95	11-Jul-01
23.	Jamaica	4-Feb-94	7-Mar-97
24.	Jordan	2-Jul-97	12-Jun-03
25.	Kazakhstan	19-May-92	12-Jan-94
26.	Kyrgyzstan	19-Jan-93	11-Jan-94
27.	Latvia	13-Jan-95	26-Dec-96
28.	Lithuania	14-Jan-98	22-Nov-01
29.	Moldova, Republic of	21-Apr-93	25-Nov-94
30.	Mongol	6-Oct-94	4-Jan-97
31.	Moroc	22-Jul-85	29-May-91
32.	Mozambique	1-Dec-98	3-Mar-05
33.	Nicarag	1-Jul-95	----
34.	Pana	27-Oct-82	30-May-91
35.	Polan	21-Mar-90	6-Aug-94
36.	Roman	28-May-92	15-Jan-94
37.	Russian Federation	17-Jun-92	----
38.	Rwan	19-Feb-08	----

39.	Senegal	6-Dec-83	25-Oct-90
40.	Slovakia	22-Oct-91	19-Dec-92
41.	Sri Lanka	20-Sep-91	1-May-93
42.	Trinidad and Tobago	26-Sep-94	26-Dec-96
43.	Tunisia	15-May-90	7-Feb-93
44.	Turkey	3-Dec-85	18-May-90
45.	Ukraine	4-Mar-94	16-Nov-96
46.	Uruguay	4-Nov-05	1-Nov-06
47.	Uzbekistan	16-Dec-94	----

Source: Website: Board of Investment, Government of Pakistan.

- Light shade shows the countries to which US Model BIT still in negotiation process
- Dark shade indicates those countries which concluded BITs with US

THIS DOCUMENT CONTAINS: PAKISTAN/U.S. CONFIDENTIAL INFORMATION
TO BE TREATED AS U.S. CONFIDENTIAL – MODIFIED HANDLING AUTHORIZED

Draft
Subject to Legal Review for Accuracy, Clarity, and Consistency
March 3, 2006

TREATY BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN CONCERNING THE ENCOURAGEMENT AND RECIPROCAL PROTECTION OF INVESTMENT

The Government of the United States of America and the Government of the Islamic Republic of Pakistan (hereinafter the "Parties");

Desiring to promote greater economic cooperation between them with respect to investment by nationals and enterprises of one Party in the territory of the other Party;

Recognizing that agreement on the treatment to be accorded such investment will stimulate the flow of private capital and the economic development of the Parties;

Agreeing that a stable framework for investment will maximize effective utilization of economic resources and improve living standards;

Recognizing the importance of providing effective means of asserting claims and enforcing rights with respect to investment under national law as well as through international arbitration;

Desiring to achieve these objectives in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights;

Having resolved to conclude a Treaty concerning the encouragement and reciprocal protection of investment;

Have agreed as follows:

SECTION A

Article 1: Definitions

For purposes of this Treaty:

"central level of government" means:

(a) for the United States, the federal level of government; and

(b) for Pakistan, [___]. *[language to be provided]*

"Centre" means the International Centre for Settlement of Investment Disputes ("ICSID") established by the ICSID Convention.

"claimant" means an investor of a Party that is a party to an investment dispute with the other Party.

"covered investment" means, with respect to a Party, an investment in its territory of an investor of the other Party in existence as of the date of entry into force of this Treaty or established, acquired, or expanded thereafter.

"disputing parties" means the claimant and the respondent.

"disputing party" means either the claimant or the respondent.

"enterprise" means any entity constituted or organized under applicable law, whether or not for profit, and whether privately or governmentally owned or controlled, including a corporation, trust, partnership, sole proprietorship, joint venture, association, or similar organization; and a branch of an enterprise.

"enterprise of a Party" means an enterprise constituted or organized under the law of a Party, and a branch located in the territory of a Party and carrying out business activities there.

"existing" means in effect on the date of entry into force of this Treaty.

"freely usable currency" means "freely usable currency" as determined by the International Monetary Fund under its *Articles of Agreement*.

"GATS" means the *General Agreement on Trade in Services*, contained in Annex 1B to the WTO Agreement.

"government procurement" means the process by which a government obtains the use of or acquires goods or services, or any combination thereof, for governmental purposes and not with a view to commercial sale or resale, or use in the production or supply of goods or services for commercial sale or resale.

"ICSID Additional Facility Rules" means the *Rules Governing the Additional Facility for the Administration of Proceedings by the Secretariat of the International Centre for Settlement of Investment Disputes.*

"ICSID Convention" means the *Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, done at Washington, March 18, 1965.

"investment" means every asset that an investor owns or controls, directly or indirectly, that has the characteristics of an investment, including such characteristics as the commitment of capital or other resources, the expectation of gain or profit, or the assumption of risk. Forms that an investment may take include:

(a) an enterprise;

(b) shares, stock, and other forms of equity participation in an enterprise;

(c) bonds, debentures, other debt instruments, and loans;[1]

(d) futures, options, and other derivatives;

(e) turnkey, construction, management, production, concession, revenue-sharing, and other similar contracts;

(f) intellectual property rights;

(g) licenses, authorizations, permits, and similar rights conferred pursuant to domestic law;[2, 3] and

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[1] Some forms of debt, such as bonds, debentures, and long-term notes, are more likely to have the characteristics of an investment, while other forms of debt, such as claims to payment that are immediately due and result from the sale of goods or services, are less likely to have such characteristics.

[2] Whether a particular type of license, authorization, permit, or similar instrument (including a concession, to the extent that it has the nature of such an instrument) has the characteristics of an investment depends on such factors as the nature and extent of the rights that the holder has under the law of the Party. Among the licenses, authorizations, permits, and similar instruments that do not have the characteristics of an investment are those that do not create any rights protected under domestic law. For

(h) other tangible or intangible, movable or immovable property, and related property rights, such as leases, mortgages, liens, and pledges.

"investment agreement" means a written agreement[4] between a national authority[5] of a Party and a covered investment or an investor of the other Party, on which the covered investment or the investor relies in establishing or acquiring a covered investment other than the written agreement itself, that grants rights to the covered investment or investor:

(a) with respect to natural resources that a national authority controls, such as for their exploration, extraction, refining, transportation, distribution, or sale;

(b) to supply services to the public on behalf of the Party, such as power generation or distribution, water treatment or distribution, or telecommunications; or

(c) to undertake infrastructure projects, such as the construction of roads, bridges, canals, dams, or pipelines, that are not for the exclusive or predominant use and benefit of the government.

"investment authorization"[6] means an authorization that the foreign investment authority of a Party grants to a covered investment or an investor of the other Party.

"investor of a non-Party" means, with respect to a Party, an investor that attempts through concrete action to make, is making, or has made an investment in the territory of that Party, that is not an investor of either Party.

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greater certainty, the foregoing is without prejudice to whether any asset associated with the license, authorization, permit, or similar instrument has the characteristics of an investment.

[3] The term "investment" does not include an order or judgment entered in a judicial or administrative action.

[4] "Written agreement" refers to an agreement in writing, executed by both parties, whether in a single instrument or in multiple instruments, that creates an exchange of rights and obligations, binding on both parties under the law applicable under Article 30[Governing Law](2). For greater certainty, (a) a unilateral act of an administrative or judicial authority, such as a permit, license, or authorization issued by a Party solely in its regulatory capacity, or a decree, order, or judgment, standing alone; and (b) an administrative or judicial consent decree or order, shall not be considered a written agreement.

[5] For purposes of this definition, "national authority" means (a) for the United States, an authority at the central level of government; and (b) for Pakistan, [ ]. *[language to be provided]*

[6] For greater certainty, actions taken by a Party to enforce laws of general application, such as competition laws, are not encompassed within this definition.

"investor of a Party" means a Party or state enterprise thereof, or a national or an enterprise of a Party, that attempts through concrete action to make, is making, or has made an investment in the territory of the other Party; provided, however, that a natural person who is a dual national shall be deemed to be exclusively a national of the State of his or her dominant and effective nationality.

"measure" includes any law, regulation, procedure, requirement, or practice.

"national" means:

(a) for the United States, a natural person who is a national of the United States as defined in Title III of the Immigration and Nationality Act; and

(b) for Pakistan, [___]. *[language to be provided]*

"New York Convention" means the *United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, done at New York, June 10, 1958.

"non-disputing Party" means the Party that is not a party to an investment dispute.

"person" means a natural person or an enterprise.

"person of a Party" means a national or an enterprise of a Party.

"protected information" means confidential business information or information that is privileged or otherwise protected from disclosure under a Party's law.

"regional level of government" means:

(a) for the United States, a state of the United States, the District of Columbia, or Puerto Rico; and

(b) for Pakistan, [___]. *[language to be provided]*

"respondent" means the Party that is a party to an investment dispute.

"Secretary-General" means the Secretary-General of ICSID.

"state enterprise" means an enterprise owned, or controlled through ownership interests, by a Party.

"territory" means:

(a) with respect to the United States,

(i) the customs territory of the United States, which includes the 50 states, the District of Columbia, and Puerto Rico;

(ii) the foreign trade zones located in the United States and Puerto Rico; and

(iii) any areas beyond the territorial seas of the United States within which, in accordance with international law and its domestic law, the United States may exercise rights with respect to the seabed and subsoil and their natural resources.

(b) with respect to Pakistan, [___]. *[language to be provided]*

"TRIPS Agreement" means the *Agreement on Trade-Related Aspects of Intellectual Property Rights*, contained in Annex 1C to the WTO Agreement.[7]

"UNCITRAL Arbitration Rules" means the arbitration rules of the United Nations Commission on International Trade Law.

"WTO Agreement" means the *Marrakesh Agreement Establishing the World Trade Organization*, done on April 15, 1994.

Article 2: Scope and Coverage

1. This Treaty applies to measures adopted or maintained by a Party relating to:

(a) investors of the other Party;

(b) covered investments; and

(c) with respect to Articles 8 [Performance Requirements], 12 [Investment and Environment], and 13 [Investment and Labor], all investments in the territory of the Party.

[7] For greater certainty, "TRIPS Agreement" includes any waiver in force between the Parties of any provision of the TRIPS Agreement granted by WTO Members in accordance with the WTO Agreement.

2. A Party's obligations under Section A shall apply:

(a) **to a state enterprise or other person when it exercises any regulatory, administrative, or other governmental authority delegated to it by that Party**; and

(b) to the political subdivisions of that Party.

3. For greater certainty, this Treaty does not bind either Party in relation to any act or fact that took place or any situation that ceased to exist before the date of entry into force of this Treaty.

4. For greater certainty, no provision of this Treaty shall be construed to impose any obligation on a Party regarding its immigration measures.

Article 3: National Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of its own investors with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.

3. The treatment to be accorded by a Party under paragraphs 1 and 2 means, with respect to a regional level of government, treatment no less favorable than the treatment accorded, in like circumstances, by that regional level of government to natural persons resident in and enterprises constituted under the laws of other regional levels of government of the Party of which it forms a part, and to their respective investments.

Article 4: Most-Favored-Nation Treatment

1. Each Party shall accord to investors of the other Party treatment no less favorable than that it accords, in like circumstances, to investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments in its territory.

2. Each Party shall accord to covered investments treatment no less favorable than that it accords, in like circumstances, to investments in its territory of investors of any non-Party with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments. [8, 9]

Article 5: Minimum Standard of Treatment[10]

1. Each Party shall accord to covered investments treatment in accordance with customary international law, including fair and equitable treatment and full protection and security.

2. For greater certainty, paragraph 1 prescribes the customary international law minimum standard of treatment of aliens as the minimum standard of treatment to be afforded to covered investments. The concepts of "fair and equitable treatment" and "full protection and security" do not require treatment in addition to or beyond that which is required by that standard, and do not create additional substantive rights. The obligation in paragraph 1 to provide:

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[8] *Note*: The Parties agree that the following footnote will be included in the negotiating history as a reflection of the Parties' shared understanding of the Most-Favored-Nation Treatment Article and the *Maffezini* case. This footnote will be deleted in the final text of the Treaty.

The Parties note the recent decision of the arbitral tribunal in *Maffezini (Arg.) v. Kingdom of Spain*, which found an unusually broad most-favored-nation clause in an Argentina-Spain agreement to encompass international dispute resolution procedures. *See* Decision on Jurisdiction ¶¶ 38-64 (Jan. 25, 2000), *reprinted in* 16 ICSID Rev. – F.I.L.J. 212 (2002). By contrast, the Most-Favored-Nation Treatment Article of this Treaty is expressly limited in its scope to matters "with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments." The Parties share the understanding and intent that this clause does not encompass international dispute resolution mechanisms such as those contained in Section B of this Treaty, and therefore could not reasonably lead to a conclusion similar to that of the *Maffezini* case.

[9] *Note*: The Parties agree that the following footnote will be included in the negotiating history as a reflection of the Parties' shared understanding regarding the interpretation of the National Treatment and Most-Favored-Nation Articles. This footnote will be deleted in the final text of the Treaty:

The Parties agree that each Party shall accord to investors of the other Party and to covered investments the better of most-favored-nation or national treatment. However, the Parties believe that a specific provision stating this principle is unnecessary. Each Party must comply with both Article 3 and Article 4 independently, and one Article should not be interpreted to limit the other. A specific provision stating that each Party shall accord to investors of the other Party and to covered investments the better of most-favored-nation or national treatment would be duplicative.

[10] Article 5 [Minimum Standard of Treatment] shall be interpreted in accordance with Annex A.

(a) "fair and equitable treatment" includes the obligation not to deny justice in criminal, civil, or administrative adjudicatory proceedings in accordance with the principle of due process embodied in the principal legal systems of the world; and

(b) "full protection and security" requires each Party to provide the level of police protection required under customary international law.

3. A determination that there has been a breach of another provision of this Treaty, or of a separate international agreement, does not establish that there has been a breach of this Article.

4. Notwithstanding Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants], each Party shall accord to investors of the other Party, and to covered investments, non-discriminatory treatment with respect to measures it adopts or maintains relating to losses suffered by investments in its territory owing to armed conflict or civil strife.

5. Notwithstanding paragraph 4, if an investor of a Party, in the situations referred to in paragraph 4, suffers a loss in the territory of the other Party resulting from:

(a) requisitioning of its covered investment or part thereof by the latter's forces or authorities; or

(b) destruction of its covered investment or part thereof by the latter's forces or authorities, which was not required by the necessity of the situation,

the latter Party shall provide the investor restitution, compensation, or both, as appropriate, for such loss. Any compensation shall be prompt, adequate, and effective in accordance with Article 6 [Expropriation and Compensation](2) through (4), *mutatis mutandis*.

6. Paragraph 4 does not apply to existing measures relating to subsidies or grants that would be inconsistent with Article 3 [National Treatment] but for Article 14 [Non-Conforming Measures](5)(b) [subsidies and grants].

Article 6: Expropriation and Compensation[11]

1. Neither Party may expropriate or nationalize a covered investment either directly or indirectly through measures equivalent to expropriation or nationalization ("expropriation"), except:

(a) for a public purpose;

[11] Article 6 [Expropriation] shall be interpreted in accordance with Annexes A and B.

(b) in a non-discriminatory manner;

(c) on payment of prompt, adequate, and effective compensation; and

(d) in accordance with due process of law and Article 5 [Minimum Standard of Treatment](1) through (3).

2. The compensation referred to in paragraph 1(c) shall:

(a) be paid without delay;

(b) be equivalent to the fair market value of the expropriated investment immediately before the expropriation took place ("the date of expropriation");

(c) not reflect any change in value occurring because the intended expropriation had become known earlier; and

(d) be fully realizable and freely transferable.

3. If the fair market value is denominated in a freely usable currency, the compensation referred to in paragraph 1(c) shall be no less than the fair market value on the date of expropriation, plus interest at a commercially reasonable rate for that currency, accrued from the date of expropriation until the date of payment.

4. If the fair market value is denominated in a currency that is not freely usable, the compensation referred to in paragraph 1(c) – converted into the currency of payment at the market rate of exchange prevailing on the date of payment – shall be no less than:

(a) the fair market value on the date of expropriation, converted into a freely usable currency at the market rate of exchange prevailing on that date, plus

(b) interest, at a commercially reasonable rate for that freely usable currency, accrued from the date of expropriation until the date of payment.

5. This Article does not apply to the issuance of compulsory licenses granted in relation to intellectual property rights in accordance with the TRIPS Agreement, or to the revocation, limitation, or creation of intellectual property rights, to the extent that such issuance, revocation, limitation, or creation is consistent with the TRIPS Agreement.

Article 7: Transfers

1. Each Party shall permit all transfers relating to a covered investment to be made freely and without delay into and out of its territory. Such transfers include:

(a) contributions to capital;

(b) profits, dividends, capital gains, and proceeds from the sale of all or any part of the covered investment or from the partial or complete liquidation of the covered investment;

(c) interest, royalty payments, management fees, and technical assistance and other fees;

(d) payments made under a contract, including a loan agreement;

(e) payments made pursuant to Article 5 [Minimum Standard of Treatment](4) and (5) and Article 6 [Expropriation and Compensation]; and

(f) payments arising out of a dispute.

2. Each Party shall permit transfers relating to a covered investment to be made in a freely usable currency at the market rate of exchange prevailing at the time of transfer.

3. Each Party shall permit returns in kind relating to a covered investment to be made as authorized or specified in a written agreement between the Party and a covered investment or an investor of the other Party.

4. Notwithstanding paragraphs 1 through 3, a Party 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, futures, options, or derivatives;

(c) criminal or penal offenses;

(d) financial reporting or record keeping of transfers when necessary to assist law enforcement or financial regulatory authorities; or

(e) ensuring compliance with orders or judgments in judicial or administrative proceedings.

Article 8: Performance Requirements

1. Neither Party may, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment of an investor of a Party or of a non-Party in its territory, impose or enforce any requirement or enforce any commitment or undertaking:[12]

(a) to export a given level or percentage of goods or services;

(b) to achieve a given level or percentage of domestic content;

(c) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(d) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment;

(e) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings;

(f) to transfer a particular technology, a production process, or other proprietary knowledge to a person in its territory; or

(g) to supply exclusively from the territory of the Party the goods that such investment produces or the services that it supplies to a specific regional market or to the world market.

2. Neither Party may condition the receipt or continued receipt of an advantage, in connection with the establishment, acquisition, expansion, management, conduct, operation, or sale or other disposition of an investment in its territory of an investor of a Party or of a non-Party, on compliance with any requirement:

(a) to achieve a given level or percentage of domestic content;

[12] For greater certainty, a condition for the receipt or continued receipt of an advantage referred to in paragraph 2 does not constitute a "commitment or undertaking" for the purposes of paragraph 1.

(b) to purchase, use, or accord a preference to goods produced in its territory, or to purchase goods from persons in its territory;

(c) to relate in any way the volume or value of imports to the volume or value of exports or to the amount of foreign exchange inflows associated with such investment; or

(d) to restrict sales of goods or services in its territory that such investment produces or supplies by relating such sales in any way to the volume or value of its exports or foreign exchange earnings.

3. (a) Nothing in paragraph 2 shall be construed to prevent a Party from conditioning the receipt or continued receipt of an advantage, in connection with an investment in its territory of an investor of a Party or of a non-Party, on compliance with a requirement to locate production, supply a service, train or employ workers, construct or expand particular facilities, or carry out research and development, in its territory.

(b) Paragraph 1(f) does not apply:

(i) when a Party authorizes use of an intellectual property right in accordance with Article 31 of the TRIPS Agreement, or to measures requiring the disclosure of proprietary information that fall within the scope of, and are consistent with, Article 39 of the TRIPS Agreement; or

(ii) when the requirement is imposed or the commitment or undertaking is enforced by a court, administrative tribunal, or competition authority to remedy a practice determined after judicial or administrative process to be anticompetitive under the Party's competition laws.[13]

(c) Provided that such measures are not applied in an arbitrary or unjustifiable manner, and provided that such measures do not constitute a disguised restriction on international trade or investment, paragraphs 1(b), (c), and (f), and 2(a) and (b), shall not be construed to prevent a Party from adopting or maintaining measures, including environmental measures:

(i) necessary to secure compliance with laws and regulations that are not inconsistent with this Treaty;

[13] The Parties recognize that a patent does not necessarily confer market power.

(ii) necessary to protect human, animal, or plant life or health; or

(iii) related to the conservation of living or non-living exhaustible natural resources.

(d) Paragraphs 1(a), (b), and (c), and 2(a) and (b), do not apply to qualification requirements for goods or services with respect to export promotion and foreign aid programs.

(e) Paragraphs 1(b), (c), (f), and (g), and 2(a) and (b), do not apply to government procurement.

(f) Paragraphs 2(a) and (b) do not apply to requirements imposed by an importing Party relating to the content of goods necessary to qualify for preferential tariffs or preferential quotas.

4. For greater certainty, paragraphs 1 and 2 do not apply to any commitment, undertaking, or requirement other than those set out in those paragraphs.

5. This Article does not preclude enforcement of any commitment, undertaking, or requirement between private parties, where a Party did not impose or require the commitment, undertaking, or requirement.

Article 9: Senior Management and Boards of Directors

1. Neither Party may require that an enterprise of that Party that is a covered investment appoint to senior management positions natural persons of any particular nationality.

2. A Party may require that a majority of the board of directors, or any committee thereof, of an enterprise of that Party that is a covered investment, be of a particular nationality, or resident in the territory of the Party, provided that the requirement does not materially impair the ability of the investor to exercise control over its investment.

Article 10: Publication of Laws and Decisions Respecting Investment

1. Each Party shall ensure that its:

(a) laws, regulations, procedures, and administrative rulings of general application; and

(b) adjudicatory decisions

respecting any matter covered by this Treaty are promptly published or otherwise made publicly available.

2. For purposes of this Article, "administrative ruling of general application" means an administrative ruling or interpretation that applies to all persons and fact situations that fall generally within its ambit and that establishes a norm of conduct but does not include:

(a) a determination or ruling made in an administrative or quasi-judicial proceeding that applies to a particular covered investment or investor of the other Party in a specific case; or

(b) a ruling that adjudicates with respect to a particular act or practice.

Article 11: Transparency

1. Contact Points

(a) Each Party shall designate a contact point or points to facilitate communications between the Parties on any matter covered by this Treaty.

(b) On the request of the other Party, the contact point(s) shall identify the office or official responsible for the matter and assist, as necessary, in facilitating communication with the requesting Party.

2. Publication

To the extent possible, each Party shall:

(a) publish in advance any measure referred to in Article 10(1)(a) that it proposes to adopt; and

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed measures.

3. Provision of Information

(a) On request of the other Party, a Party shall promptly provide information and respond to questions pertaining to any actual or proposed measure that the

requesting Party considers might materially affect the operation of this Treaty or otherwise substantially affect its interests under this Treaty.

(b) Any request or information under this paragraph shall be provided to the other Party through the relevant contact points.

(c) Any information provided under this paragraph shall be without prejudice as to whether the measure is consistent with this Treaty.

4. Administrative Proceedings

With a view to administering in a consistent, impartial, and reasonable manner all measures referred to in Article 10(1)(a), each Party shall ensure that in its administrative proceedings applying such measures to particular covered investments or investors of the other Party in specific cases:

(a) wherever possible, covered investments or investors of the other Party that are directly affected by a proceeding are provided reasonable notice, in accordance with domestic procedures, when a proceeding is initiated, including a description of the nature of the proceeding, a statement of the legal authority under which the proceeding is initiated, and a general description of any issues in controversy;

(b) such persons are afforded a reasonable opportunity to present facts and arguments in support of their positions prior to any final administrative action, when time, the nature of the proceeding, and the public interest permit; and

(c) its procedures are in accordance with domestic law.

5. Review and Appeal

(a) Each Party shall establish or maintain judicial, quasi-judicial, or administrative tribunals or procedures for the purpose of the prompt review and, where warranted, correction of final administrative actions regarding matters covered by this Treaty. Such tribunals shall be impartial and independent of the office or authority entrusted with administrative enforcement and shall not have any substantial interest in the outcome of the matter.

(b) Each Party shall ensure that, in any such tribunals or procedures, the parties to the proceeding are provided with the right to:

(i) a reasonable opportunity to support or defend their respective positions; and

(ii) a decision based on the evidence and submissions of record or, where required by domestic law, the record compiled by the administrative authority.

(c) Each Party shall ensure, subject to appeal or further review as provided in its domestic law, that such decisions shall be implemented by, and shall govern the practice of, the offices or authorities with respect to the administrative action at issue.

Article 12: Investment and Environment

1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic environmental laws.[14] Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces the protections afforded in those laws as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

2. Nothing in this Treaty shall be construed to prevent a Party from adopting, maintaining, or enforcing any measure otherwise consistent with this Treaty that it considers appropriate to ensure that investment activity in its territory is undertaken in a manner sensitive to environmental concerns.

Article 13: Investment and Labor

1. The Parties recognize that it is inappropriate to encourage investment by weakening or reducing the protections afforded in domestic labor laws. Accordingly, each Party shall strive to ensure that it does not waive or otherwise derogate from, or offer to waive or otherwise derogate from, such laws in a manner that weakens or reduces adherence to the internationally recognized labor rights referred to in paragraph 2 as an encouragement for the establishment, acquisition, expansion, or retention of an investment in its territory. If a Party considers that the other Party has offered such an encouragement, it may request consultations with the other Party and the two Parties shall consult with a view to avoiding any such encouragement.

[14] For the United States, "laws" for purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

2. For purposes of this Article, "labor laws" means each Party's statutes or regulations,[15] or provisions thereof, that are directly related to the following internationally recognized labor rights:

(a) the right of association;

(b) the right to organize and bargain collectively;

(c) a prohibition on the use of any form of forced or compulsory labor;

(d) labor protections for children and young people, including a minimum age for the employment of children and the prohibition and elimination of the worst forms of child labor; and

(e) acceptable conditions of work with respect to minimum wages, hours of work, and occupational safety and health.

Article 14: Non-Conforming Measures

1. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to:

(a) any existing non-conforming measure that is maintained by a Party at:

(i) the central level of government, as set out by that Party in its Schedule to Annex I or Annex III,

(ii) a regional level of government, as set out by that Party in its Schedule to Annex I or Annex III, or

(iii) a local level of government;

(b) the continuation or prompt renewal of any non-conforming measure referred to in subparagraph (a); or

[15] For the United States, "statutes or regulations" for purposes of this Article means an act of the United States Congress or regulations promulgated pursuant to an act of the United States Congress that is enforceable by action of the central level of government.

(c) an amendment to any non-conforming measure referred to in subparagraph (a) to the extent that the amendment does not decrease the conformity of the measure, as it existed immediately before the amendment, with Article 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], or 9 [Senior Management and Boards of Directors].

2. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], 8 [Performance Requirements], and 9 [Senior Management and Boards of Directors] do not apply to any measure that a Party adopts or maintains with respect to sectors, subsectors, or activities, as set out in its Schedule to Annex II.

3. Neither Party may, under any measure adopted after the date of entry into force of this Treaty and covered by its Schedule to Annex II, require an investor of the other Party, by reason of its nationality, to sell or otherwise dispose of an investment existing at the time the measure becomes effective.

4. Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment] do not apply to any measure covered by an exception to, or derogation from, the obligations under Article 3 or 4 of the TRIPS Agreement, as specifically provided in those Articles and in Article 5 of the TRIPS Agreement.

5. Articles 3 [National Treatment], 4 [Most-Favored-Nation Treatment], and 9 [Senior Management and Boards of Directors] do not apply to:

(a) government procurement; or

(b) subsidies or grants provided by a Party, including government-supported loans, guarantees, and insurance.

Article 15: Special Formalities and Information Requirements

1. Nothing in Article 3 [National Treatment] shall be construed to prevent a Party from adopting or maintaining a measure that prescribes special formalities in connection with covered investments, such as a requirement that investors be residents of the Party or that covered investments be legally constituted under the laws or regulations of the Party, provided that such formalities do not materially impair the protections afforded by a Party to investors of the other Party and covered investments pursuant to this Treaty.

2. Notwithstanding Articles 3 [National Treatment] and 4 [Most-Favored-Nation Treatment], a Party may require an investor of the other Party or its covered investment to provide information concerning that investment solely for informational or statistical purposes. The Party shall

protect any confidential business information from any disclosure that would prejudice the competitive position of the investor or the covered investment. Nothing in this paragraph shall be construed to prevent a Party from otherwise obtaining or disclosing information in connection with the equitable and good faith application of its law.

Article 16: Non-Derogation

This Treaty shall not derogate from any of the following that entitle an investor of a Party or a covered investment to treatment more favorable than that accorded by this Treaty:

1. laws or regulations, administrative practices or procedures, or administrative or adjudicatory decisions of a Party;

2. international legal obligations of a Party; or

3. obligations assumed by a Party, including those contained in an investment authorization or an investment agreement.

Article 17: Denial of Benefits

1. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if persons of a non-Party own or control the enterprise and the denying Party:

   (a) does not maintain diplomatic relations with the non-Party; or

   (b) adopts or maintains measures with respect to the non-Party or a person of the non-Party that prohibit transactions with the enterprise or that would be violated or circumvented if the benefits of this Treaty were accorded to the enterprise or to its investments.

2. A Party may deny the benefits of this Treaty to an investor of the other Party that is an enterprise of such other Party and to investments of that investor if the enterprise has no substantial business activities in the territory of the other Party and persons of a non-Party, or of the denying Party, own or control the enterprise.

Article 18: Essential Security

Nothing in this Treaty shall be construed:

1. to require a Party to furnish or allow access to any information the disclosure of which it determines to be contrary to its essential security interests; or

2. to preclude a Party from applying measures that it considers necessary for the fulfillment of its obligations with respect to the maintenance or restoration of international peace or security, or the protection of its own essential security interests.

Article 19: Disclosure of Information

Nothing in this Treaty shall be construed to require a Party to furnish or allow access to confidential information the disclosure of which would impede law enforcement or otherwise be contrary to the public interest, or which would prejudice the legitimate commercial interests of particular enterprises, public or private.

Article 20: Financial Services

1. Notwithstanding any other provision of this Treaty, a Party shall not be prevented from adopting or maintaining measures relating to financial services for prudential reasons, including for the protection of investors, depositors, policy holders, or persons to whom a fiduciary duty is owed by a financial services supplier, or to ensure the integrity and stability of the financial system.[16] Where such measures do not conform with the provisions of this Treaty, they shall not be used as a means of avoiding the Party's commitments or obligations under this Treaty.

2. (a) Nothing in this Treaty applies to non-discriminatory measures of general application taken by any public entity in pursuit of monetary and related credit policies or exchange rate policies. This paragraph shall not affect a Party's obligations under Article 7 [Transfers] or Article 8 [Performance Requirements].[17]

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[16] It is understood that the term "prudential reasons" includes the maintenance of the safety, soundness, integrity, or financial responsibility of individual financial institutions.

[17] For greater certainty, measures of general application taken in pursuit of monetary and related credit policies or exchange rate policies do not include measures that expressly nullify or amend contractual provisions that specify the currency of denomination or the rate of exchange of currencies.

(b) For purposes of this paragraph, "public entity" means a central bank or monetary authority of a Party.

3. Where a claimant submits a claim to arbitration under Section B [Investor-State Dispute Settlement], and the respondent invokes paragraph 1 or 2 as a defense, the following provisions shall apply:

(a) The respondent shall, within 120 days of the date the claim is submitted to arbitration under Section B, submit in writing to the competent financial authorities[18] of both Parties a request for a joint determination on the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. The respondent shall promptly provide the tribunal, if constituted, a copy of such request. The arbitration may proceed with respect to the claim only as provided in subparagraph (d).

(b) The competent financial authorities of both Parties shall make themselves available for consultations with each other and shall attempt in good faith to make a determination as described in subparagraph (a). Any such determination shall be transmitted promptly to the disputing parties and, if constituted, to the tribunal. The determination shall be binding on the tribunal.

(c) If the competent financial authorities of both Parties, within 120 days of the date by which they have both received the respondent's written request for a joint determination under subparagraph (a), have not made a determination as described in that subparagraph, the tribunal shall decide the issue left unresolved by the competent financial authorities. The provisions of Section B shall apply, except as modified by this subparagraph.

(i) In the appointment of all arbitrators not yet appointed to the tribunal, each disputing party shall take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to financial services shall be taken into account in the appointment of the presiding arbitrator.

(ii) If, before the respondent submits the request for a joint determination in conformance with subparagraph (a), the presiding arbitrator has been appointed pursuant to Article 27(3), such arbitrator shall be replaced on

[18] For purposes of this Article, "competent financial authorities" means, for the United States, the Department of the Treasury for banking and other financial services, and the Office of the United States Trade Representative, in coordination with the Department of Commerce and other agencies, for insurance; and for Pakistan, [___]. *[language to be provided]*

the request of either disputing party and the tribunal shall be reconstituted consistent with subparagraph (c)(i). If, within 30 days of the date the arbitration proceedings are resumed under subparagraph (d), the disputing parties have not agreed on the appointment of a new presiding arbitrator, the Secretary-General, on the request of a disputing party, shall appoint the presiding arbitrator consistent with subparagraph (c)(i).

(iii) The non-disputing Party may make oral and written submissions to the tribunal regarding the issue of whether and to what extent paragraph 1 or 2 is a valid defense to the claim. Unless it makes such a submission, the non-disputing Party shall be presumed, for purposes of the arbitration, to take a position on paragraph 1 or 2 not inconsistent with that of the respondent.

(d) The arbitration referred to in subparagraph (a) may proceed with respect to the claim:

(i) 10 days after the date the competent financial authorities' joint determination has been received by both the disputing parties and, if constituted, the tribunal; or

(ii) 10 days after the expiration of the 120-day period provided to the competent financial authorities in subparagraph (c).

4. Where a dispute arises under Section C and the competent financial authorities of one Party provide written notice to the competent financial authorities of the other Party that the dispute involves financial services, Section C shall apply except as modified by this paragraph and paragraph 5.

(a) The competent financial authorities of both Parties shall make themselves available for consultations with each other regarding the dispute, and shall have 180 days from the date such notice is received to transmit a report on their consultations to the Parties. A Party may submit the dispute to arbitration under Section C only after the expiration of that 180-day period.

(b) Either Party may make any such report available to a tribunal constituted under Section C to decide the dispute referred to in this paragraph or a similar dispute, or to a tribunal constituted under Section B to decide a claim arising out of the same events or circumstances that gave rise to the dispute under Section C.

5. Where a Party submits a dispute involving financial services to arbitration under Section C in conformance with paragraph 4, and on the request of either Party within 30 days of the date the

dispute is submitted to arbitration, each Party shall, in the appointment of all arbitrators not yet appointed, take appropriate steps to ensure that the tribunal has expertise or experience in financial services law or practice. The expertise of particular candidates with respect to financial services shall be taken into account in the appointment of the presiding arbitrator.

6. Notwithstanding Article 11(2), paragraph 2 [Transparency – Publication], each Party shall, to the extent practicable,

(a) publish in advance any regulations of general application relating to financial services that it proposes to adopt;

(b) provide interested persons and the other Party a reasonable opportunity to comment on such proposed regulations.

7. The terms "financial service" or "financial services" shall have the same meaning as in subparagraph 5(a) of the Annex on Financial Services of the GATS.

Article 21: Taxation

1. Except as provided in this Article, nothing in Section A shall impose obligations with respect to taxation measures.

2. Subject to paragraph 5, Articles 3 and 4 shall apply to all taxation measures, other than those on income, capital gains, or on the taxable capital of corporations, taxes on estates, inheritances, gifts, and generation-skipping transfers, except that nothing in those Articles shall apply:

(a) any most-favored-nation obligation with respect to an advantage accorded by a Party pursuant to a tax convention;

(b) to a non-conforming provision of any existing taxation measure;

(c) to the continuation or prompt renewal of a non-conforming provision of any existing taxation measure;

(d) to an amendment to a non-conforming provision of any existing taxation measure to the extent that the amendment does not decrease its conformity, at the time of the amendment, with those Articles;

(e) to the adoption or enforcement of any taxation measure aimed at ensuring the equitable or effective imposition or collection of taxes (as permitted by GATS Article XIV(d)); or

(e) to a provision that conditions the receipt, or continued receipt, of an advantage relating to the contributions to, or income of, a pension trust, fund, or other arrangement to provide pension or similar benefits, on a requirement that the Party maintain continuous jurisdiction over such trust, fund, or other arrangement.

3. Article 6 [Expropriation] shall apply to all taxation measures, except that a claimant that asserts that a taxation measure involves an expropriation may submit a claim to arbitration under Section B only if:

(a) the claimant has first referred to the competent tax authorities[19] of both Parties in writing the issue of whether that taxation measure involves an expropriation; and

(b) within 180 days after the date of such referral, the competent tax authorities of both Parties fail to agree that the taxation measure is not an expropriation.

4. Subject to paragraph 5, Article 8 [Performance Requirements] (2) through (4) shall apply to all taxation measures.

5. Nothing in this Treaty shall affect the rights and obligations of either Party under any tax convention. In the event of any inconsistency between this Treaty and any such convention, that convention shall prevail to the extent of the inconsistency. In the case of a tax convention between the Parties, the competent authorities under that convention shall have sole responsibility for determining whether any inconsistency exists between this Treaty and that convention.

Article 22: Entry into Force, Duration, and Termination

1. This Treaty shall enter into force thirty days after the date the Parties exchange instruments of ratification. It shall remain in force for a period of ten years and shall continue in force thereafter unless terminated in accordance with paragraph 2.

2. A Party may terminate this Treaty at the end of the initial ten-year period or at any time thereafter by giving one year's written notice to the other Party.

[19] For the purposes of this Article, the "competent tax authorities" means:

(a) for the United States, the Assistant Secretary of the Treasury (Tax Policy), Department of the Treasury; and

(b) for Pakistan, [___]. *[language to be provided]*

3. For ten years from the date of termination, all other Articles shall continue to apply to covered investments established or acquired prior to the date of termination, except insofar as those Articles extend to the establishment or acquisition of covered investments.

SECTION B

Article 23: Consultation and Negotiation

In the event of an investment dispute, the claimant and the respondent should initially seek to resolve the dispute through consultation and negotiation, which may include the use of non-binding, third-party procedures.

Article 24: Submission of a Claim to Arbitration

1. In the event that a disputing party considers that an investment dispute cannot be settled by consultation and negotiation:

(a) the claimant, on its own behalf, may submit to arbitration under this Section a claim

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) **an investment agreement;**

and

(ii) that the claimant has incurred loss or damage by reason of, or arising out of, that breach; and

(b) **the claimant, on behalf of an enterprise of the respondent that is a juridical person that the claimant owns or controls directly or indirectly, may submit to arbitration under this Section a claim**

(i) that the respondent has breached

(A) an obligation under Articles 3 through 10,

(B) an investment authorization, or

(C) **an investment agreement;**

and

(ii) that the enterprise has incurred loss or damage by reason of, or arising out of, that breach,

provided that a claimant may submit pursuant to subparagraph (a)(i)(C) or (b)(i)(C) a claim for breach of an investment agreement only if the subject matter of the claim and the claimed damages directly relate to the covered investment that was established or acquired, or sought to be established or acquired, in reliance on the relevant investment agreement.

2. At least 90 days before submitting any claim to arbitration under this Section, a claimant shall deliver to the respondent a written notice of its intention to submit the claim to arbitration ("notice of intent"). The notice shall specify:

(a) the name and address of the claimant and, where a claim is submitted on behalf of an enterprise, the name, address, and place of incorporation of the enterprise;

(b) for each claim, the provision of this Treaty, investment authorization, or investment agreement alleged to have been breached and any other relevant provisions;

(c) the legal and factual basis for each claim; and

(d) the relief sought and the approximate amount of damages claimed.

3. Provided that six months have elapsed since the events giving rise to the claim, a claimant may submit a claim referred to in paragraph 1:

(a) under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings, provided that both the respondent and the non-disputing Party are parties to the ICSID Convention;

(b) under the ICSID Additional Facility Rules, provided that either the respondent or the non-disputing Party is a party to the ICSID Convention;

(c) under the UNCITRAL Arbitration Rules; or

(d) if the claimant and respondent agree, to any other arbitration institution or under any other arbitration rules.

provided, however, that if arbitration under the ICSID Convention is available and the claimant and respondent do not agree to have the claimant submit its claim to any other arbitration institution or under any other arbitration rules, a claimant may submit a claim to arbitration against Pakistan only under the ICSID Convention and the ICSID Rules of Procedure for Arbitration Proceedings.[20]

4. A claim shall be deemed submitted to arbitration under this Section when the claimant's notice of or request for arbitration ("notice of arbitration"):

(a) referred to in paragraph 1 of Article 36 of the ICSID Convention is received by the Secretary-General;

(b) referred to in Article 2 of Schedule C of the ICSID Additional Facility Rules is received by the Secretary-General;

(c) referred to in Article 3 of the UNCITRAL Arbitration Rules, together with the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules, are received by the respondent; or

(d) referred to under any arbitral institution or arbitral rules selected under paragraph 3(d) is received by the respondent.

A claim asserted by the claimant for the first time after such notice of arbitration is submitted shall be deemed submitted to arbitration under this Section on the date of its receipt under the applicable arbitral rules.

5. The arbitration rules applicable under paragraph 3, and in effect on the date the claim or claims were submitted to arbitration under this Section, shall govern the arbitration except to the extent modified by this Treaty.

6. The claimant shall provide with the notice of arbitration:

(a) the name of the arbitrator that the claimant appoints; or

(b) the claimant's written consent for the Secretary-General to appoint that arbitrator.

[20] ***Note*: The Parties have agreed to this provision on the condition that Pakistan effectively implements the ICSID Convention in its domestic law before signature of the Treaty.**

Article 25: Consent of Each Party to Arbitration

1. Each Party consents to the submission of a claim to arbitration under this Section in accordance with this Treaty.

2. The consent under paragraph 1 and the submission of a claim to arbitration under this Section shall satisfy the requirements of:

(a) Chapter II of the ICSID Convention (Jurisdiction of the Centre) and the ICSID Additional Facility Rules for written consent of the parties to the dispute; and

(b) Article II of the New York Convention for an "agreement in writing."

Article 26: Conditions and Limitations on Consent of Each Party

1. No claim may be submitted to arbitration under this Section if more than three years have elapsed from the date on which the claimant first acquired, or should have first acquired, knowledge of the breach alleged under Article 24(1) and knowledge that the claimant (for claims brought under Article 24(1)(a)) or the enterprise (for claims brought under Article 24(1)(b)) has incurred loss or damage.

2. No claim may be submitted to arbitration under this Section unless:

(a) the claimant consents in writing to arbitration in accordance with the procedures set out in this Treaty; and

(b) the notice of arbitration is accompanied,

(i) for claims submitted to arbitration under Article 24(1)(a), by the claimant's written waiver, and

(ii) for claims submitted to arbitration under Article 24(1)(b), by the claimant's and the enterprise's written waivers

of any right to initiate or continue before any administrative tribunal or court under the law of either Party, or other dispute settlement procedures, any proceeding with respect to any measure alleged to constitute a breach referred to in Article 24.

3. Notwithstanding paragraph 2(b), the claimant (for claims brought under Article 24(1)(a)) and the claimant or the enterprise (for claims brought under Article 24(1)(b)) may initiate or continue an action that seeks interim injunctive relief and does not involve the payment of monetary damages before a judicial or administrative tribunal of the respondent, provided that the action is brought for the sole purpose of preserving the claimant's or the enterprise's rights and interests during the pendency of the arbitration.

4. No claim may be submitted to arbitration:

(a) for breach of an investment authorization under Article 24.1(a)(i)(B) or Article 24.1(b)(i)(B), or

(b) for breach of an investment agreement under Article 24.1(a)(i)(C) or Article 24.1(b)(i)(C),

if the claimant (for claims brought under Article 24.1(a)) or the claimant or the enterprise (for claims brought under Article 24.1(b)) has previously submitted the same alleged breach to an administrative tribunal or court of the respondent, or to any other binding dispute settlement procedure, for adjudication or resolution.

Article 27: Selection of Arbitrators

1. Unless the disputing parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each of the disputing parties and the third, who shall be the presiding arbitrator, appointed by agreement of the disputing parties.

2. The Secretary-General shall serve as appointing authority for an arbitration under this Section.

3. Subject to Article 20(3), if a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of a disputing party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

4. For purposes of Article 39 of the ICSID Convention and Article 7 of Schedule C to the ICSID Additional Facility Rules, and without prejudice to an objection to an arbitrator on a ground other than nationality:

(a) the respondent agrees to the appointment of each individual member of a tribunal established under the ICSID Convention or the ICSID Additional Facility Rules;

(b) a claimant referred to in Article 24(1)(a) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant agrees in writing to the appointment of each individual member of the tribunal; and

(c) a claimant referred to in Article 24(1)(b) may submit a claim to arbitration under this Section, or continue a claim, under the ICSID Convention or the ICSID Additional Facility Rules, only on condition that the claimant and the enterprise agree in writing to the appointment of each individual member of the tribunal.

Article 28: Conduct of the Arbitration

1. The disputing parties may agree on the legal place of any arbitration under the arbitral rules applicable under Article 24(3). If the disputing parties fail to reach agreement, the tribunal shall determine the place in accordance with the applicable arbitral rules, provided that the place shall be in the territory of a State that is a party to the New York Convention.

2. The non-disputing Party may make oral and written submissions to the tribunal regarding the interpretation of this Treaty.

3. The tribunal shall have the authority to accept and consider *amicus curiae* submissions from a person or entity that is not a disputing party.

4. Without prejudice to a tribunal's authority to address other objections as a preliminary question, a tribunal shall address and decide as a preliminary question any objection by the respondent that, as a matter of law, a claim submitted is not a claim for which an award in favor of the claimant may be made under Article 34.

(a) Such objection shall be submitted to the tribunal as soon as possible after the tribunal is constituted, and in no event later than the date the tribunal fixes for the respondent to submit its counter-memorial (or, in the case of an amendment to the notice of arbitration, the date the tribunal fixes for the respondent to submit its response to the amendment).

(b) On receipt of an objection under this paragraph, the tribunal shall suspend any proceedings on the merits, establish a schedule for considering the objection consistent with any schedule it has established for considering any other preliminary question, and issue a decision or award on the objection, stating the grounds therefor.

(c) In deciding an objection under this paragraph, the tribunal shall assume to be true claimant's factual allegations in support of any claim in the notice of arbitration (or any amendment thereof) and, in disputes brought under the UNCITRAL Arbitration Rules, the statement of claim referred to in Article 18 of the UNCITRAL Arbitration Rules. The tribunal may also consider any relevant facts not in dispute.

(d) The respondent does not waive any objection as to competence or any argument on the merits merely because the respondent did or did not raise an objection under this paragraph or make use of the expedited procedure set out in paragraph 5.

5. In the event that the respondent so requests within 45 days after the tribunal is constituted, the tribunal shall decide on an expedited basis an objection under paragraph 4 and any objection that the dispute is not within the tribunal's competence. The tribunal shall suspend any proceedings on the merits and issue a decision or award on the objection(s), stating the grounds therefor, no later than 150 days after the date of the request. However, if a disputing party requests a hearing, the tribunal may take an additional 30 days to issue the decision or award. Regardless of whether a hearing is requested, a tribunal may, on a showing of extraordinary cause, delay issuing its decision or award by an additional brief period, which may not exceed 30 days.

6. When it decides a respondent's objection under paragraph 4 or 5, the tribunal may, if warranted, award to the prevailing disputing party reasonable costs and attorney's fees incurred in submitting or opposing the objection. In determining whether such an award is warranted, the tribunal shall consider whether either the claimant's claim or the respondent's objection was frivolous, and shall provide the disputing parties a reasonable opportunity to comment.

7. A respondent may not assert as a defense, counterclaim, right of set-off, or for any other reason that the claimant has received or will receive indemnification or other compensation for all or part of the alleged damages pursuant to an insurance or guarantee contract.

8. A tribunal may order an interim measure of protection to preserve the rights of a disputing party, or to ensure that the tribunal's jurisdiction is made fully effective, including an order to preserve evidence in the possession or control of a disputing party or to protect the tribunal's jurisdiction. A tribunal may not order attachment or enjoin the application of a measure alleged to constitute a breach referred to in Article 24. For purposes of this paragraph, an order includes a recommendation.

9. (a) In any arbitration conducted under this Section, at the request of a disputing party, a tribunal shall, before issuing a decision or award on liability, transmit its proposed decision or award to the disputing parties and to the non-disputing Party. Within 60 days after the tribunal transmits its proposed decision or award,

the disputing parties may submit written comments to the tribunal concerning any aspect of its proposed decision or award. The tribunal shall consider any such comments and issue its decision or award not later than 45 days after the expiration of the 60-day comment period.

(b) Subparagraph (a) shall not apply in any arbitration conducted pursuant to this Section for which an appeal has been made available pursuant to paragraph 10 or Annex D.

10. If a separate, multilateral agreement enters into force between the Parties that establishes an appellate body for purposes of reviewing awards rendered by tribunals constituted pursuant to international trade or investment arrangements to hear investment disputes, the Parties shall strive to reach an agreement that would have such appellate body review awards rendered under Article 34 in arbitrations commenced after the multilateral agreement enters into force between the Parties.

Article 29: Transparency of Arbitral Proceedings

1. Subject to paragraphs 2 and 4, the respondent shall, after receiving the following documents, promptly transmit them to the non-disputing Party and make them available to the public:

(a) the notice of intent;

(b) the notice of arbitration;

(c) pleadings, memorials, and briefs submitted to the tribunal by a disputing party and any written submissions submitted pursuant to Article 28(2) [Non-Disputing Party submissions] and (3) [*Amicus* Submissions] and Article 33 [Consolidation];

(d) minutes or transcripts of hearings of the tribunal, where available; and

(e) orders, awards, and decisions of the tribunal.

2. The tribunal shall conduct hearings open to the public and shall determine, in consultation with the disputing parties, the appropriate logistical arrangements. However, any disputing party that intends to use information designated as protected information in a hearing shall so advise the tribunal. The tribunal shall make appropriate arrangements to protect the information from disclosure.

3. Nothing in this Section requires a respondent to disclose protected information or to furnish or allow access to information that it may withhold in accordance with Article 18 [Essential Security Article] or Article 19 [Disclosure of Information Article].

4. Any protected information that is submitted to the tribunal shall be protected from disclosure in accordance with the following procedures:

(a) Subject to subparagraph (d), neither the disputing parties nor the tribunal shall disclose to the non-disputing Party or to the public any protected information where the disputing party that provided the information clearly designates it in accordance with subparagraph (b);

(b) Any disputing party claiming that certain information constitutes protected information shall clearly designate the information at the time it is submitted to the tribunal;

(c) A disputing party shall, at the time it submits a document containing information claimed to be protected information, submit a redacted version of the document that does not contain the information. Only the redacted version shall be provided to the non-disputing Party and made public in accordance with paragraph 1; and

(d) The tribunal shall decide any objection regarding the designation of information claimed to be protected information. If the tribunal determines that such information was not properly designated, the disputing party that submitted the information may (i) withdraw all or part of its submission containing such information, or (ii) agree to resubmit complete and redacted documents with corrected designations in accordance with the tribunal's determination and subparagraph (c). In either case, the other disputing party shall, whenever necessary, resubmit complete and redacted documents which either remove the information withdrawn under (i) by the disputing party that first submitted the information or redesignate the information consistent with the designation under (ii) of the disputing party that first submitted the information.

5. Nothing in this Section requires a respondent to withhold from the public information required to be disclosed by its laws.

Article 30: Governing Law

1. Subject to paragraph 3, when a claim is submitted under Article 24(1)(a)(i)(A) or Article 24(1)(b)(i)(A), the tribunal shall decide the issues in dispute in accordance with this Treaty and applicable rules of international law.

2. Subject to paragraph 3 and the other terms of this Section, when a claim is submitted under Article 24(1)(a)(i)(B) or (C), or Article 24(1)(b)(i)(B) or (C), the tribunal shall apply:

(a) the rules of law specified in the pertinent investment authorization or investment agreement, or as the disputing parties may otherwise agree; or

(b) if the rules of law have not been specified or otherwise agreed:

(i) the law of the respondent, including its rules on the conflict of laws;[21] and

(ii) such rules of international law as may be applicable.

3. A joint decision of the Parties, each acting through its representative designated for purposes of this Article, declaring their interpretation of a provision of this Treaty shall be binding on a tribunal, and any decision or award issued by a tribunal must be consistent with that joint decision.

Article 31: Interpretation of Annexes

1. Where a respondent asserts as a defense that the measure alleged to be a breach is within the scope of an entry set out in Annex I, II, or III, the tribunal shall, on request of the respondent, request the interpretation of the Parties on the issue. The Parties shall submit in writing any joint decision declaring their interpretation to the tribunal within 60 days of delivery of the request.

2. A joint decision issued under paragraph 1 by the Parties, each acting through its representative designated for purposes of this Article, shall be binding on the tribunal, and any decision or award issued by the tribunal must be consistent with that joint decision. If the Parties fail to issue such a decision within 60 days, the tribunal shall decide the issue.

Article 32: Expert Reports

Without prejudice to the appointment of other kinds of experts where authorized by the applicable arbitration rules, a tribunal, at the request of a disputing party or, unless the disputing parties disapprove, on its own initiative, may appoint one or more experts to report to it in writing on any factual issue concerning environmental, health, safety, or other scientific matters

[21] The "law of the respondent" means the law that a domestic court or tribunal of proper jurisdiction would apply in the same case.

raised by a disputing party in a proceeding, subject to such terms and conditions as the disputing parties may agree.

Article 33: Consolidation

1. Where two or more claims have been submitted separately to arbitration under Article 24(1) and the claims have a question of law or fact in common and arise out of the same events or circumstances, any disputing party may seek a consolidation order in accordance with the agreement of all the disputing parties sought to be covered by the order or the terms of paragraphs 2 through 10.

2. A disputing party that seeks a consolidation order under this Article shall deliver, in writing, a request to the Secretary-General and to all the disputing parties sought to be covered by the order and shall specify in the request:

(a) the names and addresses of all the disputing parties sought to be covered by the order;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

3. Unless the Secretary-General finds within 30 days after receiving a request under paragraph 2 that the request is manifestly unfounded, a tribunal shall be established under this Article.

4. Unless all the disputing parties sought to be covered by the order otherwise agree, a tribunal established under this Article shall comprise three arbitrators:

(a) one arbitrator appointed by agreement of the claimants;

(b) one arbitrator appointed by the respondent; and

(c) the presiding arbitrator appointed by the Secretary-General, provided, however, that the presiding arbitrator shall not be a national of either Party.

5. If, within 60 days after the Secretary-General receives a request made under paragraph 2, the respondent fails or the claimants fail to appoint an arbitrator in accordance with paragraph 4, the Secretary-General, on the request of any disputing party sought to be covered by the order, shall appoint the arbitrator or arbitrators not yet appointed. If the respondent fails to appoint an arbitrator, the Secretary-General shall appoint a national of the disputing Party, and if the

claimants fail to appoint an arbitrator, the Secretary-General shall appoint a national of the non-disputing Party.

6. Where a tribunal established under this Article is satisfied that two or more claims that have been submitted to arbitration under Article 24(1) have a question of law or fact in common, and arise out of the same events or circumstances, the tribunal may, in the interest of fair and efficient resolution of the claims, and after hearing the disputing parties, by order:

(a) assume jurisdiction over, and hear and determine together, all or part of the claims;

(b) assume jurisdiction over, and hear and determine one or more of the claims, the determination of which it believes would assist in the resolution of the others; or

(c) instruct a tribunal previously established under Article 27 [Selection of Arbitrators] to assume jurisdiction over, and hear and determine together, all or part of the claims, provided that

(i) that tribunal, at the request of any claimant not previously a disputing party before that tribunal, shall be reconstituted with its original members, except that the arbitrator for the claimants shall be appointed pursuant to paragraphs 4(a) and 5; and

(ii) that tribunal shall decide whether any prior hearing shall be repeated.

7. Where a tribunal has been established under this Article, a claimant that has submitted a claim to arbitration under Article 24(1) and that has not been named in a request made under paragraph 2 may make a written request to the tribunal that it be included in any order made under paragraph 6, and shall specify in the request:

(a) the name and address of the claimant;

(b) the nature of the order sought; and

(c) the grounds on which the order is sought.

The claimant shall deliver a copy of its request to the Secretary-General.

8. A tribunal established under this Article shall conduct its proceedings in accordance with the UNCITRAL Arbitration Rules, except as modified by this Section.

9. A tribunal established under Article 27 [Selection of Arbitrators] shall not have jurisdiction to decide a claim, or a part of a claim, over which a tribunal established or instructed under this Article has assumed jurisdiction.

10. On application of a disputing party, a tribunal established under this Article, pending its decision under paragraph 6, may order that the proceedings of a tribunal established under Article 27 [Selection of Arbitrators] be stayed, unless the latter tribunal has already adjourned its proceedings.

Article 34: Awards

1. Where a tribunal makes a final award against a respondent, the tribunal may award, separately or in combination, only:

(a) monetary damages and any applicable interest; and

(b) restitution of property, in which case the award shall provide that the respondent may pay monetary damages and any applicable interest in lieu of restitution.

A tribunal may also award costs and attorney's fees in accordance with this Treaty and the applicable arbitration rules.

2. Subject to paragraph 1, where a claim is submitted to arbitration under Article 24(1)(b):

(a) an award of restitution of property shall provide that restitution be made to the enterprise;

(b) an award of monetary damages and any applicable interest shall provide that the sum be paid to the enterprise; and

(c) the award shall provide that it is made without prejudice to any right that any person may have in the relief under applicable domestic law.

3. A tribunal may not award punitive damages.

4. An award made by a tribunal shall have no binding force except between the disputing parties and in respect of the particular case.

5. Subject to paragraph 6 and the applicable review procedure for an interim award, a disputing party shall abide by and comply with an award without delay.

6. A disputing party may not seek enforcement of a final award until:

(a) in the case of a final award made under the ICSID Convention,

(i) 120 days have elapsed from the date the award was rendered and no disputing party has requested revision or annulment of the award; or

(ii) revision or annulment proceedings have been completed; and

(b) in the case of a final award under the ICSID Additional Facility Rules, the UNCITRAL Arbitration Rules, or the rules selected pursuant to Article 24(3)(d),

(i) 90 days have elapsed from the date the award was rendered and no disputing party has commenced a proceeding to revise, set aside, or annul the award; or

(ii) a court has dismissed or allowed an application to revise, set aside, or annul the award and there is no further appeal.

7. Each Party shall provide for the enforcement of an award in its territory.

8. If the respondent fails to abide by or comply with a final award, on delivery of a request by the non-disputing Party, a tribunal shall be established under Article 37 [State-State Dispute Settlement]. Without prejudice to other remedies available under applicable rules of international law, the requesting Party may seek in such proceedings:

(a) a determination that the failure to abide by or comply with the final award is inconsistent with the obligations of this Treaty; and

(b) a recommendation that the respondent abide by or comply with the final award.

9. A disputing party may seek enforcement of an arbitration award under the ICSID Convention or the New York Convention regardless of whether proceedings have been taken under paragraph 8.

10. A claim that is submitted to arbitration under this Section shall be considered to arise out of a commercial relationship or transaction for purposes of Article I of the New York Convention.

Article 35: Annexes and Footnotes

The Annexes and footnotes shall form an integral part of this Treaty.

Article 36: Service of Documents

Delivery of notice and other documents on a Party shall be made to the place named for that Party in Annex C.

SECTION C

Article 37: State-State Dispute Settlement

1. Subject to paragraph 5, any dispute between the Parties concerning the interpretation or application of this Treaty, that is not resolved through consultations or other diplomatic channels, shall be submitted on the request of either Party to arbitration for a binding decision or award by a tribunal in accordance with applicable rules of international law. In the absence of an agreement by the Parties to the contrary, the UNCITRAL Arbitration Rules shall govern, except as modified by the Parties or this Treaty.

2. Unless the Parties otherwise agree, the tribunal shall comprise three arbitrators, one arbitrator appointed by each Party and the third, who shall be the presiding arbitrator, appointed by agreement of the Parties. If a tribunal has not been constituted within 75 days from the date that a claim is submitted to arbitration under this Section, the Secretary-General, on the request of either Party, shall appoint, in his or her discretion, the arbitrator or arbitrators not yet appointed.

3. Expenses incurred by the arbitrators, and other costs of the proceedings, shall be paid for equally by the Parties. However, the tribunal may, in its discretion, direct that a higher proportion of the costs be paid by one of the Parties.

4. Articles 28(3) [*Amicus Curiae* Submissions], 29 [Investor-State Transparency], 30(1) and (3) [Governing Law], and 31 [Interpretation of Annexes] shall apply *mutatis mutandis* to arbitrations under this Article.

5. Paragraphs 1 through 4 shall not apply to a matter arising under Article 12 or Article 13.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Treaty.

DONE in duplicate at [city] this [number] day of [month, year], in the English and [ ] languages, each text being equally authentic.

FOR THE GOVERNMENT OF
THE UNITED STATES OF AMERICA:

FOR THE GOVERNMENT OF THE
ISLAMIC REPUBLIC OF PAKISTAN:

Annex A

Customary International Law

The Parties confirm their shared understanding that "customary international law" generally and as specifically referenced in Article 5 [Minimum Standard of Treatment] and Annex B [Expropriation] results from a general and consistent practice of States that they follow from a sense of legal obligation. With regard to Article 5 [Minimum Standard of Treatment], the customary international law minimum standard of treatment of aliens refers to all customary international law principles that protect the economic rights and interests of aliens.

Annex B

Expropriation

The Parties confirm their shared understanding that:

1. Article 6 [Expropriation and Compensation](1) is intended to reflect customary international law concerning the obligation of States with respect to expropriation.

2. An action or a series of actions by a Party cannot constitute an expropriation unless it interferes with a tangible or intangible property right or property interest in an investment.

3. Article 6 [Expropriation and Compensation](1) addresses two situations. The first is direct expropriation, where an investment is nationalized or otherwise directly expropriated through formal transfer of title or outright seizure.

4. The second situation addressed by Article 6 [Expropriation and Compensation](1) is indirect expropriation, where an action or series of actions by a Party has an effect equivalent to direct expropriation without formal transfer of title or outright seizure.

(a) The determination of whether an action or series of actions by a Party, in a specific fact situation, constitutes an indirect expropriation, requires a case-by-case, fact-based inquiry that considers, among other factors:

(i) the economic impact of the government action, although the fact that an action or series of actions by a Party has an adverse effect on the economic value of an investment, standing alone, does not establish that an indirect expropriation has occurred;

(ii) the extent to which the government action interferes with distinct, reasonable investment-backed expectations; and

(iii) the character of the government action.

(b) Except in rare circumstances, non-discriminatory regulatory actions by a Party that are designed and applied to protect legitimate public welfare objectives,[22]

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[22] *Note:* The Parties agree that the following footnote will be included in the negotiating history as a reflection of their shared understanding regarding paragraph 4(b). This footnote will be deleted in the final text of the Treaty.

For greater certainty, the Parties confirm that the list of "legitimate public welfare objectives" in paragraph 4(b) of Annex B on Expropriation is not exhaustive.

such as public health, safety, and the environment, do not constitute indirect expropriations.

Annex C

Service of Documents on a Party

United States

Notices and other documents shall be served on the United States by delivery to:

Executive Director (L/EX)
Office of the Legal Adviser
Department of State
Washington, D.C. 20520
United States of America

Pakistan

Notices and other documents shall be served on Pakistan by delivery to:

[insert place of delivery of notices and other documents for Pakistan]
[language to be provided]

Annex D

Possibility of a Bilateral Appellate Mechanism

Within three years after the date of entry into force of this Treaty, the Parties shall consider whether to establish a bilateral appellate body or similar mechanism to review awards rendered under Article 34 in arbitrations commenced after they establish the appellate body or similar mechanism.

[Annex E

Financial Services Claims under Section B

No claim that a measure relating to an investor of a Party, or a covered investment, in a financial institution located in the territory of the other Party breaches Article 3 [National Treatment] or Article 4 [Most-Favored-Nation Treatment] may be submitted to arbitration under Section B [Investor-State Dispute Settlement]. For purposes of this paragraph:

(a) The term "financial institution" means any financial intermediary or other enterprise that is authorized to do business and regulated or supervised as a financial institution under the law of the Party in whose territory it is located.

(b) Investment means "investment" as defined in Article 1 [Definitions], except that, with respect to "loans" and "debt instruments" referred to in that Article:

(i) a loan to or debt instrument issued by a financial institution is an investment in a financial institution only where it is treated as regulatory capital by the Party in whose territory the financial institution is located; and

(ii) a loan granted by or debt instrument owned by a financial institution, other than a loan to or debt instrument of a financial institution referred to in subparagraph (i), is not an investment in a financial institution.]*

**** Note – This annex was originally requested by the United States. However, due to a policy change in 2008 that applies to all future U.S. BITs, the United States no longer includes this annex in its BITs.***

Attn. Mr. Shahid Bashir

DATE : 11th July 1995

J.S. (Commerce)

Fax: 920570 (SWISS)

Agreement

between

the Islamic Republic of Pakistan

and

the Swiss Confederation

on the Promotion and Reciprocal Protection

of Investments

Swiss

Preamble

The Government of the Islamic Republic of Pakistan and the Swiss Federal Council,

Desiring to intensify economic cooperation to the mutual benefit of both States,

Intending to create and maintain favourable conditions for investments by investors of one Contracting Party in the territory of the other Contracting Party,

Recognizing the need to promote and protect foreign investments with the aim to foster the economic prosperity of both States,

Have agreed as follows:

Swiss

Article 1

Definitions

For the purpose of this Agreement:

(1) The term "investor" refers with regard to either Contracting Party to

(a) natural persons who, according to the law of that Contracting Party, are considered to be its nationals;

(b) legal entities, including companies, corporations, business associations and other organisations, which are constituted or otherwise duly organised under the law of that Contracting Party and have their seat, together with real economic activities, in the territory of that same Contracting Party;

(c) legal entities established under the law of any country which are, directly or indirectly, controlled by nationals of that Contracting Party or by legal entities having their seat, together with real economic activities, in the territory of that Contracting Party.

(2) The term "investments" shall include every kind of assets and particularly:

(a) movable and immovable property as well as any other rights in rem, such as servitudes, mortgages, liens, pledges;

(b) shares, parts or any other kinds of participation in companies;

(c) claims to money or to any performance having an economic value;

(d) copyrights, industrial property rights (such as patents, utility models, industrial designs or models, trade or service marks, trade names, indications of origin), know-how and goodwill;

(e) concessions under public law, including concessions to search for, extract or exploit natural resources as well as all other rights given by law, by contract or by decision of the authority in accordance with the law.

(3) The term "territory" includes the maritime areas adjacent to the coast of the State concerned, to the extent to which that State may exercise sovereign rights or jurisdiction in those areas according to international law.

Article 2

Scope of application

(1) The present Agreement shall apply to any investments in the territory of one Contracting Party by investors of the other Contracting Party, that have been made later than first September 1954 in accordance with the laws and regulations of the former Contracting Party.

(2) The present Agreement shall not affect the rights and obligations of the Contracting Parties with respect to investments that are not within the scope of the Agreement.

Article 3

Promotion, admission

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

(2) When a Contracting Party shall have admitted an investment on its territory, it shall grant the necessary permits in connection with such an investment and with the carrying out of licensing agreements and contracts for technical, commercial or administrative assistance. Each Contracting Party shall, whenever needed, endeavour to issue the necessary authorizations concerning the activities of consultants and other qualified persons of foreign nationality.

Swiss

Article 4

Protection, Treatment

(1) Each Contracting Party shall protect within its territory investments made in accordance with its laws and regulations by investors of the other Contracting Party and shall not impair by unreasonable or discriminatory measures the management, maintenance, use, enjoyment, extension, sale and, should it so happen, liquidation of such investments. In particular, each Contracting Party shall issue the necessary authorizations mentioned in Article 3, paragraph (2) of this Agreement.

(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.

(3) If a Contracting Party accords special advantages to investors of any third State by virtue of an agreement establishing a free trade area, a customs union or a common market or by virtue of an agreement on the avoidance of double taxation, it shall not be obliged to accord such advantages to investors of the other Contracting Party.

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:

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(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.

Article 6

Dispossession, compensation

(1) Neither of the Contracting Parties shall take, either directly or indirectly, measures of expropriation, nationalization or any other measures having the same nature or the same effect against investments of investors of the other Contracting Party, unless the measures are taken in the public interest, on a non discriminatory basis, and under due process of law, and provided that provisions be made for effective and adequate compensation. The amount of compensation, interest included, shall be settled in the currency of the country of origin of the investment and paid without delay to the person entitled thereto without regard to its residence or domicile.

(2) The investors of one Contracting Party whose investments have suffered losses due to a war or any other armed conflict, revolution, state of emergency or rebellion, which took place in the territory of the other Contracting Party shall benefit, on the part of this latter, from a treatment in accordance with Article 4, paragraph (2) of this Agreement as regards restitution, indemnification, compensation or other settlement.

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Article 7

More favourable provisions

Notwithstanding the terms set forth in the present Agreement, more favourable provisions which have been or may be agreed upon by either of the Contracting Parties with an investor of the other Contracting Party are applicable.

Article 8

Principle of subrogation

Where one Contracting Party has granted any financial guarantee against non-commercial risks in regard to an investment by one of its investors in the territory of the other Contracting Party, the latter shall recognize the rights of the first Contracting Party by virtue of the principle of subrogation to the rights of the investor when payment has been made under this guarantee by the first Contracting Party.

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 Article 10 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.

Article 10

Disputes between Contracting Parties

(1) Disputes between Contracting Parties regarding the interpretation or application of the provisions of this Agreement shall be settled through diplomatic channels.

(2) If both Contracting Parties cannot reach an agreement within twelve months after the beginning of the dispute between themselves, the latter shall, upon request of either Contracting Party, be submitted to an arbitral tribunal of three members. Each Contracting Party shall appoint one arbitrator, and these two arbitrators shall nominate a chairman who shall be a national of a third State.

(3) If one of the Contracting Parties has not appointed its arbitrator and has not followed the invitation of the other Contracting Party to make that appointment within two months, the arbitrator shall be appointed upon the request of that Contracting Party by the President of the International Court of Justice.

(4) If both arbitrators cannot reach an agreement about the choice of the chairman within two months after their appointment, the latter shall be appointed upon the request of either Contracting Party by the President of the International Court of Justice.

(5) If, in the cases specified under paragraphs (3) and (4) of this Article, the President of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Contracting Party, the appointment shall be made by the Vice-President, and if the latter is prevented or if he is a national of either Contracting Party, the appointment shall be made by the most senior Judge of the Court who is not a national of either Contracting Party.

(6) Subject to other provisions made by the Contracting Parties, the tribunal shall determine its procedure.

(7) The decisions of the tribunal are final and binding for each Contracting Party.

Article 11

Observance of commitments

Either Contracting Party shall constantly guarantee the observance of the commitments it has entered into with respect to the investments of the investors of the other Contracting Party.

Article 12

Final provisions

(1) This Agreement shall enter into force on the day when both Governments have notified each other that they have complied with the constitutional requirements for the conclusion and entry into force of international agreements, and shall remain binding for a period of ten years. Unless written notice of termination is given six months before the expiration of this period, the Agreement shall be considered as renewed on the same terms for a period of two years, and so forth.

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(2) In case of official notice as to the termination of the present Agreement, the provisions of Articles 1 to 11 shall continue to be effective for a further period of ten years for investments made before official notice was given.

Done in duplicate at Berne, on 11th July 1995, in the French and English languages, each text being equally authentic.

For the Government of the Islamic Republic of Pakistan

For the Swiss Federal Council

AGREEMENT

BETWEEN THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN AND THE GOVERNMENT OF THE ITALIAN REPUBLIC ON THE PROMOTION AND PROTECTION OF INVESTMENTS

The Government of the Islamic Republic of Pakistan and the Government of the Italian Republic (hereinafter referred to as the Contracting Parties)

desiring to establish favourable conditions for improved economic cooperation between the two Countries, and especially for investment by nationals of one Contracting Party in the territory of the other Contracting Party; and

acknowledging that offering encouragement and mutual protection to such investments, based on international Agreements, will contribute towards stimulating business ventures that will foster the prosperity of both Contracting Parties,

Hereby have agreed as follows:

ARTICLE 1

DEFINITIONS

For the purposes of this Agreement:

1. The term "investment" irrespective of the legal form adopted or the legal system having jurisdiction, shall be construed to mean any kind of property invested after 1st September 1954 by a natural or legal person being a national of one Contracting Party in the territory of the other, in conformity with the laws and regulations of the latter.

Without limiting the generality of the foregoing, the term "investment" comprises, in particular but not exclusively:

a) movable and immovable property, and any other rights "in rem" including, insofar as they may be used for investment purposes, real guarantees on others' property;

b) shares, debentures, equity holdings and any other negotiable instruments or documents of credit, as well as Government and public securities in general;

c) credit for sums of money or any right for pledges or services having an economic value connected with investments, as well as reinvested income as defined in paragraph 5 hereafter;

d) copyright, commercial trade marks, patents, industrial designs, and other intellectual and industrial property rights, know-how, trade secrets, trade names and goodwill;

e) any right of a financial nature accruing by law or by contract and any licence, concession or franchise issued in accordance with current provisions governing the exercise of business activities, including prospecting for cultivating, extracting and exploiting natural resources.

2. The term "investor" shall be construed to mean any natural or legal person being a national of a Contracting Party who effected, is effecting or intending to effect, investments in the territory of the other Contracting Party.

3. The term "natural person", in reference to either Contracting Party, shall be construed to mean any natural person holding the nationality of that State.

4. The term "legal person", in reference to either Contracting Party, shall be construed to mean any entity established in the territory of one of the Contracting Parties, and recognized as legal person in accordance with the respective national legislation such as public establishments, joint-stock corporations or partnerships, foundations, or associations, regardless of whether their liability is limited or otherwise.

5. The term "income" shall be construed to mean the money that has yielded or is still to yield by an investment, including in particular, profits, interest income, income from capital investment, dividends, royalties, returns for assistance and technical services and miscellaneous other considerations, including reinvested income and capital gains.

6. The term "territory" shall be construed to mean, in addition to the areas lying within the land boundaries, the "maritime zones". The latter also comprises the marine and submarine zones over which the Contracting Parties have sovereignty, or exercise sovereign or jurisdictional rights, according to the international law.

ARTICLE 2

PROMOTION AND PROTECTION OF INVESTMENTS

1. Both Contracting Parties shall encourage investors of the other Contracting Party to invest in their territory, and shall authorize these investments in accordance with their legislation.

2. Both Contracting Parties shall at all times ensure fair and equitable treatment of the investments of investors of the other Contracting Party. Both Contracting Parties shall ensure that the management, maintenance, enjoyment, transformation, cessation and liquidation of investments effected in their territory by investors of the other Contracting Party, as well as the companies and firms in which these investments have been made, shall in no way be subject to unjustified or discriminatory measures.

ARTICLE 3

NATIONAL TREATMENT AND THE MOST FAVOURED NATION CLAUSE

1. Both Contracting Parties, within the bounds of their own territory, shall offer investments effected by, and the income accruing to, investors of the other Contracting Party no less favourable treatment than that accorded to investments effected by, and income accruing to, its own nationals or investors of Third States.

2. The treatment accorded to the activities connected with the investment of investors of either Contracting Party shall not be less favourable than that accorded to similar activities connected with investments made by their own investors or by investors of any Third Country.

3. The provisions of paragraphs 1. and 2. of this Article do not apply to any advantages or privileges which one Contracting Party grants or may grant at some future time to Third States by virtue of its membership in Custom or Economic Unions, Common Market associations, Free Trade Areas, regional or subregional Agreements, international multilateral economic Agreements, or economic Agreements entered into in order to prevent double taxation or to facilitate cross-border trade.

ARTICLE 4

COMPENSATION FOR DAMAGES AND LOSSES

1. Should investors of one of the two Contracting Parties incur damages or losses in their investments in the territory of the other Contracting Party, due to war or other forms of armed conflict, states of emergency or other similar events, the Contracting Party in which the affected investment has been made shall offer adequate compensation. Compensation payments shall be freely transferable in convertible currency without undue delay.

2. The investors concerned shall receive the same treatment as the nationals of the Contracting Party having liability and, at all events, shall be treated no less favourably than investors of Third States.

ARTICLE 5

NATIONALIZATION OR EXPROPRIATION

1. The investments to which this Agreement relates shall not be subject to any measure which might limit permanently or temporarily the right of ownership, possession, control or enjoyment, save where specifically provided by law and by judgements or orders issued by Courts or Tribunals having jurisdiction.

2. Investments of investors of one of the Contracting Parties shall not be directly or indirectly nationalized, expropriated, requisitioned or subjected to any measures having similar effects in the territory of the other Contracting Party, except for public purposes, or national interest, against immediate full and effective compensation and on condition that these measures are taken on a non-discriminatory basis and in conformity with all legal provisions and procedures.

3. The just compensation shall be equivalent to the real market value of the investment immediately prior to the moment in which the decision to nationalize or expropriate is announced or made public, and shall be calculated according to internationally acknowledged evaluation standards. Whenever there are difficulties in ascertaining the market value, the compensation shall be calculated on the basis of the fair appraisal of the establishment's constitutive and distinctive elements as well as of the firm's activities, components and results. Compensation shall include interests calculated on a six-months LIBOR basis accruing from the date of nationalization or expropriation to the date of payment.

Once the compensation has been determined, it shall be paid promptly and authorization for its repatriation in convertible currency issued.

4. The provisions of paragraph 2. of this Article shall also apply to income from an investment, and, in the event of winding-up, to the proceeds of liquidation.

5. If, after the dispossession the assets concerned have not been utilized, wholly or partially, for that purpose, the owner or his assignees are entitled to the repurchasing of the assets at market price, on the basis of reciprocity.

ARTICLE 6

REPATRIATION OF CAPITAL, PROFITS AND INCOME

1. Each of the Contracting Parties shall guarantee that, after investors have complied with all their fiscal obligations, they may transfer the following abroad, without undue delay, in any convertible currency:

(a) capital and additional capital amounts used to maintain and increase investments;

(b) net income, dividends, royalties, payments for assistance and technical services, interests and any other profits;

(c) the proceeds of the total or partial sale or liquidation of an investment;

(d) funds to repay loans related to an investment and interest due thereon;

(e) remuneration and allowances paid to nationals of the other Contracting Party in respect of subordinate work and services performed in relation to an investment effected in its territory, in the amount and manner prescribed by current national legislation and regulations.

2. While considering the provisions of Article 3 of this Agreement, the Contracting Parties undertake to apply to the transfers mentioned in paragraph 1 of this Article, the same treatment that is accorded to investments effected by investors of Third States, if this is more favourable.

3. Both Contracting Parties may adopt provisions governing the manner of complying with the fiscal obligations referred to in paragraph 1. above.

ARTICLE 7

SUBROGATION

In the event that one Contracting Party or any of its Institutions has provided an insurance guarantee in respect of non-commercial risks for investments effected by one of its investors in the territory of the other Contracting Party, and has made payments on the basis of that guarantee; the other Contracting Party shall recognize the assignment of the rights of the insured investor to the Contracting Party gunrantor and its subrogation shall not exceed the original rights. In relation to the transfer of payments to the Contracting Party or its Institution by virtue of such subrogation, the provisions of Articles 4, 5 and 6 of this Agreement shall apply.

ARTICLE 8

TRANSFER PROCEDURES

The transfers referred to in Articles 4, 5, 6 and 7 shall be effected without undue delay and, at all events, within six months, provided that all fiscal obligations have been met. Transfers shall be made in a convertible currency at the prevailing exchange rate applicable on the date of the transfer.

ARTICLE 9

SETTLEMENT OF DISPUTES BETWEEN INVESTORS AND THE CONTRACTING PARTY

1. Any disputes arising between a Contracting Party and the investors of the other, including disputes relating to compensation for expropriation, nationalization, requisition or similar measures, and disputes relating to the amount of the relevant payments, shall be settled amicably, as far as possible.

2. In the case that such a dispute cannot be settled amicably within six months of the date of a written application, the investor in question may submit the dispute, at his discretion, for settlement to:

a) the Contracting Party's Court, at all instances, having territorial jurisdiction;

b) an ad hoc Arbitration Tribunal in accordance with the Arbitration Rules of the "UN Commission on International Trade Law" (UNCITRAL);

c) the "International Centre for the Settlement of Investment Disputes", for the application of the arbitration procedures provided by the Washington Convention of 18th March 1965 on the "Settlement of Investment Disputes between States and Nationals of other States", whenever, or as soon as both Contracting Parties have validly acceded to it.

ARTICLE 10

SETTLEMENT OF DISPUTES BETWEEN THE CONTRACTING PARTIES

1. Any disputes which may arise between the Contracting Parties relating to the interpretation and application of this Agreement shall, as far as possible, be settled amicably through diplomatic channels.

2. In the event that the dispute cannot be settled within three months from the date on which one of the Contracting Parties notifies, in writing, the other Contracting Party, the dispute shall, at the request of one of them, be laid before an ad hoc Arbitration Tribunal as provided in this Article.

3. The Arbitration Tribunal shall be constituted in the following manner: within two months from the receipt of the request for arbitration, each Contracting Party shall appoint a member of the Tribunal. These two members shall then select a national of a Third State to act as Chairman. The Chairman shall be appointed within three months from the date on which the other two members are appointed.

4. If the appointments have not been agreed within the time provided by paragraph 3. of this Article, either of the Contracting Parties, in default of any other arrangement, may apply to the President of the International Court of Justice to make the appointments within three months. In the event that the President of the Court is a national of one of the Contracting Parties or he is otherwise prevented from discharging the said function, the application shall be made to the Vice-President of the Court. If the Vice-President is a national of one of the Contracting Parties or he is equally prevented from discharging the said function for any reason, the most senior member of the International Court of Justice, who is not a national of one of the Contracting Parties, shall be invited to make the appointments.

5. The Arbitration Tribunal shall rule with a majority vote, and its decisions shall be binding. Both Contracting Parties shall pay the costs of their own arbitrator and of their own costs at the hearings. The President's costs and any other costs shall be divided equally between the Contracting Parties.

The Arbitration Tribunal shall lay down its own procedures.

ARTICLE 11

RELATIONS BETWEEN GOVERNMENTS

The provisions of this Agreement shall be enforced irrespective of whether or not diplomatic or consular relations exist between the Contracting Parties.

ARTICLE 12

APPLICATIONS OF OTHER PROVISIONS

1. Whenever any issue is governed both by this Agreement and by another International Agreement to which both Contracting Parties are parties, or whenever it is governed otherwise by general international law, the most favourable provisions, case by case, shall be applied to the Contracting Parties and to their investors.

2. Whenever as a result of laws, regulations, provisions or specific contracts, one of the Contracting Parties has adopted a more advantageous treatment for the investors of the other Contracting Party, than that provided in this Agreement, they shall be accorded that more favourable treatment.

ARTICLE 13

ENTRY INTO FORCE, DURATION AND EXPIRY DATE

1. This Agreement shall enter into force on the thirtieth day after the receiving date of the second of the two notifications by which the Contracting Parties shall have notified each other that their constitutional procedures for the entry into force of this Agreement have been fulfilled. It shall remain in force for an initial period of ten years. It shall thereafter continue to be in force for further periods of 5 years, unless either Contracting Party terminates it by giving prior written notice thereof one year before any expiry date.

2. In the case of investments effected prior to the expiry dates of the present Agreement, as provided in this Article 13, the provisions of Articles 1 to 12 shall remain effective for a further five years after the aforementioned dates.

In WITNESS WHEREOF, the undersigned, being duly authorised thereto by their respective Governments, have signed the present Agreement.

DONE at Islamabad, the day 19th of July 1997, in two originals, in the Italian and in English languages, both texts being equally authentic.

FOR THE GOVERNMENT OF THE ISLAMIC REPUBLIC OF PAKISTAN

Aftab Ahmad Khan
Secretary
Ministry of Industries and Production

FOR THE GOVERNMENT OF THE ITALIAN REPUBLIC

Patrizia Toia
Deputy Foreign Minister
Ministry of Foreign Affairs

AGREEMENT BETWEEN THE ISLAMIC REPUBLIC OF PAKISTAN AND THE REPUBLIC OF TURKEY CONCERNING THE RECIPROCAL PROMOTION AND PROTECTION OF INVESTMENTS

The Islamic Republic of Pakistan acting through its President and the Republic of Turkey, hereinafter called the Parties.

Desiring to promote greater economic cooperation between them, particularly with respect to investment by investors of one Party in the territory of the other Party.

Recognizing that agreement upon the treatment to be accorded such investment will stimulate the flow of capital and technology and the economic development of the Parties.

Agreeing that fair and equitable treatment of investment is desirable in order to maintain a stable framework for investment and maximum effective utilization of economic resources, and

Having resolved to conclude an agreement concerning the encouragement and reciprocal protection of investments,

Hereby agree as follows:

ARTICLE I

Definitions

For the purpose of this Agreement;

1. The term "investor" means:

(a) natural persons deriving their status as nationals of either Party according to its applicable law,

(b) corporations, firms or business associations incorporated or constituted under the law in force of either of the Parties and having their headquarters in the territory of that Party.

2. The term"investment", in conformity with the hosting Party's laws and regulations, shall include every kind of asset in particular, but not exclusively:

(a) shares, stocks or any other form of participation in companies,

(b) returns reinvested, claims to money or any other rights to legitimate performance having financial value related to an investment,

(c) movable and immovable property, as well as any other rights in rem such as mortgages, liens, pledges and any other similar rights,

(d) copyrights, industrial and intellectual property rights such as patents, licenses, industrial designs, technical processes, as well as trademarks, goodwill know-how and other similar rights,

(e) business concessions conferred by law or by contract including concessions to search for, cultivate, extract or exploit natural resources on the territory of each Party as defined hereafter.

3. The term "returns" means the amounts yielded by an investment and includes in particular, though not exclusively, profit, interest, and dividends.

4. The term "territory" means the Turkish and Pakistani territory, territorial sea as well as the maritime areas over which it has jurisdiction or sovereign rights for the purposes of exploration, exploitation and conservation of natural resources, pursuant to international law.

ARTICLE II

Promotion and Protection of Investments

1. Each Party shall permit in its territory investments, and activities associated therewith, on a basis no less favourable than that accorded in similar situations to investments of investors of any third country, within the framework of its laws and regulations.

2. Each Party shall accord to these investments, once established, treatment no less favourable than that accorded in similar situations to investments of its investors or to investments of investors of any third country, whichever is the most favourable.

Each party shall encourage participation of its investors, in trade promotional events such as fairs, exhibitions, mission and seminars organized in both the countries.

3. Subject to the laws and regulations of the Parties relating to the entry, sojourn and employment of aliens;

(a) nationals of either Party shall be permitted to enter and remain in the territory of the other Party for purposes of establishing, developing, administering or advising on the operation of an investment to which they, or an investor of the first Party that employs them, have committed or are in the process of committing a substantial amount of capital or other resources,

(b) companies which are legally constituted under the applicable laws and regulations of one Party, and which are investments of investors of other Party, shall be permitted to engage managerial and technical personal of their choice, regardless of nationality.

4. The provisions of this Article shall have no effect in relation to following agreements entered into by either of the Parties;

(a) relating to any existing or future customs unions, regional economic organization or similar international agreements,

(b) relating wholly or mainly to taxation.

ARTICLE III

Expropriation and Compensation

1. Investments shall not be expropriated, nationalized or subject, directly, or indirectly to measures of similar effects except for a public purpose, in a non-discriminatory manner, upon payment of prompt, adequate and effective compensation, and in accordance with due process of law and the general principles of treatment provided for in Article II of this Agreement.

2. Compensation shall be equivalent to the real value of the expropriated investment before the expropriatory action was taken or became known. Compensation shall be paid without delay and be freely transferable as described in paragraph 2 Article IV.

3. Investors of either Party whose investments suffer losses in the territory of the other Party owing to war, insurrection, civil disturbance or other similar events shall be accorded by such other Party treatment no less favourable than that accorded to its own investors or to investors of any third country, whichever is the most favourable treatment, as regards any measures it adopts in relation to such losses.

ARTICLE IV

1. Each Party shall permit in good faith all transfers related to an investment to be made freely and without unreasonable delay into and out of its territory. Such transfers include:

(a) returns,

(b) proceeds from the sale or liquidation of all or any part of an investment,

(c) compensation pursuant to Article III,

(d) reimbursements and interest payments deriving from loans in connection with investments,

(e) salaries, wages and other remunerations received by the nationals of one Party who have obtained in the territory of the other Party the corresponding work permits relative to an investment,

(f) payments arising from an investment dispute.

2. Transfers shall be made in the convertible currently in which the investment has been made or in any convertible currency at the rate of exchange in force at the date of transfer, unless otherwise agreed by the investor and the hosting Party.

ARTICLE V

Subrogation

1. If the investment of an investor of one Party is insured against non-commercial risks under a system established by law, any subrogation of the insurer which stems from the terms of the insurance agreement shall be recognized by the other Party.

2. The insurer shall not be entitled to exercise any rights other than the rights which the investor would have been entitled to exercise.

3. Disputes between a Party and an insurer shall be settled in accordance with the provisions of Article VII of this Agreement.

ARTICLE VI

This agreement shall not derogate from:

(a) laws, rules, regulations, policies and administrative practices or procedures or administrative or adjudicatory decisions of either Party,

(b) international legal obligations, or

(c) obligations assumed by either Party, including those contained in an investment agreement or an investment authorization,

that entitle investments or associated activities to treatment more favourable than that accorded by this Agreement in like situation.

ARTICLE VII

Settlement of Disputes Between One Party and Investors of the Other Party

1. Disputes between one of the Parties and an investor of the other Party, in connection with his investment, shall be notified in writing, including a detailed information, by the investor to the recipient Party of the investment. As far as possible, the investor and the concerned Party shall endeavour to settle these disputes by consultations and negotiations in good faith.

2. If these disputes cannot be settled in this way within six months following the date of the written notification mentioned in paragraph 1, the dispute can be submitted, as the investor may choose, to:

(a) the International Centre for Settlement of Investment Disputes (ICSID) set up by the "Convention on Settlement of Investment Disputes Between States and Nationals of other States" [in case both Parties become signatories of this Convention.]

(b) an ad hoc court of arbitration laid down under the Arbitration Rules of Procedure of the United Nations Commission for International Trade Law (UNCITRAL), [in case both parties are members of U.N.]

(c) the Court of Arbitration of the Paris International Chamber of Commerce,

provided that, if the investor concerned has brought the dispute before the courts of justice of the Party that is a party to the dispute and a final award has not been rendered within one year.

3. The arbitration awards shall be final and binding for all parties in dispute. Each Party commits itself to execute the award according to its national law.

ARTICLE VIII

Settlement of Disputes Between the Parties

1. The Parties shall seek in good faith an a spirit of cooperation a rapid and equitable solution to any dispute between them concerning the interpretation or application of this Agreement. In this regard, the Parties agree to engage in direct and meaningful negotiations to arrive at such solutions. If the Parties cannot reach an agreement within six months after the beginning of dispute between themselves through the foregoing procedure, the dispute may be submitted, upon the request of either Party, to an arbitral tribunal of three members.

2. Within two months of receipt of a request, each Party shall appoint an arbitrator. The two arbitrators shall select a third arbitrator as Chairman, who is a national of a third State. In the event either Party fails to appoint an arbitrator within the specified time, the other Party may request the President of the International Court of Justice to make the appointment.

3. If both arbitrators cannot reach an agreement about the choice of the Chairman within two months after their appointment, the Chairman shall be appointed upon the request of either Party by the President of the International Court of Justice.

4. If, in the cases specified under paragraphs (2) and (3) of this Article, the President of the International Court of Justice is prevented from carrying out the said function or if he is a national of either Party, the appointment shall be made by the Vice-President is prevented from carrying out the said function or if he is a national of either Party, the appointment shall be made by the most senior member of the Court who is not a national of either Party.

5. The tribunal shall have three months from the date of the selection of the Chairman to agree upon rules of procedure consistent with the other provisions of this Agreement. In the absence of such agreement, the tribunal shall request the President of the International Court of Justice to designate rules of procedure, taking into account generally recognized rules of international arbitral procedure.

6. Unless otherwise agreed, all submissions shall be made and all hearings shall be completed within eight months of the date of selection of the Chairman, and the tribunal shall render its decision within two months after the date of the final submissions or the date of the closing of the hearings, whichever is later.The arbitral tribunal shall reach its decisions, which shall be final and binding, by a majority of votes.

7. Expenses incurred by the Chairman, the other arbitrators, and other costs of the proceedings shall be paid for equally by the Parties. The tribunal may, however, at its discretion, decide that a higher proportion of the costs be paid by one of the Parties.

8. A dispute shall not be submitted to an international arbitration court under the provisions of this Article, if the same dispute has been brought before another international arbitration court under the provisions of Article VII and is still before the court. This will not impair the engagement in direct and meaningful negotiations between both Parties.

ARTICLE IX

Entering into Force

1. This Agreement shall enter into force on the date on which the exchange of instruments of ratification has been completed. If shall remain in force for a period of ten years and shall continue in force unless terminated in accordance with paragraph 2 of this Article. It shall apply to investments existing at the time of entry into force as well as to investments made or acquired thereafter.

2. Either Party may, by giving one year's written notice to the other Party, terminate this Agreement at the end of the initial ten year period or at any time thereafter.

3. This Agreement may be amended by written agreement between the Parties. Any amendment shall enter into force when each Party has notified the other that it has completed all internal requirements for entry into force of such amendment.

4. With respect to investments made or acquired prior to the date of termination of this Agreement and to which this Agreement otherwise applies, the provisions of all of the other Articles of this Agreement shall thereafter continue to be effective for a further period of twenty years from such date of termination.

IN WITNESS WHEREOF, the respective plenipotentiaries have signed this Agreement.

DONE at Islamabad on the day of 16th March, 1995 in the English and Turkish languages all of which are equally authentic.

In case of divergence of interpretation the English text shall prevail.

FOR THE GOVERNMENT OF
THE ISLAMIC REPUBLIC
OF PAKISTAN

FOR THE GOVERNMENT OF
THE REPUBLIC OF TURKEY

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